FEDERAL CONSTITUTIONAL COURT

- 2 BvR 1277/23 -

In the proceedings
on
the constitutional complaint

1. of the company [...]
2. of the company [...]
3. of the company [...]
4. of the company [...]
5. of the company [...]
6. of the company [...]

- authorised representatives: [...] -

against the Order of the Federal Court of Justice
of 27 July 2023 - I ZB 43/22 -

the First Chamber of the Second Senate of the Federal Constitutional Court, with the participation of Justices

Vice-President König
and Justices Frank
and Wöckel

unanimously held on 31 July 2025, on the basis of § 93b in conjunction with § 93a of the Federal Constitutional Court Act in the version published on 11 August 1993 (Federal Law Gazette I p. 1473):

The constitutional complaint is not admitted for decision.

Reasons:

The constitutional complaint concerns a decision of the Federal Court of Justice which held that ICSID arbitration proceedings initiated on the basis of the Energy Charter Treaty by the complainants – investors from EU Member States – against the Federal Republic of Germany are impermissible. 1

I.

[…] 2-30

[*Excerpt from Press Release No. 83/2025*]

In 1969, the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) entered into force for the Federal Republic of Germany. Art. 1 of the ICSID Convention establishes the International Centre for Settlement of Investment Disputes (ICSID Centre), whose purpose is to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of the Convention.

The Energy Charter Treaty of 17 December 1994 […] is a mixed international agreement concluded by the European Community, its Member States (with the exception of Italy) and the European Atomic Energy Community, in particular with Eastern European states that were associated states at the time. It is a multilateral treaty designed to protect private investments in the energy sector of the Contracting States.

In 2012, new provisions entered into force for the approval of the construction and operation of wind farms in the exclusive economic zone of the Federal Republic of Germany. The previous permit procedure was replaced by a planning approval procedure. Under the new legal framework, the stage reached by the complainants in the procedure under the previous law for offshore wind farms developed by them, including the permit already granted for the operation of those wind farms, no longer had any legal significance. In its order of 30 June 2020, the Federal Constitutional Court declared the Act to Develop and Promote Offshore Wind Energy (Offshore Wind Energy Act, *Windenergie-auf-See-Gesetz* – WindSeeG) to be incompatible with Art. 2(1) in conjunction with Art. 20(3) of the Basic Law (*Grundgesetz* – GG) insofar as a compensation regime was necessary as set forth in the reasons to that order. Following this order, § 10a of the Offshore Wind Energy Act was enacted, which provides that the operators of a project that completed the approval procedure are now entitled to reimbursement of certain specified costs. The complainants made use of this possibility.

In addition, they applied to the ICSID Centre for arbitration proceedings to be instituted against the Federal Republic of Germany, asserting claims for damages inter alia. The Federal Republic of Germany unsuccessfully sought a declaration from the Berlin Higher Regional Court (*Kammergericht*) that the ICSID arbitration proceedings are inadmissible pursuant to § 1032(2) of the Code

of Civil Procedure (*Zivilprozessordnung* – ZPO). Following a complaint on points of law (*Rechtsbeschwerde*) lodged by the Federal Republic of Germany, the Federal Court of Justice held in the challenged decision that the ICSID arbitration proceedings instituted by the complainants were inadmissible. According to the Federal Court of Justice, its international jurisdiction for the application pursuant to § 1032(2) of the Code of Civil Procedure followed from the application by analogy of § 1025(2) of the Code of Civil Procedure. The Federal Court of Justice held that the application was formally admissible. In the case at hand – which concerned the particular constellation of intra-EU investor-state arbitration proceedings – the preclusive effect of the ICSID arbitration proceedings on proceedings before domestic courts exceptionally did not apply due to the precedence of application of EU law, including over international law.

[*End of excerpt*]

II.

1. With their constitutional complaint, which was timely lodged on 23 September 2023, the complainants assert a violation of their fundamental rights under Art. 2(1) in conjunction with Art. 20(2) second sentence, and Art. 3(1), Art. 101(1) second sentence, Art. 2(1) in conjunction with Art. 20(3) and Art. 3(1) of the Basic Law. 31

a) The complainants contend that the challenged order goes beyond the constitutional limits of judicial development of the law and thereby violates their rights under Art. 2(1) in conjunction with Art. 20(2) second sentence and Art. 20(3) of the Basic Law. 32

[…] 33-37

b) The complainants also contend that the challenged order constitutes a violation of the right to one’s lawful judge under Art. 101(1) second sentence of the Basic Law in several respects. First, they argue that the Federal Court of Justice, contrary to its obligation under Art. 100(2) of the Basic Law, failed to refer to the Federal Constitutional Court the question whether the general rule of international law that agreements must be kept (*pacta sunt servanda*) constitutes a part of federal law such that the rule gives rise to a right on the part of the complainants, as partial subjects of international law, to require the Federal Republic of Germany to comply with the arbitration agreement based on Art. 26(2) letter c of the Energy Charter Treaty in conjunction with Art. 25 of the ICSID Convention. Second, they assert that a violation of Art. 101(1) second sentence of the Basic Law exists when the judicial branch, in the absence of a statutory basis and in violation of the wording of the law, postulates its own jurisdiction over disputes which are statutorily assigned to the jurisdiction of other courts. According to the complainants, the ICSID arbitration tribunal constitutes a lawful judge. Third, the complainants contend that the challenged order also deprives them of their lawful judge because the Federal Court of Justice, as a court of last instance, arbitrarily violated its obligation to make a referral to the Court of Justice of the European 38

Union (CJEU) pursuant to Art. 267(3) of the Treaty on the Functioning of the European Union (TFEU). The complainants contend that the CJEU has not clarified the question of the compatibility of EU investor-state ICSID arbitration proceedings pursuant to Art. 26 of the Energy Charter Treaty with EU law.

c) For the same reasons, the complainants also assert a violation of their general right of access to justice arising from Art. 2(1) in conjunction with Art. 20(3) of the Basic Law. They further contend that the challenged order violates the constitutional protection of their legitimate expectations under Art. 2(1) in conjunction with Art. 20(3) of the Basic Law. [...] 39

2. The Federal Government submitted a statement in these proceedings which expressed doubt that the constitutional complaint was sufficiently substantiated and stated that in any event the complaint is not well-founded. 40

[...] 41-46

3. [...] 47

III.

