King & Spalding

Quantum Quarterly

The Damages Newsletter

ISSUE 13 | 4Q 2021

A PUBLICATION OF KING & SPALDING'S INTERNATIONAL ARBITRATION GROUP

We are delighted to present the latest edition of *Quantum Quarterly,* in which we present extensive case notes on quantum awards that were rendered or became public since our last edition. We hope you enjoy this edition.

Quantum Quarterly Editors

Jessica Beess und Chrostin
jbeessundchrostin@kslaw.com

Craig S. Miles
cmiles@kslaw.com

Quantum Quarterly Contributors

Alex Levin Canal
alevincanal@kslaw.com

Thomas Childs
tchilds@kslaw.com

Erin Collins

Jasmine Coyle
jcoyle@kslaw.com

Vivasvat Dadwal
vdadwal@kslaw.com

Vanessa Alarcon Duvanel
valarcon@kslaw.com

Nicolas Franco
nfranco@kslaw.com

Flora Jones
fjones@kslaw.com

Xiaomao Min
xmin@kslaw.com

Joshua S. Wan

Table of Contents

1. *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain*, International Centre for Settlement of Investment Disputes (ICSID) Case No. ARB/15/16

7. *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India,* Permanent Court of Arbitration Case No. 2016-07

17. *Crescent Petroleum Company International Limited and Crescent Gas Corporation Limited v. the National Iranian Oil Company*

20. *Abed El Jaouni and Imperial Holding S.a.l. v. Lebanese Republic,* International Centre for Settlement of Investment Disputes (ICSID) Case No. ARB/15/3

27. *Freif Eurowind Holdings Ltd v. Kingdom of Spain,* Stockholm Chamber of Commerce (SCC) Case No. 2017/060

31. *Olympic Entertainment Group AS v. Ukraine,* Permanent Court of Arbitration Case No. 2019-18

36. *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain,* International Centre for Settlement of Investment Disputes (ICSID) Case No. ARB/14/34

42. *STEAG v. Kingdom of Spain,* International Centre for Settlement of Investment Disputes (ICSID) Case No. ARB/15/4

© 2022 King & Spalding LLP

In some jurisdictions, this may be considered “Attorney Advertising.”

King & Spalding consists of King & Spalding LLP, a Georgia, U.S., limited liability entity, and affiliated limited liability entities in the U.S., England, and Singapore.

Recent Damages Awards

BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain, International Centre for Settlement of Investment Disputes (ICSID) Case No. ARB/15/16

Date of the Award
January 25, 2021[1]

Decision on Annulment
Pending

The Parties
BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH (the Claimants), Kingdom of Spain (the Respondent)

Sector
Renewable Energy

Applicable Treaty
Energy Charter Treaty

Members of the Tribunal
Judge James R. Crawford (president),
Dr. Horacio A. Grigera Naón (Claimants' appointee),
Loretta Malintoppi (Respondent's appointee)

Background

The Parties' dispute concerned the Claimants' investments in two wind farms in Spain (the Wind Farms).

The Wind Farms were developed in 1997, and provisionally registered in the *registro administrativo de instalaciones de producción en regimen especial* (Special Regime) on June 28, 1999.[2] Under the applicable regulations at the time, the Wind Farms were authorized to benefit from the Special Regime set out in Royal Decree (RD) 2818/1998.[3] RD 2818/1998 created certain incentives for renewable energy producers, including wind farms.[4]

The Wind Farms began operating in early 2003.[5] The Claimants' investment in the Wind Farms began at a 32.6 percent interest (from 2003 to 2008) and increased until 2012, when they held a 74 percent interest in the Wind Farms.[6]

As the Claimants increased their stake in the Wind Farms, the Special Regime underwent various regulatory changes. On March 12, 2004, Spain enacted RD 436/2004, which adapted the feed-in system to a new methodology. According to RD 436/2004, the new regulation would accomplish the objectives set out in the European Union's 2000 Renewable Energy Plan "by providing 'security and stability' and establish a 'long-lasting, objective and transparent regulatory framework' in order to foster investment in renewable energy projects."[7] Under the new regime, wind producers had the option to choose, on an annual basis, either a fixed tariff calculated as a specific percentage of the [average or reference electricity tariff] or a "Premium Option."[8] Plants subject to RD 2018/1998, like the Wind Farms, were granted a transitional period during which they could remain subject to RD 2018/1998 for a limited time or switch to the RD 436/2004 regime immediately.[9]

On May 25, 2007, Spain enacted RD 661/2007. Under RD 661/2007, producers of renewable energy were entitled "(i) to feed in to the grid and sell the entire energy production of their plants; and (ii) to obtain the benefits . . . granted by [law] to all energy producers registered in the 'Register for Special Regime Power Plants.'"[10]

On December 8, 2010, Spain enacted RD 1614/2010. This RD reduced the premium values under RD 661/2007.[11] Then, on December 23, 2010, Spain enacted Royal Decree Law (RDL) 14/2010. This RDL aimed to correct the tariff deficit in the electricity sector in Spain.

Starting in December 2012, Spain adopted seven measures, which the Claimants challenged in the arbitration (the Disputed Measures):

- RDL 15/2012, which introduced a 7 percent tax on all electricity revenue.[12]
- RDL 2/2013, which fixed the premium under the Premium Option of RD 661/2007 at €0/kWh (eliminating the Premium Option in RD 661/2007) and canceled the mechanism for updating tariffs, premiums and remaining elements of remuneration. This prevented plants that had opted to sell their electricity under the new Premium Option from later choosing the fixed tariff option during the remainder of their operational life.[13]
- RDL 9/2013, which amended Article 34 of RDL 54/1997 (which had created the Special Regime for energy producers) and repealed RD 661/2007 altogether. This eliminated the feed-in incentives and replaced them with a "specific remuneration" system based on the costs per unit of installed power plus a standard amount regarding operating costs.[14]
- RDL 24/2013, which superseded RDL 54/1997 and created a mechanism to have renewable energy producers finance any tariff imbalance up to a limit of 2 percent for a given financial year.[15]
- RD 413/2014, which formally established the new regime foreseen in RDL 9/2013.
- Ministerial Order (MO) IET/1045/2014, which published the details on the new compensation formula. It fixed the reasonable rate of return at 7.398 percent (pretax) for existing renewable energy facilities.[16] But for certain facilities, including those designated as a Standard Facility IT-00652 (which the Wind Farms were), MO IET/1045/2014 fixed compensation at €0.[17] Spain considered those facilities to have

already covered their capital and operating expenditures and received a rate of return above 7.389 percent prior to the end of their 20-year regulatory life.[18]

- MO IET/1168/2014, which provided that all facilities formerly entitled to feed-in renumeration would be automatically registered in the new registry on July 9, 2014.[19]

As a result of the Disputed Measures, the Wind Farms stopped receiving any energy incentives.

On April 16, 2015, the Claimants filed a request for arbitration before the ICSID under the Energy Charter Treaty (ECT or Treaty).

Jurisdiction and Liability

On December 2, 2019, the Tribunal issued the Decision, including a dissenting opinion by Dr. Grigera Naón.

The Tribunal found that Spain breached its Article 10(1) stability obligation under the ECT when it clawed back "subsidies earlier paid at levels in excess of the amounts that would have been paid under the Disputed Measures, had they been in force in previous years."[20] Specifically, the Tribunal found that subsidies that are "duly paid and duly taken into account" cannot be clawed back at a later date based on a subsequent decision that such payments were "excessive."[21]

The Decision also ordered the Parties to "seek an agreement [within three months] on the impact of the unlawful retroactive application of the Disputed Measures, on the basis that those measures were otherwise consistent with the ECT" and "assuming a 25-year regulatory life for wind plants."[22] The Parties were unable to reach an agreement. The Claimants therefore requested that the Tribunal decide the outstanding quantum issues.

Quantum

A. Determining the Relevant But-For Scenario

The Tribunal found that the relevant but-for scenario would be a situation in which the Disputed Measures came into force but did not take into account amounts "previously earned in excess of [7.398 percent]."[23] The Tribunal further explained that this meant it should "compute the remuneration owed to Claimants if the [p]lants are assumed to be operating at a rate of return equal to 7.398 [percent] prior to 13 July 2013" — the date that RDL 9/2013 came into force.[24]

B. Calculating the Clawback

The Tribunal explained that the damage the Claimants are entitled to is the economic impact on them as a result of the retroactive clawback applied to the Wind Farms.

Thus, the Tribunal found it necessary to consider the amounts earned by the Wind Farms from 2003 to July 2013, which exceeded the 7.398 percent threshold.[25] Any deficit would have "been made good" through additional remuneration.[26]

The Tribunal outlined the appropriate mechanism to calculate the loss caused to the Wind Farms as of July 13, 2013, as a result of Spain's clawback operation as follows:

Step 1: Start with the Standard Net Asset Value (NAV) of the Plants as of 13 July 2013. Calculating the Standard NAV on 13 July 2013 is necessary to determine the total economic return the Plants were guaranteed in the subsequent years.

Step 2: Calculate a 7.398 [percent] annual target return for all subsequent years. That would represent the total economic return to which the Plants were entitled for each year until 2028. From this target return, subtract the estimated returns

the Claimants will receive by selling electricity at market price. This would lead to losses per year of the remuneration which the Plants will no longer receive as a result of the clawback operation of the Disputed Measures.

Step 3: Translate the annual losses to the Plants into damages to the Claimants. In doing so, take into account the relevant taxes, the shareholding of the Claimants in the Plants[] and the fact that future losses are being compensated ahead of time.

Step 4: Calculate the amount of interest.[27]

The Tribunal analyzed each of these steps in turn.

1. Step 1: Calculating the 2013 Standard NAV

The Tribunal recalled that the Standard NAV is not synonymous with the real value of the Wind Farms. Instead, consistent with the formula articulated in RDL 9/2013, "the Standard NAV at a given time is the difference between capitalized value of initial investments minus capitalized value of income generated in previous years."[28]

The Tribunal then made three core findings with respect to Step 1. First, it recalled that the Tribunal's Decision endorsed the existence of the Disputed Measures as consistent with the ECT once the effect of the clawback is adjusted for. As a result, "[t]he only NAV that matters is the NAV calculated per the formula set out in RDL 9/2013."[29]

Second, the Tribunal found that the correct date of valuation, as used by the Claimants, was July 13, 2013, the date RDL 9/2013 came into effect — not June 16, 2014, the date RDL 9/2013's parameters were set as proposed by Spain.

Third, the Tribunal assessed the use of actual historical production data. The Tribunal found that the Claimants' approach to calculate the Standard NAV, which tracked the RDL 9/2013 formula, was acceptable. This was true even though the Claimants replaced the "level of revenue" variable with the "level of revenue per MWh of production (increased annually in line with inflation) that yields a 7.398 [percent] return throughout the regulatory life span of the Standard Facility."[30]

As a result, the Tribunal agreed with the Claimants' calculation of the Standard NAV at €73.413 million.[31]

2. Step 2: Calculating the harm caused to the Wind Farms

The Parties and their experts agreed that the cash due to the Claimants should be discounted to the present using a discount rate of 7.398 percent. However, they disagreed on whether *ex-post* data should be used in that calculation. The Tribunal found that such *ex-post* data should be used.

The Tribunal explained that whether to use data that has become available after a breach has occurred "is often a topic of debate in the context of valuation of entities in case of expropriation or non-expropriatory breaches," but that "the issue can arise in other contexts."[32] The Tribunal considered that it should not ignore the *ex-post* data because the objective is to compensate the Claimants for losses caused but for Spain's breach. Without accounting for subsequent developments, the Tribunal could run the risk of over- or under-compensating the Claimants.[33] The Tribunal thus decided to use a model that accounted for *ex-post* data and set out the yearly pretax amounts that the plants would have received as additional remuneration/incentive per MW had it not been for the clawback operation of the Disputed Measures.

3. Step 3: Calculating the harm caused to the Claimants

The Tribunal then explained that certain adjustments needed to be made to the damages model to determine the harm caused to the Claimants — as

distinct from the Wind Farms. These included: (i) multiplying the per MW remuneration by the capacity of the Wind Farms, (ii) applying the generation tax of 7 percent applicable from 2013 to reduce the cash flow, (iii) subjecting the total to a 25 percent corporation tax and (iv) multiplying the new figure by 0.74 to reflect the Claimants' share of the Wind Farms.[34]

The Tribunal further accepted the Claimants' expert's calculation of the Claimants' yearly cash flow and discounted it by applying the 7.398 percent threshold.

Adoption of these steps resulted in the present value of damages accrued to the Claimants as €22.006 million.

4. Step 4: Calculating the applicable interest

The Tribunal analyzed the Parties' respective positions on interest. The Claimants argued that the value of the damages "has to be capitalised to the actual payment date *using the target rate of return of the Disputed Measures* [i.e., 7.398 percent]."[35] Spain disagreed. It argued that using the 7.398 percent capitalization rate would effectively award the Claimants pre-Award interest at an annual compounded rate of 7.398 percent. Spain proposed an alternative interest rate, equivalent to the six-month EURIBOR.[36]

The Tribunal agreed with Spain. First, it found that the €22.006 million reflected the time-adjusted value of all remuneration that the Claimants had to forgo on account of the Disputed Measures' clawback operation. This amount already assumed a target rate of return of 7.398 percent.[37]

Second, the Tribunal recalled that if restitution had been immediate, it would have resulted in the payment of €22.006 million on July 13, 2013.[38]

Third, the Tribunal explained that this was not the case of a yearly investment where the Claimants could reinvest and also earn a 7.398 percent return. Indeed, the Tribunal recalled that there was no promise under the Disputed Measures that a plant's remuneration would grow at a rate of 7.398 percent.[39]

Fourth, the Tribunal recalled that it was irrelevant that a lower interest rate would result in a "lower amount than the sum of nominal damage cash flows."[40] This is because the method for calculating the €22.006 million itself reflected the composite time-adjusted value of all future cash flows as of July 13, 2013.[41]

Fifth, the Tribunal recalled that the 7.398 percent figure is a pretax growth figure of the Wind Farms' investment.[42] There was therefore no reason to assume that the post-tax participative shares would have also increased by 7.398 percent. Rather, the Tribunal considered that "it would have been decidedly lower."[43]

Thus, the Tribunal found that Spain's proposal of a six-month EURIBOR interest rate was most appropriate, and that interest would run from July 13, 2013, until the date the Award is paid. (The Tribunal also rejected the Claimants' requests for punitive or moratorium interest. [44]

Costs

The Claimants requested that the Tribunal order Spain to pay all of the Claimants' costs for their legal representation and their ICSID payments.[45] The Claimants also requested pre- and post-Award interest on those amounts.

By contrast, Spain argued that it should not be responsible for any of the Claimants' costs for legal representation and requested that the Tribunal order the Claimants to cover Spain's costs for legal representation and its arbitration costs.[46]

The Tribunal found that while it did hold in favor of the Claimants, it had rejected several of the Claimants' claims on the merits. Similarly, during the quantum phase, while it agreed with the Claimants' analysis regarding the relevant breach date, it had accepted Spain's proposed interest rate. As a result, it found that costs should be balanced — the Parties should split the arbitration costs equally and each Party should bear the costs of its own legal representation.[47]

---

1 The Award incorporates the Tribunal's prior Decision on Jurisdiction, Liability and Directions on Quantum (Decision), dated December 2, 2019.

2 Decision ¶ 65.

3 *Id.* ¶ 65.

