In the arbitration proceeding between

JGC HOLDINGS CORPORATION
(FORMERLY JGC CORPORATION)
Claimant

and

KINGDOM OF SPAIN
Respondent

ICSID Case No. ARB/15/27

PARTIAL DISSENTING OPINION BY PROF. MÓNICA PINTO

May 21, 2021

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While there is much with which I agree in the Tribunal's Decision on Jurisdiction, Liability, and Certain Issues of Quantum (Decision), I cannot concur with my colleagues in certain parts of it.

I. Introduction

1. This dispute relates to a series of measures implemented by the government of Spain modifying the regulatory and economic regime of renewable energy projects in 2012 through 2014 after the Claimant made an investment in renewable energy projects in Spain in 2010[1].

2. Spain's main argument for such changes regards its tariff deficit. In fact, many pieces of Spanish legislation refer to the tariff deficit, including Royal Decree Law 6/2009[2], Royal Decree 1614/2010[3], Royal Decree Law 14/2010[4], Royal Decree Law 1/2012[5], among others, and to the measures adopted to supersede the situation.

3. In this regard, the Claimant contends that in spite of the tariff deficit, the Respondent kept promoting the construction and commissioning of CSP installations to become the world's leader in this technology[6]. It further contends that the Respondent has the burden of proving this claim, and it has clearly failed to do so. Also that the Respondent has provided no evidence demonstrating that the tariff deficit made it impossible to comply with Article 10(1) of ECT[7].

4. I find that Spain had an objective basis for adopting measures, it was facing a legitimate problem requiring public policy solutions through the exercise of its regulatory power and such a situation was known by the Claimants. However, this legitimate problem could not release Spain from its international engagements, namely from the obligations assumed under ECT, especially the obligation to

[1] Decision #5
[2] Decision #178
[3] Decision #203
[4] Decision #210
[5] Decision #212
[6] Decision #589
[7] Decision #592

accord fair and equitable treatment to investors as provided for in Article 10 ECT. That is what the Tribunal decided in the Decision on Jurisdiction, Liability, and Certain Issues of Quantum[8].

5. The whole Tribunal decided, as many others in the same situation, that a fundamental or radical change from the legal and economic regime in force at the date of the investment could be considered in breach of Article 10(1) of the ECT.[9]

6. While agreeing with the criteria, I am in disagreement with my esteemed colleagues regarding the evaluation of some of the disputed measures and some elements for the calculation of the Quantum.

II. The so-called Regulatory Framework No. 2 (RF#2)

7. I am not joining the majority of the Tribunal regarding the evaluation of some of the Disputed Measures, essentially those measures that Claimant labeled as Regulatory Framework No. 2[10], namely Act 15/2012[11], Royal-Decree 2/2013[12].

8. As shown in this Decision[13], on December 27, 2012, the Respondent enacted Law 15/2012 which entered into force on January 1, 2013 on fiscal measures for energetic sustainability.[14] Law 15/2012 introduced two major changes to the remuneration regime applicable to CSP producers under the Special Regime of RD 661/2007 as modified by RD 1614/2010. It eliminated the feed-in remuneration regime for the production of electricity attributable to the use of LNG as back-up fuel starting from January 1, 2013.[15] Another important change was the introduction of a 7% charge on the value of the electric power production, which, as indicated in the Decision[16], is beyond the competence of this Arbitral Tribunal.

[8] Decision #1025
[9] Decision #1011
[10] CM, p.7
[11] C-0372t
[12] C-0373t
[13] Decision, #225
[14] (C-0372) (R-0030)
[15] (C-0372t), p. 8. A section 7 is added to Article 30 of Law 54/1997.
[16] Decision #464, 1017

9. On February 1, 2013, the Respondent approved Royal Decree-Law 2/2013, on urgent measures in the electric system and the financial sector to guarantee budget stability and encouragement of competition.[17] RD-L 2/2013 introduced further changes to the remuneration of the Special Regime. It replaced, with effect from January 1, 2013, the Consumer Price Index that governed the updating of the remunerations, tariffs and premiums of activities of the electricity sector, including the production of renewable energy, by another consumer price index which excluded unprocessed food or energy products. It also reduced the amount of the premium to a value in the remunerative pool plus premium option prescribed in RD 661/2007 to zero and supressed the upper limit and lower limit values.

