



School of International Arbitration

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International Arbitration Case Law

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CHARANNE B.V. AND CONSTRUCTION INVESTMENTS S.A.R.L.

V.

THE KINGDOM OF SPAIN

(SCC CASE NO. 062/2012)

AWARD

Case Report by Tammi Pilgrim **
Edited Ignacio Torterola ***

In the Award rendered on January 21, 2016 (accompanied by a concurring and dissenting opinion by Claimants' appointed arbitrator), the Tribunal found that it had jurisdiction to hear the claim brought by Charanne B.V. and Construction Investments S.A.R.L against The Kingdom of Spain. The Tribunal also went on to find in favor of Spain and dismissed the claims, with costs awarded to Spain, on the basis that Spain's exercise of its right to regulate in the country's renewable energy sector, particularly in removing incentive payments (in the nature of a Feed in Tariff) among other things, did not infringe the Claimants' legitimate expectations and did not violate the ECT's guarantee of fair and equitable treatment. Claimant appointed arbitrator, Mr. Guido Tawil, concurred with the Tribunal that it had jurisdiction and that Spain had not indirectly expropriated the Claimants' investment. However, he disagreed with the Tribunal's finding that the circumstances could not give rise to a breach of Claimants' legitimate expectations and the fair and equitable treatment standard.

Main Issues:	Jurisdiction – Consent – Fork in the Road – Nature of the Dispute – Whether EU or ECT Dispute – Protection and Treatment of Investments – Fair and Equitable Treatment – Non-discrimination – Legitimate Expectations – Removal of Incentives – Sovereign’s rights to regulate sector – Renewable Energy
Tribunal:	Alexis Mourre (President), Guido Santiago Tawil (Appointed by Claimants), Claus Von Wobeser (Appointed by Respondent).
Claimant’s Counsel:	Hermenegildo Altozano, Coral Yáñez, Paloma Belascoain of Bird & Bird, Madrid, Spain; Shearman & Sterling LLP (April 2013 – May 2014); Fernando Mantilla Serrano and John Adam of Latham Watkins, Paris, France (from May 2014).
Respondent’s Counsel:	José Luis Gomara, Fernando Irurzun, José Ramón Mourenza of Abogacía del Estado; Eduardo Soler Tappa, Christia Leathley, Florencia Villaggi, Beverly Timmins, Pilar Colomes of Herbert Smith Freehills, Madrid, Spain.

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- ** Tammi Pilgrim is an LL.M. candidate at Georgetown University Law Center. She is a practicing attorney in the Commonwealth Caribbean having obtained an LL.B. from the University of the West Indies, Cave Hill Campus, and a Legal Education Certificate from Hugh Wooding Law School.
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Digest

1. Relevant Facts and Procedural History

Claimants¹ maintain an ownership interest in Grupo T-Solar Global S.A. (“**T-Solar**”),² an entity which (among other things) carried on the business of generation and sale of electrical energy through solar photovoltaic centers. (¶¶ 4-9.) At all material times, T-Solar was the owner (via a special purpose vehicles) of 34 installations for the production of electrical energy in Spain. (¶ 5.) These installations are the subject of regulation by Spanish authorities under the government’s special regime for the production and use of solar photovoltaic technology.

The dispute arose out of adjustments made by the Spanish authorities to the regulatory framework for electricity for solar photovoltaic energy produced at installations in Spain (“**PV installations**”). To promote the use of renewable energy, Spain created a special regulatory framework for electricity produced by PV installations, which encompassed incentive payments, including a system of bonuses and tariffs, paid to owners of PV installations to reward the production of electricity generated by solar photovoltaic units. (¶¶ 78-79, 85.)

Claimants’ complaint argue that Respondent, after having attracted its investment in the area of solar photovoltaic generation through a series of government incentives, changed the regulatory framework, thereby causing damages to the investments. (¶ 80.) In this case, the investment relied upon by the Claimants was comprised of their respective stakes in T-Solar. (¶ 459.)

In particular, Claimants challenged Royal Decree (“**RD**”) 1565/2010 (dated November 19, 2010) and Royal Decree Law (“**RDL**”) 14/2010 (dated 23 December 2010), which affected their installations in the following manner: (a) RD 1565/2010 primarily removed all incentive payments for PV installations operating under a classification made in a previous regulation³ from the 26th year of operation, where previously there had been no time limit established, and demanded additional technical requirements, namely that the generation plants install reaction mechanisms to protect the electricity system in case of a decrease in the voltage in the network; and (b) RDL 14/2010 was established to pass urgent measures in order to correct the rising tariff deficit⁴ by, *inter alia*, limiting the

¹ Charanne B.V. (registered in the Netherlands), Construction Investments S.A.R.L (registered in Luxemburg).

