



School of International Arbitration

IACL
International Arbitration Case Law

**School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law**

*Academic Directors: Ignacio Torterola, Loukas Mistelis**

Award Name and Date: 9REN Holding S.à.r.l v. Kingdom of Spain (ICSID Case No. ARB/15/15) – Award – 31 May 2019

Case Report by: Iryna Ivanova**, Editor: Ignacio Torterola***

Summary: Claimant brought an action for relief against Spain pursuant to the Energy Charter Treaty (the “ECT”) alleging that Spain breached fair and equitable treatment, transparency and non-discrimination standards and expropriation protections in relation to the Claimant’s investments in photovoltaic power plants located in Spain. The Tribunal dealt with the questions of jurisdiction over the intra-EU disputes and revisited the definition of the “investor”. On the merits, the Tribunal decided to determine whether Respondent breached fair and equitable treatment under Article 10 of the ECT and whether Respondent expropriated the Claimant’s investments in the meaning of Article 13 of the ECT.

Main Issues: tribunal’s jurisdiction over intra-EU disputes under the ECT; the definition of “substantial business activities” and “investor” under the ECT; the possibility to get remedies for taxation under the ECT; basis for legitimate expectations; frustration of legitimate expectations; transparency duty; statutory obligations and expropriation in the context of the ECT.

Tribunal: The Honorable Ian Binnie (President), Mr. David R. Haigh (Arbitrator) and Mr. V.V. Veeder (Arbitrator)

Claimant's Counsel: Mr. Kenneth R. Fleuriet, Ms. Amy Roebuck Frey, Ms. Heloise Herve, Ms. Isabel San Martin, Mr. Reginald R. Smith, Mr. Kevin D. Mohr, Mr. Enrique Molina, Mr. Christopher Smith, Ms. Verónica Romaní Sancho, Mr. Gonzalo Ardila Bermejo, Mr. Luis Gil Bueno, Ms. Inés Vázquez García, Ms. Beatriz Fernández-Miranda de León, Ms. Cristina Matia Garay (King & Spalding LLP)

Respondent's Counsel: Mr. José Manuel Gutiérrez Delgado, Mr. Francisco Javier Torres Gella, Mr. Javier Castro López, Ms. Amaia Rivas Kortázar, Mr. Antolín Fernández Antuña, Ms. María José Ruíz Sánchez, Mr. Roberto Fernández Castilla, Ms. Patricia Froehlingsdorf Nicolás, Ms. Elena Oñoro Sainz, Ministry of Justice of the Government of Spain

* Directors can be reached by email at ignacio.torterola@internationalarbitrationcaselaw.com and loukas.mistelis@internationalarbitrationcaselaw.com

** Iryna Ivanova is an Associate at Avellum law firm, Kyiv, Ukraine. She holds Master’s degree in Law from National University “Kyiv-Mohyla Academy”, Ukraine, and is a LLM Candidate at the Paris Institute of

Political Science. IACL’s case reports do not offer personal views but strictly reflect the content of the decision. However, in case of doubts, the views set forth herein are the personal views of the author and do not reflect those of Avellum law firm or Sciences Po. Ms. Ivanova can be contacted at iryana.ivanova@sciencespo.fr.

*** Ignacio Torterola is co-Director of International Arbitration Case Law (IACL) and a partner in the International Arbitration and Litigation Practice at GST LLP.

Digest:

1. Relevant Facts

9REN Holding S.À.R.L. (the “Claimant”) is a renewable energy company with headquarters in Luxembourg (¶ 3). The underlying dispute relates to measures implemented by Respondent, the Kingdom of Spain (the “Respondent” or “Spain”), which modified, to the disadvantage of Claimant and other producers, the regulatory and economic regime applicable to renewable energy projects, and in particular, electricity produced by solar photovoltaic cells (the “PV”) (¶ 2).

To comply with EU goals on renewable energy, in 2007 Spain adopted Royal Decree (the “RD”) 661/2007, which guaranteed to potential investors premium rates for the lifetime of their renewable energy facilities (adjusted for inflation during the initial 25 years and thereafter at the rate of 80% of the premium tariff throughout the remaining life of the generating facilities). Further, in 2008 Spain adopted RD 1578/2008, which was less favourable but still included guarantee of irrevocable feed-in tariff benefits (the “FIT”) (¶ 8).