10. Under RD-L 2/2013, the Special Regime producers which previously had opted to sell their energy under the FiP option would be deemed subject to the Regulated Tariff (FiT) option as of February 2, 2013 with effect from January 1, 2013, unless they notified the Government that they desired to opt for the FiP option, in which case they would not be allowed to opt for the FiT option subsequently.[18] The Respondent implemented the changes introduced by RD-L2/2013 through the approval of MO IET/221/2013.[19]

11. On October 14, 2014, MO IET/1882/2014 was approved. It determined the calculation methodology for the electric energy generated from the usage of fuels in thermosolar facilities.[20] Pursuant to Law 15/2012, such electricity produced using back-up fuels would not be entitled to the special payment regime applicable to solar thermal facilities. MO IET/1882/2014 provided that any payments received as premiums or tariffs for electricity produced by using back-up fuels from January 1, 2013, the date of entry into force of Law 15/2012, would have to be returned[21].

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[17] (C-0373) (R-0077).
[18] *Ibid.*, Article 3.
[19] (C-0374/0374t)
[20] (C-0376t)
[21] Decision #272

III. RF#2 is not in breach of Article 10(1) ECT

12. One of the findings of the majority of the Tribunal in this Decision is that both Law 15/2012 and RD-L 2/2013 constituted a breach of the Claimant's legitimate expectations, and as such, a breach of Article 10(1) of the ECT[22].

13. In my view, the measures adopted in Law 15/2012 and RD-L 2/2013 did not affect the essential features of the regime in force at the date of the investment. In fact, all the rights of producers under the Special Regime provided for in Article 17 of RD 661/2007 remained in force when RF#2 went into effect.

Article 17 reads:

> Rights of producers under the Special Regime
>
> Without prejudice to the provisions of Article 30.2 of Act 54/1997, of November 27, the proprietors of production facilities under the special regime shall enjoy the following rights:
>
> a) To connect their generating unit or units in parallel to the grid of distribution or transport company.
> b) Incorporate into the system, through the electric distributor or transport company, their net production of electric energy or energy sold provided that it is technically possible for it to be absorbed by the grid.
> c) Receive, for the total or partial sale of their net electrical energy generated under any of the options listed in Article 24.1, the remuneration provided in the economic regime set out by this Royal Decree. The right to receive the regulated tariff, or if appropriate the premium, shall be subject to final registration of the facility in the Register of production facilities under the special regime of the General Directorate of Energy Policy and Mining, prior to the final date set out in Article 22.
> d) To sell all or part of their net production by way of direct lines.
> e) Priority of access and connection to the electricity grid under the terms and conditions set out in Annex XI of this Royal Decree, or in such regulations that may supersede them.

[22] Decision #1023

14. Moreover, as shown in the Decision[23], when Claimant diligently requested a due diligence report by Clifford Chance, such report referred only to five rights, namely the right to connect their generators to the electricity distribution or transport company's grid in parallel; the right to transfer their net production of electric energy or sold energy to the system by means of the distribution or transport company, as long as the grid is capable of absorbing all the energy; the right to receive the retribution foreseen in RD 661/2007 for the complete or partial sale of their net generated electric energy, choosing one of the two remuneration options set out in article 24.1 of RD 661/2007; the right to sell all or part of their net production by means of direct lines. (However, the economic regime set out in RD 661/2007 will not be applied to the energy sold by means of direct lines.); and the right to priority access and connection to the electric grid in accordance with Annex XI of RD 661/2007 or any regulations that may eventually substitute the former[24].

