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

*Academic Directors: Ignacio Torterola, Loukas Mistelis**

Award Name and Date: Cube Infrastructure Fund SICAV and Others v Kingdom of Spain (ICSID Case No. ARB/15/20) – Award and Dissenting Opinion – 15 July 2019

Case Report by: Jake Lowther**, Editor Ignacio Torterola***

Summary: The Claimants brought an action for relief against the Kingdom of Spain (‘Spain’) pursuant to the Energy Charter Treaty (‘ECT’) alleging Spain breached the fair and equitable treatment protection in Art. 10(1) ECT in relation to its investments in photovoltaic facilities and hydroelectric facilities located in Spain. Following preliminary objections, the Tribunal considered the evolution of the Spanish renewable energy policy including the imposition of a seven per cent tax on power generators’ revenues and a reduction in subsidies for renewable energy producers to determine the liability of Spain, but in a Decision left open the precise sum payable as damages and costs. Following the satisfactory joint computation of damages by the parties, the Tribunal rendered its Award, incorporating the Decision and a Separate and Partial Dissenting Opinion, largely in favour of the Claimants.

Main Issues: Jurisdiction - Competence of the Arbitral Tribunal; Treaty Obligations - Fair and Equitable Treatment; Damages - Determination of Value of Compensation

Tribunal: Professor Vaughan Lowe (President), the Honourable James Jacob Spigelman (Arbitrator), Professor Christian Tomuschat (Arbitrator)

Claimants’ Counsel: Mr. Kenneth R. Fleuriet, Ms. Amy Roebuck Frey, Ms. Héloïse Hervé (King & Spalding, Paris), Mr. Reginald R. Smith, Mr. Kevin D. Mohr (King & Spalding, Houston), Mr. Enrique Molina (King & Spalding, New York), Mr. Christopher Smith (King & Spalding LLP, Atlanta), Ms. Verónica Romaní Sancho, Mr. Gonzalo Ardila Bermejo, Mr. Luis Gil Bueno, Ms. Inés Vázquez García (Gómez-Acebo & Pombo, Madrid)

Respondent’s Counsel: Mr. José Manuel Gutiérrez Delgado, Mrs. María José Ruiz Sánchez, Mr. Roberto Fernández Castilla, Mrs. Patricia Froehlingsdorf Nicolás, Mrs. Elena Oñoro Sainz, Mr. Juan Antonio Quesada Navarro, Mrs. Gloria de la Guardia Limeres, Mrs. Ana María Rodríguez Esquivias, Mr. Javier Comerón Herrero, Mrs. Estibaliz Hernández Marquínez, Mr. Francisco Javier Torres Gella, Mrs. Amaia Rivas Kortazar, Mr. Antolín Fernández Antuña, (Abogacía General del Estado, The Ministry of Justice of the Government of Spain, Madrid)

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

** Jake Lowther, LL.M (Berlin) is the Foreign Legal Specialist at the international division of the Korean Commercial Arbitration Board (KCAB INTERNATIONAL). He is a lawyer admitted in Western Australia and entered in the Register of Practitioners of the High Court of Australia. IACL's case reports do not offer personal views but strictly reflect the content of the decision. However, in case of doubts, the views set forth herein are the personal views of the author and do not reflect those of KCAB INTERNATIONAL. Mr Lowther can be contacted at jake.lowther@kcab.or.kr

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

Digest:

1. Relevant Facts

Cube Infrastructure Fund SICAV, Cube Energy S.C.A., and Cube Infrastructure Managers S.A. ('Cube') are companies incorporated under the laws of the Grand Duchy of Luxembourg and together with Demeter 2 FPCI and Demeter Partners S.A. ('Demeter'), companies constituted under the laws of the French Republic, are the Claimants in this case ('Claimants') (¶ 2).¹ The Respondent in this case is the Kingdom of Spain ('Spain' or the 'Respondent') (¶ 3). The Claimants and the Respondent are collectively referred to as the 'Parties.'

