Rechtsanwälte Günther
Partnerschaft

Rechtsanwälte Günther • Postfach 130473 • 20104 Hamburg

Michael Günther *
Hans-Gerd Heidel *[1]
Dr. Ulrich Wollenteit *[2]
Martin Hack LL.M. (Stockholm) *[2]
Clara Goldmann LL.M. (Sydney) *
Dr. Michéle John *
Dr. Dirk Legler LL.M. (Cape Town) *
Dr. Roda Verheyen LL.M. (London)
Cathrin Zengerling LL.M. (Ann Arbor)

[1] Fachanwalt für Familienrecht
[2] Fachanwalt für Verwaltungsrecht
* Partner der Partnerschaft
AG Hamburg PR 582

Postfach 130473
20104 Hamburg

Mittelweg 150
20148 Hamburg

Tel.: 040-278494-0
Fax: 040-278494-99
Email: post@rae-guenther.de
www.rae-guenther.de

11.04.2012
11/1038RV/C/cb
Sekretariat: Frau Drzewiecki
Tel.: 040-278494-11

Briefing Note:
The Coal-fired Power Plant Hamburg-Moorburg, ICSID proceedings by Vattenfall under the Energy Charter Treaty and the result for environmental standards

1. Scope and Purpose

The purpose of this note is to explore whether, and if to what extent, the ICSID proceedings Vattenfall./.Germany in the case of the Moorburg Plant (ARB 09/6) have resulted in damage to the environment, in particular, whether the ICSID settlement and a related settlement in a national court has resulted in a lower standard of protection for the river Elbe and/or the global climate.[1] The Moorburg Plant is a 1730 MW coal powered electricity plant (including some currently unknown volume of district heating) which will emit 9,9 Mio t/CO_2 a year and will – due to water use for cooling purposes – heat up the river water. For these reasons, the Moorburg Plant was (and is) viewed highly critical by the citizens as well as by part of the local Government. It was and still is subject to judicial review in national courts, but also to ICSID arbitration.

The background to this note is to some extent already set out in the complaint launched by Greenpeace under the OECD Guidelines for Multinational Enterprises (Oct. 2009), which was rejected by the National Focal Point in Germany,

[1] In a short internal note of 6 Sept 2010 to Greenpeace (09/0499), I have already pointed out some elements of this appraisal.

the Ministry for Economics.[2] Greenpeace argued that Vattenfall – among other elements of the Guidelines – violated Chapter II.5 of the OECD Guidelines, because Vattenfall in effect required special (more lenient) treatment with regard to the water use permit.

This note also has the aim to prepare the community to some extent for a new challenge under the Energy Charter Treaty which is said to be prepared by Vattenfall concerning the nuclear phase out decision taken by the German Government in 2011. Vattenfall currently claims in public to incur damages due this decision in the order of billions of Euro and is set to file a claim for damages due to expropriation and unfair and unequitable treatment under the ECT provisions. Vattenfall has sent notice to the German Government on this issue on 21 December 2011, indicating that a new ICSID request for arbitration could be launched on or after **21 March 2011**.[3] There is no confirmation as of yet that Vattenfall has taken this step.

This evident parallel necessitates a closer look at the ICSID proceedings regarding the Moorburg Plant, which have only recently become more transparent due to key documents requested and received in the context of a request for environmental information. Only now is it possible to properly assess the claim and the settlement finalised in March 2011 in the light of the national legal proceedings and the new water permit granted in 2010.

2. Time line of the conflict

This time line is extensive, but serves as a necessary background for the deliberations in this opinion. The substance of the items below can be specified further by the author, and most of the documents and permits[4] mentioned below are also in the public domain – however in German. The time line should be studied carefully and possibly be used as a reference for the understanding of the following analysis.