4 *Id.* ¶ 89.

5 *Id.* ¶ 67.

6 *Id.* ¶¶ 73-4.

7 *Id.* ¶ 93.

8 *Id.* ¶ 96.

9 *Id.* ¶ 100.

10 *Id.* ¶ 76.

11 *Id.* ¶ 170.

12 *Id.* ¶ 188.

13 *Id.* ¶¶ 190-91.

14 *Id.* ¶¶ 192-93.

15 *Id.* ¶¶ 194-95.

16 *Id.* ¶¶ 199, 201.

17 *Id.* ¶ 204.

18 *Id.*

19 *Id.* ¶ 206.

20 Award ¶ 6(c). Horacio A. Grigera Naón issued a dissenting opinion (the Dissent) and argued that Spain not only breached Article 10(1) regarding stability, but also breached its Article 10(1) fair and equitable treatment obligation. Dissent. ¶ 43

21 *Id.* ¶ 18.

22 *Id.* ¶ 7.

23 *Id.* ¶ 19.

24 *Id.*

25 *Id.* ¶ 26.

26 *Id.*

27 *Id.* ¶ 27.

28 *Id.* ¶ 31.

29 *Id.* ¶ 39.

30 *Id.* ¶ 42.

31 *Id.* ¶¶ 33, 43.

32 *Id.* ¶ 51.

33 *Id.* ¶ 52.

34 *Id.* ¶ 54.

35 *Id.* ¶ 57 (emphasis in original).

36 *Id.* ¶¶ 59, 62.

37 *Id.* ¶ 61(a).

38 *Id.* ¶ 61(b).

39 *Id.* ¶ 61(c).

40 *Id.* ¶ 61(d).

41 *Id.*

42 *Id.* ¶ 61(e).

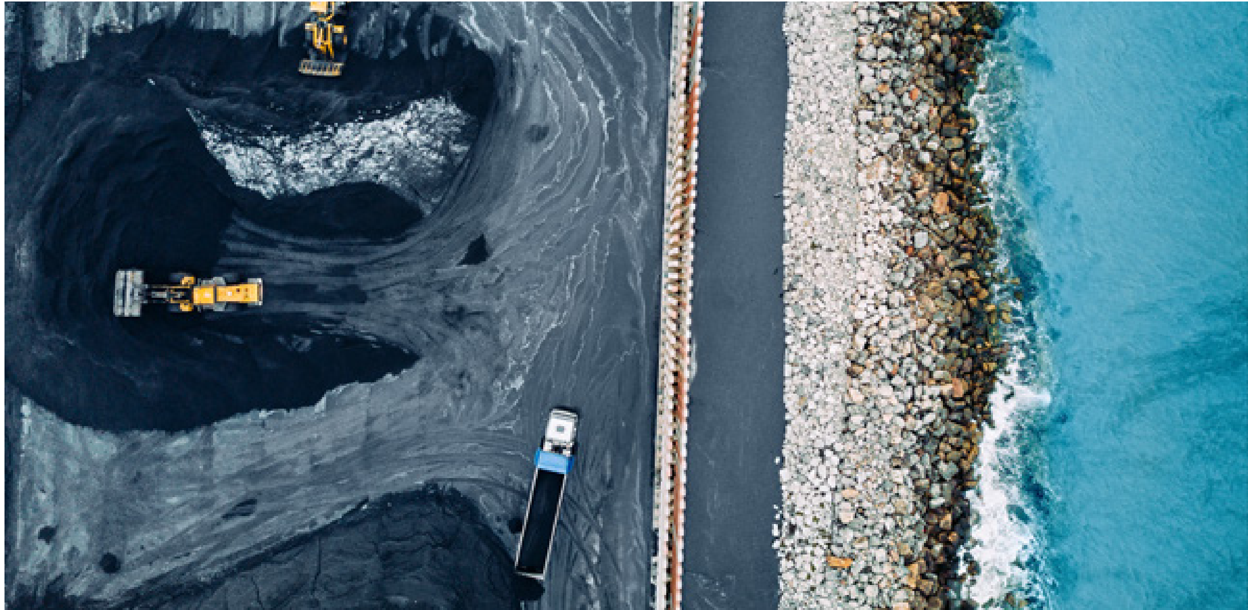
43 *Id.*

44 *Id.* ¶ 62.

45 *Id.* ¶¶ 64-5.

46 *Id.* ¶ 67.

47 *Id.* ¶ 75.



Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India, Permanent Court of Arbitration Case No. 2016-07

Date of the Award
December 21, 2020

The Parties
Cairn Energy PLC (Cairn Energy or CEP) and Cairn UK Holdings Limited (CUHL, collectively, the Claimants), Republic of India (the Respondent)

Sector
Mining and Quarrying

Applicable Treaty
Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Promotion and Protection of Investments (the UK-India BIT or BIT)

Members of the Tribunal
Laurent Lévy (president), Stanimir A. Alexandrov (Claimants' appointee), J. Christopher Thomas (Respondent's appointee)

Background

This dispute concerns the application of certain tax measures by the Government of India to the Claimants' corporate reorganization transactions in 2006 (2006 Transactions).[1]

Cairn Energy, a UK company, began oil and gas exploration and development activities in India in 1996.[2] By 2006, CEP held operations and assets in India through nine UK incorporated subsidiaries (the 9 Subsidiaries), which in turn held between them a further 18 subsidiaries (together with the 9 Subsidiaries, the 27 Subsidiaries).[3] On April 20, 2006, CEP announced its intent to reorganize its Indian assets and operations under an

Indian holding company that would be publicly listed in India after launching an initial public offering (IPO).[4]

On June 26, 2006, CEP incorporated CUHL (the second Claimant in the arbitration) in Scotland as a wholly owned subsidiary. CEP subsequently transferred the entire issued share capital of the 9 Subsidiaries it held directly to CUHL in exchange for an issuance of 221,444,034 ordinary shares (at £1 each) in CUHL.[5] Following this transaction, CUHL became the direct and indirect owner of the 27 Subsidiaries.

Subsequently, on August 2, 2006, CUHL incorporated Cairn India Holdings Limited (CIHL) in Jersey as a wholly owned subsidiary.[6] On August 7, 2006, CUHL transferred the 9 Subsidiaries (and as a result, its holdings in all 27 Subsidiaries) to CIHL in exchange for shares in CIHL.[7] In exchange for the 27 Subsidiaries, CIHL issued 221,444,032 shares (once again at a value of £1 each) to CUHL, and Juris Limited and Lively Limited (each holder of one share in CIHL), transferred their CIHL shares to CUHL.

On August 21, 2006, Cairn India Limited (CIL) was incorporated in India as a wholly owned subsidiary of CUHL.[8] The final step in the reorganization was the transfer of all of Cairn Energy's Indian assets to CIL. This was done by transferring the shares of CIHL from CUHL to CIL in a series of incremental transactions (CIHL Acquisition).[9] CIL's acquisition of CIHL from CUHL in 2006 is the subject of the tax measures at issue in this arbitration.

Between 2009 and 2010, CUHL sold much of its shareholding in CIL to third parties. The most important transactions were two off-market share sales: one to Petronas International Corporation Ltd. (Petronas) in 2009, when CUHL sold 2.3 percent of CIL's issued share capital, and another to a subsidiary of Vedanta Resources Plc (Vedanta) in 2010, when CUHL sold approximately 40 percent of CIL's issued share capital.[10] In both instances, CUHL applied for a tax withholding certificate in which it requested the application of a 10 percent long-term capital gains tax rate; this request was rejected by the Income Tax Department (ITD), which applied a tax rate of 20 percent.[11]

In 2012, the Indian Ministry of Finance introduced an amendment to Section 9(1)(i) of the Income Tax Act (ITA) of 1961 (the 2012 Amendment).[12] The 2012 Amendment was passed with retroactive effect as of April 1, 1962.[13] As explained below, the 2012 Amendment formed the legal basis for the ITD Final Assessment Order (FAO) levied in connection with Cairn Energy's 2006 reorganization culminating in the IPO, which is said to have generated a taxable capital gain.

Specifically, following CIL's announcement that it would use its reserves to buy back some of its shares from CEP (Buy-Back Programme),[14] on January 15, 2014, the Investigation Wing of the Income Tax Authority conducted an unscheduled survey of CIL's premises to review the files relating to the 2006 Transactions.[15] On January 22, 2014, the ITD notified CUHL that it had failed to report short-term capital gains taxable in India arising from the CIHL Acquisition and that consequently CUHL's shares in CIL were being frozen to prevent their sale in CIL's Buy-Back Programme.[16]

In the following months and years, the ITD undertook several measures at the heart of this dispute, including the continued freeze of CUHL's remaining equity shares in CIL (as well as any dividends payable by CIL to CUHL),[17] issuance of a draft assessment order against CUHL in respect of fiscal year 2006-2007,[18] and issuance of an FAO requiring CUHL to pay, in respect of assessment year (AY) 2007-2008, INR 291,025,144,030, or approximately US$4.4 billion within 30 days from the date of service (Demand).[19] India claimed that the amount was owed as a result

of the 2012 Amendment, which allowed Indian tax authorities to levy taxes retrospectively on cross-border transactions concerning underlying assets in India.

On March 11, 2015, the Claimants served a Notice of Dispute on India, arguing that India had violated its obligations under the UK-India BIT.[20] On September 22, 2015, the Claimants filed their Notice of Arbitration under the BIT.[21]

In subsequent years, the ITD also issued a warrant attaching CUHL's movable property, issued an order prohibiting and restraining CUHL from making any transfer of the shares in CIL/Vedanta Limited (VIL) and/or from receiving any dividends on those shares, and issued a lump-sum penalty order against CUHL for approximately US$1.6 billion.[22]

By November 27, 2018, while arbitration proceedings were ongoing, the Respondent had sold a total of 181,764,297 shares, i.e., 98.72 percent of CUHL's shareholding in CIL/VIL, as well as 736,503,056 of CUHL's redeemable preference shares in CIL/VIL.[23]

Jurisdiction and Liability

On December 21, 2020, the Tribunal issued its Award. It found that it had jurisdiction over the Claimants' claims and that they were admissible.[24]

On the merits, the Tribunal found that by enacting the 2012 Amendment and applying it to the Claimants retroactively through the FAO and related enforcement measures, India failed to accord the Claimants' investments fair and equitable treatment in violation of Article 3(2) of the BIT.[25]

Due to the fact that the Claimants' claims arose from the same facts and requested the same relief, the Tribunal found it "unnecessary" to make a declaration on whether the Respondent (i) failed to encourage and create favorable conditions for the Claimants' investment (Article 3(1) of the BIT); (ii) unlawfully expropriated the Claimants' investments or subjected them to measures having effect equivalent to expropriation (Article 5(1) of the BIT); and (iii) breached the Claimants' right to the unrestricted transfer of their investments or returns (Article 7 of the BIT).[26]

Quantum

The Tribunal found that India bore international responsibility and the ensuing duty of reparation for its breach of Article 3(2) of the BIT. Specifically, the Tribunal ordered the Respondent to pay (i) net proceeds the Claimants would have earned from the planned 2014 sale of CIL shares for various dates spanning January 2014 to May 2014 (US$984,228,274.00); (ii) withheld tax refund due with respect to AY 2012-2013 (i.e., share sales to Vedanta) (US$240,645,158.81); and (iii) withheld tax refund due with respect to AY 2010-2011 (i.e., share sales to Petronas) (US$7,946,710.55).[27] In addition to monetary relief, the Tribunal also granted the Claimants' requests for declaratory and injunctive relief. [28]

The Tribunal denied the Claimants' request for the loss of the exemption from UK corporation tax.[29]

Finally, in all instances where it awarded damages, interest was set at a rate of US$ six-month LIBOR plus a six-month margin of 1.375 percent, compounded semiannually. The Tribunal also ordered the Respondent to pay the Claimants' cost of arbitration (Arbitration Costs) and legal representation (Legal Costs) in the arbitration proceedings.[30]

A. Applicable Legal Principles

Having found a breach of Article 3(2) of the BIT, the Tribunal applied the customary international law principle of full reparation as articulated by the Permanent Court of International Justice (PCIJ) in *Factory at Chorzów*.[31] Accordingly, the Tribunal

ordered relief that "will 'wipe out' the consequences of India's breach" and place the Claimants "in the position they would have been had that breach not been committed."[32] Thus, the Tribunal assessed the difference between "what happened in reality" (Actual Scenario) and the "situation which would, in all probability, have existed if that act had not been committed" (But-For Scenario).[33] With respect to the But-For Scenario, the Tribunal clarified that the Respondent is only under an obligation to repair "the injury *caused* by the international wrongful act," which includes "any damage, whether material or moral, caused by the internationally wrongful act."[34]

The Tribunal also clarified that the Claimants carried the burden of proving their loss and the Respondent carried the burden of proving any assertions or defenses in response (such as a mitigation defense).[35]

B. As a Preliminary Matter, the Tribunal Rejected the Respondent's General Objection That It Had No Jurisdiction to Order Reparation

The Tribunal rejected the Respondent's jurisdictional objection that it could not determine reparation due to the Claimants.[36] It clarified that it did not "encroach on the mandate of municipal organs as it did not determine whether sums were due and payable under the applicable municipal law."[37] Any pronouncements made on the "likelihood of the Claimants' receiving certain proceeds but for India's internationally wrongful act" constituted "determinations of fact falling under the Tribunal's discretion in assessing the loss."[38]

C. The Tribunal Granted the Claimants' Request That the Respondent Withdraw Its Tax Demand

The Claimants had requested that the Tribunal order the Respondent to withdraw its unlawful tax demand for the 2006 Transactions under the FAO. The Respondent did not specifically challenge the Tribunal's authority to order such withdrawal. However, it opposed the Claimants' alternative request for future setoff payments of the amount due on the tax demand outstanding (as of the date of the Award and any amounts that may subsequently become due).[39]

Therefore, under Article 34 of the International Law Commission Articles on State Responsibility, the Tribunal ordered the Respondent to withdraw its internationally unlawful tax demand as a measure of restitution.[40] The Tribunal found "no obvious impediment" that would prevent the Respondent from withdrawing its internationally unlawful tax demand.[41] It also noted that such a form of remedy found support in international law, in the decisions of both the PCIJ and other investment tribunals.[42] The Tribunal ordered the Respondent to withdraw the Demand permanently and refrain from seeking to recover the alleged tax liability or any interest and/or penalties arising from the Demand.

The Tribunal denied the Claimants' alternative request for the payment of "an amount equal to the amount due on the Demand outstanding as of the date of the Award, and any amounts that may subsequently become due thereon."[43] It stated that such a request was "premature and insufficiently substantiated until and unless such amounts actually became due" and that granting such a request could raise multiple difficulties in respect of "legal certainty and possible double recovery," especially since the Tribunal would be *functus officio* following the Award.[44]

D. The Tribunal Awarded the Claimants Compensation for the Respondent's Seizure and Sale of CIL Shares

The Claimants requested compensation for the CIL shares that India seized and sold in enforcement of its tax demand of the FAO. The Claimants asserted that but for the Respondent's unlawful conduct, CUHL would have disposed of the CIL shares in early 2014.

