

To the International Centre for Settlement of Investment Disputes

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**REQUEST FOR ARBITRATION**

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in a dispute between

**VATTENFALL AB**  
**VATTENFALL EUROPE AG**  
**VATTENFALL EUROPE GENERATION AG & Co. KG**  
**(SWEDEN AND GERMANY)**

and

**THE FEDERAL REPUBLIC OF GERMANY**

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30 March 2009

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## REQUEST FOR ARBITRATION

In accordance with Article 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"), the Swedish company Vattenfall AB ("Vattenfall") and its subsidiary, the German company Vattenfall Europe AG ("Vattenfall Europe") as well as the German company Vattenfall Europe Generation AG & Co. KG ("Vattenfall Generation") (collectively the "Claimants") hereby respectfully submit this Request for Arbitration (the "Request") to the International Centre for Settlement of Investment Disputes ("ICSID"), and respectfully request that the Secretary-General register this arbitration against the Federal Republic of Germany ("Germany" or "Respondent").

### 1. The Parties

#### 1.1 Claimants

1. Vattenfall is a Swedish joint stock company (*Aktiebolag*) with its registered office in Stockholm, Sweden. A certified excerpt from the Swedish company registry is attached as **Exhibit C-1**.
2. Vattenfall Europe is a German joint stock company (*Aktiengesellschaft*) with its registered office in Berlin, Germany. From 2006 until 2008, Vattenfall directly or indirectly continuously owned more than 95% of the shares of Vattenfall Europe. Since 2008, Vattenfall directly or indirectly owns 100% of the shares of the Vattenfall Europe AG. A certified excerpt from the company registry is attached hereto as **Exhibit C-2**.
3. Vattenfall Generation is a German limited partnership (*AG & Co. KG*) with its registered office in Cottbus, Germany. From 2006 to 2008, Sole general partner (*Komplementär*) of Vattenfall Generation is the joint stock corporation Vattenfall Europe Generation Verwaltungs-AG with its registered office in Cottbus. Sole shareholder of the general partner is Vattenfall Europe, also being the sole limited partner (*Kommanditist*) of Vattenfall Generation. The described ownership structure remains unaltered since 2006.

4. As contemplated by Rule 18 of the ICSID Arbitration Rules the following will serve as counsel

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5. Claimants have duly authorized the institution of legal proceedings and appointed, respectively, Mannheimer Swartling Advokatbyrå (“Mannheimer Swartling”) and Luther Rechtsanwalts-gesellschaft mbH (“Luther”) as their legal representatives, as evidenced by Exhibits C-3 to C-5.
6. Claimants have designated Mannheimer Swartling as their joint point of contact with ICSID and authorized Mannheimer Swartling to communicate with ICSID on their behalf. Claimants therefore respectfully request that all communication in this arbitration be addressed to Mannheimer Swartling.

## 1.2 Respondent

7. The Federal Republic of Germany (“Germany”) is Respondent in this arbitration. Respondent has in the negotiations between the parties been represented by the Federal Ministry of Economy and Technology (*Bundesministerium für Wirtschaft und Technologie, BMWi*). The Ministry has

so far been represented by the head of the division for International Investments, Mr Joachim Steffens.

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## 2. Summary of the Dispute

### 2.1 Background

8. The first Claimant, Vattenfall, is the parent company of the the Vattenfall group of companies (hereinafter the "Vattenfall Group"). Vattenfall is a Swedish electricity company. In 1996, Vattenfall began to expand internationally. Today the Vattenfall Group is operating in six different core markets: Sweden, Finland, Germany, Denmark, Poland and the United Kingdom.
9. The Vattenfall Group's business in Germany is conducted through the second Claimant, Vattenfall Europe. Vattenfall Europe was established as the result of a merger between several German companies active in the electricity sector in which the Vattenfall Group had acquired the majority of the shares. Such companies include: HEW in Hamburg (*Hamburgische Electricitätswerke*), BEWAG in Berlin (*BEWAG Aktiengesellschaft Berlin*), VEAG (*VEAG Vereinigte Energiewerke AG*) and LAUBAG (*Lausitzer Braunkohle AG*), a coal producer. Vattenfall Europe has several German subsidiaries, including, Vattenfall Europe Generation AG & Co. KG ("Vattenfall Generation"). Vattenfall Generation operates the major part of the Vattenfall Group's power plants in Germany, and sells the electricity and heat to other companies within and outside the Vattenfall Group.
10. HEW, in the German federal state of Hamburg (*Freie und Hansestadt Hamburg*), was previously the local state-owned electricity company. HEW

supplied the city of Hamburg both with electricity and district heating generated by its own power plants. One of these plants was situated in the local suburb of Moorburg and used to operate on gas and oil. However, due to high gas prices, the plant was decommissioned in 2001 and eventually dismantled in 2004.

