Charanne B.V.

Construction Investments S.A.R.L.

v.

The Kingdom of Spain

(Arbitration No.: 062/2012)

Dissenting Opinion of Prof. Dr. Guido Santiago Tawil

1. I agree with the conclusions drawn by my distinguished colleagues on those aspects of the case relating to the recognition of the jurisdiction of the Arbitral Tribunal to resolve this dispute. In that sense, I agree that this Tribunal is competent to decide on the dispute between the Claimants and the Kingdom of Spain under the Energy Charter Treaty ("ECT").

2. As to the merits of the case, I agree with the standard for "indirect expropriation" as followed by the majority of the Arbitral Tribunal in paragraph 461 of the award, to the extent that it is characterized by the existence of a "substantial effect" on property rights. Having limited the decision of this Arbitral Tribunal, by party agreement, to information received up to the enactment and entry into force of the RD 1565/2010 and RDL 14/2010 (The "2010 Measures", as defined in the Award) and excluding from the analysis any regulations issued thereafter, I also agree that there has not been any evidence of an indirect expropriation of investments by the Kingdom of Spain under Article 13(1) of the ECT.

3. Unfortunately, I cannot agree with the reasoning and conclusions made by the majority on the treatment of "legitimate expectations" as they relate to the standard of "fair and equitable treatment" under Article 10 (1) ECT.

4. First of all, I agree that whether there has been a violation of the investor's legitimate expectations should be based upon an "objective" standard or analysis – not in the mere subjective belief that the investor could have held at the time of making the investment – a criterion which must be evaluated on a case-by-case basis. In addition, I understand that the application of the principle depends on whether the expectation was reasonable,[1] as it relates to the representations made by the receiving State to induce the investment, and the change of the legal regime that occurred once that investment was made.

5. My disagreement with the majority lies in the fact that, in my opinion, the creation of legitimate expectations in an investor is not limited solely to the existence of a "specific commitment" – either contractual in nature or founded in statements or specific conditions declared by the receiving State - but it can also derive from, or be based on, the legal system in force at the time of the investment.[2]

6. In the present case, the policy outline in the special regime put into place by the Kingdom of Spain through RD 661/07 and 1578/08, establishing a "Feed In Tariff"

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[1] See: *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v Republic of Argentina* (ICSID Case No. ARB/03/19), Decision on Liability, 30 July 2010, para 226.

[2] See: United Nations Conference on Trade and Development (UNCTAD), Fair and Equitable Treatment, 2012, p. 69: "Arbitral decisions suggest [...] that an investor may derive legitimate expectations either from (a) specific commitments addressed to it personally, for example, in the form of a stabilization clause, or (b) rules that are not specifically addressed to a particular investor but which are put in place with a specific aim to induce foreign investments and on which the foreign investor relied in making his investment". In *Total v. Argentina*, the Court concluded that legitimate expectations can be created not only in contracts, concessions and stabilization clauses, but also from any intentional conduct on the part of the host State to make an investor reasonably believe that it has "the intent to pursue a certain conduct in the future", or to create "expectations in potential investors with respect to particular treatment or comportment". See: *Total S.A. v. Republic of Argentina* (ICSID No. ARB/04/1), Decision on Liability on 27 December 2010, paras.119-121. In the same vein, Rudolph Dolzer and Christoph Schreuer, "*Principles of lnternational lnvestment Law, Oxford University Press*", Second Edition, (2012), p. 145.

("FIT") to remain in force - at a minimum - for 25 years, and in relation to which Spain had declared that it would not be affected by future tariff reviews,[3] together with related documents issued contemporaneously by the Spanish Government, serve to interpret the context and the purpose of the regulatory measures -[4] which, in my view, appear to be enough for the claimants to decide to carry out the investment in photovoltaic plants even if each representation, by itself, may not have had the full effect to generate a legitimate expectation. Therefore, pursuant to the declarations under RD 661/07 and 1578/08, the claimants could have "objectively" believed that the tariff regime established under each law[5] would remain unaltered.

7. In this sense, the system established by RD 661/07 and 1578/08 constitutes a regime of promotion and "encouragement," a typical instrument of economic policy aimed at creating various incentives that would lead private capital in a certain direction, an objective that otherwise would probably not be achieved. This concerns a legitimate initiative by the Spanish State designed to "protect or promote" those economic activities by individuals that satisfy a public necessity or general utility, initially avoiding the use of coercion or social activity that characterizes a public service.