The dispute arose out of the Claimants' investments through a number of subsidiaries in photovoltaic facilities in 2008 and hydroelectric facilities in 2011 and 2012 in Spain (¶¶ 69-70). Since 1994, the Respondent has aimed to create a legal regime to encourage the production of renewable energy in the country (¶¶ 241, 242). In 2007, Spain adopted Royal Decree 661/2007 ('RD 661/2007'), revising the legal regime to include attractive tariff rates to guarantee a predictable level of profitability for renewable energy investors with a guaranteed duration (¶ 252-253). However, the generosity of the scheme alongside the effects of the global financial crisis created financial problems for the Respondent (¶ 320). Consequently, the Respondent made a number of amendments to the legal regime, which culminated in a series of enactments between 2013 and 2014 (¶ 380).

In 2015, the Claimants submitted a claim to the International Centre for Settlement of Investment Disputes ('ICSID') for relief against Spain under the Energy Charter Treaty ('ECT') (¶ 1). They alleged that the regulatory changes in the energy market made by the Respondent constituted a violation of their right to fair and equitable treatment under Art. 10(1) ECT (¶ 237). The Claimants argued that they were entitled to and did rely upon the representations made by the Respondent that a particular legal regime would continue to apply for a certain period when making their investments (¶ 237). The subsequent regulatory changes were a denial of their legitimate expectations, which constituted a violation of their right to fair and equitable treatment under Art. 10(1) ECT (¶ 237).

2. Procedural History

The Claimants filed a Request for Arbitration on 16 April 2015, which was registered by ICSID on 1 June 2015 (¶¶ 6-7). The Tribunal was constituted on 8 December 2015 (¶ 12). The first

¹ All citations (e.g. '¶ 1') are to the Tribunal's Decision on Jurisdiction, Liability and Partial Decision on Quantum (Decision), unless stated otherwise.

session was held by means of a telephone conference on 5 September 2016 (¶ 13). On 22 February 2016, the Tribunal issued Procedural Order No. 1 which provides that the applicable ICSID Arbitration Rules would be those in effect from 10 April 2006, that the procedural languages would be English and Spanish, and that the place of proceeding would be Washington, D.C (¶ 14).

On 9 May 2016, the Claimants filed their Memorial on the Merits (¶ 15). On 29 July 2016, the Respondent filed its Counter-Memorial on the Merits and a Memorial on Jurisdiction (¶ 17). On 4 November 2016, the Parties submitted their “Responses to the Objections to the Production of Documents” (¶ 21). On 30 November 2016, the Tribunal issued Procedural Order No. 2 concerning document production (¶ 22). On 27 February 2017, the Claimants filed their Reply Memorial on the Merits and Counter-Memorial on Jurisdiction (¶ 24).

On 11 April 2017, the Tribunal issued Procedural Order No. 3, also concerning document production (¶ 26). On 21 April 2017, the Respondent filed its Rejoinder on the Merits and Reply on Jurisdiction (¶ 28). On 19 June 2017, the Claimants filed their Rejoinder on Jurisdiction (¶ 29). On 18 September 2017, the Tribunal held a pre-hearing teleconference with the Parties (¶ 30). On 29 September 2017, each Party submitted an “Application for the Submission of New Documents” (¶ 32) and following comments from the Parties, on 7 October 2017 the Tribunal decided to admit all unopposed documents and to hear brief submissions on the opposed document (¶ 36).

On 6 October 2017, the Tribunal issued Procedural Order No. 4 concerning the organization of the hearing (¶ 37). The hearing on jurisdiction and the merits was held in Paris, France, on 9-13 October 2017 (¶ 38). On 29 October 2017, the Tribunal requested the Parties to submit their post-hearing briefs in English only by 19 January 2018, later extended to 31 January 2018 (¶ 40, 44). On 8 January 2018, the Respondent requested the Tribunal introduce the European Commission’s (EC) Final Decision regarding the Spanish State Aid Framework for Renewable Resources (EU Decision) (¶ 41). On 30 January 2018, the Claimants requested leave from the Tribunal to introduce new documents into the record and on 9 February 2018 the Respondent requested leave to file additional documents stated in the EU Decision (¶ 50).

On 15 February 2018, the Tribunal granted leave to the Parties to introduce into the record additional agreed-upon documents (¶ 51). On 9 March 2018, the Tribunal decided to admit into the record certain legal authorities requested by the Parties and invited the Parties to comment on the Judgment of the Court of Justice of the European Union (“CJEU”) in the Case C-284/16, *Slowakische Republik v. Achmea BV* (‘*Achmea Judgment*’) (¶ 52). On 31 October 2018, the EC filed an application to intervene as a non-disputing party in the case (¶ 61). On 1 November 2018, the Tribunal decided not to grant the EC’s application because “allowing the Commission to intervene at this stage would significantly disrupt the proceedings” (¶ 63).