The Tribunal ordered compensation for the Claimants, noting that withdrawal of the tax demand by the Respondent would be insufficient to provide full reparation for the Claimants' loss.

i. ***The Claimants did not have the ability to regain possession or control of their assets or to mitigate their damages as alleged by the Respondent***

The Respondent made two arguments to reduce the Claimants' damages in the arbitration. First, it contended that the Claimants had the possibility of regaining control of their remaining assets in India and selling them prior to their attachment. The Tribunal rejected this argument. On the facts, it found that the possibility of the Claimants regaining control of their assets in India was "too remote and speculative" to be considered for the quantification of damages.[45]

Second, the Respondent contended that the Claimants should have mitigated their loss by (i) offering alternative security to the tax authorities (e.g., bank guarantee) and obtaining authorization to sell its shares in CIL, and (ii) remitting the dividends to CUHL before receipt of notice under Section 226(3) of the ITA dated June 16, 2017.

In order to address the Respondent's second objection, the Tribunal first cited the test laid out in *Clayton v. Canada*, which clarified that the Respondent carried the burden of showing the Claimants could have "reasonably" avoided the loss.[46] A mitigation defense is "difficult to prove, given that it is in claimant's own best interest to minimize its loss."[47] There must be "sufficient evidence" to show that a claimant's conduct ("action or inaction"), following the Respondent's breach was "unreasonable, abusive or against its own economic interests."[48] It further observed that "speculative options of mitigation that are proposed in hindsight" are unpersuasive.[49]

Under this test, the Tribunal found no failure or breach of duty to mitigate loss by the Claimants.[50] First, it found that there was no evidence to support the Respondent's assertion that the Claimants would have been able to obtain alternative security. Second, it found that there was no evidence to support the Respondent's assertion that the Indian tax authorities would have exercised their discretion to release the CIL shares.[51] Third, it found that the Respondent's mitigation scenario "relie[d] on inadmissible hindsight" rather than "the information and data that was available to [the Claimants] when they allegedly failed to mitigate their loss."[52] The Claimants had no obligation to pursue mitigation efforts that "may well have turned out to be entirely futile [or that] could have even exacerbated the loss."[53] Fourth, the Tribunal disagreed with the Respondent that it would not have enforced its subsequent tax demand against the alternative security furnished by the Claimants. Finally, with respect to the Respondent's dividend mitigation scenario, the Tribunal found that the Claimants had, in fact, made "significant efforts to obtain release" of the dividends and that their reasonable attempts

to mitigate their losses could not be held against them.[54]

ii. ***The Tribunal valued CUHL's shares in CIL based on the net proceeds that CUHL would have obtained by selling CIL's shares starting in January 2014***

The Respondent claimed compensation equivalent to "the net proceeds that would have been earned from the planned 2014 sale of CIL shares."[55]

It was undisputed between the Parties that in the Actual Scenario, CUHL had lost control of its shares in CIL as a result of the Respondent's actions, and that by November 2018, the Respondent had sold 99 percent of those shares. The Tribunal further found that the Claimants could not have reasonably regained control of these shares, nor could they reasonably have obtained their release and sold them to mitigate their damages.

As such, the Tribunal accepted the Claimants' argument that in the But-For Scenario, the Claimants would have sold those shares back to CIL or to other buyers from January 23, 2014, onward. The Tribunal noted that both experts calculated the Claimants' losses on "the basis of the net proceeds that CUHL would have received but for the sale of those shares if they had started to sell them from 23 January 2014 onward."[56] In this regard, the Tribunal found the Claimants' expert's estimation of the market impact costs (slippage costs) more reliable.[57]

E. The Tribunal Awarded the Claimants Compensation for Tax Refunds Relating to CUHL's Share Sale to Petronas in 2009 and CUHL's Share Sale to Vedanta in 2011

The Claimants also claimed compensation for certain tax refunds that they claimed they would have received but for India's imposition and enforcement of the unlawful tax demand under the FAO.[58] The Tribunal again rejected the Respondent's assertion that this determination required application of Indian law.[59] The Tribunal found sufficient evidence that but for the Respondent's unlawful tax demand, the Claimants would have received a refund with respect to (i) CUHL's share sale to Vedanta in 2011, and (ii) CUHL's share sale to Petronas in 2009.[60] As the Parties' experts mostly agreed on the quantification of these two categories of refunds, the Tribunal so ordered.[61]

F. The Tribunal Denied the Claimants' Tax Gross-Up Claim for Compensation for UK Corporation Tax

In addition to the net proceeds of the CIL shares, the Claimants also requested that any award of damages be grossed up. They argued that but for the Respondent's actions, they could have sold the CIL shares in 2014 without paying any UK taxes.[62] Accordingly, they asked that any award "must be increased to an amount that, once corporate tax at the prevailing rate is deducted, will be equal to the damages due to the Claimants."[63] They argued that awards of damages are taxable in the UK at the corporate tax rate of 19 percent.[64]

Although the Tribunal found the Claimants' request admissible, it dismissed the Claimants' request for a tax gross-up.[65] It found that the record did "not contain sufficient expert or documentary evidence that would establish that such tax would apply, and if so, that it would apply to the entirety of the compensation." [66]

G. The Tribunal Granted the Claimants' Request for an Award Net of Indian Taxes

The Claimants also requested that the Tribunal declare that any award of damages was calculated on a "net-of-Indian-tax basis, and that . . . India may not deduct taxes in respect of payment thereof."[67]

Despite finding that the Claimants had not "formally" articulated this request in their submissions, the Tribunal granted this request with respect to certain amounts claimed.[68] It found, first, that the Claimants had requested that any award granted account for "any such tax that the Claimants may have to pay on the award of damages" in "any relevant jurisdiction."[69] Second, it observed that the Respondent had not objected to this prayer of relief (though it had expressly rejected the Claimants' request for a gross-up in respect of UK corporation tax). Third, it found that certain amounts on the record were calculated net of taxes and "should be granted net of Indian taxes to make the Claimants whole."[70]

Thus, the Tribunal awarded the Claimants an amount net of Indian taxes to fully repair the harm suffered. Specifically, it adopted the Parties' experts' calculations for the proceeds from the CIL shares in the But-For Scenario, which amounted to net proceeds after deducting the costs of the sale, including the applicable Indian Securities Transaction Tax. As regards the compensation awarded with respect to the tax refunds, the Tribunal found that the refund related to the sale of CIL shares to Petronas had already been calculated on a net of tax basis and that tax refunds related to the sale of CIL shares to Vedanta were yet to be granted net of Indian tax.

H. The Tribunal Applied an Interest Rate of US$ Six-Month LIBOR plus a Six-Month Margin of 1.375 Percent to Both the Proceeds of the CIL Shares and the Tax Refunds

The Claimants requested both pre-Award and post-Award interest on all amounts awarded, namely on compensation for (i) the value of the CIL shares and (ii) the tax refunds.

With respect to interest calculations concerning compensation for the value of the CIL shares, the Claimants requested a rate consistent with the statutory rate applied to tax refunds in India and, in the alternative, the Claimants' borrowing rate, for both pre- and post-Award interest.[71] The Respondent argued that the appropriate rate for pre-Award interest is the risk-free rate corresponding to the yield on one-month U.S. Treasury bills.[72] The Parties also disputed whether the interest should be simple or compounded.

The Tribunal first rejected the Claimants' request for India's statutory interest rate. It found that the Claimants would not have earned a return on the

CIL share proceeds at India's' statutory rate in the But-For Scenario.[73] Further, although the Claimants were effectively forced to lend money to the Respondent (from which the Respondent benefited), the "purpose of an award of interest is to make the Claimants whole, not to eliminate the Respondent's enrichment *per se*."[74] In response to the Respondent's arguments, the Tribunal found a U.S.-denominated risk-free interest rate inappropriate given that India (not the U.S.) might default on its payment obligation.[75]

Instead, the Tribunal decided that the Claimants' borrowing cost at a rate of US$ six-month LIBOR plus a six-month margin of 1.375 percent was most reasonable.[76] It further found that since the Claimants' debt obligations involved paying compound interest, only an award of compound interest would make the Claimants whole.[77] In line with investment treaty jurisprudence, a six-month compounding was more appropriate than a monthly compounding.[78] It granted the Claimants' request for post-Award interest until the Award is paid in full.[79]

With respect to interest calculations concerning compensation for the tax refunds, the Tribunal held that an award of interest should compensate the Claimants for the value that they would have realized on their tax refunds in the But-For Scenario. It found that, as with the proceeds of the CIL shares, the Claimants would have likely alleviated their borrowing cost by using their tax refunds.[80] The Tribunal thus applied to the tax refunds the same interest rate as it applied to the proceeds of the CIL shares. It also ordered compounding every six months (as before) and applied the interest start date as agreed to by the Parties' experts.

I. The Tribunal Awarded the Claimants Their Arbitration Costs and Reduced Legal Costs

The general principle that the "costs follow the event" applies both to Arbitration Costs and Legal Costs.[81] A party should "not be forced to bear the costs of proceedings it was obliged to initiate to protect its investment (in the case of a prevailing claimant) or compelled to participate in (in the case of a respondent)."[82] In light of the Parties' behavior, the Tribunal found no "exceptional circumstances" to warrant a departure from this general principle.[83]

Accordingly, and exercising the discretion that was provided to it by the BIT and the UNCITRAL Rules, the Tribunal awarded the Claimants US$4,011,400.83 in Arbitration Costs.[84]

The Tribunal further awarded the Claimants reduced Legal Costs in the amount of US$21,629,657.48.[85] This is because the Tribunal deemed a limited extent of the Claimants' costs as being unreasonable.[86] First, the Tribunal denied the Claimants' Legal Costs associated with an unsuccessful request for interim measures (RIM) application (in the amount of US$1,245,657.43). (To the contrary, the Tribunal ordered the Claimants to reimburse the Respondent for its Legal Costs related to the RIM, in the amount of US$1,240,243.51).[87] Second, the Tribunal found that the Claimants' costs relating to domestic proceedings in India did not "qualify as Legal Costs under Article 38(e) of the UNCITRAL Rules, as they are not 'costs for legal representation and assistance of the successful party' in this arbitration" (in the amount of US$357,373.00).[88] Finally, the Tribunal found that the Claimants had generally failed to demonstrate how the fees and expenses of KPMG were necessary to their claims in the arbitration and rejected awarding such costs (in the amount of US$809,649.00).[89] In sum, the Claimants were awarded US$20,389,413.97 in Legal Costs incurred in the arbitration proceedings.[90]

[1] Award, List of Abbreviations, at vii (defining 2006 Transactions as "transactions undertaken in 2006 by the Claimants in and around the time of their corporate reorganisation and the listing of CIL on the [Bombay Stock Exchange], specifically, Cairn's pre-IPO corporate reorganisation and post-IPO transactions.")

[2] Award ¶ 18.

[3] Award ¶ 25.

[4] Award ¶¶ 29-30.

[5] Award ¶ 35.

[6] Award ¶ 36.

[7] Award ¶ 37.

[8] Award ¶ 38.

[9] Award ¶ 43.

[10] Award ¶¶ 88-9.

[11] Award ¶¶ 88-9.

[12] Award ¶ 123.

[13] Award ¶ 124.

[14] Award ¶ 147.

[15] Award ¶ 149.

[16] Award ¶¶ 157-60.

[17] Award ¶ 157 *et seq*.

[18] Award ¶ 171.

[19] Award ¶ 186 (this included interest that had allegedly accrued at a rate of 2 percent per month on the US$1.6 billion principal).

[20] Award ¶ 172.

[21] Award ¶ 179.

[22] Award ¶¶ 200-04.

[23] Award ¶ 205.

[24] Award ¶ 2032(1).

[25] Award ¶ 2032(2).

[26] Award ¶¶ 1825, 2032(2).

[27] Award ¶ 2032(3).

[28] Award ¶ 2032(5).

[29] Award ¶ 2032(3)(a).

[30] Award ¶¶ 2016, 2032(8) (noting that "distinction is drawn between the costs of legal representation and assistance referred in Article 38(e) of the UNCITRAL [United Nations Commission on International Trade Law] Rules (Legal Costs) and the other costs of the arbitration referred in Article 38(a)-(c), (d) and (f). The costs referred in Article 38(a)-(c) are hereafter referred to as Arbitration Costs.").

[31] Award ¶ 1859.

[32] Award ¶ 1861.

[33] Award ¶ 1861.

[34] Award ¶ 1862 (noting also that it is "'the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act' which must be repaired.")

[35] Award ¶ 1887.

[36] Award ¶ 1865.

[37] Award ¶ 1867.

[38] Award ¶ 1867.

[39] Award ¶ 1871.

[40] Award ¶ 1872.

[41] Award ¶ 1874.

[42] Award ¶¶ 1873-74 (noting that the PCIJ favored restitution "as the preferred form of reparation" in the *Factory at Chorzów* case).

[43] Award ¶ 1875.

[44] Award ¶ 1875.

[45] Award ¶ 1883.

[46] Award ¶ 1887 ("The duty to mitigate applies if: (i) a claimant is unreasonably inactive following a breach of treaty; or (ii) a claimant engages in unreasonable conduct following a breach of treaty.").

[47] Award ¶ 1888.

[48] Award ¶ 1888.

[49] Award ¶ 1888 (citing *Magyar Farming v. Hungary*, where the tribunal was "not prepared to speculate whether the [c]laimants should have exercised a better business judgment.")

[50] Award ¶ 1889.

[51] Award ¶ 1881.

[52] Award ¶¶ 1892, 1894.

[53] Award ¶ 1894.

[54] Award ¶ 1896.

[55] Award ¶ 1898.

[56] Award ¶ 1901.

[57] Award ¶ 1909.

[58] Award ¶ 1910.

[59] Award ¶ 1912 (instead asking whether "absent the Respondent's breaches, the Claimants would have received the refunds they claim.")

[60] Award ¶¶ 1913-14.

[61] Award ¶¶ 1914 (granting compensation for tax refunds as set out at paragraphs 3(b) and 3(c) of the Claimants' Request for Relief).

[62] Award ¶ 1919.

[63] Award ¶ 1920.

[64] Award ¶ 1920.

[65] Award ¶ 1930.

[66] Award ¶ 1929 (noting that the Claimants had "not even made a *prima facie* case" that they were likely to incur corporation tax in the UK on the totality of the amount awarded for the proceeds of the CIL shares).

[67] Award ¶ 1931.

[68] Award ¶ 1932.

[69] Award ¶ 1933.

[70] Award ¶ 1933.

[71] Award ¶ 1941.

[72] Award ¶ 1950.

[73] Award ¶ 1948.

[74] Award ¶ 1944.

[75] Award ¶ 1950.

[76] Award ¶ 1949.

[77] Award ¶ 1956.

[78] Award ¶ 1958.

[79] Award ¶ 1963 ("It is widely accepted that, to achieve full reparation, interest will accrue until the date of full payment.").

[80] Award ¶ 1966.

[81] Award ¶¶ 2019-20 (citing to Article 40(1) of the UNCITRAL Rules).

[82] Award ¶ 2020.

[83] Award ¶ 2022 (noting that the Claimants did not engage in behavior increasing the time and costs required to resolve the dispute, but that to the contrary, the Respondent made "numerous unsolicited submissions and additional document requests outside of the agreed-upon procedure that added to the length of the proceedings.")

[84] Award ¶ 2027(a).

[85] Award ¶ 2027(b).

[86] Award ¶ 2025.

[87] Award ¶ 2025(a).

[88] Award ¶ 2025(b).

[89] Award ¶ 2025(c).

[90] Award ¶ 2031.