- 2004/2005: State Secretary Gundelach (Environment) of the City of Hamburg discusses idea of a coal plant in Hamburg with Vattenfall. A single-block plant is proposed by Vattenfall, but Gundelach explicitly suggests to build a dual-block-plant to satisfy disctrict heating demand in Hamburg

- 27 October 2007 – Vattenfall requests permit for construction and operation for the Moorburg plant (immission control permit), volume: dual – block plant, 1730 MWe and 450 MWth

[2] All documents relating to this complaint are available (some in English) at http://oecdwatch.org/cases/Case_170.
[3] This cooling-off period is prescribed by Art. 26 Energy Charter Treaty.
[4] All permits can be viewed at http://www.hamburg.de/kraftwerk-moorburg/ .

- 5 December 2006 – Vattenfall requests water use permit for Moorburg plant (in particular use of cooling water)

- 14 November 2007 – Vattenfall is granted the right to preliminary begin construction of the plant ("Vorzeitiger Beginn", § 8a BImSchG[5])

- 26 November / 4 December 2007 – Vattenfall and the City of Hamburg enter into the so called "Moorburg Agreement" containing *inter alia* the obligation on Vattenfall to build discharge cooler and additional disctrict heating pipelines, as well as to operate the plant with CCS[6] as soon as possible.

- 24 February 2008 – local parliamentary elections in Hamburg leading to a Conservative (CDU)-Green (GAL-Die Grünen) Government. The Green Party seeks to delay or prevent the final permit for Moorburg

- April 2008: Vattenfall starts proceedings against the City of Hamburg for undue delay in granting the above permits, filed with the High Administrative Court of Hamburg, Oberverwaltungsgericht, OVG (5 E 4./08 P)

- 30 September 2008 – Both permits are granted by the City of Hamburg, the claim at the OVG is continued by Vattenfall on substantial grounds. The case is settled quickly regarding the immission control permit, but the case continues regarding the restraints put on Vattenfall in the context of the water use permit (4/5/A 34 Kraftwerk Moorburg)

- 2 April 2009 – Request for arbitration under ECT and ICSID rules by Vattenfall against Germany (dated 30.3.2009)

- 5 March 2010 Vattenfall applies for permit to construct a hybrid cooling tower (which it had before deemed too expensive)

- 12 March 2010 – ICSID proceedings are suspended until Sept 2010

- 23 Aug 2010 – Settlement of the claim in the OVG Hamburg

- 25 August 2010 – Settlement of the ICSID case is signed ("Agreement between the Parties to the ICSID case ARB/09/6")

- 4 October 2010 – New water use permit is issued (4/5/A 34 Kraftwerk Moorburg) modifying the permit of 30 September 2008

[5] Bundesimmissionsschutzgesetz, Immission Control Act
[6] CCS = Carbon Capture and Storage

- 23 December 2010 – the additional permit for construction and operation of the hybrid cooling tower is issued (IB 1208 – 10/10)

- 21 January 2011 – The water use permit is changed again to accommodate the conditions of operation of the cooling tower

- February 2011 – Parties to the ICSID Proceedings declare all conditions if the settlement to be met

- 11 March 2011 – Formal Award by ISCID closing the proceedings on the agreed terms of the settlement of August 2010.

- December 2011 – Vattenfall drops plans to build a district heating pipeline from the Moorburg plant to Altona (450 MWth)

- Construction of the Moorburg Plant is delayed, operation is now projected to commence by 2014 rather than, as intended, by the end of 2012.

3. Energy Charter and ICSID

The Energy Charter Treaty (ECT) is a multilateral investment protection treaty, which has 46 member states, amongst them Germany and Sweden. Its aim is to *"build a legal foundation for global energy security, based on the principles of open, competitive markets and sustainable development*".[7] As most investment Treaties, it also includes a clause on expropriation (Article 13(1) ECT[8] , including any measures that have equivalent effect) and a clause on fair and equitable treatment (Article 10(1) ECT) [9]. It applies (possibly) to the Moorburg Plant dispute because it seeks to create a "level playing field for energy sector investments, with the aim of reducing to a minimum the non-commercial risks associated with energy-sector investments."[10] The Moorburg Plant is, in essence, the investment of a Swedish Company in Germany to generate electricity and heat.

