School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
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Award Name and Date: The PV Investors v. The Kingdom of Spain (PCA Case No. 2012-14) – Final Award – 28 February 2020

Case Report by: Cristina Viteri**, Editor Diego Luis Alonso Massa***

Summary: Claimants brought an action for relief against Spain pursuant to Article 10 of the Energy Charter Treaty ('ECT') alleging Spain breached, *inter alia*, fair and equitable treatment and full protection and security, as well as its obligations under international law in relation to their investment in Spain's renewable energy sector, specifically in photovoltaic installations. The Tribunal declined to accept the Primary Claim establishing that the amendment of the regulatory framework did not constitute a violation of its obligations. The Tribunal upheld the Alternative Claim and found that Spain violated the ECT by not providing the Claimants with the "reasonable rate of return" as promised under the regulatory framework in place when the Claimants made their investments.

Main Issues: FET, legitimate expectations, immutability of the legal framework, reasonable rate of return

Tribunal: Professor Gabrielle Kaufmann-Kohler (Presiding Arbitrator), The Honorable Charles N. Brower (Arbitrator) and Judge Bernardo Sepúlveda-Amor (Arbitrator)

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Digest:

1. Relevant Facts

The PV Investors ('PV Investors' or 'Claimants') are 25 corporate entities and one natural person. Respondent is the Kingdom of Spain ('Spain' or 'Respondent') (¶¶ 2-5). The underlying dispute arose out of the evolution of the legal framework applicable to the Claimants' investment in Spain's renewable energy ("RE") sector, specifically in photovoltaic ('PV') installations (¶ 181).

Power generation in Spain was legislated by the 1997 Electricity Law, which was divided in two regimes: the "Ordinary Regime" and the "Special Regime", applicable to power generation from RE sources, including PV energy. Article 30.4 of the aforementioned law established that the Special Regime generators' remuneration was supplemented by a State subsidy or premium, determined by a number of different factors, in order to achieve reasonable rates of return with reference to the cost of money in the capital market (¶¶ 182 - 183).

Royal Decree 436/2004 of 12 March 2004 ('First Decree') established an incentive system based on a "Feed-in-Tariff" ('FIT') for investors in PV technology. According to Article 30.4. of the 1997 Electricity Law, Investors were entitled to sell their electricity freely on the market or at a "single, flat rate". The First Decree purported to guarantee the owners of special regime installations a reasonable remuneration for their investment and to electricity consumers a reasonable allocation of the costs attributable to the electricity system (¶¶ 184-188).

Royal Decree 661/2007 ('Second Decree') replaced the First Decree and according to the Tribunal, it constituted the bedrock on which the Claimants anchored their claims. Its purpose was to amend the remuneration scheme and to separate the calculation of the FIT from the consumer electricity tariff used until then. It also guaranteed the owners of special regime facilities a reasonable return on their investments and electricity consumers a reasonable allocation of costs attributable to the electricity system. PV installations were entitled to receive a FIT in Euro cents per kilowatt-hour for the first 25 years of their operational life, and a lower amount thereafter, or to sell directly to the market and receive the market price (¶¶ 189-194).

Since 2010, Spain enacted a series of measures that adjusted and ultimately replaced the economic incentives granted under the Second Decree, which are referred to as the "2010

Measures" and the "New Measures". The first ones extended the higher FIT to 30 years and eliminated the lower FIT. The consequence was that the PV installations would sell electricity at the market rate after year 30. They also established a limit on the number of hours per year for which PV installations would receive the FIT. Consequently, after the cap, investors would have to sell electricity at the market prices. Additionally, Spain approved Law 15/2012, which imposed a tax of 7% on the production of electricity and its incorporation into the electricity system (¶¶ 199-202).

The second ones had the effect of withdrawing the regime put in place under the Second Decree and instead, introduced a "New Regime" for both, the existing and new installations. The New Measures repealed all former regulations governing the PV sector, abolished FIT and replaced it with a "Special Payment" (market price plus an additional amount), that every six years was revised by the Government and capped. In addition, they removed the distinction between Ordinary and Special Regime to bring both at par and provided for a set of remuneration parameters to calculate the costs of a Standard Installation (¶¶ 203-212).

