

SCRIPT TITLE

Written by

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Personen:

1. Richter ICSID Älterer seriöser Mann. Charismatisch und stellenweise mit Humor, trotzdem auch ernsthaft streng. Mit starkem holländischen Akzent. Versucht ab und an mit Bemerkungen aufzulockern.

Anwalt der Kläger - Vattenfall (und andere) Älterer klassischer, gutbürgerlicher Mann. Kühle Autorität, teilweise überheblich und arrogant. Kaum emotional.

Anwältin der Angeklagten -Bundesrepublik Deutschland Jüngere, elegante Frau. Stark mit Handgesten, Mimik und Körpersprache inszenierend. Kontrolliert ihr Bild.

(2. Richter Anspieler n.n.)

Alle Beteiligten sind sich bewusst, dass diese 10-tägige Verhandlung am ICSID gefilmt wird, und sie alle online gesehen und gehört werden.

Ort:

Die Verhandlung findet in Washington im ICSID Hauptsitz statt, in einem grossen Raum mit Fenstern. Es sind Aussengeräusche zu hören, wie Sirenen oder ähnliches.

Die Sitzordnung ist an einem ovalen, raumeinnehmenden Tisch.

Oben in der Mitte sitzt der Hauptrichter (zu besetzende Rolle). Rechts und links neben dem Hauptrichter sitzen die 2 weiteren Richter. Hinter ihnen sitzen die Assistent*innen der Richter und Übersetzer.

Hinter ihnen ist eine grosse Leinwand zur Projektion der Verhandlungsdokumente.

Links vom Richter sitzen die Angeklagten: Ihre Hauptanwältin (zu besetzende Rolle) und neben ihr in der Reihe über 10 weitere Anwäl*innen und juristische Spezialist*innen.

1 Rechts vom Richter sitzen die Kläger: Ihr Hauptanwalt (zu 1 besetzende Rolle) und neben ihm in der Reihe über 10 weitere Anwältinnen und juristische Spezialist*innen,

Die Anwälte und Richter haben eine Sprechanlage mit Mikrofon und Kontrollknopf vor sich. Die Dokumente in Papierform liegen vor ihnen auf dem Tisch. Ordner, Computer, Wasser.

1. TEIL

- ALLE 3: RICHTER INFORMIERT ÜBER STREAMING UND ERÖFFNET DIE VERHANDLUNG

- KLÄGER ALLEINE: TEILE AUS DEM ERÖFFNUNGS-PLÄDOYER

- DEBATTE ZWISCHEN RICHTER UND KLÄGER

ERÖFFNUNGSTAG

Alle Beteiligten betreten den Saal, nehmen ihren Platz ein und richten sich dort ein.

Der Richter schaltet das Mikrofon an und spricht zu den Anwesenden links und rechts.

1. RICHTER ICSID

You may recall that the tribunal invited the parties to stream this hearing in the interest of transparency! The tribunal is grateful that both parties have agreed to, eh, this, that this hearing is being streamed so that, eh, also the public can know what, eh...investor state dispute settlement is about. Now, transparency is not unlimited, there may be confidential or political information. And in that connection, the parties have agreed on a four hours delay in streaming. And I understand that the parties have worked out a signaling system for signaling which parts are confidential. Eh, is that agreed?

ANWALT KLÄGER - VATTENFALL (+)

Yes, Mr Chairman, President, that's agreed.

ANWÄLTIN ANGEKLAGTER - BUNDESREPUBLIK

Yes, Mr Chairman, President, that's agreed.

1. RICHTER ICSID

Okay. Alright. Mr. Hober I think, eh, you're the first one to start. Your time starts now.

ANWALT KLÄGER - VATTENFALL

Thank you very much. Good morning,
Mr Chairman, members of the
tribunal, ehm...

Liest den Text ab und schaut abwechselnd zum Richter.

ANWALT KLÄGER - VATTENFALL (CONT'D)

This dispute arises out of
Germany's decision following the
Fukushima accident on the 11th of
March 2011 to shut down claimant's
nuclear power plants to revoke
rights granted six months before,
which destroyed the value
claimant's other investments by
distorting the market. We have
heard and seen quite a lot from the
respondent side what this case is
allegedly all about. Ehm, it is
appropriate we think, to start out,
eh, this hearing by pointing out
what the case is **not** about !

