iisd International Institute for Sustainable Development / Institut international du développement durable

December 2014

BRIEFING NOTE

# The State of Play in *Vattenfall v. Germany II*:

## Leaving the German public in the dark

***Nathalie Bernasconi-Osterwalder***
***Martin Dietrich Brauch***

**Two years after Vattenfall brought Germany to international arbitration for a second time (*Vattenfall II*), the German public is still left out in the dark**. This briefing note reviews the background to the case on Germany's decision to phase out nuclear power and outlines its current state of play. A commentary follows on the transparency provisions applicable to arbitrations at the International Centre for the Settlement of Investment Disputes (ICSID), and discusses how some ICSID tribunals have dealt with matters of transparency and confidentiality. Finally, it argues for the release of decisions, orders, and submissions by the parties to the public, noting that there is nothing in the ICSID Rules that would disallow this type of transparency.

## Background to the *Vattenfall II* Case

After the 2011 nuclear disaster in Fukushima, and as the culmination of a decades-long public debate, the German parliament decided to amend the Atomic Energy Act to speed up the phase-out of nuclear energy, so that it would be completed by 2022. The amendment entailed the immediate shutdown of some of Germany's oldest reactors. Vattenfall, an energy company wholly owned by the Swedish State, operates and owns two of those oldest reactors: the Krümmel (66.7 per cent ownership) and Brunsbüttel (50 per cent ownership) power plants (Bernasconi-Osterwalder & Hoffmann, 2012).

According to Vattenfall's CEO at the time, the shutdown of the two reactors resulted in a loss of expected revenues of 10.5 billion Swedish Kronor (US$1.5 billion) in 2011 alone (Hessler, 2012). Seeking to "obtain fair compensation for the financial losses," Vattenfall and the two power plant companies (collectively, "Vattenfall") initiated arbitration proceedings against Germany before the International Centre for Settlement of Investment Disputes (ICSID),[1] and also filed a lawsuit before the Federal Constitutional Court of Germany (Vattenfall, 2013).

Initially it was reported that, in the international arbitration, Vattenfall would be claiming at least €700 million (US$870 million) as compensation for the closure of its plants, invoking its rights as a foreign investor under the Energy Charter Treaty (Bernasconi-Osterwalder & Hoffmann, 2012). Later media reports, however, indicated that compensation claimed would amount to €3.5 billion (US$4.4 billion) for both past and future lost profits (DW, 2012). German newspaper *Die Zeit* reports that the compensation claimed would be higher than €4 billion—half of Germany's annual development aid budget—and indicates that €2.2 million were earmarked in Germany's federal budget to cover legal expenses with the *Vattenfall II* proceedings in 2014 (Pinzler, Uchatius, & Kohlberg, 2014). According to most recent media reports, Vattenfall is claiming compensation of €4,675,903,975.32 (US$5.8 billion) plus 4 per cent interest. Responding to a request by the Green Party, State Secretary Matthias Machnig of the German Ministry for Economic Affairs and Energy informed that, from the beginning of the arbitration in 2012 until mid-October 2014, the German government spent over €3.2 million on attorneys' fees, experts' fees and services such as translations; that amount also includes €200,000 spent on arbitration costs. Machnig also stated that the German government estimates that the total costs of the proceedings could reach €9 million (Balser, 2014).[2]

### Procedural Developments to Date in *Vattenfall II*

ICSID registered Vattenfall's request for arbitration on May 31, 2012. The arbitral tribunal was first constituted on December 14, 2012, by Daniel M. Price (a U.S. national, Vattenfall's appointee) and Vaughan Lowe (British, appointed by Germany), and Albert Jan van den Berg (Dutch, President of the tribunal, appointed by agreement of the parties).

[1] *Vattenfall AB and others v. Federal Republic of Germany* (ICSID Case No. ARB/12/12).