PV Investors alleged having invested approximately EUR 2 billion in the Spanish PV sector, relying on the economic incentives contained in the Second Decree and particularly on the alleged stabilization guarantee in Article 44.3, with the reasonable and legitimate expectation that such incentives would remain unchanged during the lifetime of their plants. In their view, once Spain charmed the Claimants into making their investments, it enacted a series of measures that ultimately withdrew the incentives (¶ 213).

Claimants brought an action for relief against Spain pursuant to the ECT alleging that Spain had breached Article 10 of the aforementioned treaty (¶ 214).

Spain asserted that the incentives were subject to a "principle of reasonable profitability". Consequently, the Claimants were only entitled to a reasonable rate of return, applicable at the time the Claimants made their investment, which was around 7% (¶ 215).

In response, Claimants presented an Alternative Claim establishing that in the event that the Tribunal were to agree that the Claimants' legitimate expectations were limited by Spain's concept of a 'reasonable return', Spain would still face international liability under the ECT since it significantly lowered the 'reasonable return'" (¶ 216).

Spain contended that the Claimants continued to remain highly profitable and achieved the reasonable return that they could have expected at the time of their investment (¶ 217).

2. Procedural History

The procedural history of the first phase of the arbitration until 13 October 2014 is recounted in section II of the Preliminary Award on Jurisdiction (¶ 8). On 28 September 2012, the Claimants filed a request to amend their Statement of Claim (¶ 11). On 14 October 2014, the Tribunal rendered the Preliminary Award on Jurisdiction and dispatched the Concurring and Dissenting Opinion of The Honorable Charles N. Brower dated 10 October 2014 (¶ 9). On 5 January 2015, the Claimants were granted leave to file an amended Statement of Claim in Procedural Order No. 8 (¶ 15). On 6 February 2015, the Claimants filed their amended Statement of Claim (¶ 20). On 22 May 2015, the Respondent filed its Statement of Defence (¶ 30). On 16 June 2015, the Respondent filed a corrected version of the Statement of Defence (¶ 33). On 17 October 2015, the Claimants filed their Reply (¶ 46). On 21 December

2015, the Respondent filed its Rejoinder (¶ 51). The hearing on liability was held at the Peace Palace in The Hague on 14 - 21 March 2016 (¶ 73). On 20 May 2016, the Claimants and the Respondent filed their first post-hearing briefs (¶ 81). On 24 June 2016, the Parties filed their reply post-hearing briefs (¶ 85). On 8 July 2016, the Parties filed their submissions on costs (¶ 87). On 15 July 2016, the parties filed their replies on costs (¶ 87). On 7 April 2017, the Claimants filed their Quantum Submission (¶ 97). On 14 September 2017, the Respondent filed its Quantum Counter-Memorial (¶ 106). On 9 November 2017, the Claimants filed their Quantum Reply Submission (¶ 111). On 22 December 2017, the Respondent filed its Quantum Rejoinder (¶ 117). The PO12 Hearing was held on January 16 - 19, 2018 at the Peace Palace in The Hague (¶ 128). On 16 March 2018, the Claimants filed their First PO12 Post-Hearing Brief and the Respondent filed its Quantum Post Hearing Brief (¶ 137). On 29 November 2018, the Claimants filed their Second PO12 Post-Hearing Brief (¶ 164). On 12 February 2019, the Respondent filed its Second Post-Hearing Brief on Quantum (¶ 167). On 14 June 2019, the Parties filed their Submissions on Costs (¶ 172). On 28 June 2019, the Claimants and the Respondent filed their Reply Submissions on costs (¶ 173).

3. Positions of the Parties

3.1. Claimants' position

Claimants contended that investments in the energy sector involve high-value long-term commitments in projects that cannot easily adapt to the vagaries of legal and political changes. According to Claimants, the ECT seeks to reduce political and regulatory risks: (i) by requiring Contracting States to maintain a stable, predictable and transparent legal and regulatory investment framework; and, (ii) by offering more robust levels of protection than ordinary bilateral investment treaties, subject to very few exceptions with respect to a host State's right to regulate (¶ 295).

