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2 O 447/22

Announced on 12.04.2024

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Essen Regional Court

ON BEHALF OF THE PEOPLE

Judgement

In the legal dispute

of the Kingdom of Spain, (Ministry of Ecological Transition and Demographic Challenges), represented by the Spanish Ambassador to Germany, Embassy of Spain in Germany, Lichtensteinallee 1, 10787 Berlin,

the plaintiff country,

Counsel: Attorneys at law Simmons & Simmons LLP,
Lehel Carre, Thierschplatz 6,
80538 Munich,

against

1. RWE Renewables Europe & Australia GmbH, represented by its legal representatives, RWE Platz 4, 45141 Essen, Germany,

2. RWE Renewables Iberia S.A.U., represented by its legal representatives, Pl. Catalunya, 1, 3-E (Ed. El Triangle), 08002 Barcelona, Spain,

Defendant,

Counsel to 1, 2:
Lawyers Allen & Overy,
Haus am OpernTurm, Bockenheimer
Landstraße 2, 60306 Frankfurt am Main,

the 2nd Civil Chamber of the Regional Court of Essen at the hearing on 26 January 2024

by Ms Wolf, Presiding Judge at the Regional Court, Ms Brill, Judge at the Regional Court and Ms Sentker, Judge

recognised:

The action is dismissed.

The applicant is ordered to pay the costs.

The judgement is provisionally enforceable against security amounting to 110% of the amount to be enforced in each case.

Facts of the case

The plaintiff country is claiming that the defendants should refrain from recognising an arbitral award issued in its favour by the International Centre for Settlement of Investment Disputes (hereinafter "ICSID") or from enforcing the arbitral award; alternatively, it is seeking a declaration that the corresponding measures taken by the defendants are unlawful.

The plaintiff country is a member state of the European Union. Defendant 1) is a subsidiary of RWE AG and a company incorporated under German law with its registered office in Essen. It specialises in the supply of energy from renewable sources. Defendant 2), for its part, is also affiliated under company law with RWE AG and defendant 1). It is organised as a company incorporated under Spanish law and operates on the Spanish energy supply market.

In the 1990s and 2000s, the legal predecessors of the current defendants, which have been transferred to the present defendants while preserving their identity, were active in the energy market of the plaintiff country. The plaintiff government supported this through state investment incentives. In this context, the legal predecessors of the defendants purchased and developed in particular four hydroelectric power plants and 16 wind farms in the Kingdom of Spain.

The government of the plaintiff country subsequently changed its policy. From 2013, subsidies and premiums were reduced. Some of the investment incentives already granted were also reclaimed.

The legal predecessors of the defendants were of the opinion that the plaintiff country was violating the Energy Charter Treaty (hereinafter: "ECT"), which entered into force in both the Federal Republic of Germany and the Kingdom of Spain in 1998, by amending its legislation. Article 10 of the ECT provided:

> *"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."*

Art. 26 of the ECT, entitled *"Settlement of Disputes between an Investor and a Contracting Party", states,* inter alia, the following:

> *"(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.*
>
> *(2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:*
> *[...]*
> *(c) in accordance with the following paragraphs of this Article.*

[...]

(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:

(a) (i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the "ICSID Convention"), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention [...]

(8) The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute.

In December 2014, the legal predecessors of the defendants initiated arbitration proceedings against the plaintiff country before the ICSID in Washington, citing Art. 26 ECT. The proceedings were conducted under case number ARB14/34. Hearings were held from 15/05/2017 to 19/05/2017.
On 30 December 2019, the arbitration tribunal issued an interim award finding that the plaintiff country had violated Art. 10 para. 1 ECT.
Finally, by arbitral award dated 18 December 2020, the plaintiff country was ordered to pay USD 28,080,000.00 as compensation for the damage resulting from its tortious acts (plus monthly interest of 2.07% since 30 June 2014). The arbitral award also stated that the plaintiff country had to bear the costs of the arbitration proceedings in the amount of USD 715,740.36 as well as a further USD 2,373,909.24 in legal fees and other costs and expenses incurred by the defendants.

On 17 April 2021, the plaintiff country initiated annulment proceedings regarding the arbitral award, which were conducted before an ad hoc committee of the ICSID. In decisions dated 22/11/2021 and 28/02/2022, the committee lifted the suspension of the enforceability of the award. A final decision by the ad hoc committee on the annulment proceedings was still pending at the time of this hearing, but is

expected in the first half of 2024.

In July 2021, the plaintiff state notified the European Commission of the arbitral award under file number ARB 14/34. The state aid investigation has been pending with the European Commission since then under file number SA.64062. No decisions were made by the European Commission within the deadlines specified in Art. 4 of the State Aid Procedure Regulation (Regulation (EU) 2015/1589). No notifications were made by the plaintiff country within the meaning of Art. 4 para. 6 of the aforementioned regulation.

In December 2021, the defendants initiated proceedings before the US District Court of Columbia of the United States of America, whose jurisdiction under the ICSID Convention was provided for the enforcement of the proceedings, to enforce the arbitral award through enforcement measures against the plaintiff country, which are still ongoing.

On 24 March 2023, after the pendency of the present litigation, the defendants applied to the District Court in Washington for the issuance of a preliminary injunction and temporary restraining order against the plaintiff country, with which they sought to prevent the conduct of the present district court proceedings.
In view of the possible threat of the US court issuing a preliminary injunction after the pendency of the present action, the plaintiff country initiated preliminary injunction proceedings against the defendants before the Regional Court of Essen on 3 March 2023 under file number 2 O 97/23. In a judgement in the second instance dated 02.05.2023 under file number I-9 W 15/23, the Higher Regional Court of Hamm issued a preliminary injunction stating that the defendants are prohibited from initiating or continuing legal proceedings abroad, including outside the European Union, insofar as these proceedings request that the plaintiff country be prohibited from asserting and enforcing claims against the defendants in the Federal Republic of Germany in the proceedings pending before the Regional Court of Essen under file number 2 O 447/22 or from enforcing court judgements already issued against the plaintiff country.

The plaintiff country is of the opinion that it can claim against the defendants to refrain from recognising and enforcing the arbitral award at issue, or alternatively to declare that these enforcement measures are unlawful.

It holds the following legal opinions in particular:
The German courts have jurisdiction on the basis of the Brussels Ia Regulation, Regulation (EU) No. 1215/2012 (so-called Brussels I Regulation). The exception to jurisdiction under Art. 1 para. 2 (d), which is provided for arbitration there, does not apply. Thus, there is already no effective arbitration agreement. Furthermore, the subject matter of the present proceedings is not the question of the enforcement of the arbitral award as such, but rather the question of whether the defendants violated higher-ranking EU law by obtaining or enforcing the arbitral award and thus committed an abuse of rights. This was not a question genuinely related to the arbitral award, but rather one of a tort or European law nature. The jurisdiction of the chamber also follows from the provisions of the ZPO in the event that the Brussels I Regulation does not apply. In particular, the court seised also has local jurisdiction with regard to the defendant 2), as Section 32 ZPO is applicable, the requirements of which are also met - as the plaintiff country explains in more detail. Finally, a payment from the arbitral award at issue would be made to both defendants and is comparable to the situation of a joint creditor.

