The German Nuclear Phase-Out Put to the Test in International Investment Arbitration?

Background to the new dispute *Vattenfall v. Germany (II)*

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In May 2012 the Swedish energy company Vattenfall filed a request for arbitration against Germany at the International Centre for the Settlement of Investment Disputes (ICSID), housed at the World Bank in Washington, D.C., because of Germany's decision to phase out nuclear energy.[2] Vattenfall relies on its rights under the Energy Charter Treaty, an international trade and investment agreement in the energy sector.[3] This treaty, like many international investment agreements, grants foreign investors the right to bypass the domestic courts of the host country and to directly file a complaint to an ad hoc international tribunal to challenge proposed government regulations. Vattenfall claims over €3,7 billion in compensation in response to the closure of the nuclear power plants Krümmel and Brunsbüttel.

This article sets out to assist interested members of the public and policy-makers to better understand this particular case and the investment law and policy it relies on. We will first provide the background on the conflict (including the first 2009–2011 *Vattenfall v. Germany* arbitration) and the central elements of international investment law that Vattenfall is likely to call into play.

We also provide a comparison with the domestic legal situation by looking into the pending review of the constitutionality of the nuclear phase-out. Finally, we briefly address a number of fundamental issues and needs for reform that come to the fore in the relationship between international investment protection law (including arbitration) and public policy-making.

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Power Shift

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Background: Nuclear Phase-Out – Investment Treaties – Investor-State Arbitration – Investment Protection Standards

Germany Decides to Phase Out Nuclear Power

The conflict between Vattenfall and the German federal government was triggered by the summer 2011 decision of the German Parliament to abandon the use of nuclear energy by the year 2022. The amendment to the Atomic Energy Act[4] was discussed and adopted against the backdrop of the nuclear disaster in Fukushima (Japan). It was the culmination of an intensive and controversial public debate that had been going on in Germany for decades about the use of nuclear energy and energy policy as a whole. In addition to this most recent (13th) amendment to the Atomic Energy Act, a comprehensive package of seven further legislative proposals from the federal government were set to be put to the vote in 2011, to bring about a new era of energy policy. With this legal package, the federal government reached out to the broad social majorities against the use of nuclear energy and rolled back the lifetime extension decision only a few months after it was announced in December 2010. In 2010, the eleventh amendment to the Atomic Energy Act—in a departure from an earlier nuclear consensus decision negotiated by the SPD (social democrats) and the Greens with the energy companies in 2002—had sanctioned additional energy supplies that would extend the life of Germany's nuclear plants by eight to 14 years (lifetime extension).

The new Atomic Energy Act stipulates that authorization for the operation of a nuclear power station expires at the latest on a legally specified date for each respective plant. The law foresees an immediate closure (August 6, 2011) for the oldest of the 17 nuclear power plants (Biblis A, Neckarwestheim 1, Biblis B, Brunsbuettel, Isar 1, Unterweser, Philippsburg 1 and the Krümmel nuclear power plant, which has not been in operation since 2007 because of a number of incidents). The remaining nuclear plants will gradually be shut down by 2022.

Vattenfall and Other Nuclear Companies Announce Complaints Against the New Atomic Energy Act

Shortly after the new Atomic Energy Act passed into law, several nuclear power plant operators announced their intention to file a suit to contest it. A special position was taken up by the Swedish energy group Vattenfall (the operator of the Krümmel and Brunsbüttel nuclear power plants). After several months of threats to obtain "compensation for the phasing out of nuclear energy,"[5] Vattenfall took first steps to initiate international arbitration under the Energy Charter[6] by submitting a request for arbitration at the ICSID. The dispute was registered May 31, 2012. The next step will be the establishment of a tribunal. The exact amount of Vattenfall's compensation claim against Germany is as yet unknown. Press reports in late 2011 put Vattenfall's lost investments in nuclear power plants at €700 million. In the spring of 2012, in its financial report for 2011, the company estimated the damages from the nuclear phase-out over the preceding financial year at €1.18 billion.[7] It is unclear what additional costs the company may wish to add on to its claim (missed future profits, legal fees, interest, etc.).

