FEDERAL COURT OF JUSTICE

DECISION

I ZB 75/22

Proclaimed on:
27 July 2023
Hemminger Clerk of
the Court as clerk of
the court registry

in the proceedings
for a declaration of the inadmissibility of the arbitration proceedings

ECLI:DE:BGH:2023:270723BIZB75.22.0

At the hearing on 17 May 2023, the First Civil Senate of the Federal Court of Justice (Bundesgerichtshof) by the Presiding Judge Prof. Dr. Koch, Judge Feddersen, Judges Pohl and Dr. Schmaltz, and Judge Odörfer

decided:

On the appeal on points of law of the respondent, the order of the 19th Civil Senate of the Cologne Higher Regional Court of 1 September 2022 is set aside on points of costs and to the extent that it was found against the respondent with regard to application no. 2.

To the extent of the annulment, the second request for a declaration that any arbitration proceedings between the applicant and the respondent on the basis of Art. 26 paras. 3 and 4 ECV are inadmissible is dismissed as inadmissible.

The costs of the proceedings shall be borne by the applicant at /$^{1}_{3}$ and by the defendant at /$^{2}_{3}$.

The value of the subject matter of the appeal is set at € 30 million.

Reasons:

1 A. The applicant is the Kingdom of the Netherlands (hereinafter 'the Netherlands'). derlande"). The respondent has its registered office in the Federal Republic of Germany (hereinafter "Germany"). It invests, inter alia, in conventional electricity generation from coal.

2 The respondent considers its investments in the property located in the territory of the Applicant's coal-fired power plant located at G. in the port of E.

harmed as a result of the claimant's regulatory decision to phase out coal-fired power generation by 2030. It therefore filed a request with another arbitration claimant on 20 January 2021 to initiate arbitration proceedings against the claimant on the basis of the Energy Charter Treaty at the International Centre for Settlement of Investment Disputes (hereinafter "ICSID" or "the Centre"). The proceedings were registered on 2 February 2021 under reference ICSID ARB/21/4; the arbitral tribunal was constituted on 2 June 2021. The arbitration claimants quantified their claims at *€1*.4 billion.

3 The Energy Charter Treaty is a multilateral agreement on cooperation in the energy sector which was ratified by 49 states as well as the European Union (EU) and the European Atomic Energy Community (Euratom) and entered into force on 16 April 1998. Since that date, the Energy Charter Treaty has also been in force in Germany (BGBl. II 1998 p. 3009; hereinafter "ECT") after approval by law of 20 December 1996 (BGBl. II 1997 p. 4) and, after ratification on 11 December 1997, in the Netherlands.

4 In Art. 10 ECT, the contracting parties ensure the promotion and protection of investments by creating stable, equitable, favourable and transparent conditions for investors of other contracting states. In Art. 13 ECT, protection against expropriation without compensation is granted, among other things. Both provisions are found in Part III of the Energy Charter Treaty. According to Art. 26 ECT, the investor from a Contracting State has the possibility to take another Contracting State to arbitration for possible violations of the Energy Charter Treaty. The provision reads in part:

> (1) Disputes between a Party and an investor of another Party concerning an investment by the latter in the territory of the former, relating to an alleged breach by the former Party of an obligation under Part III, shall be settled amicably, if possible.
>
> (2) If such disputes cannot be settled amicably within three months of the date on which one of the parties to the dispute has requested an amicable settlement,

be settled in accordance with paragraph 1, the investor as party to the dispute may have the dispute settled in the following manner:

a) by the civil or administrative courts of the Party involved in the dispute;

b) in accordance with an applicable, previously agreed dispute resolution procedure; or

c) in accordance with the following paragraphs.

(3) (a) Subject only to subparagraphs (b) and (c), each Party hereby gives its unconditional consent to submit a dispute to international arbitration or conciliation in accordance with this Article. ...

(4) Where an investor intends to submit the dispute to resolution under paragraph 2(c), it shall also give its consent in writing for the dispute to be submitted to the following entities:

(a) (i) the International Centre for Settlement of Investment Disputes established under the Convention for the Settlement of Investment Disputes between States and Nationals of Other States opened for signature in Washington on 18 March 1965 (hereinafter referred to as the "ICSID Convention"), if both the Party of the investor and the Party to the dispute are Parties to the ICSID Convention;...

(5) (a) consent under paragraph 3 together with the investor's written consent under paragraph 4 shall be deemed to satisfy the requirement of

(i) the written consent of the parties to the dispute within the meaning of Chapter II of the ICSID Convention and within the meaning of the Additional Facility Rules, ...

(6) An arbitral tribunal constituted in accordance with paragraph 4 shall decide the issues in dispute in accordance with this Treaty and the applicable rules and principles of international law. ...

The Convention of 18 March 1965 on the Settlement of Investi

5 The International Centre for Settlement of Investment Disputes (hereinafter referred to as the "ICSID Convention") was established to provide conciliation and arbitration facilities for the settlement of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of the Convention (Art. 1 ICSID Convention). The German Bundestag approved the ICSID Convention by Act of

25 February 1969 (Federal Law Gazette II p. 369; hereinafter "InvStreitBeilG"); the Convention entered into force on 18 May 1969 (Federal Law Gazette II p. 1191). The Netherlands signed the ICSID Convention on 25 May 1966; it entered into force there on 14 October 1966.

6 With its applications received by the Higher Regional Court on 10 May 2021, the Applicant sought a declaration of inadmissibility of the arbitration proceedings instituted under ICSID ARB/21/4 (Application No. 1) as well as of any arbitral proceedings pursuant to Article 26 (3) and (4) ECT (Application No. 2). The Higher Regional Court granted the applications (OLG Köln, order of 1 September 2022 - 19 SchH 15/21, juris). The respondent's appeal is directed against this and the applicant requests that it be dismissed.

7 B. The Higher Regional Court essentially stated in justification of its decision:

8 Pursuant to § 13 GVG in conjunction with § 40 .2 sentence 1 half-sentence 1 VwGO, recourse to the ordinary courts was open for the application under § 1032.2 ZPO. The factual, local and international jurisdiction followed from § 1062.1 no. 2 and § 1062.2 ZPO. In the absence of a domestic place of arbitration, the seat of the respondent was decisive, which gave rise to the jurisdiction of the Senate.

9 Application No. 1 had been filed in due time before the constitution of the arbitral tribunal. Its admissibility was not precluded by the closed legal system of the ICSID Convention. In this case, it was not the arbitration claim under the ICSID Convention that had to be decided, but whether there was an effective arbitration agreement based on the provision of Article 26 of the ECT, which was also under European Union law, as the basis of the arbitration proceedings. It was up to the national courts to give full effect to Union law. An early determination of the ineffectiveness of the arbitration agreement under Union law was, according to

The court stated that the provision of section 1032 (2) of the Code of Civil Procedure, which serves procedural economy, is possible and must also be admissible for ICSID proceedings.

10 The application under 1 was also well-founded. There was no valid arbitration agreement. The arbitration clause in Art. 26 para. 2 lit. c, para. 3 and 4 ECT was incompatible with Union law in intra-EU disputes according to the case-law of the Court of Justice of the European Union. It is true that arbitration proceedings under the ICSID Convention are in principle not subject to the control of national courts. However, the monopoly of jurisdiction of the Court of Justice of the European Union precludes a binding interpretation and application of Union law by the arbitral tribunal. This also applies to arbitration proceedings with seat outside the European Union and to ICSID arbitration proceedings. For the effectiveness of Union law, it must also be possible to assert in advance the preliminary question of the inadmissibility of the arbitral proceedings because of a violation of Union law.

11 The second application was also admissible and well-founded. For the application under § 1032.2 of the Code of Civil Procedure, there did not have to be a concrete dispute. The only general need for legal protection required was given.

12 C. The appeal on points of law is admissible (§ 574.1 sentence 1 no. 1 of the Code of Civil Procedure in conjunction with § 1065.1 sentence 1, § 1062.1 no. 2 case 1, § 1032.2 of the Code of Civil Procedure) and otherwise admissible (§ 574.2 of the Code of Civil Procedure). It proves to be partially well-founded. The Higher Regional Court rightly held that the first application for a declaration of the inadmissibility of the arbitration proceedings was admissible (see C I) and well-founded (see C II). A referral to the Court of Justice of the European Union is not necessary (see C III). The second application for a declaration of inadmissibility of any arbitral proceedings between the parties, on the other hand, is inadmissible, contrary to the opinion of the Higher Regional Court (see C IV).

13 I. The application to 1 pursuant to § 1032.2 of the Code of Civil Procedure is admissible. The question of whether recourse to the ordinary courts is open is not subject to the

Review by the appellate court (see C I 1). The German courts have international jurisdiction to decide on the application (see C I 2). The application was filed in time (see C I 3) and is also admissible (see C I 4). There is also a need for legal protection for the application (see C I 5).

14 (1) The question of whether recourse to the ordinary courts is open pursuant to section 13 GVG, section 40(2) sentence 1 VwGO, is subject in the dispute pursuant to section 17a VwGO.
(5) GVG is not subject to review by the court of appeal.

15 a) The Higher Regional Court assumed that recourse to the ordinary courts was open pursuant to § 13 GVG. The case concerned secondary claims of a private investor against a party to an international treaty, for which the ordinary courts had jurisdiction pursuant to the special displacement allocation in § 40.2 sentence 1 half-sentence 1 VwGO.

16 b) Pursuant to § 17a.5 GVG, the court that decides on an appeal against a decision on the merits does not examine whether the legal action taken is admissible. The provision also applies to decisions that are capable of formal res judicata (see MünchKomm, ZPO/Pabst, 6th ed., § 17a GVG marginal no. 25). This is the situation here. In its order, the Higher Regional Court expressly affirmed the civil-law remedy and also considered the application to be admissible and well-founded in all other respects pursuant to § 1032.2 of the Code of Civil Procedure.

17 c) The admissibility of the legal remedy is also not to be reviewed by the Senate as an exception. If the Court of First Instance, contrary to § 17a.3 sentence 2 GVG, has not decided on the admissibility of the legal remedy in advance by order, but only in the decision on the merits, § 17a.5 GVG is not applicable. 5 GVG is not applicable (see BGH, Order of 23 September 1992 I ZB 3/92, BGHZ 119, 246 [juris para. 15] - Rechtswegprüfung; Order of 3 November 2021 - XII ZB 289/21, NZFam 2022, 63 [juris para. 9], etc.). However, such a preliminary ruling was not necessary here. The response to the appeal rightly points out that there is no need for a preliminary ruling.

explicit denial of the civil-law remedy by the respondent in the first-instance proceedings and thus the objection under § 17a.3 sentence 2 GVG, which is necessary for an obligation to make a preliminary ruling, is lacking.

18 aa) If the parties have not objected to the admissibility of the legal action taken and the court of first instance was therefore allowed to refrain from a preliminary ruling pursuant to § 17a.3 GVG, the appellate court is bound by the jurisdiction, even if only tacitly affirmed, even in doubtful cases (see BGH, Order of 18 September 2008 - V ZB 40/08, NJW 2008, 3572 [juris para. 13 et seq, 16 f.]; Jacobs in Stein/Jonas, ZPO, 23rd ed., § 17a GVG marginal no. 24). The complaint must be made expressly and within the time limit of § 282.3 ZPO (see Wittschier in Musielak/Voit, ZPO, 20th ed, § 17a GVG marginal no. 12; on the validity of § 282.3 ZPO see BGH, judgment of 25 February 1993 - III ZR 9/92, BGHZ 121, 367 [juris marginal no. 15]; judgment of 18 November 1998 - VIII ZR 269/97, NJW 1999, 651 [juris marginal no. 7]; Zöller/Lückemann, ZPO, 34th ed., § 17a GVG marginal no. 6). The appeal does not have to be expressly designated as such. What is required, however, is a submission that clearly disputes the admissibility of the legal remedy (VGH Baden-Württemberg, WissR 2020, 209 [juris marginal no. 3]; Kissel/Mayer, GVG, 10th ed., § 17 marginal no. 27, both with corroboration). This is lacking here.

