INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

WATKINS HOLDINGS S.À R.L. & OTHERS

(Claimants)

v.

THE KINGDOM OF SPAIN

(Respondent)

ICSID Case No. ARB/15/44

DISSENT ON LIABILITY AND QUANTUM

Prof. Dr. Helene RUIZ FABRI

1. I support the conclusion that the Tribunal has jurisdiction over large parts of the claims brought by Watkins Holdings S.à r.l. & Others, including the dismissal of the Respondent's intra-EU jurisdictional objection (Award, paras. 142-226). I also agree that the Tribunal does not have jurisdiction with respect to the Tax on the Value of the Production of Electrical Energy (TVPEE) (Award, paras. 227-274).

2. However, with all due respect for my esteemed colleagues, I have to disagree with the conclusion that the majority reached in the instant case on liability and quantum, concerning mainly the meaning and functioning of the fair and equitable treatment standard (FET), on the basis of the record before the Tribunal in this case.

3. This case is to be located in the broader context of a series of cases concerning a large number of arbitrations conducted against Spain for its normative changes in the regulatory framework of the renewable energy sector (sometimes named as the "Spanish saga"). In a situation where many different cases stem from the same general measures and are conducted in parallel, the clarity of the reasoning is especially important. I fear that the Tribunal in this award is far from bringing the necessary clarity to the discussion.

4. More generally, the Tribunal does not justify sufficiently the reasoning that brings it to reach its conclusion regarding FET. In my view, the judicial function of an international investment tribunal entails a duty of legal reasoning that goes far beyond the exercise of qualifying certain awards as convincing or discarding the reasons of others as non-satisfactory. The Tribunal has to develop its own argumentation, answering carefully the arguments of the parties. Evidence presented in the case must take precedence. In this regard, it might be noted that the *Watkins* case is one of the very few, besides *RREEF*, which has to deal with the wind industry, whereas the vast majority of the cases deal with solar (or PV or CSP) energy. And yet, the *Watkins* award fails to point out whether this is a particularity to be taken into account or not, sometimes finding it is a factor of distinguishing to discard the relevance of some other awards or, on the contrary, ignoring it when espousing the findings of others.

5. The clarity of the reasoning is all the more crucial when fair and equitable treatment is at stake: a fine-tuned balance should be found between the protection of the investment, especially the legitimate expectations of the investor,[1] and the sovereign prerogatives of the State to legislate for purposes in the general interest.

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[1] As stated by the Tribunal in *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award of 25 November 2015, para. 7.75: "It is widely accepted that the most important function of the fair and equitable treatment standard is the protection of the investor's reasonable and legitimate expectations."

"As firmly established in the case-law, an international obligation imposing on the State to waive or decline to exercise its regulatory power cannot be presumed, given 'the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.' The regulatory power is essential to the achievement of the goals of the State, so to renounce to exercise it is an extraordinary act that must emerge from an unequivocal commitment; more so when it faces a serious crisis."[2]

6. In all the awards in the Spanish saga, investment tribunals have agreed on the existence of some legitimate expectations on the side of the investor, the fundamental question being the extent of those legitimate expectations in every single case. It is not questioned that the starting point is the State's right to regulate. Nor is it questioned that the role of the arbitrator is to determine what the commitment, taken under the Energy Charter Treaty, to exercise this regulatory power within certain limits means. The question is whether the State has overstepped the boundaries set by the fair and equitable treatment obligation, inscribed in Article 10 of the Energy Charter Treaty (ECT).

7. In its recent case *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile),* the ICJ dismissed Bolivia's argument that the doctrine of "legitimate expectations" exists in general international law outside the context of fair and equitable treatment clauses.[3] The doctrine is at the heart of the functioning of the treaty standard. In this regard, I regret that the Tribunal did not seize the opportunity to clearly rebut the attempt to read in Article 10(1) ECT an autonomous standard of stability, existing alongside FET.

