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VATTENFALL V. FEDERAL REPUBLIC OF GERMANY

- A report of a long storyand an outlook on the future of investment arbitration under the ECT-

Master's Thesis
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A. Introduction

The purpose of this paper is to present the case between the Federal Republic of Germany and Vattenfall AB before the International Centre for Settlement of Investment Disputes. The process has many peculiarities, not least of which is the unusually long duration of almost 10 years.

Vattenfall is an energy company headquartered in Germany but wholly owned by the Swedish state. It operates several nuclear power plants in Germany.

In 2010, the then federal government under Angela Merkel in Germany decided to postpone the nuclear phase-out and decided to extend the operating lives of the 17 nuclear power plants in Germany until 2038. After the reactor accident in Fukushima, Japan, this decision was revised in 2011. Now the German government has decided that all nuclear power plants in Germany should be taken off the grid by the end of 2022 in order to accelerate the phase-out of nuclear power. The operators of the nuclear power plants then filed a lawsuit with the German Federal Constitutional Court against the regulations on the nuclear phase-out. In addition, Vattenfall is seeking investment protection proceedings before an ad hoc court of the International Centre for Settlement of Investment Disputes[1].
The decision by the German government to phase out nuclear power marked the beginning of a long period of various proceedings against Vattenfall, among others, which only seem to have reached a conclusion this spring. The topic is additionally relevant in that the next chapter will open with the conclusion of the nuclear phase-out in the coming year, namely that of the planned coal phase-out. It remains to be seen to what extent history will repeat itself here, so it is worth taking another close look at the proceedings between Vattenfall and Germany.

B. Proceedings before the Federal Constitutional Court

1. The first Constitutional litigation

The legal dispute between the Federal Republic of Germany and the Swedish company has a long history. Among other procedures, the parties met before the German Federal Constitutional Court in 2012. In its 2016 ruling, the Federal Constitutional Court states that the Nuclear-Phase-

[1] From Now on: ICSID.

out law (Atomausstiegsgesetz, AtG) is unconstitutional. This ruling is of particular relevance for several reasons. Not only does the court establish for the first time the appealability of a legal entity wholly owned by a member state of the European Union, but the scope of property protection under the German constitution is discussed in detail and its limits are clearly set out. In addition, the ruling was a big win for the operators of the nuclear power plants and thus also for comparable (future and existing) investors. The important independence of the Federal Constitutional Court from the political interests of the federal government is clearly evident.

The court was of the opinion that the phase-out itself was legally permissible, but that the relevant provisions of the Atomic Energy Phase-out Act were unconstitutional and therefore required improvement by the federal government.[2]

The plaintiff nuclear power plant operators (E.ON, RWE, Vattenfall) complained of a violation of their fundamental right to freedom of property under Article 14 I of the Basic Law by the Thirteenth Act Amending the Atomic Energy Act, which pursues the goal of accelerating the phase-out of nuclear power. Their complaint was not directed against the decision of the federal government per se to phase out nuclear power.[3]

The Federal Constitutional Court found that the law is largely constitutional, but that a compensation scheme must be introduced for the regulation to be proportionate. The legislature was allowed to use the reactor accident in Fukushima as an opportunity to accelerate the phase-out of nuclear power in order to protect the health of the population and the environment, even in the absence of new hazard findings.

The legal allocation to quantities of electricity that can now no longer be converted into electricity does not form part of the protection of property, however, they have a property-

[2] Nikos Lavranos, "The German Constitutional Court Judgment in the Vattenfall Case: Lessons for the ECT Vattenfall Arbitral Tribunal," Kluwer Arbitration Blog, December 28, 2016, http://arbitrationblog.kluwerarbitration.com/2016/12/29/german-constitutional-court-judgment-vattenfall-case-lessons-ect-vattenfall-arbitral-tribunal/; "Bundesverfassungsgericht - Press - the Thirteenth Amendment to the Atomic Energy Act Is for the Most Part Compatible with the Basic Law," www.bundesverfassungsgericht.de, December 6, 2016, https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-088.html.

[3] BVerfG: * Vereinbarkeit der Dreizehnten Novelle des Atomgesetzes mit dem Grundgesetz (NJW 2017, 217).

relevant significance as usage variables.[4] The restrictions on the right of use and disposal do not constitute an expropriation, but rather provisions on the content and limits within the meaning of Article 14 I 2 of the Basic Law, which are, however, of such intensity and thus come close to an expropriation that they require compensation which is provided for by law.[5]

a) Admissibility of the constitutional complaint

For Vattenfall, a particular admissibility-relevant problem arose in the constitutional complaint. While the fundamental rights of private-law companies in the hands of the German public sector are generally excluded, this was left open for Vattenfall in a chamber decision of the Federal Constitutional Court in 2009.[6] Since fundamental rights are primarily defensive rights against the state, i.e. the state is the obligor of fundamental rights, the state cannot additionally be a beneficiary (confusion argument) [7]. Since the Swedish state is not bound by the fundamental rights of the German Basic Law, this contradiction is not applicable. Furthermore, the Swedish company has no power in the German state, so that the right to sue cannot mean a weakening of the protection for German citizens. Without the possibility of a constitutional complaint against legal restrictions, Vattenfall GmbH would be without legal protection. Therefore, under the special circumstances of the case, the German constitutional court assumed that Vattenfall GmbH is entitled to fundamental rights under Article 14 of the basic law and thus the possibility of a constitutional complaint.[8]

b) Merits of the claim

The ruling then focuses on the property guarantee under Article 14 of the Basic law.

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[4] Markus Ludwigs, "The Nuclear Phase-out and Its Consequences," in *Schriften Zum Deutschen Und Europaeischen Infrastrukturrecht; v. 6; 2016 Duncker and Humblot* (Berlin, Germany: Duncker and Humblot, 2016), Pg. 44.

[5] BVerfG, Judgement of 6 December 2016 – 1 BvR 2821/11, 1 BvR 321/12, 1 BvR 1456/12.

[6] BVerfG (2. Kammer des Ersten Senats), Order from 21. December 2009 - 1 BvR 2738/08.

[7] The confusion argument means that the state cannot be the bearer and addressee of fundamental rights at the same time.

[8] The Thirteenth Amendment to the Atomic Energy Act is for the most part compatible with the Basic Law, Press Release No. 88/2016 of 06 December 2016, www.bundesverfassungsgericht.de.