According to Claimants, Respondent breached the following obligations:

3.1.2. Claimant's legitimate expectations

Claimants submitted that the central tenet of Spain's obligation regarding fair and equitable treatment was to refrain from conducts that defeated the legitimate expectations on which the investor relied at the time of making its investment. The Claimants' expectations were based on (i) the explicit guarantees and assurances made by Spain in the Second Decree; and, (ii) the numerous public statements made by Spain and various entities regarding the application of the regime. In addition, Claimants contended that other investors shared their expectations, as they were objective and reasonable. Respondent altered and ultimately ended the economic incentives contained in the legal and regulatory framework in place at the time when the investment was made, in disregard of their expectations (¶¶ 296-301).

3.1.2.1. Spain failed to create stable investment conditions

Claimants contended that whether the obligation to create stable, equitable, favourable and transparent conditions is considered a sub-set of the FET standard or an independent obligation, Respondent was obliged to maintain stability. Therefore, future changes to the legal framework were supposed to be predictable and should not have altered the fundamentals of the legal framework, based on which the investment was made, absent the payment of compensation. Spain's continuous and unreasonable changes in the legal framework breached its obligations under the ECT (¶¶ 303-304).

3.1.2.2. The Disputed Measures were unreasonable, arbitrary and disproportionate

Claimants argued that the Disputed Measures were (i) unreasonable since they imposed retroactive incentive cuts for existing investments and not tailored to meet stated policy goals; (ii) arbitrary since the cap applied to the number of years and hours for which Claimants were entitle to receive benefits and the target rate return were unreasonable; and, (iii) disproportionate to the aim pursued, since other measures were available to address the tariff deficit (¶¶ 305-314).

3.1.2.3. The Disputed Measures were not transparent

According to Claimants, Article 10(1) ECT requires States to encourage and create transparent conditions for other Contracting Parties Investments. In their view, Spain's conduct in dismantling the Second Decree lacked transparency since (i) the Transitory Period left PV producers in the dark regarding what would happen next; (ii) the New Regime criteria and revisions were not explained (iii) the standard installation parameters were adjustable without its methodology being known; (iv) it was not a valid methodology for reviewing the Special Payment established; and, (v) there was no transparent methodology to determine whether a plant had achieved reasonable profitability (¶ 315).

In addition, (i) Spain failed to consult the affected parties prior to enacting the Disputed Measures; (ii) Spain ignored the recommendations made by the public entities´ reports and some of them were issued after the measures were imposed; and, (iii) the Ministry rejected the submissions made by interested parties (¶ 316).

3.1.2.4. The Disputed Measures impaired the Claimant´s Investment

Claimants asserted that the Disputed Measures were unreasonable and discriminatory, in violation of Article 10(1) ECT, since they were not taken pursuant to a rational policy goal. In the Claimant's view, the Disputed Measures tried to fix several years of regulatory malfeasance (¶¶ 318-319).

3.1.2.5. The Disputed Measures violated the constant protection and security obligation

According to the Claimants, a change in the legal framework that makes it impossible for an investor to preserve and continue its rights associated to the investment, constitutes a breach of the legal security obligation. The Disputed Measures caused Claimants to lose their rights to the FIT (¶ 320).

3.1.2.6. The Disputed Measures were criticized and challenged

Claimants contended that the Disputed Measures were the object of strong domestic and international criticism, not only by PV industry associations and the banking sector, but also by Spain's own organs, including three of Spain's Autonomous Communities and the European Commission (¶ 358).

3.1.2.7. The Tribunal had a duty to decide consistently

Claimants submitted that over 30 ECT claims were filed against Spain as a result of its repeal of the Second Decree via the Disputed Measures, and five of seven tribunals "found that Spain had violated the investors' legitimate expectations and ordered damages". In the Claimants' view, the tribunal was obliged to ensure the "the harmonious development of international investment law" (¶ 361).

3.2. Respondent's position

Spain asserted that the Claimants failed to show a breach of Article 10(1) of the ECT, for the following reasons:

3.2.1. The Claimants could not legitimately expect the stabilisation of the Second Decree

Respondent argued that for a breach of the FET standard in Article 10(1) of the ECT it is necessary to impair a conduct that is "arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process". Therefore, a simple perception of unfairness by means of many governmental actions, do not rise to a breach on international law (¶¶ 364-365).

Respondent asserted that it was entitled to amend its laws and that Claimants should have demonstrated that the Second Decree constituted an exception to the rule (¶¶ 366-367).