11. The dispute between the Vattenfall Group and Germany arises out of the conduct of the Hamburg government authorities relating to the administrative procedure for the issuing of permits for a new power plant being constructed by Vattenfall Generation at the site of the former plant which is at Hamburg-Moorburg. This new coal-fired power plant (the "Moorburg power plant"), will have two block-units, with a combined production capacity of max. 1730 MW electricity or max. 650 MW district heating.
12. The planning of the Moorburg power plant started in 2004. The Vattenfall Group originally planned to build a one-block plant at an investment cost of approximately EUR 700 million. However, the city of Hamburg explicitly encouraged and proposed the construction of a dual-block plant. The idea was that the increased amount of district heating from a dual-block plant would ensure long-term supply of district heating to the city of Hamburg. The Vattenfall Group accepted Hamburg's proposal to expand the plant to a dual block plant. This also proved favourable in Vattenfall's economic analysis. Consequently, Vattenfall changed its investment decision accordingly. Thus, on 31 August 2006, the board of directors of Vattenfall approved the planned construction of the Moorburg power plant with an - initial - budget of EUR 1833 million. At the date of filing of this Request, due to the actions of Hamburg, the costs have increased to more than EUR 2 billion.

## 2.2 Administrative Procedure

### Background

13. Under German law, the construction and operation of a power plant requires permits from the responsible authorities of the federal state where the plant is to

be operated. In this case the authority in question is the Authority for Urban Development and Environment in Hamburg (*Behörde für Stadtentwicklung und Umwelt*, the "BSU"). Two permits were particularly relevant: *First*, the permit under the Federal Act on Immission Control (*Bundes-Immissionsschutzgesetz*), which would permit the construction and operation of the plant ("immission control permit"). *Second*, the permit according to the Federal Water Resources Act (*Wasserhaushaltsgesetz*), allowing the use of cooling water out of the river Elbe and the return of such water back to the river ("water use permit").

14. After the board of Vattenfall had approved the planned construction, Vattenfall Generation, on 27 October 2006, applied for the immission control permit, and, on 5 December 2006, for the water use permit. As to the water use permit, Vattenfall Generation applied for a permit that would allow the plant to take out of the river Elbe cooling water at a rate of up to 64,4 m<sup>3</sup>/s and to return such cooling water at a maximum temperature of 30°C with a resulting temperature increase between water intake and outlet of the river water of maximum 6/7.5°C.

The permits were delayed

15. A fundamental characteristic of the administrative procedure under the Federal Act on Immission Control, and relevant ordinances is the strict time limits for certain procedural steps: the procedure must not take longer than is strictly necessary. The decision must be taken within seven months after the filing of a complete application. This deadline, however, can be extended, once e.g. in complicated cases, by three months. To speed up the procedure, an applicant seeking an immission control permit may simultaneously apply for a "preliminary start permit" ("*Zulassung vorzeitigen Beginns*"), which entitles the applicant to carry out certain preliminary construction measures.
16. Before Vattenfall Generation applied for the immission control permit and the water use permit, it discussed the prospective timeframe of the administrative procedure with the BSU. At the time of applying for the permits, Vattenfall Generation, therefore, had reason to expect that the emission permit would be

issued by May 2007. However, after Mr. Axel Gedaschko, previously deputy head of the BSU and a Christian Democrat politician, became Senator<sup>1</sup> (on 17 January 2007) and head of the BSU, the start of the administrative procedure for the issuing of the permits was further delayed. With the reports of the Intergovernmental Panel on Climate Change having alerted the public to the impending climate change, Mr. Gedaschko imposed very clear requirements for the procedure to continue. Such demands were expressed by Mr Gedaschko at a meeting on 16 March 2007 with members of Vattenfall Europe's Board of Directors. One such requirement was that the Vattenfall Group was requested to agree with a Hamburg-based huge copper producer, which also planned to build a power plant, that this factory would discontinue its power plant project and instead be supplied with electricity by the Moorburg power plant. The bottom line message communicated by the Hamburg authorities was thus that only one power plant would be authorized.