19 bb) In its response to the application of 9 July 2021, and thus within the time limit of § 282.3 sentence 2 of the Code of Civil Procedure, the respondent did not expressly and unambiguously challenge the admissibility of recourse to the ordinary courts within the meaning of § 17a.3 sentence 2 of the Code of Civil Procedure. The interpretation of the submissions referred to by the appeal on points of law shows that the admissibility of recourse to the Higher Regional Court and thus the competition between state courts was not challenged. Rather, the argument concerned the question whether an action under § 1032.2 of the Code of Civil Procedure is possible at all before the state courts. The respondent did mention § 13 GVG, according to which civil disputes belong before the ordinary courts - among other things - for which either the

jurisdiction of administrative authorities or administrative courts is established or special courts are appointed or admitted on the basis of provisions of federal law. However, it then submitted under the heading "The provisions of §§ 1025 et seq. are not applicable to ICSID arbitration proceedings" on the relationship of civil-law disputes before the ordinary courts to international-law disputes before an international arbitral tribunal. In a later submission, the respondent confirmed that it was generally concerned with an "exclusion of state jurisdiction in ICSID arbitration proceedings". Thus, in the overall view, it aimed at the lack of admissibility of the application under § 1032.2 of the Code of Civil Procedure before a state court, which was intended to support its sole application for dismissal of the applications - primarily as inadmissible. It was precisely not a matter of referring the case to another state court on the grounds of the inadmissibility of the legal action taken, which it therefore did not request in the alternative.

20 2 The German courts have international jurisdiction pursuant to section 1025 (2) of the Code of Civil Procedure for the application pursuant to section 1032 (2) of the Code of Civil Procedure.

21 a) The international jurisdiction of the German courts is to be examined ex officio in appeal proceedings. The examination is not excluded by section 576 (2) of the Code of Civil Procedure; nothing else applies to the appeal proceedings than to the appeal proceedings, in which section 545 (2) of the Code of Civil Procedure does not preclude the examination of international jurisdiction (see BGH, order of 13 August 2009 - I ZB 43/08 [2009] WRP 1559 [juris, marginal note]; order of 22 August 2009 - I ZB 43/08 [juris, marginal note]). August 2009 - I ZB 43/08, WRP 2009, 1559 [juris para. 10]; Order of 22 September 2016 - V ZB 125/15, RIW 2017, 138 [juris para. 8]; on Section 545 (2) ZPO see only BGH, Judgment of 14 July

2022 - I ZR 121/21, GRUR 2022, 1675 [juris para. 29] = WRP 2022, 1519 - Google-Drittauskunft, mwN).

22 b) The international jurisdiction for the application under § 1032.2 of the Code of Civil Procedure results in the case in dispute from the analogous application of § 1025.2 of the Code of Civil Procedure.

23 aa) Pursuant to section 1032 (2) of the Code of Civil Procedure, an application for a declaration of the admissibility or inadmissibility of arbitral proceedings may be filed with the court until the arbitral tribunal has been constituted. Pursuant to section 1025 (2) ZPO, the provisions of sections 1032, 1033 and 1050 ZPO are also applicable if the place of arbitration is abroad or has not yet been determined.

24 bb) The provision of § 1025 (2) ZPO thus regulates the international jurisdiction of the German courts for - inter alia - the proceedings under § 1032 (2) ZPO (see Geimer, IZPR, 8th ed, marginal no. 1258 f.; MünchKomm.ZPO/ Münch loc.cit. § 1025 marginal no. 18; Schlosser in Stein/Jonas loc.cit. § 1062 marginal no. 4, § 1025 marginal no. 6; Voit in Musielak/Voit loc.cit. § 1062 marginal no. 1, § 1025 marginal no. 5; aA Kröll, IHR 2005, 142, 144). Insofar as the respondent asserts that the inclusion of § 1032.2 of the Code of Civil Procedure in § 1025.2 of the Code of Civil Procedure is a legislative oversight, it does not succeed. It is true that the explanatory memorandum to the Act only refers to the arbitration defence in legal proceedings before the state courts pursuant to § 1032 (1) ZPO (cf. Government Draft of an Act to Reorganise Arbitration Law of 12 July 1996, BT-Drucks. 13/5274, S. 31). However, a possible exclusion of § 1032 (2) and (3) ZPO in the application of § 1025 (2) ZPO did not find expression in the law. For the interpretation of a statutory provision, however, the objective intention of the legislature expressed in it is decisive, as it results from the wording of the statutory provision and the context in which it is placed. The interpretation, which is to be based primarily on the objective meaning and purpose of the law, cannot be bound by motives that were set out in the legislative process but have not been expressed in the wording of the law (see BGH, Judgment of 6 June 2019 - I ZR 67/18, GRUR 2019, 970 [juris, marginal no. 66] = WRP 2019, 1304 - Erfolgshonorar für Versicherungsberater, mwN).

25 cc) The international jurisdiction of German courts does not already follow from the wording of § 1025.2 ZPO. The arbitral proceedings initiated by the respondent neither take place "abroad" within the meaning of this provision (case 1) nor is the place of the arbitral proceedings "not yet determined" (case 2).

26 (1) The arbitration was initiated by the respondent before the Centre. Pursuant to Art. 2 sentence 1 of the ICSID Convention, the seat of the Centre is at the seat of the International Bank for Reconstruction and Development and thus in Washington D.C., United States of America (USA). Pursuant to Art. 62 f. in Chapter VII of the ICSID Convention, the arbitral proceedings take place at the seat of the Centre, which is to be distinguished from the arbitral tribunal (cf. Schöbener/Markert, ZVglRWiss 2006, 65, 73), subject to other party agreements.

27 (2) However, it does not follow from this that the place of arbitration relevant for § 1025.2 ZPO is in the USA and thus abroad.

28 Contrary to what the title of Chapter VII of the ICSID Convention - "Place of Proceedings" - might suggest, Art. 62 et seq. ICSID Convention only regulates the place of the hearing as the place where the arbitral tribunal actually holds its hearings. This place of meeting is not to be equated with the place of arbitration as the legal domicile of the arbitral proceedings, which serves to anchor the arbitral proceedings in a certain legal system (cf. BT-Drucks. 13/5274, p. 47; BeckOK.ZPO/ Wilske/Markert, 48th edition [as at 1 March 2023], § 1043 marginal no. 1; MünchKomm.ZPO/Münch loc.cit. § 1043 marginal no. 3 and 5; Zöller/Geimer loc.cit. § 1043 marginal no. 1 and 4).

29 This corresponds to the overwhelming view in national and international literature on the ICSID Convention. According to this, investor-state arbitration proceedings under this Convention take place in a delocalised manner (cf. Kern, Schiedsgericht und Generalklausel, 2017, pp. 62, 78; Bertolini, Die Durchsetzung von ISDS-Entscheidungen in Deutschland, 2019, p. 92; Köster, Investitionsschutz in Europa, 2022, p. 16 f.; Schütze/Thümmel, Schiedsgericht und Schiedsverfahren, 7th ed., Section 25 para. 6; Happ in Schütze, Institutionelle Schiedsgerichtsbarkeit, 3rd ed, XV Chapter, Section II para. 13, Section IV Rule 13 ICSID Arbitration Rules para. 5; Sasson in Fouret/Gerbay/Alvarez, The ICSID Convention, Regulations and Rules, A Practical Commentary, Art. 62 para. 7.03 f.; Schütze in Wieczorek/Schütze, ZPO, 5th ed, § 1025 marginal no. 56b; Gaillard, ICSID Review - Foreign Investment Law Journal 1988, 136, 138 f.; Berger, SchiedsVZ 2017, 282, 289; von Marschall, RIW 2021, 785, 787; Nikolov, EuR 2022, 496, 501; Seelmann-Eggebert, SchiedsVZ 2023, 32, 35 f.; aA Semler, SchiedsVZ 2003, 97, 101).

30 Arbitral awards issued by ICSID arbitral tribunals are therefore neither domestic nor foreign arbitral awards within the meaning of §§ 1060 et seq. ZPO, but rather arbitral awards sui generis (see Semler, SchiedsVZ 2003, 97, 99; von Marschall, RIW 2021, 785, 787). Contrary to the principle applicable in commercial arbitration that there are no private arbitral proceedings detached from any national legal system (cf. Geimer loc.cit. marginal no. 3718; MünchKomm.ZPO/Münch loc.cit. § 1025 marginal no. 11; Schütze in Wieczorek/Schütze loc.cit. § 1043 marginal no. 6 f.), an investment dispute before the centre exceptionally results in an international arbitral proceeding (Köster loc.cit. p. 16 f.).

31 (3) There is also no case of a "not yet determined" place of arbitration (section 1025 (2) case 2 ZPO). The wording "not yet determined" speaks for a merely temporary situation. Pursuant to section 1043, subsection 1, sentence 1 of the Code of Civil Procedure, the parties may reach an agreement on the place of arbitration. In the absence of such an agreement, the place of arbitration is determined by the parties.

The arbitral tribunal shall determine the venue of the proceedings (section 1043 (1) sentence 2 ZPO). Until such a determination, there is a state of suspense without the possibility of a territorial connection. This state of suspense is governed by the provision in § 1025 (2) case 2 ZPO (cf. MünchKomm.ZPO/Münch loc.cit. § 1025 marginal no. 24).

32 Such a - temporary - state of limbo does not exist in the dispute. In an ICSID arbitration, no place of arbitration is determined, but only a venue. A later determination of the place of arbitration by the arbitral tribunal is therefore ruled out from the outset.

33 dd) However, the provision of § 1025.2 ZPO is to be applied accordingly, at least insofar as it refers to the provision of § 1032 ZPO, if there is no domestic place of arbitration (similarly BeckOK.ZPO/Wolf/Eslami, 48th edition [as at 1 September 2022], § 1032 marginal no. 39; rejecting BeckOK.ZPO/ Wilske/Markert aaO § 1062 marginal no. 2.4 mwN).

34 (1) The analogous application of a provision requires an unplanned regulatory gap and a comparable interest situation (settled case law; see only BGH, Judgment of 7 November 2019 - I ZR 42/19, GRUR 2020, 429 [juris, marginal no. 32] = WRP 2020, 452 - Sportwetten in Gaststätten, mwN). These requirements are fulfilled.

35 (2) Insofar as the delocalised and thus anational ICSID investment arbitration proceedings are not covered by the wording of the law, there is an unplanned gap in the law. There is no indication that the legislature intended to exclude this particular constellation from the 10th Book of the Code of Civil Procedure.

36 (a) Pursuant to section 1025, subsection 1 of the Code of Civil Procedure, the provisions of the 10th Book of the Code of Civil Procedure are applicable if the place of the arbitral proceedings within the meaning of section 1043, subsection 1 of the Code of Civil Procedure is in Germany. For some provisions of the 10th Book of the Code of Civil Procedure, inter alia the arbitration defence under § 1032.1 of

the Code of Civil Procedure as well as the declaratory proceedings relevant here under

§ 1032 (2) ZPO, the provision of § 1025 (2) ZPO - as already explained - opens up a further scope of application if the place of arbitration is abroad or has not yet been determined (cf. Schlosser in Stein/Jonas loc. cit. § 1062 marginal no. 4, § 1025 marginal no. 6; Voit in Musielak/Voit loc. cit. § 1025 marginal nos. 5 to 7).

37 (b) With the three groups of cases resulting from sec 1025 (1) and (2) ZPO - "place of arbitration in Germany", "place of arbitration abroad" and "place of arbitration not yet determined" - there were no special rules for international commercial arbitration within the meaning of the UNCITRAL Model Law serving as the basis for the arbitration reform (cf. BT-Drucks. 13/5274, p. 24; on the scope of application of the Model Law, cf. Melis in Kronke/Melis/Kuhn, Hand-buch Internationales Wirtschaftsrecht, 2nd ed., Part P marginal no. 230) all conceivable constellations were covered.