The interest in a declaratory judgement required for alternative claim II was given due to the enforcement measures already initiated in non-European countries.

Contrary to the opinion of the defendant, the plaintiff country is not seeking an inadmissible (worldwide) prohibition on conducting proceedings. There is no interference with the sovereign rights of a state associated with the request. This is because the plaintiff country is not attempting to deny the defendants access to state courts. Rather, it is about the enforcement of an arbitral award on the basis of Art. 54 of the ICSID Convention, which state courts cannot (in principle) review on the basis of the understanding of the ICSID Convention. However, the arbitral award is not a decision issued in sovereign proceedings and is therefore

not part of the state's monopoly on the use of force or of ordinary court proceedings. An interference with the judicial sovereignty of the United States could therefore only be assumed if the plaintiff country were to defend itself against a fundamental decision of a US court, which is not the case. Assuming that the plaintiff country demands a prohibition of litigation on the merits, such a prohibition is exceptionally justified here. The plaintiff country must be given the opportunity - comparable to Section 826 BGB - to protect itself against a materially incorrect order.

The action is also admissible. In particular, the ICSID Convention does not have a blocking effect in the particular constellation of intra-EU investor-state arbitration proceedings under the ICSID Convention on the basis of Art. 26 ECT due to the primacy of Union law - also vis-à-vis international law.

The plaintiff country also has a need for legal protection. The courts in the United States are not bound by the jurisdiction of the Court of Justice of the European Union. Therefore, the plaintiff could not argue that it could also assert its objections before the court there. Nor should the plaintiff country be referred to a procedurally uncertain route.

The claim for injunctive relief and a declaratory judgement exists on the merits. The arbitral award itself and thus also its recognition and enforcement constitute a violation of mandatory European Community law. According to the case law of the Court of Justice of the European Union investment arbitration proceedings between an investor from an EU Member State and an EU Member State - as here - violated Art. 19 TEU, Art. 267 and 344 TFEU, as well as the general principles of Union law of mutual trust and of autonomy.
Arbitration clauses are clauses are inapplicable and arbitration courts have no jurisdiction in any conflicts. Against this background, the courts of each Member State are obliged by the so-called effet utile of Article 4 para. 3 TEU and the principles of loyal cooperation to give effect to European Community law. As a result, a German court must prevent the recognition or enforcement of the

arbitral award that is not compatible with Union law. In this respect, the claim for injunctive relief follows directly from EU law. The German courts would therefore not be required to fulfil a global policing task. This is by no means a global dispute that goes beyond the home jurisdiction of the European Union.

The plaintiff country is entitled to direct injunctive relief under Union law. In view of the effectiveness of Union law, the claim arises from Articles 267 and 344 TFEU. If Union law is directly directed against the admissibility of arbitration agreements, the enforcement of arbitral awards is also disapproved in continuation of this idea.

The claim for injunctive relief continues to follow from the state aid provisions of EU law. The enforcement of the arbitral award constitutes state aid within the meaning of Art. 107 TFEU, which has not yet been declared compatible with the internal market by the Commission. The plaintiff country is subject to a standstill obligation under European state aid law. It is a preventive regulation that aims to ensure that only aid that is compatible with the internal market is implemented and is directly applicable to the plaintiff state. In this respect, the defendants were acting in breach of trust if they insisted on payment of the arbitral award but at the same time considered themselves subject to a repayment obligation. Finally, the court seised is obliged under Community law to prevent the plaintiff country from being forced to grant unauthorised state aid.

Moreover, German substantive law is also applicable, as is clear from Art. 6 para. 3 Rome II Regulation, alternatively Art. 6 para. 1 Rome II Regulation and alternatively Art. 4 Rome II Regulation. A claim for injunctive relief therefore also follows from Sections 1004, 823, 826 of the German Civil Code (BGB), which the plaintiff states in more detail. In the alternative, the asserted claim also arises from the application of Spanish law.

Originally, the plaintiff did not limit its main claim and auxiliary claim I to the territory outside the European Union and, conversely, initially limited auxiliary claim II to the territory of the European Union

and formulated a deviating auxiliary request III. In a written submission dated 18 December 2023, the plaintiff country added a further auxiliary request, auxiliary request IV, and amended the rest of the requests in a written submission dated 15 January 2024.

The plaintiff country now requests,

(1) to order the defendants to pay a fine of up to EUR 250,000.00 for each

case of infringement, alternatively imprisonment, or imprisonment for up to six months, to be enforced against the respective legal representative, in the event of a repeat offence imprisonment for up to a total of two years,

to refrain from,

seeking recognition or a declaration of enforceability or equivalent measures outside the European Union in relation to the award ICSID Case No. ARB/14/34 of 18 December 2020, to pursue and/or have pursued proceedings already pending in relation thereto and/or to enforce or have enforced against the plaintiff any recognition or declaration of enforceability or other equivalent measures already obtained to compel the plaintiff directly or indirectly by court or administrative order to pay the award ICSID Case No. ARB/14/34 of 18 December 2020;

in the alternative (auxiliary request I):

(2) to order the defendants to pay a fine of up to EUR 250,000.00 for each

case of infringement, alternatively imprisonment, or imprisonment for up to six months, to be enforced against the respective legal representative, in the event of a repeat offence imprisonment for up to a total of two years,

to refrain from,

seeking recognition or a declaration of enforceability or equivalent measures outside the European Union in relation to the award ICSID Case No. ARB/14/34 of 18 December 2020, to pursue and/or have pursued proceedings already pending in relation thereto and/or to enforce or have enforced against the plaintiff any recognition or declaration of enforceability or other equivalent measures already obtained to compel the plaintiff directly or indirectly by court or administrative order to pay the award ICSID Case No. ARB/14/34 of 18 December 2020 until the compatibility of the award ICSID Case No. ARB/14/34 of 18 December 2020 with the internal market has been finally decided in proceedings SA.64062 pending before the European Commission has been finally decided.

further in the alternative (auxiliary request II)

(3) the requests under the main request and the auxiliary request to I, with the proviso that, for corresponding requests and measures of the Respondent outside the European Union, it is established that an application for recognition or declaration of enforceability or equivalent measures or the pursuit or abandonment of proceedings already pending to that end or recognition or declaration of enforceability already obtained or other equivalent measures in relation to the ICSID Case No. ARB/14/34 award of 18 December 2020 are unlawful.

further in the alternative (auxiliary request III)

(4) to order the defendants to pay a fine of up to EUR 250,000.00 for each case of infringement, alternatively imprisonment, or imprisonment for up to six months, to be enforced against the respective legal representative, in the event of a repeat offence imprisonment for up to a total of two years,

to refrain from,

seeking recognition or a declaration of enforceability or equivalent measures in relation to the arbitral award ICSID Case No. ARB/14/34 of 18 December 2020 by actions in the Federal Republic of Germany and/ or to carry out or have carried out an already obtained recognition or declaration of enforceability or other equivalent measures by actions in the Federal Republic of Germany against the plaintiff to compel the plaintiff directly or indirectly by court or administrative order to pay the award ICSID Case No. ARB/14/34 of 18 December 2020. ARB/14/34 of 18 December until the compatibility of the award ICSID Case No. ARB/14/34 of 18 December 2020 with the internal market has been finally decided in proceedings SA.64062 pending before the European Commission has been finally decided.

in the further alternative (auxiliary request IV):

(5) to order the defendant 1) to pay a fine of up to EUR 250,000.00 and, in the

event that this cannot be collected, to impose an administrative detention order of up to six months, whereby the administrative detention order is to be enforced on the members of the management of the defendant 1) and may not exceed a total of two years,

and to ensure and to influence the defendant 2),

that the defendant (2) does not take any of the actions set out in the main claim (1), auxiliary claim I, auxiliary claim II or auxiliary claim III.