² By virtue of their shares in Grupo Isolux Corsán S.A and Grupo Isolux Corsán Concesiones S. A.

³ Royal Decree 661/2007, called the “Feed In Tariff”.

⁴ The boom in installation operations resulted in electricity output far surpassing the Spanish Government’s expected targets.

operational hours of the PV installations and requiring owners to pay tolls for the use of the transport and distribution networks. (¶¶ 148-168, 232, 269-276.)

Actions taken in response to the measures imposed in RD 1565/2010 and RDL 14/2010 included:

- (a) Contentious administrative claims before the Supreme Court of Spain by T-Solar⁵ and the SPVs in relation to RD 1565/2010; and
- (b) Claims by companies affiliated with T-Solar against Spain before the European Court of Human Rights (“ECHR”) requesting that RDL 14/2010 be declared in violation of Article 1 of the Additional Protocol and Articles 6 and 13 of the Convention for the Protection of Human Right and Fundamental Freedoms.

All of these actions were dismissed by the respective Tribunals.

In accordance with Article 26 of the ECT, the Claimants sent Respondent a Notice of Dispute on April 28, 2011 in order to commence a 3-month period for negotiations to take place between the parties (¶ 17). On May 7, 2012, Claimants filed their Request for Arbitration with the Stockholm Chamber of Commerce (“SCC”) under Article 2 of the SCC Rules and the Tribunal was constituted on September 26, 2012 (¶¶ 18-19). The tribunal rejected the Respondent’s request to bifurcate the proceeding (¶¶ 30-32). On November 3, 2014, the European Commission (“EC”) filed a request with the Tribunal in order to participate *amicus curiae* in the proceedings (¶ 49). With the agreement of the Parties, the EC was permitted to file an *amicus curiae* brief, but was not permitted to take part in the proceedings (¶¶ 56-57).

2. *The Tribunal’s Reasoning - Jurisdiction*

2.1 *Analysis of Respondent’s First Jurisdictional Objection: the claim had already been submitted for resolution before domestic courts*

The first ground⁶ on which Respondent asked the Tribunal to dismiss the arbitration effectively stated that the Claimants’ claims before the domestic courts and tribunals in Spain activated the fork in the road provision in Article 26(3)(b)(i) of the ECT, which excludes the consent to arbitration if the affected investor has previously submitted the claim for resolution before domestic courts and tribunals of the Contracting Party

⁵ Together with Grupo Isolux (parent company of T-Solar).

⁶ Respondent had also objected to the Tribunal’s jurisdiction on the basis that the Claimants had not discharged the burden of proof that they had made investments protected by the terms of the ECT, since they had not produced official certificates or constituent documents of the companies that owned the PV installations to certify their existence, nationality and ownership. The argument was abandoned by Spain after the Claimants produced the documents requested. (¶ 397.)

involved or in accordance with any applicable, previously agreed dispute settlement procedure. (¶ 398.) In support of its objection, Respondent argued that the dispute before the Tribunal was the same dispute (in terms of content of the claim and the identities of the parties) that had been already submitted to other forms of dispute resolution, thus precluding the Tribunal's jurisdiction. (¶¶ 194-198.) Respondent urged the Tribunal to apply the triple identity test formulated by recent arbitral tribunals decisions in order to conclude that the group of companies of which the Claimants formed part constituted the same economic reality, such that the actions of the entities could be considered the actions of the Claimants. (¶ 198-206.)

In response, Claimants argued that Respondent had failed to demonstrate that the proceedings before the Spanish Courts and the ECHR were the same under the triple identity test, since they did not share the same parties, the same object (the claim before the Spanish Court sought to have RD 1565/2010 nullified as infringing Spanish public order, while the present claim sought to have the 2010 Regulations declared incompatible with the ECT), nor the same legal basis (the claims before the domestic courts were based on violations of Spanish law, while the present claim was based on violations of the ECT and international law). (¶¶ 236-244.) Claimants further argued that Article 26, which mandates that the claims should not have been submitted to domestic courts or tribunals, did not apply to the ECHR, which is a court formed under a multilateral treaty and based on international law. (¶ 244.)

