Vattenfall vs. Germany: A Disgraceful Settlement of a Scandalous Claim

16 March 2021 | On March 5, 2021, it was announced that the Germany had reached an agreement with the Swedish state company Vattenfall to settle a claim valued at up to €7 billion, over the phase-out of nuclear energy in the wake of Fukushima. The government pay Vattenfall €1.4 billion, much too much, argues Juan Carlos Boué in this guest comment.

Juan Carlos Boué.* Vattenfall could not have expected much more than €1.4 billion, even if the the award fo a tribunal under the Energy Charter Treaty (ECT) had gone its way, since claims in investor-state arbitrations are usually wildly inflated. Given that the government had lost on all of its jurisdictional objections and had also failed twice to disqualify the arbitration panel, its willingness to come to terms might appear reasonable, not least because of the pro-investor bias of arbitration tribunals.

But, actually, the government has acted a bit like someone who decides to go ahead with paying a ransom even after it has become clear that the kidnappers are no longer holding the hostage. This is because the ramifications of the decision of the European Court of Justice (ECJ) in the Achmea case, which sounded the death knell for intra-EU bilateral investment treaties and arbitrations, have now engulfed the ECT.

In the Achmea judgment from March 2018, the ECJ decided that an arbitration clause in a bilateral investment treaty between two EU member states was incompatible with EU law, because an arbitration panel was given jurisdiction over questions of interpretation of EU law even though the panel was not part of the EU judicial system (and hence neither obliged nor able to consult the ECJ in matters of interpretation of EU law), and there were only limited means to review awards rendered pursuant to the treaty.

The Achmea judgment led to the signature by 23 EU member states on 5 May 2020 of an agreement terminating bilateral investment treaties between EU member states, thereby eliminating arbitration as a means for the settlement of intra-EU investment disputes.

On March 1, a Swedish court decided to ask the ECJ whether Achmea barred intra-EU investment disputes under the ECT.

More ominously still, on March 3, ECJ advocate general Szpunar opined (in connection with French proceedings to set aside the award in the case LLC SPC Stileks v. Moldova) that intra-EU investment arbitrations under the ECT are indeed barred by EU law in light of Achmea. For all that opinions of advocate generals are not binding, this raises the likelihood that an eventual victory by Vattenfall would prove Pyrrhic, as any award would be unenforceable.

In other words, the Vattenfall arbitration seemed to be turning into a “free spin” of the roulette wheel for the German government, a development that could have had major political implications, given the prominence of the Vattenfall case in the public debate about how the ECT is making climate protection difficult or very expensive for states. Faced with such a prospect, the German government preferred to spend taxpayers’ money to ensure that the difficult questions in this regard are put off for another day.

***Juan Carlos Boué** is a Mexican national and London-based counsel in the’ international corporate and arbitration practice of the international law firm Curtis, Mallet-Prevost, Colt & Mosle. Boué has combined an academic career with a decade at the helm of the international trading arm of Mexico’s state oil company, PEMEX, overseeing commercial aspects of all of Mexico’s crude oil exports. He also served on the committee

which reviewed the country's oil export pricing and policies, among other strategic roles in the oil industry, was a special adviser to the Ministry of Energy and Petroleum of Venezuela and sat on the boards of various oil refining companies. From 2010 to 2018, Mr. Boué was a senior research fellow at the Oxford Institute for Energy Studies. He has written widely on the industrial economics of oil and gas exploration and production, petroleum refining, auction design for oil and gas bidding rounds and the taxation and general political economy of oil.

More

https://norberthaering.de/en/money-finance/boue-tribunal-eni-nigeria/

Juan Carlos Boué: How a World Bank tribunal is plundering Pakistan

Investor Protection in CETA and TTIP Leaves a Lot of Room for Improvement Say Legal Experts in Parliamentary Hearing