The Court clarifies that nuclear licenses as such do not constitute property within the meaning of Article 14 of the Basic Law.[9]

The judges also do not regard the legally allocated residual power quantities as such as property within the meaning of Article 14 of the Basic Law, since they are not freely available according to the legal regulation and are not based directly on considerable contributions by the complainants. However, they determined the scope of the possibilities of use of property protected by Art. 14 I 1 GG, irrespective of whether they were granted to maintain the proportionality of the nuclear phase-out of 2000/2002, on the basis of a settlement in an individual case or in 2010 on the basis of a political decision by the legislator.[10]

In qualifying the intervention, the constitutional court rules out expropriation. Restrictions on the use and disposal of owner powers can therefore not be expropriation, even if they almost or completely devalue the use of property, because of the lack of a criterion of complete or partial deprivation of property positions. The prerequisite for expropriation is a process of acquiring property.[11]

Another position worthy of protection under the protection of property in the broader sense is that of the protection of legitimate expectations. This arises from the general principle of the rule of law but is also directly protected by Article 14 of the Basic Law. For the granting of protection of legitimate expectations, it is necessary that dispositions were made in reliance on the legal situation, which have now been frustrated by the change in law. The act of trust may lie in an investment, and it may, but need not necessarily, be accompanied by the establishment of property. Particularly in the economic sphere, individuals must be able to rely on the fact that investment-relevant framework conditions in legal form will not be changed or even revised without further ado, thereby devaluing the investments made.

With the extension of the operating life contracts one year before the announcement of Germany's withdrawal from nuclear power, the operators were able to build justified confidence

[9] BVerfG, Judgement of 6 December 2016 N° 231.

[10] BVerfG, Judgement of 6 December 2016 N 242 f.

[11] BVerfG, Judgement of 6 December 2016 N°243.

in the agreed operating lives. Therefore, the investments made during this period must be compensated.[12]

Substantively, the court examines the proportionality of the regulations. In doing so, it approves the reasonableness of the goal of accelerating the nuclear phase-out as legitimate in view of the intended protection of life and health of the population (Article 2 II 1 of the Basic Law) and the preservation of the natural foundations of life (Article 20 a of the Basic Law). In addition to reasonableness, requirements of the protection of legitimate expectations and the principle of equality are also included. As far as reasonableness is concerned, it is acknowledged that the encroachment is very extensive, but the judges see the worthiness of protection of the affected property positions reduced several times.[13]

The Court considers only one regulation to be unreasonable, which deprives two of the affected groups (Vattenfall and RWE) of the possibility to use residual electricity quantities in other nuclear power plants within the group. In doing so, it also focuses on the fact that such burdens did not occur at the other groups, without identifying sufficient factual reasons for this.[14]

"The burden on the property of the complainants Vattenfall and RWE due to the non-utilizability of the residual electricity quantities from 2002 that can no longer be used for electricity generation within the group due to the fixed shutdown deadlines weighs heavily. It is quantitatively considerable and due to the special circumstances of its occurrence, affects an ownership position that is protected against changes to a greater extent. In addition, it puts these complainants at a disadvantage in relation to competing companies." [15]

Vattenfall's violation of fundamental rights results primarily from its exposure to the large amount of unusable residual electricity from the quota allocated in 2002.

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[12] Laura Yvonne Zielinski, "'Legitimate Expectations' in the Vattenfall Case: At the Heart of the Debate over ISDS," Kluwer Arbitration Blog, January 10, 2017; BVerfG Judgement of 6 December 2016 N° 377.

[13] BVerfG, Judgement of 6 December 2016 N° 283.

[14] BVerfG Judgement of 6 December 2016 N° 310.

[15] BVerfG Judgement of 6 December RN 329.

The accelerated nuclear phase-out would make it impossible for both power plant operators to convert their residual electricity quantities specified in the 2002 nuclear phase-out agreement for the Krümmel, Brunsbüttel and Mülheim-Kärlich power plants into electricity.
The Court ordered the German government to compensate Vattenfall and RWE by the end of June 2018 - and gave it three proposed solutions: First, an individual lifetime extension for the three power plants so that they could convert their legally determined residual electricity volumes into electricity and market them. Second, to ensure the sale of the residual electricity quantities at market prices. The Court itself had doubts about this proposal, because E.on would be the only potential buyer who could not yet use all the residual electricity volumes. And thirdly, to pay Vattenfall and RWE financial compensation for the lost revenue.[16]
Because the extension of the operating lives of Krümmel, Brunsbüttel and Mülheim-Kärlich was not politically feasible, the German government opted for a combined solution: Vattenfall and RWE should try to sell their residual electricity volumes. If, despite all attempts, the sale was not possible at market conditions, then there would be compensation, it decided in the amendment to the Nuclear Phase-out Act. However, the amendment had entered into force in 2018 without the formal notification of the EU Commission under state aid law. Vattenfall therefore again took the matter to the Federal Consititutional Court.

2. Second Constitutional Litigation

The reason for the Constitutional Courts decision of September 29. 2009 was a constitutional complaint by the operators of the Brunsbüttel and Krümmel nuclear power plants. The Krümmel power plant is 50 percent owned by Vattenfall and 50 percent by PreussenElektra.[17] Brunsbüttel is 67 percent owned by Vattenfall and 33 percent by PreussenElektra.[18]
The complainants felt that the 16th amendment to the Atomic Energy Act continued to violate their fundamental rights, or violated them again, because the violation of the constitution

[16] BVerfG Judgement of 6 December N° 366, 371.

[17]"Power Plants: Kernkraftwerk Krümmel - Vattenfall," powerplants.vattenfall.com, accessed July 30, 2021, https://powerplants.vattenfall.com/de/krummel/.

[18] "Power Plants: Brunsbüttel Nuclear Power Plant - Vattenfall," powerplants.vattenfall.com, accessed July 30, 2021, https://powerplants.vattenfall.com/brunsbuttel/.

established in the Courts ruling of December 6, 2016, had not been remedied in the required manner. [19]

In the 16th amendment to the Atomic Energy Act, the German legislator only wanted to implement financial compensation in §7f of the Atomic Energy Act. For this purpose, the law provides that the residual electricity quantities with the expiry of the operating license of the power plants (on December 31. 2022), not generated and also could not be transferred to another power plant. The operators entitled to compensation must have made serious efforts to transfer the residual electricity quantities eligible for compensation after the Act came into force and until the expiry of the operating license. The operators must provide evidence of these efforts. In addition, only to the extent that this fails for the residual electricity quantities subject to compensation - i.e., with respect to Krümmel and Brunsbüttel for the shares allocated to Vattenfall - does state financial compensation kick in according to the legislative concept.[20] From the beginning, the formulation for limiting the residual electricity quantities eligible for compensation in relation to the Krümmel and Brunsbüttel plants was not clear and free of contradictions. This entitlement was limited in § 7 f I 2 AtG to two-thirds for the Brunsbüttel nuclear power plant and to half of the electricity volumes agreed for the Krümmel nuclear power plant after the new regulation of 2010.

The ability to appeal and the right to appeal were assumed with regard to the previously issued judgment of the Federal Constitutional Court. It also extends to Brunsbüttel, who withdrew their complaint after the other judgment but have an equally justifiable interest in the clarification of the legal disagreements.[21] The complainants could not reasonably be expected to take prior proceedings before the specialist courts, as there was a risk that they would lose their right to compensation due to the passage of time or they run the risk of over-committing and thus receiving less compensation for their residual power volumes that can no longer be used for electricity generation. In addition, an interest of the general public in the answer to the constitutionality was affirmed. Since in the case of unconstitutionality there is only the

[19] BVerfG, Order of the First Senate of 29 September 2020 - 1 BvR 1550/19 – reasons A., http://www.bverfg.de/e/rs20200929_1bvr155019en.html.