In 2008, Claimant invested €211,000,000 in Spanish renewable energy projects (¶ 127). However, in a series of regulatory measures enacted between 2010 and June 2014, the FIT scheme established by RD 661/2007 and RD 1578/2008 was dismantled and replaced by a new legislative and regulatory framework that required PV and other renewable facilities to sell electricity on the wholesale market. The revenues from such sales were supplemented by new “incentives”, to bridge the difference in cost of generating renewable energy over conventional sources but these “new incentives” were far less valuable than “guaranteed” under RD 661/2007 and RD 1578/2008 (¶ 13).

Claimant brought an action for relief against Spain pursuant to the ECT alleging Spain had breached fair and equitable treatment, transparency and non-discrimination standard and expropriation protections in relation to the Claimant’s investments.

2. Procedural History

Claimant filed a Request for Arbitration on 30 March 2015, which was registered by ICSID on 21 April 2015 (¶¶ 19-20). The Tribunal was constituted on 8 February 2016 (¶ 23). The first session was held by means of a telephone conference on 4 April 2016, and on 14 April 2016 the Tribunal issued Procedural Order No. 1 (¶¶ 24-25). Claimant filed its Memorial on the merits on 22 July 2016 (¶ 26) and its Reply on the Merits and Counter-Memorial on Jurisdiction on 19 May 2017 (¶ 32). Respondent filed its Counter-Memorial on 7 November 2016 (¶ 27) and its Rejoinder on the Merits and Reply on Jurisdiction on 2 August 2017 (¶ 34). On 29 September 2017, Claimant filed a Rejoinder on Jurisdiction (¶ 36). The hearing was held at the World Bank facilities in Paris from 4 December 2017 to 8 December 2017 (¶ 43). Claimant and Respondent submitted their respective Costs submissions on 25 January 2019 (¶ 59).

3. Positions of the Parties in respect of jurisdiction

3.1. Respondent's Position

Respondent challenged the Tribunal's jurisdiction based on a few various reasons. First, Respondent submitted that under Article 26 of the ECT the Tribunal lacked jurisdiction to deal with an investment dispute, whereas the contracting states were both EU members. Second, Respondent objected to jurisdiction *rationae voluntatis* under Article 17 of the ECT, stating that Claimant was not a real investor, but a shell company. Third, Respondent argued that, in case of any loss, the Claimant's Spanish subsidiaries suffered it, but not Claimant itself. Fourth, Respondent submitted that under Article 10 of the ECT no remedies for taxation measures were available (¶ 141).

3.1.1. The Tribunal has no jurisdiction to deal with intra-EU investment disputes

Respondent argued that Article 26 of the ECT required the Tribunal to determine its jurisdiction on the basis of EU law (¶ 145). Respondent submitted that "applicable rules and principles of international law" referred to in Article 26(6) of the ECT included EU law and prioritized EU law over general principles of international law (¶ 146).

Moreover, Respondent relied on the *Achmea* decision to submit that the Tribunal's acceptance of jurisdiction would be contradictory to EU law and would violate Article 267 of the Treaty on the Functioning of the European Union (¶ 148).

Finally, Respondent contended that since this dispute was largely about EU law, the Tribunal would inevitably have to interpret and apply EU law (¶ 161). In the Respondent's view, this Tribunal has no jurisdiction to do so neither under the BIT nor under the ECT (¶¶ 160-161).

3.1.2. Claimant as a shell company is not entitled to bring claim under Article 17 of the ECT

Respondent referred to its right to deny the advantages to the entity which had no substantial business activities, which is enshrined in Article 17 of the ECT. Respondent argued that Claimant was controlled or possessed by the US' citizens or nationals, whereas Luxembourg flag was used only for convenience. Thus, Claimant did not have substantial business activities "in the Area of the Contracting Party in which it is organized". At the same time, Respondent acknowledged that it did not deny these benefits before delivery of its Counter-Memorial (¶ 177).

