In the arbitration proceeding between

1. DCM ENERGY GMBH & CO. SOLAR 1 KG
2. DCM ENERGY GMBH & CO. SOLAR 2 KG
3. EDISUN POWER EUROPE AG
4. HANNOVER LEASING SUN INVEST 2 SPANIEN GMBH &CO. KG
5. HANNOVER LEASING SUN INVEST 2 SPANIEN BETEILIGUNGS GMBH

(Claimants)

and

THE KINGDOM OF SPAIN
(Respondent)

ICSID CASE NO. ARB/17/41

DISSENTING OPINION
Prof. Dr. Pierre-Marie Dupuy

Date: 30 September 2024

I acknowledge the merits of this Decision on Jurisdiction, Liability and Quantum Principles ("**Decision**"), which I appreciate for the care with which it was drafted, and for the attention it generally paid to recalling the respective positions of the parties involved.

I. INTRODUCTORY OBSERVATIONS

1. I generally agree with the conclusions of the majority's position on the jurisdiction of the Tribunal in the present case.

2. As far as the applicable law is concerned, however, I cannot join my distinguished colleagues in affirming that European Union law does not form part of the applicable law. In that regard, I confine myself here to referring to the detailed analysis which I have made elsewhere of the extent to which European law forms part of public international law for the Member States of the Union[1]. Moreover, that position had already led me, in various cases based on the ECT Treaty in an intra-European context, such as *Blusun v. Italy* (the tribunal of which I was a member) to hold that European law does indeed form part of the applicable law[2]. In the present case, however, I do not consider it essential to develop the reasons for my disagreement with the majority on this point. Indeed, my colleagues have agreed that EU Law must be taken into account at least as a relevant legal fact and, in the present case, that seems sufficient.

3. Be that as it may, whatever my personal regard for each of them, my difference with my distinguished colleagues is fundamental in many respects. It has less to do with particular analyses of this or that element of the case than with the general approach they have followed in reaching their conclusions that Spain had breached its obligations under the ECT. In my view, as will be seen further in this text, the majority reached this opinion by disregarding the essential

[1] P.M.Dupuy, L'unité de l'ordre juridique international, Cours général, Hague Academy of International Law, Collected Courses, Vol. 297 (2002), paras. 438-450.

[2] (**RL-0059**) *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016 ("***Blusun v. Italy***"), para. 278. "*The Parties in effect agree that the applicable law in determining this issue is international law, and specifically the relevant provisions of the VCLT. The Tribunal agrees, but would observe that this does not exclude any relevant rule of EU law, which would fall to be applied either as part of international law or as part of the law of Italy. The Tribunal evidently cannot exercise the special jurisdictional powers vested in the European courts, but it can and where relevant should apply European law as such.*"

characteristics of the regulatory system applicable to producers of electricity from renewable energy sources in Spain.

4. From a general point of view, the Decision takes care not to formally call into question the normative power of the host State, and in particular its power to amend its legislation in the public interest; but the very narrow limits within which it does take this power into account lead to a result close to that which could have been achieved in the absence of formal recognition of this capacity.

5. Furthermore, I consider that, in the sometimes difficult balancing of interests that any arbitral tribunal must attempt to establish on the merits of the case, the majority did not take sufficient account of two factual elements: a) the considerable constraints to which Spain was exposed as a result of the international energy price disturbance caused by the economic crisis of 2007-2008; b) the fact that, despite the adoption by Spain of a new regulatory regime, which, indeed, altered the initial conditions of their remuneration, the concerned investors have been able to profitably maintain their respective investments in Spain. To be sure, this is a factual element; but one that lends significant support to the Respondent's contention that the rate of return perceived by investors was and has remained reasonable[3].

6. As in all cases concerning the energy sector, particularly in Spain, this is a case that arises in a closely regulated area. However, as this Tribunal and many others before it has found, the circumstances in which the international energy market, including that of renewable energies, operates, have changed rapidly. The Spanish authorities, for whom this type of energy is crucial, given the absence of fossil fuel sources on the national territory, were then led to revise the regulatory framework initially put in place on the basis of Law 54/1997 for the renewable energy sector. It was in this context that Royal Decrees 661 and 1578 were passed in 2007 and 2008 respectively. However, the general economic situation, both nationally and internationally, continued to deteriorate. A few years later, this led

[3] See Respondent's Counter-Memorial ("**Counter-Memorial**"), para. 1059 et seq.

to the adoption of a new investor remuneration regime. The Decision concludes, based on Article 10 of the ECT, that Spain is liable for having breached the principle of Fair and Equitable Treatment as a result of these changes to the normative framework within which the investments had taken place.