The Tribunal found that Claimants had not triggered the fork in the road provision contained in Article 26(3)(b)(i) of the ECT because the claims submitted to the domestic tribunals could not be considered the same claims submitted to arbitration. (¶ 408.) The Tribunal based its conclusion mainly on its finding that the Claimants to the arbitration were different entities from those which initiated the claims before the Spanish Court and the ECHR, and that there was no dispute between the parties on this fact. Additionally, the Tribunal determined that Respondent had failed to produce any evidence that Claimants were part of the same economic reality as the claimants to the domestic court claims and the claim before the ECHR. On this point, the Tribunal was clear that the mere fact that an entity existed as part of a group of companies was not sufficient for it to be considered identical with the aforementioned entities, with the result that Respondent's argument would be rejected based on the triple identity test. (¶¶ 405-408.)

Even though the Tribunal considered that this was sufficient to dismiss the objection, it further determined that the ECHR could not be considered a tribunal of a Contracting Party for the purposes of Article 26(2)(a), as it was not a Spanish tribunal, nor could it be considered a previously agreed method of dispute resolution under Article 26(2)(b), since the parties had not previously agreed to submit their disputes to it. (¶ 409.) The Tribunal

therefore dismissed the objection and did not consider it necessary to explore the other limbs of the triple identity test.

2.2 *Analysis of Respondent's Second Jurisdictional Objection: Claimants were not investors in accordance with Article 1.7 of the ECT because Claimants' beneficial owners were nationals of the Kingdom of Spain*

Respondent also argued that the investment would not be protected if it were controlled by investors who had the nationality of the same State in which the investment was made, since the ECT was intended to protect foreign and not domestic investment. (¶¶ 226.) In this regard, it urged the Tribunal to adopt a more purposive interpretation of the ECT, which would allow it to examine the effective nationality of the Claimants and lift the corporate veil to reveal the true claimants to the arbitration, who Respondent contended were two natural persons of Spanish nationality. (¶¶ 225-228.)

Claimants on the other hand asserted they were validly constituted under the laws of a Contracting Party and that this was sufficient to ground the jurisdiction of the Tribunal under the ECT. (¶ 263.) Further, Claimants submitted that lifting the veil should only be done in cases of fraud or abuse, neither of which were shown to be present in the current circumstances, and that their links with the group of companies did not permit the Tribunal to ignore their separate legal personality. (¶ 266.)

The Tribunal disagreed with Respondent that it was entitled to lift the corporate veil. (¶ 415.) It found that the ECT provisions were clear as to the criteria by which the nationality of an investor should be analyzed, namely all that was required was that the company should be validly constituted in accordance with the laws of a Contracting State. (¶ 414.) In light of this, there was no basis for importing extraneous criteria to determine how the nationality of an investor should be analyzed. Since Claimants were clearly companies established in accordance with the laws of a Contracting Party (the Netherlands and Luxemburg), they satisfied the requirements of the ECT and were to be considered investors under Article 1(7). (¶ 414.) The Tribunal did consider, however, that lifting the corporate veil might be conceivable in some circumstances, for example, where there was a case of fraud going to jurisdiction – such as an instrumental transfer of the assets to be invested after the emergence of the dispute. (¶ 415.)

2.3 *Analysis of the Respondent's Third Jurisdictional Objection: Resolution of the dispute by the Arbitral Tribunal would be contrary to the Spanish Constitution*

The Respondent's assertion on this ground was that the Tribunal's determination of the dispute would jeopardize Spain's public order, particularly the principle of equality contained in article 14 of the Spanish Constitution, which effectively provided that no

citizen should have access to a tribunal (with certain procedural aspects) that was unavailable to other citizens. (¶ 419.)

Claimants submitted that there was no possibility for discrimination to occur as between Spanish citizens as contemplated by the Spanish Constitution, since (a) they were not in fact Spanish citizens, but had been validly constituted under the laws of the Netherlands and Luxemburg; and (b) the rights of an investor before the arbitral tribunal granted under an investment treaty constituted an enlargement of rights rather than a limitation, and that State would not be excused from its international obligations thereunder. (¶ 423.)

According to the Tribunal, Respondent's Constitutional argument basically recycled its previous argument that the claim was being made by Spanish nationals – which argument has been rejected. (¶ 422.) Further, the Tribunal found that Spanish internal public order could not be affected by the jurisdiction of a tribunal under an international treaty to which Spain was a party, and the relevant article in the Constitution guaranteed equal access to protection of the law before Spanish Tribunals, but did not prohibit a citizen from enjoying other protections in other situations. (¶ 422.)