8. The protection granted by the FET standard is of variable intensity. Depending on the existence of a stabilization clause or of specific commitments towards the investor (including representations), the contours of the legitimate expectations will be different than in the case where no such circumstances exist and the legitimate expectations stem from the general regulatory framework of the State. In any event, since the inception of the doctrine of legitimate expectations

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[2] ***RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.d r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, para. 244.**

[3] **ICJ, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile),* Judgment of 1 October 2018, para. 162.**

in the *Teemed* Award,[4] the date of the investment and the standard of the reasonable investor have always contributed to circumscribe its scope.

9. Generally, "the investor's legitimate expectations are based on [the host state's] legal framework and on any undertakings and representations made explicitly or implicitly by the host state".[5] In the Spanish saga, different tribunals have reached different solutions concerning the extent and morphology of the legitimate expectations. First, some tribunals have relied on the existence of specific commitments equivalent to a stabilization clause in the favour of the investor at hand. Second, other tribunals have found that individual representations of the State toward the investor existed in the case at hand. Third, when no such specific commitments exist and in the absence of individual representations, the question becomes whether the general regulation can create legitimate expectations such that there will be no change of the normative framework. In this case, the functioning of the FET standard requires balancing the regulatory margin of the State with the legal security of investors, the assessment of such a balance being based on a proportionality control. As recalled in *Charanne*, "in the absence of a specific commitment, an investor cannot have a legitimate expectation that existing rules will not be modified",[6] but the State should not overstep the limits of the fair and equitable treatment.

10. Now, provided, *arguendo*, that we are in the first scenario and that, based on evidence on record in the case, the Tribunal considered that there were such "firm undertakings" on the side of the State, equivalent to a firm pledge of regulatory stabilization, I cannot adhere to the solution reached by the Majority for two main reasons.

11. First, I cannot agree with the method used to justify the legal analysis of the qualification of the obligation of stabilization allegedly created with Article 44(3) of the Royal Decree (RD) 661/2007 or the identification of specific commitments allegedly stemming from RD 661/2007. This is because an in-depth analysis of Article 44(3) of the RD 661/2007 is missing, including regarding its exact scope and the arguments raised in this regard by the Respondent, as summarised in para. 407 of the Award. All the same, the Majority never demonstrated that Article 44(3) was

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[4] ***Tecnicas Medioambientales Teemed, S.A. v. The United Mexican States*, Award of 29 May 2003.**
[5] **R. Dolzer, C. Schreuer, *Principles of International Investment Law*, OUP, 2008, p. 134.**
[6] ***Charanne and Construction Investments* v. *Spain*, SCC Case No. V 062/2012, Final Award of 21 January 2016, para. 499.**

grandfathered and could not be repealed or replaced. And yet, there would not be so many different approaches and divergences between tribunals of the Spanish saga if the legal qualification and status of Article 44(3) could be treated so lightly.

12. Second, I cannot adhere to the solution reached by the Majority as it did not take into sufficient consideration the date of the investment. The Tribunal did not consider how the date of the investment would change the intensity of the legitimate expectations. Even admitting *arguendo* that there was a stabilization commitment in 2007, can it be considered that the same commitment still existed in 2011, where the stability became so uncertain that a "regulatory risk" became plausible? The Tribunal in *Watkins* should have answered this question with the highest clarity, explaining its positions concerning the "clear possibility of modification resulting from Articles 4 and 5 of RD 1614/2010".[7]

13. Different arbitral tribunals have clearly done so. The tribunal in *Cube* has for instance considered that there was in 2010 a "climate of change", because of unambiguous signals that a regulatory change of some sort was coming:

> "330. The regulatory regime was largely the same as that applicable when the PV investments were made, but with the important difference that the 2010-2011 regulatory changes had by that time been adopted and with retroactive effect. The laws of 2010 and 2011 had demonstrated that the Respondent would at least adjust the periods for which price incentives were payable and the levels of price incentives, if it considered this necessary in order to address the tariff deficit.
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> 333. In these circumstances, the Tribunal considers that any reasonable investor would have taken a much more cautious view of the extent to which the continuation of the existing legal regime could be relied on, but would not have had reason to expect the complete abandonment of the Special Regime."[8]

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[7] *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l.* v. *Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, para. 321.

[8] *Cube Infrastructure Fund SICAV and others* v. *Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum of 19 February 2019.

