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International Arbitration Case Law
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Award Name and Date: Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain (SCC Arbitration (2015/063) - Final Arbitral Award - 15 February 2018

Case Report by: Eleni Bakalarou**, Editor Ignacio Torterola***

Summary: Claimant brought an action for relief against the Kingdom of Spain pursuant to the Energy Charter Treaty (hereinafter referred to as "*ECT*") alleging Spain did not honour its undertakings for offering and guaranteeing certain conditions to investors, by implementing a series of energy reforms affecting the renewables sector. Following preliminary objections, the Tribunal decided to have a phase of the proceedings dedicated to determining whether Respondent has breached its obligations under the ECT.

Main Issues: Fair and equitable treatment - Minimum standard of treatment, including denial of justice claims.

Tribunal: Mr. Johan Sidklev (Chairperson), Professor Antonio Crivellaro (Co-Arbitrator) and Judge Juez Bernardo Sepúlveda-Amor (Co-Arbitrator)

Claimant's Counsel: Mr. Fernando Mantilla-Serrano, Mr. Antonio Morales, Mr. John Adam, Ms Rosa Espin, Ms Aija Lejniece, Ms Nora Fredstie (Latham & Watkins LLP)

Respondent's Counsel: Mr. Diego Santacruz Descartin, Fco. Javier Torres Gella, Ms Monica Moraleda Saceda, Ms Elena Oñoro Sainz, Ms Amaia Rivas Kortazar, Mr. Antolin Fernandez Antuña, Mr. Alvaro Navas Lopez and Ms Ana Maria Rodriguez Esquivas (Abogacía General del Estado-Dirección del Servicio Jurídico del Estado - Government Attorney's Office)

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Digest:

1. Relevant Facts

Novenergia is a *Société d'investissement en capital à risque* (SICAR) ("*Novenergia*" or "*Claimant*") incorporated in the Grand Duchy of Luxembourg (¶ 1). Respondent is the Kingdom of Spain (hereinafter together with Claimant referred to as the "*Parties*") (¶ 7).

Claimant had established an indirect investment in eight photovoltaic ("*PV*") plants ("*PV Plants*") in Spain, through Novenergia II Energy & Environment España, S.L., a locally-incorporated company, wholly and directly owned by Claimant. The underlying dispute arose out of a series of energy reforms undertaken by the Government affecting the renewables sector, despite reassuring its investors for the stability of the former favourable regime ("*Special Regime*") (¶¶ 153-155).

More specifically, Law 54/1997 of 27 November, on the Electric Sector ("*Law 54/1997*") was focused on liberalising the energy market in Spain (¶¶ 78, 79). Royal Decree 661/2007 of 25 May 2007 ("*RD 661/2007*") was enacted so as to establish a legal and economic framework for the production of electric energy (¶¶ 95-103).

Claimant established Novenergia Spain to hold the investment in the PV Plants on 3 July 2007 (¶ 164). The construction of Claimant's seven PV plants had ended by November 2008.

Under the Renewable Energy Plan 2005-2010 ("*REP 2005-2010*"), further financing requirements were imposed for electric energy producers. Additionally, in 2012, Respondent enacted a new tax on the production of electric energy within the Spanish territory, consisting of 7% of taxable income (the "*Tax*"), applicable by default to all producers (¶¶ 127-130). In 2013, the Royal Decree-Law 9/2013 ("*RDL 9/2013*") repealed the Special Regime and substituted it with a new "*legal and economic regime*", consisting of more and stricter criteria (¶¶ 134-143).

2. Procedural History

On 8 May 2015, Claimant submitted its Request for Arbitration (¶ 9). On 1 June 2015, Respondent submitted its Answer to the Request for Arbitration (¶ 13). On 7 August 2015, the SCC wrote to the tribunal (the "*Tribunal*") stating that the case was at last referred to the Tribunal (¶ 22). On 24 September 2015, the Tribunal issued Procedural Order No. 1, stipulating *inter alia* that the seat of the arbitration is Stockholm (¶ 25). At several instances, Claimant raised concerns about Respondent's belated and incomplete production of the requested documents (¶ 38). On 12 June until 16 June 2017, a hearing on jurisdiction and merits (the "*Hearing*") took place in Stockholm (¶ 55). Being satisfied that the Parties have had a reasonable opportunity to present their cases, the Tribunal on 19 January 2018 declared the proceedings closed (¶ 69). On 5 February 2018, Respondent requested that the Tribunal reopen the case; however, the Tribunal rejected Respondent's request (¶ 71).

3. Jurisdiction

3.1 Does the Tribunal Have Jurisdiction Over Intra-EU Disputes (Preliminary Objection A)?

3.1.1 Respondent's position

Respondent claims that the Tribunal lacks jurisdiction to hear the intra-EU dispute that is the subject of this arbitration, given that the provisions of Article 26(1) of the ECT which state that to be able to resort to arbitration, the dispute must be between a Contracting Party and investors from a different Contracting Party, are not met (¶¶ 404,405).