3.1.3. Loss, if any, has been suffered by Spanish subsidiaries, not by Claimant itself

Respondent argued that Claimant as a corporation had no compensable interest in the assets of its Spanish subsidiaries. Claimant could submit the claim on diminution in the value of its equity, but not the claim it actually submitted (¶ 183).

3.1.4. The Tribunal lacks jurisdictions to deal with respect to the TVPEE tax

Respondent submitted that Article 21 of the ECT excludes taxation measures from the scope of application of the ECT. The Tax on the Value of the Production of Electrical Energy (the

“TVPEE”) is characterized as a tax, thus, the Tribunal has no jurisdiction to decide on the TVPEE claim under Article 10 (1) of the ECT (¶ 191).

3.2. Claimant’s position

Claimant rejected all the Respondent’s arguments in respect of the Tribunal’s jurisdiction. First, Claimant submitted that the tribunal’s jurisdiction is exclusively based on express provisions of Article 26 of the ECT. Satisfaction of these provisions is sufficient to establish the jurisdiction regardless of whether the *Achmea* decision is found to be relevant or not (¶ 149).

Second, Claimant argued that the Respondent’s objections to jurisdiction *rationae voluntatis* under Article 17 of the ECT were not timely submitted (¶ 178). In any event, the Claimant’s business activities in Luxembourg met the standard of substantiality (¶ 181).

Third, Claimant contended that the loss suffered by its operating companies had been appropriately discounted to reflect its percentage shareholding by both Claimant’s and Respondent’s experts (¶ 184).

Fourth, in the Claimant’s view, the TVPEE is not a tax. Consequently, application of Article 21 is wrongful, and the Tribunal has jurisdiction to decide on this issue (¶ 192).

3.2.1. The Tribunal’s jurisdiction is based exclusively on Article 26 of the ECT

Claimant argued that EU law should be only taken into consideration but cannot displace the plain reading of Article 26 of the ECT (¶ 146).

Claimant further submitted that the *Achmea* decision does not impact the issue of the tribunal’s jurisdiction unless express provisions of the ECT are satisfied. Claimant relied on 18 investment treaty tribunals which have rejected this argument (¶ 149).

Moreover, Claimant objected to the *Achmea* relevance to the dispute arisen under the ECT, since EU itself is the ECT party. Claimant concluded that the Claimant’s prospects of successful enforcement of the Tribunal’s decision were not relevant to determination of the Tribunal’s jurisdiction (¶ 149).

Claimant also argued that Article 26(6) of the ECT refers to public international law, but not regional law such as EU one (¶ 163). Claimant reiterated that numerous investment treaty tribunals confirmed that they were not tasked with deciding the disputes before them on the basis of EU law (¶ 165).

Thus, in the Claimant’s view, the Tribunal’s jurisdiction is not affected by EU law in any manner.

3.2.2. Claimant has substantial business activities in Luxembourg and is entitled to bring the claim

Claimant noted that Respondent could not retroactively deny the benefits, supporting its position by award in *Isolux and Liman Caspian Oil v. Kazakhstan* cases. The Respondent’s objections should have been raised prior to the commencement of the dispute (¶¶ 178-179).

Further, Claimant relied on the definition of “substantial business operations” established in *Limited Liability Company Amto v. Ukraine*, wherein it was stated that “substantial” meant “of substance and not merely of form” (¶ 181). Based on this, Claimant concluded that all its business activities in Luxembourg – lease of the office space, maintenance of employees, managers and directors, maintenance of bank accounts – were substantial enough to initiate the dispute (¶ 180).

3.2.3. Claimant suffered loss in its percentage shareholding

Claimant argued that the Claimant’s loss resulted directly from the loss of its operating companies. Moreover, such loss was calculated with appropriate discounts both by the Claimant’s and by the Respondent’s experts (¶ 185).