3.2.1.2 Spain's regulatory framework in the electricity sector

According to the Respondent, the Spanish electricity system forms an "economic, technical and legal system", governed by different principles, including inter-depency, general economic interest, access in equality and quality, financial self-sufficiency, with hierarchically structured laws and regulations. The subsidies granted to RE producers under the Special Regime represented a cost to the system that had to be balanced against the goal of ensuring the overall sustainability of the system. Consequently, the FIT could not be petrified for life if the subsidies and incentives threatened its sustainability (¶¶ 368-370).

Respondent asserted that the growth of the PV sector was unprecedented and surpassed the predictions made when determining the remuneration regime under the Second Decree. Additionally, the situation exacerbated by the global financial crisis that placed Spain's economy in recession. Spain attempted to account for the higher costs by increasing the consumer electricity price and amortising the tariff deficit. Unfortunately, the revenues did not cover the growth of the costs and resulted in a tariff deficit that posed a threat to the sustainability of the system. These factors combined obliged Spain to make changes to the legal framework (¶¶ 371-372).

3.2.1.3 The principle of reasonable profitability

According to Respondent, Claimants could only aspire to "reasonable profitability". Article 30.4 of the 1997 Electricity Law recognized that the premiums established through RDs were to ensure that operators' remuneration would not fall below a threshold for the investors to achieve reasonable profitability. In Spain's view, the Second Decree did not guarantee the immutability of the incentive scheme. Instead, it supplemented a scheme meant to provide reasonable profitability (¶¶ 374-378).

Respondent asserted that reasonable profitability is a dynamic concept, as what is reasonable today may not be so in 30 years under different economic circumstances. The principle of normative hierarchy allowed regulatory changes. In addition, Respondent argued that there is no provision in the entire Spanish energy legal framework that guaranteed an unlimited and perpetual remuneration. The reasonable profitability at the time the Claimants invested in Spain was around 7%. The Disputed Measures provided a return of 7.398%. In other words, the New Regime provided a higher return than the one established by the Second Decree, which was in the Respondent's view proportionate, legitimate and reasonable (¶¶ 380-387).

3.2.1.4 The Second Decree's Regime was not immutable

According to Respondent, an immutable FIT applicable on a permanent and unlimited basis would have been contrary not only to Spanish and EU law, but also to common business sense. In addition, Respondent denied that Article 40.3 of the First Decree constituted a stabilization commitment aimed at creating long-term stability to attract investment. Therefore, Claimants were unable to rely on Article 44.3 of the Second Decree (which was almost identical to Article 40.3 of the first one) to claim that they had legitimate expectations that the incentives regime would remain unchanged. Various challenges were brought against the Second Decree and decided by the Supreme Court, which confirmed (i) that the government was entitled to change the regulatory framework; (ii) that the expectation of receiving a FIT on a perpetual basis was not legitimate; (iii) that the modifications made were compatible with the principle of legal certainty; (iv) that the incentives scheme had to be considered in conjunction with the rest of the elements of the principle of reasonable profitability; and, (v) that such scheme could be adapted to the circumstances from time to time (¶¶ 388-395).

3.2.1.5 Judgements of the Spanish Supreme Court confirmed Spain's position

Respondent argued that the Supreme Court clearly did not regard Article 40.3 as a provision preventing subsequent modifications to the incentives offered in the First Decree. A group of decisions that were handed down between 2012-2014 rejected challenges brought against the changes effected through the 2010 measures and reflected a consistent view that those changes were lawful. Respondent asserted that the Supreme Court decisions are deemed part of the Spanish legal system (¶¶ 399-403).

3.2.1.6 In any event, Spain did not give a stabilization commitment under international law

According to Spain, under international law, any legitimate expectation of stabilization may only arise if a State gives a direct and specific commitment or representation to an investor (such as in a stabilization clause), on which the latter relies to make its investment. To identify a stabilization commitment, the investor must identify (i) the act of the State being precluded (i.e. change of the law); (ii) the specific investor towards which such commitment is being made; and (iii) the period of preclusion". Spain asserted that Article 44.3 of the Second Decree did not meet the test (¶¶ 405-406).

