School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
*Academic Directors: Ignacio Torterola, Loukas Mistelis**

Award Name and Date: Naturgy Energy Group, S.A. And Naturgy Electricidad Colombia S.L. v The Republic of Colombia (ICSID Case No. UNCT/18/1) – Award – 12 March 2021

Case Report by: Ana María Sánchez Silva**, Editor Diego Luis Alonso Massa***

Summary: Claimants brought an action for relief against Colombia ('Respondent' or 'Colombia') pursuant to the Spain - Colombia BIT ('BIT' or 'Treaty') alleging Colombia had breached, *inter alia,* fair and equitable treatment, full protection and security, most-favoured nation and expropriation standards under the BIT in relation to its investment in an operating electricity distribution and marketing company ('Company') located in the Colombian Caribbean Coast. The dispute between the parties arises, in particular, with regards to Colombia's decision to place the Company, Electricaribe S.A. E.S.P., into administrative receivership in November 206 and its subsequent decision to liquidate the Company. Finally, the Tribunal dismissed Claimants' claims, and also determined that it lacked jurisdiction over Respondent's counterclaims, and that each party shall bear their own cost of legal representation and assistance.

Main Issues: scope of Colombia's obligations under the BIT between Spain and Colombia, specifically as regards the regulation of the electricity sector in Colombia's territory.

Tribunal: Mr Stephen L. Drymer (President), Mr Alexis Mourre (Arbitrator), and Mr Eric A. Schwartz (Arbitrator)

Claimant's Counsel: Mr Manuel García Cobaleda (Naturgy Energy Group S.A., Madrid), and Dr Gaëtan Verhoosel, Ms Carmen Martinez Lopez, Mr Richard Trinick, Ms Vanessa Moracchini, Mr César Coronel Ortega, Mr Juan Pablo Labbe Arocca (Three Crowns LLP, London), Mr Agustín G. Sanz, Ms Laura França Pereira (Three Crowns LLP, Washington, D.C.)

Respondent's Counsel: Mr Camilo Gómez Alzate, Director General, Ms Ana María Ordóñez, Directora Defensa Jurídica Internacional, Agencia Nacional de Defensa Jurídica del Estado, Dirección de Defensa Jurídica Internacional, and Ms Jennifer Haworth McCandless, Ms Marinn Carlson, Mr Patrick Childress, Ms María Carolina Durán (Sidley Austin LLP, Washington, D.C.) and Mr Stanimir Alexandrov (Stanimir A. Alexandrov PLLC, Washington D.C.).

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organisation located in London. She holds a B.A. degree in Law from the Pontificia Universidad Javeriana, Colombia, and is a Specialist in International Business Law from the Universidad de Los Andes, Colombia. IACL´s case reports do not offer personal views but strictly reflect the content of the decision. However, in case of doubts, the views set forth herein are the personal views of the author and do not reflect those of ACICA or the IBA. Ms Sanchez can be contacted at am.sanchezsilva@gmail.com

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Digest:

1. Relevant Facts

Claimants – formerly known as Gas Natural SDG, S.A. ('Gas Natural SDG') and as Gas Natural Fenosa Electricidad Colombia S.L. ('GNF Electricidad', together with Gas Natural SDG referred to as 'Gas Natural'); and now known as Naturgy Energy Group, S.A. and Naturgy Electricidad Colombia S.L. (together with Naturgy Energy as 'Naturgy' or 'Claimants') are companies incorporated under the laws of the Kingdom of Spain.[1] (¶ 6) Respondent is Colombia ('Colombia' or 'Respondent').

The underlying dispute arose out of GNF Electricidad's ownership and management of 85.3% of Electricaribe's capital, an electricity distribution and marketing company operating in Colombia's Caribbean Coast. (¶ 1; ¶ 7). Gas Natural SDG indirectly owns 100% of the shares of GNF Electricidad. (¶ 7). Gas Natural acquired Electricaribe from Unión Fenosa Internacional, S.A., in 2009, as part of the acquisition of the global operations of Unión Fenosa by Gas Natural. (¶ 14) At the time of such acquisition, Electricaribe was the main electricity distributor and retailer for the Caribbean region. (¶ 15)

In May 2016, due to the financial difficulties Electricaribe was facing, the Superintendence of Domiciliary Public Utilities ('SSPD') imposed a mandatory management plan which required Electricaribe to comply with standards in relation to six main points: investments, network maintenance, losses, quality indicators, collections, and customer service. (¶ 44) By late summer 2016, Electricaribe continued with financial difficulties. As a result, XM, the operator of the wholesale market, had initiated a regulatory procedure (*procedimientos de limitación de suministro*) against Electricaribe that may result in curtailment of energy supply. (¶ 45)

By letter dated 3 November 2016, Electricaribe wrote to the Ministry of Mines and Energy, Minister González, explaining the difficult financial situation it has been facing, and indicating that it was not going to be able to secure bank guarantees or cash flow to make cash deposits on outstanding obligations. (¶ 46)