On 12 November 2018, the Tribunal declared the proceeding closed and invited the Parties to file their submissions on costs by 3 December 2018 (¶ 64). On 4 December 2018, the Claimants filed their submission on costs (¶ 66). On 11 January 2019, the Tribunal decided to reopen the proceeding to obtain clarification on a specific point and requested updated submissions on costs from both Parties (¶ 67). On 25 January 2019, the Respondent requested leave to enter into the record, and file submissions on the “Declaration of the Representatives of the Governments of the Member States, of 15 January 2019, on the legal consequences of the judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union” (¶ 68). On 28 January 2019 the Tribunal decided not to receive either that Declaration

or submissions on it (¶ 68). On 19 February 2019, the Tribunal issued a decision on jurisdiction, liability and a partial decision on quantum (Decision). Attached to the Decision is a separate and partial dissenting opinion by arbitrator Christian Tomuschat (Separate Opinion).

On 1 April 2019, the Respondent filed their submission on costs (Award ¶ 15). On 16 April 2019, the Parties submitted a joint expert report (Award ¶ 20). On 13 May 2019, the Parties submitted a supplementary joint expert report due to the experts' failure to agree on the computation of one of the Tribunal's instructions (Award ¶ 23, 21). On 31 May 2019, the Tribunal declared the proceedings closed. On 15 July 2019, the Tribunal rendered its Award.

The author notes that on 18 November 2019, the Secretary-General of ICSID registered an application for annulment of the award filed by the Respondent and notified the parties of the provisional stay of enforcement of the award (see ICSID 'Case Details'²).

3. Positions of the Parties

3.1 Jurisdiction

The Respondent raised three preliminary objections (¶ 76). First, that the Tribunal lacked jurisdiction *ratione personae* as the ECT does not apply to intra-EU disputes ('EU Objection'). Secondly, that the Tribunal lacked jurisdiction because the owners of the investments are not the Claimants ('Corporate Personality Objection'). Thirdly, that the Tribunal lacked jurisdiction to hear the dispute in respect to taxation, which the ECT excludes as a source of obligation for states parties ('Taxation Objection').

3.1.1 EU Objection

The Respondent submitted that Art. 26(1) ECT refers to disputes between a Contracting Party and an Investor from another Contracting Party. It argued that, in the instant case, as all the States involved are members of the EU, the lack of dividing lines denies the Claimants any investment protection under the ECT (¶ 78). Further, the Respondent argued that as Art. 26(6) ECT refers the Tribunal to the 'applicable rules and principles of international law,' the Tribunal should apply EU law as a standard of international law. On this basis, the Respondent invoked the doctrine of the primacy of EU law, which permits only the judicial bodies of the EU member states to interpret and apply EU law (¶ 85). Referring to the recent *Achmea* Judgment, the Respondent argued that this doctrine applies not only to bilateral investment treaties, but to the ECT as well (¶ 99).

The Claimants argued that the requirements of Art. 26 ECT were fully met as there is no exception to the rule that entitles an investor of a contracting party to bring a claim against another contracting party for a violation of the ECT (¶ 101-102). Further, that there is no inconsistency between the ECT and the EU legal system, but that they complement one another (¶ 105). The Claimants also pointed to numerous Tribunals that upheld their own jurisdiction in respect to intra-EU disputes. While the *Achmea* Judgment may deal with matters related to the instant case, the Claimants argue it is irrelevant for the present proceedings that the Tribunal's jurisdiction is based in the ECT alone (¶ 109, 116).

² See <<https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/15/20>>

3.1.2 Corporate Personality Objection

The Respondent argued that as the Claimants' interests in the investments were through indirect shareholdings, the Tribunal is precluded from hearing the Claimants (¶ 161). The Respondent argued on the basis of separate legal personalities that owning a percentage of shares in a company does not mean owning the same percentage of its capital or income (¶ 166). The Respondent also argued that Art. 26(7) ECT, which permits a local company controlled by foreigners to begin proceedings for treaty breaches, would not be necessary if the foreign shareholders could claim for the company's losses (¶ 172).

