INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

RWE INNOGY GMBH
AND
RWE INNOGY AERSA S.A.U.

Claimants

and

KINGDOM OF SPAIN

Respondent

ICSID Case No. ARB/14/34

SEPARATE OPINION OF MR. JUDD L. KESSLER

I. Introduction and Background

1. I have joined in this Award ("the Award") as well as in the Decision on Jurisdiction, Liability, and Certain Issues of Quantum (hereinafter "the Decision") and am in agreement with my distinguished colleagues on a great many issues in this complicated and demanding dispute. Areas of agreement include jurisdiction and applicable law, as well as the standard of Fair and Equitable Treatment under international law which includes, importantly, the principle of good faith, and as an element of this latter principle, the protection of legitimate expectations. The key factual issues, of course, include what obligations each side undertook, whether or not they complied with those obligations, and finally what compensation, if any, should be due to the Claimants, who own and operate no fewer than 24 separate wind power and hydro facilities in Spain – of different sizes, in different locations with investments made under differing circumstances and at different times.

2. As a preface to this Separate Opinion, I consider it important to explain my reasoning in writing it. As I understand it, the obligation of a three arbitrator tribunal is, insofar as possible, to air among themselves any disagreements as to the facts or the law (and there are almost always some), and at the end, if possible, to produce a coherent award that will be enforceable. I have great respect for my distinguished colleagues and for the great effort and professional integrity that has produced the Decision and the Award. Though, as you will see, I have deep concerns about some of the reasoning that led to the outcome, I have joined in both the Decision and the Award. To do otherwise, would potentially weaken or undercut our years of common effort. I wish to make it clear that I have no intention to do so.

3. But I do feel obliged to express in detail how differently I perceive many of the issues involved in this dispute. I do so not as a claimant-appointed arbitrator disappointed with the quantum of the Award, but rather for reasons that I believe are more fundamental. If I may be so bold, I have taken as my model the well-known Separate Opinion of Prof. Thomas Wälde in *Thunderbird Gaming v. Mexico,* in which, while joining fully in the result, he expressed his differing views in some 130 pages of sparkling insight and erudition.[1] His purpose, clearly, was to influence future tribunals as they would struggle with the complex and difficult issues involved

[1] International Thunderbird Gaming Corp. v. Mexico, UNCITRAL, Award (Jan. 26, 2006)

in investment arbitration cases. I draw only my inspiration from him. The views expressed herein, valid or not as they me be considered, are my sole responsibility.

4. The main outlines of the circumstances that have given rise to this and numerous other cases involving Respondent are well known. Spain established a program of incentives which by 2004 became quite specific and attractive to investors. These incentives were adjusted somewhat in 2007 but remained essentially in place until 2013. In 2007-8 the world economy experienced a severe crisis whose effects were felt strongly in the Kingdom of Spain as they were in every other country in the world. One of the effects of that crisis was a diminution in consumption of power at the retail level which seriously diminished funds which had previously been available to cover the cost of incentives under the Special Regime for Renewable Energy. This further resulted in a continuing increase of the tariff deficit which led Respondent to enact the Disputed Measures which substantially reduced remuneration to RE producers under the Special Regime. Spain maintains that it was required to make these changes which were within its regulatory powers in order to protect the public as well as the sustainability of Spain's electric power network. Claimants maintain that the major changes made in the legal regime under which they made their investments violated their rights under the ECT, for which they are entitled to compensation.

5. While I believe that the above represents a fair general description of the circumstances that gave rise to this dispute, I take a very different view of important elements of the context and facts of this dispute from that of my distinguished colleagues. It is fair to say that we agree that the Kingdom of Spain did violate Section 10(1) of the ECT, and that some measure of compensation is due to the Claimants. But other than those two conclusions, I would have weighed the facts differently and would have reached a different outcome regarding virtually everything else.

6. I would have found that Spain did, indeed, enter into either a firm commitment, or the equivalent thereof, with the Claimants; that Respondent failed in more important ways to accord Fair and Equitable Treatment to the Claimants, and, accordingly, that Claimants should receive substantially more compensation. Since this is a separate opinion and since my concerns are rather broad and concrete I have, in parts of this opinion, not included extensive references to other decisions or awards. I recognize that this choice may draw criticism, but my principal

purpose here is to leave no doubt about my areas of concern and the reasons for them. As I see it, the reason for such a marked divergence of views among the Tribunal members is not that anyone is biased in favor of or against one side or the other, or that anyone failed to understand the evidence and argumentation presented by the Parties. All members of the Tribunal are well versed in the law of international investment in general and the FET standard in particular.

7. My view, and this is not something that I have discussed directly with my colleagues, is that, at least in part, these disparate views result from two different schools of legal thought regarding the entire enterprise of international investment arbitration. If I am correct, and I may not be, these differences have their roots, on the one hand, in the origins of investment arbitration where — after World War II — there was an urgent need to increase the flow of private investment resources to developing nations. On the other hand, more recently, a significant number of estimable practitioners and legal scholars have suggested that the investment arbitration process is not sufficiently structured. They maintain that investment tribunals should not focus so much on the tribulations of private investors. Instead they should be more deferential to the decisions of governments - especially democratically elected governments - and their respective agents. Some further elaboration of these disparate approaches, I believe, may help to explain how this arbitrator might approach this dispute in a manner so at variance with the reasoning of my distinguished colleagues.

II Guideposts for Analysis

8. Recognizing that any attempted summary of such complicated matters is likely to displease someone, I, nevertheless, offer the following descriptions of what appear to me as two poles or guideposts for analysis and as to how they may relate to a different appraisal of the facts and the law with regard to this dispute.

A. School of Thought A — The Rationale for and the Rise of Investment Arbitration.

9. The system we now know as "investment arbitration" arose from the same post-World War II efforts that gave rise to the World Bank, the IMF, the UNDP, and Regional Development Banks as well as numerous bilateral aid programs. The developing world was in urgent need of development finance and the demand exceeded by far the funds then available from these new institutions. By the 1960's foreign assistance levels across the board had stagnated. As a result, the prospects for major improvements to the lot of developing nations seemed limited at

best. It was hoped that private foreign investment would come to the rescue and might dramatically expand the resources available for development. It was also observed that developing nations were still attracting only a relatively small proportion of the world's private investment flows.

10. This situation arose from the perception of the world business community that something drastic needed to be done to protect private foreign investment from political and/or non-commercial risks in developing nations, where legal systems were often perceived to be weak and unreliable. While protection against expropriation was the risk most often highlighted, businesses had similar concerns about the dangers presented by other, less easily described, governmental measures that might seriously impair the rights or assets of foreign investors.[2]

11. And so began a remarkable effort of world leaders to create the Washington Convention, and an institution within the World Bank Group dedicated to administering a rules-based system for resolving international investment disputes transparently, in accordance with widely accepted international law principles. It was also hoped that this new institution (which we now know as ICSID), might relieve the World Bank of certain "extra-curricular burdens" - namely being pushed to intervene forcefully in settling investment disputes with developing nations - often under considerable pressure from a wealthy member government which was being pressed to back one of its investors.[3] World Bank officials also urged signatory nations of the "ICSID" Convention, to negotiate bilateral investment treaties (BIT's) — also known as International Investment Agreements ("IIA's") — that would provide a neutral arbitral forum, such as ICSID, for the resolution of disputes. The expectation was that these arrangements would enable investors, when making large and long term investment decisions, to rely on the undertakings of and commitments by the government of a host State. And then, if a dispute did occur, investors could expect a reasonably expeditious and fair resolution based on widely accepted international law principles.