The constitutional complaint is not admitted for decision, as the prerequisites for admission pursuant to § 93a(2) of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG) are not met. The constitutional complaint neither has general constitutional significance, nor is its admission for decision appropriate to enforce the rights of the complainants as laid down in § 90(1) of the Federal Constitutional Court Act. The constitutional complaint is inadmissible. Neither the possibility of a violation of fundamental rights (see 1. below) nor a recognised legal interest in bringing an action (see 2. Below) has been sufficiently substantiated by the complainants. 48

1. Insofar as the complainants assert that the Federal Court of Justice exceeded the limits of judicial development of the law by analogy, by interpreting the federal law provisions in a manner which disregards the Constitution’s openness to international law and by not finding the *Achmea* case-law of the CJEU to be an *ultra vires* act as part of its interpretation (see a) below), they have not sufficiently substantiated a violation of their fundamental right under Art. 2(1) in conjunction with Art. 20(3) of the Basic Law (see b) below). 49

a) aa) Courts observe the principle of the rule of law (Art. 20(3) of the Basic Law) when, in interpreting and applying the law, they remain within the boundaries of tenable interpretation and permissible judicial development of the law. Art. 2(1) in conjunction with Art. 20(3) of the Basic Law ensures that court decisions meet this standard (cf. BVerfGE 128, 193 <206 ff.>; 132, 99 <127 para. 73>; 149, 126 <154 f. para. 72 ff.>). 50

When interpreting legislation, the decisive factor is the objective legislative intent expressed in the legislation in question as it arises from the wording of the provisions and its contextual meaning (cf. BVerfGE 1, 299 <312>; 11, 126 <130 f.>; 105, 135 <157>; 133, 168 <205 para. 66>; 144, 20 <212 f. para. 555>; 163, 1 <27 para. 54> – *Wind turbines in woodland areas*; 168, 1 <40 f. para. 118> – *Transfer of business assets between partnerships, where the ownership interests of both are held by the identical group of persons*). Objective intent is to be determined by recognised methods of legal interpretation, i.e. the wording, systematic approach, spirit and purpose of the provision, as well as through the legislative materials and legislative history. These methods are not mutually exclusive, but instead complement one another. None of these methods takes absolute precedence over the others (cf. BVerfGE 11, 126 <130>; 105, 135 <157>; 133, 168 <205 para. 66>; 144, 20 <213 para. 555>; 157, 223 <263 f. para. 106> – *Berlin rent cap*; 168, 1 <40 f. para. 118>). The starting point for interpretation is the wording of the legislation in question. However, the wording alone is not always sufficient for determining legislative intent. Under certain circumstances, the concept expressed in said wording and pursued by the legislator – which the courts may not oppose – only becomes clear when it is considered in the context of the spirit and purpose of the law or other aspects (cf. BVerfGE 122, 248 <283> – dissenting opinion; 133, 168 <205 para. 66>). The court's task is limited to giving effect to the intended legislative concept in the specific case as faithfully as possible, including under changed circumstances (cf. BVerfGE 96, 375 <394 f.>; 133, 168 <205 para. 66>). Under no circumstances may a judicial determination of the law fail to give effect to or otherwise distort the essential aspects of the legislator's statutory objective, and it must never replace the legislator's concept with the court's own concept (cf. BVerfGE 78, 20 <24> with further references; 119, 247 <274>; 133, 168 <205 para. 66>; 138, 64 <93 f. para. 86>; 168, 1 <40 f. para. 118>). 51

Developing the law is part of the judicial responsibilities of the courts (cf. BVerfGE 149, 126 <154 para. 73>; 168, 1 <45 para. 130>). This includes applications by analogy (cf. BVerfGE 82, 6 <12 f.>; 132, 99 <128 para. 77>; 168, 1 <45 para. 130>). Development of the law may be necessary when there are gaps in the law as written or when contradicting assessments must be reconciled (cf. BVerfGE 34, 269 <287>; 126, 286 <306>). However, judicial development of the law may not result in the courts replacing the legislator's concept of substantive justice with their own concept (cf. BVerfGE 82, 6 <12 f.>; 128, 193 <210>; 132, 99 <127 para. 75>; 149, 126 <154 para. 73>; 168, 1 <45 para. 130>). An interpretation of the law by way of judicial development that sets aside the clear wording of the law and overrides the clearly recognisable legislative intent amounts to impermissible interference with the competences of the democratically elected legislator (cf. BVerfGE 118, 212 <243 f>; 128, 193 <210>; 132, 99 <127 f. para. 75>; 133, 168 <205 para. 66>; 134, 204 <238 para. 115>; 149, 126 <154 para. 73>; 168, 1 <45 para. 130>). In determining the underlying legislative concept of a provision, both its wording as well as the systematic approach of the legislation and the legislative materials are of considerable importance (cf. 52

BVerfGE 133, 168 <205 f. para. 66>; 135, 126 <151 f. para. 81>; 137, 350 <367 para. 43>; 138, 261 <281 para. 46>; 145, 171 <215 para. 121>; 149, 126 <154 f. para. 74>; 168, 1 <45 f. para. 131>).

53 As the development of the law concerns ordinary law, the question of whether and to what extent changed circumstances require new legal responses is for the ordinary courts to decide. Thus, the Federal Constitutional Court may not in principle substitute its assessment for that of the ordinary courts (cf. BVerfGE 82, 6 <13>; 128, 193 <211>). Its review is limited to whether the development of the law by the ordinary courts respects the fundamental decision of the legislator and its goals and whether the ordinary courts followed recognised methods of legal interpretation (cf. BVerfGE 96, 375 <395>; 113, 88 <104>; 122, 248 <258>; 128, 193 <210 f.>; 132, 99 <128>).

54 The ordinary court's assessment as to whether the facts of the case justify an application by analogy is only subject to a limited review by the Federal Constitutional Court. The determination of whether gaps in a law exist or whether the legal provision was intended to be comprehensive, much like the determination of how to resolve such gaps, also requires a legal assessment (cf. BVerfGE 82, 6 <13>). This requires a consideration of the ordinary law by the ordinary courts, which the Federal Constitutional Court is not authorised to review (cf. BVerfGE 18, 85 <93>; 82, 6 <13>). The answer to the question of whether the factual circumstances since the enactment of a provision have changed in such a way that an application by analogy is justified is also a matter for the ordinary courts to decide. Even though reconciling the boundaries of the binding effect of the law on judges becomes more problematic in the context of judicial development of the law, review by the Federal Constitutional Court of application by analogy is restricted to whether the ordinary court has tenably identified a gap in the ordinary law and resolved it and whether this extension of the law contradicts constitutional values, namely fundamental rights (cf. BVerfGE 82, 6 <13>).

55 bb) The principle of openness to international law has constitutional rank. It follows from an overall assessment of the constitutional provisions that address the relationship between Germany and the international community (cf. BVerfGE 141, 1 <26 f. para. 65> with further references). This principle requires interpreting, where possible, national statutes in such a way as to avoid a conflict with the Federal Republic of Germany's international law obligations (cf. BVerfGE 74, 358 <370>; 83, 119 <128>; 111, 307 <317 f.>; 120, 180 <200 f.>; 128, 326 <367 f.>; 141, 1 <29 f. para. 71>). Therefore, when multiple potential interpretations exist within the scope of the applicable methodical principles, an interpretation that is open to international law is generally to be preferred (cf. BVerfGE 141, 1 <29 f. para. 71> with further references). However, it does not follow from the Basic Law's openness to international law that there is an unreserved constitutional duty to comply with every rule of international law (cf. BVerfGE 123, 267 <400 f.>; 141, 1 <28 f. para. 69>).

56 It is for the ordinary courts to interpret and apply international treaty law, which in accordance with Art. 59(2) first sentence of the Basic Law is accorded the rank of ordinary (federal) law at the national level (cf. BVerfGE 111, 307 <318>; 141, 1 <19 f. para. 45 f.>). The Federal Constitutional Court's review of these decisions follows the same general standards as apply to the review of court decisions (cf. BVerfGE 18, 441 <450>; 59, 63 <89>; 94, 315 <328>; 99, 145 <160>; 111, 307 <328>; 118, 124 <135>). However, within the scope of its jurisdiction, the Federal Constitutional Court is also authorised to, if possible, prevent and eliminate violations of international law that result from an incorrect application or non-compliance with international legal obligations by German courts and could give rise to a responsibility of Germany under international law (cf. BVerfGE 58, 1 <34>; 59, 63 <89>; 109, 13 <23>; 111, 307 <328>).