Kurze Pause, dann spricht er weiter

ANWALT KLÄGER - VATTENFALL (CONT'D)

We're faced with a situation where
Germany took measures, certain
measures in 2011 that's targeted
our client's investments, which
happen to be in the energy sector.
And this whole ... eh, event, if I
may say so, has become, as you are
well aware of a hotly debated
topic. In fact, in Germany, it has
become a political football,
particularly in relation to the
general debate about TTIP, CETA and
investment arbitration. That is all
politics! In this conference room,
however, we are dealing with
international law and the ECT, the
energy charter treaty. Germany has
talked a lot about perception, but
public perception is not a valid
defense for Germany, in this case.

Kurze Pause, dann spricht er weiter.

ANWALT KLÄGER - VATTENFALL (CONT'D)

Finally then a few words about
quantum, ehm.

(MORE)

ANWALT KLÄGER - VATTENFALL (CONT'D)

Germany's breaches of the ECT have caused considerable damage to claimants. To quantify the damage claimants have suffered... eh, to quantify the damage the claimants have suffered. Mr.Kaczmarek has first calculate the value of the investments without the 13th amendment and the nuclear fuel tax as the 14th of March.

Kurze Pause, dann spricht er weiter

ANWALT KLÄGER - VATTENFALL (CONT'D)

Ehm Mr.Kaczmarek has calculated separate damages for each of claimant's nuclear power plants. Moreover, he has provided alternative calculations in the event that the tribunal should find that, eh, it does not have jurisdiction over certain claimants. The total amount of damages claim is about 5.7 billion I will come back to, eh... describe our prayers relief when I deal with quantum later on.

Kurze Pause, dann spricht er weiter

ANWALT KLÄGER - VATTENFALL (CONT'D)

So that concludes our opening statement. Thank you.

1. RICHTER ICSID

I have a question if I may, eh could you please go back to slide 98.

Der 1. Richter blickt Richtung "Kamera" gerade vor sich und kratzt sich am Kopf.

1. RICHTER ICSID (CONT'D)

And that's the slide about prayers for relief.

ANWALT KLÄGER - VATTENFALL

Ok.

1. RICHTER ICSID
and you explain to us your principal claim, and you put them in a alternative, but your principal claim is that you claim for Krümmel and Brunsbüttel 100%.

ANWALT KLÄGER - VATTENFALL
Yes.

1. RICHTER ICSID
Correct, so could you help me... because you said that you based that on control... Ehm, but if you would base it on share holding, then you come in your first alternative claim isn't it? Or in your second, actually, depending where you look at it?

ANWALT KLÄGER - VATTENFALL
Ehm.

1. RICHTER ICSID
Could you help me, why is it that you rely on control rather than on share holding? And I give you an example why I ask this question, a very simple one; if I have 50% share holding in a company I got 50% of available dividends, not 100%. Unless there is a special arrangement, perhaps special types of shares. Why is that different for...in your submission?

Der 1. Richter kratzt sich im Gesicht, fragender Blick.

1. RICHTER ICSID (CONT'D)
And maybe....

ANWALT KLÄGER - VATTENFALL
Eh I'm not...

1. RICHTER ICSID
the compares dividends
...it's not appropriate, but explain me why you make this distinction ?

ANWALT KLÄGER - VATTENFALL
These alternative claims that we're presenting are in response to objections made by Germany.
(MORE)

ANWALT KLÄGER - VATTENFALL (CONT'D)

So in case you accept some of their jurisdictional objections, we have prepared alternative claims. But we, I mean, our primary claim...

Der Anwalt ist immer stärker verunsichert.

ANWALT KLÄGER - VATTENFALL (CONT'D)

I mean is that Krümmel, Brunsbüttel are claimants in their own rights. So they claim for 100% of the damages that they have been afflicted. And that's item number 1, that's our primary claim. And Vattenfall Nuclear being the 20% share holder of Brokdorf is claiming for that...that share, so to speak.

1. RICHTER ICSID

It goes back actually of one of the first question we had this morning of share holding and what is the investment. Right, but you may have then the situation that you get a 100%, for example for Brunsbüttel, were as you have, there is only a share holding of, only 66,7% by Vattenfall Europe and E.ON has the other share holding.

ANWALT KLÄGER - VATTENFALL

Yes because the...the the damages inflicted on Brunsbüttel, I mean... they are what they are! And since the ECT is... is structured in such a way that is based on control. I mean as you well know... I mean a local incorporated company but controlled by non-local company is an investor under the treaty and as a claimant. And that is in that capacity that Krümmel and Brunsbüttel are claimants here. So that has nothing to do with the share holdings!

1. RICHTER ICSID

I can see that, ok.
Has it to do with... because finally these plants could be conceal a kind of tolling plants ?

ANWALT KLÄGER - VATTENFALL

What?

1. RICHTER ICSID

Tolling plants. T-O-L-L-I-N-G

ANWALT KLÄGER - VATTENFALL

No No...