[20] A Battle on Two Fronts: Vattenfall v. Federal Republic of Germany
Daniela Páez-Salgado, Herbert Smith Freehills, February 18, 2021.

[21] BVerfG order from 29 September 2020 – 1 BvR 1550/19, N° 30.

possibility of monetary compensation, which is a burden on the state budget and affects the financial resources for the general public. [22]

As the constitutional court states, the original violation of fundamental rights continues to exist as a result of the 13th amendment to the Atomic Energy Act. This finding is based on both formal and factual grounds.

From a formal point of view, the court states that the 16th AtG amendment has not entered into force. The background to this is Article 3 of the 16th AtG amendment, which requires either the approval of the European Commission under state aid law or the binding notification that such approval is not required for it to enter into force iSd §108 (3) TFEU. However, there was only a so-called comfort letter, a non-binding assessment of the Directorate General for Competition of July 4, 2018, which did not meet the factual requirements for the entry into force.[23] Previously, the ECJ had issued a decision on July 11, 2019, dismissing an action for annulment brought by Vattenfall Europe Nuclear Energy GmbH against the German Federal Ministry for the Environment, Nature Conservation and Nuclear Safety as inadmissible. In the decision, the judges in Luxembourg found that the letter at issue was not a challengeable act within the meaning of Article 263 TFEU, as it did not have a legally binding character in relation to the plaintiff.[24]

Thus, there is a renewed and ongoing violation of fundamental rights already because the legislator did not create a new regulation even for the date of the expiry of the implementation period on June 30, 2018, which was determined by the constitutional court.

This applies not only to Section 7 f of the Atomic Energy Act, but also to the compensation with regard to frustrated investments,11 since the compensation regulation in Section 7 e of the Atomic Energy Act made in this regard could also never enter into force.[25]

[22] BVerfG order from 29 September 2020 – 1 BvR 1550/19, N° 32 f.

[23] Code of Best Practice for the conduct of State aid control procedures (2009/C 136/04) N° 16.

[24] BVerfG, Order of the first Senate of 29 September 2020- 1 BvR 1550/19, http://www.bverfg.de/e/rs20200929_1bvr155019en.html N° 37; Ludwigs: Das 16. AtG-ÄndG: Ein legislatives Phantom?.

[25] BVerfG, Order of the first Senate of 29 September 2020- 1 BvR 1550/19 N°75.

In addition, the law in this version risks a double reduction of the compensation claims for the Brunsbüttel and Krümmel power plants.[26] In §7 f I 1 AtG, the compensation claim is limited to one third and one half of the allocated electricity quantities, respectively. Since both Vattenfall and PreussenElektra have stakes in the power plants, only one of the groups is entitled to compensation and the parties involved are to reach a supplementary agreement. The reason given for this is that no compensation is required for the residual electricity volumes attributable to PreussenElektra's shareholding, but only electricity volumes equivalent to Vattenfall's shareholding in Brunsbüttel and Krümmel. "Electricity quantities of the Krümmel nuclear power plant [and Brunsbüttel], which are arithmetically attributable to the shareholder PreussenElektra, are in contrast, on the basis of the forecast taken as a basis by the Federal Constitutional Court, completely producible by nuclear power plants in which PreussenElektra holds an interest and therefore not subject to compensation."[27]
In addition, §7 f I 2 AtG provides for a reduction of the state compensation by one third or one half depending on the specific market situation. The provision states that operating risks, investment risks and marketing risks must be included when determining the amount of compensation. In detail, this means the risk of a double reduction of the entitlement, which is actually intended to provide adequate compensation for the operators' investments. This scenario would be possible if compensation claims in favor of Vattenfall for the residual electricity quantities of the power plants had first been reduced by up to half in accordance with Section 7f I 2 of the Atomic Energy Act, so that it would then also have had to be shared with the proportionate owner PreußenElektra.[28]

In summary, the court came to the following conclusions: It is established that the complainants' right to property under Article 14 (1) of the Basic Law has been violated. This follows from the fact that the violation previously found by the Federal Constitutional Court has not been remedied. The Court states firstly that, the 16th amendment to the Atomic Energy Act has not entered into force; secondly, even if it had entered into force, it would not have been suitable to remedy the violation of property.

[26] BVerfG, Order of the first Senate of 29 September 2020- 1 BvR 1550/19 N°77 f.

[27] Entwurf eines Sechzehnten Gesetzes zur Änderung des Atomgesetzes, BT-Drs. 19/2508, 10, 16 f.

[28] BVerfG, Order of the first Senate of 29 September 2020- 1 BvR 1550/19 N°78, 79.

C. The ICSID Arbitration

1. Introduction

The following describes the course of the proceedings pending before the ICSID in Washington between Vattenfall GmbH and the Federal Republic of Germany. The proceedings are currently pending, as the parties agreed to suspend the proceedings in mid-March of this year.[29]

On March 22, 2019, Vattenfall quantified its claim at approximately EUR 4,381,938,000 without litigation interest and approximately EUR 6,095,521,000 with process interest.[30]

The legal basis for the lawsuit is the Energy Charter Treaty ("ECT"). This Energy Charter Treaty is an international treaty that entered into force in April 1998. It is based on the Energy Charter signed in December 1991, the original objective of which was to integrate the energy sectors of the successor states of the USSR and Eastern Europe into the European energy market. Currently, the Energy Charter Treaty has 52 signatories, including all the member states of the European Union and, in particular, the European Union itself. According to the Energy Charter Treaty, the signatories are subject to the prohibition of property-disturbing measures such as expropriation without compensation, the prohibition of discrimination and the requirement of fair and equitable treatment of foreign investors. [31]

Almost on time for the 10th anniversary of the Fukushima reactor disaster on March 11, 2011, the German government announced on March 5, 2021, that it would compensate the four nuclear companies RWE, E.ON, EnBW and Vattenfall for the accelerated nuclear phase-out after Fukushima, totaling about EUR 2.43 billion. In return, it had been agreed that the companies would decommission their nuclear power plants early and settle all related legal disputes.[32] Apparently Vattenfall has also announced that it will withdraw its long-standing investment arbitration case against the Federal Republic in return for the announced compensation payment. Until the final settlement is implemented in a law passed by the German

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[29] http://icsiddev.prod.acquia-sites.com/cases/case-database/case-detail?CaseNo=ARB/12/12

[30] https://gpil.jura.uni-bonn.de/2020/12/notable-statements-on-international-law-during-september-2020/.

[31] https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/.

[32] https://www.bmwi.de/Redaktion/DE/Pressemitteilungen/2021/03/20210305-bundesregierung-und-energieversorger-verstaendigen-sich-auf-finanziellen-ausgleich-und-beilegung-aller-rechtsstreitigkeiten-zum-atomausstieg.html.