38 (c) The German legislator deliberately chose to extend the 10th Book of the Code of Civil Procedure beyond the scope of the UNCITRAL Model Law to all arbitral proceedings (cf. BT-Drucks. 13/5274, pp. 25 and 31). This covers all national and international private law arbitration proceedings and not only commercial law arbitration proceedings (cf. Kulick/Scheu in Fouret, Enforcement of Investment Treaty Arbitration Awards, 2nd ed., pp. 385, 389; Lachmann, Handbuch für die Schiedsgerichtspraxis, 3rd ed., marginal no. 190; MünchKomm.ZPO/Münch aaO Vorb. zu § 1025 marginal no. 23 f., § 1029 marginal no. 93). Despite its close connection to international law, international investment arbitration between private investors and states also belongs here as a special form (on arbitration proceedings based on a bilateral investment protection treaty see BGH, Order of 3 March 2016 - I ZB 2/15. March 2016 - I ZB 2/15, SchiedsVZ 2016, 328 [juris marginal no. 15]; Order of 31 October 2018 - I ZB 2/15, SchiedsVZ 2019, 46 [juris marginal no. 16]; Order of 17 November 2021 - I ZB 16/21, IWRZ 2022, 129 [juris marginal nos. 8, 34]; Raeschke-Kessler in Prüt-ting/Gehrlein, ZPO, 14th ed, § 1061 marginal no. 11; Köster loc. cit. p. 30; Schwab/Walter, Schiedsgerichtsbarkeit, 7th ed., chapter 41 marginal no. 22; cf. also BeckOK.ZPO/

Wolf/Eslami loc. cit. § 1025 marginal no. 9a; MünchKomm.ZPO/Münch loc. cit. preliminary to § 1025 marginal nos. 18 to 22), which also includes ICSID investment arbitration proceedings (cf. Herdegen, Internationales Wirtschaftsrecht, 13th ed, § 23 marginal no. 97; Kern loc. cit. p. 66 to 88; Schöbener/Markert, ZVglRWiss 2006, 65, 68 to 70 mwN; openly Schwab/Walter loc. cit. chapter 41 marginal no. 5, fn. 42; also Raeschke-Kessler in Festschrift Schlick, 2015, p. 57 f., 75; in general Pirrung, Die Schiedsgerichtsbarkeit nach dem Weltbankübereinkommen für Investitionsstreitigkeiten, 1972, p. 183 to 192 mwN).

39 (d) Insofar as the appeal takes the view that the legislature intended to make a conclusive provision for ICSID proceedings by amending Article 2.2 InvStreitBeilG in the course of the new regulation of arbitration law by the Act of 22 December 1997 (Federal Law Gazette I p. 3224), this is not valid.

40 Before the reform of arbitration law, the provision declared the provisions on the procedure for the declaration of enforceability of domestic arbitral awards, which also applied to foreign arbitral awards pursuant to section 1044 (1) sentence 1 of the old Code of Civil Procedure, to be applicable mutatis mutandis to the proceedings on the application for a declaration of the admissibility of enforcement of an ICSID arbitral award. 1 sentence 1 ZPO old also applied to foreign arbitral awards, the provisions on the procedure for the declaration of enforceability of foreign arbitral awards (section 1025 (4), sections 1061 to 1065 ZPO) are now expressly applicable to the proceedings accordingly.

41 This amendment is merely one of many necessary consequential adjustments of already existing provisions to the new provisions of Book 10 of the Code of Civil Procedure (cf. BT-Drucks. 13/5274, p. 68). It does not change the fact that Art. 2 InvStreitBeilG still only regulates the postarbitral phase after the award has been made and that the corresponding application of provisions of Book 10 of the Code of Civil Procedure only concerns the enforcement of ICSID awards. Statements on (non-)applicability

The applicability of § 1025 (2) of the Code of Civil Procedure (and § 1032 (2) of the Code of Civil Procedure) to ICSID arbitration proceedings cannot be inferred from this, particularly in view of the deliberate extension of the scope of application of the 10th Book of the Code of Civil Procedure beyond the UNCITRAL Model Law to all arbitration proceedings (cf. BT-Drucks 13/5274, pp. 25 and 31).

42 (e) At least for the declaratory proceedings under section 1032 (2) of the Code of Civil Procedure that are at issue here, the existing regulatory gap of section 1025 (2) of the Code of Civil Procedure also becomes apparent when looking at the provisions on local jurisdiction in section 1062 (1) and (2) of the Code of Civil Procedure, which, with the delimitation solely from the domestic place of arbitration, open up a basically global scope of application.

43 The provision of section 1062 subs. 1 No. 2 Case 1 ZPO regulates the jurisdiction of the Higher Regional Court designated in the arbitration agreement or, in the absence of such designation, in whose district the place of arbitration is located, for decisions on applications concerning the determination of the admissibility or inadmissibility of arbitral proceedings (section 1032 ZPO). If in this case there is no German place of arbitration, the Higher Regional Court in whose district the respondent has his seat or habitual residence or in whose district the assets of the respondent or the object claimed by the arbitral action or affected by the measure are located, alternatively the Court of Appeal, shall have jurisdiction for the decisions (section 1062 subs. 2 ZPO).

44 Taking into account the legal concept of the dual function of local jurisdiction, this provision suggests that § 1025 (2) ZPO for international jurisdiction - like § 1062 (2) ZPO for local jurisdiction - is always applicable (mutatis mutandis), despite the positive wording ("abroad", "not yet determined"), if there is "no German place of arbitration".

45 In case of doubt, if there are no special rules on jurisdiction, international jurisdiction is indirectly derived from the provisions on local jurisdiction (so-called "double function"; on § 32 ZPO cf. BGH, Judgment of 28 June 2007 - I ZR 49/04, BGHZ 173, 57 [juris para. 23] - Cambridge Institute, mwN; generally Roth in Stein/Jonas aaO Vor § 12 Rn. 32, 32b; Zöller/ Schultzky aaO § 1 Rn. 8). As far as a German court has local jurisdiction according to these provisions, it also has international jurisdiction according to German law (see MünchKomm.ZPO/Patzina loc.cit. § 12 marginal no. 90).

46 § Section 1025 (2) ZPO does contain a special provision for international jurisdiction. However, the provision is to be interpreted in accordance with § 1062 (2) ZPO. If section 1062, subsection 2 of the Code of Civil Procedure provides for a local jurisdiction of the Court of Appeal as an alternative for the declaratory proceedings under section 1032, subsection 2 of the Code of Civil Procedure in cases where - as in this case - there is "no German place of arbitration", a lack of international jurisdiction in this case reveals an unintended loophole.

47 (3) The characteristic of a comparable interest situation requires the assumption that the legislature would have arrived at the same result in a weighing of interests according to the principles that guided it when enacting the standards referred to (BGH, GRUR 2020, 429 [juris, marginal no. 34] - Sportwetten in Gaststätten). This is the situation here.

48 According to the intention of the legislator, which manifested itself in the wording of the law, the German courts should be able to be seised in the cases listed in section 1025 (2) ZPO even if the arbitral proceedings take place abroad (cf. BT-Drucks. 13/5274, p. 31). The interest expressed therein in a global jurisdiction of the German courts in the cases mentioned is given in delocalised arbitral proceedings under the ICSID Convention as well as in arbitral proceedings with place of arbitration abroad. This is particularly evident in the explanatory memorandum to the Act.

The same applies to the provision of section 1032 (1) of the German Code of Civil Procedure (ZPO) on the defence of arbitration in proceedings before the state court. In the case of ICSID arbitration proceedings, this defence, with the possible consequence of the inadmissibility of the action, is also only opened up through the corresponding application of section 1025 (2) of the Code of Civil Procedure. If the defence of the (ICSID) arbitration agreement could not lead to the inadmissibility of the action before the state court due to the lack of applicability of § 1032 (1) ZPO (via § 1025 (2) ZPO), this would contradict the sense and purpose of arbitration agreements also within the scope of application of the ICSID Convention.

49 3 The application under section 1032 (2) of the Code of Civil Procedure was filed with the Higher Regional Court in due time.

50 a) Decisive for the timeliness of the application pursuant to § 1032 (2) ZPO, which can be filed until the arbitral tribunal has been constituted, is the receipt by the court, not the service of the application on the opposing party (cf. BGH, Order of 30 June 2011 - III ZB 59/10, GRUR 2012, 95 [juris marginal no. 10] with corpus; MünchKomm.ZPO/Münch loc. cit. § 1032 marginal no. 30; Voit in Musielak/Voit loc. cit. § 1032 marginal no. 10). A non-permanent arbitral tribunal is formed within the meaning of § 1032 (2) ZPO if all arbitrators have been appointed and the arbitrators have not only been nominated but have also accepted their office (cf. BGH, Order of 9 February 2023 - I ZB 62/22, NJOZ 2023, 497 [juris marginal no. 15] mwN).

51 b) Accordingly, the time limit is met here. The application was received by the Higher Regional Court on 10 May 2021 and thus before the formation of the arbitral tribunal on 2 June 2021.

52 4 The application under section 1032 (2) ZPO is also admissible. In the context of such an application, the state court examines whether an effective arbitration agreement exists, whether it is enforceable and whether the subject matter of the arbitral proceedings is subject to the arbitration agreement (BGH, Order of 19 September 2019 - I ZB 4/19, SchiedsVZ 2020, 50 [juris, marginal no. 11] with the

remainder). In the present context, the state court can also carry out this examination with a view to the already previously

which, according to Article 41 (1) of the ICSID Convention, provides for a genuine competence of the arbitral tribunal to decide on its jurisdiction. The blocking effect of the ICSID arbitration regarding proceedings before the state courts (see C I 4 b) does not apply here by way of exception due to the primacy of application of Union law (see C I 4 c and d).

53 a) The Higher Regional Court assumed that the admissibility of the application was not precluded by the fact that the procedural rules of the ICSID Convention in conjunction with the Investment Disputes Settlement Act do not provide for a review pursuant to § 1032.2 of the Code of Civil Procedure. Arbitration proceedings under the ICSID Convention were in principle not subject to review by national courts. However, this did not affect the admissibility of the application under § 1032.2 ZPO, because the Senate did not decide on the admissibility and merits of the arbitration claim, but on the question of whether there was an effective arbitration agreement - in this case by the provision of Article 26 ECT, which was also under European Union law - as the basis of the arbitration proceedings.

54 The fact that the proceedings are based on the regulation of international economic law in the field of investment protection on the basis of an international treaty does not preclude dealing with the applicant's request on the basis of the primacy of Union law. The fact that the Court of Justice of the European Union had not made any statements on the national procedural rules and their applicability in the case of ICSID arbitration proceedings also did not prevent a decision pursuant to § 1032.2 of the Code of Civil Procedure. It was up to the national court to give full effect to Union law by interpreting its legal provisions accordingly. Precisely because § 1032.2 of the Code of Civil Procedure is a provision that serves procedural economy, the early determination of the invalidity of the arbitration agreement under Union law in this case must be made in these proceedings. The result stands up to legal scrutiny.

55 b) However, proceedings before the state courts are in principle blocked, at least from the commencement of ICSID arbitration proceedings, by the arbitral tribunal's competence under Article 41 (1) of the ICSID Convention, which takes precedence in this respect because it is more specific.

56 aa) The ICSID Convention under international law has the rank of a simple federal law in the German legal order on the basis of the 1969 Act on Consent under Article 59.2 sentence 1 of the Basic Law. The provisions of the treaty are given domestic validity by the order to apply the law within the meaning of Article 59.2 sentence 1 of the Basic Law (see BVerfGE 141, 1 [juris, marginal no. 45 f.]; von Arnauld, Völkerrecht, 5th ed, marginal no. 509; BeckOK.GG/Pieper, 55th edition [as of 15 May 2023], Art. 59 marginal no. 41; Nettesheim in Dürig/Herzog/Scholz, GG, 90th supplementary edition February 2020, Art. 59 marginal no. 177 f.; on the ICSID Convention cf. Seelmann-Eggebert, SchiedsVZ 2023, 32, 36). In the case of a conflict of laws, the lex-posterior principle and the lex-specialis principle apply to domestic law of the same rank (cf. BVerfGE 141, 1 [juris, marginal no. 49 f.]). The principle of the Basic Law's friendliness towards international law requires that, as far as possible, national laws be interpreted in such a way that a conflict with the Federal Republic of Germany's obligations under international law does not arise. Within the framework of applicable methodological principles, therefore, of several possible interpretations of a law, a law that is friendly to international law must in principle be chosen (BVerfGE 141, 1 [juris marginal no. 71]; von Arnauld loc. cit. marginal no. 517, 525 f.; BeckOK.GG/Pieper loc. cit. art. 59 marginal no. 38, 44). However, this does not result in a constitutional obligation to comply with every provision of international law without restriction (BVerfGE 141, 1 [juris marginal no. 69]).

57 bb) The ICSID Convention has a closed legal system with its own procedural rules. Whereas under national arbitration law and the UNCITRAL Model Law, both in the pre-arbitral phase up to the formation of the arbitral tribunal, the arbitral phase during the arbitral proceedings and the post-arbitral phase after the award has been made, the state courts are called upon to control and assist the

arbitration proceedings (cf. for example § 1032 para. 2, § 1033, § 1040 para. 3 sentence 2 and §§ 1059 to 1061 ZPO) and have the final decision-making competence (cf. BGH, GRUR 2012, 95 [juris marginal no. 11]; Schütze in Wieczorek/Schütze loc. cit. § 1032 marginal no. 17), the ICSID Convention deliberately deviates from such involvement of the state courts.