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[2] Anthony R. Parra, *The History of ICSID*, 12 (2012).

[3] *Id*. at 141; *See also* Judd L. Kessler, Investment Arbitration, Legitimacy and National Law in Latin America: An Arbitrator's Perspective, Am. Rev. of Int. Arb. 2016, (Vol. 27, No.3) at p. 265-8; 298-310.

12. A World Bank Development Report in 2005 summarized the hoped-for benefits of the system as follows:

> "Governments and firms can both benefit. Governments benefit from a commitment device that can address concerns from investors, and thus help them attract more investment at lower cost, and also reduce the risk of any later dispute becoming politicized. Firms benefit from reduced risks and a more reliable mechanism for protecting their rights if the relationship with the host government deteriorates."[4]

13. The Report also viewed the use of investment treaties as a "potentially powerful tool to enhance the credibility of their contractual and policy commitments."[5]

14. With his characteristic directness, Jan Paulsson expresses the rationale for treaties to protect foreign investments as follows:

> ". . . The obvious policy objective is to access international capital at the lowest possible cost. Investors are rational: to insist that those who act in the name of governments have an unfettered right to alter the terms of investment in the alleged public interest would lead to tragic disempowerment and dependence. If states were incapable of giving reliable promises — because their misconceived 'sovereignty' renders them powerless to do so — the policy objective of attracting foreign investment would be illusory."[6]

15. Finally, by entering into investment treaties, sovereign governments also made a commitment to honor such treaty obligations and commitments as part of their domestic law — even if such commitments were understood to include standards that are more demanding than those normally applied in domestic law. Importantly, it was understood that the standards set forth in investment treaties would impose little or no additional burden on nations that already had highly developed legal systems.

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[4] World Bank Development Report (2005) p. 179.

[5] *Ibid*.; *See also* Jan Paulsson, the Power of States to make Meaningful Promises to Foreigners, Journal of International Dispute Settlement Vol.1, No. 2 (2010), pp. 341-352; doi10.1093/jnlids/idq 013.

[6] Paulsson op cit. at 341.

B. School of Thought B — The Critique of Investment Arbitration — Involving Concerns of Legitimacy, Appropriate Deference to Governmental Decisions, and the Need for Proportionality Analysis.

16. Over the past 20 years at least, practitioners, scholars and governments — predominantly from Europe — have expressed concerns that investment arbitration tribunals are insufficiently connected to the political sources of legitimacy by comparison, for example, to permanent tribunals authorized by domestic law. Such *ad hoc* arbitration tribunals are thought to give insufficient deference to the decisions of agencies authorized by democratically elected governments and to lack sufficient expertise or in-depth understanding of national circumstances. Finally, these critics urge that arbitral tribunals would benefit greatly by making use of proportionality analysis — a technique which originated in German administrative law. It involves a sophisticated three stage process and has proved very useful, *inter alia*, in elaborating complex relations between the European Union and its various member governments and court systems.

17. In summary the analysis would proceed more or less as follows: first, was the measure addressed to a legitimate government objective (i.e., rather than an arbitrary or corrupt purpose). If so, the measure is considered "suitable. " Second, was the measure "necessary" – i.e. having found the objective "suitable," were the measures reasonable/appropriate? Were there less restrictive means reasonably available to the State for meeting the given objectives? And third, even if the previous requirements were found to be satisfied, was the impact of the measures on the affected parties "disproportionate?" And in answering that question, did the government, in the decision-making process, give due consideration to the interests of the impact on the affected parties.[7]

18. The proponents of this approach believe that increased use of proportionality analysis in international investment arbitration would result in a more careful balancing of public *vs*. private interests. They urge that this approach would require *ad hoc* arbitration tribunals to be more accountable and to justify their decisions in a more detailed fashion. Finally, it is thought that this approach might provide a gateway for non-investment principles to enter the investment

[7] Decision ¶ 552-597.

arbitration framework of argumentation, thereby avoiding the fragmentation of international law between functional and special investment-related systems.[8]

19. Needless to say there are ardent supporters and opponents of these two approaches. I confess to leaning toward School of Thought A, though I respect and agree with elements of School of Thought B. My purpose at this point is simply to summarize these views so as to allow fair consideration of them as we now enter into examination of the detailed issues presented in this case.

III. Main Elements in the Logic of the Decision/Award

20. Like any decision in a complex dispute, the Decision and the Award build to their conclusions in a series of steps. For purposes of this Separate Opinion, I will limit my comments to certain key issues on which I see things differently. In summary, the major steps in the reasoning of the Tribunal seem to me to proceed as follows:

21. The language of the ECT, Titles I and II, regarding a stable and transparent legal framework is "focused on establishment of arrangements at the national level as opposed to the acceptance of international legal obligations owed to Investors."[9]

(1) According to the Decision's interpretation of the FET Standard, there was no specific commitment by the Kingdom of Spain or an explicit undertaking because, *inter alia*:

(i) Spain's alleged "commitment" arose from a regulation of general application — which should not be interpreted as the equivalent of a contractual commitment — or more specifically a "stabilization clause."[10]

(ii) The law of Spain provides for a hierarchy of laws, regulations, etc. which means that where a law sets forth a particular policy, no regulation may conflict with or contradict such policy — and this is something that potential investors must know when they

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[8] Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – the Concept of Proportionality. *Benedict Kingsbury and Stephan W. Schill*. ©Oxford University Press 2010. Published 2010 by Oxford University Pres.; Robert Alexy, A Theory of Constitutional Rights (Oxford University Press, 2002).

[9] Decision ¶ 438.

[10] The Decision does acknowledge, however, that the absence of a specific commitment does not mean that an investor that has invested on the basis of a given tariff regime ceases to be a relevant factor in applying the FET Standard under Article 10(1). Decision ¶ 462.

decide to invest. In addition the Supreme Court of Spain has held on numerous occasions that, for example:

> *There is no legal obstacle that exists to prevent the Government, in the exercise of the regulatory powers and of the broad entitlements it has in a strongly regulated issue such as electricity, from modifying a specific system of remuneration …* [11]

Because of the above circumstances, it is concluded that there could not have been a firm commitment regarding RE tariffs in the first place, or, stated otherwise, the existence of these features of Spanish law undercut a claim by these investors based on "reasonable and legitimate expectations." Also, if one views this transaction by the standards of normal commercial negotiations — there were weaknesses in Claimants case on "due diligence" and "reliance."

(iii) Nonetheless, it is found that these alleged weaknesses in the Claimants' case do not mean that Claimants have no legal rights if the Tribunal finds (as it does) that there has been a complete change in the system on which Claimants' made their investments. Their compensation will, however be limited to those situations in which Spain has not taken their interests sufficiently into account, or where the impacts on Claimants' investments have been "disproportionate."

(iv) Finally, the Tribunal examines whether Spain's Measures were "proportionate" or "not disproportionate" making use of the accepted three-part test described at ¶17, *supra*. The conclusion reached is that Spain's Measures have passed the test of proportionality with the exception of minor adjustments regarding seven of Claimants' 24 plants. The Tribunal also requires Spain to return to Claimants certain sums which Claimants had received as compensation for a given quantity of electric power sold in 2013 — and which Claimants were later required to return to Respondent, when RD 413/2014 and IET/1045/2014 retroactively lowered the price to which Claimants had been previously entitled for those sales.