[2] An earlier publication by IISD (Bernasconi-Osterwalder & Hoffmann, 2012) brings further details on the background to the *Vattenfall II* case. Another IISD publication (Bernasconi-Osterwalder, 2009) offers background on the *Vattenfall I* dispute, in which the Swedish company challenged Germany's environmental regulations applying to a coal power plant. *Vattenfall I* was settled in August 2010, with Germany agreeing to issue Vattenfall the required environmental permits and to loosen some safeguards against environmental impact. As recently reported, given that the water abstraction processes used to cool the plant may have a negative impact on certain species of fish, the European Commission is now urging Germany to correctly apply the environmental protection requirements of the E.U. Habitats Directive in relation to the plant. According to an October 2014 press release (European Commission, 2014), "[w]hen authori[z]ing the plant, Germany failed to carry out an appropriate assessment as required by the Directive, and notably failed to assess alternative cooling processes which could avoid the killing of the species concerned [salmon and lamprey]." Germany must come into compliance with the Directive within two months of the date of the reasoned opinion issued by the European Commission; otherwise, the Commission may refer the matter to the Court of Justice of the European Union. Future developments in this regard may give rise to an interesting interface between international investment law and investor–state dispute settlement, on the one hand, and E.U. law and adjudication before the Court of Justice of the European Union, on the other.

After Price's resignation, the tribunal was reconstituted on February 25, 2013, with Charles N. Brower (a U.S. national) as Vattenfall's appointee.

While ICSID has provided several procedural updates on its website since the tribunal's reconstitution, the information is cryptic, indicating only when a submission was made or order issued.[3] None of the party submissions or orders issued by the tribunal have been published on the website to date, nor have the parties to the dispute made them public.

## Preliminary objections to jurisdiction—claim manifestly without legal merit

On January 10, 2013, Germany filed preliminary objections to the tribunal's jurisdiction, pursuant to ICSID Arbitration Rule 41(5). Under this rule a party may, after the constitution of the tribunal but before the first session, "file an objection that a claim is manifestly without legal merit." The rule requires the tribunal to issue a decision on the objection at the "first session or promptly thereafter." This allows the early termination of the arbitration process in case of patently unmeritorious claims. It is quite clear, however, that it will only be in the clearest cases that the tribunal will dismiss a claim in this summary proceeding. As soon as any more detailed examination is required, an objection under Rule 41(5) will likely fail. In the *Vattenfall II* arbitration, we know from the ICSID website that the tribunal issued a decision on Germany's jurisdictional objections on July 2, 2013. We do not know, however, what the tribunal decided. Since, according to the ICSID website, Vattenfall and Germany subsequently filed their memorials on the merits, we must assume that the tribunal did not find Vattenfall's claim against Germany was manifestly without legal merit—and so the arbitration is proceeding, and the arbitrators continue with their mandate.

## Jurisdiction as a preliminary question

From the ICSID website we can also see that in early September 2014, the tribunal issued a procedural order to decide if it would address Germany's objection to jurisdiction as a preliminary question. This indicates that Germany, after not succeeding at getting the case thrown out in a summary proceeding as "manifestly without legal merit," must have argued that the tribunal did not have jurisdiction to hear the case, and that it would like this question to be resolved separately and independently from the merits. The separation or bifurcation of jurisdictional issues derives from Article 41(2) of the ICSID Convention. It gives the tribunal the power to decide whether to bifurcate jurisdictional issues and whether or not to put to the burden on the respondent state of defending the entire case when it might not have jurisdiction in the first place. This could potentially reduce the cost of an already very expensive arbitration process, if the tribunal found it did not have jurisdiction. In that case, the tribunal would not move on to examine whether Germany breached an obligation and had to pay pursuant to the Energy Charter Treaty when the German parliament took the decision to phase out nuclear power. Unfortunately, we cannot know what the *Vattenfall II* tribunal decided in this respect in its procedural order issued on September 7, 2014. It is possible that the tribunal will examine both jurisdictional questions and the merits at the same time.

## Orders on confidentiality

We can also see on the ICSID website that, in the course of the proceedings, the tribunal issued four procedural orders concerning the confidentiality of documents (February 11 and 27, March 18, and May 19, 2014). However, we cannot know what the tribunal ordered with respect to confidentiality or whether Germany and Vattenfall argued in favour of or against keeping the process confidential.