58 cc) In order to clarify the question of the jurisdiction of the Centre within the meaning of Article 25 of the ICSID Convention and, consequently, the question of the jurisdiction of the arbitral tribunal, the arbitral tribunal alone is the competent forum in accordance with Article 41.1 of the ICSID Convention, at any rate as of the registration of an ICSID arbitration - in this case on 2 February 2021.

59 (1) Pursuant to Art. 25 (1), first sentence, of the ICSID Convention, the jurisdiction of the Centre shall extend to all disputes between a Contracting State, on the one hand, and a national of another Contracting State, on the other hand, which are directly related to an investment, if the parties have consented in writing to submit the dispute to the Centre.

60 From the submission of the request for arbitration (Art. 36 para. 1 ICSID Convention) until its registration, the Secretary General of the Centre is responsible, according to Art. 36 para. 3 sentence 1 ICSID Convention, for the preliminary examination as to whether the dispute obviously does not fall within the jurisdiction of the Centre according to Art. 25 ICSID Convention (so-called "screening power"; cf. 25 ICSID Convention (so-called "screening power"; see Escher, RIW 2001, 20, 23 f.; Escobar in Fouret/Gerbay/Alvarez loc. cit. Art. 36 paras. 4.23, 4.35; Kern loc. cit. p. 60 mwN; Schöbener/Markert, ZVglRWiss 2006, 65, 76 f.). The Secretary General's power to refuse registration is defined so narrowly that it does not interfere with the competence of the arbitral tribunal (cf. von Wobeser in Fouret/Gerbay/Alvarez loc.cit. art. 41 marginal no. 4.184).

61 This competence of the arbitral tribunal is established by Art. 41 (1) ICSID Convention, according to which the arbitral tribunal itself decides on its competence. In doing so, it may, irrespective of a positive

Preliminary examination of the Secretary-General still deny the jurisdiction of the Centre (cf. Pirrung loc. cit. p. 94 f., 97; Schöbener/Markert, ZVglRWiss 2006, 65, 77 mwN; von Wobeser in Fouret/Gerbay/Alvarez loc. cit. Art. 41 marginal no. 4.184). In such a case, the effective formation of the arbitral tribunal remains, even if the effectiveness of the parties' consent to ICSID arbitration is in dispute and it should turn out to be ineffective (see Kriebaum in Schreuer's Commentary on the ICSID Convention, 3rd ed., Art. 41 marginal no. 7 f.). The decision as to whether the jurisdictional requirements of Art. 25 ICSID Convention are fulfilled therefore lies in principle solely with the arbitral tribunal according to Art. 41 para. 1 ICSID Convention (cf. Kern loc. cit. p. 60; von Wobeser in Fouret/Gerbay/Alvarez loc. cit. Art. 41 para. 4.182, 4.184).

62 (2) Accordingly, Art. 41 (1) ICSID Convention applies in deviation from § 1040 ZPO, which provides for the (provisional) competence of the arbitral tribunal in interaction with § 1032 (2) ZPO only from the formation of the arbitral tribunal (cf. BeckOK.ZPO/Wolf/Eslami loc. cit. § 1032 marginal no. 2; Schütze in Wieczorek/ Schütze loc. cit. 2; Schütze in Wieczorek/ Schütze loc.cit. § 1032 marginal no. 8), at any rate already from the moment of the commencement of the arbitral proceedings (cf. Kriebaum in Schreuer's Commentary on the ICSID Convention loc.cit. Art. 41 marginal no. 25 and marginal nos. 83 to 85; Kryvoi, International Centre for Settlement of Investment Disputes (ICSID), 4th ed, marginal no. 208; Pirrung loc. cit. p. 97; von Wobeser in Fouret/Gerbay/Alvarez loc. cit. Art. 41 marginal no. 4.179; Steinbrück/Krahé, IPRax 2023, 36, 38 f.). According to No. 6 para. 2 Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings, an ICSID arbitration is deemed to be commenced as soon as it is registered. Whether Art. 41 (1) ICSID Convention already applies in the period from the filing of the request for arbitration until its registration does not need to be decided in the dispute because registration has already taken place.

63 (3) From a systematic point of view, the seamless connection to the preliminary examination of the General Court, which is thereby ensured, speaks in favour of

the jurisdiction of the arbitral tribunal at least from the initiation of the proceedings by its registration.

secretary of the centre. According to Art. 36 para. 3 sentence 1 of the ICSID Convention, this extends from the filing of the application to the registration and is concluded therein. The decisive point in time for the Centre and the arbitral tribunal to examine whether the requirements of Art. 25 ICSID Convention have been met is therefore the registration; subsequent changes are irrelevant (see Banifatemi/Edson in Fouret/Gerbay/Alvarez loc. cit. Art. 25 para. 2.09; Kriebaum in Schreuer's Commentary on the ICSID Convention loc. cit. Art. 41 paras. 83 to 85).

64 The meaning and purpose of the Convention, which is designed to decouple national law and state courts as far as possible (cf. Pearsall in Fouret loc. cit. p. 117, 118; Sasson in Fouret/ Gerbay/Alvarez loc. cit. Art. 62 marginal no. 7.04; Happ in Schütze loc. cit. 7.04; Happ in Schütze loc.cit. XV. chapter, section II marginal no. 13; Kern loc.cit. p. 65; Kröll, NJW 2023, 819, 820), speaks for a complete decision-making power within the ICSID system from the filing of the application or at least from the initiation of proceedings.

65 Contrary to the mandatory provision for commercial arbitration in § 1040 para. 3 sentence 2 ZPO (cf. BGH, Order of 24 July 2014 - III ZB 83/13, BGHZ 202, 168 [juris para. 10] with corrigendum; Schroeter, SchiedsVZ 2004, 288, 290; on the corresponding provision in Art. 16 para. 3 sentence 2 UNCITRAL Model Law cf. Melis in Kronke/Melis/Kuhn loc.cit. part P marginal no. 279), in ICSID arbitration there is in principle no subsequent review of the jurisdiction decision by state courts and thus no final decision competence of state courts. According to the more specific and therefore fundamentally more important provisions of the ICSID Convention, the examination of jurisdiction is to be carried out exclusively within the framework of the arbitral proceedings themselves (cf. Pirrung loc. cit. p. 116; Schöbener/Marker loc. cit. 116; Schöbener/Markert, ZVglRWiss 2006, 65, 74; Berger, SchiedsVZ 2017, 282, 290; Raeschke-Kessler, SchiedsVZ 2018, 1, 6; Kröll, NJW 2023, 819, 820 f.; Seelmann-Eggebert, SchiedsVZ 2023, 32, 36; Steinbrück/Krahé, IPRax 2023, 36, 38). This also satisfies the priority of international treaties, which the legislator considered self-evident when reforming the arbitral procedure (cf. BT-Drucks. 13/5274, p. 31).

66 dd) The competence of the arbitral tribunal pursuant to Article 41.1 of the ICSID Convention, when the provisions of the ICSID Convention are considered in isolation, therefore precludes the proceedings pursuant to § 1032.2 of the Code of Civil Procedure on the basis of the arbitral proceedings already commenced. According to the database available on the ICSID website (icsid.worldbank.org), the arbitration proceedings were registered on 2 February 2021 with the file number ICSID ARB/21/4 and were thus initiated, whereas the application under § 1032.2 ZPO was only received by the Higher Regional Court in May 2021.

67 ee) Since the arbitral proceedings have already been commenced, the significance of the provision of Article 26, first sentence, of the ICSID Convention, according to which the consent of the parties to arbitration under the Convention is at the same time deemed to be a waiver of any other remedy, unless otherwise declared, is not decisive. This provision applies directly only for the time until the submission of the request to the Centre (see Alexandrov in Schreuer's Commentary on the ICSID Convention loc. cit. Art. 26 para. 6; Haridi in Fouret/Gerbay/Alvarez loc. cit. Art. 26 para. 2.258 f.).

68 c) However, the blocking effect of Article 41.1 of the ICSID Convention does not exceptionally prevent the admissibility of an application under § 1032.2 of the Code of Civil Procedure in the special constellation of the dispute of an intra-EU investor-state arbitration under the ICSID Convention on the basis of Article 26 of the ECT because of the primacy of application of Union law - also over public international law.

69 aa) According to the settled case-law of the Court of Justice of the European Union, Union law originates from an autonomous source, the Treaties, and takes precedence over the law of the Member States. The autonomy of the Union legal order exists both vis-à-vis the law of the Member States and vis-à-vis public international law (see ECJ, Opinion of 30 April 2019 - Gut 1/17, EuGRZ 2019, 191 [juris para. 109] - CETA Agreement EU-Canada, with citations; on the supremacy over public international law, see also ECJ, Judgment of 3 September

2008 - C-402/05, C-415/05, [2008] ECR I-6351 = EuGRZ 2008, 480 [juris para. 281 to 285] - Kadi and Al Barakaat Foundation v Council and Commission). The primacy of Union law requires national courts, which have to apply the provisions of Union law within their jurisdiction, to ensure the full effectiveness of those provisions. To that end, they must, if necessary, disapply any conflicting national provision on the basis of their own decision-making power, without requesting or awaiting the prior elimination of that provision by legislative means or by any other constitutional procedure (see ECJ, judgment of 4 December 2018 - C-378/17, NZA 2019, 27 [juris para. 35] - Minister for Justice and Equality and Commissioner of An Garda Síochána, mwN; Judgment of 2 September 2021 - C-741/19, SchiedsVZ 2022, 34 [juris marginal no. 43] - Komstroy; cf. also BVerfGE 126, 286 [juris marginal no. 53]; Nettesheim in Grabitz/Hilf/ Nettesheim, Das Recht der EU, 48th Supplementary Edition August 2012, Art. 288 TFEU marginal no. 47 to 53).

70 bb) According to the likewise constant case-law of the Court of Justice of the Euro- Articles 267 and 344 TFEU are to be interpreted as precluding a provision in an international agreement concluded between two Member States under which an investor of one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter before an arbitral tribunal to whose jurisdiction that Member State has submitted (see ECJ, judgment of 6 March 2018 - C-284/16, SchiedsVZ 2018, 186 [juris para. 32, 60] - Achmea; ECJ, SchiedsVZ 2022, 34 [juris para. 42] - Achmea). March 2018 - C-284/16, SchiedsVZ 2018, 186 [juris para. 32, 60] - Achmea; ECJ, SchiedsVZ 2022, 34 [juris para. 42 to 46] - Komstroy; ECJ, Judgment of 26 October 2021 - C-109/20, EuZW 2021, 1097 [juris para. 44] - PL Holdings; Judgment of 25. January 2022 C638/19, RIW 2022, 219 [juris para. 138] - European Food; Opinion of 16 June 2022 - C-1/20, juris para. 47 with para. 20 - Modernised Energy Charter Treaty; Decision of 21 September 2022 - C333/19, BeckRS 2022, 26460 para. 33 - Romatsa).

71 An ICSID award is to be regarded as incompatible with Union law, in particular with Articles 267 and 344 TFEU, if the arbitration clause underlying the arbitration proceedings calls into question the preservation of the specific nature of Union law guaranteed by the preliminary ruling procedure in violation of the principles of loyal cooperation and autonomy of Union law (cf. ECJ, RIW 2022, 219 [juris para. 142] - European Food; BeckRS 2022, 26460 para. 41 f. - Romatsa). An arbitral award that is incompatible with Union law in this way cannot have any effect and thus cannot be enforced. A court of a Member State dealing with the enforcement of such an ICSID award is obliged to disapply the award and consequently may not enforce it under any circumstances (see ECJ, BeckRS 2022, 26460, para. 43 f. - Romatsa [in French]; for the translation of the operative part, see OJ C 24 of 23 January 2023, p. 14).

72 cc) According to these principles, in the intra-EU context, state court review of an ICSID arbitral award in the downstream declaration of enforceability proceedings is mandatory for reasons of Union law - contrary to the regulatory system of the ICSID Convention (see C I 4 c c [1]). In this case, however, the principle of effectiveness ("effet utile") requires that, when deciding on the admissibility of an upstream remedy such as § 1032.2 of the Code of Civil Procedure, the provision of Article 41.1 of the ICSID Convention - which is simple federal law via the Consent Act - is not applied in order to give effect to Union law as soon as possible (see C I 4 c c [2]).