A week later, SSPD placed Electricaribe into administrative receivership. (¶ 46) By resolution dated 14 November 2016, 'SSPD' ordered that Electricaribe's property, assets and business be placed in administrative receiverships, under the following arguments: (i) Precarious financial situation, and (ii) difficulties in meeting its commercial obligations and obtaining funding. At least two of the grounds for intervention were met under Colombia law (Law 142 of 1994),

[1] The Claimants' change of name, which occurred in 2018, was notified to the Tribunal in their Reply dated 3 April 2019. This is the reason why both, Naturgy and Gas Natural appeared in the Award.

namely (i) inability to meet commercial obligations, (ii) inability to provide the public utility service with the continuity and quality required by the law. (¶ 43)

By resolution dated 14 March 2017, after receiving two recommendations on Electricaribe's situation, the SSPD ordered to wind up Electricaribe. (¶ 48; ¶ 49)
Both Claimants and Respondent, recognize that Electricaribe had financial difficulties in November 2016. However, are the causes under-grounding this situation the parties' do not agree on. Generally, Claimants contend that the regulatory environment was not sufficient to ensure that the provision of electricity in the Caribbean Region was financially viable, thus it was inadequate to perform the provision of the services Electricaribe was committed to. Respondent disagrees and suggests that Electricaribe's financial burden was the result of Gas Natural' poor management. (¶ 88)

Claimants brought an action for relief against Colombia pursuant to the Spain-Colombia BIT alleging Colombia had breached, *inter alia,* fair and equitable treatment ('FET') (Article 2(3)), full protection and security treatment ('FPS') (Article 2(3), most-favoured nation treatment ('MFN') (Article 3), and expropriation provisions (Article 4) under the aforementioned BIT (¶ 18; ¶ 216).

2. Procedural History

On 21 March 2017 (under article 10(3) of the BIT), the Claimants submitted a "Notice of Arbitration" to the Respondent pursuant to article 3(1) of the 1976 UNCITRAL rules. (¶ 51)

On 13 February 2018, the parties agreed, *inter alia*, that (i) the place of arbitration would be London, England, (ii) the languages of the arbitration would be Spanish and English, (iii) the ICSID would administer the proceedings, (iv) the tribunal may appoint an assistant, in addition to the one that is provided by the ICSID. (¶ 56)

On 19 February 2018, the Tribunal informed the Secretary-General of ICSID that the Parties had agreed on ICSID to administer the case. (¶ 57) Subsequently, the Secretary-General informed the Parties that the ICSID accepted the Parties' appointment to administer the case, on 22 February 2018. (¶ 58)

The hearing on jurisdiction and the merits was held by the Tribunal in Washington D.C., on 5-13 December 2019. (¶ 73). On 8 December 2020, the Award was being finalised for signature, but Claimants requested that ICSID change the original caption (Naturgy Energy and Naturgy Electricidad) of the arbitration to reflect their current names (Gas Natural SDG and GNF Electricidad).

3. Positions of the Parties – Debates on factual and regulatory matters

3.1 Claimants' Position

3.1.1 The Regulatory Environment

Claimants called in expertise in regulatory experts in the energy sectors, in particular, with regards to Colombia's energy industry. The experts supported the existence of distinct socioeconomics factors that, in accordance with Claimants' arguments, affected the proper performance of Electricaribe's services provision.

(a) Market Specificities in Electricaribe' Service Region

Claimants' experts mention that: (i) 26% of the Caribbean population was below the poverty line. Such poverty levels raised during Gas Natural's management. (¶ 91), (ii) Moreover, 51% of Electricaribe's users belong to the lowest stratum compared to other operators (¶ 92), and (iii) most of the Electricaribe's customers reside in substandard neighbourhoods. (¶ 93). Thus, conditions in Costa Caribe not only are unique and cannot be compared with other electricity companies (¶ 98) but also indicate Electricaribe is highly dependent on government subsidies. (¶ 97). In addition, there are other various factors that impede the recovery of invoices in Colombia (¶ 100), a culture of non-payment for electricity services (¶ 99), the threat of violence in the absence of law enforcement, and the work of outlaws -called mareñeros- who quickly reconnect delinquent users after their service has been cut off. (¶ 100)

(b) The tariff

Claimants argue that the reimbursement of losses, distribution and retail activities through the tariff were not sufficient to cover Electricaribe's costs (¶ 106). In addition, Colombia failed to update the tariff within the time limits prescribed by Colombian law. According to the Claimants' statements, article 126 of Law 142 requires that the distribution remuneration methodology be reviewed every 5 years and updated if necessary. (¶ 114)