The defendants request

the dismissal of the action.

The defendants are of the opinion that the action is already inadmissible, but in any case unfounded.

They hold the following legal opinions in particular:
The German courts already lack the international jurisdiction to decide whether an arbitral award may be enforced abroad. According to the established case law of the Federal Court of Justice, the enforcement of assets located in the territory of another state is exclusively a matter for that other state and, in the present case, is therefore to be decided solely by US courts. The Brussels Ia Regulation also does not confer jurisdiction on the German courts because questions of arbitration are excluded from the scope of the Regulation pursuant to Art. 1 para. 2 (d). In the present case, an arbitration issue is in disupute, so that the exception to the scope of application must apply. In any case, the ZPO does not have jurisdiction over the defendant 2). Neither Section 12 ZPO, nor Section 32 ZPO or the idea of a joint litigation established the place of jurisdiction here. Even assuming the - disputed - applicability of Section 32 ZPO, the jurisdiction of the court seised is not given, as - according to the defendants in more detail - neither the place of action nor the place of success of the allegedly threatening "offence" is located in Germany.

The action is also inadmissible as it is directed at a worldwide prohibition of litigation and is therefore unlawful. The arbitral award rightly grants the defendants a claim for damages against the plaintiff country. The present action is intended to deprive the defendants of their procedural rights to enforce this claim. The plaintiff country is therefore pursuing an inadmissible worldwide prohibition of litigation, a so-called anti-suit injunction. However, this leads to an inadmissible interference in the exclusive jurisdiction of foreign courts and also constitutes an encroachment on the sovereignty and judicial sovereignty of foreign states. Specifically, it is an interference in the proceedings for recognition and declaration of enforceability before the court in Washington D.C., which have been ongoing since December 2021. This applies all the more because, according to Art. 54 of the ICSID Convention, the US courts have exclusive jurisdiction to enforce the arbitral award.

Prohibitions on conducting proceedings are inadmissible under both German and European Union law.

Furthermore, the action lacked the need for legal protection, as the plaintiff country could assert the objections raised here in the proceedings that it wanted to prevent.

The action is inadmissible - in particular with regard to Section 1026 ZPO. The award of the ICSID Convention is only subject to the legal remedies provided for in the ICSID Convention. National courts are excluded under Art. 53 para. 1 sentence 1 ICSID Convention. This is also stipulated by the German Act on the Convention on the Settlement of Investment Disputes (InvStreitBeilG), through which the German legislator has given the ICSID Convention domestic effect. These provisions are also not superseded by Union law by analogy with Art. 351 TFEU. The ICSID Convention had been in force in Germany and Spain long before the TFEU and its Art. 107 para. 1 came into effect.

The plaintiff country is also not entitled to injunctive relief on the merits. The objections raised by the plaintiff country amounted to an inadmissible examination of the content of the arbitral award. The arbitral tribunal had made a final and binding decision within the meaning of Art. 54 para. 1 sentence 1 of the ICSID Convention. A strictly limited review of the content could only take place in the already pending ICSID annulment proceedings.

Furthermore, there is no basis for a claim for a prohibition on conducting proceedings. It remains unclear where the plaintiff country intends to derive the basis for its alleged claim in connection with Art. 19 TEU, Art. 267, 344 TFEU. A basis for the claim based on Union law is not apparent.
German law is not applicable to the claim for injunctive relief. If the measures taken by the defendant to recognise and enforce the arbitral award were classified as tortious acts, the substantive law under Art. 4 para. 1 ROM II Regulation would have to be determined according to the place of the imminent occurrence of the damage. In this respect, the defendants are of the opinion that, according to this consideration, US substantive law should be applied. German law is

only applicable if the enforcement was to be pursued in Germany. The plaintiff country itself does not even argue this.
Even if German tort law were to be considered applicable, the plaintiff state would not be entitled to injunctive relief against the defendants. There is no threat of an unlawful violation of a protective law within the meaning of Section 823 para. 2 BGB. Art. 19 TEU as well as Art. 267 TFEU and Art. 344 TFEU are not protective laws within the meaning of Section 823 para. 2 BGB. They are provisions on the organisation of courts. Furthermore, these provisions are too vague to be protective laws. Articles 107 and 108 TFEU are also not relevant protective laws here. Furthermore, the plaintiff country, as a sovereign state, could not derive any subjective rights from the state aid provisions.

The defendants also argue that the arbitral award does not constitute state aid. Rather, they were awarded compensation for damages that they had suffered. It is even less clear why this should constitute unlawful aid. It is not clear how competition could be distorted, how trade between the Member States could be affected at all or to what extent the arbitral award was intended to give the defendants a selective economic advantage.
The EU Commission considers the plaintiff's new investment incentive programme to be compatible with the internal market and permissible overall, in particular the target returns of 7.398% before tax for renewable energy installations. More than this target return of 7.398% before tax was not awarded to the defendants by the arbitral award - to that extent undisputed - which is why the defendants believe that (unlawful) aid cannot be assumed for this reason either.

The plaintiff country could also not base its request on Article 108 para. 3 TFEU and the standstill obligation contained therein. The provisions of state aid law do not have the character of protective legislation; in any case, state aid law does not serve the member state, but rather the defence against distortions of competition due to state aid.

Section 242 BGB or Section 826 para. 1 BGB in conjunction with Section 1004 para. 1 BGB do not justify a claim. In this respect, the order in question was not materially incorrect.

The defendants had neither obtained it by fraud nor had they fraudulently exploited it. Finally, there was also no evidence of disloyal behaviour on the part of the defendants. On the contrary, the European Commission had not properly conducted the procedure required by the state aid regulations, which is why the plaintiff country was able to bring about the fictitious authorisation pursuant to Art. 4 para. 6 of the European State Aid Regulation (EU) 2015/1589.

The files LG Essen, ref. 2 O 97/23 - OLG Hamm, ref. 9 W 15/23, were submitted and were the subject of the oral hearing. On 18 October 2023, the European Commission issued a written statement on the pending legal dispute before the Regional Court of Essen with reference to Art. 29 para. 2 Regulation (EC) No. 1589/2015, the content of which is referred to (p. 571 et seq. of the file). The representatives of the European Commission were permitted to attend and make oral statements at the hearing by order of the Chamber on 19 December 2023. The representatives of the European Commission made use of this in the oral hearing on 26 January 2024.
With regard to the content of the aforementioned statement and the further details of the facts of the case and the dispute, reference is made to the minutes of the oral hearing, the written submissions and annexes submitted by both parties, the written statement of the European Commission and the grounds for the decision.

Grounds of the judgement

The action is inadmissible and - for the sake of completeness - unfounded on the merits.
I. International jurisdiction

The international jurisdiction of the German courts is given.

