CHAPTER 7

PROSPECTS OF UTILISING INVESTOR-STATE MEDIATION AND UNCITRAL RULES ON TRANSPARENCY FOR POLYCENTRIC ENVIRONMENTAL DISASTER-RELATED DISPUTES: THE CASE OF *VATTENFALL V GERMANY*

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I VATTENFALL v GERMANY*: POST-DISASTER IMPLICATIONS ON COMMERCIAL CONTRACTS*

A Background of Fukushima

Under the backdrop of the Japanese Fukushima nuclear disaster, Chancellor Angela Merkel's government decided to rapidly phase out nuclear energy in Germany with an amendment to the "Atomic Energy Act".

Previously, Merkel had decided to extend the use of the nuclear reactors past their due phase-out date. Following Fukushima, such a decision was rendered politically unpalatable and untenable.[1]

B Previous Arbitration Actions

In 2009, Vattenfall arbitrated against the German government at the International Center for Settlement of Investment Disputes excessive imposition of

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1 <www.iisd.org/pdf/2012/german_nuclear_phase_out.pdf>.

water quality standards for a coal power plant, which rendered Vattenfall's investment project "unviable". The claim against Germany was about €1.4bn, but it was settled in 2011, with Germany agreeing to a more lenient water quality standard in favour of Vattenfall.[2]

C The Claim

In 2012, Vattenfall, a Swedish nuclear plant operator, sought compensation for the rapid exit from nuclear energy in Germany – "fair compensation" associated with the rapid phase-out of their two nuclear plants. Press reports in late 2011 put Vattenfall's lost investments in nuclear power plants at €700mm. In 2012, the company estimated the damages from the nuclear phase-out actions at €1.18bn. However, the exact amount of Vattenfall's compensation claim against Germany is unknown.

Vattenfall initiated arbitration proceedings by filing a Request for Arbitration at the International Center for Settlement of Investment Disputes in Washington D.C. Vattenfall was attempting to claim "compensation for the phasing out of nuclear energy" under the Energy Charter Treaty. The Energy Charter Treaty is a multilateral treaty that essentially protects foreign investors in the energy sector by allowing them to bypass the domestic courts of the host country and file a complaint to an ad hoc international tribunal to challenge proposed government regulations.[3]

D Current Status

Despite enormous public interest in the case, only minimal amounts of information have been made available to the public. The recent UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration might put pressure on the ICSID to be more transparent regarding the proceedings of the case.

II IBA RULES FOR INVESTOR-STATE MEDIATION

A Background

The IBA rules for Investor-State mediation ("The Rules") have as their primary purpose, the establishment of a set of concrete measures to be followed in an investor-state mediation context to increase resort to mediation for investor-state disputes. The State Mediation subcommittee of the Mediation Committee, housed under the IBA, promulgated The Rules. Adopted on 4 October 2012, The Rules are divided into 12 articles, and facilitate the resolution of disputes between States and

2 <www.italaw.com/sites/default/files/case-documents/ita0890.pdf>.

3 <www.tni.org/sites/www.tni.org/files/download/vattenfall-icsid-case_oct2013.pdf>.

State entities. The Rules establish clear rules for the commencement of mediation and for the appointment of a mediator in absence of party agreement.

B Scope and Application

The Rules are designed for mediation of investment-related disputes involving States and State entities.[4] The Rules apply when the mediating parties have agreed on the rules or authorised a mediator to apply the rules.[5] The Rules may be varied or excluded partially or wholly at any time.[6] Local provisions of law take precedence over The Rules.[7]

C News and Commentary

Wolters Kluwer NV commented that The Rules contain mostly standard clauses seen in other mediation rules, but also contain innovative regulations such as the clause on "Mediation Management Conference" (Article 9). It was also relatively optimistic on the future application of The Rules and the entrance of mediation into the arena of Investor-State mediation.[8]

Herbert Smith Freehills commented on the relatively new development of including provisions for co-mediators, as well as the requirement of disclosure of any personal interest or personal conflict in a "statement of independence and availability".[9]

III POTENTIAL APPLICABILITY OF INVESTOR STATE MEDIATION AND UNCITRAL RULES ON TRANSPARENCY TO THE VATTENFALL CASE

As noted by Fuller (1978), mediation can be of particular benefit in cases where adjudication has reached its "limits", such as in "polycentric disputes" where there are no clear issues subject to proofs and contentions. The case of *Vatenfall v Germany* arising following the Fukushima nuclear disaster and subsequent decision of the German government to phase out nuclear power production by 2022

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4 Article 1, IBA Rules for Investor-State Mediation.

5 Article 1(a), IBA Rules for Investor-State Mediation.

6 Article 2, IBA Rules for Investor-State Mediation.

7 Article 3, IBA Rules for Investor-State Mediation.

8 Munir Maniruzzaman *Rethink of Investor-State Dispute Settlement* (University of Portsmouth, 2013) See Kluwer Arbitration Blog <http://kluwerarbitrationblog.com/blog/2013/05/30/a-rethink-of-investor-state-dispute-settlement/>.

9 International Bar Association launches investor-state mediation rules (2012). See Herbert Smith Freehills news web-site: <http://hsfnotes.com/adr/2012/10/23/international-bar-association-launches-investor-state-mediation-rules/>.

arguably raises multi-dimensional issues of public policy and *force majeure*. From both a process as well as efficiency perspective, investor state mediation may prove a viable alternative.