7. To avoid unnecessary length, I will limit myself here to examining the essential points of the liability issue. In any event, this opinion will not contain an exhaustive critical analysis of all the positions taken by the majority in relation to all the elements of the case under consideration; it will confine itself to the decisive factors on the basis of which my approach in this arbitration differed from that of the other two members of the Tribunal in such a way that I could not join them. I will deal in turn with the six essential points on which my dissent is based.

(1) Failure to Recognise the Fundamental Nature of the Reasonable Rate of Return ("RRR") Principle Under Spanish Law.

8. The Decision cannot be said to ignore the existence of the RRR. It notes, in particular, that it is set out in Article 30(4) of Law 54/1997,[4] or, when examining the content of RD 661/2007, it also points to the reference to the RRR to be found in Article 44(3) regarding the periodic review of its provisions[5]. However, the majority does not draw substantive conclusions from this situation, considering instead that the aforementioned principle constitutes not much more than a general guideline or, at best, an objective to be achieved, but is not in itself capable of direct applicability or precise consequences depending on whether or not it is complied with.

9. In its pleadings, and in particular in its Counter-Memorial, the Kingdom of Spain nevertheless took great care to define the framework, objectives and operation of the RRR which are all directly linked to the need to maintain the economic viability of the Spanish Electricity System ("**SES**") for the benefit of both users and the

[4] Decision, para. 839.

[5] See Decision, para. 841, where the Tribunal states: "*Law 54/1997 left to the Government the task of devising, subject to the general goal of allowing for a* 'reasonable rate of return'*, the specific form and quantum of the remuneration offered to producers of energy from renewable sources*."

national economy[6]. As a matter of fact, the RRR is much more than a guideline; its calculation is based on a combination of technical, economic, environmental and political criteria[7] with due regard to every feature of the investments at stake at a certain time. But this calculation may be adapted over time in consideration of the overall evolution of this economic sector.

10. This RRR principle must be understood in direct relation to the various obligations and constraints to which electricity producers are subject under the special regime, for whom it constitutes a guarantee that their investment will remain sufficiently profitable. The principle of the RRR was maintained throughout the life of Law 54/1997 and was renewed in Law 24/2013, which succeeded it on 26 December 2013[8].

11. The methodology by which the RRR is determined in each case under consideration owes nothing to chance or approximation, as described in paragraphs 369 et seq. of Respondent's Counter-Memorial[9].

12. Generally speaking, while stressing that the RRR was a guarantee intended to limit the risk to which the investor was naturally exposed, Spain also took care to explain the *dynamic* nature of the principle, which allows the State to adapt the remuneration of producers to changes in the market and the general economy, in line with the directives laid down by the European Union Commission concerning

[6] See Counter-Memorial, para. 348 et seq.

[7] Ibid., para. 364, where Respondent notes: "*The Government, when establishing the subsidy, must take into account the criteria set out in Article 30.4 of Act 54/1997. In this regard, the last paragraph of said article, in its original draft, sets for [sic] the following: 'For determining the premiums, the voltage level of the energy delivered to the network will be taken into account; plus the effective contribution to improving the environment, to primary energy savings and to energy efficiency; the economically justifiable production of useful heat and the investment costs that have been incurred, in order to achieve reasonable rates of return in reference to the cost of money in the capital market"'*.

[8] (**R-0023**) Law 24/2013 enacted on 26 December 2013 regarding the Electrical sector ("**Law 24/2013**").

[9] Counter-Memorial, para. 369: "*A reasonable return means receiving income that allows recovering the investment costs (CAPEX) and the operating costs (OPEX) and earning profit according to market criteria, which means, earning profit with reference to the cost of money in the capital market. This profitability arranged according to market criteria remunerates the investor proportionally, allowing it to compete on a level* playing field *with conventional energies*." Respondent subsequently describes the relevant methodology under paras. 370-373.

the development of the European energy market aimed at increasing the importance of the renewable energy sector[10].