Crescent Petroleum Company International Limited and Crescent Gas Corporation Limited v. the National Iranian Oil Company

Date of the Award
September 2021

The Parties
Crescent Petroleum Company International Limited and Crescent Gas Corporation Limited (the Claimants), National Iranian Oil Company (the Respondent or NIOC)

Sector
Oil and Gas

Applicable Treaty
N/A

Administered by the Permanent Court of Arbitration (PCA); United Nations Commission on International Trade Law Rules

Members of the Tribunal
Gavan Griffith QC (president), Kamal Hossain (Claimants' appointee), Assadollah Noori (Respondent's appointee)

Background

On April 25, 2001, Crescent Petroleum Company International Limited (Crescent International) and the Respondent concluded a long-term gas supply and purchase contract (GSPC).[1] The GSPC provided for the supply of gas by the Respondent from the Salman field in the Persian Gulf to the city of Sharjah in the United Arab Emirates between 2005 and 2030.[2]

In 2003, Crescent International sought to assign the GSPC to its subsidiary, Crescent Gas Corporation Limited (Crescent Corporation).

In July 2009, the Claimants commenced arbitration proceedings against the Respondent claiming that the Respondent had failed to deliver any gas to the Claimants, in breach of the GSPC. The Claimants sought damages for the period between 2005 and 2014, reportedly totaling US$15 billion. The Respondent challenged the jurisdiction of the arbitrators, alleging corruption by Crescent International and invalid assignment of the GSPC to Crescent Corporation.[3]

Jurisdiction and Liability

On August 24, 2014, the Tribunal issued its award upholding the Claimants' claims and dismissing the Respondent's jurisdictional challenges and counterclaims (the Award). The arbitrators concluded that the GSPC was binding on the Parties, the Claimants were competent to bring the claim and the Respondent had been in breach of its contractual obligation to deliver gas under the GSPC since December 1, 2005. The Tribunal reserved its decision on remedies.[4]

The Award has not been made public.

In March 2015, the Respondent applied to set aside the Award in the High Court in London in the case of *National Iranian Oil Company v. Crescent Petroleum Company International Ltd & Another* [2016] EWHC 510 (Comm) (March 4, 2016). The Court dismissed the Respondent's application. The Court refused to interfere with the Tribunal's finding that the GSPC was not procured through corruption, and held that public policy did not require it to refuse to enforce a contract obtained by bribery, or one preceded and unaffected by a "failed attempt to bribe."[5]

Quantum

In November 2016, the Tribunal held a separate hearing in respect of the Claimants' remedies, including the Claimants' claims for damages and indemnities for third-party claims up to 2014.[6]

On September 18, 2021, Dana Gas PJSC (Dana), an affiliate of Crescent Petroleum, announced that the Tribunal had rendered a decision on remedies in terms of which Dana would receive US$607.5 million.[7] However, the total amount awarded to the Claimants may be much higher, as this figure represents only Dana's share of the Award proceeds rather than NIOC's total liability to the Claimants.[8] The Tribunal's final award on quantum has not been made public.

Further Proceedings

In 2018, the Claimants commenced a second arbitration against the Respondent seeking damages for the Respondent's breach of the GSPC from 2014 until the contract's conclusion in 2030. A new arbitral tribunal was appointed, constituted of Professor Laurent Aynès (president), Dr. Charles Poncet and Professor Dr. Klaus Sachs.[9]

On July 30, 2018, the Tribunal upheld jurisdiction.

On May 5, 2020, the Tribunal decided that the GSPC had been terminated as of September 11, 2018. The Claimants' request to set aside this award at the seat, in Switzerland, was dismissed on July 24, 2020, by the Swiss Federal Tribunal.[10]

A hearing in the second arbitration is reportedly scheduled for October 2022.[11]

---

[1] This award and related awards in this dispute have not been made public. However, many of the details surrounding the dispute have been reported in the decision of the English High Court of Justice (EWHC) in *National Iranian Oil Company v. Crescent Petroleum Company International Ltd & Another* [2016] EWHC 510 (Comm) (March 4, 2016) at paras. 1-4 and various news reports.

[2] Sanderson, C. "PCA hears second UAE-Iranian gas dispute," *Global Arbitration Review* (July 10, 2019), accessed on November 15, 2021, at https://globalarbitrationreview.com/pca-hears-second-uae-iranian-gas-dispute (subscription required).

[3] National Iranian Oil Company v. Crescent Petroleum Company International Ltd & Another [2016] EWHC 510 (Comm) (March 4, 2016) at para. 3.

[4] National Iranian Oil Company v. Crescent Petroleum Company International Ltd & Another [2016] EWHC 510 (Comm) (March 4, 2016) at para. 3.

[5] National Iranian Oil Company v. Crescent Petroleum Company International Ltd & Another [2016] EWHC 510 (Comm) (March 4, 2016) at para. 49(3).

[6] Sanderson, C. "PCA hears second UAE-Iranian gas dispute," *Global Arbitration Review* (July 10, 2019), accessed on November 15, 2021, at https://globalarbitrationreview.com/pca-hears-second-uae-iranian-gas-dispute (subscription required).

[7] Dana Gas PJSC disclosure pursuant to Article 33 of the Regulations of the Abu Dhabi Stock Exchange (September 27, 2021), accessed on November 15, 2021, at https://www.danagas.com/wp-content/uploads/2021/09/20210927-DG-NIOC-Award-EN.pdf.

[8] Fisher, T. "Iranian state oil company ordered to pay damages," *Global Arbitration Review* (September 28, 2021), accessed on November 15, 2021, at https://globalarbitrationreview.com/pca-hears-second-uae-iranian-gas-dispute (subscription required).

[9] *Ibid*.

[10] Perry, S. "Interim award upheld in mega-claim over Iranian gas," *Global Arbitration Review* (September 22, 2020), accessed on November 15, 2021, at https://globalarbitrationreview.com/interim-award-upheld-in-mega-claim-over-iranian-gas.

[11] Dana Gas PJSC Disclosure pursuant to Article 33 of the Regulations of the Abu Dhabi Stock Exchange (September 27, 2021), accessed on November 15, 2021, at https://www.danagas.com/wp-content/uploads/2021/09/20210927-DG-NIOC-Award-EN.pdf.

Abed El Jaouni and Imperial Holding S.a.l. v. Lebanese Republic, International Centre for Settlement of Investment Disputes (ICSID) Case No. ARB/15/3

Date of the Award
January 14, 2021

The Parties
Abed El Jaouni and Imperial Holding S.a.l. (the Claimants), Lebanon (the Respondent)

Sector
Aviation Services

Applicable Treaty
Bilateral Investment Treaty between Germany and Lebanon (BIT)

Members of the Tribunal
Albert Jan van den Berg (president), J. William F. Rowley (Claimants' appointee), Rodrigo Oreamuno (appointed by the Appointing Authority)

Background

In 2004, Mr. El Jaouni established ImperialJet S.a.l., an aviation business based in Lebanon, to provide private charter, commercial aviation and ground handling services. In 2005-2006, he established Imperial Holding S.a.l. and Aviation Plus Holding S.a.l., Lebanese joint stock companies that held 99.94 percent and 0.03 percent shareholdings in ImperialJet, respectively. As of 2008, Mr. El Jaouni held direct shareholdings in Imperial Holding (49 percent), ImperialJet (0.03 percent) and Aviation Plus (49.5 percent).

In December 2014, the Claimants commenced an ICSID arbitration against Lebanon under the BIT.

The Claimants claimed that starting in 2008, the Lebanese government violated the BIT with respect to their investment in Lebanon by, inter alia, (i) taking protectionist measures that benefitted Middle East Airlines, the Lebanese national flag carrier; (ii) failing to implement the government's "Open Skies" policy, which provided for liberalization of the Lebanese aviation sector; (iii) preventing ImperialJet from expanding its operations at Beirut's airport; (iv) suspending and then revoking ImperialJet's Air Operator Certificates and Ground Handling Certificate; and (v) banning ImperialJet's employees from accessing the company's premises at Beirut's airport.

Jurisdiction and Liability

On June 25, 2018, the Tribunal issued its Decision on Jurisdiction, Liability and Certain Aspects of Quantum (Decision). It held that it had jurisdiction over Mr. El Jaouni's claims but not over those of Imperial Holding, which did not qualify as a German investor under the BIT.

On the merits, the Tribunal held that Lebanon's revocation of ImperialJet's Air Operator Certificates and Ground Handling Certificate on June 22, 2010, and its subsequent denial of access to the company's premises at Beirut's airport violated the fair and equitable treatment (FET) standard under the BIT. The Tribunal rejected Mr. El Jaouni's claims of breach of the BIT arising from Lebanon's other alleged acts and omissions.

Quantum

A. Valuation Principle and Standard

In its Decision, the Tribunal held that it would apply the "full reparation" principle under customary international law to determine the damages payable to Mr. El Jaouni, because the BIT does not stipulate the standard for determining damages in case of a breach of the FET standard.[1] The Tribunal also held that the appropriate standard for valuing the Claimants' damages was to calculate the loss in the fair market value (FMV) of his investment in Lebanon caused by the Respondent's breach of the FET standard.[2]

B. Valuation Methodology (Initial Decision)

The Tribunal's Decision addressed the valuation methodologies proposed by the parties for calculating the loss in the FMV of the Claimants' investment in Lebanon caused by the Respondent's breach. As discussed in this section, the Tribunal concluded that neither the Parties nor their quantum experts had presented an appropriate valuation methodology to assess the FMV of Mr. El Jaouni's shareholdings in Imperial Holding, ImperialJet and Aviation Plus. In these circumstances, the Tribunal considered it appropriate to provide the Parties with another opportunity to present their respective damages assessments,[3] which the Tribunal addressed in its final Award (discussed in Parts C and D below).

i. Rejection of Claimants' DCF analysis

The Claimants' quantum expert used a discounted cash flow (DCF) analysis to calculate the net present value of the profits that the Claimants would have achieved during the period from mid-2010 to 2018 but for the Respondent's revocation of ImperialJet's licenses on June 22, 2010. This analysis was based on (i) the historical financial performance of Imperial Holding and its Lebanese and offshore subsidiaries (collectively, the Imperial Group) during the period from 2004 to mid-2010, and (ii) the Imperial Group's business prospects, based on a forecast of its "value drivers" provided by the Claimants' aviation expert.[4] Under their "base case" projected fleet plan, the Claimants claimed to have suffered damages

of US$615,441,000 (not including pre-Award interest) as a result of the Respondent's breach.[5]

The Tribunal rejected the Claimants' DCF analysis on three grounds. First, it held that the Claimants had failed to establish the existence of the Imperial Group as a single entity, with Imperial Holding at the center and Beirut as the hub of operations, for the purposes of valuing Mr. El Jaouni's 49 percent direct shareholding in Imperial Holding. The Claimants had not placed on record consolidated financial statements of Imperial Holding, and it appeared from the record that Imperial Holding's subsidiaries retained their respective revenues.[6]

Second, the Tribunal held that even if one were to assess the historical financial performance of the Imperial Group, the use of a DCF analysis was not justified because neither Imperial Holding nor any of its subsidiaries qualified as a "going concern" under the definition in the World Bank Guidelines on the Treatment of Foreign Direct Investment. In particular, the Tribunal found that (i) none of the entities in the Imperial Group had been in operation for a sufficient period of time to generate the data required for the calculation of future income, which was an essential prerequisite for the adoption of the DCF valuation method, and (ii) the historical financial information of Imperial Holding's subsidiaries was not sufficient to conclude, with reasonable certainty, that they would continue to produce legitimate income over the course of their economic lives.[7]

Third, the Tribunal observed that the Claimants' contemporaneous business plans were insufficient to support a DCF analysis because (i) they contained only minimal reference to allegedly integral elements of the Claimants' aviation business and (ii) they did not evidence that the Claimants had carried out contemporaneous market research, risk analysis or formal business planning in relation to their investment.[8]

ii. Rejection of the Respondent's net assets valuation

The Respondent's expert used the net assets method to value the loss to Mr. El Jaouni's shareholding in ImperialJet at nil, on the basis of ImperialJet's audited financial statements as at December 31, 2009, which recorded negative net assets of US$705,000.[9]

The Tribunal rejected the Respondent's net assets valuation on the ground that it did not correctly reflect the losses suffered by Mr. El Jaouni's investment in ImperialJet as a result of Lebanon's revocation of ImperialJet's licenses. It was not disputed that the revocation of the licenses prevented ImperialJet from operating one of its aircraft and from conducting ground handling services at Beirut's airport, resulting in losses to the company. These losses would naturally have had a negative effect on Mr. El Jaouni's shareholding in ImperialJet, both directly and through Imperial Holding and Aviation Plus.[10]

iii. Rejection of the Respondent's sunk costs valuation

The Respondent's expert also used a sunk costs valuation method to calculate the FMV of the Claimants' loss of investment by reference to the equity contributions injected into ImperialJet. Based on this method, the Respondent's expert calculated the Claimants' damages as US$1.2 million. The Tribunal rejected the Respondent's sunk costs valuation on the ground

that it did not include the loss, if any, caused to Mr. El Jaouni's investment in Aviation Plus due to the Respondent's breach of the BIT.[11]

C. Parameters for the Calculation of Damages

On January 14, 2021, the Tribunal issued its final Award, after holding a separate quantum phase in which the Parties had the opportunity to present new models for the calculation of Mr. El Jaouni's damages. Before addressing the Parties' damages models, the Tribunal determined three disputed issues that set the parameters for the calculation of damages.

i. Suspension of ImperialJet's first Air Operator Certificate

The first disputed issue concerned the significance of the Respondent's suspension of one of ImperialJet's two Air Operator Certificates on May 11, 2010, approximately one month before the Respondent breached the FET standard under the BIT by revoking both Air Operator Certificates as well as ImperialJet's Ground Handling Certificate. In its Decision, the Tribunal had rejected the Claimants' claim that the suspension of the first Air Operator Certificate breached the BIT. The Respondent argued in the quantum phase that (i) any damages should take account of the lawful suspension of the first Air Operator Certificate on May 11, 2010, and (ii) the Claimants' damages must be discounted to reflect the low probability that the suspension would have been lifted.[12]

In its Award, the Tribunal concluded that it was not appropriate to apply a discount to the Claimants' damages on account of the Respondent's suspension of ImperialJet's first Air Operator Certificate on May 11, 2010. The Tribunal found that the suspension would, in all likelihood, have been lifted but for the Respondent's unlawful revocation of ImperialJet's licenses on June 22, 2010.[13]

ii. Renewal of ImperialJet's Ministerial Authorization

The second disputed issue concerned the significance of the expiry of ImperialJet's authorization from Lebanon's Ministry of Public Works and Transport to operate air transport services. The Respondent argued that the expiry of the Ministerial Authorization on November 15, 2010, precluded the Claimants from claiming any damages after that date, because it resulted in the automatic lapse of ImperialJet's Air Operator Certificates and Ground Handling Certificate. The Respondent's position raised the following three questions: (i) whether ImperialJet would have applied for renewal of its Ministerial Authorization; (ii) whether it was reasonable to assume that the Ministry of Public Works and Transport would have granted the renewal; and (iii) if the renewal was not granted, whether the expiry of ImperialJet's Ministerial Authorization would have prevented it from operating its business.[14]

The Tribunal upheld the Respondent's position on each of these three questions, concluding that: (i) it was unlikely that ImperialJet would have applied for renewal of its Ministerial Authorization because, on the Claimants' own case, there was no requirement to renew the Ministerial Authorization; (ii) even if ImperialJet had applied for renewal of its Ministerial Authorization, it would not have met the criteria for renewal; and (iii) in the absence of renewal, ImperialJet would not have been permitted to operate its business after November 15, 2010.[15]

iii. The Claimants' non-Lebanese operations

The third disputed issue concerned the significance of the Claimant's non-Lebanese operations, specifically operations related to

aircraft that ImperialJet "wet-leased" from JetAir Flug, the Claimant's German aviation company.[16] The aircraft in question were all registered outside Lebanon and were not enrolled on a Lebanese Air Operator Certificate. The Claimant contended that the Lebanese government arbitrarily denied landing permits to these aircraft following its revocation of ImperialJet's licenses as part of a targeted "blacklisting" of all aircraft connected with Imperial Holding.[17]

The Tribunal concluded that for a valid assessment of the damages due to the Claimants, aircraft that were not enrolled under ImperialJet's licenses must be excluded. The evidence on the record did not support a conclusion that Lebanon's revocation of ImperialJet's licenses was the but for or factual cause of its denial of landing permits to JetAir Flug aircraft.[18] Indeed, the Tribunal had already concluded in its liability decision that the denial of landing permits to JetAir Flug aircraft was not a targeted attack on the Claimants' business or connected with the revocation of ImperialJet's licenses. The Tribunal also noted *in dicta* in its Award that even if factual causation had been established, it would have had difficulty concluding that there was the requisite legal causation, because the losses associated with the denial of landing permits were not sufficiently proximate or foreseeable to the Lebanese government when it revoked ImperialJet's licenses.[19]

D. Valuation Methodology (Final Award)

i. Adoption of the Respondent's new damages model

In the quantum phase, the Respondent's quantum expert presented an entirely new damages model that assessed the loss in value of ImperialJet's net assets between June 22, 2010 (the date on which Lebanon revoked ImperialJet's licenses in breach of the BIT), and November 15, 2010 (the date on which ImperialJet's Ministerial Authorization expired). This loss in value was represented by the profits that ImperialJet would have earned during this period but for Lebanon's breach of the BIT.[20] The Respondent's expert referred to this assessment as a "net assets approach," a term that the Tribunal used for convenience, although it was essentially a DCF valuation based on ImperialJet's projected cash flows over a limited period of only five months.