3.1.2 Electricaribe´s level of Investment and Quality of Service

Claimants assert that they did receive no dividends for the entire period they managed the Company, whilst, at the same time, have financed investments through debt. (¶ 121) Especially, their ability to invest, Claimants mentioned, was constrained by cash stress and a difficulty raising debt. (¶ 123) Furthermore, Claimants refute Respondent's allegation of poor customer services and customer relations. They pointed out their efforts to reduce non-payment culture and fraud. (¶ 122) In any event, Gas Natural did everything they could to ensure the level required to maintain an adequate quality of service. (¶ 121)

3.1.3 Electricaribe's Exposure to the Spot Market

Claimants deny that Electricaribe was over-exposed to the spot energy market. They allege that, in fact, their exposure was consistent with that of the other retailer-distributors positions. (¶ 132) Electricaribe's exposure was due to forces outside its control. However, under SSPD's intervention, the Company exposure to the spot energy market increased. (¶ 133)

3.1.4 Alleged Commitments to Improve the Regulatory Environment

Claimants allege that Colombia's purported commitment to implement agreed measures, including regulatory reform, which were expected to improve Electricaribe's financial position. (¶ 134). Claimants also argue that, in December 2014, Colombia made firm commitments to implement certain defined measures that had been discussed between the Company and the government. There are three events that are relevant in this point: (i) 2014 Action Plan, (ii) Plan 5 Caribe, and (iii) Barranquilla summit. (¶ 137)

3.1.5 The circumstances surrounding the Decision to Place Electricaribe into Administrative Receivership.

Claimants also debate certain factual and regulatory issues surrounding Colombia's decision to place Electricaribe in administrative receivership, namely, (a) company's financial situation in the period leading up to intervention, (b) Claimants' allegations relating to "political suitability", (c) Colombia's decision to liquidate the Company, (d) Electricaribe's conduct after the intervention. (¶ 157), and harassment (¶ 190).

3.2. Respondent's position

3.2.1 The Regulatory Environment

(a) Market Specificities in Electricaribe' Service Region

Respondent argues that Claimants failed to establish a causal link between poverty level and operational risks such as non-payment and high structural losses. In any case, electricity fraud and non-payment have existed in the Caribbean Region since long before Claimants took control of Electricaribe, *i.e.*, during Union Fenosa's tenure. (¶ 102) The causes that led Electricaribe to financial difficulties go beyond the particular socioeconomic conditions that the Claimants have pointed (¶ 103) and that was proved through experts reports. In addition, Respondent argues that poverty rates declined substantially between 2010 and 2017. (¶ 104), that is, during Gas Natural's management and its subsequent intervention. Finally, Respondent asserts that if the demand increased, the benefit should have raised too due to the price-cap methodology used to calculate the tariff. (¶ 105)

(b) The tariff

To begin with, Respondent asserts that the tariff includes a portfolio risk factor which compensates retailers like Electricaribe for some, but not all, of the default payment risk. (¶ 116). Moreover, Respondent's expert report mentioned that the 2008 distribution methodology is consistent with the best practices, while it creates incentives for companies to reduce structural losses. (¶ 117). In this same vein, Respondent argues that (i) provisions of article 126 of Law 142 establishes a possibility and not a compulsory or mandatory revision of the tariff, much less to update the tariff in a manner favorable to Electricaribe, (ii) to reconsider the tariff, the government must follow other principles and not only the financial sufficiency referred to by the Claimants, and (iii) therefore, the tariff is not intended to cover all of retail-distribution company's losses (¶ 118). Lastly, Colombia asserts that it did not raise any legitimate expectation to update the tariff every five years. (¶ 119)

3.2.2 Electricaribe´s level of Investment and Quality of Service

Rather, Respondent expresses that Claimants failed to adequately invest in the Company during their management (2009-2016), and that this underinvestment contributed greatly to the Company's decline. (¶ 126) The financial difficulties began to appear in 2014. (¶ 126) Respondent pointed to several services provision indicators on which Electricaribe's performance fell short. These include a higher incidence of service interruption and structural losses, as well as lower collection rates. (¶ 128)

3.2.3 Electricaribe's Exposure to the Spot Market

Respondent mentioned that if Electricaribe had secured a greater number of long-term electricity purchase agreements with generators, they would have been less exposed to drastic price increases by the El Niño event that affected Colombia between 2014 and 2016. This is, according to Respondent, the factor that ultimately led to receivership (*e.g.*, a case of an electricity purchase contract that terminated in August 2015, and which Electricaribe did not manage to replace). (¶ 130)

3.2.4 Alleged Commitments to Improve the Regulatory Environment

Respondent denies that it made any type of binding commitment (¶ 145 - ¶ 156)

3.2.5 The circumstances surrounding the Decision to Place Electricaribe in Administrative Receivership.

Respondent also disagrees on certain factual and regulatory issues surrounding its decision to place Electricaribe in administrative receivership (¶ 157). Respondent intervened in Electricaribe based on two of the grounds set out in article 59 of Law No. 142 of 1994, namely, (i) Company's ability to provide continuity and quality of service, and (ii) the Company's ability to pay its commercial obligations. (¶ 159) Therefore, the Respondent denies that its decision was politically motivated. (¶ 175) In addition, the Respondent denies that the performance of the Company has deteriorated, and asserts that its performance is simply a reflection of Gas Natural's mismanagement and underinvestment. (¶ 187)

In any event, Respondent, categorically, denies that one of the state's duties refers to correct the Company's situation during administrative receivership.