2.4 *Analysis of the Respondent's Fourth Jurisdictional Objection: The dispute was an intra-EU dispute, subject to EU Rules*

In relation to the fourth objection, the Respondent argued that since the parties to the dispute were all parties to the EU's Regional Organization for Economic Integration, and that the EU was itself a contracting party of the ECT, there was no diversity of territory as required under Article 26 of the ECT; the case was therefore essentially that of an EU investor making an investment in EU territory. (¶¶ 207, 426-427.) Further, it submitted that Article 27 of the TCE (State-to-State dispute resolution) impliedly carved out intra-EU matters from its application, when read in conjunction with Article 267 of the Treaty on the Functioning of the European Union ("TFEU"), which prevented disputes between members from being submitted to an ad hoc international arbitration tribunal. (¶¶ 213, 433-434.) Finally, Respondent argued that Article 344 of the TFEU prohibited member states from resolving conflicts involving EU law via international arbitration. (¶¶ 217, 405-408.)

Claimants submitted that the ECT and the TFEU were separate treaties with distinct spheres of application. (¶ 245.) The matter fell within the scope of the ECT covering investments in the energy sector and not the TFEU, which regulates the general economic and legal traffic in the EU. (¶¶ 246, 405-408.)

In the Tribunal's view, the meaning of the word "territory" could reflect either the territory of individual member States of the EU or the EU as a whole, since individual

states did not lose their character as member States under the EU, simply by virtue of also being part of the EU's economic integration regime. (¶¶ 429-430.) As the dispute concerned an investment made by investors from the Netherlands and Luxemburg in the territory of the Kingdom of Spain, the ECT was applicable. (¶432.) In addition, the Tribunal opined that although the TFEU prevented the resolution of disputes between member states from being referred to international arbitration, this was inapplicable to the present dispute, which was between a private investor and a State. (¶¶ 405-408.) The Tribunal noted that no EU law prevented a member State from resolving disputes with investors of another member State via arbitration, nor was there a rule preventing such a tribunal from applying EU law to resolve similar disputes. (¶¶ 443-444.)

3. *The Tribunal's Reasoning – The Substantive Claim*

3.1 *Analysis of Respondent's challenge to the core object of the Substantive Claim: The claim lacks a core object due to the repeal of the 2010 Regulations by subsequent legislation*

Respondent asked the Tribunal to dismiss the arbitration on the basis that it lacked a core object. (¶¶ 188-193.) The Tribunal found that the existence of a core object was a substantive question which the Tribunal could not answer without having determined that there was jurisdiction to do so. It therefore proceeded to consider the question of jurisdiction, before turning to the assertion that the claim had no core object. (¶ 394.)

The core of the Respondent's submission on this point was that the Claimants had limited their claim to a challenge to the efficacy of RD 1565/2010 and RDL 14/2010 (together, the "2010 Regulations"), but that this removed the core of their claim since the 2010 Regulations had been subsequently repealed.⁷

The Tribunal noted that the 2010 Regulations would have had effect until the July 14, 2013 when the subsequent legislation came into force and would have had a temporary transitional effect afterward, as the installation operators registered under the previous regulations continued to be governed by them and continued to receive remuneration in accordance with them. As a result, the claim could not be said to be lacking an object since they could have affected the Claimants' rights, even if in a temporary manner. (¶ 454.)

3.2 *Analysis of the Claimant's First Substantive Claim: The reduction in profitability of the PV installations constituted an indirect expropriation*

Claimants submitted that the 2010 Regulations had such a brutal impact on the economic value of their investment that this reduction in value constituted an indirect

⁷ By the entry into force of RDL 9/2013 and subsequent regulations.

expropriation of the value and returns of the investment, even though their ownership rights were not affected. (¶¶ 280, 283-284.)

The Tribunal did not share this view and emphasized that inherent in the concept of expropriation is a loss of property. (¶ 460.) Thus, the standard by which indirect expropriation may be found to exist under international law calls for the demonstration of a substantial impact on the property which, if it alleged to be a reduction in value, must be equivalent in magnitude to a loss or destruction of the investment. (¶¶ 464-465.) Since the Claimants' investment was not in returns of the PV installations, but in shares in T-Solar, the measures taken must have totally or partially deprived the Claimants of their rights as shareholders in T-Solar, in order to constitute indirect expropriation. (¶ 460.)