Respondent further suggests that EU law is applied to intra-community relations with preference to or prevailing over any other law, displacing any other domestic or international provision, as established by the CJEU in the Costa v. ENEL case (¶¶ 408-410). The principle of primacy of EU law in intra-EU relations has an explicit recognition under Article 25 of the ECT, as well (¶ 412).

Additionally, it has been noted by the European Commission that "*the ECT [...] does not apply in an intra-EU situation in any event*". During negotiations "*the Union and its Member States only intend to create international obligations vis-à-vis third countries. [...] Union law is part of the applicable law, the principle of legitimate expectation under the fair and equitable treatment provision has to be interpreted in line with the content of that principle under Union law*". Moreover, "*the Arbitral Tribunals are not competent to authorize the granting of State aid. That is an exclusive competence of the Commission. If they were to award remuneration, they would violate Article 108(3) TFEU, and any such award would not be enforceable, as that provision is part of the public order*" [*Decision EC(2016) 7827 final of 28 November 2016, Czech Republic*] (¶ 423).

3.1.2 Claimant's position

Based on an interpretation of Article 26(1) ECT in accordance with the Vienna Convention on the Law of Treaties ("*VCLT*"), Article 26(1) does not contain any requirements other than that the investor be a national of an ECT Contracting State other than the host State (¶ 428). The ECT does not preclude EU Member States from not applying the ECT *inter se*. Thus, a disconnection clause is not included in the ECT [*Charanne v. The Kingdom of Spain; RREEF v. The Kingdom of Spain; Isolux v. The Kingdom of Spain; Eiser Infrastructure v. The Kingdom of Spain*] (¶ 429).

Regarding the Tribunal's jurisdiction, it is determined based on the ECT, not EU law (¶ 430). Claimant did not submit any claims by virtue of EU law. This dispute arose by the Kingdom of Spain's abolition of the Special Regime in violation of its international law obligations (¶ 432). Moreover, as underlined by the Eiser Infrastructure v. The Kingdom of Spain tribunal: "*The Tribunal's jurisdiction is derived from the express terms of the ECT, a binding treaty under international law. The Tribunal is not an institution of the European legal order*" (¶ 435). Similarly, the Electrabel v. Hungary tribunal held that international investment treaty tribunals are "*required to apply the ECT and 'applicable rules and principles of international law*" (¶ 436). Besides, it has been held that the ECT and EU law do not regulate the same subject matter [*Electrabel S.A. v. Hungary; European American Investment Bank AG v. The Slovak Republic*] (¶¶ 438, 439). At the same time, there is no incompatibility between the dispute resolution mechanism in Article 26 ECT and EU law [*Charanne v. The Kingdom of*

Spain], and Article 344 TFEU is not applicable to ECT disputes, as it refers to disputes between EU Member States themselves, not disputes between EU Member States and private parties (¶¶ 440, 441).

Even if an incompatibility existed, the ECT would prevail, since it contains a provision that determines the "*hierarchy*" between the ECT and other international agreements should a conflict arise (¶ 444). In this context, investment treaty tribunals have consistently affirmed that pursuant to Article 16 ECT, the ECT prevails over EU law, as its protections, especially the right to arbitration, are more favourable to investors [*RREEF Infrastructure v. The Kingdom of Spain; Eiser Infrastructure v. The Kingdom of Spain; Plama Consortium Limited v. Republic of Bulgaria; Achmea B.V. v. Slovak Republic; Eastern Sugar v. The Czech Republic*] (¶ 445).

Concerning the "*primacy*" of EU principle claim, the RREEF v. The Kingdom of Spain tribunal found that "*[S]hould it ever be determined that there existed an inconsistency between the ECT and EU law [...], the unqualified obligation in public international law of any arbitration tribunal constituted under the ECT would be to apply the former*" (¶ 446). Finally, an analysis based on Articles 59 and 30 of the VCLT would lead to the same result [*Eastern Sugar v. The Czech Republic; Achmea B.V. v. Slovak Republic; WNC Factoring Ltd v. Czech Republic; Anglia Auto Accessories Limited v. Czech Republic*] (¶ 447).

3.1.3 The Tribunal's reasons

Respondent contends that the Tribunal should declare that it lacks jurisdiction to hear this intra-EU dispute. More specifically, Respondent argues that Claimant is not from an "*Area*" of "*another Contracting Party*", as set out in Article 26(1) of the ECT, since both Luxembourg and Respondent are Member States of the EU (¶ 449). Pursuant to the plain reading of Article 26 of the ECT, the parties must be of different nationalities (¶ 451). Even though the EU itself is a Contracting Party of the ECT, this does not eliminate the EU Member States' individual standing as respondents under the ECT (¶ 453).

Regarding the disconnection clause, which would bar EU Member States from applying the ECT *inter se*, it is evident from the text of the ECT that it does not contain an explicit disconnection clause. Furthermore, in accordance with the VCLT, the ECT should be interpreted in good faith according to the ordinary meaning of the terms of the treaty in their context and taking into account the object and purpose of the treaty (¶ 454).