IV. A Different Appreciation of the Dispute

22. Respectfully, I am not in agreement on any of the above elements for the following reasons:

[11] *Judgment of the Supreme Court, 15 December 2005; translated extract at R-0137; cited in Award ¶234.*

A. The Background of the ECT and its Relation to Application of the FET

The Tribunal's analysis of the scope of Section 10(1) is detailed and precise in parsing the language of the ECT. It reasons, in summary, that the ECT's concerns, especially in Title I, go beyond protection of investment, including for example, references to "non-discrimination and market oriented price information."[12] As to investment protection, the Tribunal views references in Titles I and II to a "stable and transparent legal framework" to be focused on establishment of such a framework at the national level "as opposed to the acceptance of international legal obligations owed to Investors. . ."[13] Regarding references in Title II to legal framework, the Decision indicates that norms to be established at the national level should be in conformity "*with the relevant international laws and rules on investment and trade*."[14]

23. The Decision properly raises the question as to what such international laws and rules are — and after discussion ¶423 to 438, states:

> "In the view of the Tribunal, the objects and purposes of the ECT are therefore more balanced than either Party allows for, and it approaches the interpretation of Article 10(1) on that basis."[15]

I cannot agree. To conclude that the ECT is relatively neutral regarding protection of foreign investment is not I believe, an appropriate conclusion. The careful analysis of the words of Section 10(1) does not, I believe, give sufficient weight to the context and origin of the ECT. The Berlin Wall fell in November 1989.

24. As explained by the great Professor Wälde, himself an expert on the subject of the energy industry and investments:

> "The overall background of the Treaty [the ECT] was the effort to help the transition economies of Eastern Europe to attract investment, mainly by helping to install a rule of law, safeguarding

[12] Decision ¶ 438.

[13] *Id*.

[14] *Id*.

[15] Decision ¶ 439

> of property, respect for contracts and liberalization of investment conditions in the model of Western market economies."[16]

Prof. Wälde continues:

> "…[T]he overriding purpose of the Treaty [ECT] is the encouragement of private investment by stable, equitable, transparent conditions at a **"high level" of protection**… The tools — the 'investment disciplines' in part III of the Treaty — have to be seen as instruments to implement the overall emphasis on promotion of private investments…
>
> …the Treaty [ECT] emphasizes a "high" (i.e. not as other BITs a "normal") level of protection of foreign investors, highlights the importance of "liberalization", i.e. movement away from socialist command-control energy economy and monopolies with a new emphasis on property, contract and competition and highlights all features of a market economy in energy which are the opposite of socialist energy industry — that is respect for property rather than pervasive state control, separation of private ownership and entrepreneurship from politicized comingling of state, politics and energy industry, fair and transparent treatment of foreign investor — rather than exposing them to the volatilities and vagaries of intricate and not easily intelligible political maneuvering … The Treaty's language has therefore to be seen before the background and overall objectives and context — liberalization and modernization of still state-dominated energy industries, and the objects and purposes — to provide in a legally binding form with maximum effectiveness a high degree of investment security …
>
> From this detailed identification of relevant objectives of the Treaty identified in a formal, explicit and legally relevant form (i.e. not super-imposed by the interpreter's personal subjective views and preferences) it seems clear that the broad thrust of the **ECT is intended to offer extensive, rather than restrictive, protection** to foreign energy investors and their investments". (emphasis added)[17]

25. As the Decision indicates, at ¶447, the language of the ECT regarding investment protection was by no means novel. By 1998, nations had already signed more than 1700 BIT's, virtually all of which required Host nations not to expropriate without compensation and, *inter*

[16] CL-0010; CM ¶ 397.

[17] *Id.*; CL. Mem. ¶ 401.

alia, required the Host nation to provide Fair and Equitable Treatment. The former Communist countries clearly lacked the kind of legal framework conducive to inspiring the confidence of long-term private foreign investors. This background accords comfortably with words of Article II of the ECT confirming its purpose to:

> "[establish] a legal framework in order to promote long-term co-operation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the [European Energy] Charter."[18]

26. Surely this background and the objective of increasing the flow of ample capital from the West to develop East European energy, and for that energy to be transferred to the West suggests at least a continuity of minimum international law protections of foreign investment and more likely an expansion of such protections as urged by Prof. Wälde. I see nothing in the language of the ECT to suggest, as the Decision does, that the ECT should be understood to grant generous deference, for example, to the national laws of any signatory nation, much less the former Communist bloc nations.

B. The Context and Facts of the Dispute: The Issue of a Specific Commitment; Legitimate Expectations

27. Anyone who has had the honor of being entrusted to decide a dispute between an investor and a sovereign government knows the weight of responsibility that comes with it. As one human element of a human institution, all arbitrators can do is attempt to view the facts and the law in a way that accords full respect to both Parties – here the RWE Claimants and the Kingdom of Spain, Respondent.

28. The Decision provides a detailed listing of the various legal and regulatory provisions enacted in the Kingdom of Spain — as well as the timing of each of the investments — but, in my view, does not provide adequate discussion of the economic and, business context of the dispute. I recognize that the Parties may take very different views of the legal significance of certain facts, but as to certain fundamentals there is no significant disagreement.

29. The Kingdom of Spain recognized that its balance of payments, and indeed its industrial competitiveness (including job creation) were being impacted negatively by the high

[18] C-0001; Cl. M. ¶ 395.

cost of imported petroleum-based energy resources. Spain further recognized that its geography provided attractive conditions for Renewable Energy (hereafter "RE") generation of all sorts, but that it was especially favorable for solar and wind power. Needless to say, increased generation from these power sources also would also provide a significant reduction in Spain's carbon footprint, thereby reducing its contribution to global warming.

30. At about the same time, and for very similar reasons, the European Union undertook to foster an increase in the percentage of power generation from RE sources for the region as a whole. Between 2001 and 2009 it enacted, *inter alia*, two directives — EU Directive 2001/77/EC and EU Directive 2009/28/EC. These Directives created specific and binding requirements that member nations take steps to achieve RE generation of at least 12% by 2010, and 20% by 2020. In so doing, the EU also, consistently, called attention to the benefits of Feed-in Tariff (FIT) arrangements and advised strongly and repetitively against making retroactive changes to such tariff arrangements once they were put in place. [19]

31. It probably should be said here that different nations surely have different views about the role of the private sector in their economies. There is certainly no international mandate requiring any nation to seek foreign investment generally. And if a nation does seek to attract foreign investment, there are no fixed formulae for doing so. But once having made policy choices about obtaining the foreign investment it seeks, international norms, including the requirement of Fair and Equitable Treatment do attach. In seeking RE investment, Spain made a number of policy choices. First, it might have established incentives applicable only to Spanish nationals, in which case the rules of international law likely would not apply. But, in fact, the RE incentives were offered to, and actively sought from, foreign investors as well. Another policy choice was made regarding the precise nature of RE investments to be eligible under the Special Regime. Those incentives might, for example, have been limited to "green field" investments – meaning only investments made to construct new RE generation facilities. But in fact the Special Regime also applied to investments made to purchase and operate existing RE generation facilities. Finally, the specific terms of the incentives themselves – i.e. the remuneration rates as well as the number of years they were to be effective – involved another choice. As will be demonstrated, *infra*,

[19] Decision ¶ 131.

Spain's incentives were put in place at a time when the costs of RE generation plants – especially those for wind and solar – were too high to make an unassisted private investment viable. Because of this, and because the moment of investment is, of course, crucial for the long-term investor, Spain chose to provide incentives that would pertain essentially for the operational life of each category of equipment involved.