57 cc) In accordance with Art. 23(1) first sentence of the Basic Law, the Federal Republic of Germany contributes to the establishment and development of the European Union. The uniform application of EU law is crucial for the European Union to be successful (cf. BVerfGE 123, 267 <399>; 126, 286 <301>). It could not exist as a legal community if there were no guarantee of the uniform application and effectiveness of its law (cf. the foundational explanations of the CJEU, Judgment of 15 July 1964, *Costa/ENEL*, C-6/64, EU:C:1964:66; established case-law). To this end, Art. 23(1) of the Basic Law lays down a commitment to ensure the effectiveness and enforcement of EU law (cf. BVerfGE 126, 286 <302>). Therefore, by empowering the Federation to transfer sovereign powers to the European Union (Art. 23(1) second sentence of the Basic Law), the Basic Law accepts the precedence of application accorded to EU law by the act of approval to the Treaties. In principle, this precedence of application of EU law over domestic law also applies with respect to conflicting provisions of constitutional law (cf. BVerfGE 129, 78 <100>), meaning that in the event of a conflict in a specific case, the relevant provision of domestic constitutional law is generally inapplicable (cf. BVerfGE, 126, 286 <301>).

58 Nevertheless, the precedence of application of EU law is not comprehensive or without exception. It only applies insofar as the Basic Law and the act of approval permit or provide for a transfer of sovereign powers (cf. BVerfGE 73, 339 <375 f.>; 89, 155 <190>; 123, 267 <398 ff.>; 126, 286 <302>; 129, 78 <99>; 134, 366 <384 para. 26>; established case-law). These constitutional standards correspond to the provisions set forth in the Treaty on European Union (TEU). The European Union is a community based on the rule of law (cf. Art. 2 first sentence TEU; cf. CJEU, Judgment of 23 April 1986, *Les Verts/Parliament*, C-294/83, EU:C:1986:166, para. 23). Most notably, the European Union is bound by the principle of conferral (cf. Art. 5(1) first sentence and Art. 5(2) first sentence TEU; cf. BVerfGE 75, 223 <242>; 89, 155 <187 f., 192, 199>; 123, 267 <349>; 126, 286 <302>; 134, 366 <384 para. 26>; 142, 123 <199 para. 144>) and by EU fundamental rights, and respects the constitutional identity of the Member States, on which it is founded (Art. 4(2) first sentence TEU, Art. 5(1) first sentence and Art. 5(2) first sentence TEU, Art. 6(1) first sentence and

Art. 6(3) TEU; cf. BVerfGE 126, 286 <303>; 142, 123 <199 para. 144>). EU law therefore continues to require conferral in the Treaties. If institutions, bodies, offices and agencies of the European Union wish to extend their powers, such extension requires a corresponding treaty amendment, which the Member States must effectuate and take responsibility for in line with their respective constitutional rules (cf. Art. 48(4) subpara. 2, Art. 48(6) subpara. 2 third sentence, Art. 48(7) subpara. 3 TEU; cf. BVerfGE 142, 123 <199 para. 144>). Similarly, the principle of the rule of law (Art. 2 TEU, Art. 20(3) of the Basic Law) requires that the exercise of public authority must have a valid legal basis. Thus, measures of institutions, bodies, offices and agencies of the European Union that result from an exceeding of competences are not based on a valid allocation of powers in the Treaties in conjunction with the corresponding act of approval and consequently cannot justify interferences with citizens' rights and legal interests (cf. BVerfGE 134, 366 <388 para. 30>; 142, 123 <202 para. 152>; 164, 193 <283 para. 127> – *Act Ratifying the EU Own Resources Decision – Next Generation EU*).

59 On the basis of the *ultra vires* doctrine (*ultra vires* review), the Federal Constitutional Court is therefore entitled and required to review acts of institutions, bodies, offices and agencies of the European Union as to whether these acts evidently exceed the European Union's competences and, where necessary, to find that acts exceeding these competences are inapplicable for the German legal order (cf. BVerfGE 126, 286 <302>). This obligation of the Federal Constitutional Court to review substantiated *ultra vires* challenges regarding acts of EU bodies and other institutions must be coordinated with the mandate conferred upon the CJEU through the Treaties to interpret and apply the Treaties and thereby ensure uniformity and coherence of EU law (cf. Art. 19(1) subpara. 1 second sentence TEU, Art. 267 TFEU). If any Member State could readily invoke the authority to decide, through its own courts, on the validity of EU acts, this could in practice undermine the precedence of application and jeopardise the uniform application of EU law (cf. BVerfGE 126, 286 <303>).

60 To find an *ultra vires* act, competences must have been exceeded in a sufficiently qualified manner. This standard of review ensures respect for the judicial mandate of the CJEU enshrined in Art. 19 subpara. 1 second sentence TEU (cf. BVerfGE 126, 286 <307>; 142, 123 <200 f. para. 149>; 154, 17 <92 para. 112> – *PSPP asset purchase programme of the ECB*; 164, 193 <283 f. para. 129>). A qualified exceeding of competences must be manifestly evident and of structural significance for the division of competences between the European Union and the Member States (cf. BVerfGE 154, 17 <90 para. 110>; 164, 193 <283 f. para. 129>).

61 A measure of an EU institution, body, office or agency manifestly exceeds the competences conferred on it (cf. BVerfGE 123, 267 <353, 400>; 126, 286 <304>; 134, 366 <392 para. 37>; 142, 123 <200 para. 148>; 151, 202 <300 f. para. 151> – *European Banking Union*; 154, 17 <90 para. 110>) when, in applying common methodological standards, a competence cannot be established under any legal point of view (cf. BVerfGE 126, 286 <308>;

142, 123 <200 para. 149>; 151, 202 <300 f. para. 151>; 164, 193 <284 para. 130>). An exceeding of competences can therefore be manifest even if it is the result of careful and meticulously reasoned interpretation of the law (cf. BVerfGE 142, 123 <201 para. 150>; 151, 202 <301 para. 152>; 154, 17 <92 f. para. 113>; 164, 193 <284 para. 131>).

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The interpretation of EU law, including the determination of the applicable methodological standards, primarily falls to the CJEU (Art. 19(1) subpara. 1 second sentence TEU; cf. BVerfGE 142, 123 <205 para. 158>). The methodological standards developed by the CJEU for the judicial interpretation and application of the law are based on the (constitutional) legal traditions common to the Member States, not least as they are reflected in the case-law of the Member States' constitutional and supreme courts and that of the European Court of Human Rights. In this regard, the wording of a legal provision (binding in several language versions), its regulatory purpose (*effet utile*) and the systematic context in which it exists, must be given particular weight. The particularities of EU law give rise to considerable differences with regard to the importance and weight accorded to the various means of interpretation. Yet the mandate conferred in Art. 19(1) subpara. 1 second sentence TEU is exceeded where the traditional European methods of interpretation or, more broadly, the general legal principles that are common to the laws of Member States are manifestly disregarded (cf. BVerfGE 142, 123 <206 f. para. 160>). Against this backdrop, it is not for the Federal Constitutional Court to substitute the CJEU's interpretation with its own when faced with questions of interpreting EU law, even if the application of accepted methodology, within the established bounds of legal debate, would allow for different outcomes (cf. BVerfGE 126, 286 <307>). On the contrary, as long as the CJEU applies recognised methodological principles and does not act in a way that is objectively arbitrary, the Federal Constitutional Court must respect judicial development of the law by the CJEU even when it adopts a view against which weighty arguments could be made (cf. BVerfGE 142, 123 <207 para. 161>).