[3] https://icsid.worldbank.org/ICSID/FrontServlet

## Transparency Versus Confidentiality in ICSID and in *Vattenfall II*

As evidenced in the account above, the ICSID Secretariat lists the procedural steps on the ICSID website based on the ICSID Arbitration Rules and the ICSID Administrative and Financial Regulations, which guarantee public access to a minimum of information about the conduct of all ICSID arbitrations.[4] At the same time, the ICSID provisions do not prohibit disclosure and openness. The tribunal in ICSID case *Biwater v. Tanzania* highlighted:[5]

> In the absence of any agreement between the parties on this issue, there is no provision imposing a general duty of confidentiality in ICSID arbitration, whether in the ICSID Convention, any of the applicable Rules or otherwise. Equally, however, there is no provision imposing a general rule of transparency or non-confidentiality in any of these sources.

In a confidentiality order in *Abaclat v. Argentina*, another ICSID tribunal shared the opinion of Biwater and, acknowledging a trend towards transparency, stated that[6]

> transparency in investment arbitration shall be encouraged as a means to promote good governance of States, the development of a well-grounded and coherent body of case law in international investment law and therewith legal certainty and confidence in the system of investment arbitration.

However, the *Abaclat* tribunal went on to state that "transparency considerations shall not justify actions that exacerbate the dispute or otherwise compromise the integrity of the arbitration proceedings,"[7] and concluded that,[8]

> unless there exist an agreement of the Parties on the issue of confidentiality/transparency, the Tribunal shall decide on the matter on a case by case basis and, instead of tending towards imposing a general rule in favour or against confidentiality, try to achieve a solution that balances the general interest for transparency with specific interests for confidentiality of certain information and/or documents.

These excerpts tell us that investment arbitration does not have to be confidential under ICSID Rules. Much will depend on the parties to the dispute. If both agree to the publication of documents, everything can be made public. If just one party wishes to publish documents, nothing in the text prohibits publication unless the tribunal prohibits publication and orders confidentiality.

In both *Biwater* and *Abaclat*, the investors requested the tribunals to prohibit the respondent states from disclosing certain information or documents relating to the proceedings.[9] In both cases, the respondent states fought for transparency. For example, Tanzania "decline[d] to accept additional constraints upon the transparency of the proceeding as a matter of principle,"[10] and Argentina asserted that the only applicable confidentiality obligations were those under the ICSID Convention and Arbitration Rules, which do not establish "a general principle of confidentiality or a confidentiality rule applicable to the kind of documents submitted by Argentina."[11] The *Biwater* and the *Abaclat*

[4] See ICSID Arbitration Rules 6(2), 15, 32 and 48, and ICSID Administrative and Financial Regulations 22 and 23.
[5] *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Procedural Order No. 3 of September 29, 2006, para. 121, retrieved from http://www.italaw.com/sites/default/files/case-documents/ita0089.pdf.
[6] *Abaclat and Others v. the Argentine Republic* (formerly, *Giovanna A Beccara and Others v. the Argentine Republic*) (ICSID Case No. ARB/07/5), Procedural Order No. 3 (Confidentiality Order) of January 27, 2010, retrieved from http://www.italaw.com/sites/default/files/case-documents/ita0002.pdf, para. 72.
[7] *Abaclat*, para. 72.
[8] *Abaclat*, para. 73. For a more detailed analysis of *Abaclat's* Procedural Order No. 3, see Ukbapi (2010) and Newcombe (2010).
[9] *Biwater*, paras. 42, 44–45.
[10] *Biwater*, para. 44.
[11] *Abaclat*, paras. 50–51.

tribunals did impose some of the confidentiality restrictions requested, but decided that their procedural orders on confidentiality could be freely disclosed.[12]

Given the lack of information and access to documents in the *Vattenfall II* arbitration, we must assume that the tribunal ordered at least some confidentiality. However, *Vattenfall II* offers strong reasons to support that "the general interest for transparency" should prevail over "specific interests for confidentiality." Not only are billions of euros of taxpayer money reportedly at stake, but the parliament's decision to phase out nuclear power is firmly anchored in the public policy realm.