3.2.4. The Tribunal has jurisdiction to decide on the TVPEE, since it is not a tax

Claimant challenged the Respondent’s position to consider the TVPEE a tax. Claimant relied on essential criteria of “Taxation Measure” under Article 21(1) of the ECT and submitted that (1) the TVPEE was simply a reduction to the incentive tariffs, not the tax itself; (2) revenue raised from the TVPEE did not flow into the state treasury, but into the electricity system; (3) domestic view of Spanish courts, under which the TVPEE was a tax, is not determinative in the case at hand (¶ 194).

4. The Tribunal’s analysis in respect of jurisdiction

The Tribunal concluded that it had jurisdiction to decide on the dispute at hand, since (1) there was no conflict between the ECT and EU law; (2) Claimant was a real investor, with substantial business activities in Luxembourg; (3) Claimant itself, but not its subsidiaries only, suffered the loss; (4) the TVPEE amounted to expropriation under Article 13 of the ECT.

4.1. Whether the Tribunal is precluded to consider intra-EU investment dispute

The Tribunal rejected the Respondent’s arguments relying on conjunct reading of the ECT and Vienna Convention on the Law of Treaties (¶ 146). The Tribunal held that, applying the Respondent’s logic, “the same words in the same treaty provision may have a different meaning ... depending on the parties to a particular dispute” (¶ 146), since the ECT dispute between different parties would be subject to different rules. In order to provide certainty and unified interpretation, the Tribunal decided to uphold its jurisdiction and stated that the exclusion of intra-EU disputes from the scope of the ECT would contradict to the plain language of the ECT or the ICSID Convention (¶ 147).

The Tribunal referred to the *Achmea* decision and agreed with the difference between a bilateral investment treaty and a multilateral investment treaty established in that case (¶ 152). Given that EU itself consented to submit the disputes to the arbitral tribunal under Part V of the ECT (¶ 152), it is hard to conclude that EU suggested to immunize EU member states from such claims (¶ 157). The Tribunal also commented on the Respondent’s allegation that the *Achmea* decision did not refer to the tribunal, but to the court and held that “this is a distinction without a difference” (¶ 152).

Further, the Tribunal rejected the Respondent’s arguments that only EU judges may consider EU law, since international courts are often required to consider the domestic or regional laws (¶ 170). The Tribunal thus found itself empowered to consider EU law to the extent necessary for the resolution of the dispute under international law (¶ 172). It also held that there was no material conflict between the ECT and EU law, thus, the Tribunal had jurisdiction pursuant to the ECT and the ICSID Convention (¶ 173).

4.2. Whether Claimant lacks substantial business activities and is not entitled to raise the claim

The Tribunal held that “the test of substantial business activities must take its colour from the nature of the business”. The Claimant’s evidence (paperwork, board meetings, bank accounts and cheque books) sufficed to meet the requirement. Thus, Respondent failed to raise these objections on time and, most importantly, failed to prove the lack of the Claimant’s business activities (¶ 182).

4.3. Whether Claimant itself suffered any loss

The Tribunal ruled that the Claimant’s corporate structure is almost universal and supported the common view of the investment state tribunals that the loss to operating subsidiaries inevitably led to the loss of the owners, i.e. of the Claimant. The Tribunal specifically noted that Respondent itself instructed its expert to calculate the Claimant’s loss, not the loss of the Claimant’s subsidiaries. Given that both experts – of Claimant and of Respondent – calculated the loss with appropriate discount, the Respondent’s argument was rejected (¶ 187).

4.4. Whether the TVPEE is a tax and may be dealt with by the Tribunal

The Tribunal considered the TVPEE is a tax, since (1) it was established by law; (2) it was imposed on a defined group of persons; (3) the revenues were eventually appropriated by the Respondent’s state budget; (4) reduction of the tariff deficit may fall within the scope of public purpose (¶¶ 198-204). The Tribunal further agreed with conclusions of the ICSID tribunal in the *Eiser* case that “the Tribunal cannot disregard the ECT’s clear terms on the strength of the record here, which falls well short of demonstrating any improper or abusive use of the power to tax” (¶ 207).

The Tribunal ruled that the TVPEE was a tax, but the Tribunal had jurisdiction to consider the TVPEE in the context of expropriation under Article 13 of the ECT (¶ 208).