In this regard, the Tribunal found that Claimants' essential complaint was a loss of profitability of the PV installations, which in turn reduced the value of their shares in T-Solar. (¶ 463.) The Tribunal emphasized that, notwithstanding the measures, the Claimants continued to be shareholders in T-Solar and that T-Solar continued to operate and earn revenue. (¶ 462) Although the profitability has been seriously affected, it was not so serious as to be characterized as an expropriation. (¶ 465.) The Tribunal opined that simple diminution in value of shares cannot constitute an indirect expropriation. (¶ 465.)

3.3 *Analysis of the Claimant's Second Substantive Claim: Respondent failed to provide effective means to process challenges to the Royal Decree Law (RDL)*

Claimants' position on this claim was that, by adopting RDL 14/2010, Spain violated their rights, since Spanish law did not permit recourse to contentious administrative proceedings of a royal decree law. Essentially, Claimants submitted that they were left without a remedy to address their dispute/claim over the effects of the RDL 14/2010, and that this constituted a breach of Spain's obligation under the ECT to provide investors with effective means of presenting claims. (¶¶ 310-312.)

Respondent argued that Spain had provided efficient means of addressing claims, since the constitutionality of RDL 14/2010 could be challenged by any citizen before an ordinary judge on the Constitutional Court. Further, an investor could complain to the body allegedly causing damage to its investment. (¶ 372.)

The Tribunal opined that the standard for the provision of effective means obliged a host State to provide a legal framework that guaranteed to investors effective recourse for the making and protection of investments. The host State's legal system must be examined, but it would be sufficient if the State had established an adequate system of laws and institutions that function effectively. In this regard, the Tribunal examined the methods

established by Spain, namely the access by an investor to the court to challenge the constitutionality of the RDL 14/2010 and an investor's ability to complain to the body allegedly causing damage, and found that Spain had fulfilled its obligation to provide efficient means for presenting claims. (¶¶ 471-472.)

3.4 *Analysis of the Claimant's Third Substantive Claim: The Respondent's 2010 Regulations constituted a failure to create stable conditions for investment including the obligation to accord fair and equitable treatment*

Claimants submitted that the evolution of the special regulatory framework created a context of instability and lack of clarity in the regulatory regime, contrary to Article 10(1) of the ECT. (¶¶ 479-480.) In addition, Claimants submitted that Spain's actions caused them to have legitimate expectations that the regulatory regime would not be modified, and that no contract with Spain was necessary to demonstrate this. (¶ 296.) Specifically, Claimants argued that Spain mounted a campaign to obtain investments, including the dissemination of literature describing the high profitability of an investment in solar photovoltaic installations. (¶¶ 298-301.) They further submitted that Spain specifically committed to preserving the existing tariff and regulatory regime by implementing RD 661/2007 and RD 1578/2008, which outlined requirements to be fulfilled in order to receive remuneration within an established timeframe and which were targeted at a limited group of specific investors. (¶ 297.)

The Tribunal commenced its analysis by emphasizing that it was restrained by Claimants' own pleadings (which expressly excluded the subsequent regulations from the Tribunal's consideration). As a result, it limited itself to considering **only** the 2010 Regulations. The Tribunal found that in that limited context, it was unable to assess the evolution of the regulatory framework and thus unable to conclude that Spain had breached its obligation to maintain regulatory stability under Article 10(1). (¶¶ 480-484.) In relation to the lack of clarity in the regulations, the Tribunal noted that the Claimants had not alleged that there was anything ambiguous or difficult to understand about the 2010 Regulations. (¶ 485.)

In approaching the question of Claimants' legitimate expectations, the Tribunal espoused the general principle of good faith in international customary law that a state cannot induce an investor to make an investment, generate legitimate expectations and then later ignore commitments that generated those expectations. (¶ 486) The Tribunal opined that the legitimate expectations on the part of the investor must: (a) be analyzed using an objective standard, (based on the circumstances) and not the mere subjective belief held by an investor; (b) be reviewed according to the relevant circumstances, which were those prevailing at the time the investment was made; and (c) have been reasonable. (¶¶ 494-495.)

In addition, in determining whether legitimate expectations may have been created by the regulatory framework existing at the time when the investment was made, the Tribunal made the following observations:

- (a) A State is entitled to maintain a reasonable degree of regulatory flexibility to respond to changing circumstances and the public interest;⁸ (¶ 500.)
- (b) The fair and equitable treatment protection standard does not contemplate that the law existing at the time the investment is made will be frozen or will never change; and
- (c) An investor cannot have a legitimate expectation in the absence of a specific commitment on the part of the State made specifically to the investor(s) that existing regulations are immutable and will not be modified in order to adapt to market needs and the public interest. (¶¶ 499, 510.)