4. Positions of the Parties on the claims

4.1 Claimants' position

4.1.1 Jurisdiction

Claimants assert that the Tribunal has jurisdiction under the Parties' consent to arbitration (article 10 of the Treaty). Also, they say they are a "protected investor" under the BIT provisions. (¶ 196). The limitations period under the text of the Treaty (article 10(5)) can begin only in the event at the time when the investor knew or should have known of the infringement, the loss or damage sustained. In fact, Claimants alleged that no claims have been submitted before the 2014 Action Plan. Therefore, such claims are covered under the Treaty. In any event, the Tribunal should consider the Respondent infringement as a continuing breaching. (¶ 198).

4.1.2 Fair and Equitable Treatment standard

Claimants raise four factual grounds to support FET provision infringement: (i) failure to comply with commitments made through the 2014 Action Plan and Barranquilla Summit, (ii) failure to update the tariff in 2015, (iii) failure to pay debts owed to the Company, and (iv) infringements related to the administrative receivership decision. (¶ 220).

Claimants say that Colombia's actions violated their legitimate expectations and constituted arbitrary state conduct, in particular, due to the failure in filing the measures to which Colombia committed in the so-called 2014 Action Plan. (¶ 224)

Finally, Claimants argue that Colombia's decision regarding the administrative receivership was arbitrary for at least three reasons: (i) this measure was taken for reasons created by the state itself, (ii) was also taken for a reason unrelated to the state purpose, and (iii) it was disproportionate as well. (¶ 237)

To fulfil the disproportionate requirement, Claimants identify a four-pronged test: (i) identify the legitimacy of the measure's aim. Claimants assert that the receivership was taken for political reasons, (ii) suitability of the measure for the purported purpose. In the Claimants' view, the Company continue to deteriorate after the measure was taken, then it was not suitable (iii) it was the least restrictive measure. In fact, there were other measures available in order to ensure the continuity of Electricaribe's service provision, such as the ones identified in the so-called 2014 Action Plan, and (iv) proportionality *stricto sensu*, where Claimants contend that the harm they have suffered resulting from the intervention far outweighs the benefit if any. (¶ 240)

4.1.3 Expropriation

Claimants submit that Colombia's decision to place Electricaribe under administrative receivership and liquidate the Company constitutes an unlawful expropriation under the terms of the Treaty. (¶ 512)

Relying on the decision of *Metalclad v Mexico*, Claimants argue that the government's intervention in the Company, implied a deprivation of the basic rights as the shareholders (i.e.) their right to vote on the decisions and to manage the Company. (¶ 513) Such deprivation was not ephemeral, and Claimants dispute the contention that they suffered no deprivation because they retain the residual value of their share. In addition, the liquidation, Claimants say, will not provide adequate compensation for the deprivation they suffered. (¶ 514)

By citing *Crystallex v Venezuela*, Claimants mentioned that non-compliance with any of the four criteria as set out in Article 4 of the Treaty leads to the conclusion that the expropriation perpetrated by Colombia was unlawful in nature: (i) public purpose: Claimants assure the expropriation was carried out for political expedience motives, (ii) due process and adherence to principles of Colombian law: Colombian law stated that the government discretion to expropriate must follow proportionate standards and it did not. In addition, Colombia infringed due process rules by publicly announcing the intention to proceed with the administrative receivership before actually doing so, (iii) discriminatory: Colombia did not considered other measures on the grounds that it could led Gas Natural to continue with the ownership of the Company, and (iv) Prompt, Adequate and Effective Compensation: the compensation would fail to meet the requirement of promptness, as well as adequacy, since the value resulting for any auction will not be equal to the fair market value of their assets. (¶ 515)

Further, Claimants deny this expropriation as a result of the legitimate exercise of Colombia's police power (¶ 516).

4.1.4 Alleged failure to Provide Full Protection and Security

Claimants argue that the FPS provision of the Treaty refers to both physical and legal security, in accordance to *Biwater Gauff v Tanzania* case. (¶ 547) Legal security is related to the certainty in the legal system and its implementation. Its breach does not require any direct fault, but the mere lack or want of diligence. Colombia breached the FPS provision as it took insufficient measure to safeguard Electricaribe from losses caused by thefts, and events where the Company's employees suffered violence. (¶ 548).

4.1.5 Alleged Violation of the Most-Favoured National Treatment Standard

Claimants assert that Colombia breached the MFN standard through its failure to pay debts and subsidies, update the tariff, adequately address payment delinquency and fraud. These omissions disproportionally affected Electricaribe as compared to other electricity operators in Colombian territory. (¶ 576).