In the opinion of the Chamber, this does not follow from the direct application of Regulation (EC) No. 1215/2012, also referred to as "EuGVVO" or "Brussels Ia Regulation" (hereinafter referred to as the "EuGVVO"), but rather indirectly by analogy from the German provisions on local jurisdiction.

1.

International jurisdiction in cross-border matters within the European Union is to be examined in principle and primarily on the basis of the EuGVVO in accordance with Art. 1 para. 1 EuGVVO. However, in Art. 1 para. 2 of the EuGVVO, the EuGVVO lists areas of law for which it excludes its own applicability. Such an exception applies to the present case. Pursuant to Article 1 para. 2 (d), the Regulation does not apply to arbitration. In the opinion of the Chamber, the present case is a legal dispute that is to be subsumed under this exception. The Chamber does not fail to recognise that the present proceedings are not directly related to arbitration. Neither the proceedings here, in which the plaintiff country is essentially pursuing a claim for injunctive relief or at least disapproval of the recognition and enforcement of an arbitral award already issued, nor the proceedings pending before the US courts for the recognition and enforcement of the arbitral award are themselves arbitration proceedings, but rather, as state proceedings, each concern the question of the enforcement of an arbitral award. Nevertheless, the present proceedings fall under the field exemption. Recital 12 of the Regulation should be used as an aid to interpretation to characterise the scope of the exclusion. Subparagraph 4 of the recital states that the Regulation should not apply in particular to actions or ancillary proceedings relating to a decision to set aside, review, challenge, recognise or enforce an arbitral award. However, this is the case here. By seeking to enforce the legal protection objective already characterised, the plaintiff country is creating ancillary proceedings that are capable of affecting the proceedings already pending to enforce the arbitral award. This is sufficient to exclude the scope of application. This is because the EuGVVO does not, in principle, require any regulation of the enforceability of arbitral awards. These are governed by the statutes of international treaties already in force, such as the UNÜ (New York Convention on the

Recognition and Enforcement of Foreign Arbitral Awards of 10.06.1958) and the EuÜ (European Convention on International Commercial Arbitration of 21.04.1961), which take precedence over the EuGVVO, cf. in particular Art. 73 para. 2 EuGVVO and recital 12 subpara. 3 EuGVVO (cf. Antomo, in BeckOK ZPO, Vorwerk/ Wolf, 51st edition, as at 01.12.2023, on Art. 1 EuGVVO, para. 97; Stadler/ Krüger, in Musielak/ Voit, ZPO, 20th edition 2023, on Art. 1 EuGVVO, para. 8; Gottwald, in Münchener Kommentar zur ZPO, 6th edition 2022, on Art. 1 EuGVVO para. 27 et seq.).

2.

If the EuGVVO is not applicable, international jurisdiction is determined according to national rules (see also Geimer, in Zöller, ZPO, 35th edition 2024, on Art. 4 EuGVVO, para. 5; Schack, Internationales Zivilverfahrensrecht, 7th edition 2017, para. 266 et seq.; Wagner, Internationale und örtliche Zuständigkeit nach der EuGVVO, EuZW 2021, 572). This also follows from the legal concept of Art. 6 para. 1, 4 para. 1 EuGVVO.

There is no separate German regulatory system for international jurisdiction. Against this background, the provisions on local jurisdiction of the ZPO are applied in a dual function (see BGH, decision of 27 July 2023 - I ZB 74/22 -, para. 41, juris; Geimer, in Zöller, ZPO, 35. Auflage 2024, on Art. 4 Regulation (EC) No. 1215/2012 para. 5; Schack, Internationales Zivilverfahrensrecht, 7th ed. 2017, para. 266 et seq.; Wagner, Internationale und örtliche Zuständigkeit nach der EuGVVO, EuZW 2021, 572).

a)

International jurisdiction for the defendant 1) therefore follows from Sections 12, 17 ZPO by analogous application.

b)

The international jurisdiction of the German courts and the Regional Court of Essen for the defendant 2) follows by (double) analogous application of Art. 8 para. 1 EuGVVO, which allows for the joint hearing of related proceedings.

An analogous application of provisions can only be considered if there is an unintended loophole in German law with comparable interests. These conditions are met here for the application of Art. 8 para. 1 EuGVVO.

For the defendant to 2) no jurisdiction provision of the ZPO

jurisdiction can be considered. Defendant 2) does not have a registered office in the Federal Republic of Germany, nor is Section 32 ZPO relevant. Irrespective of the question of whether it is a tort on the merits to pursue the recognition and enforcement of the arbitral award of 18 December 2020 in court, neither the place of the causal event nor the potential act of damage is located in the Federal Republic of Germany. The legal dispute in question is being conducted in the United States of America and enforcement is threatened there.

Furthermore, the German Code of Civil Procedure (ZPO) does not contain any explicit rules on jurisdiction in Sections 12-35 ZPO that would allow for annex jurisdiction or the joint hearing of a legal dispute if two parties to the dispute do not have a common place of jurisdiction.

There is a situation of interest comparable to Art. 8 para. 1 EuGVVO. From the point of view of procedural economy, the standard provides that, if several persons are sued together, an action may be brought before the court of the place where one of the defendants is domiciled, provided that the actions are so closely connected that it appears necessary to hear and determine them together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings. This interest situation exists here. The subject matter of the dispute is not only identical. Rather, the defendants belong to the same group of companies in terms of company law. There is also the closest connection to the courts in Germany in that, in addition to defendant 1), the group of companies also has its registered office here and - according to the undisputed submission of the plaintiff country in this respect - far-reaching strategic decisions are not made without the involvement of the parent company. According to the facts of the case, defendant 2) is regarded in the Kingdom of Spain precisely as a foreign investor from Germany, so that this also emphasises the connection to the Federal Republic of Germany.

The fact that the idea of joining two litigants before a single place of jurisdiction is not completely foreign to German law is demonstrated by Section 36 No. 3 ZPO or Section 20 StVO.

II. Admissibility

The action is - insofar as it still has to be decided after the admissible partial withdrawal of the action - inadmissible. The Essen Regional Court does have jurisdiction over the location and subject matter of the legal dispute. However, the plaintiff country is pursuing an inadmissible legal protection objective with the present action. Furthermore, the plaintiff state also lacks the need for legal protection.

1.
The local jurisdiction of the Regional Court of Essen follows the international jurisdiction.
The subject matter jurisdiction of the Regional Court of Essen results from Section 1 ZPO in conjunction with Section 23 No. 1 GVG. Sections 23 no. 1, 71 para. 1 GVG. The value in dispute exceeds an amount of EUR 5,000.00.

2.
The legal protection objective of the plaintiff country, which it is pursuing with the applications - specifically the main application and the auxiliary applications under I and III - to order the defendant to refrain from seeking recognition or a declaration of enforceability or equivalent measures outside the European Union in relation to the arbitral award ICSID Case No. ARB/14/34, proves to be an inadmissible prohibition of litigation, a so-called anti-suit injunction.