(2) Interpretation of Royal Decrees 661/2007 and 1578/2008.

13. It is against this background, and taking into account the evolution of the energy market in Spain, that we must understand the adoption of RD 661/2007, the purpose of which was precisely to adapt the system and safeguard the sustainability of the Spanish Electricity System. Rather than setting vague objectives, this Royal Decree determined the criteria for the RRR at the time in question (2007). It stated: "The regulated tariff has been calculated for the purpose of guaranteeing a return of between 7% and 8%, depending on the technology."[11] Whatever the case may be, the dynamic nature inherent in the RRR is an expression of the legal capacity of the Spanish Government to modify for public purpose the applicable legal regime of remuneration of investment, as a number of previous awards have recognized it.[12]

14. It is also this dynamic nature which absolutely prevents in particular section 44(3) of RD 661/2007 from being seen, contrary to what is stated at paragraph 931 of the present Decision, as a kind of general stabilization clause that would have enabled investors to be assured that the terms of return on their investment could not be affected, even during specific periods or within specific timeframes. Article 44(3) does not exclude any revision:

> *"[…] The revisions referred to in this section of the regulated tariff and the upper and lower limits shall not affect those facilities whose start-up certificate was issued before 1 January of the second year following the year in which the revision"*[13]

[10] Ibid., para. 392.

[11] Ibid., para. 493.

[12] Starting with the *Charanne* and *Isolux* cases. See *infra*.

[13] Counter-Memorial, para. 520, quoting Article 44(3) of RD 661/2007.

15. As Respondent observes in its Counter-Memorial[14], this provision relates only to the revisions that were to be made in 2010; it does not lay down any general rule of normative intangibility that would have been imposed on the public authority. In particular, this article in no way prohibits changes intended, for example, to mitigate excessive income or, more broadly, to safeguard the sustainability of the SES.

16. Consequently, I consider it impossible, contrary to what the Decision does at paragraphs 854 or 931, to read Article 44(3) as if it were a stabilization clause that would prevent the government from amending the applicable legislation on a prolonged basis. The quid pro quo for this power, it should be remembered, is that the investor retains a RRR that is itself subject to modification as part of the possible adjustments required to address the economic evolution of the sector. This interpretation was retained by many tribunals including, for instance, the *PV Investors* case[15]. As for it, the award in *Stadtwerke München v. Spain* made the adequate following observation:

> *"[...] Spain had not committed itself to refrain from modification of the regulatory framework governing renewable energy at the time the Claimants invested in Spain. On the contrary, the regulatory history of RD 661/2007 should have put the Claimants on notice that future modifications were likely. Spain had clearly retained its sovereign right to enact new laws and regulations and to amend or cancel those in force at the time the investment was made. Moreover, as it is clear from the preambles of the introduced amendments and laws, the changes in the framework applicable to renewable energy were introduced to protect the public interest, and particularly the sustainability of the Spanish electricity system".*[16]

[14] Counter-Memorial, para. 522.

[15] (**RL-0145**) *The PV Investors v. The Kingdom of Spain*, PCA Case No. 2012-14, Final Award, 28 February 2020 ("***PV Investors v. Spain***"), para. 601. "[...] [the Sentence] *in and of itself does not make of Article 44.3 a stabilization commitment according to which the State guaranteed that future legislative or regulatory change would not affect the investment. Moreover, Article 44.3 cannot be read in isolation but must be viewed in the context of the entirety of the Spanish regulatory framework* [...]".

[16] (**RL-0131**) *Stadtwerke München GMBH, RWE Innogy GmbH, and Others v. Kingdom of Spain,* ICSID Case No. ARB/15/1, Award, 2 December 2019, para. 261 ("***Stadtwerke v. Spain***").

17. The same award further noticed that "it would have been unreasonable for the Claimants to have interpreted Article 44(3) of RD 661/2007 as constituting a stabilized regime for the calculation of the premium that would be impervious to any future modification regardless of a change in the market conditions [...]".[17]

18. As far as the analysis of RD 1578/2008 is concerned, it contains a series of rather heterogeneous considerations, the purpose of which appears to try and demonstrate that the aforementioned decree in turn constituted a sufficiently precise basis for expectations of stabilization of the regulatory framework nourished as they were developed by the Claimants.