*Vattenfall II* takes confidentiality to a higher level. Considering that it is known from the ICSID website that the tribunal has issued four confidentiality orders, surely one of the parties or both must have brought the issue before the tribunal. However, since none of the orders has been published, whether by ICSID or the parties, it is impossible to know who raised the issue, what the arguments of each party were (in particular, whether Germany argued for confidentiality or for transparency) and what the tribunal decided on the matter.

Copies of documents concerning the case are kept in secret in a high-security building of the German parliament and may not be made known to the public under any circumstances. Press inquiries are denied, and not even parliamentarians have access to meaningful information about the case. They are only allowed to see a one-page summary, in which Vattenfall's argument is summarized superficially: claims of damages for loss of value of investments due to regulatory change in the energy sector (Schlandt, 2013; Werdermann, 2013). In 2012, shortly before *Vattenfall II* was initiated, MP Ralph Lenkert formally asked the federal government how it would disclose information to the parliament and to the public should the case arise. State Secretary Anne Ruth Herkes simply replied: "ICSID arbitrations are confidential" (Deutscher Bundestag, 2012). However unlikely it may seem, the German government appears to be intentionally leaving the German public out in the dark.

A report in the German newspaper *Die Zeit* highlights that the *Vattenfall II* tribunal is a powerful parallel justice system, in which a panel of three arbitrators who are not permanent judges or even civil servants or employees, but legal experts from different countries, meets behind closed doors and may impose penalties in the billions of euros against the German government and, ultimately, its population. The report points out that all Germans are being sued for compensation, but no one has an indication of how the matter will be decided, in a judgment that will be not subject to appeal or revision (Pinzler, Uchatius, & Kohlberg, 2014).

The authors of the report raise no objection against companies suing sovereign states, but question why some companies may circumvent the well-functioning courts of a democratic country. They contrast the case of energy companies RWE and E.ON, which judicially challenged Germany's nuclear phase-out before the Federal Constitutional Court, subject to public hearings, with that of Vattenfall, which initiated arbitration proceedings held in secret (Pinzler, Uchatius, & Kohlberg, 2014).

[12] *Biwater*, para. 164; *Abaclat*, para. 153.

## Concluding Remarks

When a foreign investor is known to be challenging a state's widely endorsed environmental, energy and safety policy, and when it is reported to be claiming billions of euros in compensation potentially to be paid from the public purse, this raises serious concerns that the general public has no access to documents or detailed information on the international proceedings—even more so given that arbitrators are in no way accountable to the German public, and their decisions cannot be reviewed for legal or factual correctness. Transparency in investment arbitration is essential to inform relevant public debate on whether and how public interests concerns and the state's right to regulate are being balanced against private interests.

## References

Balser, M. (2014, Oct. 26). Eon und Vattenfall machen gemeinsame Sache bei Atomklage. *Süddeutsche.de*. Retrieved from http://www.sueddeutsche.de/wirtschaft/umstrittene-milliardenklage-eon-und-vattenfall-machen-gemeinsame-sache-bei-atomklage-1.2189880

Bernasconi-Osterwalder, N. (2009). *Background paper on Vattenfall v. Germany arbitration*. Retrieved from http://www.iisd.org/pdf/2009/background_vattenfall_vs_germany.pdf

Bernasconi-Osterwalder, N., & Hoffmann, R. T. (2012, June). *The German nuclear phase-out put to the test in international investment arbitration? Background to the new dispute Vattenfall v. Germany II)*. Retrieved from http://www.iisd.org/pdf/2012/german_nuclear_phase_out.pdf

Deutsche Welle. (2012, Dec. 21). Vattenfall seeks recompense for German nuclear phaseout. Retrieved from http://www.dw.de/vattenfall-seeks-recompense-for-german-nuclear-phaseout/a-16473507

Deutscher Bundestag. (2012, Mar. 30). *Schriftliche Fragen mit den in der Woche vom 26. März 2012 eingegangenen Antworten der Bundesregierung*. Retrieved from http://dipbt.bundestag.de/dip21/btd/17/092/1709225.pdf

European Commission. (2014, Oct. 16). *October Infringements Package: main decisions*. Retrieved from http://europa.eu/rapid/press-release_MEMO-14-589_en.pdf

Hessler, U. (2012, Feb. 9). German nuclear phase-out causes Vattenfall profits to slump. *Deutsche Welle.* Retrieved from http://www.dw.de/german-nuclear-phase-out-causes-vattenfall-profits-to-slump/a-15732588.