5. Positions of the Parties in respect of merits

5.1. Claimant’s position

The essence of the claim lays in violation of Article 10(1) of the ECT, providing for fair and equitable treatment, as well as Article 13 of the ECT, prohibiting expropriation.

First, Claimant submitted that Respondent owed to Claimant irrevocable obligation to pay the feed-in tariff under RD 661/2007 for 25 years and thereafter at 80% of the original base for the life of the facility (¶ 212).

Second, Claimant argued that the Claimant's legitimate expectations under RD 661/2007 were frustrated (¶ 300).

Third, Claimant contended that Respondent breached its duty to treat the Claimant's investments transparently and free from impairment by unreasonable or discriminatory measures (¶ 312).

Fourth, in the Claimant's view, Respondent breached a number of its explicit obligations regarding the tariffs undertaken pursuant RD 661/2007 and RD 1578/2008 (¶ 331). Claimant argued these obligations fall within the scope of the ECT umbrella clause, namely Article 10(1) of the ECT (¶ 326).

Fifth, Claimant asserted that the Respondent's actions cumulatively constituted the expropriation in the context of Article 13 of the ECT (¶ 347).

5.1.1. Claimant had certain legitimate expectations based on Respondent's actions

Claimant relied on a number of cases and arbitral jurisprudence to argue that Respondent made specific commitments under RD 661/2007 (¶ 226), which offered a stable pricing mechanism of tariff rates for the full operating life of a facility. This mechanism was necessary for Respondent to meet binding EU targets for renewable energy (¶ 218). Thus, Claimant had legitimate expectations based on the Respondent's promises (¶ 226).

Claimant further submitted that it was a common ground between the Parties that upfront costs of facility construction were so significant that both investors and lenders needed to ensure the recoverability of the costs. Claimant underlined that guaranteed stability tariff was a condition precedent to the Claimant's investment decisions (¶ 218).

The Claimant's decision to invest was based on the explicit promises of the Respondent's officials along with so-called "roadshows", according to which investors were guaranteed profitability and stability under the regulatory regime (¶ 218). Claimant specifically relied upon Article 44(3) of RD 661/2007 along with a Cabinet Office Press Release stating that "the new regulation will not have a retroactive nature" (¶ 219).

Moreover, Claimant contended that the Respondent's assessment of returns was in between 9.1% for fixed installation and 9.8% for sun-tracking facilities, whereas now Respondent claimed 7.398% to be reasonable (¶ 218).

5.1.2. The Claimant's legitimate expectations under RD 661/2007 were frustrated

Claimant submitted that its legitimate expectations based on RD 661/2007 were frustrated due to (1) the cancellation of the Claimant's rights to receive the tariffs after Year 25 of the projects' operating lives, (2) the limitations on electricity amount eligible for feed-in tariffs, (3) reduction of the Claimant's income resulted from a 7% levy imposition, (4) amendments to compensatory scheme (¶ 300).

Claimant referred to the New Regulatory Regime of 10 June 2014, by which Respondent unilaterally amended the regulatory framework. Claimant emphasized that it did not expect a reasonable return, instead, it was expected to receive the precise tariffs established in RD 661/2007 and RD 1578/2008 (¶¶ 302-303).

5.1.3. Respondent failed to treat the Claimant's investments transparently

Claimant relied on *Micula v. Romania* to submit that the state may violate fair and equitable treatment standard twice – first by undermining the legitimate expectations and second by failing to act transparently and consistently, and Respondent violated both (¶ 313). Claimant argued that Respondent replaced its clear pricing formulas under RD 661/2007 with remuneration under the New Regulatory Regime, which referred to a reasonable rate of returns and provided enormous amount of formulas (¶ 314).

5.1.4. Respondent breached its statutory obligations

Claimant referred to umbrella clause in Article 10(1) of the ECT and stated that notion of “any” obligations included both contractual and statutory obligations (¶ 330). Claimant contended that Respondent violated its obligations under RD 661/2007 and RD 1578/2008, namely (1) to pay incentives on all electricity produced by eligible plants; (2) to pay incentives for the full life of facilities; (3) to pay fixed incentive rates for the lifetime of plant operation (¶ 332). Claimant supported its position by a number of cases, such as *LG&E v. Argentina*, *Khan Resources v. Mongolia* and *Al-Bahloul v. Tajikistan* (¶¶ 328-330).

