

Magnolia Case

Youth NGOs and Individuals v. the Government of Sweden

Executive summary:

In June 2016, the Swedish government approved the request from state-owned company Vattenfall to sell off their lignite assets in Germany to a Czech risk capitalist company, Czech Energetický a Průmyslový Holding (EPH) and PPF Investment (PPF). Two youth NGOs, PUSH Sweden and Fältbiologerna (Nature and Youth Sweden) together with 176 individuals, being concerned that the sale will result in increased emission of greenhouse gases, filed a multifold claim against the Government of Sweden in September 2016 in order to establish that the State has failed in its duty of care, that the sale itself was illegal and for the disclosure of any information about climate/environmental impact assessment.

The Stockholm District Court has given notice in January 2018, that they will not address the Magnolia case. The plaintiffs appealed the decision to the Court of Appeals, but the appeal was not successful.

The Court of Appeal reiterated in its judgment the District Court's argument that "the plaintiffs' claim for financial damage is based on a hypothetical risk assessment of future environmental and health effects, and not on any actual economic damage".

According to one of the plaintiffs, they are not going to pursue the proceedings further to the Supreme Court, because they find it beyond hope to win the appeal before the highest court.

Irrespective of the outcome, the petition highlights some of the most interesting aspects on how the interests of future generations can be put in practice through climate change litigation claims. The below case description will focus on these aspects in detail for future references.

The background:

On the 2nd of July 2016, the Swedish Ministry of Industry announced the approval of the deal in which state-owned utility Vattenfall sold its German lignite assets to Czech Energetický a Průmyslový Holding (EPH) and PPF Investment.

The deal includes some of Germany's largest coal mines – and three of the top 10 most polluting coal plants in Europe. Coal is the most polluting of all fossil fuels, and lignite or 'brown coal' is the most polluting type of coal and the greatest threat to EU climate goals. This deal risks the future release of 1.2 billion tonnes of additional CO₂ into the atmosphere, which would be equivalent to 22 years of Sweden's annual emissions as an entire country.

On the sale of state-owned companies, the Government should make an assessment of the buyer to ensure that the purchaser is acceptable according to several criteria related to sustainability and that Vattenfall's handling of the deal meets the requirements of national and international law, the state's ownership policy and other regulations, such as the OECD Guidelines for Multinational

Enterprises (also containing a series of recommendations concerning, amongst other, environmental requirements).

The Czech energy company EPH is an independent holding company for some 30 companies with various forms of energy business. Before the sale, EPH owned and operated 27 plants in five countries, the majority in the Czech Republic. Emissions of carbon dioxide from the plants amounted to 24 million tonnes last year, about 2.5 percent of Europe's emissions. With taking over Vattenfall's four German brown coal power stations and associated mines, EPH's emissions could increase to about 90 million tonnes per year. Since neither EPH, PPF Investments or any of its owners report having environmental, climate or sustainability policies, it is not possible to determine with certainty the companies' positions on sustainability issues. PPF Investments has released no public documents at all, while the annual reports from EPH mainly mention environmental standards as a factor that can reduce profitability and slow the company's growth.

Looking at the human rights perspective of the deal, it is a widely accepted concept both in international human rights law and in national legal systems that the right to life is a solid dimension of the realization of all other human rights. Sweden, as a party to the European Convention on Human Rights is also bound by the growing environmental requirements set by the European Court of Human Rights under the right to private and family life, enshrined in Article 8 of the European Convention on Human Rights, which is interpreted by the Court as providing guarantees against and requiring impact assessment procedures from certain environmentally harmful industrial activities authorized by Member States. The Swedish Constitution also ensures in Chapter 1, § 2: "The public authorities shall promote sustainable development leading to a good environment for present and future generations."

Therefore, according to the plaintiffs, the State's sale of its German lignite assets goes against what Sweden has signed on to in (i) international climate agreements, such as the Paris agreement, the European Convention for the Protection of Human Rights and Fundamental Freedoms, (ii) national climate targets, (iii) the state's ownership policy, (iv) the Swedish constitution, and (v) the Swedish national goal called 'the generational goal' - a goal adopted by the Swedish Parliament in 1999 and meant to be reached by 2020 stating that: "The overall target for environmental politics is to hand over to the next generation a society where the major environmental problems are solved, without causing increasing environmental and health problems outside Sweden's borders."