19. Just as an illustration of my distinct position in the analysis of this Royal Decree, I note, on the one hand, that if it was susceptible to amendment, as the majority acknowledges[18], and, on the other hand, that this does not mean that it offered an intangible framework. The very fact that it did not include an identical or analogous provision to Article 44(3) of Royal Decree 661/2007, was of little value as the Supreme Court itself had indeed indicated that this article could not be considered as a stabilization clause.

(3) Meaning and scope of Supreme Court case law

20. Confronted by the Respondent to the authority of the main interpreter of Spanish public law, my distinguished colleagues state the following at paragraph 928:

> *"The question before the Tribunal is not whether the Supreme Court decisions invoked by Spain were correct or not as a matter of Spanish law or, more generally, whether it would have been lawful under Spanish law for RD 661/2007 or RD 1578/2008 to be amended or repealed by a later norm of equal or higher rank, as these are matters that exceed the Tribunal's jurisdiction. The question to be addressed is, rather, whether under the ECT and international law those Supreme Court decisions were sufficient, as a matter of fact, to render objectively unreasonable the Claimants'*

[17] Ibid., para. 282.

[18] As admitted by the present Decision, para. 244, the Fifth Additional Provision of RD 1578/2008 expressly contemplated the possibility that in the course of 2012 "*the compensation for electricity power generation with solar photovoltaic technology, may be amended*". But such a provision did not prohibit an earlier amendment if needed.

expectations based on the Special Regimes of RD 661/2007 and RD 1578/2008."

21. I do not share this view. Of course, the law applicable by the Tribunal is first provided by the provisions of the ECT and its Article 10 to determine whether the investors concerned have received fair and equitable treatment. That said, in this case as in many others, the domestic law of the host State plays a decisive role,[19] unless it is considered that it is in substance incompatible with the applicable rules of international law, a presumption which could hardly be sustained here. Indeed, the Tribunal did not venture such a demonstration, since despite the fact that its general philosophy seems to accept a strict limitation on the right of the host State to amend its legislation for reasons of general interest, it took care to avoid directly calling into question the normative power of the State in question.

22. In reality, there is a connection between the fairness of the treatment of the investment by the State and the conduct of the investor himself.; the second could not pretend to the legitimacy of its expectations when ignoring the importance of the RRR principle as established by the municipal law of that State. It is Spanish domestic law that determines the legal conditions of the investment; this is precisely why it is generally accepted that the legitimate expectations of foreign investors should be determined after verifying whether, prior to the decision to invest, they had exercised sufficient diligence to ascertain the content of that domestic law and the conditions of its application by the domestic courts. And, as set out in the Spanish Constitution,[20] the judicial body that, par excellence, is responsible for ensuring general compliance with the Spanish legal system is, by definition, its Supreme Court. This has been recognized in the largest majority of arbitration awards made to settle disputes between foreign investors in the renewable energy sector and the Spanish Government.

23. Indeed, the very purpose of the Respondent when referring to the case law of the Supreme Court, was primarily to observe the very great constancy of this

[19] As stated by Art. 42 ICSID Convention.

[20] (**R-0003**) Spanish Constitution of 1978 (Consolidated Version), Article 123(1).

jurisprudence in recalling the cardinal importance of the RRR. This principle is an essential element of the coherence and relative simplicity of the system for remunerating the production of renewable energy in Spain. When compared with similar types of investments taking place in some other countries, including in Europe (as the author of this opinion was able to observe as an international arbitrator), the fairness and efficiency of the Spanish legislation lies, first of all, in the insurance and guarantees offered to the investor by the RRR principle. Arbitral assessment of the normative behaviour of the public authority in Spain is facilitated in verifying whether the RRR was respected through changes in legislation. And in many respects such a verification is made much easier by the Supreme Court's case law as it clarifies the meaning and scope of the said principle and the way in which it should be used by government authorities.