32. Viewed from the present moment, with perfect hindsight, one might be critical of one or more of these policy choices. In particular, it seems that Respondent might rightfully have expected that the cost of wind and solar capacity would gradually decline – so that after a given period, RE generation costs would fall to the point that additional economic incentives would no longer be required.[20] But the point of this discussion is not to exercise hindsight, but rather simply to make clear that Respondent made certain choices in inviting investors, and that this is the policy framework which we have before us in this dispute.

33. While Spain first created a separate category for RE generators in 1994, Spain's first major legislation which included this general subject was the 1997 Electricity Law ("Law 54/1997" or the "Electricity Law"). This law covered a wide range of different activities related to electric power generation, transmission etc. Included within that law were two elements of fundamental importance to the dispute before us. First, in Title IV, it distinguished between the "Ordinary Regime" for electricity generation (Chapter I of Title IV) and the "Special Regime": which was focused especially on "non-consumable renewable energies." The specific key features of the Special Regime (Chapter II of Title IV) were also distinguished from those of the "Ordinary Regime."

34. As described in ¶131-132 of the Decision, Article 28(1) then established a requirement of prior administrative authorization of the construction and operation of installations under the Special Regime, while a series of rights and obligations for such installations were set forth in Article 30.4, which stated, *inter alia* that:

> "The remuneration arrangements for electric power generation…under the Special Regime shall be supplemented by the payment of a premium under statutory terms set out in regulations…

[20] Indeed Respondent has introduced evidence that it is now able to conduct competitive auctions which will result in new investments in the RE generation without the need of incentives. Mr. Santacruz, Day1/271.

> "To work out the premiums, the voltage level on delivery of the power to the network the effective contribution to environmental improvement, to primary energy saving and energy efficiency, the generation of economically justifiable useful heat and the investment costs incurred shall all be taken into account as to achieve reasonable profitability rates with reference to the cost of money on capital markets." (Emphasis added) [21]

35. According to Respondent, the above language establishes the principle of a "reasonable return" with reference to the cost of money on capital markets. But of greater importance in the judgment of this arbitrator is the statement that the remuneration arrangements for power generation under the Special Regime shall be supplemented by the payment of a premium under statutory terms set out in Regulations.[22] The first regulation implementing the above language was not enacted until Royal Decree 2818/1998 which, in its Preamble, stated:

> *"for the facilities based on renewable energies and waste, the incentive established has no time limit as the environmental benefits need to be internalized, and* ***because of their special characteristics and technological level , their higher costs do not allow them to compete in the free market."***[23] (Emphasis added).

36. But in March of 2004, the Spanish government repealed RD2818/1998 and enacted RD436/2004 which, for the first time, set forth a more specific remuneration scheme for the Special Regime. It contained two key elements which remained, with relatively minor variations, from 2004 until 2013-14. First, investments, once they were found to be qualified for the Special Regime could choose each year between being remunerated (1) in the form of a regulated tariff *i.e.* a single, flat rate defined as a percentage of the average referenced tariff (TMR) or (2) by selling directly into the market in which case the operator would receive the market price plus an incentive, as well as a premium if the specific plant was entitled to receive one.[24]

37. RD436/2004 then added a second key element regarding future changes in the remuneration rates. The tariffs and premiums established in RD434/2004 would be revised in 2006, and every four years thereafter. However, Articles 40(2) and (3) provided as follows:

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[21] R-3 at 50-51
[22] Id.
[23] *C-0177 and R-98*
[24] Decision ¶ 144-145.

> "2. The tariffs, premiums, incentives and supplements resulting from any of the revisions provided for in this section shall come into force on January 1st of the second year subsequent to the year that the revision has been carried out.
>
> 3. The tariffs, premiums, incentives and supplements resulting from any of the revisions provided for in this section shall apply solely to the plants that commence operating subsequent to the date of the entry into force referred to in the paragraph above and shall not have a backdated effect on any previous tariffs and premiums."[25]

38. It is evident to this arbitrator that Spain, for its own good and sufficient reasons, had created a sophisticated invitation to long-term RE investors. Recognizing that the generators under the Special Regime used technologies "involving higher costs that do not allow them to compete in the free market,"[26] Spain's invitation was, in essence, as follows:

> We want to expand RE electric generation in Spain as quickly as possible. In order to incentivize long-term RE investment in Spain, you may be assured of the following: Once your plant has been approved as qualified under the Special Regime you may sell all of your power either (1) at a favorably regulated market rate, or (2) directly into the market in which case you will receive an incentive payment, and, if qualified, also a premium.
>
> Finally we know that in order to make these investments you need the assurance of reasonable stability. Therefore, though remuneration rates may change beginning in 2006, no such changes will affect plants already approved and in operation at that time — and future rate changes will only take effect on January 1 of the second year subsequent to the year that the revision is carried out.

39. For a potential investor, this presented a clear and unmistakable message. The investor knew its capital and operating costs. The investor could easily see how these Special Regime rates were established and knew the operational life of its equipment. If the investor considered that these incentives were sufficient to earn an acceptable profit, Spain would welcome this investment and Spain would do its best to maintain stability over the long term.

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[25] Decision ¶ 146; similar language was included in RD 661/2007, Sec 44.3.

[26] See ¶ 30 *supra*.

40. As Respondent affirms correctly, this arrangement did not guaranty the investor a particular annual profit in Euros, or even a guaranteed percentage of profit. Ministry statements and press releases refer to a guaranteed return of (at least?) 7% for wind and hydro installations.[27] But in concrete business terms, it is evident that, according to the established remuneration system, the success of any investment would, in fact, depend on the efficiency of the particular plant in terms of capital cost, operating cost and, crucially, the actual volume of power it produced and sold to the grid each year over the useful life of its wind, solar or hydro generation equipment. The remuneration math was rate per unit of power – under either of the two options times the number of MWh produced.

41. Giving due respect to Respondent's intentions at the time, this appears certainly to have been what Spain intended and what the investor relied on. In business vernacular, this was "the deal." There was an invitation by Respondent and an acceptance by means of reliance by the investor. The resulting plants were then each, initially, administratively approved as properly qualified for remuneration under the Special Regime, or later were granted registration under the RAIPRE. In either case they were remunerated in the same way. Benefits and responsibilities flowed in both directions. Each year the investor operated the respective plants, kept accounts, delivered the power to the grid, paid their taxes and proceeded to do the same each successive year. Each year, as a result, Respondent required smaller quantities of imported petroleum products and improved its carbon footprint. This continued for approximately 10 years, from 2004 to 2013-14. In terms of the Paulsson article referred to above, the Respondent made "meaningful promises" to such foreign investors. It did so to enhance the flow of capital into Spain's RE sector on the most favorable terms. It did so following the best advice of the EU as well as its own CNE and other related knowledgeable sources — all of whom knew that FIT schemes not only worked, but worked well — provided, however, that reasonable stability was maintained.

42. The Claimants, for their part, believed that Respondent was making this invitation honorably and in good faith and this would seem to have represented good business judgment. The record in this case shows that from 2004 onward, this invitation was accepted by Claimants as well as many other investors who have since made similar claims. Indeed, if one has doubts that Respondent, in fact, did recognize the essence of this agreement, one needs to look no further

[27] Decision ¶ 174-5.

than the record of Spain's conversations with the RE investors in 2010. While asserting that it had the right to make changes to the remuneration system, Spain made clear that the temporary reductions, for which it was seeking the Investors concurrence in 2010, would be for one year only. [28]

43. Thus the story of these and other RE investments during this period is the history of a highly successful campaign by the Respondent to attract billions of Euros in RE investment in Spain; as well as to comply with the ambitions and binding Directives of the EU regarding increased RE generation capacity.