The Tribunal has to further take into account the fact that Claimant has not submitted any of its claims based on EU law, but rather based on the ECT (¶ 460). This Tribunal's jurisdiction is based exclusively on the explicit terms of the ECT, and, thus, it is not constituted on the basis of the European legal order (¶ 461). In any event, if an incompatibility between the ECT and EU law exists, the Tribunal does not need to determine the alleged effects, since there is no such clash between the two legal regimes [*Charanne v. The Kingdom of Spain*] (¶ 462). The ECT tribunals in other previous similar cases against Respondent, *i.e.* Charanne, Isolux, RREEF, and Eiser, all followed the same approach and dismissed the jurisdictional objection of Respondent on the same grounds (¶ 464). Thus, the proceedings concern certain alleged breaches of the ECT by the Kingdom of Spain, and particularly the breach of the duty to comply with the fair and equitable treatment ("*FET*") to foreign investors in the meaning of the ECT and public international law, a legal notion which does not even exist, as such, in the EU legal order (¶ 465).

3.2 Does the Taxation Carve-out in Article 21 of the ECT Apply to Law 15/2012 (Preliminary Objection B)?

3.2.1 Respondent's position

Respondent asserts the lack of jurisdiction of the Tribunal to hear the claim on an alleged breach by the Kingdom of Spain of section (1) of Article 10 of the ECT through the introduction of the Tax in Law 15/2012. Pursuant to Article 21 of the ECT on taxation, taxation measures are excluded from the scope of application of the ECT (taxation carve-out) with certain exceptions (claw-backs) stated in the said Article 21. Section (1) of Article 10 of the ECT is not found among those exceptions. The fundamental question is thus to determine whether the provisions relating to the Tax of Law 15/2012 are a taxation measure for the purposes of the ECT (¶¶ 470-472).

Pursuant to section (7)(a)(i) of Article 21 of the ECT provides that the term "*taxation measure*" includes any provisions relating to taxes of domestic law of the Contracting Party (¶ 474). Given that Law 15/2012 was passed in exercise of the legislative authority and primary power to impose taxes through legislation that the Spanish Constitution grants the Spanish State, it is part of the domestic law of the Kingdom of Spain. In any case, there could be no doubt regarding what is tax, both from the perspective of Spanish law and from the perspective of international law (¶¶ 475-476). In order to further determine that this case is dealing with taxation measures for the purposes of the ECT, the following should be taken into consideration: "*The question whether something is a tax measure is primarily a question of its legal operation […] a measure is a taxation measure if it is part of the regime for the imposition of a tax.*" [*EnCana v. Ecuador*] (¶¶ 481-482).

Claimant questions the good faith of the measure because renewable producers have not been granted a different treatment in the Tax through for example tax exemptions, reductions or deductions (¶ 489). The Tribunal in Isolux case had abstained from ruling claims similar to Claimant's (¶ 490). Moreover, the Spanish Constitution grants the State the power to establish taxes. Therefore, it cannot be argued in any way that the Tax is not a *bona fide* taxation measure (¶ 493).

In general, the repercussion of a tax can be of two types: legal and economic. Firstly, there is no discrimination against renewable producers from the perspective of legal repercussion, as Law 15/2012 grants the same treatment to all taxpayers (¶¶ 497-501). Secondly, there is no discrimination against renewable producers from the perspective of economic repercussion either, since the Tax is one of the costs that are remunerated to the renewable producers; thus, the economic effect of the Tax on these renewable producers is neutralised (¶¶ 503-505).

3.2.2 Claimant's position

Article 21 ECT includes a requirement that a tax be adopted *bona fide* in order to fall within the taxation measures carve-out (¶ 509). However, the mere labelling of a measure as a "*tax*" does not automatically fulfil the requirements of a tax carve-out in an investment protection agreement, and that in order to do so, a tax must be a *bona fide* taxation measure [*RosinvestCo v. Russian Federation; Renta 4 v. Russian Federation; Yukos v. Russian Federation*] (¶ 510). A tax is adopted *bona fide* if the state's intention was only to raise revenues, in accordance with the stated purpose of that tax; any motivation other than the public purpose of collecting taxes has to be considered *mala fide* (¶ 512).

Regardless of Respondent's promises through Law 15/2012, its actual aim was to reduce the income Respondent had guaranteed to PV investors (¶ 513). At the same time, Law 15/2012 did not take into consideration the higher cost of RE production compared to traditional energy, and likewise did not consider the fact that RE producers could not pass on the tax burden to final consumers. Finally, Respondent intended to adopt a tax that disadvantaged RE producers, even though the measures for guaranteeing the stability of the electricity system proposed in the 2012 Report did not include the taxation of RE producers (¶ 514).

