

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

[20 November 2020 | The special tribunals which allow potential or actual foreign investors to sue governments for infringements on their rights outside the regular courts are often the most criticized component of free trade agreements. Juan Carlos Boué gives an example in this guest comment, which makes it clear why this is so.](#)

Juan Carlos Boué.* In his General Theory, John Maynard Keynes noted that “[o]ur knowledge of the factors which will govern the yield of an investment some years hence is usually very slight and often negligible”. The Discounted Cash Flow (DCF) method relies on such prospective factors to calculate asset values, which is why judges are not keen on DCF being used in court proceedings.

However, DCF’s inherently speculative nature does not bother international arbitration tribunals greatly, and a number of them have used it to assess compensation for multi-decade projects lacking any record of profitability, and even for paper projects that have not progressed beyond the planning stage.

One such recent case is Tethyan Copper v. Pakistan, in which a World Bank tribunal determined that rejection by a provincial government of an application for a copper mining licence amounted to a violation by Pakistan of its bilateral investment treaty with Australia, entitling the investor to compensation in the form of the present value of all the profits that the project would supposedly have generated over its lifetime.

The award came to US\$4.1 billion, plus US\$1.9 billion in interest, which is equivalent to 86% of Pakistan’s foreign reserves. It is 7.5 times the healthcare budget and 22 times its education budget (all for 2019).

Enforcement of the Tethyan award has been stayed, pursuant to an annulment petition by Pakistan (on corruption and arbitrator bias allegations), and on 18/09/2020, the Tethyan annulment committee decided that Pakistan would be harmed if the stay were lifted and, conversely, that maintaining it would damage Tethyan.

Thus, the continued stay was conditioned on Pakistan posting a security for 25% of the award, and undertaking that it would pay it if the annulment bid failed. Now, the annulment success rate is barely 7% (because the grounds for annulment are extremely narrow), although the controversial track record of one of the Tethyan arbitrators may marginally improve Pakistan’s chances.

But even were this colossal award to be annulled, this would not be because it was considered unacceptable to ruin a country on the basis of a ludicrous forecasting exercise predicated on “guesstimates” imbued with a totally fictitious and misleading certainty. So, Germans can rest easy that it is this system which shall determine Germany’s liability to Vattenfall for the decision to phase out nuclear power in the wake of Fukushima.

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