44. The question of whether or not Spain's invitation and investments by the Claimants should be considered to constitute a "specific commitment" may be fairly debated. Common law principles normally applied in circumstances such as this generally come under the heading of estoppel. But the civil law also honors the same sound equitable principles, which are referred to as *venire contra factum propium*, or in Spanish law the Doctrine of *Actos Propios*.[29] In essence, no party may rely upon its own inconsistency to the detriment of another. This principle has been traced back through 12 centuries of Islamic jurisprudence and has deep roots in Roman law, common law, and modern civil law.[30] Unlike common law estoppel, *actos propiós* applies so long as the conduct is capable of creating an objective expectation in third parties — actual detrimental reliance by the other party based on its subjective expectations is not typically required.[31] In other well-known investment arbitration cases, the Tribunal in *ADC v. Hungary* stated that "[when' Hungary enters into and performs these agreements for years and takes full benefit of them, it lies

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[28] Decision ¶ 183-5.

[29] *See, CHARLES T. KOTUBY JR. and LUKE A. SOBOTA, GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS, C. 119, (Oxford Univ Press, 2017; See also* HÉCTOR MAIRAL, THE DOCTRINE OF *ACTOS PROPIOS* AND THE ADMINISTRATION OF JUSTICE ¶¶ 2,5 (1988) (analyzing the doctrine in Spanish); MARCELO J. LÓPEZ MESA, THE DOCTRINE OF ACTOS PROPIOS IN JURISPRUDENCE 93-95 (1997) (analyzing the doctrine in Spain and Argentina) Rubén S. Stiglitz & Gabriel A. Stiglitz, *Actos Propios, in* Contracts 491-512 (1994) (analyzing the doctrine in Spain and Argentina); MIGUEL PASQUAU LIAÑO AND VOIDABILITY OF CONTRACTS 246-51 (1997) (analyzing the doctrine in Spain and Germany). As the Ecuador Supreme Court has recognized, the principle of *venire contra factum proprium* is a "principle of universal law, accepted by all legal systems." *Cobos Peña v. Asociación Mutualista de Ahorro y Crédito*, R.O. No.363, Decision No. 195-2001 (July 6, 2001).

[30] *See Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. AARB/05/17, Award, ¶ 207 (Feb. 6, 2008); *Case concerning the Temple of Preah Vihear (Cambodia v. Tha.*), Merits, Judgment, 1962 I.C.J. 6.

[31] *See* Mairal, *supra* note 28.

ill in the mouth of Hungary now to challenge the legality and/or enforceability from these Agreements.[32]

45. Another source in the same vein is Prof. Wälde's well known Separate Opinion in *Thunderbird Gaming v. Republic of Mexico* regarding situations involving "invitations to invest," I believe that he was correct in that dispute, though the present case is a lot stronger on the facts than was *Thunderbird*. He maintained that in "invitation disputes," it was a mistake to analyze due diligence and reliance as if an arbitral tribunal were considering a normal commercial dispute. He emphasized the challenges for a foreign investor to find its way in a strange legal system, political system and culture. The investor in *Thunderbird* was a relatively small and unsophisticated company, which RWE certainly is not. Nonetheless, if the above description of Spain's initiative to attract RE investment is accurate, it would seem of doubtful legal significance to insist on the most exhaustive evidence from Claimants as to due diligence and reliance in the circumstances of this dispute. His opinion also references *actos propios* and other national laws that lead to a similar result.

46. But, no matter. If one considers that this position represents perhaps, the law as it should be, rather than as it is, we may move instead to a legal foundation that the Decision does accept, at lease in principle. The Decision, (¶462) recognizes that even in the putative absence of a specific commitment, this does not mean that an investor, who has invested under a given tariff regime, has no rights under the FET Standard and Article 10(1).

47. If the Decision had proceeded from that conclusion to calculate the amount due to fully compensate Claimants for the damage caused, I would not be writing this Separate Opinion. Had this been done, the measure of damages to Claimants in accordance with the venerable *Chorzow* principles might have been determined by calculating the present value of the reduction in the cash flow for the remaining years of the term under the Special Regime remuneration system, and by using DCF (as Claimants' expert had suggested) to come up with an appropriate level of compensation. In so doing, the 7% tax and other modest changes to the original remuneration structure would be removed from the but-for expected cash flow. But this is not what the Decision did.

[32] *ADC Affiliate Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award ¶ 475 (Oct. 2, 2006.

48. Instead the Decision, through a complex series of steps – attempts to weigh the interests of these private investors against Respondent's much broader responsibilities to protect the interests of Spanish citizens and the political and economic stability of the Kingdom of Spain. In so doing, the Decision gives credence to the creative advocacy of Spain's counsel, which framed this dispute as one which requires recognition of Spain's sovereign right to regulate, as well as its need to exercise broad discretion to address the public interest, not merely the interests of private investors. This, I believe, is a mistake.

49. In my view, this dispute does not, in any way, call into question Respondent's right to regulate. Respectfully, I believe that the Decision would have more appropriately taken the path of the tribunals in *Eiser, Novenergia* and RREEF, among others that found Respondent squarely at fault.[33]

C. Balancing the Interests of the Public vs. Private Investors: A Different View

1. Brief Comments Regarding the *Saluka* Case

50. One of the most highly regarded investment arbitration awards on the subject of balancing public vs. private interests was the Award in *Saluka*.[34] In that case the tribunal began by citing language from the *Mondev* case that:

> "[a] judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case."[35]

51. *Saluka* further found that, under the treaty in question, the Preamble and statements of purpose of the treaty were, as in the ECT, tied directly to the stimulation of foreign investment.[36] The tribunal also found that encouragement of foreign investment was not the sole aim of the treaty but was rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations. This language, the tribunal found

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[33] This reference to RREEF award is limited to its finding regarding violation of the FET Standard as well as ECT Article 10(1). The tribunal's treatment of appropriate compensation, I believe, was erroneous, and will comment further on this point, *infra*.

[34] Cl. Memorial ¶ 456; *See, e.g.,* CL-0034, *Saluka Investment B.V. v. The Czech Republic*, Partial Award on Jurisdiction and Merits, 17 March 2006, ¶ 302.

[35] *Id*. at ¶ 285.

[36] *Id*. at ¶ 298.

did not exaggerate the protection to be provided to foreign investments. Instead, in a more balanced way, the tribunal understood that "fair and equitable treatment" under the treaty should be understood, if not to be proactively stimulating the inflow of foreign investment capital, at least not to deter foreign capital by providing disincentives to foreign investors. The *Saluka* tribunal concludes: "…an investor's decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment as well as on the investor's expectation that the conduct of the host State subsequent to the investment will be fair and equitable."[37]

52. As indicated above at ¶ 23 to 26, I believe that the protections provided to investors under the ECT are stronger than those in the treaty in the *Saluka* case. I, nonetheless, find this to be a fair expression of the general scope of the FET standard. Regarding a State's right to regulate, the *Saluka* award cites with approval language from the award in *S.D. Myers*, that in determining the scope of the obligation of a host state under FET, tribunals should decide "in the light of the high measure of deference which international law generally extends to the right of domestic authorities to regulate matters within their own borders."[38] Compared to this case, however, the facts in *Saluka* were relatively simple and straightforward. There was a financial crisis that affected all five major banks in the Czech Republic. The essence of the Claimants' case related to being treated differently, as a foreign investor, from the way the other four banks were treated. Unfairness as "discrimination," however, is not one of the allegations of the Claimants in this case.