Bundestag, the eventful proceedings are on hold. According to the figures now officially announced, Vattenfall is to receive the largest share of the compensation, 1.425 billion euros. 880 million euros are earmarked for RWE, 80 million euros for EnBW, and 42.5 million euros would go to Eon/PreussenElektra.[33]

The current lawsuit is not the first occasion on which the parties have met before an ICSID arbitration tribunal.

2. Previous arbitration

In 2006, Vattenfall received preliminary approval to operate a coal-fired power plant in Hamburg-Moorburg, Germany. Vattenfall received final approval in 2008, but under strict conditions relating to water rights. The company now wanted the state to reimburse the estimated additional costs of 600 million euros, citing the International Energy Charter. Vattenfall GmbH took legal action against this before the German administrative courts. After no amicable settlement emerged there, the Group filed an arbitration claim under ICSID procedural rules in April.[34] In March 2011, the proceedings in Washington ended with a comparative award. The proceedings were discontinued with a view to the proceedings before the Higher Administrative Court in Hamburg, where a settlement was reached which provided for the lifting of some water law conditions.

The tribunal was composed as follows. The president in the trial was Marc Lalonde from Canada, who was appointed by the Co-Arbitrators. The arbitrators were the British Franklin Berman who was appointed by the Respondent and Gabrielle Kaufmann-Kohler from Switzerland who was appointed by the Claimant.[35]

3. Admissibility with regards to the ECT

In the spring of 2018, the question of admissibility was once again opened by the arbitrators following the ECJ ruling Achmea. As a foreign investor, the Swedish state-owned group can invoke the ECT. A decision had originally been expected as early as the first quarter of 2018.

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[33] Regierungspressekonferenz vom 5. März 2021; https://www.handelsblatt.com/unternehmen/energie/energiewirtschaft-entschaedigung-fuer-atomausstieg-konzerne-erhalten-2-4-milliarden-euro/26977850.html.

[34] IBR News, 09.04.2009, 13218.

[35] http://icsiddev.prod.acquia-sites.com/cases/case-database/case-detail?CaseNo=ARB/09/6.

However, at the beginning of March the ECJ ruled in the Achmea case on the Dutch-Slovak Investment Protection Treaty (BIT) that the arbitration clause there violated Union law: The decision by the arbitral tribunals, which are not entitled to make submissions and cannot be comprehensively controlled by state courts, violates the autonomy of Union law.[36] The Commission has been arguing for years that the ECT's arbitration clause does not apply to proceedings between an EU member state and an investor from another EU member state because this violates Union law. On 24 July 2015, the European Commission filed an "Application for Leave to Intervene as a Non-Disputing Party" in the present proceedings. As a result of the Achmea ruling, the Vattenfall Arbitration Tribunal had once again given the parties the opportunity to comment. Germany requested that Vattenfall's claim be dismissed because it was inadmissible and unfounded. Germany also argued that an affirmation of jurisdiction by the arbitral tribunal could lead to problems with the enforceability of the award. Unlike the Achmea proceedings, Vattenfall is an ICSID proceeding whose awards are enforceable under the special rules of the ICSID Convention. This means that there is no remedy open to states that would allow national courts to reconsider the arbitral tribunal's decision on its own jurisdiction.

a) The Achmea Judgement

The ruling of the European Court of Justice (ECJ) in the Achmea case of March 06.2018 had been eagerly awaited. Previously, the question of the compatibility of arbitration clauses in so-called investment protection agreements between two EU states had already occupied various arbitration tribunals and national courts.

In the context of the question referred by the Federal Court of Justice, the ECJ now had the opportunity to take a position on this issue. In its landmark judgment, the Court ruled that such arbitration clauses are incompatible with the autonomy of EU law and the legal protection system within the EU.[37] While the BIT on which Achmea is based expressly grants the arbitral tribunal the competence to take EU law into account, the ECT stipulates in Art. 26(6) that disputes are to be decided in accordance with the ECT itself and the applicable rules and principles of international law.

[36] ECJ Case C-284/16.

[37] ECJ Case C-284/16 N°60.

b) Findings of the parties

The German government was of the opinion that the Achmea ruling also applies to the ECT due to the comparable starting position.

Following the Achmea ruling of the ECJ in early March 2018, the Respondent requested that the Court address the arguments raised by the EU Commission in September 2015 regarding jurisdiction.

Before the arbitral chairmen commented on this and reached a decision on the admissibility of the action, the two parties were invited to comment on this. The main questions were: Does the ECJ's finding apply only to bilateral or also to multilateral investment protection agreements? Does the ECJ's finding also apply to investment protection agreements to which the European Union itself is a signatory?

The Claimants and the Respondent submitted their observations in this regard on May 30, 2018.

For the first time, the Respondent raised the objection that the General Court lacked jurisdiction based on EU law. Although the Commission raised the objection of possible incompatibility between intra-EU investor-state dispute settlement under the ECT and EU law for the first time in its submissions in 2015, the Respondent did not join it. Accordingly, the court had to deal with the question of whether the defendant's objection to jurisdiction could be considered at all at this point in the proceedings.

aa) Claimants opinion:

The Claimants submit that the Adversary's submission that the Tribunal lacks jurisdiction on the merits because of the ECJ's Achmea jurisprudence should no longer be taken into account because of delay, pursuant to ICSID Rules 26(3) and 27. This follows from ICSID Rule 41(1), according to which the objection on admissibility should have been raised as early as possible, in particular because there are no new facts involved, since the ECJ's judgment merely applies pre-existing EU law.[38]

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[38] Vattenfall AB and others v. Germany ICSID Case No. ARB/12/12 Decision on the Achmea Issue, N° 60f.

Moreover, EU law is not binding for the arbitral tribunal to assess its own jurisdiction. It is not subject to international law but is autonomous from it. Any questions of jurisdiction are to be assessed only according to the ICSID Convention, which is to be applied according to the general principles of international law. In the present case, the issue is filled in by the ECT, to which both parties had autonomously submitted.[39]

In any case, the ECJ ruling is not applicable to the case, on the one hand, because it deals with the applicability of EU law under BITs and MITs and, on the other hand, because the EU itself is a member of the ECT. [40]As a result, the EU has also agreed to the provision of Article 26, i.e. the possibility of arbitration. The EU does not have the competence to declare the regulation of 26 ECT as invalid, not even by jurisdiction of the ECJ.

Furthermore, a transfer of the jurisdiction is excluded, since the BIT on which the Achmea ruling was based regulates in Article 8 (6), „The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:

- the law in force of the Contracting Party concerned;
- the provisions of this Agreement, and other relevant agreements between the Contracting parties;
- the provisions of special agreements relating to the investment;
- the general principles of international law" [41]

However, there is no such provision in the ECT that leaves room for the application of different legal systems; rather, the treaty is to be the sole instrument for finding the law.

The provision of Article 1 (10) ECT refers to the "territory" of the member state, not that of the EU as a whole. The party thus joins the arbitral tribunals in Masdar v. Spain et. al. In addition, Article 16 of the ECT mandatorily provides that the right to refer matters to investment arbitration tribunals shall continue to exist irrespective of any conflicting treaty provisions.

