INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

STADTWERKE MÜNCHEN GMBH, RWE INNOGY GMBH, AND OTHERS
Claimants

and

KINGDOM OF SPAIN

Respondent

ICSID Case No. ARB/15/1

Dissenting Opinion
Professor Kaj Hobér

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1. I agree with my co-arbitrators as far as jurisdiction is concerned. I do not, however, agree with them concerning liability.

2. For the reasons set out below, I find that the Respondent has breached the Fair and Equitable Treatment (FET) standard enshrined in Article 10(1) of the ECT. As a consequence, the Claimants are in my view entitled to full compensation for any damages caused by such breach.

3. I preface my analysis by restating the obvious, *viz*., that it is based on the particular facts, evidence and arguments presented by the Parties in this arbitration. Also, factually similar cases are different. They differ, *inter alia*, in the manner in which they are presented by counsel and in the manner in which witnesses and experts testify and are cross-examined.

4. The core liability issue in this arbitration is whether the Respondent, by introducing the measures challenged by the Claimants, has violated the FET standard in Article 10(1) of the ECT.

5. The Claimants have also relied on other standards of protection in Article 10(1) of the ECT. I do not deal separately with these standards of protection, largely because in my opinion they overlap with, and form part of, the FET standard. This does not relate to the so-called umbrella clause in the last sentence of Article 10(1). I do not need to – and I do not – express a view on this provision.

6. The FET standard is laid down in the second sentence of Article 10(1). That sentence refers back to the first sentence - "such conditions" in the second sentence refers to the conditions mentioned in the first sentence – which stipulates that Contracting Parties shall "encourage and create stable, equitable favorable and transparent conditions for Investors of Other Contracting Parties to make investments in its Area" as such term is defined in the ECT. Whilst it could perhaps be argued that that the first sentence of Article 10(1) is not a separately enforceable obligation under Article 26 of the ECT, it does constitute "context" in the meaning of Article 31(1) of the Vienna Convention on the Law of Treaties for purposes of interpreting the FET standard in the second sentence of Article 10(1).

7. It follows, in my view, that the FET standard in the ECT must be interpreted as including stable and equitable conditions for investors. It is thus a reasonable and legitimate expectation among investors that a Contracting Party will provide fundamental stability with respect to the main characteristics of the legal and regulatory regime which existed at the time when the investor made his investment. Under the FET standard in Article 10(1), it is indeed the obligation of a Contracting Party to do so.

8. Needless to say, this does not mean that the legal and regulatory regime existing at the time when the investment was made cannot be changed. A Contracting Party, acting as a host State, retains the power to regulate its economy, including making amendments and changes to the legal and regulatory regime, unless it has agreed not to do so.

9. Most experienced and sophisticated investors – the record shows that the Claimants fall into this category – understand and expect that changes and amendments will be made in the legal and regulatory framework during the lifetime of their investment. As matter of general principle, however, the reasonable and legitimate expectations of investors do not include fundamental and radical changes to the legal and regulatory regime existing at the time when the investment was made.

10. A legitimate expectation is not a hope. It is more than a hope, but does not need to be based on a guarantee or a promise or on any other commitment. Legitimate expectations are usually formed on the basis of the legal and regulatory framework in the host State existing at the time of the investment in combination with statements by and conduct of the host State and its representatives concerning the legal and regulatory framework, as well as concerning the investment in question. The present case is no exception.

11. The Claimants made their investment based on the regulatory regime launched by RD 661/2007. The legal and financial analyses performed by the Claimants, and by financial institutions and investors involved in the project, as well as by retained consultants, were based on this regulatory regime. In addition to the expectations created by the RD 661/2007 regime itself, representatives of Spain made statements and presentations which explained the benefits of investing in the Spanish renewable sector at

the time. Such statements and representations form part of the Claimants' legitimate expectations in this dispute.

12. The Claimants have among other things referred to a press release by the Ministry of Industry, Energy and Tourism in May 2007 announcing RD 661/2007 and explaining the stability of the new regime. The Claimants have also referred to and relied on reports from the CNE from 2007 and 2008 emphasizing the stability and predictability of the RD 661/2007 regime. In addition, the Claimants have referred to presentations made by CNE in October 2008 and in February 2009 and to presentations by the InvestinSpain agency in November 2008 referring, *inter alia*, to regulatory stability.

