

# Vattenfall v. Germany: Anomaly or New Trend?

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ICSID arbitration proceedings against Germany (Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG & Co. KG v. Federal Republic of Germany – ICSID On April 17, 2009, the government-owned Swedish energy company Vattenfall initiated Case No. ARB/09/6, reported in IA Reporter, April 2nd, 2009 (Vol. 2, No. 6)). The dispute concerns the construction by Vattenfall of a coal-fired power plant in Hamburg, Germany.

Originally, Vattenfall had received permission to build the powerplant in 2007, at a time when the City of Hamburg was ruled by the Christian Democratic Union (CDU). However, the project was heavily criticized by the Green Party which had taken the City State of Hamburg to court over the Project. In April 2008, elections in the City State of Hamburg failed to give the CDU the majority, and forced the conservative party into an unprecedented coalition with the Green Party. The Greens made the imposition of heavy environmental restrictions on the plant project as a condition to join the government. Frustrated by the new changes to the plant, which would make the whole project less profitable, or even a loss, and unable to convince the government of Hamburg to ease the new restrictions, Vattenfall initiated proceedings.

Is the Vattenfall case an anomaly or the harbinger of a new trend? The dispute is an anomaly for two reasons. To begin with, it is the first ICSID case ever against

Germany, a country that is typically anxious to appear as investor-friendly. In the overwhelming majority of cases, the respondent in ICISD cases is the government of a developing country. The second anomaly is that the case alleges violations of the Energy Charter Treaty. The Energy Charter Treaty Secretariat lists 20 cases (21 with the present one) that have been brought by investors to international arbitration. Interestingly, all of these have been brought against governments of Eastern Europe, the former Soviet Union and Turkey.

However, one could possibly see a trend emerging here. As concerns about environmental degradation, and in particular climate change, grow amongst public opinion, it is possible that an increasing number of governments (at the national and sub-national level) might question the terms of contracts and treaties entered into and try to impose greater and more stringent regulations on projects to develop utilities, triggering litigation. The jury is out, so to speak.

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