17. By letter of 25 April 2007, the BSU indicated to Vattenfall Generation that the water use permit could not be issued. The reason given was that the temperature increase of the water in the river would cause serious harm to the ecology of the river. Under German law, without a water use permit the Vattenfall Group would not be entitled to the immission control permit for the construction of the plant. The BSU invited Vattenfall Generation to amend its application and to meet with BSU officials to discuss the consequences of BSU's opinion.
18. The Vattenfall Group maintained its application as submitted. In early May 2007, a long-term electricity supply agreement was reached between the Vattenfall Group and the copper factory, enabling the latter to give up its own power plant project. The contract was signed in the City Hall of Hamburg in the presence of Senator Gedaschko. Some days later the meeting proposed by the BSU in its letter of 25 April 2007 took place between Vattenfall Generation and the BSU. At such meeting it became clear that the BSU now had revised its

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<sup>1</sup> In Hamburg, government ministers traditionally are named "Senators".

previous view that the water use permit could not be issued. Rather, the BSU now took the position that the amount of cooling water would not pose any substantial problem.

19. After the meeting, by letter of 11 May 2007, the BSU notified Vattenfall Generation that the procedure concerning the immission control permit could officially start. In connection herewith the BSU indicated that the immission control permit and the water use permit could be issued by 28 November 2007. The statutory time limit within which the permits had to be issued by the authorities expired seven months after the official commencement of the procedure for issuing the permits, i.e. on 10 December 2007. As mentioned above in para. 15, there are very limited possibilities to extend this time limit. Moreover, no extension may exceed three months.

20. In preparation of the construction of the Moorburg power plant, Vattenfall Generation had entered into a number of option contracts with construction companies. Such options had to be called by the end of 2007. It was therefore of great importance for the Moorburg project that Vattenfall Generation obtained the preliminary start permit that would allow it to start the construction before the end of 2007. The Hamburg government, however, made the granting of the preliminary start permit dependent on the fulfilment of the following demands:

- that the Vattenfall Group further reduce the temperature of the water that was to be returned to the river Elbe;
- that the Vattenfall Group undertake to install at its own cost, and as soon as possible, a carbon capture & storage plant ("CCS-plant"); and
- that the Vattenfall Group increase the output of district heating.

An agreement is reached and the preliminary start permit is issued

21. The negotiations between the Hamburg government and the Vattenfall Group regarding the permits for the Moorburg power plant continued throughout

October 2007. The negotiations were conducted on several levels. Vattenfall made it clear during the negotiations that the planned construction of the power plant would be discontinued, if the Vattenfall Group did not receive the preliminary start permit before the end of 2007 (Exhibit C 6).

22. Following several meetings in October 2007 and early November 2007, an agreement was reached between the Vattenfall Group and the Hamburg government (the "Moorburg Agreement"). The agreement was publicly announced on 14 November 2007, Exhibit C 7). Under the agreement, the Vattenfall Group accepted the demands put forward by the government of Hamburg and made corresponding undertakings which entailed very substantial additional costs for the Vattenfall Group.
23. In return, the Hamburg government, through BSU, on the same day, i.e. 14 November 2007, granted Vattenfall Generation's application for the preliminary start permit that allowed Vattenfall Generation to initiate the construction of the plant. In the permit, attached hereto in excerpts as Exhibit C 8, the BSU stated:

A decision in favour of the applicant can be expected in immission protection proceedings. According to a provisional assessment of the immission control application there are no obstacles that cannot be removed by covenants that stand in the way of approval. Assessment of the submitted application documents has revealed that from the current point of view it is highly probable that the provisions of Section 6 of the BImSchG<sup>2</sup> in relation to the proposed plant are met. This opinion was also shared by the authorities involved in the proceedings.

Fundamental objections, that cannot be overcome or settled by covenants, have not been raised by the authorities involved.

24. By letter dated 22 November 2007, Prof. Josefsson, CEO of Vattenfall, thanked Mayor von Beust for the "constructive negotiations". Mayor von Beust replied by letter dated 11 December 2007, stating that he had been aware of the significance of the Moorburg matter for the Vattenfall Group. This correspondence is attached as Exhibits C 9 and C 10.

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<sup>2</sup> Federal Act on Immission Control (*Bundes-Immissionsschutzgesetz*)

25. At its meeting on 12 December 2007, the board of Vattenfall was informed about the agreement and approved an increase of the budget for the construction of the plant and the district-heating pipelines to EUR 2,205 million.
26. Relying on the Moorburg Agreement, the preliminary start permit, and the assurances received from the representatives of the City of Hamburg, Vattenfall Generation called the options it previously had secured with contractors for building the plant (see para. 20 above). At that time, BSU officials also informed Vattenfall Generation that the immission control permit, which was crucial for the further construction work, would be granted in January 2008.

The Hamburg government tries to stop the building of the plant - further delays

27. In the electoral campaign of the Green Party for the state parliament elections in Hamburg in February 2008, the Moorburg power plant played a central role. In a press statement of 8 February 2008, Mr. Christian Maaß of the Green Party publicly declared, Exhibit C-11, that the Green Party<sup>3</sup> would stop the building of the power plant, should they be part of the government after the election:

There are sufficient legal options to stop the power station being built. We will use all means at our disposal if we are in the government after the election.