Der Anwalt hält den Finger auf dem Sprechanlage-Mikrofon, schüttelt den Kopf, mit verständnislosem Blick.

1. RICHTER ICSID

Because what you do it is the only cost sharing arrangement for this plants, isn't it?

ANWALT KLÄGER - VATTENFALL

I'm not quite sure how that is relevant for...

Sein verständnisloser Blick hält an, die Situation spannt sich an.

1. RICHTER ICSID

But...I'm still lost here...!
And you have to help me. Is that, what might happen here is that you get 100% of the damages for Brunsbüttel, as E.ON goes also after the... the government or the state, and say *look I have here, what is it.. 33...point something in...in shares and I also have damages!*

Anspieler 2. Richter ICSID: That's the question I have got too. On your approach, could E.ON make a claim for a 100% of the damages to Brokdorf, on the bases that they control it ?

1. RICHTER ICSID (CONT'D)

(leicht genervt über die Verwirrung durch den 2. Richter) Could we start one first with the Krümmel plant and then with the Brunsbüttel plant and then Brokdorf.

Der Anwalt der Kläger schaut fragend.

1. RICHTER ICSID (CONT'D)

Brokdorf you claim only the 20%.. for, for... Brokdorf you claim only 20%, is that correct?!

ANWALT KLÄGER - VATTENFALL

Yes.

1. RICHTER ICSID

Yes, so there, so the problem is...

Anspieler 2. Richter ICSID: No it's not, because the question is whether the approaches between Brokdorf and the other two are consistent or whether they are adopting different approaches to the different plants.

Der Anwalt der Kläger wird nervöser, schiebt die rechte Hand unter den Anzug.

ANWALT KLÄGER - VATTENFALL

Well, I mean we're clearly adopting, I mean since the claims are different. I mean they... maybe I missing...I misunderstanding a question but, I mean Krümmel and Brunsbüttel they are, as we said, claimants in their own rights, in their own right, and so they're asking for, we're asking for the "total" damage.

Der Anwalt der Kläger macht zu „total“ die Geste für Anführungszeichen.

ANWALT KLÄGER - VATTENFALL (CONT'D)

what ever that is, that they have be suffering.

1. RICHTER ICSID

Question that still remains is that whether you can also that translate this into damages, in quantum. Ok, but let's put it that for...I almost say for an other day, but that is not the case, we say an other afternoon. Let's have lunch now I would suggest.

Pause. Die Beteiligten stehen auf, unterhalten sich.

2. TEIL

- ERÖFFNUNG DURCH RICHTER □
- ANGEKLAGTER ALLEINE: TEILE AUS DEM ERÖFFNUNGS PLÄDOYER
- DEBATTE ZWISCHEN RICHTER UND ANGEKLAGTER

Der 1. Richter richtet sich mit seinen Dokumenten am Platz ein.

1. RICHTER ICSID
 Right, eh, can we then proceed, Dr. Konrad, this closing, ...oh, sorry, the opening statement.

Er lacht über seinen Versprecher.

1. RICHTER ICSID (CONT'D)
 I am efficient in my proceedings !
 ehm, it's the opening statements for the respondent please.

ANWÄLTIN ANGEKLAGTER - BUNDESREPUBLIK
 Good afternoon.

Die Anwältin inszeniert sich bewusst ruhig.

ANWÄLTIN ANGEKLAGTER - BUNDESREPUBLIK (CONT'D)
 I'm sure you've heard the voices outside, of the demonstrators. And ehm, it's no surprise also, if you've just followed the procedural conversation we just had, that this case is very controversial and has generated much public debate. Now, why is that ? Because it's an arbitration, which should never have been brought under the Energy Charter Treaty and under the ICSID Convention.

Sie macht eine kurze Pause, bevor sie weiterspricht.

ANWÄLTIN ANGEKLAGTER - BUNDESREPUBLIK (CONT'D)
 What you've seen is...a lot of smoke, eh, not from the transformer, but from claimant's counsel about how bad this is and how badly they've been treated.
 (MORE)

ANWÄLTIN ANGEKLAGTER - BUNDESREPUBLIK

Eh, if you really look at the facts of the case, all that goes away. It's unsubstantiated, it's rhetorics. Your job is... not to second guess the mandate of the German parliament, but to apply the provisions of the ECT and to decide this dispute. But when... and I was listening to Vattenfalls opening this morning, claiming that the 13th amendment was a political *decision*, they've said it quite often, I wonder when political has become such a dirty word. It comes... from the greek word politikos, which means relating to the people, to the citizens, to the state. And democracy is nothing, if not political. It is government of the people, by the people, for the people. It has to be politic. That's its definition. And it's certainly not a dirty word.