In this regard, the Chamber assumes, in line with the parties' concurring view in this respect, that ICSID arbitral awards - and thus also the arbitral award of 18 December 2020 at issue - are not compatible with Union law according to the case law of the ECJ and therefore cannot be enforced in the European Union (ECJ, judgement of 6 March 2018, case C-284/16: "Achmea"; judgement of 2 September 2021, case C-741/19: "Komstroy"; Federal Court of Justice, decision of 27 July 2023 - I ZB 43/22). However, in the opinion of the Chamber, the (legal) consequence of this case law of the ECJ sought by the plaintiff country in the present legal dispute, to the effect that - German - courts must also ensure with non-European effect that the enforcement of such an arbitral award is prevented, does not exist.

In detail:

a)

The arbitral award of 18 December 2020 is to be regarded as incompatible with European Union law, taking into account the decisions of the ECJ on intra-European arbitration proceedings that have been issued in the meantime. Accordingly, an ICSID arbitral award is not compatible with Union law if the arbitration clause on which the arbitration proceedings are based calls into question the preservation of the specific nature of Union law guaranteed by the request for a preliminary ruling in violation of the principles of sincere cooperation and the autonomy of Union law (BGH, order of 27 July 2023 - I ZB 43/22, para. 70 et seq. 27.07.2023 - I ZB 43/22, para. 70 et seq. - juris; ECJ, judgement of 06.03.2018, case C-284/16: "Achmea"; judgement of 02.09.2021, Case C-741/19: "Komstroy"). This is the case here. The arbitration proceedings at issue before the ICSID, as intra-EU investor-state arbitration proceedings, were based on the arbitration clause in Article 26 para. 2 (c) ECT. In this particular constellation, the arbitration clause violates Art. 267 TFEU and Art. 344 TFEU.

If - as in the arbitration proceedings at issue - the arbitral tribunal is not part of the judicial system of the Union and, in particular, cannot be regarded as a court of a Member State within the meaning of Art. 267 TFEU, it is not authorised to refer a question to the Court of Justice of the European Union for a preliminary ruling (ECJ, judgement of 2 September 2021, Case C-741/19, para. 52 et seq.: "Komstroy"). According to the case law of the ECJ, the preliminary ruling procedure provided for in Art. 267 TFEU is a key element of this court system, as it is intended to ensure the introduction of a court-to-court dialogue and, in particular, a uniform interpretation of Union law with the Court of Justice of the European Union, thus ensuring its consistency, full application and autonomy and, ultimately, the intrinsic nature of the law created by the Treaties (ECJ, judgement of 6 March 2018, Case C-284/16: "Achmea"; para. 37).

According to this provision, an international agreement must not affect the system of jurisdiction laid down in the Treaties and thus the autonomy of the Union's legal system, the safeguarding of which is ensured by the Court of Justice (ECJ, judgement of 2 September 2021, Case C-741/19, para. 42: "Komstroy").

An arbitral award that is incompatible with Union law in this way cannot have any effect and therefore cannot be enforced. A court

of a Member State involved in the enforcement of such an ICSID award is obliged to refrain from applying this award and may therefore not enforce it under any circumstances (see BGH, decision of 27 July 2023 - I ZB 43/22, para. 70 - juris; ECJ, judgement of 6 March 2018, Case C-284/16: "Achmea"; judgement of 02/09/2021, case C-741/19: "Komstroy").
As a result, a court of the European Union jurisdiction cannot itself allow the arbitral award to be recognised and enforced.

b)
However, the injunction sought by the plaintiff country also constitutes an inadmissible prohibition on conducting proceedings, an anti-suit injunction, against the background of the above statements on the intra-European obligation of the Member States to fully comply with Union law.

aa)
Anti-suit injunctions are characterised as injunctions that are issued with the aim of preventing proceedings conducted elsewhere, particularly in other states. The order obtained is not directed against another court, but against the legal entity participating in the legal dispute itself and is also intended to prevent the risk of contradictory decisions by different courts. Nevertheless, the judicial sovereignty of the state in which the legal entity has initiated the legal dispute is also indirectly affected. This is because the court of the other (member) state would be deprived of its legal review competence without any action on its part.

bb)
The Court of Justice of the European Union considers anti-suit injunctions to be inadmissible in the context of European Union law. It has ruled that, on the basis of the mutual trust of the Member States in their respective legal systems and judicial authorities, it is inadmissible and incompatible with the EuGVVO if a court of a Member State prohibits a party from bringing legal proceedings before a court of another Member State which would have jurisdiction under the EuGVVO. This undermines the above confidence as well as the idea that the jurisdiction of the Member States that have jurisdiction under the EuGVVO is equivalent (cf. 27 April 2004 - C- 159/02: "Turner/Grovit and others", with comment by Schröder, EuZW 2004, 468 ff).

Furthermore, existing jurisdiction would be subsequently restricted by the courts. This also applies in the constellation in which the EuGVVO does not apply due to the territorial exception of Art. 1 para. 2 (d) EuGVVO - as is the case here (ECJ, judgement of 10 February 2009 - C-185/07: "West Tankers"). This is because this examination of the extent to which a possible territorial exception applies is also left solely to the Member State court seised.

cc)

However, this case law cannot be applied to the present proceedings, in which there is a context outside the Union. This is because there is no principle of loyal cooperation and autonomy of Union law comparable to Union law in relation to third countries, such as the USA in this case (see BGH, judgement of 17 October 2019 - III ZR 42/19, para. 30 et seq.). In the opinion of the Chamber, the aforementioned decisions of the Court of Justice of the European Union therefore do not consistently address the extent to which anti-suit injunctions are permissible or impermissible in a non-European context. On the contrary, the ECJ makes a clear distinction between the obligations of the Member States and the necessary compatibility with the principles of Union law and "extra-EU" situations (cf. on the complex of extra-EU BITs BGH decision of 12 October 2023 - I ZB 12/23, BeckRS 2023, 37538, beck-online and in detail: BGH, decision of 27 July 2023, file no. I ZB 43/22, SchiedsVZ 2023, 289 para. 117 et seq, beck-online).

In the opinion of the Chamber, the assumption of a competence of the court seised, even if only indirectly by exerting influence on the party, to prevent a procedure of a third state under the rule of law violates the principles of territoriality and essential elements of state sovereignty.

This is because - as already explained - an indirect influence is exerted on the judicial sovereignty of a third country. It is irrelevant whether the prohibition is directed against the court or the party. As a result, the jurisdiction of the other court is decided without its intervention. Competence-Competence, i.e. the answer to the question of whether a state's own jurisdiction and judicial sovereignty has been established, is an essential element of state sovereignty. Respecting the sovereignty of third countries is also part of the constitutional identity of the European Union. This is expressed in Art. 3 para. 5 TEU, 21 para. 1 TEU and Art. 216 para. 5 TFEU.

In other constellations, the European Union, for its part, also assumes that the

(non-European) anti-suit injunctions are inadmissible. In a press release dated 18.02.2022, the European Commission announced that it was initiating proceedings against China at the World Trade Organisation (WTO) because the country was restricting the ability of EU companies to appeal to a foreign court to protect their patents (available at https://ec.europa.eu/commission/presscorner/detail/de/ip_22_1103, last accessed on 28.02.2024).