The Claimants referred to the very broad definition of "investment" contained in Art. 1(6) ETC and argued that 'separate legal personalities' was of no relevance to the ECT (¶ 181, 197).

3.1.3 Taxation Objection

Art. 21(7) of the ECT includes a carve-out for taxation. The Respondent argued that Spain did not consent to arbitration in respect to taxation measures, which in the instant case refers to a tax on the value of production of electrical energy ('TVPEE') and a levy on the use of continental waters for the production of electrical energy ('Water Levy') (¶ 205). The Respondent argued that a tax is defined as "a compulsory exaction of money for public purposes" (¶ 212), and the Taxation Measures have the requisite characteristics.

The Claimants cited the *Yukos* case³, arguing that the Art. 21(7) ECT carve-out did not apply to the TVPEE or Water Levy because they were not "bona fide taxes," but rather an attempt to recover some of the incentives already paid out (¶ 212-217).

3.2 Merits

3.2.1 Fair and Equitable Treatment

The Claimants argued that the Respondent breached the fair and equitable treatment protection in Art. 10(1) ECT in relation to its investments in photovoltaic facilities in 2008 and hydroelectric facilities in 2011 and 2012. The Claimants submitted that they relied on the Respondent's representations, particularly RD 661/2007 and accompanying press release, that the prices for their electricity would remain stable throughout the period. The Claimants argued that the Respondent denied their legitimate expectations by changing the regulations in 2013 and 2014, causing losses to their investments (¶ 234-237).

The Respondent argued that RD 661/2007 only ever guaranteed a 'reasonable return' on investment and that any reasonable return would be balanced with the 'reasonable costs' for consumers (¶ 284). Given that the Claimants received a 'reasonable return' on their investments, their legitimate expectations have been fully realised and they can claim no more (¶ 284). The Respondent also argued that as the price support scheme was characterised as impermissible State aid under EU rules, the Claimants should have taken this into account as evidence that the scheme might not continue as planned (¶ 306).

³ *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, Final Award, 18 July 2014. Document incl. summary available at <<https://www.transnational-dispute-management.com/legal-and-regulatory-detail.asp?key=12041>>

3.3 *Quantum*

The Claimants sought damages calculated on a discounted cash flow (DCF) basis (¶ 237). The Respondent argued that the most appropriate method to calculate damages was the cost of the assets plus a ‘reasonable return’ (¶ 471).

4. Tribunal’s analysis

4.1 *Jurisdiction*

The Tribunal unanimously upheld the Respondent’s preliminary objection in respect to the Taxation Measures, but dismissed all other preliminary objections (¶ 543).

4.1.1 *EU Objection*

The Tribunal considered the ‘ordinary meaning’ of the text of the ECT in line with Art. 31 of the Vienna Convention on the Law of Treaties (¶ 122). In its analysis of the ECT, the Tribunal did not note any distinction between or exclusion of contracting parties, and accordingly dismissed the Respondent’s *ratione personae* objection under Art. 26(6) (¶ 124, 126, 138). As EU law is one of several regional legal systems, the Tribunal did not consider it to have supremacy over international law, including the ECT (¶ 130). The Tribunal also took the view that the *Achmea* judgment was inapposite as precedent in the instant case as the claims had different bases in law, one being the law of Germany and therefore EU law, and the other being international law (¶ 142-146). Further, the Tribunal held that the EU has long communicated that ‘the ECT constitutes a crucial building block of the regime of investment protection’ (¶ 154). This objection was dismissed.

4.1.2 *Corporate Personality Objection*

In the view of the Tribunal, the Respondent’s interpretation ignored the broad definition of ‘investment’ and the clear inclusion of indirect investments (¶ 188). This objection was dismissed.

4.1.3 *Taxation Objection*

The Tribunal assessed the TVPEE and Water Levy and whether they should fall under the ECT carve-out for taxation measures contained in Art. 21(7) ECT (¶ 203) in accordance with international law (¶ 211). It took the view that both the TVPEE and Water Levy had ‘the appearance of being a tax,’ but the critical issue was whether the measures were *bona fide* (¶ 221). However, the Tribunal held that the arguments that either measure was not a *bona fide* tax were flimsy because they were based on the inference that due to the effects of the measures on the Claimant’s revenue, the Respondent’s motive was to reduce the subsidy (¶ 224). Given

the lack of evidence, the Tribunal followed the conclusions of the *Eiser*⁴ and *Masdar*⁵ tribunals and upheld this objection (¶ 227-228, 233).