3.2.1.7 Flaws in the Claimants' due diligence

Respondent asserted that the Claimants' expectations as to the immutability of the Second Decree regime could only have been generated by an erroneous interpretation of the regulatory framework. In its view, the Claimants failed to conduct a due diligence regarding the regulatory framework prior to making their investments. Respondent further contended that Claimants' due diligence was limited, focused on the registration requirements, in rare occasions considered Article 44.3, which was merely recited, and that there is no evidence that the lenders shared the Claimants' expectations (¶¶ 407-410).

3.2.1.8 The Claimants' misplaced reliance on advertising materials and project finance

Respondent asserted that it is untenable that sophisticated investors form their expectations based on advertisement materials instead of the Spanish Supreme Court case law and the opinions issued by the Council of State and the General State Attorneys. Respondent also denied that the acts of various entities that issued materials are attributable to Spain. Those entities were not considered State organs under Article 4 of the ILC Articles and their acts could not be attributed to the State under Articles 5 and 8 of the ILC Articles (¶¶ 411, 416-417).

3.2.1.9 The Disputed Measures meet objective legitimate expectations

According to Respondent, the essential features of the regulatory framework of the Claimants' investment were not dismantled. As a general matter, Respondent asserted that the 2013 Measures absorbed the 2010 Measures. Consequently, the effect of the 2010 Measures on the Claimants' return could not be analysed, as they were never applied. In addition, the 2013 Measures extended the limit for the subsidized remuneration from 25 to 30 years and did not establish caps of hours. In conclusion, Spain argued that the Disputed Measures provided a reasonable profitability as established by the Second Decree and that the Claimants continued to receive a subsidy or premium that they undermined by referring to it as a "Special Payment" (¶¶ 419, 431).

3.2.1.10 The Disputed Measures were not retroactive

The Respondent asserted that under Spanish law the application of a new regulation to pre-existing situations is allowed, as confirmed by the Supreme Court and the Constitutional Court. Spain contended that strict retroactivity is forbidden, but this would not be the case since the Disputed Measures did not claw back the remuneration received under the Second Decree (¶¶ 442 - 443).

3.2.1.11 The Disputed Measures did not constitute a breach of the ECT

In the Respondent's perspective, Spain complied with the obligation to create stable conditions for investment. In addition, Respondent asserted that such obligation is not a separate obligation under the treaty and is embedded within FET (¶ 444).

According to Respondent, the standard contained in Article 10(1) of the ECT does not constitute a stabilization clause. A proper interpretation of this standard implies that the State must exercise its regulatory flexibility fairly, consistently, and predictably, taking into account the circumstances of the investment. Spain asserted that (i) the changes to the legal regime were neither constant, nor frequent, nor contradictory; (ii) the Disputed Measures were not perceived as unstable by investors; and, (iii) respected the principle of reasonable profitability and maintained the essential features of the prior regulatory framework (¶¶ 445 - 448).

Respondent asserted that the Disputed Measures were transparent. Spain allegedly provided information and engaged in extensive dialogue with the investors prior to making any changes with the exception of the royal decree law, that did not require a consultation process due to its urgency. They followed the mandatory process of approval and during the consultation process 619 submissions from different actors were filed (¶¶ 449 - 453).

Respondent also argued that the Disputed Measures were justified and suitable, for many reasons, including the need to (i) correct the over-remuneration of PV plants under the previous regime, (ii) to remedy the tariff deficit, (iii) to protect consumers and (iv) to comply with EU state aid rules. In addition, Spain contends that the Tribunal should have adopted a deferential approach and "not act as a court of appeal", since Spain selected appropriate measures from a range of reasonably available alternatives (¶¶ 455 – 467)

According to Respondent, the Disputed Measures were reasonable and did not impair the Claimants' investment given the fact that there is no evidence of loss. The new regime continued to provide reasonable profitability and sufficient visibility as to return and the introduction of transitory hour caps formed an implicit basis for the tariff established in the Second Decree. The Respondent denied that the measures taken were a mechanism for retaining the risk incurred by private investors, while denying them associated rewards when investors confronted lower risks that the rest of RE generation technologies with very generous rates of return. Additionally, Respondent contended that the increase in PV installations was unprecedented and nobody could foresee the global event (¶¶ 468 – 472).