4.2 Respondent's positions

4.2.1 Jurisdiction

The Respondent raised two broad objections to the Tribunal's jurisdiction, namely, *ratione temporis* and *ratione materiae*. (¶ 200).

(a) *Ratione temporis.*

Limitations period (article 10(5) of the BIT).

Respondent divides the claims into two categories: (i) the so-called "historic claims", and (ii) "intervention claims". (¶ 201). The first category refers to those claims related to actions or omissions pre-dating the SSPD intervention, thus they run afoul of the 3-year limitations period set out at article 10(5) of the Treaty. The limitations cut-off must be set at 21 March 2014 -this means, three years prior to filing the Notice of Arbitration. In accordance to Respondent's view, Claimants bring claims outside the 3-year limitations period on the grounds of continuing breaching. Hence, Respondent invites the Tribunal to reject Claimants' contention that the historic claims are related to continuing breaches. (¶ 202 - ¶ 205).

(b) *Ratione materiae.*

Considering the distinction between the right to operate and the right of ownership that the Respondent has mentioned, the Tribunal could not rule on the intervention claims. (¶ 205).

4.2.2 Fair and Equitable Treatment standard

(a) Legitimate expectations.

First, Respondent asserts that FET standard only protects expectations that were held at the moment of the investment. Second, the expectation must be objectively reasonable. Then, the measures identified in the so-called 2014 Action Plan were taken after the investment the Claimants made in 2009. Moreover, Colombia never committed to solving the financial

situation of the Company, and its best effort to support Electricaribe cannot be seen as obligations and a generator of legitimate expectations. (¶ 242-243).

(b) Arbitrariness

Claimants did not prove the measure were improper or implied deliberate repudiation of the purpose and objectives of a state policy. (¶ 249).

Respondent also asserts that the decision to place Electricaribe into administrative receivership was taken in accordance with Colombian Law, and for legitimate purposes i.e., to safeguard the quality and continuity of electricity service in the Caribbean Coast -and no further purpose- as Claimants argue, related to political expediency or otherwise. Also, it denies any responsibility for the financial situation of Electricaribe that led the Company to administrative receivership. (¶ 253).

(c) Discrimination

Claimants' claim does not meet the three-pronged test notably because it cannot point to a suitable corporate comparator. Under this test, the Claimant must show (i) that they received different treatment from other operators, who were (ii) in similar circumstances, and (iii) the differential treatment was not justified. (¶ 254)

(d) Proportionality

The Respondent identified a four-pronged test to analyze the present requirement. The test demands from the Claimants to show: (i) that the motivation for the impugned measure was illegitimate, (ii) the measure was not appropriate or reasonably related to the purpose of the measure, (iii) the measure was not necessary, or (iv) the impact of the measure on claimants outweighed the benefit of the measure. (¶ 255).

The decision was legitimate since it was taken for the purpose of safeguarding the quality and continuity of service in the Caribbean region. Additionally, only under receivership, the financial obligations of the Company would be suspended. (¶ 256). The decision was taken 6 months after the management plan was initiated. (¶ 257). Colombia's decision purports to avoid widespread blackouts. (¶ 258). Claimants had proven themselves unfit, notably because of their unwillingness to provide significant amounts of additional capital, therefore removing them from the management was the unique option to safeguard the Company. (¶ 259). Claimants' prejudice is relatively limited, given that Colombia will provide Claimants with any proceeds that are received from the sale of the Company. Further, the Caribbean population will greatly benefit since it could allow Colombia to find a manager who can more ably invest in and manage the Company. (¶ 260).

4.2.3. Expropriation

Respondent mentioned, at first, that there was no expropriation because the decision constitutes a legitimate exercise of Colombia's police powers. Besides, Claimants continued with the ownership of the value of their investment. Yet, even if The tribunal were to conclude that there was an expropriation, Respondent asserts that its intervention decision in Electricaribe meets all the conditions for a lawful expropriation as set out in Article 4 of the Treaty. (¶ 517 - ¶ 521)

4.2.4. Alleged Failure to Provide Full Protection and Security

In contrast to Claimants' arguments, Respondent limited the FPS standard to physical security, as it has been commonly used in international tribunals. (¶ 549). On another point, the FPS standard is meant to protect the investment from third-parties interference, civil strife, and any other physical violence. (¶ 550).

4.2.5. Alleged Violation of the Most-Favoured National Treatment Standard

Respondent asserts, again, that Claimants must show that they received a different treatment in contrast with other operators (suitable comparator), in like circumstances, and without justification. However, Claimants have failed to provide such evidence. (¶ 576).

5. Tribunal's analysis

5.1. Jurisdiction

The Tribunal is not persuaded that it must decline jurisdiction to hear and decide any of Claimants' claims based on the objection raised by the Respondent. (¶ 206).