53. The dispute in the present case is based on the Measures taken by Spain in 2013-44. As we know, the Special Regime became effective in 2004. When we examine the facts — and especially when we examine how the Respondent managed its responsibilities regarding the Special Regime, some interesting elements emerge. Obviously, this dispute was triggered by the Disputed Measures in 2013-14. But the tariff deficit began in 2000. If one is to balance public and private investor interests, a lot may depend on when the balancing takes place. As will be seen below, there were many significant moments during the period 2004 to 2013-14. A snapshot taken in 2006, 2008 or 2010 would involve different elements of weight in the imagined scales.

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[37] *Id*. at ¶ 301.

[38] *Saluka* at ¶ 305.

With this in mind, we proceed to examine balancing in the present dispute, including consideration of Respondent's role as regulator.

2. The Right to Regulate and Its Relation, If Any, to the Dispute Before Us

54. A major issue which, in my view, has led to confusion relates, in one way or another, to Respondent's right to regulate and, as appropriate, to change laws or regulations in the public interest. For the avoidance of doubt, as we have stated earlier, numerous tribunals have found that, in the absence of a specific commitment, States retain the right to modify their regulatory regimes.[39] Such tribunals have found that "in order to adapt to changing economic circumstances the State's regulatory powers still remain in place."[40] And where there is not a specific stabilization clause or its equivalent, investors must expect that legislation or regulations may change.[41] I recognize and accept this.

55. But the issue before us is to what extent Treaty protections, and, specifically, the obligation to accord investors Fair and Equitable Treatment under the ECT may give rise to legal liability and compensation notwithstanding the State's acknowledged right to regulate.

56. The Decision, properly takes note of the *Eiser* tribunal's language to this effect, namely that:

> "… the Respondent's obligation under the ECT to afford investors fair and equitable treatment does protect investors from a fundamental change to the regulatory regime in a manner that does not "take account of" existing reliance on the prior regime. The ECT did not bar Spain from making appropriate changes to the regulatory regime of RD 661/2007. Thus, the Tribunal does not accept Claimants' contention that RD 661/2007 gave them immutable economic rights that could not be altered by changes in the regulatory regime. Nevertheless, the ECT did protect Claimants against the total and unreasonable change that they experienced here."[42]

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[39] *See, e.g., Parkerings –Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, 11September 2007 ¶ 332, RL-0035, *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶¶ 217-218.

[40] CL-0049, *BG Group Plc. v. Argentine Republis*, UNCITRAL, Award 24 December 2007, ¶ 298.

[41] CL-0052, *Micula v. Romania*, ¶ 666.

[42] Decision ¶ 449.

57. The Decision takes note of similar language from the *Blusun* case which, in turn, refers to the *El Paso* Award which speaks of "a total alteration of the entire legal setup for foreign investments" as well as language from the LG&E tribunal which speaks of "complete dismantling of the very legal framework constructed to attract investors." Finally, the Decision takes note of the *Blusun* award's conclusion that: "The emphasis is on the subversion of the legal regime."[43]

58. The Decision recognizes that, in addition to the *Eiser* case, tribunals in other Spanish investment cases — including *Novenergia* have also found that even if no "specific commitment" to the investor was found, that the relevant question:

> "*is[still] whether the statement or conduct is objectively sufficient to create legitimate expectations in the recipient. Such conduct or statements can take the form of laws or regulations.*"[44]

59. In a similar vein, but in factually different circumstances, Judge Higgins said in the *Martini* case:

> "In my view the right distinctions are here being drawn: governments may indeed need to be able to act *qua government* and in the public interest. That fact will prevent specific performance (including restitution) from being granted against them. But that is not to liberate them from the obligation to compensate those with whom it has entered into specific arrangements. That is the reasonable place to strike the balance between the expectations of foreign investors and the bona fide needs of governments to act in the public interest."[45]

3. <u>The Heart of the Matter</u>

60. The Decision recognizes that Claimants are protected from total and unreasonable change or the subversion of the legal regime under which they invested, but the Decision still worries that recognition of anything less than a "specific commitment" may "constitute an

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[43] Decision ¶ 450; *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic* (ICSID Case No. QRB/14/3, ¶ 363 (CL-0187), referring to *El Paso Energy International Co v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 517; *LG&E Energy Corp. LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 139.

[44] Decision ¶ 456; *Novenergia II – Energy Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Spain*, SCC Case 2015/063, Final Decision, 15 February 2018, ¶ 547.

[45] R. Higgins, *The Takings of Property by the State: Recent Developments in International Law*, (III) Collected Courses of the Hague Academy of International Law, p. 338; cited in *National Grid v. Argentina,* ¶151.

excessive limitation on power of states to regulate the economy in accordance with the public interest."

61. I believe that in the circumstances of this case, this concern in not warranted because the situation that gave rise to this dispute, respectfully, has nothing to do with a limitation on Respondent's regulatory powers. First, as has already been demonstrated (see ¶ 29 to ¶ 40, *supra*) Respondent created the structure of incentives for RE investments for perfectly understandable national interest reasons. Spain, alone, established the detailed remuneration system which came together first in RD 434/2004 and was further refined in RD 636/2007. Respondent does appear to have had in mind that investors under the Special Regime would earn what Respondent's authorities considered a reasonable return, 7.398% per annum before taxes. But what Respondent established, in fact, was a remuneration system that gave investors an annual choice of two measure of remuneration per unit of electric power produced. The structure did not guarantee investors any specific level of return, but permitted them, if they were efficient, to earn as much as they could Further, I see no evidence in the record that participants in the Special Regime were advised that continuation of their remuneration under the Special Regime was, in any way, conditioned on revenues received by Respondent from electricity consumers, or indeed from any other budgetary account or source of funds. No such condition was established because none existed.

62. Regarding Respondent's right to regulate, I was struck by the representation that under Spain's system of regulation for electric power generally, that regulators were charged with "the obligation of a result."[46] Respondent had created a system whereby remuneration was calculated by multiplying the applicable rate (fixed tariff or market plus premium) times the numbers of MWh produced. Having done so, it is difficult to see how one could even speak of "over-remuneration." But if somehow that were genuinely the concern, and if earnings seemed to be in excess of Respondent's conception of a "reasonable return, one would have expected that as power plants were commissioned, regulators might have given some attention to the actual returns achieved by Claimants and other investors similarly situated. If it appeared, for example, beginning in 2004-5 that the incentives Respondent had provided for Special Regime investors had been too generous – i.e. genuinely in excess of the returns Respondent envisioned in

[46] Resp. C-Mem. ¶ 342.

establishing the RE remuneration regime -- the regulators might, without legal objection from anyone -- have reduced the regulated tariff or the market price plus premium – not for plants already approved – but for future investors. But no evidence of such regulatory attention was presented. I find this interesting.

63. As RE investments flowed into Spain, some limits were established in 2010, on the minimum and maximum number of KWh eligible for remuneration under the Special Regime but the remuneration system remained the same. The only matter that did receive significant attention was the growth of the tariff deficit. And this became important only after the world economic crisis of 2007-2008. It caused a substantial reduction in Respondent's revenues from retail power consumption. Previously, revenues from power sales had been used to cover the cost of the incentives provided under the Special Regime. But as previously mentioned, investments under the Special Regime had, in no way, been tied to, or conditioned upon, Respondent's revenues from that or any other source.