German case law, on the other hand, considers anti-suit injunctions directed against proceedings conducted before them to violate the judicial sovereignty of the Federal Republic of Germany and the local right to the protection of justice (as expressly stated by the Higher Regional Court of Hamm, judgement of 2 May 2023 - 9 W 15/23, para. 6, in continuation of the preliminary injunction proceedings already conducted before the local regional court, case no. 2 O 97/23; Regional Court of Munich, judgement of 20.07.2023 - 7 O 5416/23; LG Munich I, judgement of 02.10.2019 - 21 O 9333/19; also OLG Düsseldorf, decision of 10.01.1996 - 3 VA 11/95).

There would be a contradiction in terms of the rule of law if the German courts were to defend themselves against injunctions from abroad, but for their part were to issue injunctions.
This applies all the more with regard to the area of law concerned. For if - as here indirectly - the enforcement of an order is at issue, the question of whether enforcement may take place in Germany must be decided solely by German courts (see BGH, decision of 9 March 2023 - I ZB 33/22. para. 48 et seq.). Furthermore, compulsory enforcement in the Federal Republic of Germany requires that the compulsory enforcement is to be carried out against assets located in Germany, as state coercive power can only be exercised on these ("territoriality principle") (BGH, decision of 25 November 2010 - VII ZB 120/09, para. 13).
Conversely, German case law has established, as it were, that enforcement measures in objects located in the territory of another state are exclusively a matter for that state (BGH, decision of 25 November 2010 - VII ZB 120/09, para. 13; BGH, decision of 4 October 2005 - VII ZB 9/05).
This principle must also apply accordingly to the recognition and enforcement of orders obtained in arbitration proceedings in non-European third countries.

c)
Nor does the principle of effectiveness under Article 4 para. 3 TEU require the court to ensure that an arbitral award such as the one at issue cannot be enforced, even with non-European effect.

aa)
From the perspective of EU law, the principle of effectiveness and thus compliance with EU law is already sufficiently effective.

In order to clarify the principle of effectiveness in the context of arbitration proceedings and clauses, the Court of Justice of the European Union has deduced from the principles of the primacy of Union law and sincere cooperation that Member States may not undertake to remove from the Union judicial system disputes which may concern the application and interpretation of Union law, and further that, as soon as such a dispute is brought before an arbitration body on the basis of an obligation contrary to Union law, they are obliged to challenge before that arbitration body or before the competent court the validity of the arbitration clause or the ad hoc arbitration agreement on the basis of which that body was seised (cf. ECJ, judgement of 26 October 2021 - Case C-109/20, para. 52: "PL Holdings").
In the present case, however, no dispute is being withheld from the Union court system. This requirement presupposes that a dispute needs to be resolved. However, this is not the case here. The fact that the arbitral award is irrelevant from a Union law perspective is, in the view of the Chamber, already established on the basis of supreme court case law and is also not called into question by the parties. In this respect, reference is made to the above statements.
The plaintiff country has also complied with the further requirement of the European Court of Justice to challenge the validity of the arbitration clause.

In so far as it is incumbent upon the Member States to ensure, in particular, the application and observance of Union law in their respective territories and, to that end, to take all appropriate measures, whether general or particular, to fulfil the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union (ECJ, judgement of 06.03.2018 - C-284/16,

para. 34: "Achmea"), the Chamber is also of the opinion that this requirement is fulfilled in this respect. This is because, according to the concurring statements of the parties, enforcement of the arbitral award at issue is neither intended nor apparent in the Federal Republic of Germany or throughout the EU.

bb)

Assuming - and thus hypothetically following the argumentation of the plaintiff country - that the principle of effectiveness requires that the enforcement of the arbitral award at issue also be prevented outside the European Union, the Chamber is of the opinion that the principle of effectiveness cannot be placed above respect for the state sovereignty of - constitutional - third countries. As already discussed, two elementary principles of Union law with constitutional status are in conflict with each other, which are not compatible in the assumed constellation. The principle of effectiveness ensures the primacy of Union law. It requires that the exercise of rights based on Union law is not made practically impossible or more difficult (see only ECJ, judgement of. 11.11.2015 - C-505/14, para. 40, cited in juris; judgement of 05.03.2019 - C-349/17, para. 137 et seq. cited in juris and: ECJ, judgement of 07.04.2022 - C-116/20, para. 100 et seq. cited in juris) and thus preserves the continued existence of the "structured network" (see ECJ, judgement of 6 March 2018, Case C-284/16: "Achmea", para. 33), which gives the European Union its character.

These values also include respect for the sovereignty of third countries. The "intrinsic" values mentioned in Art. 2 TEU are thus made an essential component of the European Union's external relations. Art. 21 TEU lists, for example, democracy, the rule of law, the universal validity and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principle of equality and solidarity and respect for the principles of the United Nations Charter and international law. A reference to the values can also be found in Art. 3 para. 5 TEU, which concerns the Union's relations with the rest of the world. Finally, Art. 8 TEU stipulates that the Union shall develop special relations with the countries in its neighbourhood in order to create an area of prosperity and good neighbourliness based on the values of the Union and characterised by close and peaceful relations based on cooperation (see Calliess/Ruffert/Calliess, 6th ed. 2022, EU-

Treaty (Lisbon) Art. 2 para. 37). However, if this foreign sovereignty is impaired by the imposition of a litigation ban outside the European Union, a part of the common values is abandoned. Common values cannot be safeguarded by a breach of themselves.

cc)
The result described above is also not overcome by considerations of state aid law.

The European Commission rightly stated that the plaintiff country, which notified the arbitral award at issue as aid requiring authorisation under Articles 107 and 108 TFEU, has not yet been granted such authorisation by the European Commission and that the plaintiff country is therefore subject to a standstill obligation under Article 108 para. 3 sentence 3 TFEU, i.e. it is not permitted to take any implementing measures until the Commission has adopted a final decision, and that this obligation also exists even before the initiation of a formal investigation procedure.

However, the standstill obligation can be overcome by a so-called "fictitious authorisation". According to Art. 4 para. 6 of Regulation (EU) No. 1589/2015, such an "Fictitious authorisation" may occur if the applicant country notifies the Commission of its intention to implement the measure in question within two months of notification of the aid and the Commission does not adopt a decision concluding the preliminary examination procedure within a further 15 working days of receipt of this notification.

It is clear from the European Commission's statement that the plaintiff country in this case did not make a notification in this sense (p. 16 of the opinion under footnote 35, p. 603 dA). In light of the fact that the plaintiff country thus has the opportunity to pursue the examination procedure with the consequence of not contradicting Union law by complying with the arbitral award, it proves to be contradictory behaviour to rely solely on the standstill obligation without using all available instruments to accelerate the procedure.

3.