The Energy Charter Treaty, Bilateral Investment Treaties (BITs) and Investor-State Arbitration

The Energy Charter Treaty (ECT), which was concluded in 1994 and entered into force in 1998, was signed by fifty-one states, including the European Union and Euratom (Eastern and Western European states, the former Soviet Union, Japan, Australia).[8] It is a multilateral treaty that controls the transnational environment for trade, transfer and protection of investment in the energy sector. In addition to its comprehensive protection of foreign investors in the energy sector (Part III, Articles 10–17 on the promotion and protection of investments), it also foresees a dispute settlement mechanism that, if a conflict arises, provides investors with the option of investor-state legal action against states (Article 26: settlement of disputes between an investor and a contracting party). Unlike the ECT, the vast majority of investment protection agreements are concluded between two states and are not limited to specific economic sectors (such bilateral investment treaties are generally referred to as BITs). The first BIT was agreed in 1959 between Germany and Pakistan. This was the forerunner of the currently more than 2,800 investment protection treaties concluded worldwide.[9] Germany heads the list of states having signed such agreements with 139 signed BITs, of which 130 have entered into force.[10] An important characteristic of the vast majority of these agreements is that in case of an alleged breach of a treaty provision they grant investors a right to apply for international arbitration (investor-state arbitration). This right of action was increasingly included in BITs from the 1980s onward, but it wasn't until the end of the 1990s that investors began to widely and offensively sue host states under these agreements. To date, nearly 400 known arbitration cases have been launched under these agreements—almost all of them after 1997. Due to the general lack of transparency of the system, the total number of cases remains unknown.

The Vattenfall I Dispute Case (2009–2011) Regarding Environmental Regulations Applying to the Coal-Fired Power Plant Hamburg-Moorburg

In 2009, the company Vattenfall filed its first complaint against the German federal government with the ICSID in Washington, D.C. This was the first (known) investor-state arbitration procedure against Germany. At issue in that case was the construction of a new coal-fired power plant in Hamburg-Moorburg, situated on the River Elbe. The Hamburg Environmental Authority had issued a licence imposing water quality standards, which, according to Vattenfall, made the whole investment project "unviable." The corporation argued that the environmental permit violated the provisions set out in Part 3 of the Energy Charter Treaty regarding the promotion and protection of investments and proceeded to file a compensation claim against Germany of about €1.4 billion, plus arbitration costs and interest.[11] The dispute between Germany and Vattenfall was settled in the spring of 2011, with Germany agreeing to a watered down environmental permit in favour of the corporation.[12]

Possible Impacts of the Investment Treaties on Germany's Environmental Policy

Germany's over 130 BITs, as well as the Energy Charter Treaty, can have a significant impact on environmental regulation and environmental policy, both in Germany and on its treaty partners. In particular, regulatory changes that could have negative effects on foreign investors can be subject to litigation before international arbitration tribunals. Investors may challenge such regulations as violations of the so-called "fair and equitable treatment standard" (FET) or request compensation for "indirect expropriation". There is a permanent tension between investor rights and public welfare interests, which may be resolved to the detriment of the public interest. In principle, public welfare considerations may be taken into account in an arbitral decision. However, the investment protection agreements focus almost exclusively on investor interests, and the investor-state arbitration mechanism is increasingly used as a tool to safeguard investor interests against "political" risks. As a consequence, the rights provided to foreign investors in investment treaties surpass the protections enshrined in Germany's Basic Law (the German Constitution: *Grundgesetz*), which provides a careful balance between public welfare objectives and the government's role as the guarantor of these objectives on the one hand, and investor rights on the other. If an investor initiates an arbitration and the arbitral tribunal rules that an investment protection standard has been violated, the state concerned may have to pay high amounts in compensation to the plaintiff companies. The mere threat of a claim can therefore lead states to roll back on the intended adoption or implementation of regulatory measures to protect the environment or public health. This kind of pre-emptive action can benefit the investor to the detriment of the common good (the "chilling effect").

In order to shed light on some of the problems at issue in terms of substantive law as well as procedural issues, we will provide an overview and comparison of the legal protection offered by international investment law on the one hand and by German law on the other, without any attempt to predict the outcome of any potential claims brought by Vattenfall against Germany regarding the nuclear phase-out.