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A structurally significant shift of competences to the detriment of the Member States results where the exceeding of competences has a considerable impact on the principle of conferral and on the extent to which respect for the legal order, as part of the rule of law, is upheld. This is generally the case if the exercise of the competence invoked by the European Union is contingent upon a treaty amendment in accordance with Art. 48 TEU or the use of an evolutionary clause (cf. BVerfGE 126, 286 <309>; 151, 202 <301 para. 153>; 154, 17 <90 para. 110>), thus requiring action on the part of the German legislator pursuant to either Art. 23(1) second sentence of the Basic Law or the Act on the *Bundestag*'s and the *Bundesrat*'s Responsibility with Regard to European Integration (*Integrationsverantwortungsgesetz* – IntVG) (cf. BVerfGE 89, 155 <210>; 142, 123 <201 f. para. 151>; 151, 202 <301 para. 153>; 154, 17 <90 para. 110>; 164, 193 <284 f. para. 132>).

Against this background, a constitutional complaint alleging an *ultra vires* violation can only be admissible if the complainants have shown that the special requirements for *ultra vires* challenges resulting from the Basic Law's principle of openness to European law have been met (cf. BVerfGE 142, 123 <174 f. para. 83>). 64

It also follows from the commitment to ensure the effectiveness and enforcement of EU law (cf. BVerfGE 126, 286 <302>) that national law must be interpreted – to the extent permitted by methodological boundaries – in a manner that conforms with EU law (cf. BVerfGE 75, 223 <237>; 129, 78 <99>; Federal Constitutional Court, Order of the Second Chamber of the Second Senate of 26 September 2011 - 2 BvR 2216/06 *inter alia* -, para. 46 <on interpretation in conformity with EU directives>). 65

b) Based on the foregoing, the complainants have not sufficiently substantiated that the order of the Federal Court of Justice violates their fundamental right under Art. 2(1) in conjunction with Art. 20(3) of the Basic Law by exceeding the limits of judicial development of the law. 66

The interpretation by the Federal Court of Justice developing the law follows recognised methods of legal interpretation (see aa) below). A conflict with constitutional values – in this case by the alleged failure to observe the Basic Law’s principle of openness to international law and by relying on the *Achmea* case-law of the CJEU in spite of its *ultra vires* nature – is not sufficiently substantiated (see bb) below). 67

aa) [...] 68-71

bb) A conflict with constitutional values, and fundamental rights in particular, is [...] not sufficiently substantiated. There is some tension between the interpretation and the obligations under international law arising from the ICSID Convention, which constitutes a part of the German legal order (see (1) below). That said, the Federal Court of Justice justifies its interpretation with an exception within the scope of application of EU law. Insofar as the Federal Court of Justice considered its interpretation to be obligatory under EU law based on the case-law of the CJEU in regard to the incompatibility of arbitration clauses in investment protection law, it was not prohibited from making reference to such case-law on the grounds that the case-law should have been determined to be an *ultra vires* act. The complainants have not satisfied the stringent substantiation requirements that apply to such a determination (see (2) below). Whether the Federal Court of Justice was correct in assuming to be bound by an obligation under EU law may be subject to debate. However, it has not been sufficiently substantiated that its interpretation is untenable and therefore arbitrary (see (3) below). 72

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(1) (a) The ICSID Convention is part of the German legal order at the level of federal law pursuant to the order giving effect to the Convention contained in the act of approval of 25 February 1969 [...].

[...] 74-76

(b) There is much to suggest that the interpretation adopted by the Federal Court of Justice creates tensions with the principle of the Basic Law's openness to international law, because this interpretation – as the Federal Court of Justice itself assumes when viewing the ICSID Convention in isolation – violates Art. 41 of the ICSID Convention (see (aa) below) and because the ICSID Convention is applicable with regard to the decision on the objection raised against the validity of the arbitration agreement (see (bb) below). 77

(aa) As noted above [...] the Federal Court of Justice is of the opinion that § 1025(2) of the Civil Code, insofar as it makes reference to § 1032(2) of the Civil Code, should be applied analogously to Intra-EU ICSID arbitration proceedings. Consequently, and contrary to Art. 26 and Art. 41 of the ICSID Convention, it views the arbitration agreement to be inadmissible pursuant to § 1032(2) of the Civil Code. In doing so, the Federal Court of Justice assumes in the challenged decision that there is a conflict between its interpretation, which it considers to be obligatory due to the precedence of application of EU law, and Art. 41 of the ICSID Convention ([...]). 78

Pursuant to Art. 26 of the ICSID Convention, the parties' agreement to arbitration proceedings under the Convention, absent an agreement to the contrary, is deemed an agreement to arbitration proceedings for matters within the scope of the Convention to the exclusion of any other legal remedy. According to Art. 41(1) of the ICSID Convention, it is for the arbitral tribunal to decide on its own competence (*Kompetenz-Kompetenz*). Art. 26 of the ICSID Convention and the competence of the arbitral tribunal to decide on its own competence arising from Art. 41(1) of the ICSID Convention in principle rules out a decision on the matter by a national court after the initiation of ICSID arbitration proceedings ([...]). The Federal Court of Justice also assumed this to be the case. In its decision of 17 July 2023, the arbitral tribunal itself indicated that, according to its preliminary assessment, the proceedings before German courts could violate the ICSID Convention ([...]). 79

(bb) EU law and international law may reach different conclusions as to whether a valid arbitration agreement is in place (see (α) below). However, the question of the validity of an arbitration agreement will in any case likely fall within the scope of application of the ICSID Convention, meaning that it is in principle for the ICSID tribunal to answer this question (see β below). 80

(α) Based on the case-law of the CJEU, it seems sensible to assume that the arbitration provision under Art. 26 of the Energy Charter Treaty must be viewed as incompatible with 81

EU law, insofar as it relates to arbitration proceedings between an investor from one Member State of the European Union against another Member State, and that it therefore cannot take effect. According to the case-law of the CJEU to date, arbitration clauses in bilateral investment treaties between Member States of the European Union as well as ad hoc arbitration agreements violate the fundamental principle of the autonomy of the EU legal order laid down in Arts. 267 and 344 TFEU (cf. CJEU, Judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2017:699, para. 59 f.; Judgment of 26 October 2021, *PL Holdings*, C-109/20, EU:C:2021:875, para. 56). The CJEU has further indicated that these considerations also apply to the arbitration clause in Art. 26 of the Energy Charter Treaty in regard to internal relations among EU Member States (cf. CJEU, Judgment of 2 September 2021, *Komstroy*, C-741/19, EU:C:2021:655, para. 42 ff.; CJEU, Opinion 1/20 of 16 June 2022, *Draft of a modernised Energy Charter Treaty*, EU:C:2022:485, para. 47) and that the payment of damages as part of an arbitral award could be seen under such circumstances to be an aid that is incompatible with EU law. This is reflected in the CJEU's overturning of a judgment by the General Court which had declared void an order of the European Commission stating that Romania's settlement of an arbitral award constituted an aid that is incompatible with the internal market within the meaning of Art. 107(1) TFEU (cf. CJEU, Judgment of 25 January 2022, *European Food*, C-638/19 P, EU:C:2022:50, paras. 109 ff., 137 ff.). In this case, the CJEU left open the question of whether the decision of the General Court violated Art. 19 TEU or Art. 267 and 344 TFEU (CJEU, Judgment of 25 January 2022, *European Food*, C-638/19 P, EU:C:2022:50, para. 148). In more recent decisions, the CJEU has expanded on its decisions in *Achmea* and *European Food* to find that arbitration clauses that are incompatible with Arts. 267 and 344 TFEU cannot take legal effect (cf. CJEU, Judgment of 21 September 2022, *Romatsa*, C-333/19, EU:C:2022:749, para. 42 f; Judgment of 14 March 2024, *Commission v United Kingdom of Great Britain and Northern Ireland*, C-516/22, EU:C:2024:231, para. 41).