[39] Vattenfall AB and others v. Germany ICSID Case No. ARB/12/12 Decision on the Achmea Issue, N°63f.

[40] Vattenfall AB and others v. Germany ICSID Case No. ARB/12/12 Decision on the Achmea Issue, N°68f.

[41] Judgement of the Court (Grand Chamber) In Case C-284/16, N° 4

Moreover, the Federal Republic of Germany could not simply unilaterally withdraw its previously given consent to the procedure pursuant to Article 26 (3) ECT. This declaration was binding, which the ECJ ruling cannot change.[42]

(bb) Respondents opinion:

The German government is of the opinion that the Achmea ruling also applies to the ECT due to the comparable starting position.

It was of the opinion that its plea is not out of time, since the ECJ ruling creates a "new procedural situation"[43], upon the occurrence of which the defendant raised its plea as soon as possible. Moreover, it had doubted the jurisdiction of the court from the outset. Even if this was based on other grounds, the court must comprehensively examine the arguments against its jurisdiction on its own motion.

The ECJ's ruling in Achmea was not merely applicable to BITs but found corresponding validity in MITs. Arbitration proceedings on the basis of the ECT, with legal actors of the member states therefore fall under this jurisdiction. The provision of Article 26 ECT, which provides for the possibility of arbitration in case of disputes under the ECT, has to be interpreted in the light of the ECJ case law. Therefore, the jurisdiction of arbitral tribunals in cases where an investor from one member state sues another member state does not apply. Uniform jurisdiction and handling within the European Union are indispensable and must always be guaranteed. Arbitration courts are not in a position to do this, especially since they do not function as part of the legal order of the European Union, whereas the two parties are obliged to comply with European law. The Kingdom of Sweden, as the sole shareholder of Vattenfall, is in breach of this obligation.[44]

[42] Vattenfall AB and others v. Germany ICSID Case No. ARB/12/12 Decision on the Achmea Issue, N°62.

[43] Vattenfall AB and others v. Germany ICSID Case No. ARB/12/12 Decision on the Achmea Issue, N°46.

[44] Vattenfall AB and others v. Germany ICSID Case No. ARB/12/12 Decision on the Achmea Issue, N°49f.

The law of the European Union is to be treated and respected in international arbitration proceedings as part of international law and not merely as part of domestic or internal law.[45]

Contrary to Article 25 I of the ICSID Convention, it was possible for the Respondent to unilaterally withdraw its consent, since Article 26 ECT became inapplicable retroactively with the judgment of the ECJ. Due to the hierarchy of norms, the EU treaties take precedence over the ECT, which already results from the provision of Article 351 TFEU. This conflict of laws rule states that international treaties between Member States and third countries concluded before accession to the European Union (old treaties) continue to apply by way of exception for the time being, even in the event of a breach of Union law. However, Art. 351 TFEU does not apply to intra-European international treaties. Therefore, Art. 351 TFEU is only applicable if the non-application of the Energy Charter Treaty in intra-European disputes also violates third countries. In any case, Art. 351 (2) TFEU establishes an obligation of the Member States to take all appropriate measures to remedy the violation of Union law. This represents a special manifestation of the Member States' duty of loyalty enshrined in Article 4 (3) TEU. Even if Art. 351 TFEU were to apply with respect to the arbitration proceedings Vattenfall v. Germany, the initiation of the arbitration proceedings on the part of Vattenfall appears to be a breach of Sweden's duty of loyalty. After all, Vattenfall is a Swedish state-owned company. Sweden could thus have remedied the breach of the Union in the specific case by asserting its influence over Vattenfall and thereby preventing the present arbitration proceedings. This would have protected the autonomy of Union law, if not in principle, at least in individual cases.

The previous arbitration proceedings of Spain against Masdar, in which the court had ruled despite the ECJ case law on Achmea, were not to be followed.

cc) The ECs position

The Commission is of the opinion that the ECT should not be given any preference on the basis of the principle of lex specialis. On the other hand, the Treaty is to be applied in any case in the light of the applicable EU law.The EC says that EU law must be taken into account as international law when applying law under art 26 (6) ECT.[46] The ECJ's ruling renders

[45] Vattenfall AB and others v. Germany ICSID Case No. ARB/12/12 Decision on the Achmea Issue, N°48.

[46] Vattenfall AB and others v. Germany ICSID Case No. ARB/12/12 Decision on the Achmea Issue, N°81.

arbitration inapplicable to investments under the ECT “on the ground of the general principle of EU law of autonomy of the EU legal order”[47].

The case law of the ECJ on Achmea is also transferable to the case of EU-internal investor-state arbitration proceedings and must be taken into account. This is already evident from the fact that the judgments cannot be reviewed by national or European courts. [48]
Regarding the point that the EU itself is a member of the ECT, the Commission states that the proceedings are between Sweden and Germany. The membership of the EU has no influence here. [49]
For cases in which only member states of the Eu are involved, a "special conflict rule"[50] should apply, according to which Eu law has priority. This follows from the general principle of the primacy of Eu law.

dd) The Courts decision

The court accepts the defendant's argument and does not reject it as belated. In doing so, it opposes the Claimants' assertion.[51]

First, it finds that the ECJ's judgment rendered in Achmea is a new fact within the meaning of ICSID Rule 41(1). Even if the legal content is not to be considered a fact in itself, the fact that the judgment was rendered is. In this respect, the Respondent addressed the Judgment as a fact as soon as possible after it became known and complied with the requirements of ICSID Rule

[47] Vattenfall AB and others v. Germany ICSID Case No. ARB/12/12 Decision on the Achmea Issue, N° 84.

[48] Vattenfall AB and others v. Germany ICSID Case No. ARB/12/12 Decision on the Achmea Issue, N°82.

[49] Vattenfall AB and others v. Germany ICSID Case No. ARB/12/12 Decision on the Achmea Issue, N°86.

[50] Vattenfall AB and others v. Germany ICSID Case No. ARB/12/12 Decision on the Achmea Issue, N°91.

[51] Vattenfall AB and others v. Germany ICSID Case No. ARB/12/12 Decision on the Achmea Issue, N°106.