The reasons to reject Respondent's objections concerning jurisdiction *rationae temporis* on Claimants' historic claims, are: (i) first, it is undisputed that Claimants are investors under the terms of the Treaty (¶ 207), (ii) arbitration has been properly commenced in accordance with the applicable procedural rules (¶ 207), (iii) the cut-off date was agreed to be 21 March 2014, (iv) the Respondent did not raise an objection with regards to Claimants' claims based on the 2014 Action Plan. Therefore, the Tribunal accepts jurisdiction over them (¶ 208), and (v) an investor may validly initiate an Arbitration based on an alleged Treaty violation and damages of which it reasonably became aware only after the limitations period, even if it became aware of some of the circumstances of its claim prior to that same date.

The jurisdictional objection regarding the so-called intervention claims is also without merit. (¶ 214)

5.2. Fair and Equitable Treatment standard

The text of the Treaty does not prohibit the FET standards can be assessed from the perspective of several strands. (¶ 262)

(a) The circumstances of Claimants' investment in Electricaribe

The Tribunal's conclusions are that: (i) Gas Natural invested in the Colombia electricity sector as part of a larger transaction, (ii) the general regulatory framework of the sector was already established at the time Gas Natural invested in Electricaribe, (iii) Gas Natural acknowledged this framework due to its operations previous in the gas sector in Bogota, however, did not pursue other research regarding the Caribbean region and the operation of the electricity sector there, and (iv) Gas Natural appears to have performed limited, if any, due diligence before acquiring Electricaribe, in particular, of its operations. (¶ 267-280)

(b) Implementation of Measures Contained in the 2014 Action Plan and Barranquilla Summit

In the Tribunal's view, having reviewed all of the evidence submitted by the Parties, the record simply does not establish that Colombia made any binding commitments to implement the measure in question, not even and especially with Minister Gonzalez's letter. (¶ 299)

(1) Legitimate expectations

Any expectation formed by Claimants regarding the measures listed in the 2014 Action Plan and statements made at the Barranquilla Summit are not susceptible to protection under the Treaty. (¶ 319). In fact, the Tribunal doubts that any expectations arising from the 2014 Action Plan could be characterized as objectively reasonable. (¶ 320). The measures related to the so-called 2014 Action Plan and Barranquilla Summit clearly arose after the Claimants' initial investment. (¶ 321).

International jurisprudence typically extends protection to legitimate expectations only in the case that they were formed prior to the investor's initial investment and that the investors relied on them to make their investment. (¶ 322) The findings of the Crystallex case cannot be applied to the instant case as the circumstances are different since (i) Gas Natural's initial investment was made in 2008 (¶ 330), (ii) Claimants did not undertake due diligence prior to the investment (¶ 330), (iii) despite the email of Ms. Coronado dated March 2015, Claimants did not produce evidence to support that Gas Natural has incurred debts to cover Electricaribe's operational expenses. (¶ 331).

Furthermore, the *Ioannis Kardassopoulos* tribunal cannot be applicable to the instant case, since the regulatory framework was already in place at the time of the Claimants' initial investment. At the same time, Colombia did not repudiate its promises, if any at all. (¶ 335-337)

(2) Arbitrariness

The Tribunal is no longer satisfied that Colombia infringed its Treaty obligation under the FET standard in the sense that its conduct in relation to the 2014 Action Plan and Barranquilla Summit was arbitrary. (¶ 339)

In short, the Tribunal does not find that Colombia had committed to implementing any specific measures through the 2014 Action Plan or the Barranquilla Summit. Nevertheless, the state appears to have made efforts to address some of the measures, and those efforts appear reasonable. (¶ 365).

(c) Alleged failure to update of the Distribution Tariff Formula

Claimants also contend that Colombia violated its Treaty obligations by failing to update the distribution tariff formula in 2015. The Claimants mentioned that the regulatory framework is inadequate and that Colombia had an obligation to reform the regulatory framework. (¶ 366).

At first, Law 142 does not provide for a process whereby the regulatory framework itself would be periodically subject to review. It established the need to review the tariff, but not the regulation itself. (¶ 374). The CREG followed the process set in article 124 of Law 142 (¶ 382-

386), nonetheless, the delay of approximately 3 years was explained by the large number of comments made by the interested parties. (¶ 386).

(1) Purported obligation to Ensure that the Company can make Reasonable Return

Regarding legitimate expectations, the Tribunal did not find that Colombia violated any legitimate expectations held by Claimants relating to an update of the distribution tariff. (¶ 402). The same framework has been in force even prior to the investment and after it. Further, it is not accurate to interpret a requiring update of the regulatory framework. (¶ 404).

With respect to arbitrariness, the Tribunal does not find any evidence of arbitrary state conduct in relation to the CREG's view of the distribution tariff or a purported failure to update this tariff (¶ 406).

Cases such as *Clayton v Canada* and *Quiborax v Bolivia* were cited by Claimants to support the view that a breach of domestic law can constitute arbitrary conduct that infringes the state's international obligations. In fact, breach of domestic law can, but not necessarily or automatically violates international obligations. (¶ ¶ 408- 409).