28. Contrary to what had been indicated by the BSU and what the Vattenfall Group had expected, the immission control permit was not granted in January 2008. By letter dated 8 February 2008, the BSU asserted that they already in December 2007 had extended the time limit of issuing the permit until 10 March 2008, without, however, having informed Vattenfall Generation about this. The BSU further stated that it was unlikely that the permits would be issued before the end of March 2008.

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<sup>3</sup> In Hamburg, the Green Party bears the name „Bündnis 90/Die Grünen GAL Hamburg“ (hereinafter „Green Party“).

29. On 24 February 2008, the elections for the state parliament were held. The local CDU party (*Christlich Demokratische Union Deutschlands*) lost its absolute majority and entered into coalition talks with the Green Party. The coalition talks lasted from early March 2008 until 10 April 2008.
30. On 10 March 2008, the CDU and the Green Party established the "Working Group Moorburg", the purpose of which was to discuss the alternatives to Moorburg plant. During the coalition talks, Mrs. Anja Hajduk, chairperson of the Hamburg Green Party, issued the following press statement of 12 March 2008, **Exhibit C 12**:
- We will do everything within our power to prevent the construction of this huge coal-fired power station.
31. On 27 March 2008, the BSU again extended the time limit for the issuance of the immission control permit. This time until 10 June 2008, i.e. until well after the end of the coalition talks.
32. The coalition talks, resulted in an agreement between the CDU and the Green Party to the effect that the BSU was to be headed by Mrs. Hajduk and her deputy Mr. Maaß. The coalition agreement of 18 April 2008 states that the applications for the permits for the Moorburg plant would be assessed and decided "according to law".
33. Already on 14 April 2008, due to the delay in issuing the permits, Vattenfall Generation had filed a lawsuit against the BSU with the Higher Administrative Court in Hamburg (*Hamburgisches Obergerverwaltungsgericht, OVG*), applying for a judgement ordering the BSU to issue the permits. Despite those proceedings, the BSU, for the third time, extended the time limit for the issuance of the permits, this time until 10 September 2008.
34. The central issue before the Higher Administrative Court was the granting of the water use permit, without which there would be no final construction permit. In the proceedings the BSU raised a number of arguments why the permit should not be granted, arguments which the BSU had not raised in 2007 under the former Hamburg government.



may be required periodically to shut down, even if the requirements under the permit on the useable amount of surface water are met.

39. Thirdly, the BSU arbitrarily increased the duration of the monitoring phase for the efficiency of the so-called "fish-stair" in the river Elbe<sup>4</sup> from one year to two years, which could delay the start of the operation of the plant by one year.

40. Since the amount of cooling water is decisive for the electricity output of a coal-fired power plant, the plant will – as a result of the above-described restrictions – be able to operate only with substantially reduced capacity. Based on an annual average output, the reduction can today be estimated to amount to approximately 45% per cent of the plant's normal output.

### 2.3 The damage suffered by the Claimants

41. The Claimants have suffered considerable losses and damage as a consequence of the above-described actions taken by the BSU. The following categories of general loss can be defined at this time.

42. Firstly, the delay in issuing the required permits has led to damage claims against Vattenfall Generation by contractors retained for the construction of the power plant. The original construction schedule for the power plant provided that work for which the immission control permit was necessary needed to start in May 2008. When the permit was not issued by this date, Vattenfall Generation had to instruct its contractors to suspend the works.

43. Secondly, the water use restrictions make the plant uneconomical. The restrictions lead to a significant reduction in the electricity generation capacity and to a corresponding loss of cash-flow from sold electricity. The effect of the

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<sup>4</sup> Southeast of Hamburg, the river Elbe is blocked by a weir ("Wehr") with a sluice-lock. To enable fish which have their breeding grounds upriver to cross the weir, a fish-stair had been built into one side of the river. As the power plant, by taking water out of the river, could potentially kill a certain number of fish, Vattenfall Generation plans the construction of a second fish-stair. This would prevent damage to the fish population by allowing more fish to swim upriver and breed. The power plant will not be allowed to start operations before a monitoring phase has established the efficiency of the second fish-stair.

reduced generation capacity is a very significant reduction of the value of the plant.