3.2.3 The Tribunal's reasons

There is no doubt that the provisions of Law 15/2012 are provisions relating to a tax of the domestic law of a Contracting Party as set out by Article 21, section (7)(a)(i) of the ECT (¶ 519). Thus, it has to be determined whether Law 15/2012 was enacted in good faith. The starting point, or the assumption, should always be that the taxation measure was in fact adopted in good faith, which leads to Claimant bearing the burden of proving the opposite to the Tribunal (¶¶ 520-521). In fact, "*[s]tates have a wide latitude in imposing and enforcing taxation law, even if resulting in substantial deprivation*", as founded in *Yukos* and *RosInvestCo* cases (¶ 522). In the case at hand, the Tribunal has reviewed the evidence put forth by Claimant for the purposes of establishing that Law 15/2012 was a *mala fide* taxation but is not convinced. Besides, there should be extreme actions that according to other arbitral tribunals constitute viable *mala fide* grounds [*Yukos v. Russian Federation*], and this is not the case (¶¶ 523-524). Given the aforementioned, the Tribunal does not have jurisdiction to rule on the claims presented by Claimant regarding the alleged breach by Respondent of its obligations under Article 10(1) of the ECT by the enactment of Law 15/2012 (¶ 525).

4. Merits

4.1 When Was Claimant's Investment Made?

4.1.1 Claimant's position

Novenergia invested on 13 September 2007, relying on the Kingdom of Spain's explicit offer in RD 661/2007 of a fixed long-term FIT, on the condition that Novenergia registered its PV Plants with the RAIPRE by September 2008 (¶154).

4.1.2 Respondent's position

Claimant continued carrying out investment activities in Spain after the acquisition of the shares in Novenergia Spain. Claimant assumed obligations and granted express warranties to a financial entity when it signed a bridge loan with BPI on 19 March 2008, and, during June and July 2008, Claimant assumed the role of guarantor in other project finance *vis-à-vis* other lending banks, undertaking new obligations. Besides, the construction of all the PV Plants did not end until November 2008, while Claimant itself had to lend money to the company Novenergia Spain (¶ 204).

4.1.3 The Tribunal's reasons

The date of Claimant's investment is important in this case, as it lays the foundation in terms of timing for the assessment of Claimant's legitimate expectations (¶ 531). The legitimate expectations of an investor have generally been considered to be grounded in the legal order of the host State, as it stands at the time the investor acquires or makes the investment [*National Grid v. Argentina; SD Myers v. Canada*] (¶¶ 532-533). Thus, Claimant's legitimate expectations shall be assessed at the time it made its investment in Respondent's territory (¶ 535). The more difficult issue is to determine in an actual case when such investment was in fact made, since in larger projects the investment phase transcends through various stages (¶ 538).

The Tribunal finds that Claimant made its investment no later than 13 September 2007, since as from that date Claimant had irreversibly committed to investing in the Spanish PV sector (¶ 539). The Tribunal accepts that any agreements that post-date the investment were re-financing agreements of an earlier concluded bridge agreement that related to all the PV Plants (¶ 540).

4.2 Has Respondent Failed to Accord at All Times to Claimant and its Investment Fair and Equitable Treatment?

4.2.1 Claimant's position

The FET standard under the ECT is a broad obligation that encompasses good faith, due process, non-discrimination, proportionality, and the obligation to create and maintain stable and transparent conditions for investors and their investments, and is informed by the stability and transparency standard in the first sentence of Article 10(1), protecting the investor's legitimate expectations. The latter arise naturally from undertakings and assurances made by, or on behalf of, the state. These undertakings or assurances can be explicit or implicit [*Total S.A. v. Argentina*] (¶¶ 545-546), and take the form of conduct or statements by the host State. Such conduct or statements can be laws and regulations, as well (¶ 547). An investor can have a legitimate expectation that a regulatory framework will be stable (¶ 548). It had been held that "*the obligation to provide fair and equitable treatment comprises [...] an obligation to act transparently*" [*Electrabel v. Hungary*]. If the state does not, it will have failed to observe its obligation under Article 10(1) ECT (¶ 549).

It is indisputable that Novenergia's expectations were legitimate and reasonable (¶ 552), as they were formed based on Respondent's conduct (¶ 553) and they arose out of a stable legal framework that was tailored to attract PV investments (¶ 554). Besides, it is widely accepted that the host State must announce officially its intent to pursue a certain conduct in the future, on which, in turn, the investor relied in making investments or incurring costs [*Total S.A. v. Argentina*] (¶ 555). Respondent actively promoted the perception of its legal framework as stable, transparent, and welcoming to RE investors (¶¶ 556). However, there were no warnings that could have allowed a reasonable investor to foresee that the Special Regime would be overhauled (¶ 557).

As held in the recent award in the Eiser Infrastructure v. The Kingdom of Spain arbitration, "*[t]he ECT's stated purpose thus emphasizes the treaty's role in providing a legal framework promoting long-term cooperation*" (¶ 562), while the Tribunal further underlined that a host State is under an obligation to refrain from fundamentally changing the regulatory regime. The Kingdom of Spain breached this stability and transparency standard by failing to create and maintain stable conditions for Novenergia's investment (¶ 565).

4.2.2 Respondent's position

From Article 10(1) it can be inferred that the duty to provide fair and equitable treatment is included within the broader obligation to create stable, equitable, favourable and transparent conditions [*Plama case; Charenne v. Kingdom of Spain; Isolux case*]. The obligation to create stable conditions is nothing more than an illustration of the obligation to respect the legitimate expectations of the investor. In fact, Claimant does not offer any convincing jurisprudence or case law to support its allegations and, as a result, the Arbitral Tribunal shall not examine the alleged violation on behalf of the Kingdom of Spain (¶¶ 570-571).