---

[7] Energy Charter Secretariat, The Energy Charter Treaty and related documents, September 2004, p. 15.

[8] Art. 13 (1) ECT: "Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or *subjected to a measure or measures having effect equivalent* to nationalization or expropriation (…) except where such Expropriation is: (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation.."

[9] Art. 10 (1) ECT: "Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal…".

[10] See Fn. 7, p.14.

The ECT confers disputes between Parties or between Parties and private entities – such as Vattenfall – as one option to ICSID (Art. 26 (4) ECT).

ICSID is an autonomous international arbitral tribunal located at the World Bank which settles disputes between private investors and states. ICSID has been established under the auspices of the World Bank through the 1956 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) which entered into force in October 1966 and has 146 member states. An ICSID award is binding (Art. 53 ICSID Convention), and is not subject to any national scrutiny before enforcement (Art. 54(1) ICSID Convention). States must enforce the obligations imposed by an award within its territories as if it were a final judgment of a court in that state.

4. The request for arbitration

The request of 30 March 2009 filed by Vattenfall contains three interrelated contentious issues, which combined allegedly lead to losses of 1,4 billion €[11]:

One: the general delay in the licensing procedure, which Vattenfall claimed was arbitrary and in violation of Art. 10 (1) ECT.

In this context, Vattenfall also argued that it needed to commence the construction of the Moorburg Plan due to contractual options by the end of 2007. The Hamburg Government had (in its view) promised to issue at least a preliminary permit by then, but in fact used this economic lever to force a special agreement on Vattenfall (the above "Moorburg Agreement"), which contained several (costly) items for Vattenfall such as reducing the amount of cooling water taken from the Elbe, expansion of the district heating by 200 MWth, and the establishment of a CCS-Plant as soon as technology allowed.

Two, the restrictions put on the water use, in Vattenfall's view, made the plant "uneconomical". It was claimed that the 2008 water use permit would lead to a reduction of productivity of the plant by 45% of the technically possible output. Also, it was contended that the Hamburg water authority had never hinted at such severe restrictions. This, in Vattenfall's view, lead to "indirect expropriation" (Art. 13 ECT) as well as to "unfair treatment" (Art. 10 ECT).

Three, the water use permit 2008, in Vattenfall's view arbitrarily, set out a two-year monitoring phase for fish protection measures before operation of the plant could be commenced. This would unduly delay the operation of the plant, and again constitute "indirect expropriation".

[11] Request of 30 March 2009, para. 41 ff.

5. The settlement / agreements
There are two agreements which contain the substance of the Moorburg deal.

One is of 23 Aug 2010 and settles the claim in the OVG Hamburg between the City of Hamburg and Vattenfall, the other is the ICSID settlement as set out in the award of 11 March 2011, terminating the case between Vattenfall and Germany. The latter refers mainly to the settlement in the OVG case.

The overall deal was thus clearly struck as one.

The OVG settlement is based on the new 2010 water use permit which was annexed to the settlement, which – according to the terms – to be set into operation immediately and which will only be amended / restricted to respond to "mandatory legislative standards". Vattenfall is obliged to realise and operate the hybrid cooling power.

The OVG settlement also refers to a separate disclaimer deed (Verzichtserklärung) with regard to the 2007 Moorburg agreement, and in particular with regard to the discharge cooler and the extension of the district heating network. Through this deed, the City of Hamburg waives its rights that flow from the 2007 Moorburg Agreement, i.e. to request from Vattenfall the erection of the discharge cooler and the additional district heating pipelines. Vattenfall also waives all claims to damages or compensation, including possible claims of the basis of public tort, but only for claims under German Law. Finally, the claim in the OVG is terminated by the Parties.

The settlement as contained in the ICSID Award of March 2011 mainly draws on the OVG settlement as well as the disclaimer with regard to the 2007 Moorburg Agreement and explicitly declares all claims to be settled under international law: The Parties agree to "*resolve finally the rights and liabilities of the Parties in connection with the Dispute*". No monetary payments are agreed. The Award contains a procedural history and then the "Agreement" on six pages. The rest of the Award are formal annexes that have no bearing on the substance of the deal.