Which Investment Protection Standards of the Energy Charter Treaty Might Vattenfall Invoke?

It is likely that Vattenfall will sue the Federal Republic of Germany by primarily, but not exclusively, invoking three provisions in the Energy Charter Treaty:

1. The provisions for protection against expropriation without compensation
2. The obligation on fair and equitable treatment and the non-impairment through unreasonable or discriminatory measures
3. The duty to observe any obligations vis-à-vis an investor or investment (umbrella clause)

Protection Against Expropriation without Compensation

Article 13 of the Energy Charter Treaty provides that investments may not be nationalized or expropriated or subjected to "an action equivalent to nationalisation or expropriation" without compensation. In the case concerned, the cancellation of the extension of the operating licence does not constitute a direct expropriation or nationalization in which the property of the investor is transferred to the state. Vattenfall might argue, however, that it amounts to a so-called "indirect expropriation" or a "measure having an effect equivalent to nationalisation or expropriation" under Article 13. In the case of indirect expropriation, the property right remains with the owner, but is adversely affected by changes to the use of the property, often as the result of a regulatory measure. The protection against indirect expropriation is particularly important in the context of international investment protection law because it often differs significantly from domestic approaches, which tend to be more mindful of public welfare perspectives.

Based on the provision on expropriation, Vattenfall might argue that the cancellation of its operating license amounts to an (indirect) expropriation, as Vattenfall's ownership of the nuclear power plants Krümmel and Brunsbüttel has become worthless as a result of their immediate closure pursuant to the new Atomic Energy Act, and that Vattenfall should be compensated accordingly.

Investment tribunals approach the question of whether an indirect expropriation offense was committed in different ways. It is therefore difficult to predict whether or not an arbitration tribunal would qualify the new Atomic Energy Act to an (indirect) expropriation:

- Some arbitration tribunals focus primarily on the impact of government measures on an existing investment. Their main questions are: (1) what is the magnitude of the impact on the investment and (2) are these permanent or long-term measures, or are they temporary or short term in nature? Pursuant to this approach, the objective of public policies and the intent of the state (environmental protection, public health and security, etc.) are irrelevant or, at least, of secondary importance.

- Other arbitrators, however, weigh the benefits of a measure for the common good against the burden placed on the investor. As part of this balancing test, additional criteria will be included to judge the measure that take into account the importance of the measure for achieving the objective, as well as its necessity and appropriateness. This allows public interests to be considered, but makes a prognosis about the outcome of the evaluation of a government regulatory action by a tribunal even more difficult, as the additional criteria hamper the predictability of the award.

- A third, more regulation-friendly approach, which has been so far less frequently taken by tribunals, is based on the understanding that generally applicable regulatory measures taken in the public interest, for example to protect the environment or public health, should, irrespective of their effects, not be considered as an expropriation.

Which approach an arbitration tribunal chooses to select in relation to the issue of expropriation is impossible to predict, because this depends a) on the composition of the arbitral tribunal and b) on the specific facts of the case. In response to developments in investment disputes, an increasing number of countries—like the United States and Canada—have more closely defined the concept of expropriation in their model investment protection agreements, in order to enhance the predictability of the legal implications of these agreements. However, in the international Energy Charter Treaty—as in most other investment agreements—such appropriate measures were not taken. Therefore, it remains to be seen how an arbitration tribunal will deal with the issue of expropriation in the context of Germany's new Atomic Energy Act. But even if the complaint regarding alleged expropriation is rejected as unfounded, Germany might not win the case. Vattenfall might still be successful if the tribunal finds a violation of the fair and equitable treatment provision—the most effective and most frequently sought remedy used by foreign investors.

Fair and Equitable Treatment Requirement

Article 10(1) of the Energy Charter Treaty requires that "each Contracting Party shall [...] encourage and create stable, equitable and transparent conditions for Investors of other Contracting Parties." Article 10(1) further includes a commitment "to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment." The majority of investment protection agreements includes this far-reaching fair and equitable treatment principle, which has been interpreted very differently by arbitration tribunals. Tribunals have predominantly interpreted this vague concept in the spirit of the purpose of the investment agreements, namely to create stable and favourable conditions of business for investors. As a result, public interest plays a relatively minor role in the decision-making process of arbitration tribunals. However, it should be noted that in contrast to most investment agreements, the Energy Charter Treaty does contain certain provisions and references to protect the environment in its preamble, which should be taken into account by any tribunal.