15. The interpretation of Article 17 of RD 661/2007 together with the relevant part of Clifford Chance Report does not support the allegation of the Seven Feed-in Rights in the Memorial[25]. However, the argumentation by Claimant lies in the consideration that each of the changes brought by these two pieces of legislation cancels an alleged right.

a) The use of back-up fuel

16. Law 15/2012 provided for the elimination of the application of the RD 661/2007 economic regime to the electricity produced using back-up fossil fuels in CSP installations and the introduction of a 7% charge on the value of the electric power production. These measures applied to existing plants including Solacor 1 and Solacor 2 from January 1, 2013[26].

17. Claimant alleged that the use of back-up fuel in order to compensate the lack of solar irradiation as long as this did not exceed 12 percent (for the FiT option) or 15 percent (for the FiP option) of the total energy production was another right of

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[23] Decision #975
[24] C-0574, I.C, p.5-6
[25] Memorial, *inter alia,* para. 607, 863, 952, 1071, 1076, 1085; footnote 715.
[26] Decision #1017

the producers under Special Regime[27]. The majority of the Tribunal considered that it was an essential element of the remuneration regime under the RD 661/2007 and RD 1614/2010 relied on by the Claimant, irrespective of whether it could be deemed as a right under Spanish domestic law[28].

18. I have a different view. The use of back-up fuel was a technical feature of the Special Regime in RD 661/2007 and it was considered like that in the Clifford Chance Report.

19. Article 2 of RD 661/2007, on the Scope of application, provides that "1. Facilities for the production of electrical energy under Article 27.1 of Act 54/1997, of November 27, may avail themselves of the special regime established under this Royal Decree. Such facilities are classified into the following categories, groups and Sub-Groups, depending on the primary energy used and production technologies employed, and the energy yields obtained:". It then, under Category b) – "facilities using any non-consumable renewable energies, biomass, or any type of biofuel, provided that the proprietor does not carry out production activities under the ordinary regime" – deals with "Sub-Group b.1.2.: Facilities using only, as primary energy, thermal processes for the transformation of solar energy into electricity. These facilities will be entitled to use equipment that use a fuel for the maintenance of the temperature of the heat transmitter fluid compensating for an absence of solar irradiation that may affect the planned supply of energy. The generation of electricity from such fuel shall be less, on an annual basis, than 12% of the total production of electricity, if the facility sells its energy under option a) of Article 24.1 of this Royal Decree. This percentage may rise up to 15% if the facility sells its energy according to option b) of Article 24.1".

20. It is crystal clear that Article 2 is not aimed at awarding rights to producers, instead it is a description of the technical elements of the different categories of facilities for electrical production under the legal regime of RD 661/2007. This view is reinforced by the fact that the legislation embodied a specific rule dealing with

[27] Decision #976, 1020
[28] Decision #1025

the Rights of the Producers under the Special Regime, where the back-up fuel is not mentioned.

21. Moreover, Clifford Chance Report mentions the use of back-up fuel as a note when dealing with solar thermal plants (Subgroup b.1.2) in the last paragraph of the "General considerations on the special regime"[29] immediately before the "Rights of Special Regime producers"[30].

b) The replacement of CPI and the amount of the premium

22. On its side, RD-L 2/2013 introduced two more changes to the legal and economic regime in force: (i) replacement of CPI with IPD-IP (CPI to constant taxes without food or energy products) in updating the tariffs, premiums and the upper and lower limits; and (ii) reduction of the amount of the premium to a value in the pool plus premium option prescribed in RD 661/2007 to zero. These measures applied to existing plants. Although RD-L 2/2013 formally entered into force on February 2, 2013, the measures went into effect retroactively from January 1, 2013[31]. The Respondent submits that the legality of the replacement of CPI with the other index was upheld by the Supreme Court, and thus such changes were predictable. It argues that the changes corrected inefficiencies in how the updating index was calculated[32].