82 On 26 June 2024, the European Union and its Member States – with the exception of Hungary – issued a declaration affirming the case-law of the CJEU and stating that according to their common understanding, Art. 26 of the Energy Charter Treaty could not serve and never could have served as a legal basis for intra-EU arbitration proceedings. The declaration further stated that the primacy of EU law as a rule of international law to resolve a conflict of laws applies to the mutual relationships of Member States (Official Journal EU, 6 August 2024, L 2024/2121, p. 4 f.)

83 However, the incompatibility of the arbitration clause with EU law does not affect its validity from the perspective of international law ([…]). The interpretation of an international treaty follows the general rules of treaty interpretation as expressed in Art. 31 through 33 of the Vienna Convention on the Law of Treaties of 23 May 1969 (Federal Law Gazette, *Bundesgesetzblatt* – BGBl 1985 II p. 926, *Wiener Vertragsrechtskonvention* – WVRK, hereinafter: VCLT). Conflicts as between international treaties generally do not affect their validity.

Pursuant to Art. 53 VCLT, a treaty obligation is only to be assumed void if it conflicts with a peremptory norm of general international law. The application of successive treaties covering the same matter is addressed in Art. 30 VCLT, according to which the application follows the rules specifically provided for in the treaty (Art. 30(2) VCLT) or the principle of *lex posterior*, whereby the provisions of the later treaty prevail over those of the earlier treaty (Art. 30(3) and (4) VCLT). Pursuant to Art. 41(1) VCLT, two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if the possibility of such a modification is provided for by the treaty, or the modification in question is not prohibited by the treaty and does not relate to a provision from which derogation is incompatible with the effective execution of the object and purpose of the treaty as a whole and does not affect the enjoyment by other parties of their rights under the treaty.

84 Whether the interpretation of these rules from the perspective of international law results in there no longer being an effective arbitration agreement, because, for example, the arbitration clause in Art. 26 of the Energy Charter Treaty must be interpreted as not including intra-EU disputes, or that the obligations under EU law take precedence over the Energy Charter Treaty, is subject to debate in legal scholarship ([…]).

85 Looking at the practice of national courts, there is no unified approach ([…]). Within the European Union, a number of Member State courts have overturned arbitral awards or declared them unenforceable due to the incompatibility of the underlying arbitration agreement with EU law (cf. *Cour d'Appel de Paris*, Judgment of 19 April 2022, RG 20/14581, para. 72; Judgment of 19 April 2022, RG 20/13085, para. 97; Luxembourg *Cour de cassation*, Judgment of 14 July 2022, 116/2022, p. 30; *Svea hovrätt*, Judgment of 13 December 2022, T-4658/18, p. 2; *Högsta domstolen*, Judgment of 14 December 2022, T 1569-19, paras. 56, 60; […]). The Lithuanian Supreme Court affirmed the decision of a lower court finding that a lawsuit brought before a Lithuanian court by the Republic of Lithuania against a French investor was not ruled out by pending ICSID arbitration proceedings on the basis of a bilateral investment treaty because the arbitration clause was incompatible with EU law (cf. *Lietuvos Aukščiausiasis Teismas*, Judgment of 18 January 2022, e3K-3-121-916/22 […]). The *Rechtsbank* Amsterdam found that damages awarded in arbitration on the basis of the Energy Charter Treaty constituted a remedy within the meaning of Art. 107(1) TFEU and was therefore illegal as long as the European Commission had not declared the arbitral award either fully or partially compatible with EU law for matters in the internal market (cf. *Rechtsbank* Amsterdam, Judgment of 5 February 2025, C/13/728512/HA ZA 23-65 […]).

86 Conversely, outside the European Union, there are still national courts that have recognised arbitral awards between an EU Member State and an investor from another Member State on the basis of a bilateral investment treaty or the Energy Charter Treaty on the grounds of the exclusivity of the rules under the ICSID Convention and have declared such

awards enforceable or otherwise declared that the dispute between the investor from an EU Member State and Member State fell within the arbitration clause in Art. 26 of the Energy Charter Treaty (cf. High Court of Australia, Judgment of 12 April 2023, S43/2022, para. 78 f.; High Court of Justice, Judgment of 24 May 2023, [2023] EWHC (Comm), para. 86 ff.; *Schweizer Bundesgericht*, Judgment of 3 April 2024, 4A_244/2023, para. 7.7.6 ff.; […]) or have lifted a court ordered suspension of enforcement pending a decision by the CJEU with reference to the provisions of the ICSID Convention (cf. UK Supreme Court, Judgment of 19 February 2020, [2020] UKSC 5, para. 117 f. – this decision became the subject of treaty infringement proceedings, cf. CJEU, Judgment of 14 March 2024, *Commission v United Kingdom of Great Britain and Northern Ireland*, C-516/22, EU:C:2024:231, para. 176).

87 Thus far, the majority of arbitral tribunals have not sustained the objection on the basis of incompatibility with EU law and have assumed that the arbitration agreement was valid on the basis of international law ([…]). That said, there have also been arbitral awards in which the arbitration tribunal found that it did not have jurisdiction because of the incompatibility of the arbitration agreement with EU law (cf. *Green Power Partners v. Spain*, Award of 16 June 2022, SCC Case No. V 2016/135, para. 477; […]). On 11 October 2024, two ICSID arbitration tribunals in proceedings against Spain issued confidential arbitral awards in which they found, for the first time, that Art. 26 of the Energy Charter Treaty was not an effective arbitration agreement for intra-EU disputes (cf. *European Solar Farms A/S v. Spain*, ICSID Case No. ARB/18/25; *Sapec, S.A. v. Spain*, ICSID Case No. ARB19/23; cf. Press Release from the Kingdom of Spain of 14 October 2024, available at https://www.italaw.com/cases/12085 and https://www.italaw.com/cases/8228).

88 (β) Despite the fact that courts have reached different decisions as to the effectiveness of an arbitration agreement pursuant to Art. 26 of the Energy Charter Treaty for intra-EU disputes, the question of how to interpret the arbitration clause and the assessment of its effectiveness will in any case likely fall within the arbitral tribunal's competence to decide on its own competence; an objection that the arbitration agreement is not effective generally will not lead to an ICSID arbitral tribunal finding that it does not have jurisdiction ([…]). Even when the effectiveness of the arbitration agreement is doubtful, the parties to the ICSID Convention have conferred this decision on the respective arbitral tribunal and not to their own national courts.