In the present dispute over the new Atomic Energy Act, Vattenfall will likely argue that it has not been treated fairly and equitably, as it had legitimate cause to assume that the legal extension of 2010 would remain in force. Based on this expectation, the company invested in nuclear power plants. According to the company, Vattenfall has invested some €700 million in the two nuclear power plants Krümmel and Brunsbüttel in recent years, with the belief that these reactors would be taken back into operation.[13] Vattenfall could also, on the basis of investments already made, claim damages for future lost profits.

In this context, Vattenfall will likely refer to its "legitimate expectation"—an element that tends to constitute a major factor for arbitral tribunals in assessing a violation of the principle of fair and equitable treatment. In the case of *Tecmed v. Mexico*, for example, the arbitral tribunal came to the conclusion that the host state must provide the investor treatment "that does not affect the basic expectations that were taken into account by the foreign investor to make the investment."[14] The tribunal continued to say:

> *The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.*[15]

The ICSID dispute of *MTD v. Chile*[16] followed this expansive Tecmed interpretation.[17] Other tribunals, however, have interpreted the standard of fair and equitable treatment in a more narrow way, thus leaving more flexibility for state interventions.

In practice, the standard of fair and equitable treatment for investors has become a kind of carte blanche to challenge a wide range of government measures. So it is not surprising that foreign investors in most cases take recourse to this principle, when they want to successfully challenge the conduct of host countries.

In addition, Article 10(1) of the Energy Charter Treaty prohibits that contracting parties "in any way impair by unreasonable or discriminatory measures [the] management, maintenance, use, enjoyment or disposal" of investments. Such a prohibition of arbitrary and discriminatory measures is less common in investment agreements than the standard of fair and equitable treatment. Some authors understand it as a part of the standards of fair and equitable treatment, while others interpret it as an additional duty. In order to claim a violation of Article 10(1) of the Energy Charter Treaty, Vattenfall might possibly argue that the new Atomic Energy Act is discriminatory and/or inappropriate, since the same conditions do not apply to all companies, and that the measures constitute an emotional reaction to the Fukushima disaster. However, here one should note that German investors were affected in the same way as Vattenfall. E.ON, a German investor, for example, owns the remaining investments in the nuclear power plants of Krümmel and Brunsbüttel. Whether an arbitration tribunal will consider the new Atomic Energy Act and the proposed lifetime reduction an inappropriate measure will depend on how it assesses the response to Fukushima, taking into account the public interest.

Umbrella Clause

Vattenfall will probably also raise the umbrella clause, which obliges the host country in general to observe all obligations that it has entered into with an investor or an investment by an investor of another Contracting Party (last sentence of Art. 10(1) of the Energy Charter Treaty). A similar clause is included in the German model investment protection treaty. An investor may invoke this general rule of contract compliance in an investor-state dispute settlement case and thus elevate a contractual or other public law obligation to the international level and have it enforced in an international arbitration claim. Vattenfall could thus argue that the lifetime extension agreed in September 2010 constitutes a German commitment to Vattenfall. If this commitment is not met, this in itself could constitute a violation of the Energy Charter Treaty—even leaving aside any alleged violation of other specific international legal guarantees in connection with the duty to compensate for expropriation and the principles of non-discrimination and fair and equitable treatment.

This internationalization of all obligations was apparently a step too far for some states in the negotiation of the Energy Charter Treaty. Interestingly, four states[18] in Annex IA to the Energy Charter Treaty stated that the last sentence of Article 10(1) (the umbrella clause) would not be automatically applicable to investor-state dispute settlement ("A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1)"). Germany has made no such reservation, so that Vattenfall could bring this clause to bear against Germany in its investment arbitration case.