6. The Water Use Permits of 2008 and 2010
The new water permit is at the core of the settlements, and must therefore be scrutinised further.

As a pretext it is vital to understand that German water law does not grant a right to use water in a certain volume or quality to anyone. The water authority can and must exercise its management discretion in the public interest (§§ 6, 12 Water Law (WHG)). As opposed to this, the immission control permit for the construction and the operation of a plant like Moorburg must be granted as

soon as specific legal requirements are met (§§ 5, 6 Immission Control Act, BImSchG).

Vattenfall applied for the use of 64 m^3/s as cooling water, directly taken from the river and discharged into the river heated up by max. 6 F (summer) or 7,5F (winter) and with a maximum temperature of 30°C. The Moorburg plant would have been the single largest emitter of cooling water in the area. By taking cooling water, fish and other organisms would be killed / damaged, by discharging the heated water, the ecology of the Elbe would be disturbed.

From the start of the deliberations of the request for a water use permit, both environmental NGOs and the Hamburg water authority therefore favoured the use of a cooling tower to protect the river Elbe. NGOs also argued that this would be the only legal solution as a cooling tower was "best available technique" for the protection of the river ecology. Vattenfall rejected this request as being too expensive (ca. 200 Mio €) and not necessary under German water law. It would also (which is true) reduce the energy efficiency of the plant by 1.5%.

The 2008 permit is a complex document of 121 pages. It does not prescribe the use of a cooling tower but permits the – restricted – use of river water for cooling purposes. This is one reason why the environmental group BUND (Friends of the Earth Germany) still maintains a court case against the permit, also in the OVG Hamburg.[12]

The main elements of the permit 2008 contended by Vattenfall in the OVG case and before ICSID are relatively few:

- The permit restricted water use to max. 1/3 of the surface water flow of the river Elbe at any time

- The permit restricted cooling water discharge in the winter time to max. 42 m^3/s,

- The permit made the building of a fish stair in Geesthacht ("Fischtreppe Geesthacht) as well as its due functioning mandatory and prescribed a 2-year monitoring phase in which Vattenfall would have had to show that the fish-stair was indeed resulting in more fish entering the lower part of the river Elbe. The legal construct was such, that the monitoring phase of two years effectively suspended the use of any cooling water and thus the operation of the plant. It must be noted that this fish-stair had not been built at the time. It has been in operation only since September 2010.[13] It must also

[12] OVG 5 E 11/08, ongoing.
[13] See for details http://www.vattenfall.de/de/fischtreppe-geesthacht.htm

be noted that the fish-stair is a damage prevention measure in the context of EU nature protection law (FFH-directive).

- Specific technical measures were prescribed to increase oxygen levels in the cooling water discharged into the river

By contrast, the 2007 Moorburg agreement had contained a specific discharge cooler to ensure that maximum water temperatures would not be exceeded. The 2007 Agreement also contained the obligation to use overall 650 MWth district heating from the Plant, which would have meant a substantial limitation of cooling water discharge into the Elbe, especially in the winter time, but also an obligation on Vattenfall to build the necessary district heating pipelines to expand the use of the excess heat from the Moorburg plant.

The restrictions set out in the water use permit 2008 were based on sound scientific reasoning and – due to the fact that the authority has discretion in water management decisions –it was far from clear that Vattenfall would win the OVG case. The City of Hamburg was – at the time – governed by a Conservative/Green Government and it is at least plausible to assume that the Government might have awaited a court judgement calmly.

The 2010 water use permit has changed with respect to the items above and **has considerably lowered the environmental standards** set by the permit of 2008. One issue must also be understood: While the application for the hybrid-cooling tower was already made on 5 March 2010, the water permit does not prescribe the use of the cooling tower at all times, as might seem logical and was called for by environmentalists. Rather, the permit still sets restrictions for the use of cooling water which will probably lead to the need to use the cooling tower in hot periods in the summer only.