In order to calculate the profits that ImperialJet would have earned during this five-month period, the Respondent's expert extrapolated from the profits that it actually had earned during the period from January 1, 2010, to June 23, 2010. Using this approach, the Respondent's expert assessed the loss in the FMV of the Claimants' direct and indirect shareholdings in ImperialJet in the amount of US$218,200.[21]

The Tribunal considered the Respondent's damages model to be reasonable, taking into account that (i) there was nothing to suggest that ImperialJet's operations would have been significantly different from June to November 2010 but for Lebanon's breach of the BIT, and (ii) the Claimants had not established that the market would have grown significantly between early and late 2010.[22] Moreover, the Respondent's approach was not inconsistent with the Tribunal's rejection of the Claimants' DCF valuation in its Decision. Unlike the Claimants' DCF valuation, the Respondent's damages model involved limited speculation because it was based on financial information immediately preceding the breach and projecting for a period of only five months into the future.[23]

ii. Rejection of the Claimants' new damages model

The Claimants' quantum expert also presented a new damages model in the quantum phase. The Tribunal excluded this model because, contrary to its determinations, (i) the model assumed the renewal of ImperialJet's Ministerial Authorization in the but-for scenario and (ii) the model included damages for the Claimants' non-Lebanese operations.[24] The Tribunal nonetheless proceeded to address the merits of the Claimants' model, leaving aside these flaws.

The Claimants' new model was based on a combination of (i) so-called historical damages during the period from the Respondent's breach of the BIT (June 23, 2010) to the proxy date of the Award (December 31, 2018) and (ii) the FMV of the Claimants' investment as of December 31, 2018. The Claimants' model was thus an *ex-post* valuation, i.e., conducted as of a date after the date of the Respondent's breach.[25]

The Tribunal rejected the Claimants' model on two grounds. First, the Tribunal confirmed the finding in its Decision that the appropriate valuation date for the Claimants' investment was the day before the Respondent's breach (i.e., June 22, 2010) and rejected the Claimants' use of December 31, 2018, as the valuation date. Absent particular circumstances that had not been established by the Claimants, the date immediately prior to the breach best reflected the value of the investment but for the Respondent's wrongful conduct.[26]

Second, the Claimants' historical damages model, which estimated the profits that Imperial Holding would have earned between 2010 and 2018 but for the Respondent's breach, suffered from the same flaws as the DCF analysis that the Tribunal had rejected in its Decision. In particular, the

historical financial information of Imperial Holding and its subsidiaries was insufficient to conclude, with reasonable certainty, that these companies would have continued to produce income over their economic lives.[27]

Interest

In its Decision, the Tribunal held that the appropriate rate of pre-Award and post-Award interest was the Lebanese government's borrowing rate, which was the effective annual rate of interest paid by Lebanon on sovereign bonds issued in US$. As of November 9, 2010 (the closest date to the valuation date), this rate was 5.22 percent. Interest was payable from the valuation date of June 22, 2010; post-Award interest would be compounded annually.[28]

---

1 Decision ¶¶ 1141-43.

2 Decision ¶¶ 1145-46.

3 Decision ¶¶ 1207-08.

4 Decision ¶¶ 991-94, 1154-55, 1167.

5 Decision ¶ 1150.

6 Decision ¶¶ 1172-74.

7 Decision ¶¶ 1179-84.

8 Decision ¶ 1197.

9 Decision ¶ 1202.

10 Decision ¶ 1203.

11 Decision ¶¶ 1204-05.

12 Award ¶¶ 117-20.

13 Award ¶ 138.

14 Award ¶ 168.

15 Award ¶¶ 170-76.

16 A wet lease is a commercial arrangement whereby an aircraft owner both leases the aircraft and makes available at least one crewmember to another person for his or her exclusive use for a specified period or a defined number of flights.

17 Award ¶ 208.

18 Award ¶ 225.

19 Award ¶ 226.

20 Award ¶ 247.

21 Award ¶¶ 258, 263.

22 Award ¶ 259.

23 Award ¶ 260.

24 Award ¶ 276.

25 Award ¶¶ 278, 285.

26 Award ¶¶ 311-12.

27 Award ¶ 317.

28 Award ¶¶ 1228, 1232.

Freif Eurowind Holdings Ltd v. Kingdom of Spain, Stockholm Chamber of Commerce (SCC) Case No. 2017/060

Date of the Award
March 8, 2021

The Parties
FREIF Eurowind Holdings Ltd (the Claimant), Kingdom of Spain (the Respondent)

Sector
Renewables

Applicable Treaty
Energy Charter Treaty (ECT)

Members of the Tribunal
Doug S. Jones (president), C. Mark Baker (Claimant's appointee), Kaj I. Hobér (Respondent's appointee (replaced)), Thomas Clay (Respondent's appointee)

Background

In the mid-2000s, Spain (and certain other European countries) implemented a series of policies aimed at reducing CO^2 emissions. The policies were enacted in response to a European Union directive that required Member States to reduce their carbon emissions in line with obligations committed to under the Kyoto Protocol. To incentivize investment in its renewable energy sector, Spain implemented a scheme that promised investors certain subsidies on renewable energy production.

In December 2011, the Claimant purchased a 50 percent preferred equity interest in a portfolio of six operating wind farms. However, in 2012, the Spanish government began to make changes to the legal framework of the scheme, including canceling the scheme for new facilities and imposing a tax on the value of electricity and the value of the incentives under the scheme.

The Claimant alleged that the changes caused significant harm to its investment. On March 21, 2017, the Claimant filed a Request for Arbitration under the ECT.

Jurisdiction and Liability

The Tribunal found that it had jurisdiction under the ECT over all of the Claimant's claims, with the exception that it had no jurisdiction to determine whether one of the taxes imposed by Spain violated Spain's obligations under the ECT.

On the merits, the Tribunal found that Spain had not violated Part III of the ECT and international law with respect to the Claimant's investments. The Tribunal determined that Spain had complied with the fair and equitable treatment clause of the ECT by acting transparently and in good faith, that it did not create and then breach legitimate expectations on the part of the Claimant, and the Claimant was in fact aware of the likelihood of changes to the incentive scheme.

Quantum

A. Entitlement to Compensation

The Claimant argued that, because the ECT does not expressly provide a standard of compensation for violations of the ECT, the customary international law principle of full compensation should be applied. The Claimant relied on the statement of the principle as established by the Permanent Court of International Justice (PCIJ) in *Chorzów Factor*, which stipulates that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[1] The Claimant also relied on a number of more recent decisions that follow Chorzów Factor, including *Amoco Int'l Finance v. Iran, MTD v. Republic of China*, *Asian Agricultural Products Ltd v. Republic of Sri Lanka* and *Vivendi II*. Finally, the Claimant referred to the International Law Commission (ILC) Articles on State Responsibility, which incorporate the full compensation standard in Articles 35 and 36.

Spain accepted that, in the absence of a specific rule on reparation in the ECT, the customary international law principle of full reparation applies, pursuant to Article 26(6) of the ECT and as codified by the ILC Articles on States Responsibility. Spain also argued that the Claimant bears the burden of proving the loss and, further, that the Claimant's loss was speculative to calculate, so it must be rejected.

Because the Tribunal declined to find a breach of the ECT, it did not render a decision on the Parties' respective positions on quantum.

B. Quantification of Compensation

The Claimant sought as damages the diminution in the fair market value of its investment calculated according to the discounted cash flow (DCF) method and emphasized that every arbitration finding that a state had violated the ECT with respect to investments in renewable power assets has adopted the DCF method.

Spain argued that the correct approach to determine the economic impact of the disputed measures was to assess their internal rate of return and compare it to a benchmark considered appropriate. It argued that (i) the DCF method was not suitable because of the capital-intensive nature of the business, the

cash flow's dependency on volatile and unpredictable elements, the long-term nature of the forecasts, and the disproportion between the alleged investments and the amount claimed; (ii) the DCF method was not the most objective method available on the facts; and (iii) the Claimant's DCF was manifestly erroneous.

The Tribunal did not issue a ruling on which approach was preferable given its findings on the merits.

C. Interest

Relying on *AAPL v. Sri Lanka*,[2] the Claimant argued that pre- and post-Award interest should be calculated at the highest lawful rate from the date of assessment until the date Spain pays the Award in full. The Claimant requested an appropriate interest rate, and for both the pre- and post-Award interest it suggested calculation at the rate of Spanish 10-year bond yields.

Spain argued that interest should be assessed at the short-term risk-free rate using the EURIBOR at six months or one year, and that awarding the rate of the Spanish 10-year bond rate would unfairly reward the Claimant for a risk it did not bear. It also argued that the Claimant had provided no justification for why post-Award interest should be granted. Relying on *National Grid P.L.C. v. Argentine Republic*[3] and *Ioan Micula v. Romania*,[4] Spain argued that assessment at the highest lawful rate would result in a punitive increase to the Award amount, contravening the compensatory basis of damages.

In the absence of a finding of breach or damages, the Tribunal did not render a ruling on interest.

D. Tax Gross-Up

The Claimant argued that the Award should include a gross-up for the amount of taxation that would apply to the Award under UK law, which would not have applied if the Claimant had received that money through dividends from its investment.

Spain argued that the Claimant's claim to the tax gross-up was completely unfounded. Spain submitted that the taxation measures of the United Kingdom cannot affect the liability of Spain, relying on Article 21(1) of the ECT, which provides that "nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties." Spain also argued that there was a lack of evidence to show that the Claimant's hypothetical compensation would be subject to taxation and that the Claimant had failed to justify the tax rate.

The Tribunal did not issue a ruling on the Claimant's tax gross-up claim.

Interest and Costs

The Tribunal determined that Spain was entitled to recover the entirety of its costs from the Claimant because it was entirely successful in the arbitration, and its costs were reasonable. In this regard, the Tribunal referred to Articles 49 and 50 of the SCC Rules. The Claimant acknowledged the "loser pays" rule in the SCC Rules, but argued that because of a supplementary jurisdictional objection raised by Spain, it had incurred additional costs of more than €694,345.55. The Tribunal declined to award the costs, finding that Spain's conduct should not count against it.

The Tribunal decided to award interest on the costs to incentivize payment and adopted the Spanish government 10-year bond yield rate as a reasonable, commercial rate of interest.

---

[1] *Case Concerning Factory at Chorzów (Germany v. Poland)*, Judgment, PCIJ, September 13, 1928 (1928 PCIJ, Series A. No. 17) [47].

[2] *AAPL v. Sri Lanka*, International Centre for Settlement of Investment Disputes (ICSID) Case No. ARB/87/3, Award, June 27, 1990 [114].

[3] *National Grid P.L.C. v. Argentine Republic*, United Nations Commission on International Trade Law Arbitration Award, November 3, 2008, n 122.

[4] *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, December 11, 2013 [1269].

Olympic Entertainment Group AS v. Ukraine, Permanent Court of Arbitration Case No. 2019-18

Date of the Award
April 15, 2021

The Parties
Olympic Entertainment Group AS (the Claimant or OEG), Ukraine (the Respondent or Ukraine)

Sector
Gambling

Applicable Treaty
Bilateral Investment Treaty between Estonia and Ukraine (1995) (BIT)

Members of the Tribunal
Mr. Neil Kaplan (president), Professor Michael Pryles (Claimant's appointee), Mr. J. Christopher Thomas QC (Respondent's appointee)

Background

Starting in 2004, the Claimant, through its locally incorporated company Olympic Casino Ukraine LLC (OCU), invested in the development and operation of several gaming facilities in Ukraine. The Claimant provided equity contributions of cash and gambling equipment to OCU, as well as significant loans (collectively, the Shareholder Loan).

On May 7, 2009, a fire broke out in a small gambling hall (unrelated to the Claimant's investments) in Dnipropetrovsk, a city in central Ukraine. The Ukrainian authorities decided to suspend all gambling licenses in the country with immediate effect for one month, until June 7, 2009. One week later, on May 15, 2009, the Verkhovna Rada of Ukraine (the Ukrainian Parliament) adopted the law "On the Prohibition of Gambling Business in Ukraine"

(2009 Gambling Ban). The president of Ukraine vetoed the 2009 Gambling Ban, but the Verkhovna Rada overruled that veto. The 2009 Gambling Ban took effect on June 25, 2009, imposing a full and immediate ban of gambling. The Claimant's Ukrainian subsidiaries (save for one) filed for bankruptcy in August 2009. The dissolution of OCU was registered in January 2012.

Prior to the adoption of the 2009 Gambling Ban, the Claimant was in negotiations with the Maxbet Group (Maxbet), another gambling operator in Ukraine, with a view to disposing of the Claimant's gambling business in Ukraine. The draft share purchase agreement under negotiation indicated a consideration of US$15 million agreed to by Maxbet for the Claimant's assets in Ukraine (the Maxbet Offer). These negotiations stopped around May 15, 2009, shortly after Ukraine announced the temporary suspension of all gambling licenses and around the time Ukraine adopted the 2009 Gambling Ban.

The Claimant and Ukraine unsuccessfully tried to settle the dispute through negotiations from 2009 to 2017. In 2018, the Claimant filed its Notice of Arbitration pursuant to the 1976 United Nations Commission on International Trade Law Rules under the BIT.