Energy Companies' Complaints Against the New Atomic Energy Act before German Courts

The protection clauses of the Energy Charter Treaty are not available to German companies, which are equally affected by the new nuclear legislation. They must refer to the protections of Germany's Basic Law. In this respect, foreign investors are better off compared to German investors, because they enjoy additional legal protection they can revert to. Moreover, given the substance and the openness to interpretation of the investment protection treaty, the outcome of the international arbitration will likely be more investor-friendly.

Shortly after the entry into force of the new Atomic Energy Act, several energy operators announced they would contest it in court. In mid-November 2011, the energy company E.ON did indeed bring a complaint to the Federal Constitutional Court.[19] Since the new Atomic Energy Act does not provide for any compensation payments in relation to the phase-out of nuclear energy, the energy company challenges the conformity of the Act with German constitutional law. A constitutional complaint, if successful, should prepare the way for the energy company to sue the Federal Republic of Germany for damages in the German courts. Should the Federal Constitutional Court be persuaded that it is indeed unconstitutional, it could declare the new Atomic Energy Act invalid. This would theoretically open up the possibility for the German Bundestag (Parliament) to either withdraw the nuclear phase-out or replace it with a new law that does provide for compensation.

Constitutionality of the Nuclear Phase-Out under German Law

With regard to the constitutionality of the nuclear phase-out, its compatibility with the freedom of ownership (Art. 14, Basic Law) will be a key issue. In addition, occupational freedom (Art. 12, Basic Law), and the principle of equality (Art. 3, Basic Law) may play a role.

Some arguments that are presented below and that centre on the protection of property and the proportionality of the measures speak for the constitutionality of the nuclear phase-out[20]:

In Article 14, the Basic Law guarantees the right to own property and thus protects against state expropriation and other interventions affecting property rights. However, the rights are not absolute and can be restricted through statutory regulations. Accordingly, Article 14, paragraph 1, sentence 2 of the

Basic Law provides that content and limits of property shall be determined by law. The restriction of the operating licences to operate nuclear power plants therefore do not constitute an expropriation of the operating companies, since the state is not appropriating these nuclear facilities, but is merely prohibiting their operation. In contrast to the concept of indirect expropriation in international investment law, German constitutional law qualifies such measures as "regulations on the content and limits of property" under Article 14, paragraph 1, sentence 2 of the Basic Law. Therefore, revoking the operating licenses does not qualify as an expropriation under German constitutional law, but instead constitutes a so-called "Inhalts- und Schrankenbestimmung des Eigentums" under Article 14, paragraph 1, sentence 2 of the Basic Law. This means that the new Atomic Energy Act is a regulation, reappraising the use of nuclear energy, which sets limits to the property rights of the owner by redefining the content and limits of the legal position of the property rights owner protected by the constitutional guarantee under Article 14 of the Basic Law.

Although the new Atomic Energy Act cannot be considered an expropriation, the Basic Law does not ignore the position of the property holder altogether. The Basic Law calls upon legislature to establish a property regime that ensures an equitable balance between the property interests of the individual property holder and the social or public interest. In order to be considered non-compensable, the regulation has to live up to the "proportionality test," which demands that the legislature balance individual interests against the public interest in its determination of the content and limits of property rights. In principle, a regulation defining content and limits of property can be considered proportional, even without compensation provided to the affected operators. In the assessment of an intervention, various factors must be considered. In the case of the new Atomic Energy Act, an important factor to consider, for example, would be that the capital invested by the energy companies has already has been (almost) fully amortized. This reduces the need for protection of the operators making their investments. Moreover, in contrast to investment protection agreements, Article 14 of the Basic Law on the protection of property does not protect the expected profits of the operators.[21]

Another consideration would be how the gains already achieved by the energy companies should be evaluated, taking into account the high state subsidies[22] as well as the value of the public interest objective of a secure energy supply. The jurisprudence of the Federal Constitutional Court also indicates that the establishment and the operation of the nuclear power plants was weighed down from the outset with the risk that the legislature would revisit the operation of the plants. This means that the operators had to expect possible legislative changes. After the nuclear agreement of 2002 it was already clear that a closure of nuclear power plants was forthcoming. One cannot argue that the plant life extension agreed end-date of 2010 assured the operating companies of a corresponding legitimate expectation.[23]

Finally, the public interest and public welfare concerns are also taken into account in the event of any legal action invoking property protection under the German Basic Law. This principle is enshrined in the so-called "Sozialbindung des Eigentums", the social obligation of property (Art. 14, para. 2, Basic Law). Generally, even regulations that have a significant adverse impact on individuals and companies can justifiably be adopted without the need to compensate.