5.1.5. Respondent expropriated the Claimant's investments

Claimant submitted that the Respondent's New Regulatory Regime substantially deprived Claimant from its benefits, which should be considered expropriation under Article 13 of the ECT (¶ 349). Claimant relied on case law to support its position and claimed that the Respondent's acts of substantial interference conferred a bundle of the Claimant's rights under Articles 17, 36 and 44 of RD 661/2007 (¶ 353). Namely, Claimant was deprived from the full value of the RD 661/2007 and RD 1578/2008 tariffs on all electricity produced, thus, the Claimant's investments were expropriated (¶ 354).

5.2. Respondent's Position

5.2.1 Respondent rejects the alleged violation of the Articles 10 and 13 of the ECT

First, Respondent denied any irrevocable obligations towards Claimant and return of the Claimant's investments, and Claimant could not have had any legitimate expectations in the light of the Spanish Supreme Court's findings (¶ 234).

Second, Respondent submitted that the Claimant's legitimate expectations were limited only to reasonable return rate, as confirmed by the Spanish Supreme Court (¶ 304).

Third, Respondent argued that the Respondent's New Regulatory Regime was so clear and detailed, there was no chance to breach the duty of transparency (¶ 318).

Fourth, Respondent provided its own construction of Article 10(1) of the ECT and concluded that there were no statutory obligations to be breached (¶ 338).

Fifth, Respondent rejected any arguments on expropriation of the Claimant's investments, since Claimant was not deprived of any of its rights (¶ 368).

5.1.2. *There was no basis for the Claimant's legitimate expectations*

First, Respondent explicitly denied existence of any legitimate expectations, given the Respondent's sovereign authority to amend regulations (¶ 233). Respondent contended that the Respondent's legislation provided only for "reasonable rates of return", which was consistently affirmed by the Spanish Supreme Court (¶ 234).

In the light of the Supreme Court's decisions Claimant should have known that its investments were subject to a regulatory risk of a reduced tariff (¶ 236). Respondent supported its position by the findings of arbitral tribunals in *Parkerings v. Lithuania* and *AES v. Hungary* cases, which uniformly acknowledged the state's sovereign right to regulate its economy in the interest of its citizens (¶¶ 240-241).

Second, Respondent argued it had the duty to regulate the energy sector in the public interest. Respondent relied on *Plama v. Bulgaria* case to assert that financial stability of the energy sector falls within the scope of the public interest (¶ 246). Respondent also declined the relevance and reliability of so-called representations made by the Respondent's government, stating that they could not be taken as government policy (¶ 247).

Further, Respondent invoked findings from *Charanne v. Kingdom of Spain* and *Isolux* cases, wherein the tribunals admitted that investors could not have had legitimate expectations that the regulatory framework would remain unchanged (¶¶ 248-249). Respondent claimed such expectation would mean freezing of the regulatory framework (¶ 248) and would run counter to Respondent's sovereign rights (¶ 252).

Third, Respondent rejected the Claimant's interpretation of RD 661/2007, since Claimant allegedly ignored the words "defined in this Royal Decree" and "indicated in this Section" (¶ 259). Respondent submitted that the text of Article 44(3) should be read in conjunction with realities, in particular, in the light of the Respondent's need to ensure the economic stability of the energy sector (¶¶ 262-263).

Fourth, Respondent submitted that, in any event, the legitimacy of expectations should be assessed by the time the whole of the investments were complete (¶ 275). Since in the case at hand Claimant continued its investments in stages from 2008 to 2011, RD 1578/2008, which did not guarantee any benefits, should be applicable to the test of legitimate expectations (¶ 275).

Respondent supported its position by reference to the PV Plant of Formiñena, which was registered at 2011, as the last stage of the Claimant's continuing investments (¶ 278). Respondent also relied on the Claimant's own instructions to the expert to assess investments that "occurred between April 2008 and March 2011" (¶¶ 280-281).