41(1). In addition, according to ICSID Rule 41 (2), the Tribunal had the power to consider jurisdictional issues on its own initiative at any time.[52]

The question of which law is to be used as a basis for the question of jurisdiction is comprehensively addressed by the court. In particular, the judgment and the effect of EU law on proceedings under Article 26 ECT are reviewed, as well as whether and how this is to be assessed in the light of Article 31 (3) VCLT. Firstly the Tribunal finds that there is no reason for it to assume that the Achmea jurisprudence, which expressly refers only to BITs, also applies to MITs.[53] Second, the arbitral tribunal noted that the starting point of its interpretation was not EU law, but Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT). According to this article, a treaty is to be interpreted in accordance with the ordinary meaning of its provisions, their context and in the light of the object and purpose of the treaty. Even if the EU treaties constituted international law and EU law could play a role in questions of interpretation, the application of EU law should not lead to a situation where the interpretation of the treaty contradicted the ordinary meaning of the treaty provisions.
As a result, the tribunal determines its jurisdiction by applying the rules (in particular, Article 26) in the ECT, which are fleshed out by the generally applicable rules of the ICSID Convention. In doing so, the general principles of international law are to be taken into account.[54] The law of the European Union and the jurisprudence of the ECJ do not form a legal basis for a divergent assessment of jurisdiction. The court does not see an exception for EU members in Article 26 ECT. The provision remains to be applied literally. The EU as such, being a member of the ECT, should have initiated measures earlier to remedy the situation in case of bases contrary to EU law. Nor do conflict-of-law rules under international law lead to a different result. Articles 267 and 344 TFEU stand independently alongside the provisions of the ECT and not in contradiction to them and vice versa. [55]

[52] Vattenfall AB and others v. Germany ICSID Case No. ARB/12/12 Decision on the Achmea Issue, N°103 f.

[53] Vattenfall AB and others v. Germany ICSID Case No. ARB/12/12 Decision on the Achmea Issue, N°161 f.

[54] Vattenfall AB and others v. Germany ICSID Case No. ARB/12/12 Decision on the Achmea Issue, N°166.

[55] Vattenfall AB and others v. Germany ICSID Case No. ARB/12/12 Decision on the Achmea Issue, N°211 f.

Finally, the Arbitral Tribunal considered it significant that the ECT does not contain a disconnection clause ensuring that provisions in mixed contracts apply only vis-à-vis third parties and not between EU member states. In particular, the fact that the EU had originally proposed a disconnection clause, but that this proposal was ultimately dropped, led the arbitral tribunal to conclude that the clause was deliberately not included in the ECT.

The Arbitral Tribunal also found it extremely difficult to derive a relevant rule of international law from the Achmea judgment of the ECJ.

In conclusion the Tribunal's decision was as follows:

> "(i) DECLARES that Respondent's jurisdictional objection of 4 April 2018 contained in its First Submission re the ECJ Judgment in *Achmea* of 6 March 2018 has been raised in a timely manner;
>
> (ii) REJECTS Respondent's request for all claims pending before this Tribunal to be dismissed because the Tribunal has no jurisdiction in the light of the ECJ Judgment in *Achmea* of 6 March 2018;
>
> (iii) RESERVES all other issues relating to the jurisdiction, admissibility and merits of these arbitral proceedings for subsequent determination by the Tribunal; and
>
> (iv) RESERVES the decision on costs. " [56]

4. First and second proposal to disqualify the tribunal

In 2018 and 2020, the Federal Republic of Germany requested that the arbitrators be dismissed on the grounds of bias and lack of independence.[57] These requests were rejected following a review by ICSID and the Permanent Court of Arbitration (PCA). In the first application, the Federal Republic of Germany accused the arbitral tribunal of giving preferential treatment to the claimant in its hearings. In addition, it argued that the arbitral tribunal had treated the Federal Republic of Germany and the claimant unequally in the submission of additional evidence. Finally, it accused the chairman of the arbitral tribunal and the arbitrator nominated by

[56] Vattenfall AB and others v. Germany ICSID Case No. ARB/12/12 Decision on the Achmea Issue N° 232.

[57] Part III: ICSID Arbitration Mechanism', in Yarik Kryvoi, International Centre for Settlement of Investment, N°163 f.

Vattenfall of a conflict of interest and partiality, respectively. In all respects, the allegations were rejected by the PCA and ICSID.[58]

a) First proposal of disqualification

The first allegation of bias was made to the ICSID Secretary General on November 12, 2018 and stems from the situation surrounding the list of questions that the arbitral tribunal addressed to the parties to the dispute on October 26, 2018. The late date (two years after the hearing) and the content of the list of questions raised doubts in the Respondent's mind about the impartiality of the arbitral tribunal. In its application, the Federal Republic requested the exclusion of the members of the arbitral tribunal, in accordance with Rule 9 of the ICSID Arbitration Rules. The decision on this is then made by the Chairman of the ICSID Administrative Council, Article 58 of the ICSID Convention. Kristalina Georgieva the Acting Chairman of the Administrative Council ruled by letter dated March 6, 2019 that the Respondent's request is denied. Prior to the decision, a recommendation was obtained regarding the request of the Secretary General of the Permanent Court of Arbitration in The Hague Hugo Hans Siblesz. The Secretary General also came to the conclusion that the request should be rejected and states this comprehensively.

„The Respondent's Proposal is based on allegations that:

> (a) The Tribunal has "assisted Claimants with the formulation of their claims and has given them an opportunity to remedy shortcomings at a time when Claimants themselves would not have been able to do so" ("**Ground One**");
>
> (b) The Tribunal treated the Parties unequally ("**Ground Two**"). " [59]

[58] Decision of the Acting Chairman of the Administrative Council (March 6, 2019); Decision of the Chairman of the Administrative Council (July 8, 2020).

[59] Recommendation on Disqualification Proposal 4 March 2019 N° 4

In addition, other aspects are criticized, which, however, are not independent grounds for bias, but were merely used in support. [60]

In the motion, the respondent claims disqualification under Article 57, i.e. the existence of facts "indicating a manifest lack of the qualities required by Article 14, paragraph (1)". Here, it refers to the quality of being able to reliably give an independent judgment.

The 8 questions addressed to the Parties for comments in October 2018 concerned the amount of damages (N° 8) and the Tribunal's jurisdiction over the third, fourth and fifth Claimants (N° 1-7).[61]

First, the Respondent takes issue with the time limit for reply. The parties have 28 days to answer the questions and so then another 28 days to respond to the answer of the opposing party. Respondent requested an interim extension of time to November 16, 2018 and was granted an extension to November 12.[62] The defendant is of the opinion that the deadline set it too short and disadvantaged it thereby, since the plaintiffs could simply name an unsubstantiated amount of damages without the defendant being able to evaluate and dismiss this to the necessary extent.

In addition, the purely written procedure on the issues raised was a violation of the right to a fair hearing. [63]

With regard to questions number 1-7, the defendant complains that the plaintiffs are unjustifiably given an ex post facto opportunity to comment and correct deficiencies in order to avoid that the court, which does not have jurisdiction per se, would have to dismiss the action. Hereby, the plaintiff's side had been helped, as it served to improve its presentation and to remedy deficiencies, whereas it had previously been denied the subsequent submission of documents.

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[60] Recommendation on Disqualification Proposal 4 March 2019, N° 79 f.

[61] Recommendation on Disqualification Proposal 4 March 2019 N.30.

[62] Recommendation on Disqualification Proposal 4 March 2019 N°. 34.

[63] Recommendation on Disqualification Proposal 4 March 2019 N°57.