8. Moreover, I am of the opinion that the system implemented by RD 661/07 and 1578/08 was not aimed at an indeterminate "generality" or an imprecise or indefinite collective, but rather at a limited number of potential recipients, who had sufficient capital for investing in the industry in question and that the Kingdom of Spain considered it useful for stimulation and to do it, avoiding having to use its own resources.

9. This regime was not valid *sine die* or indefinitely, but rather it required that investments in photovoltaic facilities be made, entered into the registry,[6] and put into operation prior to the expiration of a deadline. Failure to comply with this temporal standard prevented access to special benefits established by the regulation. There were two elements, namely, (i) a rule that creates a strong incentive to invest in the generation of renewable energy, leading to a determinable number of possible

[3] See: Article 44.3 of the RD 661/07 ("During the year 2010, in view of the outcome of the monitoring reports on the degree of compliance with the Plan for Renewable Energy (PER) 2005-2010 and the strategy for energy saving and efficiency in Spain (E4), as new objectives are included in the next renewable energy Plan for the 2011-2020 period, provisions shall apply to the review of the rates, raw, accessories and lower and upper bounds defined in the Royal Decree based on the costs associated with each of these technologies, the degree of involvement of the special demand coverage scheme and its impact on the economic and technical management of the system, guaranteeing reasonable profitability rates with reference to the cost of the money in the capital market. Every four years, from then on, there will be a new review maintaining the above criteria. Revisions to the regulated tariff and the upper and lower limits will not affect facilities whose service implementation is granted before 1 January of the second year after the year in which the review was made") (the interest belongs me).

[4] See: Renewable Energy Plan 2005-2010, approved by the Spanish Government through the agreement of the Council of Ministers of 26 August 2005. In the same vein, the document "The Sun can be Yours" (PHB1 Claimants, para.148).

[5] With greater incentives for those who invested before 29 September 2008 when the regime was established under RD 661/07. See, thus, Article 22 of RD 661/07, the resolution of the CNE of 27 September 2007 and Article 2 of RD 1578/2008.

[6] See: Article 14 of RD 661/07: "The final registration of the facility in the administrative record of production facilities within the special regime is a necessary requirement for the application of said facility of the economic system regulated by this royal decree, with the effect from the first day of the month following the date on record of the final commissioning of the facility."

interested [individuals], and (ii) a short period in which to be entitled to the benefit, directing private capital to the realization of the desired investment, resulting definitely, in my opinion, in the acceptance of the existence of the Claimant's legitimate expectations.

10. Once the Claimants made the investment, complying with all the existing requirements of the rules governing the granting of the expected benefit (in this case, the FIT), it does not appear to be recognized as legally acceptable in the receiving State to modify or eliminate them without some legal consequence.

11. There is an argument used repeatedly in the Award, according to which, the recognition of legitimate expectations in this case would be equivalent to admitting that the regulatory power of the receiving State remains "frozen" *sine die* or that the legislation cannot be subsequently amended in conformity with the public interest. I respectfully disagree with this assessment. There is no doubt that as a general rule, no vested right to the continuance of a specific general legal framework exists, nor does a legitimate expectation in the stabilization of laws and regulations. The receiving State always preserves its regulatory power and may amend its legislation, even in cases in which it had granted stabilization clauses. Nevertheless, if in the valid exercise of this regulatory power, the receiving State affects vested rights or legitimate expectations, it must compensate for the damages caused.

12. In short, when an investor complies with all the established requirements of the current legislation in order to be entitled to an expected and determinable benefit, subsequent disregard on the part of the State receiving the investment violates a legitimate expectation. The Kingdom of Spain was authorized to amend or eliminate the established promotion regime. No risk of freezing, petrification or immutability of the economic framework existed. Nevertheless, if the modification of the benefit granted to someone who had already invested as a result of this special regime – establishing, in this case, a limited number of production hours and years with right to tariffs – caused harm without providing adequate compensation, it would violate the legitimate expectations created, and thus, the fair and equitable treatment protected by Article 10 of the ECT.

13. Due to the way in which the majority has decided, there will not be any judgment given in relation to the existence or inexistence of the alleged damage, its identity, or the required compensation.

TRANSLATION FROM SPANISH ORIGINAL

Prof. Guido Santiago Tawil

Arbitrator

Date: 21 December 2015