5.1.3. *The Claimant's legitimate expectations were limited to a reasonable return*

Respondent relied on the findings of the Spanish Supreme Court to justify the limits of compensation under RD 661/2007, stating that Claimant has always earned at least a reasonable return, as guaranteed by Respondent (¶¶ 304-305).

5.1.4. The Respondent's policy remained clear and transparent

Respondent denied the Claimant's argument and submitted that the New Regulatory Regime was specific and detailed enough (¶ 318). Namely, the New Regime provided parameters for every possible combination of the mentioned factors, which made the system of remuneration explicitly clear to every party (¶¶ 318-319).

5.1.5. Respondent did not breach any statutory obligations

In the Respondent's view, Claimant misconstrued Article 10(1) of the ECT, since Article 10(1) referred to specific obligations regarding a certain investor or a certain investment (¶ 333). Respondent relied on French and Spanish version of the ECT to prove this (¶ 334) along with findings of the case law, invoked by Claimant (¶¶ 335-338). Since there were no specific commitments between Respondent and Claimant, claims under umbrella clause in Article 10(1) of the ECT should be dismissed.

5.1.6. Respondent did not expropriate the Claimant's investments

Respondent submitted that a regulatory modification affecting the value of the right did not amount to expropriation under the ECT, and Respondent had authority to exercise such regulatory power (¶ 357). Claimant was guaranteed a reasonable rate of return, but future returns on investment did not qualify as an asset subject to expropriation under Article 13(3) of the ECT (¶ 359). Thus, Claimant had the right to receive remuneration for the energy already sold, and there were no rights capable of expropriation to a future income stream (¶ 361).

Respondent relied on a number of cases to prove that expropriation must prevent the investor from continuing to enjoy its investment or from using it, or it must restrict some property right attaching to the investment in a severe and devastating manner (¶ 363). Since Claimant continued to control its shares in the plants, the plants continued to operate and the reasonable rate was obtained by Claimant, there was no expropriation (¶ 368).

6. The Tribunal's analysis in respect of merits

The Tribunal concluded that (1) the Claimant's legitimate expectations were reasonable; (2) the Claimant's legitimate expectations were frustrated; (3) Respondent did not breach its duty of transparency and non-discrimination; (4) Respondent was not in breach of any statutory obligations under umbrella clause; (5) the Respondent's action did not amount to expropriation under Article 13 of the ECT.

6.1. Whether Claimant could have had legitimate expectations with regard to its investments

The Tribunal mostly accepted the Claimant's arguments relying on conjunct interpretation of the RD 661/2007 and the Respondent's conduct. First, the Tribunal held that the jurisprudence of the Spanish Supreme Court was not determinative for the Tribunal's decision. Whereas the Spanish Supreme Court assessed the Respondent's rights and obligations under domestic law, in the case at hand the Tribunal was concerned with the Respondent's obligations under international law (¶ 242). In particular, the Tribunal had to answer the question whether the changes in legislation could have been made without financial consequences under the ECT (¶ 244). The Tribunal also relied on Article 27 of the

Vienna Convention, under which a “party may not invoke the provisions of its internal law as justification for its failure to perform a treaty” (¶ 244).

Second, the Tribunal emphasized that the findings in *Charanne* case were excessively based on the Respondent’s domestic jurisprudence. This Tribunal, however, did not accept that the investors, attracted by specific promises, should bear the costs resulting from the state’s amendments to the regulatory policy (¶ 253).

The Tribunal supported its view by the findings in *Saluka, El Paso v. Argentina* and *Glamis v. USA* cases, wherein the tribunals ruled that there should be legitimate expectations if the state made specific undertakings (¶¶ 254-256). The Tribunal held that Article 44(3) of RD 661/2007 constituted such specific undertaking and created legitimate expectations for investors (¶¶ 257-259).