89 (2) Insofar as the Federal Court of Justice bases its resolution of the conflict with the international law obligations arising from the Energy Charter Treaty and the ICSID Convention on the case-law of the CJEU, it is not precluded from doing so on the grounds that this case-law would have to be considered an *ultra vires* act. The constitutional complaint does not satisfy the particularly stringent requirements for substantiation that apply to claimed violations of *ultra vires* acts by EU institutions (cf. para. 64 above). The complainants have not shown that the CJEU has evidently exceeded its competences and that its interpretation of

Arts. 267 and 344 TFEU is not supported by the wording, systematic approach and the spirit and purpose of these provisions (see (a) below). Furthermore, the complainants fail to demonstrate that the way in which the CJEU applied the law leads to a structural reordering of competences away from the Member States and to the European Union (see (b) below).

90 (a) It is neither set out in the complainants' submissions nor otherwise ascertainable that the *Achmea* decision (see (aa) below) or its extension in subsequent decisions to the multilateral Energy Charter Treaty (see (bb) below) exceeds the judicial competences of the CJEU. This assumption is also refuted by the reaction of the overwhelming majority of Member States (see (cc) below).

91 (aa) It is not ascertainable from the complainants' submissions that the *Achmea* decision of the CJEU is not based on a tenable interpretation and application of EU law. The complainants' submissions fail to sufficiently address the prior case-law of the CJEU on this question, the fundamental concern underlying the *Achmea* judgment and its reception in the legal scholarship.

92 In the *Achmea* matter, the CJEU held that Arts. 267 and 344 TFEU barred the enforcement of an arbitration clause in an investment treaty between Member States of the European Union that authorised an investor from one of these Member States to initiate arbitration proceedings in a dispute concerning investments in another Member State (cf. CJEU, Judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, para. 60).

93 In essence, the *Achmea* judgment and subsequent case-law is carried by the view that disputes between investors and a state that occur within the European Union will typically concern matters which will also fall within the scope of application of the fundamental freedoms under the TFEU and the fundamental rights under the Charter of Fundamental Rights of the European Union. If the Member States left it to the investment arbitral tribunals, which do not take part in judicial dialogue with the CJEU, to answer these questions, the CJEU sees a risk for the uniform application and autonomy of EU law that the CJEU is tasked with preserving (cf. Federal Constitutional Court, Order of the Third Chamber of the Second Senate of 23 July 2024 - 2 BvR 557/19 -, para. 67).

94 Prior to its judgment in *Achmea*, the CJEU had already held that courts established on the basis of international treaties between Member States could impair the allocation of jurisdiction and thereby also the autonomy of the European Community and, later, the European Union, which is to be safeguarded by the CJEU (cf. CJEU, Opinion 1/91 of 14 December 1991, EU:C:1991:490, para. 35; Judgment of 30 May 2006, *Commission v Ireland*, C-459/03, EU:C:2006:345, para. 154; Opinion 1/09 of 8 March 2011, *Patent court*, EU:C:2011:123, para. 79 ff.; Opinion 2/13 of 18 December 2014, *ECHR*, EU:C:2014:2454, para. 182 ff.; [...]). In doing so, the CJEU relied on Arts. 267 and 344 TFEU. That the principle that an international treaty cannot affect the autonomy of the EU legal order is enshrined in Art. 344 TFEU

was expressly stated in the CJEU's Opinion on the European Convention on Human Rights from 2014 (CJEU, Opinion 2/13 of 18 December 2014, *ECHR*, EU:C:2014:2454, para. 201 with further references).

95 The view that Art. 344 TFEU not only applies to disputes between Member States of the European Union (cf. a correspondingly narrow view: Federal Court of Justice, Order of 3 March 2016 - I ZB 2/15 - juris, para. 36 ff.; Opinion of Advocate General Wathelet of 19 September 2017, *Achmea*, C-284/16, EU:C:2017:699, para. 181 ff.), but also extends to disputes between Member States and investors from other Member States, is also represented in legal scholarship. In this context, it is noted that Art. 344 TFEU must be interpreted in light of Art. 19 TEU, as this provision exclusively defines legal protection within the European Union. It is also noted that unlike Art. 273 TFEU, the wording of Art. 344 TFEU is not limited to disputes between Member States. In addition, the term 'submission of disputes for settlement' does not rule out proceedings relating to investment protection ([…]). Against this backdrop, some opinions in legal scholarship have expressed the view that the *Achmea* judgment is in line with the prior case-law of the CJEU on the autonomy of EU law and therefore comprehensible (cf. Federal Constitutional Court, Order of the Third Chamber of the Second Senate of 23 July 2024 - 2 BvR 557/19 -, para. 66 […]). Even those opinions critical of the CJEU's interpretation do not explicitly take the view that the *Achmea* judgment is an *ultra vires* act (cf. Federal Constitutional Court, Order of the Third Chamber of the Second Senate of 23 July 2024 - 2 BvR 557/19 -, para. 66 with further references). The complainants have not provided compelling arguments addressing these points. Their reasoning for why the *Achmea* decision of the CJEU is 'simply not understandable' or 'arbitrary' falls short. They merely present their own legal evaluation without addressing the reasoning of the CJEU. They do not meaningfully engage with the arguments put forward in legal scholarship that refute their legal assessment.

96 (bb) To the extent that the complainants assert that extending case-law developed in regard to bilateral investment protection treaties to multilateral agreements is not methodologically sound and tarnished by a severe lack of reasoning on the part of the CJEU because the CJEU failed to address both the lack of a disconnection clause in the Energy Charter Treaty and the responsibility of Member States under international law towards third states and in regard to the fundamental rights of those affected by a prohibition against arbitration, the submissions are not sufficient to demonstrate that the CJEU manifestly exceeded its competences.

97 The extension of the *Achmea* reasoning to the multilateral Energy Charter Treaty in the *Komstroy* decision (CJEU, Judgment of 2 September 2021, *Komstroy*, C-741/19, EU:C:2021:655, para. 66) and in the Opinion 1/20 (CJEU, Opinion 1/20 of 16 June 2022, *Draft of a modernised Energy Charter Treaty*, C-1/20, EU:C:2022:485, para. 47) appears to be consistent and foreseeable ([…]). It is not untenable to find that the same considerations

underlying the *Achmea* judgment and subsequent case-law (cf. para. 81 above) are transferable to the Energy Charter Treaty, insofar as it pertains to disputes between a Member State of the European Union and investors from other Member States. This is also consistent with the understanding of the CJEU that a multilateral treaty on investment protection generally provides rules for bilateral relations between a state and an investor from another state (cf. CJEU, Judgment of 2 September 2021, *Komstroy*, C-741/19, EU:C:2021:655, para. 64; cf. on the ICSID Convention CJEU, *Commission v United Kingdom of Great Britain and Northern Ireland*, C-516/22, EU:C:2024:231, para. 75). To the extent the complainants criticise the *Komstroy* decision on the grounds that the CJEU addressed a legal question that was not relevant in the specific case before it, which involved a Ukrainian investor and the Republic of Moldova, because it did not have a connection to EU law ([...]), this does not convincingly call into question the reasoning of the Federal Court of Justice. According to the opinion of the Federal Court of Justice, it was authorised to interpret international treaties entered into by the European Union, such as the Energy Charter Treaty and restricted itself to an interpretation of Art. 26 of the Energy Charter Treaty within an intra-EU context [...]. It is not apparent how the CJEU could have exceeded its competences by expressing its legal view on the question of the transferability of the *Achmea* case-law to Art. 26 of the Energy Charter Treaty – which is part of EU law – as *obiter dictum*. The objection that the Energy Charter Treaty does not contain an explicit disconnection clause also does not, without further substantiation, demonstrate an *ultra vires* violation. This is because the Federal Court of Justice did not make the interpretation of the Energy Charter Treaty according to the rules of international law the primary basis for its decision. Rather, it took a dualistic approach based on the autonomy of the EU legal order and the incompatibility of the arbitration clause in the Energy Charter Treaty – in regard to intra-EU disputes – with this legal order. While this approach has been subject to some criticism ([...]), it also does not appear to support a manifest violation of competence.