In any case, Claimant could not have reasonable and objective expectations to: (i) the maintenance or improvement of the RD 661/2007 regime by means of a grandfathering clause during 2 or 3 decades, nor (ii) the maintenance of a fixed FIT indefinitely during all the PV Plants' lifetime. Claimant has the burden of proving such expectations, as set out by the majority of awards [*Charanne and Isolux cases*], but has failed in this respect (¶¶ 576-578). Besides, an arbitral tribunal cannot protect unconditionally the subjective expectations of ill-informed investors, especially when there is no evidence that supports these subjective expectations (¶ 580). As such, the Tribunal should assess the lack of proof by Claimant (¶ 581).

At the same time, Claimant's expectations are not reasonable (¶ 592), since no diligently informed investor could have expected a perpetually fixed FIT. Nor could it expect that these conditions would be maintained indefinitely or improved for it at any rate, as no commitment exists in this regard (¶ 594). In any case, the measures adopted in 2010, 2013 and 2014 are coherent with the previous acts of the government since 2006 as to the need to intervene in the event of market distortions and in cases of over-remuneration. The announcements of a structural reform were made more than one year prior to the adoption of the measures that were taken in 2013 and 2014 (¶ 629). Besides, Respondent indicated that it would take action in situations of overcompensation or unsustainability of the SES and from 2008 it has alerted the need for introducing modifications to eliminate the tariff deficit (¶ 630). In this context, Claimant has not submitted one single regulatory due diligence report that would have clarified all these important matters (¶ 595). Therefore, the Tribunal cannot accept the expectations claimed by Claimant as reasonable (¶ 602).

4.2.3 The Tribunal's reasons

The first issue that the Tribunal has to examine is whether the stability and transparency obligation in the ECT is a standalone obligation and should be assessed separately or whether it is, as Respondent maintains, included in the FET standard in Article 10(1) of the ECT (¶ 642). The Tribunal agrees with the arbitral tribunals' findings in *Isolux*, *Plama* and *Eiser* that the stability and transparency obligation is simply an illustration of the obligation to respect the investor's legitimate expectations through the FET standard, rather than a separate or independent obligation. Accordingly, the Tribunal will not assess the stability and transparency obligation separately, but as part of the FET standard (¶¶ 644-646). The Tribunal considers the interpretation of the FET standard as outlined by the *Micula* tribunal to be of particular relevance in the case at hand: "*Although the question of whether these legitimate expectations were breached is a factual one, an overwhelming majority of cases supports the contention that, where the investor has acquired rights, or where the state has acted in such a way so as to generate a legitimate expectation in the investor and that investor has relied on that expectation to make its investment, action by the state that* *reverses or destroys those legitimate expectations will be in breach of the fair and equitable treatment standard and thus give rise to compensation.*" (¶ 649).

Additionally, the Tribunal agrees with Claimant's statements that an expectation that the regulatory framework will be stable can arise from, or be strengthened by, state conduct or statements (¶ 651). Several arbitral tribunals have assessed what falls within the stability and transparency obligation and to what extent an investor can expect that a particular regulatory framework can remain stable [*Micula v. Romania; Eiser case*] (¶ 653).

The Tribunal agrees with Respondent that an assessment of Respondent's actions under the FET standard allows for a balancing exercise. In *Saluka*, the arbitral tribunal applied the balancing exercise: "*[T]he scope of the Treaty's protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors' subjective motivations and considerations. [...] No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged.*" (¶ 658).

The Tribunal has concluded above that in the present case the investment was made on 13 September 2007. This is the relevant time at which the reasonability and legitimacy of Claimant's measures must be assessed (¶ 662). The Tribunal agrees with Claimant that the modifications in the regulatory framework and assurances were indeed aimed at incentivising companies to invest heavily in the Spanish electricity sector. The commitment from the Kingdom of Spain could not have been clearer (¶ 667).

As regards statements in relation to "*economic sustainability*" and "*reasonable rate of return*" the Tribunal finds Respondent's arguments unconvincing, since these principles were still generally vague and insufficiently defined at the time of Claimant's investment (¶ 673). Respondent has also submitted that Claimant did not perform an adequate due diligence prior to making its investment. The Tribunal disagrees. RD 661/2007 was so adamantly clear that its understanding by common readers did not require a particularly sophisticated analysis (¶ 679).

The next issue for the Tribunal to determine is whether the legislation introduced by Respondent has, in fact, constituted a radical change that reaches the threshold of amounting to a violation of the FET standard pursuant to Article 10(1) of the ECT (¶ 682). The arbitral tribunal in *Charanne* found that RD 1565/2010 and RDL 14/2010 did not violate the FET standard (¶ 685).

