

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Azienda Elettrica Ticinese

v.

Federal Republic of Germany

(ICSID Case No. ARB/23/47)

PROCEDURAL ORDER No. 9

On the Claimant's Application to Strike an Expert Report

Members of the Tribunal

Sir Christopher Greenwood GBE, CMG, KC, President of the Tribunal
Mr. John Beechey CBE, Arbitrator
Prof. Campbell McLachlan KC, Arbitrator

Secretary of the Tribunal

Ms. Anna Holloway

Assistant to the President

Ms. Rose Cameron

16 June 2026

I. PROCEDURAL BACKGROUND

1. On 16 January 2026, the Claimant filed its Reply on the Merits and Counter-Memorial on Jurisdiction (the “**Reply**”), in accordance with Procedural Order No. 7 (“**PO7**”). The Claimant submitted an expert report by Dr. Lutz Krahnefeld (the “**Krahnefeld Report**”) with its Reply.
2. On 18 May 2026, the Respondent filed its Rejoinder on the Merits and Reply on Preliminary Objections (the “**Rejoinder**”), in accordance with PO7. The Respondent submitted an expert report by Professor Dr. Ferdinand Kirchhof (the “**Kirchhof Report**”) with its Rejoinder.
3. By email of 5 June 2026 the Claimant applied to the Tribunal for an Order that the Kirchhof Report be “struck from the record as inadmissible and untimely” (the “**Application**”).
4. The Tribunal invited the Respondent to reply to the Application. By letter of 12 June 2026, the Respondent opposed the Claimant’s request.

II. THE SUBMISSIONS OF THE PARTIES

5. The Claimant argues that the Kirchhof Report fails to comply with ICSID Arbitration Rule 30(2) which limits a rejoinder to “responding to the previous written submission and addressing any relevant facts that are new or could not have been known prior to filing the ... rejoinder”.
6. According to the Claimant, the Kirchhof Report is not a genuine response to the Krahnefeld Report or to points raised for the first time in the Reply but instead responds to points made in the Memorial and should therefore have been submitted with the Counter-Memorial. The Claimant points to the fact that the footnotes to the Kirchhof Report make scarcely any reference to the Reply but contain many more references to the Memorial.
7. The Claimant further argues that the Kirchhof Report is irrelevant, since the question whether the Claimant might be entitled to compensation under German Constitutional Law is not the issue; the Claimant’s claim for compensation is based upon the Energy Charter Treaty.
8. Consequently, according to the Claimant, the Kirchhof Report is “belated and inadmissible”.
9. According to the Claimant, any attempt to cure the alleged procedural deficiency by granting the Claimant leave to submit a responsive expert report would not be appropriate, because it is uncertain whether such a report could be prepared within the available timeframe.
10. The Respondent maintains that the Kirchhof Report is responsive to the Krahnefeld Report and to points made for the first time in the Reply. In particular, the Respondent submits that Dr. Krahnefeld raised questions about the protection of property rights under the German Basic Law to which it was entitled to submit an expert report in response.
11. In addition, the Respondent submits that the Claimant made new arguments in the Reply concerning the operating permit for the Lünen Plant, contending that the permit differed in its effect under German law from other operating permits. It also maintains that the Claimant raised in the Reply a new argument that the Respondent had misrepresented German law when it contended that the German Constitution did not protect a permit from legislative changes, because the Respondent was relying on a judgment about nuclear phase-out. Permits under

nuclear law are different from permits under the Federal Immission Control Law (as the Lünen one was). According to the Respondent, the Kirchhof Report addresses this issue.

12. Finally, the Respondent asserts that the Kirchhof Report is relevant to the issues before the Tribunal and that if the Claimant considered it to be irrelevant, then the Claimant would suffer no prejudice from its admission.

III. THE TRIBUNAL'S ANALYSIS

13. Arbitration Rule 30(2) of the 2022 ICSID Arbitration Rules (which govern this case) provides, in relevant part, that:

... A reply and rejoinder shall be limited to responding to the previous written submission and addressing any relevant facts that are new or could not have been known prior to the filing the reply or rejoinder.

14. In determining whether the Kirchhof Report meets that requirement, the Tribunal does not consider that the absence of footnote references to the Reply and to the Krahnefeld Report is decisive. Whether the Kirchhof Report is responsive to matters raised in the Reply or in the Krahnefeld Report has to be decided as a matter of substance not of form.
15. The issue, moreover, is whether, in substance, the Kirchhof Report is responsive to the submissions in the Reply and not just to whether it is responsive to the Krahnefeld Report.
16. The Tribunal notes that the Reply addresses arguments relating to the position under German law (see section beginning at para. 228). It considers that the Respondent was entitled to reply to those points and to submit an expert report in doing so.
17. In addition, the Tribunal considers that the Kirchhof Report is responsive to points raised in the Krahnefeld Report regarding the effect of German law with regard to the permits for the Lünen Plant and the protection which German law might offer.
18. So far as the relevance of the Kirchhof Report is concerned, the Tribunal considers that this is a matter for argument at the hearing and on which the Tribunal must take a decision in the Award. It is not appropriate to canvass that issue in a preliminary application to strike.
19. Nevertheless, the Tribunal considers that the Claimant should have the chance to respond to the Kirchhof Report should it wish to do so. In this context it notes that the Respondent states in its letter of 12 June 2026 that it would not oppose any application to file such a response. While the Claimant has not so far made such an application and maintains that it is not certain whether it could arrange for a responsive report in the time available, the Tribunal considers that it should be given the opportunity to respond. Accordingly, the Claimant may file a short response to the Kirchhof Report by 17 July 2026.
20. The Respondent is entitled to the last word. If, therefore, the Claimant chooses to file a short response as offered, the Respondent may file a short reply strictly limited to any new matters raised by the Claimant in its response to the Kirchhof report by 20 August 2026.
21. The Tribunal is required by ICSID Arbitration Rule 27(2) to indicate the reasons upon which a procedural decision is made. At the same time, it is important that nothing is said which

might seem to prejudge the substantive issues to be determined in the Award. For that reason, as well as because of the urgency of resolving the Application, the Tribunal has kept its statement of the reasons for this decision to a minimum. For the avoidance of doubt, the Tribunal emphasizes that nothing in the present Order is intended to suggest that the Tribunal has formed a view about the matters in dispute between the Parties.

IV. ORDER

22. For the reasons given above, the Tribunal:

- (a) dismisses the Application to strike the Kirchhof Report;
- (b) permits the Claimant to file a short response to the Kirchhof Report by no later than 17 July 2026;
- (c) permits the Respondent, should the Claimant file a response in accordance with (b) above, to file a short reply in accordance with para. 20 above by 20 August 2026;
- (d) reserves the question of the costs of this Application to the Award.

On behalf of the Tribunal,

[signed]

Sir Christopher Greenwood
President of the Tribunal
Date: 16 June 2026