44. Furthermore, the Moorburg plant was intended to replace the aging power plant in Hamburg/Wedel, which currently delivers district heating for Hamburg. The Hamburg/Wedel plant is scheduled to be decommissioned in 2012. Any delay in the start of operation of the Moorburg plant, e.g. caused by the two-year monitoring phase for the fish-stair, will require the Hamburg/Wedel plant to be kept in operation longer than previously planned. The continued operation of the Wedel plant will require considerable additional investments by the Vattenfall Group. In addition, any delay of the start-date for the operation of the Moorburg plant causes additional losses and damage.

45. The combined effect of the delay in issuing the required permits and the restrictions on the use of cooling water destroys the economic value of the plant. Claimant's losses and damage have been preliminarily assessed to approximately EUR 1.4 billion.

#### **2.4 Negotiations between the Vattenfall Group and Germany**

46. The Claimants contacted the Federal Government already at an early stage to ask for an amicable settlement of the dispute. Negotiations took place in two phases: (i) before 30 September 2008, i.e. when it was still unclear whether the permits would be granted, and (ii) after 30 September 2008.

47. A first meeting was held on 15 July 2008 in the Federal Chancellery in Berlin. The meeting did not produce any substantive result. The Claimants therefore sent a formal Notice of Dispute to the Federal Government on 28 August 2008. This Notice of Dispute is attached hereto as **Exhibit C-13**.

48. Subsequently, the Federal Ministry for Economy and Technology took over the handling of the dispute. When the permits were issued with the restrictions explained above, the Claimants sent a new Notice of Dispute to the government, **Exhibit C-14**, giving the government three further months for an

amicable settlement. An informal meeting was held in Berlin on 15 December 2008. Again no agreement was reached.

49. A further meeting was envisaged for early February 2009. The Federal Government cancelled it and rescheduled it for 26 or 27 February 2009. However, the Government cancelled both dates at short notice.

### 3. **Germany has breached the Energy Charter Treaty**

50. The ECT is an international treaty establishing a legal framework for the promotion of long-term cooperation in the energy field. The ECT has been signed and ratified both by Germany and Sweden (see para. 58 below).
51. Part III of the ECT, entitled "Investment Promotion and Protection", imposes a number of substantive obligations upon Germany for the protection of investments made in Germany by investors of other Contracting Parties.
52. In particular, Article 10 (1) of the ECT provides that investments of investors of other Contracting Parties shall at all times be accorded fair and equitable treatment, enjoy the most constant protection and security, and that no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal.
53. Moreover, pursuant to Article 13 of the ECT, investments may not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation except where such expropriation is: (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation.
54. The acts and omissions of the Federal State of Hamburg in relation to the authorization process of the Moorburg power plant constitute, separately and in combination, violations of the Germany's obligations under Part III of the ECT. Such violations of the ECT are directly attributable to Germany. In particular, Germany has committed the following breaches of the ECT.

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- (i) The politically motivated delay of the administrative procedure for the authorization of the Moorburg power plant by approximately 9 months is incompatible with Germany's obligations under Article 10 (1) ECT.
- (ii) Germany is also in breach of its obligations under Article 10 (1) ECT by imposing restrictions under the water use permit for the outtake of cooling water from the river Elbe related to surface water volume and temperature and oxygen levels, which are incompatible with agreements previously reached between Hamburg and the Vattenfall Group.
- (iii) In addition, the fact that the above-mentioned severe restrictions under the water use permit were developed by the BSU in only a few days - and three working days before the permits were issued - contrary to all previous statements, and without giving the Vattenfall Group a fair hearing, is in breach of Germany's obligation under Article 10 (1) ECT.
- (iv) Moreover, the extension of the monitoring period for the fish-stair by one year to two years, which was decided shortly before the issuance of the permits, was a politically motivated, unreasonably measure impairing the enjoyment of investments in violation of Germany's obligations under Article 10 (1) ECT.
- (v) The combined effects of the delay of the administrative procedure and the restrictions imposed on the use of cooling water pursuant to the water use permits amount to an indirect expropriation of Claimants' investments in violation of Article 13 (1) ECT.

#### 4. Jurisdiction of the Centre

55. Article 25 (1) ICSID Convention provides that:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre [...].

##### 4.1 The ICSID Convention is in force between Sweden and Germany

56. Both Sweden and Germany are Contracting States to the ICSID Convention. Germany deposited its instrument of ratification with the International Bank of Reconstruction and Development (the "Bank") on 18 April 1969. The Convention entered into force for Germany on 18 May 1969.

57. Sweden deposited its instrument of ratification with the Bank on 20 December 1966. The Convention entered into force for Sweden on 28 January 1967.