Arbitration theoretically has been regarded as a swift and cost-effective mechanism to resolve disputes among parties. However, in the context of investor-state arbitration, empirical evidence appears to suggest the contrary. The "sheer expenses"[10] of investor-state arbitrations are noted in recent decisions. The average costs of an investor-state arbitration "skyrocketed"[11] from around USD 1 or 2 million in 2005[12] to around USD 8 million in 2012.[13] In some arbitrations, parties incurred costs of over USD 30 million.[14] The OECD's finding in 2012 corresponds to the research result by UNCTAD, quoting several examples of high legal costs within the range of USD 5 million to USD 10 million incurred for ISDS cases.[15] The average length of investor-state arbitration was found to be around 3.6 years from the filing of the request for arbitration to the date of the final award.[16] The UNCTAD shared a similar view, noting that it would take around 3 to 4 years for a case to be heard and finally settled.[17]

Regarding the reasons for the high costs of investor-state arbitration, scholars have noted a number of contributing factors including: 1. limited arbitrator availability;[18] 2. nature and role of the parties' counsel and their approaches to litigation[19] (ie attributed to the use of expensive litigation techniques borrowed from corporate litigation practices); 3. high billing rates of arbitration lawyers;[20] 4.

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10 David Riesenberg "Fee Shifting in Investor-State Arbitration: Doctrine and Policy Justifying Application of the English Rule" (2011) 60 Duke Law Journal 977 at 990.

11 UNCTAD (2010) *Investor-State Disputes: Prevention and Alternatives to Arbitration* UNCTAD Series on International Investment Policies for Development. Retrieved from <unctad.org/en/docs/diaeia200911_en.pdf> p.16.

12 Above n 2.

13 David Gaukrodger and Kathryn Gordon "Investor-State Dispute Settlement – A Scoping Paper for the Investment Policy Community" (2012/03) OECD Working Papers on International Investment at 19.

14 Ibid.

15 Above n 2, at 17-18.

16 Anthony Sinclair (n.d.) "ICSID Arbitration: how long does it take?" Retrieved from <www.goldreserveinc.com/documents/ICSID%20arbitration%20%20How%20long%20does%20it%20take.pdf>.

17 Above n 2, at 17.

18 Above n 2, at 20.

19 Ibid.

20 Ibid.

substantial time spent on the selection of arbitrators;[21] 5. proliferation of procedural, jurisdictional and discovery issues;[22] 6. expanded use of high-cost party-appointed experts on a range of issues;[23] 7. complexity of the legal and factual issues in international investment law;[24] 8. high damages claims;[25] 9. number and length of written pleadings;[26] 10. uncertain cost shifting rules.[27]

Investor state mediation, on the other hand, has the potential of offering a relatively efficient alternative. In some cases, it may assist parties to explore creative and innovative solutions that may lie outside strict legal remedies. Such remedies may be of particular relevance in polycentric policy issues involving complex issues of force majeure arising from unforeseen natural disasters.

The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the "Rules on Transparency"), which came into effect on 1 April 2014, "comprise a set of procedural rules that provide for transparency and accessibility to the public of treaty-based investor-State arbitration."[28] The aim is to facilitate public disclosure of arbitration awards. This follows transparency trends within other areas of international arbitration (such as ICSID) and can give rise to greater consistency in awards.

For cases that continue to raise sensitive issues of a confidential nature, parties may consider the confidentiality requirements associated with investor state mediation. Confidentiality has been considered as an essential element in mediation. It has been conceived that confidentiality encourages parties to speak freely and openly in the mediation, while ensuring the integrity of the process.[29] However, there is always a tension between confidentiality of the mediation process and the administration of justice. When parties wish to litigate on issues related to topics addressed during mediation, in most cases the courts are not

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21 Ibid.

22 Ibid.

23 Id, at 21.

24 Catherine M Amirfar "Dispute Settlement Clauses in Investor-State Arbitration: An Informed Approach to Empirical Studies about Law-A Response to Professor Yackee" (2014) 12(1) Santa Clara Journal of International Law 303 at 310.

25 Above n 2, at 21.

26 Above n 24.

27 Above n 2, at 21.

28 UNCITRAL Rules on Transparency in Treaty-based. Investor-State Arbitration.

29 Alexander Nadja *International and Comparative Mediation: Legal Perspectives* (Kluwer Law International, 2012) at 245.

permitted to rely on mediated discussions unless special circumstances exist.[30] Such an approach is generally not in accordance with the spirit of protecting confidentiality of mediated settlements. Only where pre-existing information, which is admissible in trial also is disclosed in mediation, or information is shared that is generally available to the public, or where the parties allege breach of duty or professional misconduct of the mediator, can the limits of confidentiality in mediation be said to be reached.[31]

IV CONCLUSION

This paper explored the background of the *Vattenfall* case and prospects for the application of both the investor state mediation rules and UNCITRAL Rules on Transparency in such cases. For cases raising particularly sensitive polycentric issues concerning policy and force majeure events, parties may consider the use of investor state mediation for both confidentiality, process and efficiency considerations. For cases in which consistency of rulings for future cases is desired and which raise clear issues of legal right, the UNCITRAL Rules on Transparency provide an important foundation for harmonizing future investor state arbitration cases.

30 Id, at 247.

31 Id, at 282-285.