Third, the Tribunal rejected the Respondent’s purposive and textual interpretation of RD 661/2007. The Tribunal concluded that Article 44(3) specifically represented to the potential investors that, regardless of any tariff revisions in 2010, a reasonable rate of profitability shall be guaranteed. Moreover, the facilities “for which the deed of commissioning shall have been granted prior to January 1 of the second year following the year in which the revision shall be performed” shall not be affected by such review (¶ 264).

The Tribunal also held that the above interpretation of Article 44(3) was consistently affirmed by the press release of the Respondent’s Cabinet (¶ 270) and was totally in line with the Respondent’s aims to attract investors, which have previously failed (¶ 268).

Hence, the Tribunal accepted the Claimant’s argument that the guaranteed stability tariff was a condition precedent to the Claimant’s investments. Based on the plain reading of Article 44(3) and on the due diligence opinion obtained from Garrigues Abogados, Claimant had legitimate expectations while making its investments (¶¶ 271-273).

Fourth, the Tribunal acknowledged that there was some confusion with regard to time of investments’ making, created initially by Claimant itself and the Claimant’s own expert witnesses (¶ 288). Nevertheless, in the Tribunal’s view, the critical date for assessment of the expectations’ legitimacy and the reasonableness was the date when Claimant invested, i.e. 23 April 2008 (¶ 289). The Tribunal explained that the dates of stages did not matter, since the investment funds have been already remitted by that time under the protection of the ECT (¶ 290).

At the same time, the Tribunal ruled that the Formiñena Plant was indeed covered by RD 1578/2008, which should be taken into consideration during assessment of the quantum of damages (¶ 291).

6.2. *Whether the Claimant’s legitimate expectations were frustrated*

The Tribunal concluded that (1) Article 44(3) was clear and specific enough to guarantee non-retroactivity of RD 661/2007; (2) the Claimant’s expectations were reasonable and legitimate in the light of the circumstances; (3) Claimant reasonably relied upon the Respondent’s representations prior to making investments. Consequently, the Claimant’s legitimate expectations were frustrated (¶ 307).

The Tribunal also ruled that Respondent applied one-sided treatment, under which Respondent would benefit from rising prices, while Claimant would lose in case of falling prices (¶ 311). Although the Tribunal acknowledged that this approach was legitimized by the Respondent's domestic law, it held that the standard of fair and equitable treatment under the ECT was violated (¶ 311).

6.3. Whether Respondent breached the duty of transparency

The Tribunal concluded that different regulations may adopt different methodologies and be quite complicated. Yet, it did not mean that such regulations run counter to the duty of transparency (¶ 320).

Adoption of a proportionate regulatory measure was within the Respondent's authority and did not lead to breach of transparency duty (¶¶ 321-323). Thus, the Tribunal rejected the Claimant's arguments on transparency and discrimination (¶ 325).

6.4. Whether Respondent breached any statutory obligations

The Tribunal ruled that the term "any obligation" should be interpreted in the context of Article 10(1) of the ECT (¶ 342). Tribunal agreed that Respondent did not assume any obligations to Claimant to refrain from imposing the 7% TVPEE or to refrain from modification of the compensation payable under RD 1578/2008 (¶ 344).

The Tribunal found that acceptance of the Claimant's argument would be both problematic (it would change the nature of the investment's protection under FET) and superfluous (the umbrella clause adds nothing in the way of relief to what has already been granted under FET) (¶ 345). Hence, the Tribunal dismissed the Claimant's argument on additional statutory obligations allegedly breached by Respondent.

6.5. Whether Respondent expropriated the Claimant's investments

The Tribunal rejected the Claimant's arguments on expropriation under Article 13 of the ECT (¶ 372). The Tribunal found that the Claimant's investments constituted corporate shares, and there was no loss of shares (¶ 369). Indeed, the Respondent's regulatory modification reduced the share value, but this question fell within the scope of legitimate expectations (¶ 370). Thus, there was no expropriation of the Claimant's assets.

7. Costs

The Tribunal ordered Respondent to bear the full costs and expenses incurred by ICSID in connection with the arbitration proceedings, and to reimburse Claimant its legal costs and expenses as well as fees and expenses for the Claimant's experts (¶ 226).