##### 4.2 The Parties have consented to submit a legal dispute arising out of an Investment to the Centre

###### 4.2.1 Germany's Consent

58. The parties have consented to submit their dispute to this Centre. The consent of Germany to refer this dispute to arbitration under the ICSID Convention is set forth in Article 26 of the ECT. Both Germany and Sweden are Contracting Parties to the ECT. Both States deposited their respective instruments of ratification with the depositary on 16 December 1997. A list of Contracting Parties to the ECT, published by the Energy Charter Secretariat, is attached as Exhibit C-15. The ECT entered into force on 16 April 1998. A copy of the ECT is attached as Exhibit C-16.

59. In relevant parts, Article 26 of the ECT provides that:

(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

(2) If such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:

[...]

(c) in accordance with the following paragraphs of this Article.

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

[...]

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

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

[...]

(5) (a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for:

(i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules;

[...]

60. Thus, under Article 26 of the ECT "*Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III*" comes within the scope of Germany's consent to arbitration under the ICSID Convention.

Claimants are Investors under the ECT

61. Article 1 (7) (a)(ii) of the ECT stipulates that an Investor means, with respect to a Contracting Party, a company or other organization organized in accordance with the law applicable in that Contracting Party. As a company organised in accordance with the laws of Sweden, Vattenfall is an Investor within the meaning of the ECT.
62. Vattenfall Europe is a juridical person established in accordance with German law. For the purposes of the Energy Charter Treaty and the ICSID Convention, however, Vattenfall Europe is to be considered as a national of another Contracting State than Germany. Pursuant Article 25 (2) (b) ICSID Convention, a "National of another Contracting State" means also a juridical person having the nationality of the Contracting State party to the dispute (i.e. Germany), but which, due to foreign control, the parties have agreed should be treated as a national of another Contracting State. Such agreement to treat Vattenfall Europe as a "national of another Contracting State" is set forth in Article 26 (7) ECT:
- (7) An Investor other than a natural person which has the nationality of a Contracting Party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a "national of another Contracting State" and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a "national of another State".
63. Vattenfall Europe was (and still is) controlled by an Investor, i.e. Vattenfall, of another Contracting Party to the ECT (in this case Sweden) before the dispute between it and Germany arose. The control is evidenced by Vattenfall's direct and indirect shareholding, as well as the factual control exercised by Vattenfall, via the management and supervisory boards of Vattenfall Europe. Such ownership and factual control are established by the following documentation:
- a statement by the auditor of Vattenfall confirming that Vattenfall, directly and through subsidiaries such as Vattenfall Deutschland GmbH, from 31 August 2006 until the 24 March 2009 (the date of the statement)

continuously owned more than 95% of the shares of Vattenfall Europe,  
**Exhibit C-17.**

- Vattenfall has established a Group Management System ("GMS"). The GMS is documented in governing documents, consisting of "Group policies" and "Group instructions". All activities within Vattenfall must comply with the GMS governing documents. The CEO of Vattenfall has established two separate decision fora to manage the Group: the Executive Group Management ("EGM") and the Executive Committee ("ExCom"). Investment decisions with an amount of over EUR 10 million require the consent of the CEO and ExCom of Vattenfall as well as of the board of directors of Vattenfall. The respective Group Management Instruction valid in 2006 is attached as **Exhibit C-18**. Thus, through the GMS, Vattenfall effectively exercises factual control over Vattenfall Europe.
  
- Members of the Group Management of Vattenfall are members of the supervisory board of Vattenfall Europe. The chairman and CEO of Vattenfall, Prof. Lars Josefsson, is chairman of the supervisory board of Vattenfall Europe. In 2007, five additional, current or former, members of Vattenfall's management were members of the supervisory board of Vattenfall Europe: Mr. Jan Erik Back, then Chief Financial Officer of Vattenfall AB; Dr. Helmar Rendez, Senior Vice President of Vattenfall and Head of Group Function Strategies; Lennart Billfalk, former Executive Vice President of Vattenfall and Ann-Charlotte Dahlström, Senior Vice President of Vattenfall and Head of Group Function Human Resources and Knut Erik Leman, Senior Vice President of Vattenfall and Head of Group Function Communications. As **Exhibit C-19**, the Claimants submit a list showing the respective members of the supervisory board of Vattenfall Europe in 2007 (submitted to the commercial register upon a change of the members of the board). Thus, Vattenfall also exercises factual control over Vattenfall Europe through the participation of its senior management in the supervisory board of Vattenfall Europe.