4.2 Merits

The Tribunal decided unanimously that the Respondent breached the Claimants' right under Art. 10 ECT to fair and equitable treatment in respect to their investments in the photovoltaic facilities (¶ 544) and by a majority in respect to their investments in the hydroelectric facilities (¶ 545).

4.2.1 Fair and Equitable Treatment

The Tribunal considered the 'evolution' of the Respondent's renewable energy policy in two stages, up to the time of the Claimants' investments in the photovoltaic facilities and then up to the time of the Claimants' investments in the hydroelectric facilities.

4.2.1.1 Photovoltaic Facilities

The Tribunal unanimously held that RD 661/2007 was intended to hold out the promise of a degree of regulatory stability, including price stability, and that it did so (¶ 282). Contrary to the Respondent's submission, the Tribunal did not accept that RD 661/2007 and the accompanying press release represented that only a 'reasonable return' was guaranteed (¶ 287). Indeed, the possibility of lowering the tariffs was expressly excluded (¶ 288). Any references to the phrase 'reasonable return' up to the point of the Claimants' decision to invest in the photovoltaic facilities could not have been interpreted as a 'cap' on earnings (¶ 289). Although the Tribunal saw no detailed written analysis of the regulatory risks, in its view there was evidence Cube sought professional advice which it took into consideration before investing in the photovoltaic facilities (¶ 303). Nor was the Tribunal persuaded by the Respondent's arguments in respect to EU rules on State aid, as it was not for the Claimants to 'second guess the Respondent's legislature' (¶ 306). Accordingly, the Tribunal concluded that the Claimants were entitled to rely on the Respondent's representations. However the Tribunal stressed that its conclusion did not imply that the Respondent had no right to amend RD 661/2007 or that its regulations were 'petrified' (¶ 308). In respect to the duration, the Tribunal found that the Respondent represented that the RD 661/2007 tariffs would be applicable for 30 years (¶ 314).

4.2.1.2 Hydroelectric Facilities

Given the number of regulatory modifications being made after 2008, the Tribunal did not consider that the Claimants could reasonably rely on there being no change to the legal regime at the time of its investments in the hydroelectric facilities (¶ 334). It noted that some of the Claimants' officers were discussing the risks of further changes, but accepted that the Claimants determined that they could distinguish the two categories of facility and plan on the basis of 80% of the RD 661/2007 subsidy for 25 years (¶ 335). Importantly for the Tribunal, the specific representation that there would be no retroactive revisions to the legal regime was

⁴ *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017. Document and TDM IACL Case Report available here <<https://www.transnational-dispute-management.com/legal-and-regulatory-detail.asp?key=19804>>

⁵ *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, dated 16 May 2018. Document incl. summary available at <<https://www.transnational-dispute-management.com/legal-and-regulatory-detail.asp?key=21916>>

maintained (¶ 348). The majority of the Tribunal followed the conclusion in *Eiser* that the radical change in the nature of the legal regime in 2013 and 2014 amounted to a breach of the fair and equitable treatment standard in the ECT (¶ 354). However, the Tribunal stressed that investors were ‘never entitled to expect that the regulatory regime would remain completely unchanged’ (¶ 357).

4.2.1.3 *Legitimate Expectations*

The Tribunal agreed that evidence of the Claimants’ due diligence in respect to its investments was ‘thin’ (¶ 394). The majority of the Tribunal considered that the Claimants’ right to rely on the representations of the Respondent in the instant case did not depend on the form of the legal due diligence conducted (¶ 396). The majority considered that there was evidence that Cube made an appraisal of the legal regime upon which Demeter could rely, and that the Claimants were justified in their legitimate expectations for four reasons (¶¶ 398, 406). First, RDL 661/2007 was ‘clear and specific’ in its language (¶ 401). Second, the law was backed by a government press release (¶ 401). Third, the Respondent failed to prove that a more exhaustive legal analysis would have led to a different result (¶ 401). Fourth, the significance of the Respondent’s representations as to the stability of the legal regime is not a matter of domestic law, but of international law (¶ 401). The Tribunal emphasised that ‘stability is not the same as petrification’ (¶ 408). However, it affirmed that if a State makes a representation that induces investment, it must either deliver on that representation or ensure that any adjustments do not significantly alter the economic basis of the investments made in reliance on that representation (¶ 412). The Respondent’s changes to the legal regime in 2013 and 2014 constituted a ‘mid-stream switch in the regulatory paradigm’, because they moved away from the promised tariffs and premiums to a regime based on capped ‘reasonable returns’ (¶ 427). The Tribunal considered that this unanticipated move represented a breach of the fair and equitable treatment standard under Art. 10(1) ECT (¶ 427). The Tribunal unanimously agreed that the Claimants were entitled to recover their losses in respect to the photovoltaic facilities and by a majority that the Claimants (¶ 434) were entitled to recover their losses in respect to the hydroelectric facilities (¶ 441).