Investment Arbitration Gives Foreign Investors a Preferential Position

All nuclear power plants in Germany are owned by four major energy companies: RWE, E.ON, EnBW and Vattenfall. Legally, the nuclear power plants are run by operating companies, in which the energy companies have shares. However, the energy companies, in their capacity as operators, can be considered to be the fundamental rights holders.[24] Under Article 19, paragraph 3 of the Basic Law, fundamental rights apply not only to natural persons, but also to domestic legal persons. Our assumption is that the route to the constitutional court is open to Vattenfall. Vattenfall Europe Nuclear Energy GmbH is the operator of the nuclear power plants Krümmel and Brunsbüttel. Since it is headquartered in Hamburg, as a domestic legal person it is in principle a bearer of fundamental rights. Its fundamental rights are not infringed by the fact that the limited liability company is a subsidiary of Vattenfall Europe AG with headquarters in Berlin, which is in turn is a daughter of Vattenfall AB, which is 100 per cent owned by the Swedish state. Hence, just like E.ON and RWE, Vattenfall could file a constitutional complaint. However, at the same time, Vattenfall AB is also considered an investor under the provisions of the Energy Charter Treaty and therefore enjoys additional legal protection, which may be enforced by an international arbitration tribunal, which is generally made up by three private individuals. In contrast to general International law, the Energy Charter does not require an investor to first exhaust national or European legal remedies before initiating investor-state arbitration. The Energy Charter Treaty also does not prohibit an investor to use both avenues simultaneously, or file a complaint through one channel and if unsuccessful, turn to the other.

Most importantly, it is possible that the protective provisions in favour of foreign energy companies in the Energy Charter Treaty supercede the protections extended by German law, thus providing Vattenfall not only with an additional legal remedy, but with additional rights over and above national companies. So even if the Federal Constitutional Court found the new Atomic Energy Act in conformity with constitutional law and hence rejected the obligation to compensate, an international arbitration tribunal may nontheless determine Vattenfall is entitled to compensation.

Problems with Investor-State Arbitration

Vattenfall's new lawsuit against Germany before an investment tribunal raises fundamental questions about international investment law, which should be included in the rethinking of existing international investment policy, both in Germany and the EU.

The broadly defined investor rights of the Energy Charter Treaty, in combination with the international arbitration system, make it impossible to predict how a tribunal will decide. At the same time, it is also difficult to predict how the Federal Constitutional Court will judge on the constitutionality of the new Atomic Energy Act. However, in contrast to investment arbitration, several clearly defined legal principles apply under German law. This is not the case in investment protection treaties (including the Energy Charter), as in international investment protection law there is no legal precedent and no courts that are comparable to national courts. In investment arbitration, suits are decided by a tribunal constituted on an ad hoc basis (consisting of one to three persons) the composition of which changes from case to case. Usually each party selects an arbitrator and the two appointed arbitrators in turn appoint a chairman for the tribunal or the parties agree on the chair. The composition varies from case to case, and each party naturally expects their arbitrator to act in their favour. Hence it becomes impossible to arrive at any kind of uniformity or predictability of decisions. But today, when a growing number of laws and other measures in the public Interest and to protect the public good are being tested by investment arbitration tribunals, the absence of a more uniform and predictable case law is becoming increasingly problematic for legislative and administrative authorities.

In addition, a dispute before an international Investment arbitration tribunal is assessed according to principles that differ significantly from those applied under German law. While the public interest is a guiding principle in the German Basic Law, investment protection agreements first and foremost take into consideration the rights of investors. While public interests may be read into the interpretation and consideration of vague and often ambiguously worded protection standards, these do not expressly have to be taken into consideration by arbitration tribunals.