Respondent asserted that there was no violation of the full protection and security standard since (i) no physical harm was caused to the Claimants or their investments; (ii) the measures do not involve third party or police measures; and (iii) they were only an expression of the State's right to regulate, which was reasonably exercised (¶¶ 473 – 476).

4. The Alternative claim

4.1. The Claimants' position

In case the primary claim was not successful and the Tribunal were to uphold the Respondent's argument that PV Investors were only entitled to receive reasonable rate of return within the terms of Article 30.4 of the 1997 Electricity Law, Claimants' submitted that Spain had to face international liability under the ECT because the reasonable return under the New Regime was lower than the reasonable return under the Original Regime. The reasonable return was 7% after-tax while the new regime's return was 7.398% pre-tax (5.9 % after-tax). Claimants argued that they were entitled to full reparation due to the damages suffered for an international wrongful act in an amount that could wipe out the consequences of the unlawful measures. In addition, they requested the Tribunal to ensure consistency with the established jurisprudence while quantifying damages and use the Primary Claim as a "benchmark" for assessing damages (¶¶ 481 – 486).

4.2. The Respondent's position

Respondent asserted that there was no merit in the Claimants' argument that under the Alternative Claim their damages would still be substantial. In Spain's position, the correct applicable tax rate to a 7.398% return would be 6.92% after taxes, which matched the 7% return established in the legal framework applicable at the time they invested. In addition, Respondent alleged that the Primary Claim could not be used as a benchmark for quantifying the alternative claim, as it did not represent the Claimants' legitimate expectations and, therefore, any potential measure of damages. For Respondent, in the "But For" scenario, the target rate of return should have been 7% (¶¶ 508 – 510).

5. Tribunal's analysis

The Tribunal noted that this was one of the numerous investment treaty cases filed against the Kingdom of Spain alleging that the Disputed Measures violated the ECT. Although the Tribunal found it helpful to consider all of the tribunals' findings, especially on those issues of law, which appeared similar across all Spanish renewable energy arbitrations, it reached its own conclusion. Furthermore, the Tribunal noted that the Tribunals in *Eiser*, *Masdar*, and *Novenergia* upheld the claims that in substance were broadly similar to the Primary Claim in this case. However, the Tribunals in *Charanne*, *Isolux*, and *Stadtwerke* resolved to dismiss all of the claims. In conclusion, there was no unanimous criteria (¶¶ 551– 552).

5.1. The Primary Claim

As established in *Electrabel*, the Tribunal considered that FET encompasses the protection of legitimate or reasonable expectations, the protection against arbitrary, unreasonable, and disproportionate conduct, and the principle of transparency. According to the first sentence of Article 10(1) of the ECT, the Tribunal observed that ECT places a greater emphasis on "stable" conditions than other treaties and considered this to be part of the FET within well-defined limits, including "State sovereignty" (¶¶ 564 – 571).

In cases dealing with alleged expectations arising from a regulatory framework, the Tribunals (i) have identified the existence of specific commitments given by the State to an investor; (ii) have underscored that a change in regulatory framework affecting investors must be "reasonable" in order to be compliant with FET; and, (iii) have balanced an investor's legitimate expectations with the State's right to regulate in the public interest. In the Tribunal's view, the limits of the State's power are drawn by the principles of reasonableness and proportionality, which must guide a tribunal's assessment of the allegedly harmful changes in the legislation (¶¶577, 583)

The Tribunal analysed a number of rulings issued by the Supreme Court and observed that at the time when the Claimants made their investments, the Spanish Supreme Court had rejected challenges to the various modifications of the regulatory incentive mechanisms and denied that investors had a vested right to specific subsidies. The Court's reasons addressed the State's power to modify regulatory incentives. The Tribunal agreed with the findings in *Charanne* and considered that it was not reasonable for the Claimants to have expected that no regulatory changes to the Second Decree would have ever occurred. Therefore, the regulatory framework, including the Second Decree, did not provide for a stabilization guarantee. The Tribunal also found that none of the representations invoked by the Claimants constituted promises not to change the incentives provided in the Second Decree (¶¶608 - 614)