Jurisdiction and Liability

On April 15, 2021, the Tribunal issued its final award (Award).

The Tribunal rejected Ukraine's jurisdictional objection based on the alleged illegality of the Claimant's investment, i.e., that the Claimant did not have certain gambling licenses when it commenced operations in Ukraine. The Tribunal held that Ukraine had failed to prove the alleged illegality[1] and that, in any event, the alleged breach of Ukrainian law was not a breach of a fundamental principle of Ukrainian law that would deprive the Claimant of the treaty protection.[2]

On the merits, the Tribunal ruled that Ukraine indirectly expropriated the Claimant's investment "overnight and without any compensation" in breach of Article 5 of the BIT.[3] Specifically, upon the revocation of the licenses of the gambling facilities in accordance with the 2009 Gambling Ban, the Claimant "lost the possibility to earn a commercial return from its investments, which were all dependent on the legality of gambling in Ukraine."[4] In reaching this decision, the Tribunal rejected the Respondent's argument that the 2009 Gambling Ban was a proper exercise of the state's police powers.[5] The Tribunal found that Ukraine's indirect expropriation was the "proximate causal factor" in the Claimant's investment being "wiped out."[6]

With respect to the Claimant's claim that Ukraine also failed to meet the fair and equitable treatment (FET) standard under Article 2(1) of the BIT, the Tribunal observed that the 2009 Gambling Ban and its effect justified a conclusion that Ukraine breached the FET standard, but decided that there was no need to make any decision on liability, as it bore no relevance to the quantum or the Claimant's entitlement to relief sought given the Tribunal's holding on the Claimant's expropriation claim.[7] For the same reason, the Tribunal did not issue a holding on the Claimant's claim relating to Ukraine's alleged breach of the full protection and security standard under Article 2(2) of the BIT.[8]

Quantum

Before turning to the issue of quantum, the Tribunal first addressed Ukraine's argument on the lack of a causal relationship between the Claimant's losses and the alleged expropriation. Ukraine contended that the Claimant was not entitled to any compensation, as OCU "was insolvent or about to be insolvent at

the time of the expropriation,"[9] mainly due to the significant Shareholder Loan it owed to the Claimant. But the Tribunal rejected Ukraine's "inevitable liquidation" argument,[10] finding that "[t]he unlawful indirect expropriation was the proximate causal factor that led to the Claimant's investment being wiped out,"[11] because (i) contrary to Ukraine's contention that the Claimant could have called in the Shareholder Loan, the Claimant had no incentive to do so, as it "had an interest in keeping its subsidiary afloat";[12] (ii) OCU's revenues showed a consistent growth, and it "successfully operated, without any cash injections from OEG, from November 2008 until July 2009";[13] and (iii) OCU consistently generated positive EBITDA (earnings before interest, taxes, depreciation and amortization) since 2006, with a profit margin of 32 percent in April 2009.[14]

A. Valuation Methodology

To assess quantum, the Tribunal did not rely on the BIT's provision on compensation for expropriation because it relates to lawful expropriation. Instead, it resorted to "the relevant principles of customary international law as set out by the Permanent Court of International Justice in the *Chorzów Factory* case."[15]

Having concluded that the liquidation of the Claimant's investment was not inevitable, the Tribunal rejected Ukraine's submission that the appropriate valuation should be based on the liquidation value or book value of the Claimant's investment.[16] The Tribunal found that at the time of expropriation, i.e., June 25, 2009 (the Expropriation Date), "[t]he Claimant's investment was an operating business with hopes of improved performance." On that basis, the Tribunal was of the view that "the assessment of [the Claimant's] investment must include its fair market value, which includes the expected performance in the future."[17]

B. Valuation

The Claimant's quantum experts valued the Claimant's investment at €15 million in the but-for scenario, which was the midpoint of their discounted cash flow valuation of €18.7 million and the Maxbet Offer of US$15 million (approximately €11.4 million).[18] After

deducting a sum of €2.6 million (the Recovered Sum), which was the amount the Claimant recovered after the Expropriation Date through repossessing some of OCU's equipment pursuant to a Movable Property Pledge Agreement entered into between the Claimant and OCU on June 2, 2009 (the Pledge Agreement), the Claimant sought compensation from the Respondent in the sum of €12.4 million.[19] In the alternative, the Claimant submitted that the value of its investment was "at least USD 15 million" as "implied by the Maxbet [O]ffer," and that it should be entitled to compensation calculated as the euro equivalent of US$15 million minus the Recovered Sum.[20]

As stated above, Ukraine relied heavily on the insolvency or near-insolvency status of the Claimant and argued that the liquidation or book value of the investment showed that the Claimant was not entitled to any compensation. The Tribunal rejected this argument.

The Tribunal held that the Claimant's valuation of €15 million was "more or less consistent with contemporaneous valuation benchmarks"[21] and thus "not unreasonable as a starting point."[22] But the Tribunal found that the following factors justified a discount of the Claimant's valuation, including its alternative valuation:

i. The Tribunal held that it had to take into account the Shareholder Loan in light of the significance of that financial liability and OCU's "difficult financial situation."[23] OCU did not have much cash and had to use "all free cash flows generated" to service the Shareholder Loan.[24] There also existed uncertainty as to OCU's anticipated future cash flows. The Tribunal found that the Claimant failed to provide sufficient contemporaneous business plans or financial projections to show anticipated future cash flows and profits.[25] Further, while the Claimant's quantum experts assumed that OCU's gambling licenses would have been renewed absent Ukraine's breach, OCU had no right to such renewal once those licenses expired in 2011.[26]

ii. Although the price of the Maxbet Offer was "a relevant indicator" of the value of the Claimant's investment,[27] the Tribunal decided that it "must be subject to some deduction ... to account for the various uncertainties concerning this offer and the related negotiations."[28] The price could have changed or the deal could have fallen through after Maxbet conducted the due diligence, which was yet to take place as of the Expropriation Date.[29] Also, the assets that the Claimant intended to transfer to Maxbet included not just the shares in OCU, but also an international trademark owned by the Claimant, which could possibly concern jurisdictions other than Ukraine.[30]

iii. There was a "high difference" between the valuation of OCU's equipment under the Pledge Agreement and the Recovered Sum.[31] In the Tribunal's view, such a significant discrepancy pointed to a "risk of some limited double recovery," even though the 2009 Gambling Ban did result in a significant decrease of the value of the assets recovered from OCU.

Citing *Vivendi Universal SA v. Argentina* and *Crystallex International Corporation v. Venezuela*, the Tribunal noted that "the valuation of the investment in the context of awarding compensation is not an exercise which admits of scientific accuracy."[32] It agreed with the *Gold Reserve Inc v. Venezuela* tribunal that "tribunals retain a certain amount of discretion or a 'margin of appreciation' when assessing damages."[33] In light of the factors set out above, the Tribunal exercised that discretion and awarded the Claimant €7.5 million in compensation for Ukraine's unlawful expropriation.[34]

Interest and Costs

The Tribunal held that the Claimant was entitled to both pre-Award and post-Award interest on the compensation awarded in line with the full reparation standard.[35] The Claimant sought a compound interest at the rate of 12-month LIBOR + 4 percent.[36] Ukraine did not challenge the Claimant's entitlement to interest, but insisted on a markup of 2 percent rather than 4 percent.[37] The Tribunal sided with the Claimant, finding that the rate proposed by the Claimant, which "various tribunals" had adopted, was "reasonable."[38]

Consistent with the principle that costs follow the event, the Tribunal also exercised its discretion and awarded costs to the Claimant in the amount of €2.75 million together with simple interest at the rate of LIBOR + 4 percent per annum.[39] While the compensation awarded to the Claimant was less than the compensation claimed, the Tribunal did not consider it "appropriate to reduce the recoverable costs solely on the ground that the Claimant has received less than it claims."[40] The Tribunal also took into account that the arbitration was conducted in the English language, which was "not the first language of most of the Claimant's counsel."[41]

---

1 Award ¶ 56.
2 Award ¶ 60.
3 Award ¶ 116.
4 Award ¶ 107.
5 Award ¶ 101.
6 Award ¶ 167.
7 Award ¶ 132.
8 Award ¶ 139.
9 Award ¶ 156.
10 Award ¶ 159.
11 Award ¶ 167.
12 Award ¶ 163.
13 Award ¶ 165.
14 Award ¶ 166.
15 Award ¶ 155.
16 Award ¶ 167.
17 *Id.*
18 Award ¶ 143.
19 *Id.*
20 Award ¶ 144.
21 Award ¶ 171.
22 Award ¶ 172 (emphasis in original).
23 Award ¶ 173.
24 *Id.*
25 *Id.*
26 *Id.*
27 Award ¶ 174.
28 Award ¶ 175.
29 *Id.*
30 *Id.*
31 Award ¶ 179.
32 Award ¶ 180.
33 Award ¶ 181.
34 Award ¶ 182.
35 Award ¶ 183.
36 Award ¶ 185.
37 Award ¶ 184.
38 Award ¶ 185.
39 Award ¶¶ 187, 196, 198.
40 Award ¶ 191.
41 Award ¶ 193.

RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain, International Centre for Settlement of Investment Disputes (ICSID) Case No. ARB/14/34

Decision on Jurisdiction, Liability and Certain Issues of Quantum
December 30, 2019[1]

Date of the Award
December 18, 2020[2]

The Parties
RWE Innogy GmbH and RWE Innogy Aersa S.A.U. (the Claimants), Kingdom of Spain (the Respondent or Spain). Claimants and Respondent are hereinafter referred to individually as a **Party** and collectively as the **Parties**.

Sector
Renewable Energy

Applicable Treaty
Energy Charter Treaty for Germany and the Kingdom of Spain (ECT) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States

Members of the Tribunal
Samuel Wordsworth QC (president), Judd Kessler (Claimants' appointee), Anna Joubin-Bret (Respondent's appointee)

Background

Beginning in the mid-1990s, Spain introduced a program of legislative and regulatory measures to attract investment to build renewable energy capacity.[3] These measures included Royal Decree (RD) 661/2007, which offered to investors guaranteed feed-in tariff rates that were significantly higher than existing rates.[4] Between April 2001 and December 2011, the Claimants acquired stakes in four hydroelectric plants and 16 wind farms in Spain to which the regulatory measures were applicable.[5]

Following the 2008 financial crisis, Spain passed new measures (the Disputed Measures) to roll back the benefits provided under the existing regulatory measures.[6] Among other changes, Spain imposed a 7 percent levy on all income obtained by producers, including renewable energy operators.[7] Spain also replaced the fixed feed-in tariffs with a guaranteed "reasonable return" set at 7.398 percent.[8]

In response to the new regulatory measures, the Claimants filed a request for arbitration in December 2014, claiming that the new measures violated Article 10(1) of the ECT. In particular, the Claimants alleged breach of legitimate expectations and failure to provide regulatory stability, fair and equitable treatment, reasonableness, and transparency.

Jurisdiction and Liability

On December 30, 2019, the Tribunal issued its Decision. The Tribunal unanimously dismissed Spain's intra-EU jurisdictional objection, rejecting each of Spain's arguments that the Tribunal lacked jurisdiction *ratione personae* because (i) the Claimants were not from the "area" of another contracting state, (ii) EU law had primacy over the ECT and (iii) the *Achmea* judgment prohibited the Tribunal from making determinations of EU law.[9] The Tribunal, however, agreed with Spain's objection to jurisdiction regarding two taxation measures due to a tax carve-out in Article 21 of the ECT and dismissed claims concerning the taxation measures for lack of jurisdiction.[10]

On the merits, the Tribunal found that Spain had made no specific commitment to maintain the initial program of legislation and regulatory measures that would have been sufficient to create legitimate expectations.[11] In particular, the Tribunal found that Spain did not make a specific commitment that the initial measures would not be changed, and further found a lack of evidence that the Claimants relied on any such expectation, particularly given their awareness of the possibility of regulatory changes.[12] Nevertheless, the Tribunal held that Spain breached the fair and equitable treatment (FET) standard by (i) procuring repayment by the Claimants of sums previously paid by Spain under the regime in place prior to the adoption of the Disputed Measures, and (ii) acting disproportionately by causing the Claimants to bear an excessive financial burden with respect to seven plants for which the internal rate of return was far below what Spain had decided to be reasonable.[13]

The Tribunal rejected the Claimants' claim that Spain's repeal of the initial measures constituted a failure to maintain stable regulatory conditions under Article 10(1) of the ECT.[14] In light of evidence that the new legislation essentially maintained key elements of the initial regime, the Tribunal found that the Disputed Measures did not amount to a violation of stability, but nevertheless agreed with the Claimants that the request by Spain of a repayment of specific sums already paid by 10 plants was in breach of the FET standard.[15]

Furthermore, the Tribunal rejected the Claimants' claims that Spain's actions violated the reasonableness, transparency and umbrella clauses in Article 10(1) of the ECT.[16] In addition, the Tribunal rejected the Claimant's request for restitution as opposed to compensation, concluding that restitution would disproportionately burden Spain and that the Claimants could readily be afforded full reparation through compensation.[17]

On quantum, the Tribunal directed the Parties to confer on the appropriate amount of compensation to be paid by Spain to the Claimants in light of the Tribunal's holdings on the merits, and reserved final determination on the amount of damages for the Award. The Tribunal addressed the remaining issues on quantum, including the final amounts of damages, in its Award, dated December 18, 2020.

Quantum

A. *Res Judicata*

In its Award, the Tribunal first addressed the disputed issue of whether certain issues of quantum were *res judicata*. Citing the reasoning in *Standard Chartered Bank (Hong Kong) Limited v. Tanzania (TANESCO)*, the Tribunal concluded that even though decisions of tribunals (including the Decision) are not *res judicata*, they are nevertheless binding on parties and therefore the Tribunal would not reopen issues that had already been adjudicated in the Decision.

B. Repayment of Sums Already Paid

The first head of damages involved repayments that Spain procured from 10 of the Claimants' plants. In its Decision, the Tribunal held that "the Respondent has breached Article 10(1) ECT ... to the extent that it has procured repayment by [the] Claimants of sums previously paid by the Respondent under the regime in place prior to adoption of the Disputed Measures."[18]

As an initial matter, the Parties disagreed on the scope of recovery under the Tribunal's ruling. The Claimants contended that the Tribunal's decision was not limited to the 10 plants considered by the Tribunal in its Decision, but instead covered 21 of the Claimants' 24 installations.[19] The Claimants therefore asserted that the €19.4 million calculated by the Claimants' expert did not quantify the full impact of this head of damages.[20] On the other hand, the Respondent argued that the Tribunal had rejected the Claimants' argument on the retroactivity of the Disputed Measures with the exception of the 10 plants and alleged repayment of €19.4 million, and therefore the Claimants' attempt to expand the scope of the Tribunal's ruling was barred by *res judicata*.[21] Spain further argued that the first head of damages should be reduced to zero because Spain never paid the disputed amounts to the Claimants and there could be no "repayment" in the absence of a payment.[22]

The Tribunal first clarified that in its Decision it had found in favor of the Claimants "so far as concerns the specific contention that had been put, concerning the alleged repayment of EUR 19.4 million with respect to the 10 plants which the Tribunal regarded as not having been challenged by the Respondent."[23] In other words, the Claimants had specifically pleaded their case by "dr[awing] specific attention to the 10 plants that no longer received a special payment under the New Regime and that had even been required allegedly to repay back certain sums received."[24] As a result, there was no basis to expand the scope of recovery beyond the 10 plants.