In applying the above to the present case, the Tribunal found that, in the circumstances, Spain had not infringed Claimants' legitimate expectations, due to the fact that no specific commitments had been given to Claimants. (¶ 490) The Tribunal was of the view that neither the pre-2010 Regulations nor the literature distributed by the Spanish government to encourage investment could be seen as specific commitments. (¶¶ 492, 496-497.) Further, the Tribunal found that although regulations may have limited reach, in that they might be directed to a certain portion of the population, this alone is not sufficient to elevate them to the status of a State's specific commitment. (¶ 493.) An example of a specific commitment to Claimants may have been in the form of a stabilization clause in the regulations or a declaration for the benefit of the investors that the regulatory framework would not be modified. (¶ 490.)

Finally, the Tribunal also opined that in order to determine whether there had been a breach of the fair and equitable standard of treatment in relation to modifying regulations that had been in existence at the time of the creation of the investment, an investor had to demonstrate that the regulations were made irrationally, contrary to public interest or that they were disproportionately applied. (¶ 514.) The Tribunal found that although the 2010 Regulations could prejudice the interests of the electricity generators, they were based on objective criteria and could not be considered irrational or arbitrary. (¶ 534.) In addition, as the main functions of the 2010 Regulations were to try to limit the tariff deficit, control the rising cost of electricity to the Spanish consumer and implement safety

⁸ Citing *Electrabel v. Hungary*, *CMS v. Argentina* and *El Paso v. Argentina*.

measures in relation to the voltage in the system, it could not be said that the 2010 Regulations were not applied in the public interest. (¶¶ 517, 535.)

As a result, the Tribunal found that the Claimants had not demonstrated a breach of Spain's obligation to accord fair and equitable treatment.

4. *Dissenting Opinion of Arbitrator Tawil (Claimants' Appointee)*

Mr. Tawil concurred with the majority on the issue of the Tribunal's jurisdiction. (¶ 1.) However, in relation to the substantive matters, he expressed both concurrent and divergent views. First, he shared the view of the majority that Spain had not indirectly expropriated the Claimants' investment, and agreed with the Tribunal's application of what he considered to be the correct standard of "indirect expropriation", to the extent that it is characterized by the existence of substantial interference with property rights. (¶ 2.)

However, Mr. Tawil disagreed with his colleagues on the issue of the Claimant's legitimate expectations, integrated into the standard of fair and equitable treatment in Article 10(1) of the ECT. (¶ 3.) Whilst he shared the majority's position that the finding of a violation of an investor's legitimate expectations should be based on an objective standard (and not the subjective view of the investor at the time the investment is made), he believed that this must be done on an analysis of the facts on a case by case basis. Specifically, he opined that a finding that legitimate expectations had been created was not limited to situations where there was a specific commitment, whether of contractual nature or based in declarations or specific conditions granted by the host State. (¶ 4-5.)

In Mr. Tawil's view, legitimate expectations could also be derived from a host state's legal regime existing at the time the investment is made. (¶ 5.) He noted that when an investor fulfills all the current regulatory requirements in order to obtain a specific and determinable benefit, a host State subsequent disregard of the investment violates his legitimate expectations. (¶ 12.)

He found that Spain's special regulatory regime (RD 661/2007 and 1578/2008) were specifically designed to foster a strong incentive to invest (so that the state's objective in promoting the industry could be fulfilled), and was directed to a precise group of investors with the means to invest, on the basis that the investor could benefit from the regime for a definite period of time. (¶ 7-8.) He further noted that the existence of these elements, namely, (i) rules created to foster investment in renewable energy, directed at a specific number of possible investors, and (ii) a brief time period in which the benefit was to be obtained, was sufficient to show that legitimate expectations on the part of the Claimants. (¶ 9.) He found that once the Claimants made the investment and fulfilled all

of the requirements to obtain the benefits, then it did not seem legally acceptable to recognize the host State's prerogative to modify or eliminate the benefit without any legal consequences. (¶ 9.) Mr. Tawil disagreed with the Tribunal that this was incompatible with a State's right to modify its laws, as a State never loses that right. However, if, in the process of exercising that right, the State infringes legitimate expectations, he was of the view that it should provide adequate compensation. (¶ 11.)

Mr. Tawil declined to make any statement on damages in light of the award of the majority. (¶ 13.)