73 (1) According to the case law of the Court of Justice of the European Union, judicial review of an ICSID award in an intra-EU investor-state constellation, such as here, is mandatory in the downstream declaration of enforceability proceedings.

74 (a) The "European Food" and "Romatsa" decisions illustrate, that the Court of Justice of the European Union considers its jurisdiction under Articles 267, 344 TFEU for the downstream phase of the enforcement of an arbitral award to be unaffected by the ICSID Convention. Notwithstanding the complete exclusion of a review of an ICSID award by the national courts provided for in Articles 53, 54 of the ICSID Convention, the national courts are obliged to disapply an award that is incompatible with Union law and consequently may not enforce it under any circumstances (cf. ECJ, BeckRS 2022, 26460 para. 43 et seq. - Romatsa; see also ECJ, RIW 2022, 219 [juris para. 142] - European Food; on the annulment of an intra-EU ICSID award, see Cour de Cassation du Grand-Duché de Luxembourg, judgment of 14 July 2022 - CAS-2021-00061 para. 26 to 40 and 43,

www.italaw.com/sites/default/files/case-documents/italaw170526.pdf- last accessed on 3 June 2023).

75 (b) Such a downstream control of the ICSID arbitral awards in the intra-EU context are not precluded by the provision of Art. 2 (4) InvStreitBeilG, according to which the application to determine the admissibility of enforcement may only be rejected if the arbitral award has been set aside in proceedings under Art. 51 or Art. 52 ICSID Convention. The primacy of application of Union law (para. 69 above) requires that this national provision be left inapplicable in the intra-EU context as a conflicting national provision.

76 (2) Is a downstream control of ICSID awards by the German courts is therefore mandatory for reasons of Union law, notwithstanding Articles 53, 54 of the ICSID Convention and Article 2 (4) of the InvStreitBeilG, the primacy of application of Union law according to the principle of effectiveness ("effet utile") is also to be extended to the upstream declaratory proceedings pursuant to § 1032 (2) of the Code of Civil Procedure and its admissibility is to be affirmed.

77 (a) The principle of effectiveness requires, according to the settled case-law of the Court of Justice of the European Union, that the applicable national legislation is not such as to render practically impossible or excessively difficult the exercise of the rights conferred by the Union legal order. This must be assessed in the light of the position of the provision in the proceedings as a whole, the course of the proceedings and the specific features of the proceedings before the various national bodies (ECJ, Judgment of 11 November 2015 - C-505/14, EuZW 2016, 57 [juris para. 40 f.] - Klausner Holz; Judgment of 5 March 2019 - C-349/17, EuZW 2019, 379 [juris para. 137 f.] - Eesti Pagar; Judgment of 7 April 2022 - C-116/20, juris para. 100 f. - Avio Lucos, both with citations). Where a provision of national law precludes the application of a national remedy, it must be disapplied if the national remedy is otherwise capable of giving full effect to Union law (see ECJ, Judgment of 19 June 1990 - C-213/89, paragraph 1). June 1990 - C-213/89, [1990] ECR I-2433 = NJW 1991, 2271 [juris para. 23] - Factortame and others; Judgment of 13 July 2006 - C-295/04 to C-298/04, [2006] ECR I-6619 = EuZW 2006, 529 [juris para. 62] - Manfredi and others; see also Hess, Europäisches Zivilprozessrecht, 2nd ed, § 11 marginal no. 11.9).

78 (b) For reasons of procedural economy, the national legislator has deliberately created a special remedy in § 1032 (2) ZPO which (at least initially) precedes the arbitral proceedings. The procedure is a German peculiarity and has no counterpart in the UNCITRAL Model Law (cf. BT-Drucks. 13/5274, p. 38; Saenger/Saenger, ZPO, 9th ed., § 1032 marginal no. 13; on the advantages and disadvantages see Steinbrück, Die Unterstützung ausländischer Schiedsverfahren durch staatliche Gerichte, 2009, pp. 347 to 350). A final decision on an application under § 1032 (2) ZPO is binding on the (national) state courts in subsequent court proceedings, in particular in proceedings for setting aside or declaration of enforceability under §§ 1059 to 1061 ZPO and in legal proceedings with regard to the arbitration defence under § 1032 (1) ZPO (see BGH, order of

6 May 2021 - I ZB 71/20, juris marginal no. 16; BeckOK.ZPO/Wolf/Eslami loc.cit. § 1032 marginal no. 42; Voit in Musielak/Voit loc.cit. § 1032 marginal no. 13 f.; Zöller/Geimer loc.cit. § 1032 marginal no. 24, § 1040 marginal no. 4 and § 1059 marginal no. 39). For the parties, the remedy under § 1032 (2) ZPO opens up a possibility to save time and costs, if, for example, the arbitral proceedings are not initiated at all or not pursued further upon determination of the inadmissibility, the arbitral tribunal is convinced of the inadmissibility or, in any case, the later court proceedings are simplified and accelerated by the determined result.

79 (c) Article 41 (1) of the ICSID Convention, which precludes the application of § 1032 (2) ZPO with these effects, must remain inapplicable in intra-EU investor-state arbitration proceedings (cf. Steinbrück/Krahé, IPRax 2023, 36, 41; critically Wilske/Markert/Ebert, SchiedsVZ 2022, 111, 130), in order to give full effect to Union law at an early stage.

80 The ex ante control intended by the German legislator with § 1032 (2) ZPO can, in the intra-EU context, bindingly anticipate the ex post control required for Union law reasons also in the context of ICSID arbitration proceedings (cf. ECJ, BeckRS 2022, 26460 para. 43 f. - Romatsa; supra para. 73 to 75). A determination of the inadmissibility of the arbitral proceedings pursuant to § 1032 (2) ZPO prevents the (later) declaration of enforceability of an ICSID award in Germany due to the binding effect of this decision.

81 An application of section 1032 (2) ZPO furthermore takes into account the case law of the Court of Justice of the European Union, according to which the Member States are obliged, as soon as a dispute is brought before an arbitration board on the basis of an obligation contrary to Union law, to examine before that arbitration board 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 (see ECJ, EuZW 2021, 1097 [juris para. 52] - PL-Holdings).

82 To the extent that the appellant complains in this context that the case-law of the Court of Justice of the European Union does not give rise to an obligation under European Union law to create a sui generis domestic remedy for a declaration of inadmissibility of the arbitral proceedings, it overlooks the fact that national law already provides for such a remedy in § 1032 (2) ZPO, which is also applicable via § 1025 (2) ZPO.

83 (d) The primacy of application of Union law is not achieved by an impermissible interpretation of national law contra legem (on this limit see ECJ, EuZW 2016, 57 [juris para. 32] - Klausner Holz; ECJ, Judgment of 11 February 2021 - C-760/18, NZA 2021, 333 [juris para. 67] - M. V. and others, mwN; BGH, Order of 29 July 2021 - I ZR 135/20, GRUR 2021, 1320 [juris marginal no. 36] = WRP 2021, 1290 - Flaschenpfand III, mwN). The admissibility of the application under § 1032 (2) ZPO results from the wording of the provision of § 1032 (2) ZPO, given the inapplicability of Art. 41 (1) ICSID Convention as required by European Union law (on the primacy of application of European Union law, see supra para. 69). The provisions in Art. 2 f. InvStreitBeilG in this respect cover only the downstream phase after the ICSID award has been issued; statements on the upstream phase and the applicability of § 1032 (2) ZPO cannot be inferred from these provisions.

84 d) The primacy of Union law over Art. 41 ICSID Convention is not exceptionally excluded under Art. 351 (1) TFEU.

85 aa) Pursuant to Article 351 (1) TFEU, the rights and obligations arising from agreements concluded before 1 January 1958 or, in the case of subsequently acceding States, 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 standard is to

Member States from breaches of international law vis-à-vis third countries, which would be caused by the primacy of Union law, and thus takes into account the maxim "pacta sunt servanda" (cf. Schmalenbach in Calliess/Ruffert, EUV/AEUV, 6th ed., Art. 351 TFEU marginal no. 1; Streinz/Kokott, EUV/AEUV, 3rd ed., Art. 351 TFEU marginal no. 1).

86 bb) According to its wording, the provision of Article 351.1 TFEU is not directly applicable in the case at issue. For the applicant, as a founding member of the European Economic Community, the relevant date is 1 January 1958. The same applies to the respondent with its seat in Germany, another founding member of the European Economic Community. The ICSID Convention entered into force for the claimant in 1966 and for Germany in 1969, the Energy Charter Treaty in 1998.

87 cc) According to the case-law of the Court of Justice of the European Union, an analogous application of Article 351 (1) TFEU to cases in which rights and obligations from agreements are affected which - as in the present case - were concluded after the relevant dates stated in the provision, but concern a subject area for which the Union only became competent later due to an increase in competence, is ruled out (see ECJ, Judgment of 28 October 2022 - C-435/22, NJW 2023, 349, paras. 115 to 127 - PPU). Contrary to a widespread opinion in the literature (cf. Lorenzmeier in Grabitz/Hilf/ Nettesheim loc. cit. Art. 351 TFEU marginals 24 to 28; Schmalenbach in Calliess/Ruffert loc. cit. Art. 351 TFEU marginals 6 to 9; on the Energy Charter Treaty cf. Köster loc. cit. p. 176 f.), the provision of Article 351 (1) TFEU, which, if its facts are fulfilled, may allow for derogations from Union law, including primary law, is to be interpreted narrowly as an exceptional provision. It only covers agreements concluded before 1 January 1958 or, in the case of subsequently acceded states, before the date of their accession (see ECJ, NJW 2023, 349, paras. 119 et seq. and 126 - PPU). The current wording of the provision was adopted in the Treaty of Amsterdam and subsequently not changed in the Treaties of Nice and Lisbon, although transfers of competences through the

developments of the Union's competences were known in each case. Nevertheless, a transfer of competence to the Union was not standardised as a further possible connecting factor (cf. ECJ, NJW 2023, 349, paras. 123 to 125 - PPU).

88 The legal protection requirement for the application under section 1032 (2) of the Code of Civil Procedure is given.

89 a) The Higher Regional Court assumed that the applicant's need for legal protection, which is necessary for the application, already arises from its status as a party in the arbitration proceedings initiated by the respondent. This assessment is not to be objected to as a matter of law.

90 b) Like any procedural remedy, the application pursuant to section 1032 (2) ZPO requires a need for legal protection. As a rule, this already results from the possible party status in the arbitral proceedings (see BGH, Order of 8 November 2018 - I ZB 21/18, NJW 2019, 857 [juris para. 15]). The (subsequent) formation of the arbitral tribunal does not remove the need for legal protection for the application under § 1032 (2) ZPO. In § 1032 (2) and (3) ZPO, the law assumes a subsequent coexistence of the state and arbitral proceedings in the case of an admissible application filed before the formation of the arbitral tribunal (cf. BGH, GRUR 2012, 95 [juris para. 11]; on the continuing need for legal protection in the case of an arbitral award made in the meantime, cf. BGH, Order of 11 May 2017 - I ZB 75/16, NJW 2017, 3723 [juris para. 10, 14]).

91 However, there is no need for legal protection if the plaintiff or applicant cannot achieve his objective by simpler or less expensive means or by the requested measure (for an application for a court decision see BGH, order of 10 February 2016 - IV AR (VZ) 8/15, NJW-RR 2016, 445 [juris para. 10]; for an application for an injunction under trade mark law see BGH, judgment of 15 October 2020 - I ZR 210/18, GRUR 2020,

1311 [juris marginal no. 27] = WRP 2021, 42 - Vorwerk, mwN; on compulsory enforcement law see BGH, order of 13 October 2022 - I ZB 69/21, GRUR 2023, 105 [juris marginal no. 13] mwN).

92 c) Accordingly, the need for legal protection is given in the case in dispute. The application under 1 refers to concrete arbitral proceedings in which the applicant is the respondent. The declaratory proceedings pursuant to § 1032.2 of the Code of Civil Procedure are also not objectively pointless; above all, they are not exhausted by the rendering of a legal opinion, but have legal and factual effects. In particular, a declaration of the inadmissibility of the arbitral proceedings under section 1032 (2) ZPO prevents the subsequent declaration of enforceability of an ICSID award in Germany (see above para. 80).