64. Clearly the world economic crisis of 2007-8 created serious problems for many countries – and, perhaps especially, for those countries in Southern Europe. These countries, including Respondent, had, before the days of the Euro, been able to adjust to major crises by devaluing their currencies. But that was long ago. Respondent was obviously faced with great stresses for which Respondent certainly deserves compassion and understanding. But, the crisis of 2007-8 did not undo the conditions under which billions of Euros in RE investments had come to Spain from 2004 on, and which continued to arrive until 2013.

65. Respondent has made much of a series of decisions of the Supreme Court of Spain indicating that no private party could reasonably have expected that any regulation affecting its business interests could not "change". As indicated *supra*, international law also recognizes that governments must be able to change laws and regulations in the public interest to adapt to changed circumstances. I will say more about these decisions below, but what I find striking is that, once again, Respondent, at any time, if it had so wished, could have made a number of changes to the Special Regime that would have had a direct impact on the tariff deficit, changes that almost certainly would have given rise to no negative legal consequences.

66. For example, in addition to reducing the level of Special Regime incentives for future investments, as suggested above, Respondent could have announced that, because of

economic circumstances, it would authorize only a limited number of new generating facilities under the Special Regime. Or, Respondent could simply have announced the elimination of the Special Regime as of a certain date (for installations not yet in operation). Either of these choices would certainly have stopped the growth of the tariff deficit. But of course they probably would also have halted the large flows of new RE investments – and caused Respondent's percentage of RE generation capacity to fall far short of the levels called for by the binding EU Directives.

4. The Significance of the Decisions by the Spanish Supreme Court

67. The legal system of Spain is certainly among the world's oldest and most sophisticated. No serious arbitrator can view decisions of Spain's Supreme Court other than with appropriate respect. But as to the decisions regarding the issue of "change" of regulations, such as those cited in the Decision (at ¶ 234 to ¶ 236 and ¶ 515 to ¶ 534), this arbitrator was struck by the absence of any discussion at all of the role of international law arising from treaties to which Spain is a signatory. As called for by Article 26 of the VCLT, parties to a treaty are required to abide by their terms and perform their obligations in good faith - (*Pacta Sunt Servanda*). Article 27 provides that a party may not invoke provisions of its internal law as justification for its failure to perform a treaty.

68. Indeed, in Article 96 of the Constitution of Spain it is provided that:

> *"1. Validly concluded international treaties, once officially published in Spain, shall be part of the internal legal system. Their provisions may only be repealed, amended or suspended in the manner provided for in the treaties themselves or in accordance with general international law."*

This means that the terms of the ECT, including the standard of Fair and Equitable Treatment are considered to be part of Spanish law. As a result, if Respondent made a change in Spanish law or regulations which might have resulted in a violation of the FET standard, Respondent would be required to conform its actions to the FET standard, or provide some explanation as to why the standard did not apply, or face the consequences of a violation of international law.

69. This being the case, I found it remarkable that the Supreme Court did not, in the decisions cited, so much as mention international law or the ECT. That being the case, it would

seem that the Supreme Court decisions to which Respondent has referred were of marginal significance, if any, as regards the issues before us.

70. But in any event, as stated in the Tribunal in CMS v Argentina in its Award:

> "The Tribunal is mindful that, in its Decision on Jurisdiction, the distinction was made between measures of a general economic nature, such as those concerning the economic and financial emergency, and measures specifically directed to the investment's operation. It then reached the following conclusion:
>
> > …the Tribunal concludes on this point that it does not have jurisdiction over measures of general economic policy adopted by the Republic of Argentina and cannot pass judgment on whether they are right or wrong. The Tribunal also concludes, however, that it has jurisdiction to examine whether specific measures affecting the Claimant's investment or measures of general economic policy having a direct bearing on such investment have been adopted in violation of legally binding commitments made to the investor in treaties, legislation or contracts."[47]

71. If the discussion to this point seems still to leave open concerns about Respondent's right to regulate and possible undue limitation on its power to adjust laws and regulations in the public interest, perhaps the following hypothetical will be useful. To review, the Decision as well as Section IV.B of this opinion concluded that Respondent, beginning at least in 2004, had invited Claimants to invest on the basis of two approved tariff arrangements available only to power plants qualified under the Special Regime. Respondent further provided that, beginning in 2006, these remuneration rates could be changed, but that the changes would not affect plants already qualified and producing under the Special Regime. From 2004 until 2013, these regulations with minor adjustments, remained in place.

72. The tariff deficit began in 2000 and proceeded to grow – especially after the world economic crisis of 2007-8. Spain's tariff shortfall was financed, until 2014, by Respondent's major utilities who were responsible for selling power to end-users. The record demonstrates that the increase in the tariff deficit was not due to a change in the cost of capital between 2004 and 2014. Instead, it resulted from reduced revenues paid by end-users, which revenues had previously been the main source of funds used to pay the producers under the Special Regime.

[47] CMS Gas Transmission Company v Republic of Argentina, ISCID Case No ARV/01/8 (2005), ¶ 124; citing to its Decision on Objections to Jurisdiction, July 17, 2003, 42 ILM 788 (2003) ¶ 25-32, ¶33; see also RREEF Award ¶ 593.

73. Prior to the Measures, Respondent's obligation to investors under the Special Regime consisted of a flow of funds sufficient to cover the incentive payments to Special Regime producers each year originally for the remainder of the useful life of the plant; later it related to the remaining balance of the established 20 or 25 year period. Those payment obligations can easily be conceived as a sort of amortization schedule. Until 2014, these were financed by Respondent's five major utilities.

74. Now imagine that, instead of financing these Special Regime costs as Respondent chose to do here, Respondent had gone to a major international bank and entered into a loan agreement that allowed Respondent to cover the Special Regime tariff deficit. Under these circumstances, having undertaken to repay the loan in accordance with its terms, does it seem realistic or possible that Respondent might then rely on its right to regulate, or appeal for a margin of appreciation to protect it from default? Many sovereign governments were shocked by the crisis of 2007-8. The growth of the tariff deficit was but one aspect of a larger macroeconomic crisis. It would seem that recourse to a private financial institution, or the World Bank or IMF, or a renegotiation of debt might have been a more appropriate solution. Surely this analogy to the situation of Special Regime beneficiaries is not perfect, but this arbitrator considers the reasoning to be sound and finds Respondent's arguments in defense of Claimants' claims based on broad sovereign discretion to regulate to be specious. I tip my hat to the skill of Respondent's legal team, but I am not persuaded.

V. Appropriate Deference; Proportionality (As Conceived and as Applied)

A. Appropriate Deference

75. As an arbitrator attempting in good faith to give respect and appropriate deference to policy decisions of a sovereign government, many questions come to mind. But, in the dispute before us, the first and most serious question is, "To which legitimate and sovereign government of the Kingdom of Spain shall we defer?" Respondent gradually developed and refined the characteristics of the Special Regime beginning in 1998. It settled, with the enactment of RD 434/2004 and subsequent provisions, on a regulatory structure that was intended to attract major RE investments, and was very successful in doing so. Having attracted major RE investments on this basis and with RE plants already in place and committed to operate for their useful life (or for 20 to 25 years, as later amendment provided), the Kingdom was faced with a

financial crisis involving multiple contributing factors. Respondent decided to move forcefully to deal with this crisis., and, in 2013-14, enacted the Disputed Measures. In doing so it changed the fundamental rules pursuant to which these investment had been made.