23. The Claimant contends that "This additional measure entailed a serious decrease in the updating rate and, thus, in Regulated Tariff. In addition, it represented a clear repeal of the right to receive a Feed-in remuneration scheme in which Tariffs, Premiums and Caps & Floors had to be annually updated in accordance with general CPI less 0.25% until the end of 2012 and less 0.50% onwards."[33]

24. The argument according to which the criteria and the amounts settled in the legislation could not be changed challenges the principle of the regulatory power of the State. As long as the changes introduced by the new legislation do not mean

[29] C-0574, II.B, p.4
[30] C-0574, II.C, pp.5-7
[31] Decision #1019
[32] Decision #1021
[33] Memorial #679

a fundamental or a radical change from the regime established by RD 661/2007, they cannot be, in principle, considered in breach of Article 10(1) of the ECT

c) *FiP or FiT*

25. RD 661/2007 offered operators of CSP plants under the Special Regime two possibilities to remunerate production of electricity: (i) the regulated tariff (or feed-in tariff) option expressed in Euro cents per kWh and (ii) the market price plus premium expressed in Euro cents per kWh.[34]

26. The Claimant submits it had a right of election between the options included in Article 24(1) of RD 661/2007 for Solacor 1 and Solacor 2, which was eliminated by the Respondent[35].

27. The Respondent contends that the suppression of the FiP option was also a measure to avoid situations of overcompensation in a scenario of pool prices not corresponding to initial projections, and at the same time a foreseeable measure as it had already been adopted in 2010 for the first year of operation of the plants.[36]

28. In fact, because of the so-called July 2, 2010 agreement, it was decided a year of compulsory application of the regulated tariff only.[37] In return, the agreement raised the limit of the percentage of electric energy generated from back-up fuel from 12% to 15% during this period. The so-called July 2, 2010 agreement resulted from a consultation with the sector convened by the Respondent.

29. In my view, there was no right to choose between one and the other ways of remuneration; the legislation simply offered the one or the other form of remuneration[38].

[34] Decision #164, *Ibid*., Article 24(1).
[35] Decision #564
[36] Decision #1020, Resp.PHB #68
[37] (C-0039t)(R-0088EN), Article 3(1) of RD 1614/2010
[38] RD 661/2007m, article 17.c) "Receive, for the total or partial sale of their net electrical energy generated under any of the options listed in Article 24.1, the remuneration…", Article 24.1.b) "To asell the electricity in the electricity energy production market. In this case the sale price of the electricity shall be the price resulting from the organized market or the price freely negotiated by the holder or the representative of the facility, supplemented, where appropriate by a premium, …" C-0037t In Spanish, article 24.1.b): Vender la electricidad en el mercado de producción de energía eléctrica. En este caso, el precio de venjta de la electricidad será el precio que resulte en el mercado organizado o el preio libremente negociado por el titular o el representante de la instalación, complementado, en su caso, por una prima en céntimos de euro por kilovatio hora.

d) Concluding remarks

30. Therefore, I find that there was no fundamental change of the legal regime at the time of the investment and that as amended by Law 15/2012 and RD-L 2/2013, the legal and economic regime in force provided for a reasonable rate of return even when, of course, it provided less earnings. I cannot join the Majority in that regulatory changes under Law 15/2012 and RD-L 2/2013 constitute a breach of Article 10(1) of the ECT as provided for in paragraph 1348 of the Decision.

31. This conclusion was also reached by the Tribunal in *Novenergia v Spain,* when it assessed that "RD-L 2/2013 did not entirely transform or fundamentally change the framework the Claimant relied on when it made its investment in 2007"[39]. So did other tribunals which found that only RF#3 amounted to a radical change of the framework on which Claimants relied to make their investments.[40]

32. It has to be noted that both rules, Law 15/2012 and RD-L 2/2013, operated in a very narrow window of time (from February/March 2012 to July 2013) because of the adoption of the so-called RF#3, on whose consideration I join the majority of the Tribunal.