93 Furthermore, an upstream declaratory decision of a German supreme court can have a strong signal effect for other state courts bound by Union law in recognition or enforceability declaration proceedings (cf. Scheu/Nikolov, Arbitration International 2020, 253, 267 to 269). In third countries, too, such a decision in enforceable declaration proceedings may be binding despite the binding effect of an ICSID award provided for in Art. 53, 54 ICSID Convention on the "doctrine of comity" (also "mutual sovereign respect", cf. Gibbons/Myers/Dolzer, RIW 2004, 899; Späth, IPrax 2006, 184 and 185 f.) (cf. US District Court for the District of Columbia, Order of 29 June 2021 - Civil Action No. 20-817 - Infrared Environmental Infrastructure GP Ltd. v. Spain, https://casetext.com/case/infrared-envtl-infrastructure-gp-ltd-v-kingdom-of-spain - last accessed on 3 June 2023, where "considerations of comity" are explicitly addressed; on the inconsistent case law of the US District Court for the District of Columbia in this respect, cf. Hindelang/ Naßl/Jena, Achmea goes to Washington, VerfBlog, 2023/4/19; cf. also Scheu/Nikolov, Arbitration International 2020, 253, 271 f.; Steinbrück/Krahé, EuZW 2022, 357, 364 f.; van der Beck, Schiedsgerichtlicher Investitionsschutz innerhalb der Europäischen Union, 2022, p. 255 f.; on the dangers of potential

enforcement proceedings in third countries such as the USA under Art. 54 ICSID Convention see COM [2022] 523 final of 5 October 2022, p. 1).

94 Also, an at least factual-direct effect on an already initiated ICSID arbitration is not excluded (see Steinbrück/Krahé, IPRax 2023, 36, 38; van der Beck loc. cit. p. 259). An arbitral tribunal is obliged to work towards an effective award (see BGH, Judgment of 5 May 1986 - III ZR 233/84, BGHZ 98, 32 [juris para. 15]; Schroeter, SchiedsVZ 2004, 288, 296; Spohnheimer in Festschrift Käfer, 2009, pp. 357, 371, 373 f.). The non-observance of a prior final court decision on the inadmissibility of the arbitral proceedings pursuant to section 1032 (2) ZPO leads - in the case of a domestic arbitral award - to nullity (cf. BGH, order of 11. October 2018 - I ZB 9/18, SchiedsVZ 2019, 150 [juris para. 6]; Saenger/Saenger loc.cit § 1032 para. 17; Voit in Musielak/Voit loc.cit § 1032 para. 14 et seq.), at least to annulment (cf. MünchKomm.ZPO/Münch loc.cit § 1032 para. 40; Schroeter, SchiedsVZ 2004, 288, 295 et seq.). This does not apply to an (international) ICSID award. In such a case, however, the award is not to be declared bindingly enforceable in Germany.

95 In addition, the arbitral tribunal has to take into account that the European Commission has means to practically enforce the case law of the Court of Justice of the European Union against arbitral awards in intra-EU investor-state arbitration proceedings. As the decision in the European Food case (ECJ, RIW 2022, 219) shows, compliance with an arbitral award that is contrary to EU law may constitute impermissible state aid within the meaning of Art. 107 et seq. TFEU, which in turn may lead to infringement proceedings against the respondent Member State under Article 108(2), second subparagraph, TFEU in conjunction with Article 258 et seq. TFEU (cf. von Marschall, RIW 2022, 228, 230; van der Beck loc. cit. p. 262 f., 266; cf. also Rösch, Intraeuropäisches Investitionsrecht, 2017, p. 162 f.).

96 Nor can it be objected that arbitral tribunals are per se inaccessible to an ineffectiveness of the arbitration agreement based on Union law against an at least factual-direct effect on intra-EU investor-state arbitration proceedings. In the arbitration Green Power Partners v. Spain, an arbitral tribunal constituted under the Arbitration Rules of the Institute of Arbitration of the Stockholm Chamber of Commerce (SCC) unanimously held that a Member State's consent to arbitration agreement was invalid under Article 26 ECT in an intra-EU dispute on the grounds of a violation of Union law and accordingly denied its jurisdiction (see Award of 16 June 2022 - SCC Case No. V. [2016/135] paras. 170, 411 et seq., 468 et seq, 476 to 478; on this Lavranos/Lath/Varma, SchiedsVZ 2023, 38, 41 f.; see also US District Court for the District of Columbia, Order of 29 March 2023 - Civil Case No. 21-3249, Blasket Renewable Investments v. Spain, https://jusmundi.com/en/document/pdf/decision/en-aes-solar-and-others-pv-investors-v-the-kingdom-of-spain-memorandum-opinion-of-the-united-states-district-court-for-the-district-of-columbia-wednesday-29th-march-2023 - last accessed on 3. June 2023, according to which an [UNCITRAL] arbitral tribunal in an intra-EU investor-state arbitration is bound by the interpretation of Union law by the Court of Justice of the European Union on the basis of Article 26 ECT).

97 II. the application under section 1032 (2) ZPO is also well-founded. The arbitral proceedings are inadmissible for lack of an effective arbitration agreement. The conclusion of a valid arbitration agreement between the parties is precluded by the fact that the arbitration clause in Art. 26 para. 2 lit. c ECT is not applicable to investment disputes in the intra-EU context according to the case law of the Court of Justice of the European Union (see C II 3 and 4). The arbitration agreement cannot be based on Art. 25 ICSID Convention either (see C II 5).

98 The Higher Regional Court (Oberlandesgericht) held that the first head of claim was well-founded because there was no effective arbitration clause. The arbitration clause in Art. 26 para. 2 lit. c, para. 3 and 4 of the ECT was not valid in intra-EU disputes under the ECT.

The Court of Justice of the European Union has ruled that arbitration proceedings under the ICSID Convention are incompatible with Union law. However, arbitration proceedings under the ICSID Convention were in principle not subject to review by the national courts. Pursuant to Art. 26 and 41 of the ICSID Convention, the arbitral tribunal would have to decide exclusively on a possible lack of consent by the claimant due to the incompatibility with Union law by way of competence. However, this would mean that the arbitral tribunal would have the final binding decision on the interpretation and application of Union law, which would be contrary to the Court of Justice's monopoly on jurisdiction.

99 This also applies to arbitration proceedings with a place of arbitration outside the European Union and to ICSID arbitration proceedings. According to the case law of the Court of Justice of the European Union, the Energy Charter Treaty itself is a legal act of the Union. The arbitral tribunal therefore had to interpret and apply Union law - irrespective of the specifically agreed arbitration rules and thus also according to the ICSID Convention - although it was not part of the judicial system of the European Union. As a result, the full effectiveness of Union law was no longer guaranteed. In order for it to be effective, it must be possible to assert the preliminary question of the inadmissibility of the arbitration proceedings due to a violation of Union law in advance. In view of the similar facts, it was irrelevant that the Energy Charter Treaty was a multi-lateral agreement and not a bilateral investment protection agreement as in the decision in the "Achmea" case.

100 The involvement of the Court was not sufficiently ensured by a possible setting aside procedure under section 1059 of the Code of Civil Procedure. In the absence of a domestic arbitral award, however, this provision was not applicable here anyway. In the case of the only possible refusal of recognition and declaration of enforceability in Germany, the award, which might be contrary to Union law, remained in existence and an effective basis for enforcement abroad. This stands up to legal scrutiny.

101 The law applicable to the arbitration agreement is decisive for the examination of the effectiveness of the arbitration agreement (cf. Steinbrück loc. cit. p. 379). The arbitration agreement statute to be applied independently is determined by (analogous) application of Art. V para. 1 lit. a UNC (see BGH, Judgment of 26 November 2020 - I ZR 245/19, SchiedsVZ 2021, 97 [juris para. 48, 51]). Accordingly, the law chosen by the parties prevails. The effectiveness of the arbitration agreement on arbitration proceedings initiated on the basis of the Energy Charter Treaty is therefore determined according to the parties' intention, in particular according to Art. 26 para. 2 to 4 ECT (cf. Rösch loc. cit. p. 176).

102 (3) According to the now settled case-law of the Court of Justice of the European Union, Articles 267 and 344 TFEU are to be interpreted as precluding a provision in an international agreement between Member States under which an investor of one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter before an arbitral tribunal to whose jurisdiction that Member State has submitted, if a corresponding arbitration scheme is liable to result in such investment disputes not being resolved in a manner which ensures the full effectiveness of Union law (cf. ECJ, EuZW 2021, 1097 [juris para. 44 f.] - PL Holdings; RIW 2022, 219 [juris para. 138 f.] - European Food; BeckRS 2022, 26460 para. 33 f. - Romatsa; cf. also BGH, IWRZ 2022, 129 [juris marginal no. 10, 20 f.]).

103 a) The Court of Justice of the European Union has justified its case-law by stating that an international agreement may not affect the order of jurisdiction laid down in the Treaties and thus the autonomy of the Union's legal system, the preservation of which the Court of Justice ensures. This principle is enshrined in particular in Article 344 TFEU, according to which the Member States undertake not to settle disputes concerning the interpretation or application of the Treaties otherwise than as provided herein. On the basis of mutual trust, it is incumbent on the Member States, in accordance with the principle of loyal cooperation laid down in the first subparagraph of Article 4(3) of the TEU, to take the necessary steps in their

respective territories, in particular to ensure the application and observance of Union law and, to that end, to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from action taken by the institutions of the Union. The Treaties have established a judicial system under which, in accordance with Article 19 TEU, it is for the national courts and the Court of Justice to ensure the full application of Union law in all Member States and the protection of the rights which individuals derive from it. The key element of the court system thus designed is the preliminary ruling procedure provided for in Art. 267 TFEU, which is intended to ensure the uniform interpretation of Union law by establishing a court-to-court dialogue precisely between the Court of Justice and the courts of the Member States (cf. ECJ, SchiedsVZ 2018, 186 [juris paras. 32 to 37] - Achmea; EuGRZ 2019, 191 [juris paras. 109 to 111] - EU-Canada CETA Agreement; SchiedsVZ 2022, 34 [juris paras. 42 to 46] - Komstroy; cf. also BGH, IWRZ 2022, 129 [juris paras. 10]).

104 b) This case law must be taken into account in the dispute. This is not contradicted by the fact that the provisions in Article 26 (2) to (4) ECT (also) constitute provisions of international law. According to the case-law of the Court of Justice of the European Union, the Energy Charter Treaty has a dual nature as an agreement under international law and as a legal act of the Union, because the Union itself is a party to the agreement (see ECJ, SchiedsVZ 2022, 34 [juris para. 23, 49 f.] - Komstroy; on this, Köster loc. cit. p. 131 to 135).

105 The dispute settlement mechanism in Art. 26 para. 2 lit. c ECT violates Union law according to these principles for intra-EU investor-state arbitration as in the dispute. Due to its incompatibility in particular with Articles 267, 344 TFEU, there is no effective consent and thus no offer by the claimant to conclude an arbitration agreement (see BGH, SchiedsVZ 2019, 46 [juris para. 28]; Supreme Court of Lithuania, EuZW 2022, 567 para. 79).

106 a) This is not contradicted by any factual findings to the contrary. Insofar as the Higher Regional Court stated that both Parties had agreed to ICSID dispute settlement and that the Applicant had submitted a so-called standing offer pursuant to Article 26.3 of the ECT, this merely refers to the factual situation, but does not touch upon the disputed question of the validity of the offer pursuant to Article 26.3 of the ECT. The latter is rather a question of law.

107 b) According to the case-law of the Court of Justice of the European Union, whether the possibility for an investor to bring an action before an arbitral tribunal opened up in an investment protection agreement between Member States is compatible with Union law depends, firstly, on whether the disputes on which the arbitral tribunal has to rule can relate to the interpretation or application of Union law. If the answer is in the affirmative, it depends secondly on whether the arbitral tribunal can be regarded as a court or tribunal entitled to make a reference within the meaning of Article 267 TFEU or, thirdly, whether the award is subject to review by a court or tribunal of a Member State, which ensures that the questions of Union law which the arbitral tribunal might have to deal with could possibly be referred to the Court of Justice of the European Union by way of preliminary ruling proceedings (cf. ECJ, SchiedsVZ 2018, 186 [juris paras. 39, 43 and 50] - Achmea; RIW 2021, 661 [juris paras. 48, 51 and 54] - Komstroy; BGH, IWRZ 2022, 129 [juris para. 11] with citations; Scheu/Nikolov, Arbitration International 2020, 253, 256 f.).