Claimant could not have reasonably expected that there would be no changes at all to the regulatory regime that would lower the value of its investment. Moreover, throughout this arbitration, the Kingdom of Spain has repeatedly asserted that the changes to the Special Regime were motivated by the Kingdom of Spain's need to address the so-called tariff deficit. The Tribunal understands the Kingdom of Spain's motivations in this respect. Respondent further asserts that the arbitral tribunal in *Eiser* established a clear limit to any regulatory change, namely that it cannot be a radical change adopted "*in ways that deprive investors [...] of their investment's value*" (¶ 693). The Tribunal disagrees with this approach. In the Tribunal's view, the assessment of whether the FET standard has been breached is a balancing exercise, where the state's regulatory interests are weighed against the investors' legitimate expectations and reliance (¶ 694).

Given the foregoing, the Tribunal considers these challenged measures as radical and unexpected. The manner in which the Kingdom of Spain adopted the measures "*entirely transform[ed] and alter[ed] the legal and business environment under which the investment was decided and made*" [*CMS v. Argentina*] (¶ 695). Consequently, the Tribunal finds that the radical changes enacted by the Kingdom of Spain in 2013 and 2014 have definitely abolished the fixed long-term FIT and have done so retroactively. The Tribunal concludes that the said legislation amount to a breach by the Kingdom of Spain of its obligation to accord to the investor FET as set out in Article 10(1) of the ECT and entitles Claimant to compensation (¶ 697).

4.3 Claimant's Further Alleged Breaches of Article 10(1) of the ECT

Claimant has however advanced three further distinct breaches of Article 10(1) of the ECT as grounds for its claims in this arbitration: 1. Respondent's failure to ensure that Claimant's investment enjoys the most constant protection and security (Article 10(1) of the ECT); 2. Respondent's impairment by unreasonable or discriminatory measures Claimant's management, maintenance, use, enjoyment or disposal of its investment (Article 10(1) of the ECT); and 3. Respondent's failure to observe the obligations entered into with Claimant's investment (Article 10(1) of the ECT) (¶ 698).

4.3.1 Claimant's position

The host State assumes an obligation to actively create a framework that grants security. Not only did Respondent not create a stable and secure legal framework, it actively removed all legal certainty and foreseeability. The *National Grid v.B Argentina* tribunal found that the respondent had breached the protection and security standard because it had introduced changes in the regulatory framework that effectively dismantled it (¶ 703). The "*non-impairment standard*", arising out of Article 10(1) ECT, is twofold, it imposes an obligation on the host State to act in a reasonable and measured manner, and provides that the standard can be breached by either unreasonable or discriminatory measures (¶ 704). The Kingdom of Spain's measures did not relate to a rational public policy and were disproportionately burdensome on investors who had invested in the renewable energy sector under RD 661/2007 (¶ 705). Besides, the Kingdom of Spain's failure to maintain the guaranteed tariffs under RD 661/2007 for the lifetime of Claimant's investment is also tantamount to a breach of the umbrella clause in Article 10 ECT, which obliges the Kingdom of Spain to observe all obligations entered into with Claimant's investment ((¶ 706).

4.3.2 Respondent's position

Claimant submits supposedly alternative measures that could have been reasonable and concludes that the Kingdom of Spain is the Party upon which it will be incumbent to show that the measures adopted are the most reasonable in relation to other possibilities. Claimant has the burden of proof for its claim (¶709).

With regard to the alleged adoption of abusive or disproportionate measures by the Kingdom of Spain, the measures challenged are consistent with the different tests applied in arbitration case law to evaluate whether this standard has or has not been infringed. The application of these tests to the challenged measures reveals that these: (1) are not discriminatory; (2) respect the FET standard laid down in the ECT; and (3) fulfil the minimum FET standard in international law by respecting the economic equilibrium of the investment (¶ 710).

4.3.3 The Tribunal's reasons

Out of the three breaches listed by Claimant, the first two are a further illustration of the FET standard. Having already decided that the Kingdom of Spain has breached this standard, the Tribunal does not need to expand further (¶ 714).

Article 10(1) of the ECT does indeed provide for a duty of each Contracting Party to "*observe any obligations it has entered into with an Investor*", a provision that recalls the "*umbrella clause*" contained in several investment treaties. However, in order to apply the umbrella clauses, it is required that the host State either concluded with the investor a specific contract or made to the investor a specific personal promise. On the contrary, in the present case Claimant made no contract with the Kingdom of Spain and the rights that Claimant invoke are founded in general regulatory acts enacted by the Kingdom of Spain for a generality of investors in the field of renewable energy (¶ 715).

4.4 Has Respondent Breached Article 13 of the ECT?

4.4.1 Claimant's position

Claimant's investment is protected under Article 13 of the ECT, and Respondent's unreasonable and disproportionate measures resulted in the expropriation of said investment. Furthermore, Respondent's invocation of the police powers doctrine as an excuse for said expropriation is irrelevant and should be dismissed (¶ 720).