The 2010 permit

- still sets the limit that cooling water only be used to a maximum of 1/3 of surface water, but the methods for calculating this event have changed favourably for Vattenfall. In effect, Vattenfall can use more cooling water before it has to turn on the cooling tower than under the 2008 permit

- allows Vattenfall to use 64,4 m^3/s cooling water in the winter and thus anticipates the option that no district heating will be used. This is interesting as there is no scientific basis for this decision in the absence of studies of effects on certain species such as the burbot (Quappe Lota Lota), a winter spawner, which stops spawning when the water temperature rises above 10°C.

- shortens the monitoring period for the fish-stair to one year, allowing Vattenfall (in theory) to start operating in 2012 after proving through the monitoring reports that the fish-stair has its intended effects

- lowers the standards of fish monitoring generally. For example, the results of re-feeding the fish from the technical installation within the plant into the Elbe will not be monitored as opposed to the requirements in the 2008 permit. This means that it will be more difficult to ever require a better fish protection standard.

In 2011, this permit was amended to take into account the use of the hybrid cooling tower when water condition would not permit the taking of cooling water. This permit does not make any relevant changes to the above items.

In the ongoing court case against the water use permit 2008 /now 2010, the BUND argues that the water permit of 2010 violates German water law as the authority has not exercised its discretion properly. The water authority, it is argued, has been influenced heavily by the German Ministry for Economics, and the ongoing discussions in the ICSID framework. This excludes a proper discretionary decision. While it is unclear what the court will rule, it is undeniable that the 2010 water use permit is the product of the OVG court case and the ICSID case.

7. The issue of district heat usage

In this context it is also important to take into account, that through the disclaimer deed regarding the 2007 Moorburg Agreement, no additional district heating (200 MWth) will be used in the winter time, aggravating the effects on the Elbe. Moreover, it is entirely unclear whether and when the district heating capacity of 450 MWth will be utilised. This is not an effect directly connected to the ICSID or OVG case, but it seems that it was somehow anticipated by the overall deal.

The background to this is – very briefly this: After extensive debate from the ground due to expected losses in trees and the opposition from users to coal-fired heat, Vattenfall decided in December 2011 to drop its plans to build a district heating pipeline from the Moorburg plant into Hamburg Altona, crossing the river Elbe (Fernwärmetrasse Moorburg). It had applied for this special permit (Planfeststellungsbeschluss) originally in 2007, lost a court case in formal grounds and re-applied in 2011.

The City of Hamburg had continually discussed the future of the heating network, as well as the gas network in Hamburg with Vattenfall and the other main actor E.ON, another gas supplier. In December 2011, the Government of

Hamburg issued a parliamentary information, containing the terms of the contracts entered into with the energy suppliers. The deal with Vattenfall included that the pipeline from Moorburg would not be built.[14]

As the immission control permit for the plant foresees for 450MwTh to be used for district heating, this permit would have to be changed, but it is possible that a change of the permit (electricity generation without any district heating use) would be permissible. This would mean that overall, the river Elbe will receive 650 MWth more in heat than foreseen in the permit 2008 and the agreement 2007. This is permissible on the basis of the 2010 water use permit, but was not permissible on the basis of the 2008 permit.

Thus, overall, by not using the heat from the Moorburg plant, overall energy efficiency will be reduced by 10%, in addition, when the cooling tower is in operation, the efficiency will be reduced by 1,5%. The overall loser of the agreement seems to be the global climate.[15]

8. Discussion – Effects of the ICSID arbitration

As set out above, the settlements together with the local developments on the usage of district heating from the Moorburg plant represent a picture of a comparative reduction of environmental standards through time. There is no question that the ICSID case has, throughout, much increased the pressure on the City of Hamburg also in the context of the OVG case to settle and not to wait for the OVG to rule on the case. As stated above, on the basis of the discretion awarded to the water authority under German water law, it was by no means clear that the case would have been won.