76. The Tribunal has accorded to Respondent a wide degree of deference. This is accomplished by giving credence to Respondent's sophisticated and elaborate effort to demonstrate that Claimants were only entitled to a "reasonable return." It is understandable that Respondent might have utilized the means that it did given the predicament in which the government found itself. In the circumstances, it is also understandable for a tribunal to attempt to somehow honor fully both the sovereign decisions of 2004 and 2013-14. But we are not charged with deciding this dispute e*x aequo et bono*. Respondent also appeals to and purports to apply the principles of proportionality. To this final consideration, we now turn.

B. Proportionality

77. It seems that someone once asked the American author and humorist, Mark Twain, what he thought of the music of Richard Wagner. Twain did not pretend to expertise in classical music. "People tell me," Twain said, "that Wagner's music is much better than it sounds." This arbitrator does not pretend to expertise regarding the respected principle of proportionality. But, it is clear to me that proportionality, at least as it applied to these investors, is not nearly as good as it sounds.

78. To examine this, we return to the three stage process of proportionality analysis summarized at ¶ 17, *supra*: First, were the Measures addressed to a legitimate government objective (rather than an arbitrary or corrupt purpose)? Here there was clearly a need to deal with a number of serious economic problems, including the costs arising from the tariff deficit. In these circumstances, the Measures would therefore be considered "suitable."

79. Second, having found the objective suitable, were the Measures "necessary," i.e., reasonable/appropriate. As stated in the Decision, the issue here is not whether there was a state of necessity precluding wrongfulness.[48] The Decision recognizes that passing this step is more difficult but concludes that the Measures do pass that test. My understanding, however, is that

[48] Decision ¶ 559; Cf. Cl. Reply ¶ 506, 585-7.

where the impact on a party is harsh, the threshold of "necessity" must be substantially raised.[49] Based on the reasoning provided, it seems to this arbitrator that the correct answer could be, and should be, "no." These Measures were not "necessary" because, if this was, in fact, one element of a much larger macroeconomic crisis, there were many other ways to obtain the funds to resolve it.

80. But the Tribunal reaches the opposite conclusion on this step, and so we must proceed to look at the impact of the Measures on the affected parties, the RWE Claimants. Without repeating the changes made in 2013-14, it should suffice to supply the Decision's language regarding impact on the Claimants.

> "Overall, Claimants plants are impacted by a drop in future revenue in excess of EUR 400 million, with Claimants suffering a 54% reduction in forecasted cash flows from their plants. These are by any standards very substantial reductions."[50]

The Tribunal concludes that by allowing Claimants their return of 7.398%, Respondent has used an acceptable standard to protect the Measures, generally, from being declared "disproportionate." The Tribunal does find a violation of the FET standard, but only to the extent that seven of Claimants' plants had returns below that minimum return figure. In other words, with that sole exception, the Tribunal finds the Measures to have successfully passed each of the three requisites of proportionality analysis. I see this matter differently.

81. First, as an arbitrator functioning as part of an institution based on the rule of law, I find it impossible to condone the fundamental procedural elements utilized by Respondent in establishing the Disputed Measures. Claimants were invited to invest in Spain on specific terms and conditions. As acknowledged earlier, it is not that these conditions could not be changed, but investors were protected against "a complete dismantling of the very legal framework constructed to attract investors." *See*, ¶54-56, *supra*. Putting aside investments made before 2004, Claimants, in the case of each specific investment, were found by Respondent to qualify under the conditions established for the Special Regime. Claimants successfully operated their RE plants, paid their

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[49] ECtHR, Sporrong and Lönnroth v Sweden, 23 September 1982, Series A, No. 5, para 73. See also Van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights, 3rd. Ed.(The Hague, Boston: Martinus Nijhoff Publishers, 1998) at 629;*; Burke-White and von Staden, 'Investment Protection in Extraordinary Times" 48 Virginia Journal of International Law (2008) at 347

[50] Decision ¶569(a) – based on Compass Lexecon slide No. 38 and Dr. Spiller at Day 3/190. These figures do not appear to have been disputed. See Mr. Perez at Day 5/56. Also, Slide 39, based on Compass Lexecon second report.

taxes, and generally conducted themselves as responsible corporate citizens. After operating successfully for about 10 years, I find it impossible to accept, in terms of any understanding of the rule of law, that Claimants – and other Special Regime investors -- were subjected to the "time machine" introduced by the Disputed Measures. Lawyers everywhere, I am confident, understand the fundamental inequity of a State inviting and accepting investment on one set of conditions and then, for its own reasons, establishing new rules to be applied "as if" they had been in force in the first place.[51]

82. It may be that under Spanish law, a measure is only considered to be retroactive when a party is actually required to repay to the State amounts it had already earned in full compliance with the law. It may also be that, under Spanish law, there is no legal problem if a measure, merely, goes back to recalculate earnings beginning in 2004 and uses those subsequently determined amounts of "over-remuneration" to reduce remuneration to which foreign investors would otherwise be entitled for the remainder of the 20 or 25 years that their installations will be in operation. But this arbitrator finds no reason to believe that such treatment passes muster under the FET standard. Respondent's apparent efforts to avoid retroactively reducing Claimants' earnings from 2004-2013-14 below 7.398% cannot rectify the situation. I believe that it is not possible to justify these actions in terms of due process of law and I would have found them clearly to be found wrongful under the FET standard.

83. But should proportionality analysis change this result? The Decision, after all, places on one side of the scale the very substantial impact on Claimants. On the other scale, according to the Decision, is placed the impressive tariff deficit and the entire financial health of the Kingdom of Spain. But this arbitrator believes that proper respect for both parties requires respect for their carefully considered policy decisions. Spain decided in 2004 and onward that it urgently wanted to attract investment in renewable energy. It actively sought and was successful in attracting billions of Euros in foreign investment. Claimants and many others responded to that call and behaved as responsible corporate citizens. It is undisputed that the cost of money on capital markets did not change from 2004 to 2013-14. Moreover there is no evidence that the conduct of the Claimants or others similarly situated was the cause of the growth of the tariff

[51] See generally, Legitimate Expectations and Informal Administrative Representations, *Hector A. Maiiral,* Oxford University Press 2010.

deficit. The real cause was a macroeconomic crisis for Spain, resulting largely from the world economic crisis of 2007-08 and perhaps some sort of budget stretching in prior years – a phenomenon with which the citizen of virtually every democratic nation is, unfortunately, familiar.

84. If the above is correct, the Disputed Measures, *per se,* to constitute wrongful action under international investment law and I would have preferred that they be treated as such. Without, in any way criticizing proportionality analysis *per se,*, my view of the lesson of this case is that proportionality, as applied in this dispute, points in a rather dangerous direction. It could mean that every time a State encounters a macroeconomic crisis, foreign investors become fair game – because the interests and legal rights of those private investors will be placed on one scale – and the well-being of citizens and the State's financial well-being will be placed on the other. If that is what occurs, not only Respondent but nations with much more urgent developmental needs, will find foreign investment hard to attract and maintain.

85. I reiterate that I join fully in both the Decision and the Award. It will be for others to determine whether some or all the views expressed by my fellow arbitrators or those expressed in this Separate Opinion will better serve the interests of justice, of international investment law, or of international law generally. As for the role of this arbitrator, and with sincere respect for my fellow arbitrators, I believe I have said what I must.

[Signed]
Judd L. Kessler

December 1, 2020
Date