Article 13(1) of the ECT explicitly protects investments against illegal expropriation, whether direct or indirect. First, Novenergia's investment falls within the meaning of the term "*Investment*" as defined in Article 1(6) of the ECT, and it is therefore protected by Article 13 of the ECT. Claimant's investment consists of its majority shareholding in Novenergia Spain and the returns associated with its controlling interest. Pursuant to Article 1(6) of the ECT "*Returns*" are included in the definition of "*Investment*" (¶ 721). Second, the claim for expropriation arises out of the substantial loss of value of Claimant's investment due to the measures adopted by Respondent in violation of the ECT, through abolishing the Special Regime, expropriating Claimant's rights, and thus, breaching Article 13 of the ECT (¶¶ 723-724).

It is uncontroversial in international arbitration that a State measure resulting in a "*substantial deprivation*" of an investment constitutes an expropriation [*Electrabel v. Hungary; AES Summit v. Hungary; Mamidoil v. Albania*]. The loss incurred by Claimant's investment is both substantial and permanent, and results from the challenged measures that interfered with Claimant's right to utilise its PV Plants in accordance with the guarantees set out in the Special Regime (¶ 727). Besides, Respondent has not complied with the legality requirements set out by Article 13 of the ECT, which provides that any expropriation must be carried out "*in the public interest*". The choice to permanently burden the renewable energies producers was by no means Respondent's only option to address the tariff deficit and was contrary to good regulatory practice (¶ 729). Additionally, Respondent's measures were not "*accompanied by the payment of prompt, adequate and effective compensation*" within the meaning of Article 13 of the ECT (¶¶ 730-731).

At the same time, the police powers doctrine, invoked by Respondent, is not applicable to Article 13 of the ECT and, in any event, the challenged measures do not fulfil the requirements of the standard Respondent posits since the measures are demonstrably disproportionate and unreasonable. More specifically, the police powers doctrine is merely a general rule of international law allowing States to regulate as they wish unless a rule that specifically proscribes such action, such as Article 13(1) of the ECT, exists (¶ 734). In any case, even if the police powers doctrine was applicable in the ECT context, given that the said measures were not proportionate and alternatives were available, Respondent must be held liable for the breach of Article 13 of the ECT (¶¶ 735, 737).

4.4.2 Respondent's position

Respondent claims that the premises required in order to conclude the existence of a measure equivalent to an expropriation do not exist, since Article 13 of the ECT, Section 3 stipulates that "*[e]xpropriation shall include situations where a Contracting Party expropriates the assets of a company or enterprise in its Area in which an Investor of any other Contracting Party has an Investment, including through the ownership of shares.*" (¶¶ 740-741). Besides, it suggests that any investment susceptible to being expropriated must consist of a right or asset that is duly constituted, defined, formed and recognised under the laws of the host State, which grants protection under the corresponding investment treaty (¶ 742).

The measures adopted by the Kingdom of Spain did not constitute an indirect expropriation of the investment, since they had not represented the taking of control by Spain of the investment, nor had they prevented the investment from continuing, nor had they destroyed the value of the investment forever [*Charanne case*] (¶¶ 744-745). Claimant denies that they continued to receive substantial revenues despite the changes (¶ 746). The Tax, which applies with a tax rate of just 7%, is one of the costs that are repaid to RE producers, through the specific compensation that they receive, so it neutralises the effect of the Tax on those producers (¶ 754). Consequently, a claim for direct or indirect expropriation of the investment should be dismissed (¶ 758).

4.4.3 The Tribunal's reasons

The Tribunal held that none of the Spanish regulatory acts that were enacted to regulate PV Plants or RE in general had an expropriatory intent or effect, including the 2013 and 2014 regulatory acts that the Tribunal has deemed to amount to an infringement of the FET duty under Article 10(1) of the ECT (¶ 761). Claimant's assets that could be possibly expropriated were its industrial properties (plants and related facilities) and the shares of the companies involved in the investment that Claimant directly or indirectly owns and controls. However, Claimant is still the "*untouched*" owner of its plants and is still the holder (direct or indirect) of the companies' shares and relevant capital. Thus, the Tribunal sees no "*taking*" by the Kingdom of Spain, even less an illicit taking, and further dismisses the expropriation claim. In conclusion, the only compensation which Claimant is entitled to concerns the damages based on Respondent's violation of the FET obligation (¶¶ 762-763).

5. Damages

5.1 Claimant's Position

According to Claimant, the Kingdom of Spain must place Claimant in the situation in which it would have been had Respondent not breached its international obligations. In respect of expropriation, Claimant is entitled to the fair market value of its investment immediately before the expropriation occurred (¶ 767). The Tribunal must also add pre-award compounded interest to the above sums, from 15 September 2016 up until the date of the award (¶ 769). Further, should the Kingdom of Spain fail to pay the award, Claimant's harm will continue to aggregate; therefore, the Tribunal must add post-award interest (¶ 770). Lastly, the Tribunal should dismiss Respondent's disingenuous argument that Claimant has not suffered any harm and is better off under the Specific Regime (¶ 783).