The lawsuit:

The application to challenge the decision of the Swedish government and halt the sale was filed on the 15th September 2016 at the District Court in Stockholm. Interesting to note is that crowdfunding was used to pay for legal representation, court fees and communication costs. In the first instance more than US\$2,500 was raised to cover the initial costs of filing the lawsuit. (If more money is raised than needed, or the case is not accepted in court, any leftover funds from this fundraiser will be donated to the youth in the U.S. where 21 young people from across the

United States have filed a landmark constitutional climate change lawsuit against the federal government¹.)

The plaintiffs requested that:

1. The Stockholm District Court find that the State has failed in its duty of care towards the plaintiffs by allowing or not preventing the sale of Vattenfall's lignite operations to Energetický A Prumyslový Holding and PPF Investments,
2. The Stockholm District Court find that Vattenfall AB's sale of its subsidiaries Vattenfall Europe Generation AG and Vattenfall Europe Mining AG to Energetický A Prumyslový Holding and PPF Investments is illegal.
3. The Stockholm District Court order the State to disclose copies of the Ministry of Industry documents that were drawn up or received during the period 1 April to 12 June 2016 and that might contain information about climate/environmental impact assessments relating to the sale and which might contain information on the inquiry into the suitability of EPH/PPF Investments as a purchaser.

Issue of standing under Swedish law:

One of the most striking features of this lawsuit from a future generations' point of view is the question of standing, namely, whether Swedish law would allow a group of adolescents to launch such a case. The plaintiffs rely on a broad concept of standing with a three-fold reasoning as to why their claim, filed as the representatives of future generations, should be allowed to proceed.

Firstly, regarding an individual's standing in environmental matters Swedish law provides as follows: any person who may suffer damage or is exposed to nuisance by a business activity has the right to appeal if the risk of harm is not merely transient and trifling. A broad group of interested parties can be considered well in line with the practice of the Aarhus Convention and the European Court of Justice.

Secondly, under the Swedish Constitution, the State has an obligation to protect its citizens in accordance with Chapter 1, Article 2§ of the Instrument of Government. The plaintiffs state that that there is a significant and immediate risk that the sale will lead to increased emissions of greenhouse gases and that the State has thus violated its fundamental duty of care towards its citizens.

Third, if the Swedish Government does not implement adequate measures to achieve national and global climate change goals, or acts/fails to act in a way that undermines the aim of achieving national and international climate goals, there is a basis for judicial review of the State's fulfilment of its duty of care towards its citizens.

¹ Kelsey Cascadia Rose Juliana et al vs. United States of America et al, Case No. 6:15-cv-01517-TC OPINION AND ORDER (2016 Oregon District Court)

Clarification request

The Stockholm District Court asked for further clarifications from the claimants on certain points. This has given the claimants the opportunity to elaborate on the application, and to add a symbolic claim of 1 SEK ($\approx 0,1$ EUR) per each 178 plaintiff as this could increase the chances of having the application accepted by the Court. The final version of the claim was handed in in early January 2017. OutcomeAs described above in the first paragraph, the District Court gave notice in January 2018 that it will not address the application/accept the application. This was appealed, but without success. After all, the plaintiffs came to the conclusion that they will wrap up this application, because they find thatthe appeal would not have a chance before the Supreme Court.

The Magnolia Case has been an unsuccessful legal application, but it shows some important considerations for those willing to try to litigate in the name of future generations and it lays down some important precedent to learn from in the future..

Sources:

1. Summons application to the Stockholm District Court at:

<https://drive.google.com/file/d/0BwNst9QrJa18Y2x6X1hMYmJmSEk/view>

2. Crowdfunding page for the Magnolia case:

<https://www.generosity.com/community-fundraising/youth-sue-swedish-state-on-climate-grounds--2>

3. Magnolia case press release:

<http://www.xn--magnoliamlet-1cb.se/news/press-release-in-english-2016-09-15/>