108 This case law also applies to intra-EU investor-state arbitration under the ICSID Convention. The Court of Justice of the European Union does not differentiate between the individual arbitration rules that Art. 26 para. 2 lit. c in conjunction with para. 4 lit. a to c ECT and which also cover ICSID arbitration (see ECJ, Opinion of 16 June 2022 - C-1/20, juris para. 47 with paras. 20, 25 - Modernised Energy Charter Treaty; so also Steinbrück/Krahé, IPRax 2023, 36, 40 f.; likewise already van der Beck loc. cit. p. 270 f., 393). From the decisions

in the "European Food" and "Romatsa" cases, it is also clear that the case-law also refers to ICSID arbitration proceedings (see ECJ, RIW 2022, 219 [juris para. 137 to 145] - European Food; BeckRS 2022, 26460 para. 33 to 43 - Romatsa). Insofar as it was formulated in these decisions that the consent of the state is "now irrelevant" (see ECJ, RIW 2022, 219 [juris para. 145] - European Food; BeckRS 2022, 26460 para. 40 - Romatsa), this is solely due to the particularity of the case constellation there, namely Romania's later accession to the European Union; this does not result in a restriction of the case-law with regard to arbitration proceedings under the ICSID Convention.

109 c) According to these standards, the dispute settlement mechanism pursuant to Art. 26 para. 2 lit. c ECT in the case at issue is contrary to Union law.

110 aa) The ICSID Arbitral Tribunal must (also) interpret and apply Union law in the underlying investment dispute on the merits.

111 Pursuant to Art. 42 (1) sentence 1 of the ICSID Convention (a conflict of laws rule, cf. Lörcher, SchiedsVZ 2005, 11, 17), the ICSID Arbitral Tribunal will decide on the merits of the case primarily in accordance with the legal rules agreed upon by the parties. If the state party to the dispute has declared its consent to the Centre's jurisdiction in a bilateral or multilateral investment protection treaty, the arbitral tribunal will primarily have to take into account the legal norms laid down therein (cf. Escher, RIW 2001, 20, 24; Schöbener/ Markert, ZVglRWiss 2006, 65, 101 f.). According to the findings of the Higher Regional Court, the respondent based its arbitration action on breaches of obligations under Part III of the Energy Charter Treaty. According to Art. 26 para. 6 ECT, an arbitral tribunal established under Art. 26 para. 4 ECT shall decide on the issues in dispute in accordance with the Energy Charter Treaty and the applicable rules and principles of international law.

112 According to the case law of the Court of Justice of the European Union, the Energy Charter Treaty has a dual nature as an agreement under international law.

and as a legal act of the Union, because the Union itself is a party to the Agreement. Accordingly, the arbitral tribunal's decision on the merits is in any case also made according to Union law and not only according to international law (see ECJ, SchiedsVZ 2022, 34 [juris para. 23, 49 f.] - Komstroy; on this Köster loc. cit. p. 131 to 135).

113 bb) According to the case-law of the Court of Justice of the European Union, an ICSID arbitral tribunal does not belong to the judicial system of the Union because it is not a court entitled to make submissions (cf. ECJ, RIW 2022, 219 [juris para. 141 f.] - European Food; BeckRS 2022, 26460 para. 36 et seq. - Romatsa; on an UNCITRAL arbitral tribunal under the Energy Charter Treaty see ECJ, SchiedsVZ 2022, 34 [juris para. 51 to 53] - Komstroy; on this Nikolov, EuR 2022, 496, 497).

114 cc) According to the case-law of the Court of Justice of the European Union, an ICSID award is not subject to sufficient review by a court of a Member State with regard to its compatibility with Union law in view of Articles 53, 54 of the ICSID Convention (see ECJ, RIW 2022, 219 [juris para. 142 to 144] - European Food; BeckRS 2022, 26460 para. 37 to 39 - Romatsa).

115 The (limited) review in the enforceability declaration procedure required by the case-law of the Court of Justice of the European Union by way of exception also in the case of ICSID arbitral awards (cf. above paras. 73 to 75) does not lead to a different assessment. This merely brings them into line with investment arbitral awards under other arbitration rules, for which such a limited control, however, is also not sufficient (on UNCITRAL proceedings under the Energy Charter Treaty see ECJ, SchiedsVZ 2022, 34 [juris paras. 54 to 59] - Komstroy; on this, Nikolov, EuR 2022, 496, 497).

116 The arbitration agreement cannot be based on Article 25 (1), first sentence, of the ICSID Convention. The ICSID Convention itself establishes

does not have its own arbitration agreement and does not contain the necessary consent (see Banifatemi/Edson in Fouret/Gerbay/Alvarez loc. cit. Art. 25 para. 2.76; Escher, RIW 2001, 20, 23; Kryvoi loc. cit. para. 38; Pirrung loc. cit. p. 74). In paragraph 7 of the preamble to the ICSID Convention, the Contracting States have declared that the mere ratification, acceptance or approval of the Convention by a Contracting State does not imply its obligation to submit a particular dispute to conciliation or arbitration without its consent. Accordingly, Art. 25 para. 1 sentence 1 ICSID Convention on the jurisdiction of the Centre also presupposes written consent (cf. also Art. 25 para. 4 sentence 3 ICSID Convention, according to which the notification provided for in this Article does not constitute the consent required under para. 1; Escher, RIW 2001, 20, 23). Accordingly, Article 26.5(a) Case 1 of the ICSID Convention contains the declaratory statement that the consent of the host state under Article 26.3 of the ICSID Convention and the consent of the investor under Article 26.4 of the ICSID Convention are deemed to satisfy the requirement of written consent of the parties to the dispute within the meaning of Chapter II (Articles 25 to 27) of the ICSID Convention.

117 III A referral to the Court of Justice of the European Union pursuant to Article 267 (3) TFEU is not required (see ECJ, Judgment of 6 October 1982 - 283/81, [1982] ECR 3415 [juris para. 21] = NJW 1983, 1257 - Cilfit et al.; Judgment of 1 October 2015 - C-452/14, GRUR Int. 2015, 1152 [juris para. 43] - Doc Generici; Judgment of 6 October 2021 - C-561/19, NJW 2021, 3303 [juris para. 32 f.] - Consorzio Italian Management and Catania Multiservizi).

118 (1) The dispute does not raise any question of interpretation of Union law that is relevant to the decision and which has not already been clarified by the case-law of the Court of Justice or which cannot be answered beyond doubt. In particular, the question has been clarified that also an intra-EU investor-state ICSID arbitration on the basis of Art. 26 para. 2 lit. c, para. 3 lit. a, para. 4 lit. a ECT is incompatible with Union law (see ECJ, RIW 2022, 219 [juris para. 137 to 145] - European Food; BeckRS 2022, 26460 para. 33 to 43 - Romatsa; cf.

also Steinbrück/Krahé, IPRax 2023, 36, 41; also Wackernagel, EuZW 2022, 574, 576).

119 That the principle of the effectiveness of Union law, which has been sufficiently clarified in the case-law of the Court of Justice of the European Union, as well as the obligation of the Member States under Article 19 (1), second subparagraph, TEU, require an examination of the admissibility of intra-EU investor-state arbitration proceedings on the basis of the Energy Charter Treaty as early as possible, can also be answered without doubt. The related question of whether the respondent state in the dispute can have the inadmissibility of the ICSID arbitration determined in the special German proceedings pursuant to § 1032 (2) ZPO before the constitution of the arbitral tribunal, on the other hand, concerns national procedural law and is not subject to interpretation by the Court of Justice.

120 2 A referral to the Court of Justice of the European Union is also not required because the Senate considers the prerequisites of an ultra vires act to be met (on the necessity of a referral in such a case, see BVerfG, NJW 2023, 425 [juris para. 139]; E. Klein in Benda/Klein, Verfassungsprozessrecht, 4th ed. Klein, DVBl. 2023, p. 779, 780). The Court of Justice of the European Union has not acted ultra vires with its decisions on the invalidity of arbitration agreements in bilateral and multilateral investment protection treaties.

121 a) An ultra vires review can only be considered if a violation of competence by the European institutions is sufficiently qualified (cf. BVerfGE 126, 286 [juris para. 61]; 154, 17 [juris para. 110], both cited). The mandate of the Court of Justice of the European Union to exercise jurisdiction, which is connected with the allocation of functions under Article 19.1 sentence 2 TEU, ends where an interpretation of the Treaties is no longer comprehensible and is therefore objectively arbitrary (BVerfGE 154, 17 [juris, marginal no. 112]; on the present constellation, see Steinbrück/Krahé, EuZW 2022, 357, 360 f.). In the allocation of competences, the

The principle of proportionality must be observed as a corrective to protect the competences of the Member States (cf. BVerfGE 154, 17 [juris para. 119, 123]).

122 b) The Senate has already rejected an ultra vires act of the Court of Justice of the European Union in the "Achmea" case (cf. BGH, SchiedsVZ 2019, 46 [juris paras. 60 to 71]). The decisions of the Court of Justice following the "Achmea" decision are also not based on an objectively arbitrary interpretation of the treaties.

123 aa) The allegation that the Court of Justice of the European Union, in its decision in the "Komstroy" case, ruled on a legal dispute that was completely external to the Union and declared an international agreement binding on the Member States and the Union - the Energy Charter Treaty - to be "inapplicable", although its competences pursuant to Article 267 (1) TFEU were limited to the "validity" and the "interpretation" of Union law (according to Karpenstein/Sangi, NJW 2021, 3228 marginal no. 7), is not valid.

124 The Court of Justice of the European Union was duly seised in the proceedings by the Cour d'Appel de Paris with a reference for a preliminary ruling under Article 267 TFEU on the Energy Charter Treaty. Nor is there any excess of competence in the statement made in an obiter dictum on the inapplicability of Art. 26 para. 2 lit. c ECT in the intra-EU context (see ECJ, SchiedsVZ 2022, 34 [juris para. 64 to 66] - Komstroy). The Court of Justice of the European Union has the power to interpret international agreements concluded by the Union (see ECJ, Judgment of 27 February 2018 - C-266/16, juris para. 45 et seq. - Western Sahara Campaign UK, with further references). It limited itself to an interpretation of Art. 26 ECT solely in the intra-EU context and did not declare unlimited inapplicability or amend or repeal provisions of the agreement contrary to the mechanism provided for in Art. 34, 36 ECT.

125 bb) The objection that the Court of Justice of the European Union is not responsible for the statements made only as obiter dictum due to a lack of

The court would not have had jurisdiction under Art. 267 TFEU for the question referred (cf. on this Wilske/Markert/Ebert, SchiedsVZ 2022, 111, 128 f.; critically Schwalb/Weiler, SchiedsVZ 2022, 38 f.; for the ultra vires act Lavranos/Lath/Varma, SchiedsVZ 2023, 38, 42 f.). The operative part of the decision in the "Komstroy" case, in accordance with the questions referred for a preliminary ruling, only includes the interpretation of the concept of investment in Article 1 no. 6 and Article 26 (1) TFEU; the binding effect only extends to this (cf. Wegener in Calliess/Ruffert loc. cit. Art. 267 TFEU marginal no. 50). Thus, the Court of Justice of the European Union was not prevented from making further statements within the framework of an obiter dictum.

126 In addition, the Court of Justice of the European Union has subsequently repeatedly referred to its statements in the "Komstroy" case and thereby confirmed them irrespective of the specific facts of the reference proceedings at that time. In particular, in its Opinion 1/20 on Article 26 ECT, it made a general reference to the decision in the "Komstroy" case, irrespective of a specific arbitration order (Opinion of 16 June 2022 - C-1/20, juris para. 47 with para. 20 - Modernised Energy Charter Treaty).

127 cc) The Court of Justice of the European Union has also not disregarded Article 351 (1) TFEU and the legal idea expressed therein that the Member States and not the Court of Justice must remedy incompatibilities between international agreements and Union law. The Court of Justice has comprehensibly rejected an analogous application of Article 351 (1) TFEU in view of the necessary narrow interpretation of the exception provision (see ECJ, NJW 2023, 349, paras. 115 to 127 - PPU; above paras. 84 to 87).