Another problem is the fact that investment arbitration is not endowed with adequate institutional safeguards to guarantee judicial independence. Lack of legal safeguards can cast doubts on the impartiality of arbitrators, who can turn litigation into a very lucrative business (the more cases, the higher their income). In addition, they may simultaneously act as counsel for litigants in similar investment protection disputes, so that conflicts of interest may occur. This stands in sharp contrast to the institution of the Federal Constitutional Court, whose judges are elected equally by the Bundestag and the Federal Council (*Bundesrat*) for a twelve-year term, in order to ensure their personal and judicial independence. In this light, it appears all the more serious that private arbitrators are given the power to give a final and binding ruling on public interest concerns following a complaint by an foreign corporation, and decide on compensation payments (placing a potentially heavy burden on the Federal Budget) for legislative, executive and judicial measures taken by a state.

The energy company Vattenfall can not only revert to the national courts to challenge the nuclear phase-out, but can, as a foreign investor, also make use of the international protections of the Energy Charter Treaty to argue its case. Foreign investors are not required to first exhaust German and European legal remedies before opting for the international route. They are free to avail themselves of both avenues (the national and the international) at the same time. This can lead to higher compensation obligations and legal fees and representation costs for Germany. The question is how this preferential treatment of foreign investors, including the resulting costs and the possible chilling effects on environmental policy, can be justified.

Concluding Remarks

These systemic problems and concrete cases in international investment protection law have given rise to an ever-expanding international reform debate; however, in Germany it gained relatively little response and certainly did not make its way into government policy on international investment agreements. While other industrialized countries like the United States, Canada, and Australia have decided to alter their approach to international investment treaties (including with regard to transparency, definitions and dispute settlement procedures), the German federal government continues to insist on secrecy in relation to treaty negotiations and dispute settlement procedures and on very far-reaching and broadly formulated definitions and investment protection clauses. However, from the perspective of sustainable development, it is recommended that the potential Vattenfall II dispute be conducted with the greatest possible transparency and public scrutiny and to use it as an opportunity to spur a broad debate on international investment rules in Germany, with a view to strengthen the energy turnaround and promote sustainable development.