98

(cc) The complainants also do not sufficiently address the reaction of the Member States of the European Union to the *Achmea* decision. In a declaration of 15 January 2019, 22 Member States of the European Union, among them Germany and Ireland, announced that they were willing to draw the necessary consequences from the *Achmea* judgment and expressed the view that the arbitration clause in the Energy Charter Treaty was also inapplicable on the basis of this decision. Conversely, on 16 January 2019, Finland, Luxembourg, Malta, Slovenia and Sweden issued a declaration stating that they did not wish to announce a position on the compatibility of the Energy Charter Treaty with EU law. On the same day, Hungary announced that in its view, the *Achmea* judgment did not affect the Energy Charter Treaty. None of these countries claimed that the *Achmea* decision was an *ultra vires* act. Finally, on 5 May 2020, 23 Member States signed the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union (BGBl II 2021, p. 3 ff.; cf. in this regard also Federal Constitutional Court, Order of the Third Chamber of the Second Senate of 23 July 2024 - 2 BvR 141/22 -, paras. 11, 14 f.) On 26 June 2024, all

Member States of the European Union with the exception of Hungary announced that Art. 26 of the Energy Charter Treaty was no longer applicable due to its incompatibility with EU law (see para. 82 above). Even if, as the complainants point out, not all parties to the Energy Charter Treaty have conceded this position, it does not preclude the use of this declaration in interpreting the treaty. In interpreting the Energy Charter Treaty, this type of declaration can – if necessary, as supplemental context within the meaning of Art. 32 VCLT – also be considered even if it – as in the present case – is not made by all parties to the treaty or all Member States of the European Union (cf. generally [...]; International Law Commission, *Draft conclusions on subsequent agreements and subsequent practice in relations to the interpretation of treaties, with commentaries*, 2018, UN Doc A/73/10, p. 27 <Conclusion 4(3)>, p. 75 <Conclusion 10(2)>). The complainants have not demonstrated that other treaty parties have disputed this declaration.

99 (b) The complainants also fail to sufficiently substantiate that the way in which the CJEU applied the law leads to a structural reordering of competences away from the Member States and to the European Union. The effect of the *Achmea* decision is that Member States of the European Union can no longer, from an EU law perspective, make a valid offer to initiate arbitration proceedings relating to investments by investors from one Member State in another Member State. In this way, the European Union does not seize competences from the Member States, but merely restricts the exercise of certain competences by the Member States (cf. Federal Constitutional Court, Order of the Third Chamber of the Second Senate of 23 July 2024 - 2 BvR 557/19 -, para. 68).

100 (3) Even though the decision of the Federal Court of Justice raises concerns regarding the question of whether the assumed obligation to declare the arbitration proceedings inadmissible follows from EU law and the case-law of the CJEU (see (a) below), the complainants failed to demonstrate that the decision is untenable and objectively arbitrary (see (b) below).

101 (a) With a view towards pending arbitration proceedings, the existing case-law of the CJEU (cf. para. 81 above) merely provides that when 'a dispute is brought before an arbitration body on the basis of an undertaking which is contrary to EU law, [Member States] are required to challenge, before that arbitration body or before a court with jurisdiction, the validity of the arbitration clause or the ad hoc arbitration agreement on the basis of which the dispute was brought before that arbitration body' (cf. CJEU, Judgment of 26 October 2021, *PL Holdings*, C-109/20, EU:C:2021:875, para. 52).

102 Against the backdrop of this case-law, it does not appear to be ruled out that by bringing its claim against the jurisdiction of the arbitral tribunal in the pending arbitration proceedings, the Federal Republic of Germany sufficiently fulfilled its obligations under EU law without also triggering a violation of the ICSID Convention at the present stage of the

proceedings. This is also consistent with the practice of the Member States of the European Union as expressed in Art. 7 of the Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union. Pursuant to Art. 7, the Contracting Parties are obligated in connection with both Pending Arbitration Proceedings and New Arbitration Proceedings to inform the arbitral tribunals about the legal consequences of the *Achmea* judgment and to ask the competent national court to set the arbitral award aside, annul it or to refrain from recognising and enforcing it. Art. 7 of the Agreement thus differentiates between the obligation to inform the arbitral tribunal in pending arbitration proceedings and the obligation after the conclusion of the arbitration proceedings to ask the competent national court to set aside the arbitral award. Art. 9 of the Agreement, which permits investor parties to ask a Contracting Party to enter into a 'Structured Dialog' with the goal of reaching a settlement, underlines this approach and the effort to implement the *Achmea* decision in a careful manner that seeks to avoid legal violations as far as possible.

103 The case-law of the CJEU on investment arbitration proceedings does not necessarily create an EU-law obligation to establish the jurisdiction of a national court to declare pending arbitration proceedings invalid. Rather, the CJEU recognises that there is some variation in the national laws on arbitration. One argument that the CJEU advanced in support of the incompatibility of arbitration clauses with EU law is the possibility that a review of an arbitral award by a national court may not be possible because 'such judicial review can be exercised by that court only to the extent that national law permits' (cf. CJEU, Judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, para. 53). In addition, the majority of Member States do not have laws authorising proceedings to determine the admissibility of pending arbitration proceedings ([...]). Therefore, justifying jurisdiction by way of applying a procedural law provision by analogy does not appear to be strictly necessary, because the autonomy of the EU legal order can be guaranteed in the post-award stage ([...]).

104 (b) Nevertheless, these objections do not lead to the conclusion that the interpretation and application of the law by the Federal Court of Justice is untenable and therefore objectively arbitrary.

105 A judicial decision is arbitrary only when the decision is not legally arguable under any aspect and it must therefore be concluded that it is based on irrelevant considerations. This must be determined by objective criteria. Negligent conduct by the judge is not required. A judicial decision is not arbitrary simply due to an incorrect application of the law. Rather, a decision is arbitrary only when it disregards an obviously relevant provision or flagrantly misinterprets the content of a provision. However, there is no reason to assume an arbitrary decision if the court examines the legal situation in detail and its opinion is not completely lacking in objective reasoning (cf. BVerfGE 89, 1 <13 f.>; 96, 189 <203>; Federal Constitutional Court, Order of the Third Chamber of the Second Senate of 4 May 2015 - 2 BvR

2053/14 -, para. 13; Order of the Third Chamber of the First Senate of 19 September 2023 - 1 BvR 1555/23 -, para. 4.)