64. **Vattenfall Generation** is a juridical person established in accordance with German law. For the purposes of the Energy Charter Treaty and the ICSID Convention, however, Vattenfall Generation is to be considered as a national of another Contracting State than Germany. Vattenfall Generation is controlled directly by Claimant Vattenfall Europe (an Investor) and indirectly by Claimant Vattenfall (also an Investor). Vattenfall, through Vattenfall Europe, owns all the shares in Vattenfall Generation's general partner. Under German law, the general partner of a partnership manages the business of the partnership. That Vattenfall Generation is controlled by Vattenfall has been recognized and accepted by the City of Hamburg in the final water use permit. On pages 119 and 120, attached as excerpt as **Exhibit C-20**, the BSU states:

The applicant is protected by the Charter in Germany. In fact, it is incorporated in Germany under German law and has its registered office in Germany. However, since – like its sister companies – it is substantially controlled by the Swedish parent company, Vattenfall AB, they are considered as investors of another contracting party (Art. 1 (7) in conjunction with Art. 26 (7)) within the meaning of the Charter. In Sweden, too, the Energy Charter entered into force on April 16, 1998.

This statement of the BSU confirms that the responsible authority of the German Federal State of Hamburg has accepted Vattenfall Generation as a foreign investor, and its investments into the power plant as an investment protected under the ECT.

65. Thus, Vattenfall, Vattenfall Europe and Vattenfall Generation qualify as Investors of "*another Contracting Party*" under the ECT and as nationals of "*another Contracting State*" under the ICSID Convention.

Claimants have made investments in Germany

66. Pursuant to Article 1 (6) of the ECT, an "Investment" means "*every kind of asset, owned or controlled directly or indirectly by an investor*" and includes:

- (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
- (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;

(c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;

(d) Intellectual Property;

(e) Returns;

(f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

67. Claimants' investments qualify as an Investment under the ECT. Both Vattenfall and Vattenfall Europe, directly or indirectly, own and control the German project company, Vattenfall Generation, through which the investments in the Moorburg power plant is carried out. Claimants' direct and indirect ownership of Vattenfall Generation constitutes an Investment in Germany pursuant to Article 1 (6) (b) ECT.
68. All three Claimants also own and control, directly and indirectly, the contracts for the construction of the power plant Moorburg. These contracts constitute claims to contractual performance in Germany having an economic value and are associated with Vattenfall Generation, which in itself is an Investment within the meaning of the ECT. As per the date of this Request, the contract value amounts to approximately EUR 1,600 million. Such claims to performance pursuant to contracts having an economic value and associated with an Investment qualify as an Investment pursuant to Article 1 (6) (c) ECT. In the water use permit (Exhibit C-20), Hamburg has accepted that the contracts and the financial investments made constitute protected investments within the meaning of the ECT.

Claimants bring a claim under Part III of the ECT

69. As has been set out above in Section 3, Claimants bring their claims in this dispute under Part III of the ECT, specifically Article 10 (Promotion, Protection and Treatment of Investments) and Article 13 (Expropriation). Claimants thus bring a claim which concerns an alleged breach of Germany's obligations under Part III of the ECT.

Conclusions regarding Germany's consent under Article 26 of the ECT

70. The dispute between Claimants and Germany clearly constitutes a dispute between a Contracting Party and Investors of another Contracting Party relating to an Investment of the former in the Area of the latter, which concern an alleged breach of an obligation of the former under Part III of the ECT. This dispute thus comes within the scope of Germany's consent to submit disputes under Article 26 ECT to the Centre.

4.2.2 Claimants' consent

71. By submitting this Request for Arbitration, Claimants have chosen to resolve this dispute under the ICSID Convention. This Request for Arbitration serves as Claimants' consent in writing for this dispute to be submitted to ICSID pursuant to Article 26 (4) (a)(i) of the ECT.

4.3 **The other criteria for establishing jurisdiction pursuant to Article 25(1) of the ICSID Convention are fulfilled**

4.3.1 The dispute is a legal dispute within the meaning of the ICSID Convention

72. This dispute submitted by the Claimants to ICSID is a legal dispute as required by Article 25 (1) of the ICSID Convention. In their Report, the Executive Directors of the Bank have described this requirement as follows:

26. [...] The dispute must concern the existence of scope of a legal right or obligation, or the nature or extent of the reparation to be made for the breach of a legal obligation.

73. As set out in Sections 3 above, the acts and omission of the federal state of Hamburg in relation to the authorisation process for the Moorburg power plant constitute, independently and in combination, violations of Germany's obligations under Part III of the ECT. Thus, the dispute between the Claimants and Germany is clearly a legal dispute within the meaning of Article 25 of the ICSID Convention.

#### 4.3.2 The dispute arises directly out of investments of the Claimants

74. As required by Article 25 (1) of the ICSID Convention, the dispute between the Parties arises directly out of an investment.

75. The fact that this dispute arises directly out of an investment within the meaning of the ECT has already been explained in paras. 64-66 above.