Against the background of the plaintiff's failure to attempt to bring about the fictitious authorisation of Art. 4 para. 6 of Regulation (EU) No. 2015/1589, which might have been suitable for resolving the contradiction with Union law in which the plaintiff country sees itself with regard to the payment of the arbitral award at issue, the plaintiff country also lacks the legal need for protection to obtain an order against the defendants, according to which they should be prohibited from pursuing the recognition and enforcement of the arbitral award in non-European countries. This follows from the legal concept of Section 242 BGB. This is because the plaintiff country is contradicting itself if, on the one hand, it asserts that the defendant side is invoking the formal position of the order from the arbitration proceedings in a tortious manner and, on the other hand, does not utilise the options available to it to bring about a binding decision by the Commission. Last but not least, the European Commission, as its representative stated at the hearing, did not bring the model case it had initiated to a conclusion at first instance within the 18-month time limit applicable to it.
Overall, the Chamber is unable to agree with the legal considerations made by the plaintiff country in this respect that there is a need for legal protection due to the threat of payment by the plaintiff country in violation of European law - through enforcement in a third country. For example, enforcement against the non-European assets of the plaintiff country cannot be regarded as an act by Spain that is contrary to European law, because even the state aid regulations of the European Union provide for a fictitious authorisation (see above). Moreover, the investment of state assets in non-European third countries, which cannot be prevented by EU law, is the sovereign decision of the respective state. The consequence resulting from the territorial principle (see above) - at least in the case of an existing judicial system based on the rule of law, as can be assumed for the USA - of being subject to the law of the non-European third country in this respect is therefore both a consequence and a consequence of autonomous state decision.

4.

However, for the sake of completeness, the Chamber has no reservations about the admissibility of the action in other respects.

There is neither a conflict with Art. 351 TFEU, nor does the action prove to be inadmissible due to a violation of Art. 54, 53 ICSID.

a)

Art. 351 TFEU is not applicable to the present case.
According to Art. 351 TFEU, the rights and obligations arising from agreements concluded before 1 January 1958 or, in the case of states that acceded later, before the date of their accession between one or more Member States on the one hand and one or more third countries on the other, are not affected by the Treaties. The purpose of the provision is to protect the Member States from breaches of international law vis-à-vis third countries that would be caused by the primacy of Union law and thus takes into account the maxim of "pacta sund servanda" (BGH, decision of 27 July 2023 - I ZB 43/22, para. 84).
Neither the ECT nor the ICSID Statute take precedence over the treaties.
The plaintiff country, which joined the European Community on 1 January 1986, and the Federal Republic of Germany, which was a founding member of the European Economic Community on 1 January 1958, acceded to the international agreements at issue, i.e. the ECT and the ICSID Statute, after their accession to the European Union or its predecessor entities.
The ICSID Convention only entered into force for the plaintiff country in 1994 and for the Federal Republic of Germany in 1969 (see: https://icsid.worldbank.org/about/member-states/database-of-member-states, last accessed on 19.01.2024).
The Energy Charter Treaty entered into force in 1998 at the earliest (https://energy.ec.europa.eu/topics/international-cooperation/international-organisations-and-initiatives/energy-charter_en#:text=There%20are%20currently%2056%20signatories,energy%20cooperation%20among%20the%20signatories, last accessed on 19.01.2024).

b)

Whether Articles 53 and 54 of the ICSID Convention have the blocking effect assumed by the defendants can ultimately be left open. For even if the norms had a blocking effect, the defendants could not invoke such an effect. This is because the provisions of the ICSID Convention, which

from the perspective of international law have the status of a simple federal law, may not be applied by the Regional Court of Essen anyway due to the primacy of European Community law, insofar as they would stand in the way of admissible proceedings (BGH, decision of 27 July 2023 - I ZB 43/22, para. 75).

5.

a)

With regard to auxiliary request I, which provides for a time limit on the prohibition to conduct proceedings or take measures to be imposed until a final decision has been made by the European Commission on the compatibility of the arbitral award at issue with the internal market of the European Union, the above considerations apply to the same extent. In this respect, too, the legal protection objective proves to be inadmissible. To avoid repetition, reference is made to the above statements. The temporal limitation of the injunction sought does not change this, as the indirect interference with foreign judicial sovereignty would continue to exist. Furthermore, the plaintiff country lacks the necessary need for legal protection, particularly in view of the fact that it could have brought about a fictitious authorisation under state aid law.

b)

The alternative claim under II. is also inadmissible according to the above statements. In this respect, there is already no interest in a declaratory judgement because the requested declaration is directed at an inadmissible legal protection objective. Reference is expressly made to the above statements in this respect in order to avoid repetition.

In addition, even according to the express statements of the plaintiff country (cf. statement of 18 December 2023, p. 851 of the file, para. 50 f.), the requested declaration has no influence on the legal dispute conducted outside of Europe. In these cases, the necessary interest in a declaratory judgement is lacking (see MüKoZPO/Becker-Eberhard, 6th ed. 2020, ZPO Section 256 para. 49 with reference to BGHZ 32, 173 (177) = NJW 1960, 1297; BGH MDR 1982, 828). Nor can be established that the judgement is suitable for creating clarity about the legal relationships between the parties, at least for the national territory (see MüKoZPO/Becker-Eberhard, 6th ed. 2020, ZPO Section 256).

c)

Auxiliary request III proves to be inadmissible because it lacks the need for legal protection. Both the plaintiff country and the defendant side are aware with legal certainty - as has been clearly shown in the mutual written submissions - that the pursuit of the recognition and enforcement of the arbitral award at issue in the Federal Republic of Germany will be unsuccessful. According to the case law of the Court of Justice of the European Union (ECJ, judgement of 06.03.2018, case C-284/16: "Achmea"; judgement of 02.09.2021, case C-741/19: Komstroy") and the Federal Court of Justice (order of 27 July 2023 - I ZB 43/22), domestic courts are not permitted to do so. Furthermore, there is also no need for legal protection in this respect because, according to the parties' concurring submissions, the defendants have neither taken any measures to promote enforcement and recognition in the Federal Republic of Germany nor have they given any indication that they intend to pursue enforcement in the Federal Republic of Germany at all, let alone take any action in this jurisdiction to directly or indirectly force the plaintiff country to pay the arbitral award at issue by court or official order.

6.

No decision had to be made on the auxiliary request from the pleading dated 18 December 2023 due to the lack of a condition. For the sake of completeness only, it should be noted that the above considerations apply mutatis mutandis in this respect and, in particular, the desired influence on the defendant 2) with the aim of not taking actions in accordance with the requests made does not constitute an admissible legal protection objective.

III. Justification

The complaint is - also in this respect in view of above statements for the sake of completeness - unfounded in substance. The primary law regulations do not have the character of a claim in the sense requested. The question of the nationally applicable

law is not relevant in this respect due to the application of the respective standards in conformity with European law, which is required under both Spanish and German law. In the opinion of the Chamber, US law is not applicable (see 3a) below).

In detail:

1.

The plaintiff country has no claim against the defendants under Art. 267, 344 TFEU in conjunction with Art. 19 TEU. Art. 19 TEU does not entitle the plaintiff to an injunction against the defendants to enforce the arbitral award at issue.

There are no indications, either from the wording of the provisions or from the interpretation of the standards, which is ultimately the responsibility of the Court of Justice of the European Union, that it is necessary to grant a public authority a subjective right with effect outside the Union against other legal subjects in order to effectively safeguard their meaning.
In this respect, the Court of Justice of the European Union has held that ICSID arbitral awards - and thus, in the Chamber's view, also the arbitral award of 18 December 2020 at issue - are not compatible with Articles 267 and 344 TFEU and, against this background, cannot be enforced in the European Union (ECJ, judgement of 6 March 2018, Case C-284/16: "Achmea"; judgement of 2 September 2021, Case C-741/19: "Komstroy"). Thus, the underlying arbitration clause calls into question the preservation of the specific nature of Union law in violation of the principles of sincere cooperation and the autonomy of Union law because, in particular, the possibility of a preliminary ruling is not given.
However, it follows neither from these nor from other decisions of the Court of Justice that it is necessary to proceed with effect outside the Union.
This result is in line with the problems already discussed in the context of admissibility, so that reference is made to the statements made there in addition and to avoid repetition.

b)

State aid considerations within the meaning of Art. 107 para. 1, 108 para. 3 sentence 3 TFEU also do not lead to the injunctive relief sought by the plaintiff country.