Sie macht eine Handbewegung zum "Slide-Wechsel".

1. RICHTER ICSID

If we need, ehm leave a sign now and enter in hypothetical situation, if I may. (*spricht langsam und vorsichtig betont*)
 Ehm, and assume now that the 13th amendment cannot be based on sound risk analysis, ehm no safety concerns by an, an, an... reactor safety commission identified that are additional safety concerns, but it's purely enacted for reasons that the perception of the public is saying; look, we find it too frightening, has become too frightening after Fukushima to have still nuclear power.
 If that is a public perception, the change, and that, that translated in, in, in legislation, in legislative amendment, how would that legally translate into the investment protection on the ECT ?
 I'm making a number of assumptions, and I don't ask you to anything, but assume now that this would be the case.

ANWÄLTIN ANGEKLAGTER - BUNDESREPUBLIK

It is almost impossible
hypothetical because you're, ehm
assuming, that the public is wrong!

1. RICHTER ICSID

No! I'm sorry. No, that's not at
all! Let me be very clear! I... in
this, is the public may have
legitimate concern in of itself,
and I'm not saying that it's wrong,
but that we living also in
perceptions, in this world. And,
and there may be an ill system in
place for, ehm analyzing risks with
nuclear power plants. But
nonetheless, there may be other
aspects cannot be anticipated. And
one of this is that the public
thinking about nuclear power
generation, changes.
Now, if that is the case, and if
that is the public concern, that
does not say what is right or
wrong, simply the perception
changes in the public, how does
that translate into, legally into
ECT?

Die Anwältin antwortet mit ausführlichen und illustrierenden
Handgesten.

ANWÄLTIN ANGEKLAGTER - BUNDESREPUBLIK

Let me answer it in two things!
First of all, I think, ehm... we
are also in a way the public.
So 20 or 30 years ago, it was
deemed, ehm, acceptable to dump,
ehm, acid and nuclear elements into
the sea. Ehm, we today think that's
no longer acceptable. ...And, ehm,
although the rise of international
eh, environmental law started with
the Bering Sea Arbitration, eh, it
has take leaps and bounds. So
perception of, ehm, is a relevant
factor. Otherwise, we wouldn't be
talking about public environmental
law nowadays.

Der Anwalt an ihrer linken Seite klebt ihr eine Post-it-
Nachricht auf die vor ihr liegende Dokumente, Sie klebt diese
woanders hin und ist kurz etwas im Redefluss unterbrochen.

ANWÄLTIN ANGEKLAGTER - BUNDESREPUBLIK (CONT'D)

Secondly, even if we put this aside, I've just explained to you how the legislator went about. The legislator, even if it was just public perception ..if you say.... let's take it one step further. Say it was.... and this is completely irrational to assume, it was a... a whim on which we enacted something like that, which we didn't. But the way in which the legislator did it, taking into account the legitimate interest of the stakeholders, making sure that the old energy production volumes could be eaten up. Even then, there would be no breach of the ECT because in the 13th amendment was designed to make sure that all the financial interests of the stakeholders would be protected. So the first thing, is it perception or the legislator have a right or not to change its viewpoint as to do we want to continue with nuclear energy, is irrelevant because that back end how they did it avoids any risk of a breach. But even that, and I think there I have to disagree with your hypothetical, the decision to phase out was taken in 2002. Not with the 13th amendment!

1. RICHTER ICSID
(*lächelnd*) Hypothetical is hypothetical! so...

ANWÄLTIN ANGEKLAGTER - BUNDESREPUBLIK

Absolutely

1. RICHTER ICSID
..it's disconnected of the reality,ehm for the purpose of the argument!

3. TEIL

Abschlussstag nach 10-tägiger Verhandlung

- ERÖFFNUNG DURCH RICHTER

- TEILE AUS DEM ABSCHLUSS PLÄDOYER KLÄGER

1. RICHTER ICSID

Yes. Ok. Good morning, ladies and gentlemen. I re-open the hearing on what was original day 10 but is has now become day 9. Kaj Hober please start with the closing statement.

ANWALT KLÄGER - VATTENFALL

Thank you very much, Mr Chairman, members of the tribunal! I will now address the substance, or the aspects of the substance of the case and start out with public perception.

Der Anwalt liest vom Dokument ab

ANWALT KLÄGER - VATTENFALL (CONT'D)

Regardless of the validity of the public perception at play, this ultimate the begs the question as you put, Mr Chairman on the first day; how do we place legally public perception within the context of investment protection?