128 dd) The decisions of the Court of Justice of the European Union also do not violate general rules of public international law (Article 25 of the Basic Law) or the Vienna Convention of 23 May 1969 on the Law of Treaties (Federal Law Gazette II 1985 p. 926; hereinafter "Vienna Convention"), in particular Article 27 of the Vienna Convention. According to this

a contracting party may not invoke its domestic law to justify the non-performance of an international treaty.

129 Pursuant to Article 3(b) of the Vienna Convention, which is an expression of general customary international law, the provisions of the Vienna Convention are also applicable to non-parties - such as the European Union (see ECJ, Judgment of 25 February 2010 - C-386/08, ECR 2010 I-1-189 = EuZW 2010. February 2010 - C-386/08, [2010] ECR I-1289 = EuZW 2010, 264 [juris para. 40 to 42] - Brita, mwN; Judgment of 27 February 2018 - C266/16, juris para. 58 - Western Sahara Campaign UK; Judgment of 20 October 2022 - C-111/21, NJW 2022, 3701 [juris para. 22] - Laudamotion). Art. 26 f. WVK are also part of customary international law. However, by joining the Union, the Member States have limited their power of disposition under international law and have waived among themselves the exercise of rights under international treaties that conflict with Union law. Accordingly, customary international law conflicting with Union law cannot exist between Member States (cf. BGH, Order of 24 January 2019 - I ZB 2/15, juris para. 7; cf. also BGH, SchiedsVZ 2019, 46 [juris para. 40 et seq.]; Cour d'Appel de Paris, Judgment of 19. April 2022 - No. 48/2022, RG-NR 20/13085 marginal no. 90) and the nationals of the Member States involved cannot rely on older obligations of the Member States under international law that are in conflict with Union law (cf. BGH, SchiedsVZ 2019, 46 [juris marginal no. 41]).

130 ee) An accusation of arbitrariness cannot be justified by the fact that the Court of Justice treats investment arbitration differently than commercial arbitration, which is also regularly admissible under Union law. This unequal treatment is objectively justified because the arbitral obligation of the host state in investment arbitration proceedings is based on its standing offer from its consent given in advance to other contracting states in an international treaty and not - as in commercial arbitration - on the exercise of party autonomy in the individual case vis-à-vis the respective investor (see ECJ, SchiedsVZ 2018, 186 [juris para. 55] - Achmea; SchiedsVZ 2022, 34 [juris para. 59] - Komstroy).

131 This is not contradicted by the decision in the "PL-Holdings" case. The ad hoc arbitration agreement challenged there was in fact aimed at circumventing the obligations arising for the Member State from Article 4 (3) TEU and Articles 267, 344 TFEU as interpreted in the decision in the "Achmea" case (see ECJ, EuZW 2021, 1097 [juris paras. 47, 56] - PL Holdings).

132 ff) Insofar as an encroachment on closed facts without transitional rules is complained of, this is the recognised consequence of the ex tunc interpretation of Union law by the Court of Justice of the European Union (see ECJ, EuZW 2021, 1097 [juris paras. 58 to 61] - PL Holdings, mwN; cf. also BVerfGE 126, 286 [juris paras. 83] mwN).

133 gg) The objection that the decisions on investment arbitration lack a proportionality test also cannot justify an ultra vires act.

134 (1) The objection does not concern the principle of proportionality as a corrective to protect Member State competences, which must also be observed in the allocation of competences of the Union pursuant to Article 5.1 sentence 2 and.4 TEU (BVerfGE 154, 17 [juris, marginal no. 119, 123]). The decisions of the Court of Justice on intra-EU investment arbitration proceedings concern the delimitation of the competences of, on the one hand, state courts and, on the other hand, arbitral tribunals in the interpretation and application of Union law.

135 (2) Irrespective of this, there are no indications that the decisions of the Court of Justice of the European Union in the matter do not satisfy the principle of proportionality in the review of acts of the institutions of the Union, which is also recognised as an unwritten element of Union law (on this, BVerfGE 154, 17 [juris, margin no. 124 to 126], with corrigenda), in order to achieve the legitimate objective of ensuring the coherence, full validity and autonomy of Union law.

136 (a) In particular, the fact that the interpretation of the Energy Charter Treaty is only binding on the Member States and thus on some of the contracting parties does not prevent it from being appropriate. The binding interpretation by the Court of Justice of the European Union can and may refer solely to the internal context of the Union (cf. Article 19 (1), first subparagraph, second sentence, (3) TEU). In this area, however, its interpretation is binding on all and can thus achieve its objective of ensuring the coherence and uniformity of Union law (cf. in this respect ECJ, EuGRZ 2019, 191 [juris para. 111] - CETA Agreement EU-Canada).

137 (b) In view of the opinion of the Court of Justice of the European Union that arbitral tribunals are not to be classified as courts or tribunals within the meaning of Article 267 TFEU (cf. ECJ, SchiedsVZ 2018, 186 [juris paras. 37, 43, 46] - Achmea), there is no lack of necessity because there may also be gaps in the submission of questions of interpretation to the state courts. In this respect, there are possibilities for remedy in individual cases. Under Union law, infringement proceedings pursuant to Art. 258 et seq. TFEU (cf. ECJ, Judgment of 4 October 2018 - C-416/17, EuZW 2018, 1038 [juris tenor 2 and paras. 105 to 114] - Commission v. France; Wegener in Calliess/Ruffert loc. cit. 35 et seq.) and, domestically, a constitutional court review based on the standard of Article 101 (1) sentence 2 of the Basic Law (see BVerfG, EuGRZ 2022, 350 [juris para. 41 to 47] et seq.; Wegener in Calliess/Ruffert loc. cit. art. 267 TFEU, para. 36 et seq. A comparable review in the case of arbitral tribunals entitled to make submissions, on the other hand, would not be possible.

138 (c) The decisions of the Court of Justice are also not inappropriate because of conflicting economic and foreign policy concerns. Art. 26 (2) (a) ECT expressly provides for the possibility of recourse to national courts. The Senate has already stated that investors are not denied effective legal protection (Article 2 (1) in conjunction with Article 20 (3) of the Basic Law; Article 47 EU Charter of Fundamental Rights) (cf. BGH, SchiedsVZ 2019, 46 [juris, marginal no. 72]), but rather, with a view to the principle of mutual trust, are granted before the courts of the Member States (cf. EuGH, EuZW 2021, 1097

[juris marginal no. 68] - PL Holdings; Cour d'Appel de Paris, Judgment of 19 April 2022 - No. 48/2022, RG-NR 20/13085 marginal nos. 92 to 95; cf. also BGH, IWRZ 2022, 129 [juris marginal no. 41]; Langenfeld, EuR 2022, 399, 404; van der Beck loc. cit. p. 370, 373, etc.). On the international level, there is also the possibility to appeal to the European Court of Human Rights (cf. Lavranos/Lath/Varma, SchiedsVZ 2023, 38, 46).

139 IV. Contrary to the opinion of the Higher Regional Court, application no. 2 is inadmissible.

140 The Higher Regional Court assumed that it was irrelevant that so far only the ICSID ARB/21/4 arbitration proceedings were before the court, which had been initiated by acceptance of the offer pursuant to Article 26.3 of the ECT. It was also irrelevant that an arbitration agreement would only be concluded if the respondent accepted this "standing offer", which the respondent denied with regard to further disputes. Due to the currently still valid provision of the applicant's "standing" offer of arbitration in the Energy Charter Treaty, the respondent could declare acceptance at any time and thereby initiate arbitration proceedings on an ineffective basis under EU law. This does not stand up to legal scrutiny.

141 (2) Within the scope of an application under section 1032 (2) ZPO, the state court examines whether an effective arbitration agreement exists, whether it is enforceable and whether the subject matter of the arbitral proceedings is subject to the arbitration agreement (BGH, SchiedsVZ 2020, 50 [juris, marginal no. 11]). It follows from this scope of examination that as a minimum requirement for an admissible application under § 1032 (2) ZPO an arbitration agreement between the parties must be presented (cf. Anders in Anders/Gehle, ZPO, 81st ed., § 1032 marginal no. 3; BeckOK.ZPO/ Wolf/Eslami loc. cit. § 1032 marginal no. 2; Schlosser in Stein/Jonas loc. cit. § 1032 marginal no. 38). A mere potential or future arbitration agreement between the parties is not sufficient.

142 It is disputed how far in advance of a concrete arbitration the application is admissible, in particular whether an individualised arbitration which can be delimited in terms of subject matter must be apparent (so OLG München, order of 26 August 2015 - 34 SchH 2/14, juris para. 20, 22; Saenger/Saenger loc. cit. § 1032 para. 14; Hilger, NZG 2003, 575, 576; cf. also Schlosser in Stein/Jonas loc. cit. § 1032 para. 38, 40; Spohnheimer loc.cit. p. 357, 366), or whether an abstract review of the validity of contractual arbitration clauses is possible (so KG, SchiedsVZ 2012, 337, 338; OLG Frankfurt, SchiedsVZ 2015, 47 [juris para. 21 f.]; BeckOK.ZPO/Wolf/Eslami loc.cit § 1032 Rn. 6, 26 to 32; MünchKomm.ZPO/ Münch loc.cit § 1032 Rn. 33; Voit in Musielak/Voit loc.cit § 1032 Rn. 12; Seiler in Thomas/Putzo, ZPO, 44th ed. § 1032 Rn. 5).

143 (3) This issue does not need to be decided here. Application No. 2 is inadmissible because there is already no arbitration agreement between the parties as alleged by the applicant (and possibly invalid).

144 In the dispute, only the so-called "standing offer" pursuant to Article 26(3) ECT of the Claimant is present. The acceptance of this offer by the respondent with the submission of the Request for Arbitration in the ICSID ARB/21/4 proceedings did not establish an arbitration agreement covering any dispute under the Energy Charter Treaty.

145 Insofar as the applicant wishes to have it clarified as a precautionary measure that the respondent cannot bring about an effective arbitration agreement by a possible future acceptance of the "standing offer" - with regard to a different subject matter of the dispute - this question does not concern a concrete arbitration agreement with arbitration proceedings potentially arising therefrom, but only a potential arbitration agreement and is therefore not covered by the scope of examination of an application under section 1032 (2) ZPO.

146 The minimum requirement of an arbitration agreement that is in any event alleged cannot be dispensed with in view of the special features of intra-EU investor-state arbitration. The principle of effectiveness of the

Union law (cf. supra para. 77) requires an examination of the admissibility of intra-EU investor-state arbitration on the basis of the Energy Charter Treaty as early as possible. However, this is already ensured by the fact that the legal remedy of § 1032 (2) ZPO is opened as soon as an arbitration agreement exists.

147 D. Accordingly, the appeal on points of law is to be dismissed as unfounded with regard to application number 1. With regard to application number 2, the order under appeal is to be set aside on the appeal on points of law and the application for a declaratory judgment is to be dismissed as inadmissible. In this respect, the Senate can decide on the merits because the decision is only set aside because of a violation of the law when applying the law to the factual situation that has been established and, according to the latter, the matter is ripe for a final decision (§ 577.5 sentence 1 ZPO).

148The decision on costs is based on § 92.1 sentence 1, § 97.1 ZPO.

149E . The value of the subject-matter of the appeal shall be set at € 30 million.

150 The value of the object of the appeal in proceedings pursuant to section 1032 (2) of the Code of Civil Procedure is to be set at one fifth of the value of the main matter according to the established practice of the Senate (cf. BGH, SchiedsVZ 2020, 50 [juris, marginal no. 26]; NJOZ 2023, 497 [juris, marginal no. 22]).

151 Based on the amount of compensation claimed in the Request for Arbitration for the two arbitration claimants in the amount of € 1.4 billion, the Senate, assuming equal participation of the arbitration claimants, considers a value of € 140 million to be appropriate for Request 1 (one fifth of € 700 million for the respondent here as one of the two arbitration claimants). Pursuant to § 48 (1) sentence 1 GKG, § 3 ZPO, half of the value of claim 1, i.e. a further € 70 million, is to be assessed for claim 2 and added to the value of the object pursuant to § 39 (1) GKG. Pursuant to section 39 (2) GKG, however, the value in dispute shall not exceed €30 million, unless a lower maximum value is determined. If already one

of several objects in dispute exceeds the maximum value, the aggregation pursuant to § 39 (1) GKG does not lead to an increase (see BGH, order of 6 April 2010 - II ZR 130/08, juris, marginal no. 1).

KochFeddersenPohl

Schmaltz Odörfer

Lower court:
OLG Cologne, decision dated 01.09.2022 - 19 SchH 15/21 -