In regards to the claim based on non-discrimination; the Tribunal found no infringement of Colombia's Treaty obligation under the FET standard in the sense that its conduct in relation to updating the distribution tariff was discriminatory. (¶ 411).

Claimants failed to provide evidence that ensures that CREG's conduct regarding the review process of the tariff aimed to affect only Electricaribe's financial situation. (¶ 418).

(d) Claims related to the non-payment of public entity and substandard neighbourhood debt and subsidies

There is no evidence that supports the fact that Colombia could act as the guarantor of its decentralized entities. (¶ 425). Claimants do not provide evidence that Act 859 of 2003 was considered at the time of the investment. (¶ 426).

"(…) The Tribunal finds no basis to conclude that non-payment of these debts constituted an arbitrary conduct in violation of Colombia's Treaty obligations." (¶ 427).

The State submitted evidence to establish that it has deployed efforts to investigate the means of addressing the public entity's debt prior to the intervention (¶ 428). "Similar observations can be made about Claimants' claim regarding the substandard neighbourhoods' debt." (¶ 429).

There were no commitments from Colombia prior to the investment by Gas Natural relating to the payment of substandard neighbourhoods' debts. (¶ 433). The tribunal does not find that the absence of reparation by the State to compensate for the alleged costs to the Company created by these Constitutional Court decisions violated any legitimate expectations. (¶ 434).

The Tribunal recalls that the government offers to capitalize those debts. (¶ 435).

With respect to the claims relating to the Payment of Subsidies, "(…) the Tribunal finds no basis to conclude that Colombia acted in violation of any treaty obligations regarding the payment of subsidies." (¶ 437).

There are no grounds to prove that the payments of subsidies by the Respondent were paid below any expectation held by Claimants at the time it invested in Colombia. (¶ 439).

(e) Claims related to the Decision to Place Electricaribe in Administrative Receivership for the Purpose of Liquidation

Claimants cited the *Saluka* case on the ground of the non-impairment principle, but they do not point the tribunal to an equivalent "non-impairment" principle in the Treaty applicable to the instant case. (¶ 442).

In any event, if the Tribunal finds that the receivership was a measure taken against the investors on grounds created by the state itself, the Parties must read it in light of the Tribunal's conclusion regarding the other strands of the FET standard. (¶ 444).

In the opinion of the tribunal, whether assessed from the perspective of arbitrariness or proportionality, the claim fails because the Claimants have not established that "political convenience" was the underlying reason behind Colombia's decision to put the Company into receivership. (¶ 448).

With regards to the claims based on proportionality, the Tribunal finds they have failed to be shown after conducting the test proposed by the Claimants and based, inter alia, on the *Occidental v Ecuador* case (¶ 449):

(1) Legitimacy of the state's aim.

Claimant falls short of establishing that political consideration, if any, had a "decisive effect" on the decision to place Electrical into receivership. (¶ 463-464)

(2) Suitability of the measure.

The intervention was the only means at the SSPD's disposal to suspend payment of Electricaribe's commercial obligations and to lift the supply restraint procedures. (¶ 476). In addition, SSPD received the authorization of the CREG to proceed with the intervention. (¶ 478). On this basis, the intervention appears to the Tribunal to be proportionate to the situation in which the Company found itself. In light of the foregoing, the Tribunal concludes the measure was suitable. (¶ 481).

(3) Necessity

Despite the Claimants reference to the *Occidental* case, in the present circumstances, the Tribunal finds no grounds to support a determination that the SSPD's decision to place Electricaribe in receivership was disproportionate due to the fact there were other measures that could have been taken to ensure the Company's continuity in the provision of the service (¶ 489). Lastly, the Tribunal mentioned that the *ex turpi causa non orator action* principle is not appropriate in the current circumstances (defence of necessity), mainly, because the Respondent did not refer to it. (¶ 490).

(4) Proportionality *Strict Sensu*

This strand states whether the effects of the measures were disproportionate or excessive in relation to the interest involved. (¶ 490). The balance proposed involved, on the one hand, the justification of greater weight to a potential pecuniary loss and, on the other hand, potential deterioration of an essential service for the entire region of a country that is home to approximately 10 million people. (¶ 494).

As a consequence of the mentioned above, if there is no arbitrariness and disproportion in the administrative receivership measure taken against Electricaribe, the decision to liquidate the Company was not *a fortiori* arbitrary and disproportionate. In that sense, the claim must fail. (¶ 496-497).

However, there are other reasons that can be considered to not label the SSPD decision to liquidate Electricaribe as arbitrary and disproportionate (¶ 498 - 503).

The Tribunal concludes the SSPD's determination appears to have been made in accordance with the applicable legal procedure. (¶ 504).