In the ongoing case taken by BUND it is still argued that the water permit of 2010 infringes water and nature protection law, but it is clearly possible that the OVG will rule that – just as the permit of 2008 – the new permit is well within the limits of a decision taken with the proper management discretion. The latter also seems to be plausible when comparing the 2008 water use permit for Moorburg with other permits for new power plants using cooling water. The Moorburg permit 2008 was indeed stricter than others in many respects, and even the 2010 permit is still a better example of the water permits issued around the country in the past years. This, of course is a global statement that would need to be verified by thorough analysis given that each case and each

[14] It seems that plans to replace the heat from Moorburg with heat generated either in Wedel (West of Hamburg) or in Stellingen (within the city limits) are being explored in earnest. For both locations, Vattenfall has entered into the scoping phase for a proper environmental impact assessment (Stellingen: 10.4.2012, Wedel: 29.2.2012).

[15] Opponents to the district heating pipeline expect the overall outcome to be so costly for Vattenfall that the plant might not be put in operation for long. Internal economic benefits/losses cannot be appraised here as such documents are not available in the public domain.

plant and its situation by a river is different, but it is offered on the basis of experience with various other licensing procedures.

Raising the pressure was not only done by raising damages of 1,4 billion € in the ICSID arbitration, but also by involving the Federal Ministry of Economics in the case, which would otherwise have no power over the authority in Hamburg granting a water use permit. It is clear that the Ministry would have had a thorough interest in settling the case without any costs and amicably as soon as possible given the country-wide involvement of Vattenfall in energy generation and distribution in Germany. And this was done by bringing a case which was not nearly won, as might have been suggested by Vattenfall:

With respect to the case before ICSID itself, it seems that at least the charges relating to the water permit would not have held up. After all, the tribunal would have had to interpret national water law in depth, as the intentional discrimination of a Swedish Company as opposed to a German company could not have been shown. The ECT provisions are far from clear, but on the side of the German Government would certainly have been the principle of conformity with national environmental law, also enshrined in the OECD Guidelines for Multinational Companies. The 2008 water use permit was based on a sound and scientific understanding of the ecological limits of the river Elbe. It would have been at least unclear whether the arbitrators would have followed Vattenfall or rather the defendant. After all, the water authority was regulating a cooling water emitter of a very large magnitude.

With respect to legal issues, it is far from clear that the restrictions set out by the water permit would have amounted to a “measure having equivalent effect to expropriation”. In international law, there is ample literature regarding this term and not every restriction on the operation of an industrial installation would be regarded as expropriation. This issue in itself would warrant a separate legal opinion.

The claims in relation to the time span of the licensing procedure are a little different. There is no doubt that the political takeover in 2008 of the Government has delayed the overall procedure. While the provisions in German law do offer an authority the option to prolong licensing procedures, there needs to be material reasons for such longer periods, mostly the lack of certain statements of facts or scientific opinions regarding the impacts of installations. In the case of Moorburg, there was always some reason given for expanding the time, however, it can be doubted whether the tribunal composed of “economic” experts would have regarded these favourably. In this regard, the case was also open. What should be noted, however, is the fact that the damages due to the delay would have been nowhere near the claim of 1,4 billion €.

Thus, on a general note, it can be stated that the ICSID procedure under the ECT has

- lead to settlement involving reduced environmental standards which was probably not necessary under German law and might not have come about without the ICSID case (City of Hamburg would have waited for the OVG judgement)

- involved a new actor in the dispute (Ministry of Economics) which was favourable to Vattenfall

- enabled Vattenfall to increase security in economic planning with respect to the Moorburg plant as new and stricter requirements for the water use are excluded under the settlement

- led to a licence for a coal plant which is much less effective in the use of coal as energy supplier (less district heating)

- generally increased public fear and aversion within authorities with respect to decisions taken by critical authorities that are progressive with respect to environmental standards.

Attorney at Law
Dr. Roda Verheyen