Next, the Tribunal dismissed Spain's argument that this head of damages should be reduced to zero because the Claimants did not transfer any money to Spain in the form of a repayment and therefore Spain had not procured a "repayment." The Tribunal found that in light of the evidence that Spain issued "negative invoices through which it recovered certain sums that it had paid by deducting these from sums that were due in respect of electricity that had been generated by the 10 plants," there was "no doubt that this was a form of 'procuring repayment.'"[25] The Tribunal explained that "[a]s a matter of economic reality and, more important, within the meaning of what was ordered by the Tribunal, the repayment of sums can be procured just as readily by deducting such sums from debts that are due as by requiring repayment in the form of a transfer."[26]

With respect to the appropriate amount of damages, the Tribunal further found that the €19.4 million included amounts that both Parties agreed "were never received by [the] Claimants and consequently were never paid back to [the] Respondent."[27] As such, the Tribunal determined that these amounts were outside the scope of recovery, and held that the Claimants were entitled to recover the amounts that had been paid, accepting the amount of €14.82 million

that had been calculated jointly by the Parties' experts.[28]

C. Damages Arising out of the Disproportionate Nature of the New Measures

The second head of damages concerned Spain's breach of Article 10(1) of the ECT arising out of the disproportionate nature of the new measures it adopted with respect to certain of the Claimants' plants. The Claimants submitted that the discounted cash flow (DCF) method was the most appropriate methodology for assessing the fair market value of their investments.[29] Spain responded that a DCF analysis would be speculative and would result in overvaluing the Claimants' assets, and instead argued that the Tribunal should assess damages based on the cost of assets and whether costs are recovered and a reasonable return is obtained.[30]

The Tribunal noted that "[t]he task for the Tribunal is to identify the level of compensation appropriate to wipe out all the consequences of that illegal act, and to 're-establish' — as opposed to 'establish' — the situation which would, in all probability, have existed if the illegal act had not been committed."[31] The Tribunal further observed that "[t]he relevant illegal act was found to be [a] breach of the FET standard through the defeating of the legitimate expectation to a reasonable return."[32] Therefore, the Tribunal noted that the situation which in all probability would have existed absent the illegal act was "the replacement of the regime established by RD 661/2007 through the adoption of a regime largely equivalent to the Disputed Measures that did not however lead to disproportionate impacts due to different parameters being set."[33] In light of these observations, the Tribunal held that the appropriate method of calculating damages would be a modified DCF analysis in which damages would be capped to preclude recovery beyond the reasonable return benchmark of 7.398 percent.[34] The Tribunal accepted the 7.61 percent discount rate submitted by the Claimants.

In its Award, the Tribunal addressed three remaining issues relating to the calculation of damages. First, the Tribunal addressed the Claimants' assertion that they were entitled to take advantage of a "tax shield." The Tribunal "accept[ed] the Claimants' basic

proposition that the Tribunal should be seeking to replicate the actual tax situation of the plants" and rejected Spain's submissions on this issue.[35] Second, the Tribunal rejected the Claimants' submission that damages should be awarded based on a 7 percent post-tax return rather than the 7.398 percent pretax return stated in the Decision on the grounds that the Tribunal had already decided the issue and such decision was binding on the Parties.[36] Third, the Tribunal similarly dismissed the Claimants' argument that the discount rate should be modified from the 7.61 percent stated in the Decision on the basis that the Tribunal's previous ruling remains correct.[37]

As a result, the Tribunal determined that the appropriate amount to be awarded to the Claimants was €28,080,000, as assessed in the Parties' experts' joint report.

D. Tax Gross-Up

The Tribunal denied the Claimants' request for a gross-up of its damages to account for taxes that may apply to the Award in Spain, noting the absence of legal authority or expert testimony from a tax expert on which to make or base such a determination.[38]

E. Interest

Although the Parties agreed that pre-Award and post-Award interest should be governed by the same rate, the Claimants submitted that the appropriate interest rate should be 7.61 percent compounded monthly (on the basis of a cost of equity approach), and Spain argued that the rate should be 0.6 percent (the return on a two-year Spanish bond).[39] The Tribunal held that a more suitable rate was the return on a 10-year Spanish bond. The Tribunal therefore awarded interest at a rate of 2.07 percent compounded monthly.[40]

F. Costs

Regarding costs, the Tribunal noted that while "neither Party can be seen as wholly successful,"[41] it recognized "the fact that the Claimants have established a breach of Article 10(1) [of the] ECT, and have had to pursue time-consuming and costly litigation to establish the wrongful acts of the Respondent."[42] As a result, the Tribunal determined that Spain was responsible for 50 percent of the Claimants' costs for the jurisdiction and liability phase together with the costs of the arbitration in their entirety.[43]

[1] *RWE Innogy GmbH* and *RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum (December 30, 2019) (Decision).

[2] *RWE Innogy GmbH* and *RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Award (December 18, 2020) (Award).

[3] Decision ¶¶ 128-89.

[4] Decision ¶¶ 159-76.

[5] Decision ¶ 190.

[6] Decision ¶ 211.

[7] Decision ¶ 216.

[8] Decision ¶ 225.

[9] Decision ¶¶ 333, 336, 364-72.

[10] Decision ¶ 393.

[11] Decision ¶ 542.

[12] Decision ¶ 504.

[13] Decision ¶¶ 600, 621.

[14] Decision ¶ 619.

[15] Decision ¶ 621.

[16] Decision ¶¶ 649, 666, 679.

[17] Decision ¶ 685.

[18] Decision ¶ 748.

[19] Award ¶ 28.

[20] Award ¶ 29.

[21] Award ¶¶ 60-1.

[22] Award ¶¶ 52-7.

[23] Award ¶ 96.

[24] Award ¶ 96.

[25] Award ¶¶ 98-9.

[26] Award ¶ 99.

[27] Award ¶ 104.

[28] Award ¶ 105.

[29] Decision ¶ 689.

[30] Decision ¶¶ 719-20.

[31] Decision ¶ 734.

[32] Decision ¶ 740.

[33] Decision ¶ 742.

[34] Decision ¶¶ 735, 742.

[35] Decision ¶ 113.

[36] Decision ¶¶ 114-16.

[37] Decision ¶¶ 117-18.

[38] Decision ¶¶ 125-26.

[39] Decision ¶¶ 127-29.

[40] Decision ¶¶ 133-35.

[41] Decision ¶ 142.

[42] Decision ¶ 144.

[43] Decision ¶ 144.

STEAG v. Kingdom of Spain, International Centre for Settlement of Investment Disputes (ICSID) Case No. ARB 15/4

Date of the Award
August 17, 2021

The Parties
STEAG GmbH (the Claimant), Spain (the Respondent)

Sector
Energy

Applicable Treaty
Energy Charter Treaty (ECT)

Members of the Tribunal
Eduardo Zuleta (president), Guido Santiago Tawil (Claimant's appointee), Pierre-Marie Dupuy (Respondent's appointee)

Background

Filed in 2015, this dispute arises from STEAG's objections to Spain's regulation of solar thermal energy. Specifically, the Claimant argued that the Respondent's recent reforms to the country's renewable energy subsidy regime unfairly frustrated its legitimate, investment-backed expectations in Arenales Solar PS, S.L. (Arenales Solar), a company that built and operates a solar thermal energy plant located in Morón de la Frontera, Sevilla, Spain. The Claimant held a 26 percent interest in Arenales Solar, which it sold in February 2020.

On October 8, 2020, the Tribunal held that the Respondent breached the Claimant's legitimate expectations in violation of the ECT's fair and equitable treatment (FET) standard by making specific commitments regarding incentives to which energy produced at the Arenales Solar project would be entitled for a specific amount of time, and then frustrating those expectations by changing the incentive scheme. After issuing its February 10, 2021 supplementary decision, and its March 17, 2021 responses to the Parties' queries on damages, the Tribunal awarded the Claimant €27.7 million plus interest and costs on August 17, 2021 (the Quantum Award).[1]

Through these decisions, the Tribunal set out guidelines for its quantum calculations, including, among other determinations, that the historical damages would not be included in the award, that the damages would be calculated starting from June 20, 2014, and that, to account for the Claimant's contribution to damages (i.e., the Claimant's 2012 and 2013 capital investments in the Arenales Solar project in the amount of approximately €12 million), the final damages sum would be reduced by 25 percent.[2]

Quantum

The Tribunal's decision in the Quantum Award relies on key conclusions drawn from prior decisions. Most importantly, on October 8, 2020, the Tribunal adopted the Claimant's expert's discounted cash flow (DCF) modeling as the basis for its damages calculation, finding that DCF modeling was appropriate and reasonable under the circumstances because (i) DCF modeling is frequently used to value investments and (ii) Arenales Solar's cash flows could be identified and forecasted such that DCF modeling could not be considered speculative as to the Claimant's investment.[3] However, the Tribunal did not flatly accept the Claimant's proposed DCF model; it accepted the proposed model subject to seven specific caveats discussed in the opinion and ordered the Parties to present a joint calculation of damages incorporating those caveats or further explaining any corresponding disagreement between the Parties.[4] The Tribunal's decisions on February 10, 2021, and August 17, 2021, helped resolve the Parties' subsequent disagreements including, as relevant here, (i) how to calculate historical damages and (ii) how to incorporate the impact of the Claimant's divestment in 2020 (i.e., the February 2020 sale of its interest in Arenales Solar). Upon deciding these issues, the Tribunal calculated the Claimant's damages and interest and apportioned the costs among the Parties, as summarized below.

A. Calculating Historical Damages

As a threshold matter, the Tribunal's decision on historical damages begins with the proposition that historical damages are to be excluded from the compensable damages owed to the Claimant.[5] The Tribunal's prior decision specifies that any necessary adjustments to the Claimant's compensable damages are to be applied after the Tribunal's calculation is complete.[6] The Tribunal then observed that, though the Parties agreed-upon sum of €1.8 million could be excluded as historical damages, the Parties disagreed as to whether the Claimant's 2012 and 2014 capital investments (totaling about €12 million) should be excluded from the award as historical damages. The Claimant maintained the capital investments should be included in the Tribunal's damages award; the Respondent asserted that the investments should be excluded as historical damages.[7]

Analyzing the Parties' positions, the Tribunal ultimately decided that the Claimant's capital injections should not be excluded from the total damages calculation, even though they technically

preceded the June 20, 2014 commencement date for damages calculations.[8] Reviewing its prior decisions, the Tribunal observed that the decision to calculate damages from June 20, 2014, onward included no discussion of the Claimant's capital injections.[9] To the contrary, these capital injections were discussed only in the context of the Claimant's own contributory liability.[10] Indeed, the Claimant's contributory liability — which the Tribunal determined would be incorporated through a 25 percent reduction on the damages award after all other calculations were complete — was determined, in part, on the Claimant's capital injections, as well as on the Claimant's administration of, agreements in relation to and negotiations concerning the project.[11] Consequently, to exclude the Claimant's capital injections from the damages award would be both inconsistent with the Tribunal's prior decisions and unjust, in that it would doubly penalize the Claimant for the same contributory liability, i.e., by first excluding the contributions at the onset of the calculation and then imposing a 25 percent markdown of the damages at the end of the calculation.[12]

B. Accounting for the Claimant's February 2020 Sale of Its Stake in Arenales Solar

The Tribunal next decided how to discount the Claimant's damages to account for its sale of its interest in Arenales Solar in February 2020. The Tribunal considered that any comparison between the 2020 sale of its stake in the plant and the 2014 valuation of the project must be done homogenously, i.e., by comparison of those values at the same point in time and on the basis of information learned from the arbitration.[13]

The Claimant proposed that the divestment be included in both the "actual" and "but for" scenarios.[14] The Tribunal rejected this methodology because it had the effect of increasing the Claimant's damages award, contrary to the Tribunal's guidance and reasoning in its February 10, 2021 supplementary decision that this divestment should decrease the Claimant's award.[15] The Respondent proposed that the Tribunal's award should simply subtract the monies earned by the Claimant through its divestment.[16] The Tribunal rejected this methodology because it failed to account for the value of that 2020 divestment in 2014, particularly as the damages computation was calculated according to the difference in the cash flow models estimated from June 2014.[17]

After rejecting these two methodologies, the Tribunal accepted a third methodology proposed by the Respondent: The damages calculation would discount the actual scenario by the value of the divestment but make no comparable deduction from the but-for scenario, as that would result in an increase to the Claimant's award.[18] To ensure that the damages calculation would be consistent, the Tribunal further instructed that the divestment amount should be incorporated according to its value in 2014.[19] Lastly, the Tribunal determined that the interest rate to be used in converting the divestment amount from one date to another should be the rate of return on capital as discussed in the Claimant's briefings (10.4 percent) and not the risk-free interest rate (1.5 percent) proposed by Spain.[20] That is because the expected rate of return properly incorporated the risks taken by the Claimant in its initial investment, and because that rate is based on the information and allegations presented by the Parties throughout the arbitration proceeding.[21]

The Tribunal concluded that the 2020 divestment amount should be converted from its February 2020 value to its value in June 2014 using the proposed rate of return on capital (10.4 percent) and then incorporated only into the actual scenario, not the but-for scenario, to ensure that the damages

award would be discounted by the value the Claimant obtained through its divestment of the plant.[22] As a practical matter, the Tribunal would thus reach its damages award by calculating the amount of damages on June 20, 2014, then deducting from that the 2014 value of the divestment, and then lastly applying a 25 percent reduction to account for the Claimant's contributory liability.[23]

C. Calculation of Compensable Damages

The Tribunal next proceeded to calculate the final sum of compensable damages. The Tribunal began with the Claimant's expert's calculation of damages according to its DCF modeling for June 20, 2014, in the amount of €79.2 million.[24] The Tribunal then adopted the Respondent's expert's calculations of the amounts to be deducted from the Claimant's proposed damage award:

- reduction of €1.8 million because the damages award would exclude historical damages;[25]
- reduction of €12.5 million because the Tribunal lacked jurisdiction over the Claimant's FET claim related to the Respondent's 7 percent electricity tax;[26]
- reduction of €8.4 million because the Tribunal would not compensate the Claimant for losses in connection with gas-produced energy;[27] and
- reduction of €14.3 million to account for the Tribunal's determination that the Arenales Solar plant had an expected operational lifetime of 25 years and not 40 years, as originally presumed by the Claimant's expert in its calculations.[28]

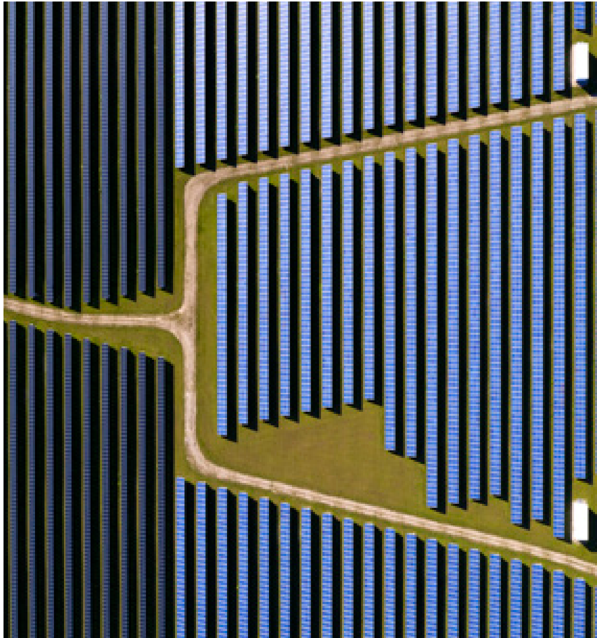
This process resulted in a preliminary damages award of €42.3 million.[29] Next, the Tribunal deducted from that sum the 2014 value of the Claimant's divestment from the project, calculated as €5.4 million.[30] The Tribunal adopted the calculation of the value of the Claimant's divestment from its expert, which applied a 10.4 percent interest rate to the Claimant's February 2020 divestment proceeds, and thereby obtained its 2014 value.[31] Lastly, the Tribunal reduced the damages award by 25 percent to account for the Claimant's contributory liability and conduct, ultimately yielding a damages award of €27.675 million.[32] This amount represents the compensable damages owed to the Claimant by the Respondent in 2014 values.[33]

D. Calculation of Interest

The Tribunal next considered the Claimant's request for compound interest and determined that an interest rate of 1.5 percent should be applied to the Claimant's compensable damages from June 20, 2014, until the date of payment.[34] Though the Parties did not dispute that some prejudgment interest was due, they disagreed as to the applicable interest rate. Specifically, the Claimant proposed that the interest be calculated with reference to the yield on a Spanish 10-year bond, whereas the Respondent proposed using the yield on two- and three-year bonds.[35]

Considering the Parties' arguments, the Tribunal ultimately decided that the appropriate basis for the interest rate to be applied would be Spain's 10-year bonds. The Tribunal's multifaceted reasoning considered the following points.