Regarding the reasonable profitability requirement, the Tribunal established that reasonable investors could have not expected an immutable tariff for the operational lifetime of their plants but they could have legitimately expected to receive a reasonable return on their investments. Such requirement restricted the State's power to amend the framework and thereby guaranteed stable conditions for the investors. The Tribunal also noted that in all relevant legislative and regulatory instruments, the principle of reasonable return or profitability is always intertwined with other factors, including the State's concern about the cost of electricity and the competitiveness with other means of production of energy. On this basis, the Tribunal dismissed the alleged expectations of obtaining a fixed tariff under the Second Decree (¶¶616 - 620)

For the Tribunal, to establish liability due to regulatory changes it is not sufficient to demonstrate that the investor was in a "worse position" than before. The Respondent, for its part, offered sufficient justifications - including the economic crisis, unemployment, and reduction in the demand of electricity - for the enactment of the Disputed Measures. In sum, the Tribunal concluded that the elimination of the Second Decree and related benefits were not unreasonable, disproportionate, arbitrary, or otherwise not "fair and equitable". Accepting a violation of the Treaty on such grounds would be tantamount to endorsing the immutability of the legal framework, contradicting the previous finding. It also declined to accept that Respondent violated its obligation of being transparent as the record did not show that the Claimants were "left in the dark" in the amendment process (¶¶623 – 632)

5.2. The Alternative Claim

The Tribunal analysed whether Spain violated the ECT by not providing the Claimants with the "reasonable rate of return" as promised under the regulatory framework in place when the Claimants made their investments. For this finding, the Tribunal considered the economic impact of the Disputed Measures on the Claimant's investment in connection with the reasonableness, non-arbitrariness, proportionality, etc., of the Respondent's alteration of the regulatory framework to assess if the guarantee of a reasonable return was infringed (¶¶641, 647 – 648).

The Tribunal requested the parties and their experts to quantify the harm allegedly suffered by the Claimants in connection with their returns under the New Regime and asked them to assume that the investor had legitimate expectations to achieve reasonable profitability under Article 30.4 of the 1997 Electricity Law among other alternative variables ("Scenario without Measures"). The Tribunal noted that the Claimants formulated the relief sought not by reference to the Primary/Alternative Claim, but more generally for compensation as a result of Spain's alleged breaches and concluded that they did no longer request full restitution by reinstating the legal framework. In any event, the Tribunal would have declined such request (¶¶ 649 -650, 665).

Based on the Claimants' experts (Brattle), the Tribunal considered that the "reasonable rate of return" that the Claimants could have expected at the time of their investments was in the range of 7% post-tax return, which was a value aligned to those granted by other European Union Member States. Finally, based in six different parameters, the Tribunal concluded that by reducing the reasonable rate of return below 7%, Spain acted unreasonably and disproportionately, in violation of the FET. Therefore, the Tribunal concluded that the Claimant entities whose IRR with the Disputed Measures were lower than 7% were entitled to compensation (¶ 847)

6. Costs

The Tribunal considered that the most appropriate cost allocation in relation to the outcome of the proceedings is for the Claimants, on the one hand, and the Respondent, on the other, to bear the costs of the proceedings in equal shares and for each side to bear the legal fees and other expenses which it incurred (¶ 902).

7. Concurring and Dissenting Opinion of The Honorable Charles N. Brower

Charles Brower concurred with his colleagues in finding that Respondent breached the ECT but he believed that there was no reason whatsoever to deprive the Claimants of their Primary Claim, when the Alternative Claim was accepted based on an expected reasonable rate of return. Furthermore, he pointed out that eleven awards were rendered against Spain on the same matter and that there were no justifiable reasons to depart from the findings of those tribunals (¶¶ 1- 2).

In his view, no Tribunal should accept an Alternative Claim over a Primary Claim without justifiable reasons to dismiss the latter. He believes that this was the only Tribunal that considered the reasonable rate of return as a key element of the regime established by the Second Decree or that it served as the limit of ECT-compliant regulatory changes. He also noted that that there are eighteen known awards involving the same treaty, the same Respondent State and the same measures as the ones at issue in this case, and fifteen found for the Claimant as summarized in his opinion (¶¶ 3- 4).

He included in the opinion the Latin expression “Errare humanum est, perseverare autem diabolicum” and according to him, Claimant would have received approximately $632 million in damages instead of $91.1 (¶¶ 13, 17).