International Centre for the Settlement of Investment Disputes (ICSID). (2006). *Administrative and financial regulations of ICSID*. Retrieved from https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf

Johnson, L., & Bernasconi-Osterwalder, N. (2013, Aug.). *New UNCITRAL arbitration rules on transparency: Application, content and next steps*. Retrieved from http://www.iisd.org/pdf/2013/uncitral_rules_on_transparency_commentary.pdf

Newcombe, A. (2010, May 3). *Confidentiality in investment treaty arbitration.* Retrieved from http://kluwerarbitrationblog.com/blog/2010/03/03/confidentiality-in-investment-treaty-arbitration

Pinzler, P., Uchatius, W., & Kohlberg, K. (2014, Mar. 10). In Namen des Geldes. *Zeit Online*. Retrieved from http://www.zeit.de/2014/10/investitionsschutz-schiedsgericht-icsid-schattenjustiz

Schlandt, J. (2013, Mar. 23). 15 Juristen gegen die Demokratie. *Berliner Zeitung*. Retrieved from http://www.berliner-zeitung.de/wirtschaft/vattenfall-15-juristen-gegen-die-demokratie,10808230,22189216.html

Ukpabi, U. (2010, Mar. 10). ICSID tribunal applies ad hoc approach to confidentiality in arbitral proceeding. *Investment Treaty News*. Retrieved from http://www.iisd.org/itn/2010/03/10/icsid-tribunal-applies-ad-hoc-approach-to-confidentiality-in-arbitral-proceeding

United Nations Commission on International Trade Law (UNCITRAL). (2014). *Rules on Transparency in Treaty-Based Investor-State Arbitration*. Retrieved from http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf

Vattenfall. (2013, Oct. 2). *Germany*. Retrieved from http://corporate.vattenfall.com/about-vattenfall/operations/markets/germany

Werdermann, F. (2013, Nov. 11). Der verklagte Atomausstieg. *Der Freitag*. Retrieved from https://www.freitag.de/autoren/felix-werdermann/der-verklagte-atomausstieg

Published by the International Institute for Sustainable Development.

International Institute for Sustainable Development

Head Office
161 Portage Avenue East, 6th Floor, Winnipeg, Manitoba, Canada R3B 0Y4
Tel: +1 (204) 958-7700 | Fax: +1 (204) 958-7710 | Web site: www.iisd.org

Geneva Office
International Environment House 2, 9 chemin de Balexert, 1219 Châtelaine, Geneva, Switzerland
Tel: +41 22 917-8373 | Fax: +41 22 917-8054 | Website: www.iisd.org

## About IISD

The International Institute for Sustainable Development (IISD) contributes to sustainable development by advancing policy recommendations on international trade and investment, economic policy, climate change and energy, and management of natural and social capital, as well as the enabling role of communication technologies in these areas. We report on international negotiations and disseminate knowledge gained through collaborative projects, resulting in more rigorous research, capacity building in developing countries, better networks spanning the North and the South, and better global connections among researchers, practitioners, citizens and policy-makers.

IISD's vision is better living for all—sustainably; its mission is to champion innovation, enabling societies to live sustainably. IISD is registered as a charitable organization in Canada and has 501(c)(3) status in the United States. IISD receives core operating support from the Government of Canada, provided through the International Development Research Centre (IDRC), from the Danish Ministry of Foreign Affairs and from the Province of Manitoba. The Institute receives project funding from numerous governments inside and outside Canada, United Nations agencies, foundations and the private sector.