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Notes

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2. Vattenfall AB and others v. Federal Republic of Germany (ICSID Case No. ARB/12/12).
3. Energy Charter Secretariat. (2004). *The Energy Charter Treaty and related documents: A legal framework for international energy cooperation.* Retrieved from: http://www.encharter.org/fileadmin/user_upload/document/EN.pdf
4. The Thirteenth Amendment to the Atomic Energy Act (13. AtGÄndG v. 31.07.2011, BGBl I S. 1704 (No. 43)) came into effect on August 6, 2011.
5. Klaus Stratman. (2011, November 2). Vattenfall verklagt Deutschland. Retrieved from: http://www.handelsblatt.com/unternehmen/industrie/atomausstieg-vattenfall-verklagt-deutschland/5787366.html.
6. See http://www.encharter.org for institutional information and the treaty text in different languages.
7. "Germany's new revision of the Atomic Energy Act took effect on 6 August 2011. The consequence of the decision for Vattenfall is that the Brunsbüttel and Krümmel nuclear power plants, for which Vattenfall has operating responsibility and owns 66.7% and 50%, respectively, may not be restarted. Vattenfall thereby lost 1,187 MW of installed capacity and was forced by the decision to recognise an impairment loss for the book value of these two plants and increase provisions for dismantling the plants and handling nuclear fuel, for a total cost of SEK 10.5 billion" (SEK10.5 billion correspond to €1.188 billion). From: Vattenfall (2012). *Year end report 2011.* Retrieved from: http://www.vattenfall.com/en/file/Q4-2011-Report_19971864.pdf
8. Of the 51 members, some, including Russia, have signed but not yet ratified the Charter (http://www.encharter.org/index.php?id=7&L=0). Russia subsequently announced on July 30, 2009 that it would withdraw its signature (http://www.nortonrose.com/knowledge/publications/2009/pub22691.aspx?lang=en-gb).
9. According to United Nations Conference on Trade and Development (2011), at the end of 2010, there were 2,807 BITs and 309 other investment agreements.
10. See the overview of the Bilateral Investment Promotion and Protection Treaties of the Federal Republic of Germany published by the Federal Ministry of Economic Affairs and Technology (October 21, 2011) at: http://www.bmwi.de/BMWi/Redaktion/PDF/B/bilaterale-investitionsfoerderungs-und-schutzvertraege-IFV,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf.
11. See the request for arbitration submitted by Vattenfall available at: http://italaw.com/documents/Vattenfall_Request_for_Arbitration_001.pdf. See also the 2009 briefing on the first Vattenfall case by Bernasconi-Osterwalder, available at: http://www.iisd.org/pdf/2009/background_vattenfall_vs_germany_de.pdf.
12. See Roda Verheyen (2012, April 11th). Briefing Note: The Coal-fired Power Plant Hamburg-Moorburg, ICSID proceedings by Vattenfall under the Energy Charter Treaty and the result for environmental standards. (Ms. on file with authors).
13. Carsten Brönstrup, *Vattenfall erwägt Klage: Atomkonzerne machen Front,* Der Tagesspiegel, June 7, 2011. Available at: http://www.tagesspiegel.de/wirtschaft/vattenfall-erwaegt-klage-atomkonzerne-machen-front/4262084.html.
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16. MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, May 25, 2004.
17. International Institute for Sustainable Development. (2004, August 23). *INVEST-SD: Investment law and policy weekly news bulletin.* Retrieved from: http://www.iisd.org/pdf/2004/investment_investsd_aug23_2004.pdf
18. List of Parties that do not allow an investor or a Party to bring a dispute relating to the last sentence of Article 10, paragraph 1 to an international arbitration court: Australia, Canada, Hungary and Norway, of which Canada never signed the treaty, and Australia and Norway have yet to ratify it.
19. In February 2012, the energy company RWE AG announced the filing of a complaint in front of the Federal Constitutional Court, too.
20. A comprehensive assessment of the prospects of constitutional complaints by the energy companies can not be provided at this point. See, for example, Wallrabenstein, Die Verfassungsmäßigkeit des jüngsten Atomausstiegs – zur 13. Novelle des Atomgesetzes, Humboldt Forum Recht, 2011, pp. 109 ff, http://www.humboldt-forum-recht.de/english/11-2011/index.html (December 6, 2011).
21. See BVerfGE 74, 129 (148).
22. A recent survey estimates the amount of government subsidies towards nuclear energy between 1950–2010 at a total of €203.7 billion (adjusted for inflation). See Forum Ökologisch-Soziale Marktwirtschaft (im Auftrag von Greenpeace), Staatliche Förderungen der Atomenergie im Zeitraum 1950–2010, 2. Auflage, October 2010. Retrieved from: http://www.foes.de/pdf/2010_FOES_Foerderungen_Atomenergie_1950-2010.pdf
23. Furthermore, there were only a few months between the life extension of December 2010 and the 13th Amendment to the Atomic Energy Act stipulating the phase-out of nuclear energy. Within this period there were probably no investments made by the energy companies beyond those for regular plant operation. The energy company Vattenfall says in recent years it has invested some €700 million in the nuclear power plants of Brunsbüttel and Krümmel. It is assumed that these were planned investments that are already written off. It seems highly unlikely that Vattenfall made the aforementioned investments in the period between the enactment of the life extension (December 14, 2010) and the announcement of the federal government that this arrangement was to be revoked.
24. Each operating company is always affiliated to a single power company. For example, Krümmel GmbH & Co KG is 50 per cent Vattenfall and 50 per cent E.ON, but as an operating company it is fully integrated into the Vattenfall energy company.

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Links

The Energy Charter Treaty and related documents: http://www.encharter.org/fileadmin/user_upload/document/EN.pdf

International Institute for Sustainable Development (IISD), Investment and Sustainable Development: http://www.iisd.org/investment/

International Centre for Settlement of Investment Disputes (ICSID): http://icsid.worldbank.org/ICSID/Index.jsp

Investment Treaty News: http://www.investmenttreatynews.org/

Investment Arbitration Reporter: http://www.iareporter.com/

Seattle to Brussels Network (S2B), Network of European NGOs with information and activities relating to investment policy: http://www.s2bnetwork.org/themes/euinvestment-policy.html