First, the Tribunal reasoned that the Claimant's damages have rightfully accrued a compounding interest.[36] Referencing another arbitration panel's decision in *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, the Tribunal observed that a damages award is necessarily composed of money that should have been paid at a prior date, and thus a damages award must also include an additional sum equal to the amount of money the award's sum would have produced had it been paid to the Claimant prior and



then reinvested.[37] Only by recognizing that interest can a damages award properly compensate the Claimant for its losses.[38]

Second, the Tribunal noted its responsibility to determine the interest with reference to a commercial rate established on a market basis.[39] This requirement stems from Article 13(1) of the ECT.[40] Recognizing that this article pertains to expropriation, the Tribunal nonetheless found the language informative as to its determination of which interest rate to apply to the Claimant's award.[41]

Third, the Tribunal noted that it held broad discretion in deciding the interest to be awarded.[42] Specifically, because the ECT delegated to each Tribunal the decision of whether to order interest in the first place, it follows that the specific rate to be applied would fall within the Tribunal's discretion as well.[43]

Taking these three factors into account, the Tribunal then determined that an interest rate calculated according to Spain's 10-year bond rate would appropriately compensate the Claimant for its losses.[44] The Tribunal remarked, without explaining further, that this rate was appropriate given the Parties' calculations, the relevant dates of the underlying facts, the Respondent's violation of the ECT and the various discounts already applied to the damages award.[45] The Tribunal further noted that, at least as far back as 2017, the Claimant had been relying on this rate in its damages calculations.[46]

The Tribunal then turned to the applicable window for that interest rate, noting that the Claimant requested the interest be calculated from the date of the Respondent's violation or, alternatively, from the date of the Tribunal's award.[47] In two short paragraphs, the Tribunal determined that the applicable interest should accrue from June 20, 2014 — the same date from which damages are to be calculated — until the date on which the Respondent pays the damages award.[48] Notably, the Tribunal expressly declined to differentiate between pre- and post-judgment interest, noting only that the determined rate (1.5 percent), to be compounded every trimester, would be adequate as to both.[49]

E. Calculation of Costs

Lastly, the Tribunal turned to the apportionment of costs between the Parties.[50] The Tribunal held that the Claimant should pay 30 percent of its costs, that the Respondent should pay 70 percent of the Claimant's costs and all its own costs, and that the Parties should pay the Tribunal's costs in equal parts.[51] The Tribunal's decision was guided by two principles: first, that it had ample discretion with which to allocate costs, and second, that costs should generally be consistent with the result of the arbitration on the merits.[52] The Tribunal recognized that, while the Claimant had largely prevailed, the Respondent had nonetheless been correct at various key junctures in the dispute, including as to issues of jurisdiction, evidence, liability and damages.[53] Hence, the costs should be split 70-30. The Tribunal also observed that the Parties

and their experts had taken inconsistent positions at various points in the arbitration, and that this had delayed — rather than advanced — the Tribunal's decision-making at times.[54] This delay, the Tribunal observed, was attributable to both Parties and their respective experts.[55]

Conclusion and Award

On the merits, the Tribunal's decision and award included the following key findings. The Tribunal unanimously found that it lacked jurisdiction to hear the Claimant's ECT Article 10(1) claim regarding Spain's tax on the value of electricity generation, that the Respondent's alleged violation of ECT Article 13 was not admissible and that it would reject all other objections raised by the Respondent.[56] The Tribunal found, by a majority, that the Respondent had violated the standard of FET under ECT Article 10(1) as outlined in the Tribunal's October 8, 2020 decision.[57] Lastly, the Tribunal unanimously rejected the Claimant's other allegations pursuant to ECT Articles 10(1) and 13.[58]

As to damages and costs, the Tribunal's decision and award included the following key findings. The Tribunal ordered, by a majority, that the Respondent pay the Claimant €27,675,000 for its above-noted violation of ECT Article 10(1).[59] The Tribunal further ordered, again by a majority, that the Respondent pay to the Claimant interest on the award, to be accrued from June 20, 2014, until the date of payment, at an interest rate of 1.5 percent compounded by trimester.[60] The Tribunal further ordered that the Parties pay equal parts of the Tribunal's fees and costs.[61] Lastly, the Tribunal ordered that the Claimant should assume 30 percent of its costs in connection with this proceeding and that the Respondent should assume the remaining 70 percent of the Claimant's costs, as well as its own costs, in connection with this proceeding.[62]

---

1 Tribunal's August 17, 2021 decision at ¶¶ 4, 9, 11, 16, 17, available at https://jusmundi.com/en/document/decision/es-steag-gmbh-v-kingdom-of-spain-laudo-tuesday-17th-august-2021#decision_17435.

2 Tribunal's August 17, 2021 decision at ¶¶ 4, 18-20, 27, 31.

3 Tribunal's October 8, 2020 decision at ¶¶ 817-20, available at https://jusmundi.com/en/document/decision/es-steag-gmbh-v-kingdom-of-spain-decision-sobre-jurisdiccion-responsabilidad-e-instrucciones-sobre-cuantificacion-de-danos-thursday-8th-october-2020?pdf=true#decision_12519.

4 Tribunal's October 8, 2020 decision at ¶¶ 821-22.

5 Tribunal's August 17, 2021 decision at ¶ 37.

6 Tribunal's August 17, 2021 decision at ¶ 37.

7 Tribunal's August 17, 2021 decision at ¶¶ 24, 25, 30, 31, 36, 38.

8 Tribunal's August 17, 2021 decision at ¶ 39.

9 Tribunal's August 17, 2021 decision at ¶ 40.

10 Tribunal's August 17, 2021 decision at ¶ 41.

11 Tribunal's August 17, 2021 decision at ¶¶ 42, 43.

12 Tribunal's August 17, 2021 decision at ¶¶ 50-2.

13 Tribunal's August 17, 2021 decision at ¶ 70.

14 Tribunal's August 17, 2021 decision at ¶ 74. As explained in the Tribunal's October 8, 2020 opinion, the actual scenario is composed of Arenales Solar's observed cash flows, whereas the but-for scenario estimates Arenales Solar's cash flows had the Respondent not implemented the regulatory changes that form the basis of the Claimant's demand for arbitration. *See* the Tribunal's October 8, 2020 decision at ¶ 817, available at https://www.italaw.com/sites/default/files/case-documents/italaw11900.pdf.

15 Tribunal's August 17, 2021 decision at ¶ 75.

16 Tribunal's August 17, 2021 decision at ¶ 76.

17 Tribunal's August 17, 2021 decision at ¶ 76.

18 Tribunal's August 17, 2021 decision at ¶¶ 77-9.

19 Tribunal's August 17, 2021 decision at ¶ 80.

20 Tribunal's August 17, 2021 decision at ¶ 82.

21 Tribunal's August 17, 2021 decision at ¶¶ 84, 85.

22 Tribunal's August 17, 2021 decision at ¶ 86.

23 Tribunal's August 17, 2021 decision at ¶ 86.

24 Tribunal's August 17, 2021 decision at ¶ 87.

25 Tribunal's August 17, 2021 decision at ¶¶ 38, 87.

26 Tribunal's August 17, 2021 decision at ¶ 87; Tribunal's October 8, 2020 decision at ¶¶ 748-51.

27 Tribunal's August 17, 2021 decision at ¶ 87; Tribunal's October 8, 2020 decision at ¶¶ 603-05, 640.

[28] Tribunal's August 17, 2021 decision at ¶ 87; Tribunal's October 8, 2020 decision at ¶¶ 800-10.

[29] Tribunal's August 17, 2021 decision at ¶ 88.

[30] Tribunal's August 17, 2021 decision at ¶¶ 88, 89.

[31] Tribunal's August 17, 2021 decision at ¶ 88 n.124.

[32] Tribunal's August 17, 2021 decision at ¶ 90.

[33] Tribunal's August 17, 2021 decision at ¶ 91.

[34] Tribunal's August 17, 2021 decision at ¶ 108.

[35] Tribunal's August 17, 2021 decision at ¶¶ 94-6.

[36] Tribunal's August 17, 2021 decision at ¶ 100.

[37] Tribunal's August 17, 2021 decision at ¶ 100.

[38] Tribunal's August 17, 2021 decision at ¶ 100.

[39] Tribunal's August 17, 2021 decision at ¶ 102.

[40] Tribunal's August 17, 2021 decision at ¶ 102.

[41] Tribunal's August 17, 2021 decision at ¶ 102.

[42] Tribunal's August 17, 2021 decision at ¶ 104.

[43] Tribunal's August 17, 2021 decision at ¶ 104.

[44] Tribunal's August 17, 2021 decision at ¶¶ 103-04.

[45] Tribunal's August 17, 2021 decision at ¶ 104.

[46] Tribunal's August 17, 2021 decision at ¶ 103.

[47] Tribunal's August 17, 2021 decision at ¶ 105.

[48] Tribunal's August 17, 2021 decision at ¶¶ 106-08.

[49] Tribunal's August 17, 2021 decision at ¶ 107.

[50] Tribunal's August 17, 2021 decision at ¶ 109.

[51] Tribunal's August 17, 2021 decision at ¶ 114.

[52] Tribunal's August 17, 2021 decision at ¶¶ 113-15.

[53] Tribunal's August 17, 2021 decision at ¶ 115.

[54] Tribunal's August 17, 2021 decision at ¶ 115.

[55] Tribunal's August 17, 2021 decision at ¶ 115.

[56] Tribunal's August 17, 2021 decision at ¶¶ 117(1), (2), (3).

[57] Tribunal's August 17, 2021 decision at ¶ 117(4).

[58] Tribunal's August 17, 2021 decision at ¶ 117(5).

[59] Tribunal's August 17, 2021 decision at ¶ 117(6).

[60] Tribunal's August 17, 2021 decision at ¶ 117(7).

[61] Tribunal's August 17, 2021 decision at ¶¶ 117(8), (9).

[62] Tribunal's August 17, 2021 decision at ¶ 117(10).

King & Spalding's International Arbitration Group Contacts

Atlanta

Elizabeth Silbert
esilbert@kslaw.com

Brian White
bwhite@kslaw.com

Austin

Adam Gray
agray@kslaw.com

Mike Stenglein
mstenglein@kslaw.com

Chicago

Javier Rubinstein
jrubinstein@kslaw.com

Dubai

Patrick McPherson
pmcpherson@kslaw.com

Randall Walker
rcwalker@kslaw.com

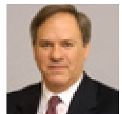
Benjamin Williams
bwilliams@kslaw.com

Frankfurt

Jan Schaefer
jschaefer@kslaw.com

Houston

Roberto Aguirre Luzi
raguirreluzi@kslaw.com


Doak Bishop
dbishop@kslaw.com

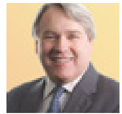
Wade Coriell
wcoriell@kslaw.com

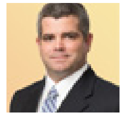
Craig Ledet
cledet@kslaw.com

Craig Miles
cmiles@kslaw.com

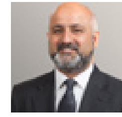
Kevin Mohr
kmohr@kslaw.com

Fernando Rodriguez-Cortina
frodriguez-cortina@kslaw.com


Reginald Smith
rsmith@kslaw.com


David Weiss
dweiss@kslaw.com

London


Sajid Ahmed Q.C.
sahmed@kslaw.com

Ruth Byrne
rbyrne@kslaw.com

Egishe Dzhazoyan
edzhazoyan@kslaw.com

Shareena Edmonds
sedmonds@kslaw.com

Ben Emmerson, Q.C.
bemmerson@kslaw.com

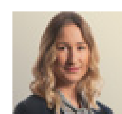
Giorgio Mandelli
gmandelli@kslaw.com

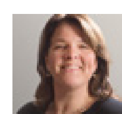
Viren Mascarenhas
vmascarenhas@kslaw.com

Vincent Rowan
vrowan@kslaw.com

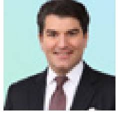
John Savage
jsavage@kslaw.com

Thomas Sprange, Q.C.
tsprange@kslaw.com


Andrea Stauber
astauber@kslaw.com


Sarah Walker
swalker@kslaw.com

Los Angeles



Joe Akrotirianakis
jakro@kslaw.com

Luan Tran
ltran@kslaw.com

Miami

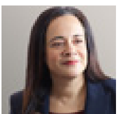
Érica Franzetti
efranzetti@kslaw.com

Henry Burnett
hburnett@kslaw.com

New York

Isabel Fernandez de la Cuesta
ifernandez@kslaw.com

Lauren Friedman
lfriedman@kslaw.com

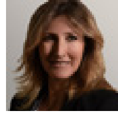


Samaa Haridi
sharidi@kslaw.com

Lucila Hemmingsen (Luli)
lhemmingsen@kslaw.com

Edward Kehoe
ekehoe@kslaw.com

Paris



Vanessa Benichou
vbenichou@kslaw.com

James Castello
jcastello@kslaw.com

Amy Frey
afrey@kslaw.com

Laurent Jaeger
ljaeger@kslaw.com

Marc-Olivier Langlois
mlanglois@kslaw.com

San Francisco

Benjamin Jones
bjones@kslaw.com

Stephen O'Neal
soneal@kslaw.com

Quyen L. Ta
qta@kslaw.com

David Wallach
dwallach@kslaw.com

Singapore

Peter T. Chow
pchow@kslaw.com

Elodie Dulac
edulac@kslaw.com

Emerson Holmes
eholmes@kslaw.com

Anisha Sud
asud@kslaw.com

Washington, D.C.

Kenneth Beale
kbeale@kslaw.com

Kenneth Fleuriet
kfleuriet@kslaw.com

Aloysius Llamzon
allamzon@kslaw.com

Celebrating more than 130 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with over 1,200 lawyers in 23 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients.

kslaw.com