The main focus of the defendant is on question No. 8:

„Having also regard to the answers to the above questions, including question 7, and if the Tribunal were to decide that the valuation date for quantification of the alleged damages is 29 June 2011 (corresponding to the date prior to the date of adoption of the 13th Amendment to the German Atomic Energy Act), what would be each Party's case regarding the alleged damages due?" [64]

Here, it was also criticized that the plaintiffs are granted another opportunity to comment. In addition, the Tribunal exceeded its competence in favor of the Claimants by carrying out the substantive factual valuation at a further valuation date than requested by the Parties. While the Respondents argued for an ex-post valuation, the Claimants submitted March 14, 2011 (ex-ante valuation) as the valuation date.[65]

The Secretary General of the Permanent Court of Arbitration in The Hague justifies his opinion contrary to the defendants by stating that the defendants had the opportunity to request an oral hearing and also a change of the procedural calendar. [66]

Against an unfair treatment by the possibility of a further statement with the fact that the court wanted to do justice thereby only to the complex evaluation of its competence and to close for this knowledge gaps. This was neither surprising nor did it speak against the independence of the tribunal. The fact that the defendant had previously been denied the opportunity to submit documents was unrelated to this issue. Both sides are equally involved in this process of questioning. It serves to fill in the gaps of the court and to enable legal discovery. A case of impropriety in the sense of Article 14 (1) of the ICSID Convention therefore did not exist.

b) Second proposal of disqualification

The second request for disqualification was issued by the Federal Republic of Germany on 16 April 2020 and was again based on the existence of unsuitability under Article 14 of the ICSID Convention on various grounds.

[64] Recommendation on Disqualification Proposal 4 March 2019 N.30.

[65] Recommendation on Disqualification Proposal 4 March 2019 N.56.

[66] Recommendation on Disqualification Proposal 4 March 2019 N.71.

Again, the Chairman of the Administrative Council joined the Secretary General of the Permanent Court of Arbitration in The Hague in his opinion and rejected the request on July 08, 2020.

The first allegation was that Vattenfall's nominated arbitrator Charles N. Brower had already ruled on legal issues important to the proceedings in 2014, in a decision on another investor claim that was secret until recently, without making this public.[67] The defendant comments on this as follows:

> „Judge Brower has openly presumed that Article 26(7) ECT would permit self-standing claims of domestic subsidiaries, not only in ICSID proceedings, but also in UNCITRAL/SCC arbitrations. That is, he has pre-judged a matter at the heart of this arbitration's jurisdictional problem, namely whether Vattenfall's domestic subsidiaries can bring their full losses, comprising E.ON's shares."[68]

Charles N. Brower counters in his comments that he is not required to disclose and that the subject matter of his closing argument in the other proceeding is not applicable to this one and thus there is no conflict of interest. A conflict of interest exists when an arbitrator favors a particular outcome in the tribunal issues for personal reasons.[69]

Mister Siblesz also does not consider the role of the judge in The PV Investors v. Spain as a ground of incompetence. In his opinion, contrary to that of the Tribunal, he considers that the Spanish subsidiaries were admissible as plaintiffs in the proceedings, under the UNCITRAL rules. The question of admissibility under the ICSID Convention had not been answered by him in this case. Therefore, the case was also not transferable to the current proceedings, in which the subsidiaries want to appear as plaintiffs on the side of Vattenfall.[70]

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[67] The PV Investors v. The Kingdom of Spain

[68] Respondent's Second Proposal for Disqualification of the Tribunal, para. 141.

[69] Ina C. Popova & Jessica L. Polebaum, Emerging Expectations for Arbitrators: Issue Conflict in Investor-State Arbitration and Beyond, 41 FORDHAM INT'l L.J. 937 (2018).

[70] Recommendation on Disqualification Proposal 6 July 2020 N°127.

In addition, the defendant accused the arbitral tribunal of deliberating internally on important issues over years without informing them. [71]

The federal republic states that because of the role of Judge Brown, the Tribunal deliberated on the subsidiaries in the PV proceedings without giving the Respondent the opportunity to comment, thus violating its right to be heard. This allegation cannot be proven and therefore seems "entirely speculative" in the view of the Secretary General. Moreover, it is usual and necessary for the court to take into account views other than those of the parties in order to reach a decision.

Furthermore, it criticized that the decision to continue the proceedings via video technology during the Corona pandemic would have limited the ability of the Federal Republic of Germany to defend itself adequately and would thus have constituted partisanship in favor of the plaintiff. Additionally, the procedural calendar would unduly complicate the defense during the pandemic.[72]

When asked by the court in March 2020, the defendant declined to hold a hearing by video conference while the claimants agreed to this proposal. The fact that the tribunal decided to hold videoconferences despite her objection would severely hamper the proceedings and greatly affect ad hoc communications. Since videoconferencing is not provided for in ICSID rules, holding it contrary to their will would be unlawful.

Even if such a procedural defect had existed, according to the Secretary General's opinion, the Federal Republic would not have had to point out the defect of the procedure per se, but a thereby recognizable lack of impartiality. There would be no room for a presumption of bias on the part of the court, by holding a hearing online. This refers just as much to the court's decisions on dates and deadlines, as a purely procedural measure.[73]

[71] Recommendation on Disqualification Proposal 6 July 2020 N° 119 f.

[72] Recommendation on Disqualification Proposal 6 July 2020 N°129 f.

[73] Recommendation on Disqualification Proposal 6 July 2020 N° 147.

5. Comments on the procedure

As already mentioned in the introduction, the Vattenfall arbitration proceedings are of particular international but above all national (German) relevance.

On the one hand, the length of the legal dispute is particularly striking. It lasted almost 10 years and is officially only paused until the plaintiffs officially withdraw their claim. Although there are always arbitration proceedings that drag on for many years (for example, the proceedings Victor Pey Casado and President Allende Foundation v. Republic of Chile, which began in 1998 and came to an end in 2020) , however, the Federal Republic and its lawyers seem to have contributed notably to the delay in the proceedings. There have been regular problems meeting deadlines and extensions have been requested. In the Public Hearing on Question 8 on November 27, 2020, counsel for the Respondent Dr. Sabine Konrad of Morgan Lewis & Bockius (Frankfurt) states in this regard that the capacities of the law firm and the Federal Government were insufficient to provide materials in a timely manner.

Understandably, the special situation during the Corona pandemic leads to new challenges and also to delays. However, the defendant's behavior regularly appears as if it is trying to torpedo the proceedings. While the bias motions may not be arbitrary in parts, the accusations of partiality due to scheduling problems, for example, are quite incomprehensible to outsiders. This only prolonged the proceedings even more.

Above it all, there is the big question of why the defendant is behaving this way. With the ruling of the Federal Constitutional Court in 2016, it was clear once and for all that compensation payments to Vattenfall were mandatory. Vattenfall made a settlement offer at the beginning of the proceedings in 2011. It was only in the spring of this year that the German government accepted the offer, although payment would have been unavoidable anyway. Even a potential victory before the ad hoc court could not change this. The behavior of the German government, also with regard to the legally flawed 16th amendment to the Nuclear Phase-out Act, shows that it wants to keep the prices for the nuclear phase-out down by all means. This is understandable up to a point. However, this has been exceeded here. The fact that the defendant wanted to avoid compensation payments at all costs and keep them small led to considerable legal and bureaucratic expense. The legal defense costs incurred by the defendant alone for the arbitration proceedings amount to almost 25 million euros. Whether Germany will also have to pay the costs of the arbitration court and the plaintiff's legal defense costs is not yet certain, but either way the costs could have been much lower if Germany had not so unreasonably refused to face

the legal facts. It is therefore not surprising that criticism of Germany's strategy of tactical delay before the ICSID court is not absent.