4.2 *Quantum*

Although it expressed the need for ‘caution’ in respect to the DCF method, the Tribunal considered it to be the appropriate method to determine damages because of the facilities’ operating history in a highly regulated industry and the specific impact of the regulatory changes on cash flow (¶ 478). The Tribunal decided unanimously that the Claimants were entitled by way of damages to €2.89 million for losses caused to the photovoltaic investments, plus interest at the six-month EURIBOR rate (¶ 502, 546). The Tribunal decided by a majority that the Claimants were entitled by way of damages to €30.81 million for losses caused to the hydroelectric investments, which includes a ‘regulatory haircut’ of 40% (¶ 529), plus interest at the six-month EURIBOR rate (Award ¶ 28).

5. **Costs**

In its Decision, the Tribunal requested the parties’ experts to submit a joint report to determine the costs (¶ 532). Given that the Claimants’ claim was only partly successful, the Tribunal did not consider it appropriate to award full costs (Award ¶ 43). As the Claimants were awarded damages reduced by 40% due to regulatory risk and taking into account the circumstances of

the case, the Tribunal decided that the Respondent was liable to the Claimants for one-half of the costs, excluding the joint expert reports on costs (Award ¶ 46).

6. Separate Opinion of Christian Tomuschat

Although Christian Tomuschat concurred to a ‘large extent’ with the majority of the members of the Tribunal, in his view and despite RD 661/2007 still being in force, the conditions of the electricity regime in Spain had changed significantly by the time of the Claimants’ investments in the hydroelectric facilities in 2011 and 2012 (Separate Opinion ¶ 7). Referring to RD 6/2009, he noted that in 2009 the deficit in the electricity system had become critical (Separate Opinion ¶ 8) and the stream of regulatory changes that followed ‘must have put on alert every investor’ (Separate Opinion ¶ 7). Indeed the Claimants were aware of the ‘threatening regulatory risk’ (Separate Opinion ¶ 15). In his view, the measures taken by the Respondent were ‘so plainly reflective’ of an ‘unbearable’ economic situation that the Claimants could not have any legitimate expectations that the RD 661/2007 regime would continue for its full duration (Separate Opinion ¶ 15). In Christian Tomuschat’s view, the four grounds advanced by the majority in favour of the Claimants held ‘little persuasive power’ (Separate Opinion ¶ 18). First, although RD 661/2007 was ‘clear and specific’, the deficit in the system had accumulated and the original factual framework had begun to ‘dismantle’ (Separate Opinion ¶ 19). Second, he considered the Claimants’ lack of due diligence to be ‘negligent’ (Separate Opinion ¶ 20). Third, he considered that it was ‘pure speculation’ whether or not further legal analysis would have yielded a different result (Separate Opinion ¶ 21). Fourth, while the applicability of international law was beyond dispute, the factual circumstances ‘obtaining in the host country’ determine whether legitimate expectations have arisen for the investor (Separate Opinion ¶ 22). He noted that Respondent had confirmed from the beginning that investors should enjoy ‘reasonable profitability’ along with the ‘leitmotiv’ of ‘reasonable return’ in the measures after RD 661/2007 (Separate Opinion ¶ 23). While the Respondent did make fundamental changes to the regime, it made strenuous efforts to maintain the guarantee of a ‘reasonable return’ and this was sufficient given that investors could no longer trust in the continuity of the regulatory regime (Separate Opinion ¶ 24). In Tomuschat’s view, the Claimants were therefore not entitled to compensation for damages allegedly suffered in respect to their investments in the hydroelectric facilities (Separate Opinion ¶ 26).