Macht kurze Pause

ANWALT KLÄGER - VATTENFALL (CONT'D)

The answer to, to the Chairman's question is, as we submit, it plays no role at all under international law, not as a defense, nor as an excuse under the ECT. There is no place for public perception in international law. It has no role to play...it has no role to play, it is of course not to be confused with public interest in the context of lawful expropriation, this is a different concept, as you know.

(MORE)

ANWALT KLÄGER - VATTENFALL (CONT'D)

There is no right, no standard, no exception, no common practice related to public perception on the customary international law nor under the ECT!

Von der Strasse sind laute Sireengeräusche zu hören.

ANWALT KLÄGER - VATTENFALL (CONT'D)

In our case, we are talking about public perception as perceived by certain politicians. Elections were coming up. The government wanted to secure the elections. It was believed that they could do so by introducing the moratorium and the measures...they wanted to please the voters. Maybe this is Realpolitik. But neither Realpolitik or public perception can constitute excuses on international law! Ehm, if I may then move...

Er greift zu seinem Glas Wasser und trinkt.

ANWALT KLÄGER - VATTENFALL (CONT'D)

...on to the right to regulate.

4. TEIL

- ERÖFFNUNG DURCH RICHTER

- TEILE AUS DEM ABSCHLUSS PLÄDOYER ANGEKLAGTER

1. RICHTER ICSID

Good afternoon, we resume the hearing. Now the closing statement by respondent. Dr. Konrad please proceed.

Die Anwältin blättert in den Unterlagen.

ANWÄLTIN ANGEKLAGTER - BUNDESREPUBLIK

Let me conclude with a discussion of the burden of proof.

Sie macht eine kurze Pause.

ANWÄLTIN ANGEKLAGTER - BUNDESREPUBLIK (CONT'D)

We are pointing out a hole in claimant's case, a failure to substantiate their claims.

Sie unterstreicht ihre Worte mit Handgesten.

ANWÄLTIN ANGEKLAGTER - BUNDESREPUBLIK (CONT'D)

Because, as Phillip Morris explained, after we've made actually the same, eh, argument, which they could not have possibly known, is that if you have the same business activity, which in the case of claimants is the production of nucle... ehm of energy of electricity, you have to look at the effects of the measures on that business. And that business is not nuclear energy. It's an integrated electricity company and the means of producing energy...

Sie verhaspelt sich etwas.

ANWÄLTIN ANGEKLAGTER - BUNDESREPUBLIK (CONT'D)

energy... electric energy, are interrelated by virtue of the merit order. So anything that affects lignite production, energy ehm electricity production, would have repercussions on coal steam on nuclear. Any regulation that affects nuclear would affect also lignite and steam coal and gas and water. It's one product. Again, as I have used it before; If you put your plug of your iPad in the socket, it will get electricity, and it doesn't care if it comes from nuclear or lignite or steam coal. Therefore it's one product, one market, one business, which was allegedly according to claimants...

Sie macht ein Handzeichen Richtung Kläger.

ANWÄLTIN ANGEKLAGTER - BUNDESREPUBLIK (CONT'D)

effected by the 13th amendment, but they have failed for the last four years to explain that effect.

(MORE)

ANWÄLTIN ANGEKLAGTER - BUNDESREPUBLIK

Instead, they're trying to make you believe that their only investment is, well...a 100% in a power plant that they only own 50% of, but completely ignore the rest of Vattenfalls investment in Germany, which is in an integrated electricity company. So claimant's case must fail because; there's no jurisdiction for claims on behalf of E.ON. There's no jurisdictions for claims on the basis of the nuclear fuel tax. There is no breach of the Energy Charter Treaty as result of the measures, and there is no financial impact. And by definition, where there's no adverse financial impact that can also be no damages for which claimant's bear the full burden of proof. Thank you very much.

Sie legt die Dokumentseite auf den Nebentapel. Ausschalten der Mikrofonanlage.

5.TEIL

- ABSCHLUSS DURCH RICHTER

Der Richter spricht zu allen Beteiligten.

1. RICHTER ICSID

Thanks so much. And I'm remiss indeed, in not thanking the interpreters, but also the AV team upstairs and downstairs for, because there are also the streaming people downstairs, for making it all available and make it transparent for those who wish to see it with the four hours delay. Ehm, then, eh, the tribunal we can close now the hearing I wish you all a very good trip back home. We have travels may bring you, eh, and eh, take some rests if I may give you an advice. Thank you. Hearing closed.

Alle Beteiligten räumen ihr Material zusammen und verlassen den Saal.

ENDE.