13. The Claimants have furthermore relied on a resolution by the Ministry of Industry, Tourism and Commerce –by the Director General for Energy Policy and Mines – in December 2010 concerning the Claimants' investment, i.e. the Andasol 3 power Plant, confirming that the Plant would be subject to the RD/661/2007 regime and specifying the feed in tariffs that the Plant would receive for the entire operational life of the installations.

14. Based on the foregoing, i.e. the RD 661/2007 regime itself and the statements of and conduct by representatives of Spain, I find that the Claimants' reasonable expectations at the time of their investment were that there would not be any fundamental and radical changes to the RD 661/2007 regime and that the Claimants relied on these expectations when making their investments.

15. Spain has argued that the only legitimate expectation that the Claimants could have had was to obtain a "reasonable rate of return" on their investments. I do not agree.

16. Determining whether the FET standard in Article 10(1) of the ECT has been breached, including whether the legitimate expectations of investors have been frustrated, involves the balancing of the State's regulatory interest in relation to the legitimate expectations of investors. In performing this balancing exercise, the economic effect of the measures challenged by the Claimants is but one of several factors to take into account to wit to be analyzed primarily in relation to the quantum of damages to be granted to investors. In

addition, the statements by and conduct of representatives of Spain mentioned above were not about a "reasonable return", but rather about regulatory certainty and stability.

17. The remaining question to be addressed then is whether the measures challenged by the Claimants did bring about a radical and fundamental change in the legal and regulatory framework existing at the time when the Claimants made their investment. In my view the short answer is yes.

18. Observing the principle of judicial economy, I focus on RDL 9/2013, which was the straw that broke the camel's back.

19. The regime introduced by RD 661/2007 had been modified over the years, essentially between 2010 and the beginning of 2013. Modifications of the regulatory regime were thus not unknown. Royal Decree Law (RDL) 9/2013 adopted in July 2013, and subsequent enactments in 2013 and 2014, however, introduced a fundamental and radical break with the RD 661/2017 regime and eventually abolished that regime. RDL 9/2013 was supplemented by RD 413/2014 and MO IET/1045/2014 adopted in June 2014.

20. The changes introduced by RDL 9/2013 were substantial. Power plants were, for example, to be paid on the basis of capacity and on regulators' estimates of the hypothetical capital and operating costs per unit of generating capacity of a hypothetical standard installation of the type concerned and not on the basis of electricity produced; the regulated feed-in-tariffs were abolished; remuneration was no longer to be paid for the life of the plants but was limited to 25 years; indexation of tariffs was no longer tied to the CPI; payment for electricity generated through natural gas as a support fuel was restricted.

21. The new regulatory system was based on very different assumptions compared to the RD 661/2007 regime in that it was based on the hypothetical costs of a hypothetical efficient plant – in other words, ignoring actual costs, such as servicing of loans, and other financial costs, as well as actual efficiencies of specific plants - as determined by the regulator, all of it seemingly intended significantly to reduce subsidies to existing plants. The standards of the new system were then applied retroactively to all existing facilities, including the Claimants'.

22. The new regulatory system was stated to apply only with respect to future remuneration. It does, however, subtract past remuneration, i.e. remuneration due under the previous system, from future remuneration. In that sense the new system has retroactive effect since it claws back past remuneration already earned by investors, including the Claimants.

23. The new regime introduced by RDL 9/2013, and subsequent measures, fundamentally and radically changed the regime existing at the time when the Claimants made their investments. The Claimants' reasonable and legitimate expectations were thereby frustrated and denied. This constitutes a violation of the FET standard laid down in Article 10(1) of the ECT.

24. As mentioned above, the Claimants are entitled to full compensation for any damages caused by the violation of the FET standard. Being in the minority, however, it is not meaningful for me to embark on an analysis and discussion of the compensation which in my view is due to the Claimants.

Professor Kaj Hobér

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