D) ECT:

Individual voices to terminate the ECT with regard to the envisaged arbitration in emerging investment disputes are getting louder. Italy already terminated its membership in 2016. Members of the EU Parliament as well as from national parliaments of EU member states called for withdrawal from the ECT in an open letter in September 2020, should the scope of the ECT not be limited to clean energy and reduced ISDS. In January 2021, Spain and France also called for withdrawal if the EU's stated goal of reducing greenhouse gas emissions is not supported.

Nelly Grotefendt, policy officer at Forum Environment and Development, says: "These high payments of over 2.4 billion to the nuclear companies would probably hardly have been possible without Vattenfall's action before an arbitration court. Because of this threat, the German government buckled and paid higher compensation than it had announced. This shows the danger that such lawsuits pose to the public purse."[74]
Of course, this procedure is already a high loss for the federal government, but the voices arguing for an exit from the ECT arbitration demand this especially in view of upcoming further changes in the energy sector. Due to the threat of climate change, the German government decided to phase out coal production by 2038, a target that could even be shortened depending on the outcome of the federal elections in September this year. Some parties are calling for a phase-out by 2030. There are fears that a large number of further lawsuits will be filed by coal operators in the event of a coal phase-out by Germany. In February of this year, the German energy company RWE filed a lawsuit on the basis of the ECT against the coal phase-out by 2030 decided by the Netherlands.[75] Critics are of the opinion that the regulation of the ECT

[74] "Kündigung Des Energiecharta-Vertrags Gefordert – SOLARIFY," Solarify Max-Planck-Institut für Chemische Energiekonversion, March 6, 2021, https://www.solarify.eu/2021/03/06/614-kuendigung-des-energiecharta-vertrags-gefordert/.

[75] Jus Mundi, "RWE v. Netherlands, Composition of the Tribunal, 2 June 2021," jusmundi.com, February 2, 2021, https://jusmundi.com/en/document/decision/en-rwe-ag-and-rwe-eemshaven-holding-ii-bv-v-kingdom-of-the-netherlands-tuesday-2nd-february-2021.

would stand in the way of a coal phase-out, as the government would want to avoid at all costs having to pay similarly high sums as the nuclear power plant operators.

It is doubtful whether a phase-out of ICT would change anything. After all, the ruling of the Federal Constitutional Court in 2016 also led to the conclusion that the German government must pay a high compensation to the nuclear power plant operators. Of course, the proceedings before the arbitration court have a high relevance and are still an important mechanism for investors to enforce their investment protection, but the Federal Constitutional Court has made it clear that it would not automatically rule in favor of the federal government and that investment protection in Germany is guaranteed. However, it is not clear whether all national courts of the ECT member states would see this similarly. Therefore, the protection guaranteed in the ECT should not be underestimated and remains very important for investors. In addition, the ECT contains a so-called "zombie clause" (Article 47, paragraph 3). This states that investment protection will continue to be valid for 20 years after the withdrawal of a contracting state for investments in that state and for investors from that state. Withdrawal from the ECT would also not result in the termination of ongoing investment protection claims. It should not be underestimated that even after a coal phase-out, investments in energy production in Germany are still desirable. The switch to sustainable energy production requires innovation and, accordingly, investment. Accordingly, it should be made particularly easy and attractive for potential investors to invest money in this sector. This is not only important on a small scale for a country like Germany or the other member states of the EU; ultimately, it is groundbreaking for the future of energy production. A German withdrawal from the ECT could therefore act as a deterrent, as it would signal to potential investors that Germany is not prepared to take disputes to arbitration for fear that this could lead to expensive compensation. However, arbitration under the ECT is necessary not only in the event of an exit, but also for all other disputes. As can be seen in relation to Vattenfall, the possibility of resorting to arbitration under ICSID was already useful in 2009. Taking away this possibility of legal certainty and not replacing it with an equivalent one (and it seems questionable whether the institutions of the EU can be considered equivalent in this respect) could also bring major problems.

On January 15, 2019, the Federal Republic of Germany, together with 21 other EU Member States, issued a majority declaration proposed by the EU Commission in which these Member States express their willingness to repeal their respective bilateral intra-EU investment promotion and protection treaties and state that they understand that the ECJ's prohibition on intra-EU arbitration also applies to ECT-based intra-EU arbitration.

A majority of member states also agreed to a number of commitments, including to prevent domestic arbitrations between investors and states from being filed under the ECT in the first place.

In its separate declaration, the Kingdom of Sweden expressly did not take a position on the compatibility of the ECT with Union law. On May 5, 2020, the majority of EU Member States signed an international law convention to end bilateral investment protection treaties between European Union Member States in Brussels. The Kingdom of Sweden and the Republic of Austria, among others, did not participate in this agreement.[76]

On May 27 2020, the EU presented its proposal for the modernization of the ECT. In terms of investment law, this includes, for example, limiting the scope of the ECT, emphasizing the right to state regulation, and limiting the FET standard. Although procedural reforms are not included in the negotiating mandate of the ECT Negotiating Group, the EU proposed to introduce a litigation option before a future Multilateral Investment Court (MIC) as an alternative to investment arbitration. [77]

This conflicts with the interests of Central Asian states in particular, which depend on revenues from fossil fuels and insist on comprehensive investment protection.

It is foreseeable, as was already apparent in the ECJ Achmea decision, that in the long term the EU would like to anchor the jurisdiction over EU internal investments exclusively in its own institutions. Whether this will be blessed with success remains to be seen, but it is clear that investors should be signaled that investment protection does not have to take a back seat due to conflicting political interests of the Union.

E) Conclusion:

Ultimately, the topic of arbitration courts with regard to energy investments is far from being settled.

The discussed case of Vattenfall against the Federal Republic of Germany in its long duration before different courts shows how difficult it is to find an agreement in this area that does justice

[76] European Commission, "EU Member States Sign an Agreement for the Termination of Intra-EU Bilateral Investment Treaties," European Commission - European Commission, May 5, 2020, https://ec.europa.eu/info/publications/200505-bilateral-investment-treaties-agreement_en.

[77] European Union, "EU Text Proposal for the Modernisation of the Energy Charter Treaty," accessed July 30, 2021, https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf.

to the interests worth protecting, such as climate protection, without disregarding the interests of the investors of a financial nature, which are also worth protecting. The dynamics before an arbitration court for investment protection are different from those of national courts. The rules that apply there are challenging in many respects. Regularly, and especially in the future, they are often in conflict with European law or national law. This will have to be resolved in the upcoming time.

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