5.2 Respondent's Position

Respondent submits that Claimant has no right to the requested relief (¶ 784). The Supreme Court has ruled that extrapolations into the future lack the necessary rigor and security and Claimant's calculations are mere speculation, not meeting the standard of proof demanded (¶ 786). Concerning the burden of proof, it must be recalled what was stated in the award in the case *Gemplus v. Mexico*: "*Burden of Proof: Under international law and the BITs, the Claimants bear the overall burden of proving the loss founding their claims for compensation. If that loss is found to be too uncertain or speculative or otherwise unproven, the Tribunal must reject these claims, even if liability is established against the Respondent.*" (¶ 788). The DCF methodology used by Claimant, in order to evaluate its losses, has been found inappropriate, given that it is excessively speculative, and "*[f]or this reason, valuations made through a DCF analysis must in any case be subjected to a "sanity check" against other valuation methodologies*" [*Rusoro v. Venezuela*] (¶ 789). Finally, Claimant's request for interest should be dismissed, since this lacks economic sense, as such interest seek to remunerate risks which Claimant has not incurred (¶ 802).

5.3 The Tribunal's Reasons

Since the ECT does not embody a provision which regulates the applicable compensation standard for a state's violation of the FET, the Tribunal finds it appropriate to apply general principles of customary international law to determine the relevant compensation standard (¶ 805). Pursuant to Article 31 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (the "*Draft Articles*"), the Responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act and injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State (¶ 806). In this context, the aggrieved investor shall through monetary compensation be placed in the same situation it would have been but for the breaches of the state's international law obligations. The compensation includes the loss already sustained as well as loss of profits [*CME v. Czech Republic; Siemens v. Argentina*] (¶ 808). Considering the aforementioned, Respondent is obliged to make full reparation to Claimant for the damages caused, wiping out all the consequences of Respondent's breach of the ECT, which includes as far as possible compensation for Claimant's lost profits (¶ 809).

Since the Tribunal has concluded that Respondent has not violated its obligations under Article 13 of the ECT, no further assessment of the damage relating to the investment's fair market value needs to be undertaken (¶ 810).

As far as the DCF-valuation is concerned, it is a methodology based on fundamental principles of economic and finance and has been broadly accepted by numerous arbitral tribunals as the only method which can accurately track value through time [*CMS v. Argentina*] (¶ 818). Furthermore, Respondent's reliance on the Spanish Supreme Court judgments on the subject are deemed irrelevant and of no assistance to the evaluation of damages in this case, since this Tribunal applies international law (¶ 819). In light of the above, the Tribunal does not consider the DCF-method ill-suited or speculative (¶ 820).

Besides, Respondent argues that the Specific Regime adequately remunerates Claimant. Respondent bases this contention on the fact that Claimant's standard investment costs are lower than the standard investment costs set by the Specific Regime, and, as a consequence, Claimant's rate of return on its investment must be higher than the standard rate of return for model PV Plants (¶¶ 821, 823). Since Claimant's plants have higher operating costs and lower production hours compared with a standard plant, Claimant's remuneration is lower than the standard remuneration (¶ 824).

The total loss suffered by Claimant as a consequence of Respondent's breach of Article 10(1) of the ECT, calculated as of 15 September 2016, amounts to EUR 61.3 million. However, as the Tribunal has dismissed Claimant's claims relating to Law 15/2012 for lack of jurisdiction, the damage corresponding to such measure needs to be deducted (¶ 838). Furthermore, since the Tribunal has concluded that it was only by Respondent's abolishment of the Special Regime and the introduction of the Specific Regime that Respondent "*crossed the line*" and breached its obligation to accord fair and equitable treatment, the losses suffered by any of the measures pre-dating the abolishment of the Special Regime on 12 July 2013 (by RDL 9/2013) also need to be deducted (¶ 839). In summary, the Tribunal concludes that, on the evidence presented to it, Claimant is entitled to an award of compensation in the amount of EUR 53.3 million (¶ 843).

The Tribunal has further concluded that Respondent has violated its obligations under Article 10(1) of the ECT. However, as noted above, this provision does not regulate the principles of compensation and, moreover, is silent with respect to the interest rate that should apply. By way of analogy, Article 13(1) (which defines the compensation payable in respect of expropriation) states that: "*[c]ompensation shall also include interest at a commercial rate established on a market basis from the date of the Expropriation until the date of payment*" (¶ 844). Claimant has requested pre-award compounded interest (from the evaluation date 15 September 2016 until the award), and post-award compounded interest (from the award until payment is made) at a rate of 7.03%, which according to Claimant equals the cost of equity (¶ 845). The Tribunal considers that a relevant interest rate for this purpose shall correspond to a commercial and risk-free yield interest rate in the Kingdom of Spain during a relevant time-period. The Tribunal finds that the 10-year Spanish yield bond best corresponds to these parameters. At the time of the award, the interest rate of this instrument is approximately 1.5% and shall be awarded on a compounded monthly basis (¶ 846).

6. Costs

Respondent has lost its primary jurisdictional objection and on the merits, and should therefore bear its own costs and refund Claimant's costs pursuant to Articles 43 and 44 of the SCC Rules (¶ 857). The Tribunal therefore orders the Kingdom of Spain to reimburse to Claimant EUR 2.6 million in total and finds it appropriate to apply the same interest rate, with respect to costs, i.e. 1.5%, compounded monthly (¶¶ 858, 859).