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Gómez-Acebo & Pombo

In the determination of proceedings instituted against Decree 413/2014, the Spanish Supreme Court refuses to apply the award rendered by the International Centre for Settlement of Investment Disputes (ICSID)

Blanca Lozano Cutanda
Professor of Administrative Law
Academic Counsel, GA_P

Luis Gil Bueno
Partner, Administrative
and Regulatory Law, GA_P

By not upholding actions brought against Decree 413/2014 and Order IET/1045/2014, three judgments of the Supreme Court of June and July 2017 have denied application of the 4 May 2017 ICSID Award against Spain for violation of the Energy Charter Treaty (ECT).

In these three judgments, the Judicial Review Division of the Supreme Court has not upheld the direct actions brought by several commercial companies against certain provisions of (i) Royal Decree 413/2014, of 6 June, regulating the production of electricity from renewable energy sources, cogeneration and waste, and (ii) Order IET/1045/2014, of 16 June, approving the remuneration parameters for standard facilities (Judgment of 21 June 2017 – Rec. 676/2014 – and two Judgments of 7 July 2017 – Rec. 718/2014 and 726/2014, respectively). The three judgments have dissenting opinions (of Justice Espín Templado and Justice Perelló Domenech in the former, and of the latter in the two others) that take the view that the contested instruments infringe the principles of legal certainty and legitimate expectations.

The judgments do not uphold the actions on the grounds that, as previously stated in other judgments and contrary to the applicants' contention, there is no breach of legislative hierarchy since it has not been proved that the contested instruments infringe governing legislation with the force and effect of acts of parliament (Royal Decree-Act 9/2013 and the Electricity Sector Act 24/2013) with regard to the calculation of "reasonable profitability" throughout the facilities' entire lifecycle. Following its reasoning in previous judgments, the Supreme Court moreover denies that the aforementioned

instruments are contrary to the principle of equality under art. 14 of the Spanish Constitution ("CE"), the principle of legitimate expectations, or the principle of proportionality, or that they infringe the freedom of enterprise guaranteed by art. 34 CE.

The interesting point about these judgments is that the applicants laid before the court, in reliance on art. 271(2) of the Civil Law Procedure Act ("LEC"), the Award rendered by the ICSID on 4 May 2017, in arbitration proceedings between EISER INFRASTRUCTURE LIMITED AND ENERGIA SOLAR LUXEMBOURG S.À R.I., which concluded, as is well known, that as a result of the regulatory changes introduced in the renewable energy sector, Spain has failed to comply with the undertaking assumed in the Energy Charter to guarantee "stable, favourable and transparent conditions" for investors from other countries to make investments in its territory, which obliges the Spanish State to provide compensation to the claimants in the amount of 128 million for the investment made by them in three solar thermal plants.

The Judgments, although they do not refuse to examine these documents despite the fact that the actions did not invoke the violation of the Energy Charter, reject their application to the cases under review because, in addition to noting "that said award is inconsistent with other arbitral awards", they consider that it cannot be made enforceable *erga omnes*, since this would remove the Court from "its duty to submit solely to the rule of law" and would mean, in contravention to the provisions of art. 5 of the Judiciary Act, non-application of the rulings of the Constitutional Court that have confirmed the constitutionality of the remuneration system for renewable energy sources laid down in Royal Decree-Act 9/2013, which covers the regulatory implementation in question.

The first argument, relating to the existence of conflicting rulings, would be undermined if the first ICSID award requires confirmation by the decisions made in the more than 30 arbitration proceedings still pending. On the other hand, it is not in these pronouncements on the nullity of the rules governing the system of remuneration for renewable energy, but in the State liability claims where the legal doctrine of awards should be taken into account for the purposes of elucidating the existence of liability.

This is so because the recognition of State liability does not necessarily require that the harm, in order to be unlawful, is caused by rules that have been annulled by the Constitutional Court or the Court of Justice of the European Union. Although State liability in these cases is even more restricted, there are pronouncements of the Constitutional Court and the Supreme Court that recognise the right to compensation for any damage or loss caused by laws that are deemed to be materially "expropriatory", insofar as they cause an "excessive and unnecessary sacrifice of private persons' property rights" (STC 227/1998), or else by rules that, without being expropriatory, cause damage or loss which entails a singular sacrifice of rights or legitimate interests which the claimant is not deemed to be under an obligation to bear in accordance with various criteria, such as the principle of good faith in relations between the public administration and private persons, the principle of legal certainty under art. 9(3) CE and the adequacy of consideration, and the

principle of legitimate expectations expressly recognised in art. 3(1)(e) of the Public Sector (Legal Regime) Act (see, for instance, the Judgments of the Supreme Court of 6 November 2000 – Rec. 5995/1994 – and of 30 June 2001 – Rec. 8016/1995, which recognise liability for legislative changes to planning, or the Judgment of the Supreme Court of 14 June 2010 in proceedings nos. 5439/2008, 5153/2008 and 5156/2008 as regards unforeseeable regulatory amendments).