24. However, the lack of importance given by the present Decision to the case law of the Supreme Court is in line with another aspect of its approach: the fact that my distinguished colleagues thought it appropriate to distinguish between the question of whether investors' legitimate expectations had been created and met and the question of the stability of the regulatory framework to which those same investors were subject. In reality, these two aspects are two sides of the same coin. According to the Claimants, their expectation laid in the perpetuation of the stability of the laws and decrees applicable to them.

25. Now, the Supreme Court did not confine itself to referring to the cardinal importance of the respect owed by public authority to the RRR. In so doing, it has constantly reiterated the non-intangible nature of the normative framework. In its judgment of 25 October 2006, after recognising the right of investors to benefit from the RRR, the Supreme Court declared:

> *'[T]he owners of electric power production facilities under the special regime have no "unmodifiable right" to the financial scheme that regulates the receipt of premiums will remain unaltered. Indeed, said scheme attempts to promote the use of renewable energies through an incentivising mechanism that, like all mechanisms of this kind, has no*

> *assurance that it will remain without being modified in the future"*[21].

26. In other judgments, dated 20 March 2007 and 9 October 2007, the Supreme Court was careful to repeat that there is no acquired right to receive a certain subsidy in the future. Later, in a judgment on 12 April 2012, the same Court stated, again in relation to the dynamic nature of the RRR, established for another time that Article 30(4) of Act 54/1997 does not guarantee that a regulated tariff will be received for a set amount of time:

> *"The reasonable remuneration [...] does not have to involve, we repeat, that the remuneration must be provided specifically through a regulated tariff (it could be, in the future, at market prices), and, particularly, that it is guaranteed beyond thirty years."*[22]

27. This is another expression of the fact, already noticed, that RD 661/2007 cannot be interpreted by attempting to read into its Article 44(3) a clause freezing the applicable law or establishing without saying so an acquired right of investors to the guarantee of a stabilized remuneration. Here again, the case law of the Supreme Court is perfectly clear and explicit. When it rejected new appeals against RD 1565/2010 of 19 November and Royal Decree-Act 14/2010 of 23 December, the Supreme Court insisted that RD 661/2007 did not set in stone the economic regime put in place at that time:

> *"We do not understand the RD [661/2007] in question as establishing a permanent tariff regime, nor that the Government or legislator, in exercising their regulatory power, cannot adapt or modify this regime to account for new circumstances (be they economic, productive, technological, or of any other kind) which may be produced over such a long period of time."*[23]

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[21] (**R-0080**) Judgment of the Third Chamber of the Supreme Court, 25 October 2006, (Appeal 12/2005).

[22] (**R-0086**) Judgment of the Third Chamber of the Supreme Court, 12 April 2012. (Appeal 59/2011), Fourth Legal Basis.

[23] Counter-Memorial, para. 598 relying on (**R-0094**) Judgment of the Supreme Court 63/2016, 21 January 2016. (Administrative Appeal 627/2012), Sixth Legal Basis.

28. An ICSID tribunal or any other arbitral tribunal may, of course, ignore or undergraduate the weight of such a constant case law but I leave this responsibility to my colleagues. As far as I am concerned, on the contrary, I agree with the position adopted by other arbitral tribunals from the outset of these cases between foreign private investors in the non-renewable energy sector, the *Charanne*[24] and *Isolux*[25] cases, which were subsequently followed by other tribunals (notably in the *Eurus*[26] and *Stadtwerke München*[27] awards). The *Isolux* award, in particular, was particularly eloquent in this regard when it stated:

> *"[...][T]he Arbitral Tribunal must determine whether the Claimant was aware that there were no obstacles under Spanish law to modify the regulatory framework including with regard to the modalities of investor's remuneration. The existence or inexistence of these obstacles in Spanish law is a fact, and the Supreme Court's rulings are part of this fact.*
>
> *Without requiring a reasonable investor to perform an extensive legal investigation at the time of investing, knowledge of important decisions from the highest authority regarding the regulatory framework for investment may be assumed."*[28]

29. Moreover, it is on the basis of the Supreme Court judgments that the *Isolux* award concludes that:

> *"The Claimant's sole legitimate expectation was a reasonable rate of return on its investment. [...] Even more significant is another judgement [of the Spanish Supreme Court] [from] the 25th of October 2006 that states: "the owners of electricity production facilities operating under the special regime do not enjoy an "unmodifiable right" to maintain the economic regime that regulates the collection of premiums, without alteration. This regime is designed to*

[24] (**RL-0033**) *Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain*, Final Award, 21 January 2016 ("***Charanne v. Spain***").