IV. The criteria for the calculation of the Quantum

a) The suitable revenue option

33. The Tribunal unanimously decided that the appropriate valuation method was the DCF with some corrections with which it dealt with in the paragraphs under *chapeau F.*[41] The majority of the Tribunal agreed that the suitable revenue option was FiP with 15% gas generation[42]. Consistent with the opinions in this partial dissenting opinion, I find that FiT with 12 % gas generation is a suitable revenue option. No more explanation is needed because it is the necessary inference from the position explained above.

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[39] #689 (2018)
[40] E.g. Antin #560 (2018)
[41] Decision #1186
[42] Decision #1224

b) The Operation and Maintenance (O&M) Costs

34. In paragraphs 1302-1310, the Decision deals with the Operation & Maintenance Costs (O&M). The majority of the Tribunal denied Respondent's claim that the O&M costs used by Compass Lexecon should be replaced by corrections proposed by Econ One on the grounds that they were inflated compared to those of other CSP projects.

35. In its Counter-Memorial, the Respondent pointed out that in the agreement with JGC, Abengoa Solar indicated it was going to be in charge of the construction of Solacor 1 and Solacor 2 and of their Operation and Maintenance (O&M).[43] In the Memorandum of Understanding that Abengoa signed with JGC on 27 May 2009, it is provided that: "(i) Abengoa subsidiaries, called Abener and Teyma, will be the EPC Contractors for the Project. (ii) Operation and maintenance of the Project will be implemented by Abengoa Solar España through an operation and maintenance contract with the SPVs to be negotiated. Pending to agree on specific terms and scope, Abengoa Solar España may outsource some parts of the operation and maintenance activities to JGC. In any case, JGC will be entitled to designate a manager that will act as deputy of the overall operations and maintenance manager of the Project[44]. It relies on a report by Econ-One to submit that the Solacors had higher costs than other plants of the same field[45].

36. In its Reply, the Claimant provided more details. Essentially, it submits that the report issued by Altermia, the technical advisor hired by the Lenders during the due diligence process, concluded that the EPC costs of Solacor 1 and 2 were in line with those of similar CSP plants with no heat storage systems[46]. This statement finds support in the technical report by Altermia where it reaches such conclusion using information provided by Abengoa Solar.[47]

37. It further states that "Solacor 1 and 2 were designed as highly efficient facilities, aimed at maximizing production and thus obtaining higher returns. As many other foreign investors at time, the Claimant poured millions of euros in building and

[43] Counter-Memorial #860
[44] C-0335
[45] Counter-Memorial #866
[46] Reply # 153
[47] CLEX-065 p.170

equipping the plants with cutting-edge technology"[48], thus concluding that "the EPC costs of the Solacor 1 and Solacor 2 plants are in line with comparable plants. They simply reflect the Claimant's investment in edge-cutting technology with the purpose of maximizing production in accordance with the Regulatory Framework that the Respondent offered at the time of investment"[49] and that "Altermia also concluded that the O&M contract costs were in the "high range" of O&M contracts for CSP plants in Spain without thermal storage, given that they included incentive payments for production and covered a range of maintenance services"[50]

38. Finally, in the Rejoinder, the Respondent insists in that Altermia acknowledged that the costs of the Solacors were high. The technical assessment of Solacor 1 states that "considering that Solacor 1 will not include a thermal storage system, the total investment cost of the plant (5.21 €/W) can be considered in the high range of the reported data. Nonetheless, we should point out that instead of a reduction cost, prices for solar thermal components have decreased in recent years. In this sense, the investment ratio is in the middle range of other solar thermal projects with similar size of the solar field and without thermal storage"[51].

39. The argument advanced by the Claimant in the sense that Econ-One evaluation did not consider comparable plants loses when opposed to the admission by both Altermia and the Claimant that costs were high.

40. Therefore, and without getting into the question of whether the costs were inflated or not, I do agree with Respondent's argument in that the investment costs of Solacor 1 and 2 are higher than those of comparable plants.

Mónica Pinto

Arbitrator

[48] Reply # 154
[49] Reply #159
[50] Reply # 162
[51] Rejoinder # 1224; C-0625 p.152