Based on the foregoing, there has not been sufficient substantiation of an arbitrary application of the law. The Federal Court of Justice expressly addressed the conflict between its interpretation and application and Art. 41 of the ICSID Convention. It thoroughly addressed the legal situation and made reference to the precedence of application and the principle of effectiveness of EU law as grounds for an exception from the preclusive effect of Art. 41 of the ICSID Convention in the particular constellation of a dispute in intra-EU investor-state arbitration proceedings. While a legal remedy like § 1032(2) of the Code of Civil Procedure does not appear mandatory under EU law (see para. 101 above), it is methodologically plausible (see para. 68 above) and not untenable to apply a legal remedy that exists in German arbitration law beyond its previous scope of application, and thus in the sense of the '*effet utile*' under EU law. It is not ascertainable that this interpretation, which focuses on the special significance and precedence of application of EU law in the legal orders of the Member States, was based on irrelevant considerations. 106

The fundamental assumption of the Federal Court of Justice that the dispute settlement mechanism in Art. 26(2)(c) of the Energy Charter Treaty violates EU law and that the case-law of the CJEU must also be applied to arbitration proceedings governed by the ICSID Convention likewise does not appear untenable. It is consistent – in regard to the arbitration clause of the Energy Charter Treaty – with the nearly unanimous opinion of the Member States and – in regard to ICSID arbitration proceedings – with the case-law of the CJEU (cf. para. 112 below). 107

Moreover, the Federal Court of Justice's assumption that Art. 351 TFEU did not apply by analogy to the Federal Republic of Germany in regard to the multilateral Energy Charter Treaty is plausibly developed from the existing case-law of the CJEU (cf. CJEU, Judgment of 28 October 2022, *PPU*, C-435/22, EU:C:2022:852, para. 115 ff.). This restrictive interpretation was essentially confirmed by a later decision of the CJEU which found that Art. 351 TFEU does not apply to rights and obligations arising from international agreements concluded before the date of accession to the European Union if the structure for fulfilling those rights and obligations is not involved (cf. in regard to the ICSID Convention CJEU, Judgment of 14 March 2024, *Commission v United Kingdom of Great Britain and Northern Ireland*, C-516/22, EU:C:2024:231, para. 58 ff.). That Art. 351 TFEU could be construed as having a broader scope of application (cf. BVerfGE 123, 267 <421 f.>; [...]) does not, without more, render the interpretation untenable. 108

2. Furthermore, the complainants have not sufficiently substantiated their recognised legal interest in bringing an action. It is not sufficiently clear from their submission that they are adversely affected by the challenged decision (see a) below). Nor have they 109

demonstrated how a decision from the Federal Constitutional Court can afford them relief (see b) below).

110 a) The complainants have not demonstrated in what way they are adversely affected by the decision of the Federal Court of Justice.

111 To the extent that the decision of the Federal Court of Justice declaring pending ICSID arbitration proceedings to be impermissible can be viewed as a violation of the exclusivity of the ICSID Convention, the complainants have not sufficiently substantiated how they are burdened – beyond the implementation of the proceedings themselves – by the challenged decision. The challenged decision does not directly impair the relevant arbitral tribunal's exercise of its competence to decide on its own competence. While the tribunal has acknowledged the proceedings before the Federal Court of Justice, it has thus far denied applications to dismiss the arbitration proceedings (cf. para. 15 above). It must therefore be assumed that the arbitral tribunal will examine the question of the validity of the arbitration clause, without considering itself bound by the decision of the Federal Court of Justice. Even if there were a violation of Art. 41 of the ICSID Convention, the complainants have not suffered any damages other than the costs of litigation. However, litigation costs alone do not justify a recognised legal interest in bringing an action for constitutional review of the judicial decision as a whole, if the challenged decision does not result (or no longer results) in any other adverse effect (cf. BVerfGE 33, 247 <256 ff.>; 39, 276 <292>; 50, 244 <248>; 75, 318 <325>). This is the case here.

112 Insofar as the complainants point out that the decision rules out subsequent enforcement of a potential arbitral award in Germany, such difficulties primarily result from the provisions of EU law as interpreted by the CJEU. As a result of this case-law, it is obvious that any arbitral award cannot be enforced in Germany or in any other EU Member State. Since the lodging of the present constitutional complaint, the CJEU has made it clear that the precedence of application of EU law also applies to all obligations under the ICSID Convention and that, in its view, the ICSID Convention 'despite its multilateral nature, is intended to govern bilateral relations between the contracting parties in an analogous way to a bilateral treaty' (cf. CJEU, Judgment of 14 March 2024, *Commission v United Kingdom of Great Britain and Northern Ireland*, C-516/22, EU:C:2024:231, para. 75; cf. also General Court, Judgment of 2 October 2024, *Micula*, T-624/15 RENV, T-694/15 RENV, T-704/15 RENV, EU:T:2024:659, para. 105 ff.). In addition, the declaration issued by the European Union and all Member States with the exception of Hungary (cf. para. 82 above) also made after the lodging of the present constitutional complaint shows that the legal view of the CJEU on Art. 26 of the Energy Charter Treaty is shared nearly unanimously among the Member States. It can therefore be assumed that an ICSID arbitral award will not be enforceable not only in Germany, but in nearly every Member State of the European Union. The enforcement

of an arbitral award in states that are not members of the European Union, however, is not prejudiced by the challenged decision.

113 b) Against this backdrop, and particularly given the decisions issued by the CJEU in the meantime, the complainants have not sufficiently fulfilled their obligation under § 23(1) second sentence, § 92 of the Federal Constitutional Court Act to substantiate that the prerequisites for admission for decision and admissibility of the constitutional complaint (cf. BVerfGE 106, 210 <214 f.>) continue to exist. The complainants fail to address the question whether they are (still) able to achieve the legal protection sought by means of their constitutional complaint (cf. BVerfGE 90, 22 <26 f.>; 119, 292 <301 f.>).

114 If the complainants were to prevail on their claim, then the challenged decision would be overturned pursuant to § 95(2) of the Federal Constitutional Court Act and the proceedings remanded to the Federal Court of Justice. Even if the Federal Court of Justice were then to dismiss the appeal against the decision of the Higher Regional Court, there would be – except for the obligation to bear the costs (cf. para. 111 above) – no significant change for the complainants. As the other claimed violations of fundamental rights are in part based on the claim that the Federal Court of Justice failed to find that the CJEU had engaged in an *ultra vires* act and consequently arbitrarily interpreted and applied the provisions of the Code of Civil Procedure that are the subject of these proceedings, a decision by the Federal Constitutional Court would have merely answered the question of whether the Federal Court of Justice exceeded the limits of judicial development of the law in its interpretation and application of German procedural law. However, this would have no significance for the ongoing arbitration proceedings, which concern the interpretation and application of the Energy Charter Treaty and the ICSID Convention. The position of the complainants in the arbitration proceedings would remain unimproved and unchanged.

115 Furthermore, the complainants did not show why they cannot be referred to the legal remedies available under the ICSID system. Considering the statements by the arbitral tribunal (cf. para. 15 above), it therefore does not appear to be out of the question, that objections to any violations of the ICSID Convention in connection with the specific arbitration proceedings could be raised before the arbitral tribunal. This would also be consistent with the exclusivity of the ICSID system.

116 3. In accordance with § 93d(1) third sentence of the Federal Constitutional Court Act, no further reasons are given.

117 This decision cannot be appealed.

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