In *Isolux*, the tribunal considered the fact that the Spanish Supreme Court has clearly stated in 2009 that there could be no guarantee that the regulatory regime was not going to change in the near future,[9] and therefore drew the conclusion that an informed investor could not ignore this wind of change.[10] The tribunal in *Novenergia* confirmed this need of distinguishing based on the date of the investment: "In *Isolux*, again, as the Claimant rightly points out, the arbitral tribunal was faced with an investor that had made investments in October of 2012, i.e. at a stage when it must have been clear to the investor that changes were being made to the Special Regime."[11] And yet, the Majority in *Watkins* fails to even analyse the issue of the date of the investment and its eventual effect on the asserted legitimate expectations.

14. Further than that, the Tribunal proceeds to assess both the reasonableness and the proportionality of the disputed measures without identifying the framework for this control. Utmost clarity would have been necessary though, as the intensity of this control changes depending on the scenario of the case (existence -or not- of specific commitments, or of firm undertakings). Inasmuch as the core of the problem is whether the State has overstepped the boundaries set by the FET standard, the Majority should have explained the method adopted to operate the proportionality control. Notwithstanding what one may think about the proportionality of the changes in the Spanish legal system, I cannot adhere to a reasoning that does not clearly set the parameters of proportionality and does not follow them just as clearly, as what is at stake is the balance between investment protection and the respect of the regulatory power of the State. And yet, the Majority simply states abruptly that "changes to the FIT… [are] not an appropriate solution to the problem" of tariff deficit, thus substituting its appreciation to Spain's (at para. 601 of the Award). Moreover, the Majority further asserts that there were "less intrusive means available"

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[9] Judgment Supreme Court 3rd Chamber, sect. 3, S 9-12-2009, appeal 152/2007: the Claimant in the case "does not pay enough attention to the case-law of this Chamber specifically referred to with regard to the principles of legitimate expectation and non-retroactivity applied to the successive incentives' regimes for electricity generation. This involves the considerations set out in our decision dated October 25, 2006 and repeated in that issued on March 20, 2007, inter alia, about the legal situation of the owners of electrical energy production installations under a special regime to whom it is not possible to acknowledge for the future an "unmodifiable right " to the maintenance unchanged of the remuneration framework approved by the holder of the regulatory authority provided that the stipulations of the Law on the Electricity Sector are respected in terms of the reasonable return on investments." (Respondent's Exhibit R-0002).

[10] *Isolux Netherlands, BV* v. *Kingdom of Spain*, SCC Case V2013/153, Final Award of 17 July 2016, paras. 792-800.

[11] *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR* v. *The Kingdom of Spain*, SCC Case No. 2015/063, Final Award of 15 February 2018, para. 686.

without verifying and justifying their effective accuracy and feasibility. I regret that no proper exercise of weighing and balancing was conducted and that the context of the economic crisis was not even acknowledged. Other awards have not hesitated to borrow from other courts or tribunals which have developed a strong framework for proportionality control, be it the WTO Appellate Body or the European Court of Human Rights.

15. Furthermore, concerning the impact of the proportionality control, provided *arguendo* that State responsibility is the outcome of the proportionality test, I believe that the Majority should have analysed clearly what was the impact of the "regulatory risk" existing at the date of the investment on the amount of reparation. Provided, again *arguendo*, that the DCF method of calculation was the most appropriate method (and some tribunals did not consider that that was the case because of the particularities of the issue at stake), I cannot agree with the way in which the Majority applied it, as the date of the investment and the surfacing of a regulatory risk had to be taken into account even in this last phase of judicial reasoning, eventually adapting the amount of damages (as the tribunal did for example in *Cube*).

16. Last but not least, contrary to what the Majority considered (at para. 593 (ii) of the Award), the investment of the Claimants was not "destroyed". The investment was bought at €91 million in 2011, valued €98 million at the moment of the alleged intervention of the wrongful act in 2014 and sold at €133 million in 2016 (which meant a return of 11.2%). What is the Majority considering as "destroyed" and what is the Tribunal repairing exactly, when awarding damages in the sum of €77 million, without taking into account the date of the investment and the impact of the context on reparation?

Dated: 23 January 2020

Prof. Dr. Hélène Ruiz Fabri