5.3. Alleged Unlawful Expropriation

Expropriation is allowed only if the four requirements provided in the text of the Treaty are met (¶ 522). It is accepted under international law that states are not liable to pay compensation to investors for injury caused by bona fide regulatory acts. (¶ 523). Then, considering that the Respondent has exercised its intervention authority according to Colombian law (article 59.1. and 59.7 of Law 142), due to Electricaribe's inability to meet its commercial and financial obligations (¶ 529), and with a view to preventing a systemic risk in the energy wholesale market; its decision cannot be considered as expropriation under the Treaty (¶ 531). Therefore, the SSPD's intervention constituted a valid, *bona fide* exercise of its regulatory authority (¶ 532). Hence, the measure is not compensable under article 4 of the Treaty. (¶ 535)

Moreover, regarding the liquidation process, the Claimants have not provided evidence of irregularity in the auction. (¶ 539) Since none of the parties submitted evidence to dispute the auction procedure or Colombia's breach of the Treaty obligations in regard to the auction, the Tribunal did not rule over such matter. (¶ 544; ¶ 546)

5.4. Alleged failure to Provide Full Protection and Security

Claimants do not allege that Colombia failed to provide stability to its legal framework. Certainly, the regulatory environment for the electricity sector had not changed since the materialization of Claimants' investment. In contrast, Claimants argue the lack of change and update of the regulatory environment. (¶ 556).

Hence, it could be assumed, the Tribunal held, that the FPS standard claim is based on the same issues than the FET ones. (¶ 557) In fact, the interconnection that the *Azurix* tribunal concludes that exists between the FET and FPS standard, since both are even provided within the same clause, also applies to the instant case. Therefore, the Tribunal would dismiss Claimants' claims under the Treaty just as it dismissed Claimants' FET claims. (¶ 558).

Regarding Claimants' claims related to the physical security, the Tribunal considers they have failed to produce evidence to support such contention. (¶ 561). Definitely, this standard is not automatically infringed by providing mere evidence on injuries (¶ 562), but to show physical interference by use of force (¶ 563).

5.5. Alleged Violation of the Most-Favoured National Treatment Standard

As the Respondent pointed out, the MFN standard analysis is identical to the one sustained for the non-discrimination strand under the FET standard. (¶ 578). Therefore, the Tribunal refers to the mentioned above arguments. (¶ 579).

6. Parties' positions and Tribunal's analysis on Counterclaims

The Respondent has brought counterclaims based on the Claimants' mismanagement in Electricaribe. The counterclaims are based on the following damages: (i) funds that Colombia was forced to channel into the Company during the intervention, (ii) the negative impact on the region and the consequent reduction in tax revenue Colombia would have been expected to collect, (iii) lower than expected tax revenues from Electricaribe itself, and (iv) reduction in the value of Colombia's shareholding in Electricaribe. (¶ 582).

6.1. Respondent's position

6.1.1 Jurisdiction

Respondent argues that the Tribunal has jurisdiction to hear its counterclaims not only because article 19(3) of the 1976 UNCITRAL Rules allows to bring them against investors (¶ 588), but also due to the Treaty permission on bringing them (article 10(2) of the Treaty) and the existent nexus between Claimants' claims and Respondent's counterclaims. (¶ 584).

Beyond any doubt, Respondent says, the phrase "all disputes" in article 10 of the Treaty includes and embraces host-state counterclaims. In addition, Respondent objects to the Claimants' argument that refers to the inexistence of a nexus between the counterclaims' issue and the Treaty, as well as the inapplicable extension of the limitations period to the counterclaims. (¶ 587).

6.2. Claimants' position

6.2.1 Jurisdiction

"Claimants deny that the Treaty extends the scope of the Tribunal's jurisdiction to include Respondent's counterclaims." However, if such counterclaims proceed, the time-barred limitation shall apply. (¶ 591). The Tribunal jurisdiction is restricted to issues governed by the Treaty. In any event, the Claimants assert that Articles 10(2) and 10(5) of the Treaty, which refer to investor disputes, should be construed as restricting the tribunal's jurisdiction to disputes initiated by an investor (¶ 593).

6.3. Tribunal's analysis

The tribunal allows the Claimants' objections to jurisdiction and determines that it has no jurisdiction over the Respondent's counterclaims. It therefore waives its jurisdiction over these counterclaims and declines to address the substantive issues therein. (¶ 624).

7. Costs

The Tribunal's decisions on costs are governed by articles 38 to 40 of the 1976 UNCITRAL Rules. (¶ 626). The Tribunal is of the view that the costs should be borne equally (50/50) between Claimants and Respondent due to the 'unsuccessful party' categorization that embrace each one, as provided by article 40(1) of the 1976 UNCITRAL Rules. (¶ 632). Each party should bear its own cost of legal representation and assistance (¶ 624).

8. Award

The Tribunal award and orders that: (i) Claimants' claims are dismissed, (ii) the Tribunal lacks over Respondent's counterclaims, and (iii) each party shall bear their own cost of legal representation and assistance. The other costs of the arbitration shall be shared in between the Parties equally. (¶ 637).