76. Unlike the ECT, the ICSID Convention does not expressly define the term "investment". Nevertheless, it has been suggested by tribunals applying Article 26 of the ICSID Convention that typical characteristics of an "investment" are that: (i) it relates to a project of a certain duration, (ii) which yields a certain regularity of profit and return, (iii) there is a financial or commercial risk, (iv) there is a financial commitment of substantial size and (v) the project is of significance for the host state's development. Claimants' investments (see paras. 66-68 above) show these characteristics.

#### 4.3.3 The Claimants are nationals of other Contracting States than the Respondent

77. The Claimants are nationals of other Contracting States than the Respondent. As has been set out above in paras. 1 and 61, Vattenfall is a Swedish national and both Vattenfall Europe and Vattenfall Generation, pursuant to Article 25 (2) (b) ICSID Convention and Article 26 ECT, are for the purposes of the ICSID Convention deemed to be a national of another Contracting State than Germany (see paras. 62-64/65 above).

#### 4.4 Conclusions regarding the jurisdiction of the Centre

78. It follows from what has been set out above in this Section of the Request that the Centre has jurisdiction over this dispute. The dispute between Claimants and Germany regarding the Moorburg power plant constitutes a legal dispute between a Contracting State and nationals of another Contracting State arising directly out of an investment. Moreover, pursuant to Article 26 of the ECT, Germany has consented in writing to submit this dispute to the Centre.



## 6. Constitution of the Tribunal

81. The parties have not agreed upon the number of arbitrators, nor have the parties agreed on the method of appointment of the Arbitral Tribunal. The ECT does not set forth any particular provisions in this respect.

82. Accordingly, Article 37 (2) (b) of the ICSID Convention provides, and the Claimants request, that a three-member Tribunal be appointed. The Claimants propose the following method for the appointment of the Tribunal:

- (i) Claimants herewith appoint Prof. Gabrielle Kaufmann-Kohler, of the law firm Levy Kaufmann-Kohler, 3-5 rue du Conseil-Général, P.O. Box 552, CH-1211 Geneva, Switzerland. Tel. +41 22 809 6200. Fax +41 22 809 6201E-mail: gabrielle.kaufmann-kohler@lk-k.com;
- (ii) Respondent shall appoint an arbitrator within 45 days following the Registration of the Request;
- (iii) The two arbitrators so appointed shall jointly designate a third arbitrator to be the President of the Tribunal within 30 days after the appointment of the second party-appointed arbitrator, or such other time as may be jointly agreed by both of them and the parties; and
- (iv) Failing an appointment by a party, or agreement by the two arbitrators first appointed on the designation of the third arbitrator to be President of the Tribunal within the stated time periods, the Secretary-General of ICSID shall appoint the arbitrator or arbitrators not yet appointed and designate an arbitrator to be the President of the Tribunal, if necessary.

83. The above procedure is Claimants' proposal for purposes of Rule 2 (i) (a) of the Arbitration Rules. Accordingly, the Claimants respectfully submit that the 20-day period set forth in Rule 2 (i) (b) of the Arbitration Rules for Germany's acceptance of Claimants' proposal as to the method of constituting the Tribunal shall run from the date of registration of this Request.

7. **Miscellaneous**

84. This Request is addressed to the Secretary General of the Centre at the principal office of the Bank in Washington, D.C.
85. This Request is accompanied by five signed copies, including exhibits.
86. The lodging fee of US\$ 25 000 has been transferred by wire to the following account:

Beneficiary Bank:	Wachovia Bank NA, New York
Address:	11 Penn Plaza, Floor 4 New York, NY 10038
Account Name:	IBRD
Account Number:	2000192003476
Swift Code:	PNBPUS3NNYC
ABA No.:	026005092
Reference:	ICSID Lodging Fee – the Vattenfall Group v. Germany

Proof of wire transfer is attached as **Exhibit C-21**.

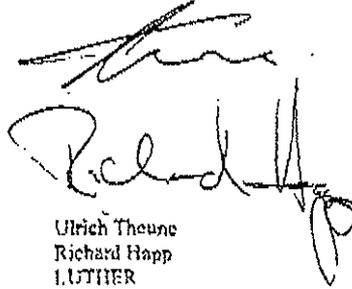
87. Based on the foregoing, the Claimants respectfully request that this Request for Arbitration be registered pursuant to Article 36 (3) of the ICSID Convention.

Respectfully submitted for and on behalf of the Claimants.

Stockholm and Hamburg, 30 March 2009



Kaj Hober  
Fredrik Andersson  
Johann von Pachelbel  
Nils Eliasson  
MANNHEIMER SWARTLING



Ulrich Theune  
Richard Happ  
LUTHER