Thus, in the Chamber's opinion, Art. 108 para. 3 sentence 3 TFEU - its applicability and the conditions, in particular the existence of a "state aid" - in the nature of an entitlement with non-European effect. The state aid regulations authorise and oblige the member states, but not non-European states. Finally, Article 4 para. 6 of Regulation (EU) No 1589/2015 would preclude an assumed claim in that - as already discussed in detail - the plaintiff country contradicts itself if, on the one hand, it asserts that the defendant side would invoke the formal position of the title from the arbitration proceedings in a tortious manner and, on the other hand, does not utilise the possibilities to which it is entitled to bring about a binding decision by the Commission.

2.

There is also no apparent national basis for the claim of the plaintiff country. As a result, the Chamber can leave open whether German or Spanish law would apply in this case. The Chamber denies the applicability of US law.

a)

In the opinion of the Chamber, the decision on the legal dispute pursuant to Art. 4 para. 3 sentence 1 of Regulation (EC) No. 864/2007 (hereinafter: "Rome II Regulation") must be based on Spanish substantive law.
This Regulation shall apply to non-contractual obligations in civil and commercial matters which have a connection with the law of different States and shall be used as part of private international law to determine the relevant substantive law.
The Regulation contains references to substantive standards that take into account special case constellations and a general conflict-of-law rule, Art. 4 Rome II Regulation, as a catch-all provision.
A special conflict rule is not relevant in the present case. In particular, the Chamber does not agree with the plaintiff's view that the relevant substantive law is determined on the basis of Article 6 para. 3 Rome II Regulation, which deals with non-contractual obligations based on behaviour restricting competition.

The provision is not applicable to the constellation here, in which the plaintiff country fears that it is providing aid that restricts competition by complying with the arbitral award. This is because the conflict rule does not cover state proceedings (see Spickhoff, in BeckOK BGB, 68th edition, as of 1 August 2023, on Art. 6 para. 3; Thorn, in Grüneberg, Kommentar zum Bürgerlichen Gesetzbuch, 83rd edition 2024, Art. 6 Rome II Regulation, para. 7).
This follows both from the structure of the provision, which is primarily aimed at actions brought by competitors, and from recital 23 of the Regulation. It states that, for the purposes of the Regulation, the concept of restriction of competition should cover prohibitions on agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in a Member State or within the internal market, as well as the prohibition on abuse of a dominant position in a Member State or within the internal market. In this respect, the recital emphasises that the behaviour restricting competition does not originate from a state institution, but from private actors.

The defendants must be admitted insofar that according to the general conflict rule of Art. 4 para. 1 Rome II Regulation, the application of US law is obvious because Spanish assets are to be enforced in the USA.
In the present case, however, Article 4 para. 1 of the Rome II Regulation is superseded by Article 4 para. 3 of the Regulation.
It is clear from the circumstances as a whole that the tort complained of by the plaintiff country, namely the enforcement by the defendants of the arbitral award made in their favour, is manifestly more closely connected with a State other than that referred to in paragraphs 1 or 2 of the provision. As a consequence, the law of that other state - in this case, in the opinion of the Chamber, ultimately that of the Kingdom of Spain - must be applied.
In the present case, there is a close connection to the law of the Kingdom of Spain. This is because the dispute originated from a change in Spanish legislation which prompted the defendants operating in the market of the Kingdom of Spain to initiate arbitration proceedings on the basis of a breach of the Energy Charter Treaty, which resulted in the

arbitral award. Furthermore, it is a case of action on the Spanish market and - insofar as it actually constitutes aid - aid that would be provided by the Kingdom of Spain.

b)
However, there is no basis for a claim for the requested injunction or declaration under either German or Spanish law.

Assuming the application of German law, the requirements of Section 826 BGB are not met. Against the background of the arbitration proceedings to assert the claims on which the arbitral award is based, which were legally possible at the time of collection, there is clearly no immoral obtaining of an order by the defendant. The arbitration proceedings conducted by the defendant's legal predecessors before the ICSID in Washington since December 2014 corresponded to the applicable legal situation until the ECJ case law discussed in detail above.
In the conduct of proceedings under the rule of law - in this case the proceedings conducted before the US District Court of Columbia in December 2021 - such an immorality cannot be recognised, taking into account the high requirements for the assumption of immorality of the enforcement in this respect, especially since the plaintiff country could have effected fulfilment of the arbitral award in a permissible manner in conformity with European law in accordance with Art. 4 para. 6 Regulation (EU) No. 1589/2015, i.e. payment would not always be contrary to European law even under the legal bases of European law. Finally, the examination of the immorality of enforcement in US territory against the claimant country's assets there - as already explained above with reference to the case law of the Federal Court of Justice - is the sole responsibility of the courts there.

If German law continues to be applied, it remains to be seen whether Art. 267 and 344 TFEU or the EU state aid provisions, in particular Art. 108 para. 3 sentence 3 TFEU, constitute protective laws within the meaning of Sections 1004 and 823 BGB. This is because the aforementioned national regulations would have to be applied against the background of Community law, according to which the national courts are not called upon or authorised to issue an extra-European anti-suit injunction (cf. in detail above). The same applies to a claim for injunctive relief under

Spanish law. In this respect, there was no need to obtain a legal opinion on Spanish law (which was at best supplementary in view of the legal opinion of Prof. Eugenio Llamas Pombo, pp. 1251 et seq. of the file), as the principles of European law are equally binding on the application of the provisions of this Member State.

V. Suspension of the legal dispute and referral to the Court of Justice of the European Union

The suspension of the legal dispute and the referral to the Court of Justice of the European Union within the meaning of Art. 267 TFEU was not necessary.

Courts that are not courts of last instance only have to stay proceedings on the basis of the European Court of Justice's monopoly on rejection if they have serious doubts about the validity of a Union standard and therefore do not wish to apply it (cf. on the duty to refer: ECJ, judgement of 4 June 2002 - Case C-99/00, para. 15: "Lyckeskog"), or if they deliberately wish to deviate from the previous interpretation of a Union provision by the Court of Justice (cf. in this respect Ehricke, in Streinz, TFEU, 3rd ed. 2018, on Art. 267, para. 45).

As the above considerations show, neither is the case here.

VI. Ancillary decisions

The decision on costs is based on Sections 91 para. 1 sentence 1, 269 ZPO. The decision on provisional enforceability is based on section 709 sentence 1, 2 ZPO.

VII.

The defendant's written submission of 25 March 2024 - which was not remitted - gives no reason to reopen the oral proceedings. The Chamber did not base its decision on the content of the pleading. The question of the procedural status of the annulment proceedings before the ad hoc committee initiated by the plaintiff country

have no influence on the Chamber's decision.

Wolf Brill Sentker

Notarised
Clerk of the District Court Essen

LANDGERICHT NORDRHEIN-WESTFALEN