[25] (**RL-008**) *Isolux Infrastructure Netherlands, B.V. v. Kingdom of Spain,* Arbitration SCC V2013/153, 12 July 2016 ("***Isolux v. Spain***").

[26] (**RL-154**) *Eurus Energy Holdings Corporation v. Kingdom of Spain*, ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability, 17 March 2021 ("***Eurus v. Spain***").

[27] (**RL-0131**) *Stadtwerke v. Spain*.

[28] (**RL-008**) *Isolux v. Spain*, Award, paras. 793-794.

> *encourage the use of renewable energies by means of an incentive mechanism which, like all other of its type, has no guarantee that it will be remained unchanged in the future."*[29]

30. This position taken in the *Isolux* case appears to be consistent with the respect due by the arbitrators to the constitution of a State governed by the rule of law, which is member of the European Union. There is no reason to suspect as a starting point that the national Spanish law disregards international law or, at the very least, to assume that it might do so, as seems to be suggested by the very problematic text of paragraph 928 of this Decision already quoted above, with which I definitely disagree. Furthermore, the present Decision appears to ignore the fact that Article 93 of the Spanish Constitution does not place treaties above the Constitution, but allows international law to be incorporated into the Spanish legal system. Be that as it may, the question was whether a diligent investor could invest in Spain without having informed himself about Spanish public investment law in the sector in which he was interested, a legal regime of which the Supreme Court is the most qualified interpreter.

31. As seen above, the case law of this Court does confirm that the RRR is the cornerstone of the entire remuneration system that a diligent investor should have expected. It is not merely an approximate objective, but rather the result of a precise methodology, the various successive stages of which the Respondent's Counter-Memorial took care to describe in particular in paragraph 628.[30]

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[29] See Counter-Memorial, para. 605.

[30] See Counter-Memorial, para. 628: "[…] **c.** *The method used to determine a reasonable return has always consisted in the following operations:**[i)]** Recognise and reconstruct an economic structure for exploitation (standard facility), identifying investment costs (CAPEX) and operating and maintenance costs (OPEX), according to market criteria and according to the actions of a "diligent investor"; **[ii)]** Based on said standard facility, set an economic return objective, within a set time period, dynamic, balanced, and proportionate in nature, in accordance with the capital market. This objective must be reached by adding two components: a) market price and b) subsidies.* **d.** *Whatever the concrete remuneration model established in the subsequent regulations, said models have always been subject to the principle of economic sustainability of the SES and the principle of reasonable return.* **e.** *Specifically, according to the consistent case law of the Supreme Court since 2005, the rights of investors in the face of such changes are clear: i) there is no guarantee that the economic regime will remain unchanged; ii) there can be no opposition to the modification of either the principle of legal certainty or the principle of legitimate expectations; iii) the only limit unless art. 30.4 of Act 54/1997 is modified is the guarantee of a reasonable return; iv) the integration of RE into the SES implies the assumption of a certain regulatory risk*."

(4) The Issue of the "Legitimate Expectations".

32. The present Decision's finding that RD 661/2007 and RD 1578/2008 created legitimate expectations is based on the belief that genuinely diligent investors investing in Spain could attach little significance to the above-mentioned case law of the Supreme Court of that country. But the view of the majority is also based on the opinion that such expectations could simply arise from laws and decrees of general application without the need, in order for these attempts to legitimately appear, for specific promises to be made in a particular context to each of the investors concerned.

33. My conception of legitimate expectations is different. I was able to express it together with the other members of the Tribunal who sat in the *Blusun* case,[31] which also repeated on this point the precedents mentioned above including the *Charanne*,[32] *Isolux*[33] and *Stadtwerke*[34] cases, among others.

34. I remain furthermore convinced that, in the absence of a 'special commitment', legislation (law or decree) of general application is unlikely to create 'legitimate expectations' in favour of a particular investor[35]. Incidentally, I feel compelled to point out that, with regard to the concept of 'legitimate expectations', the International Court of Justice has had occasion to emphasize that taking them into

[31] (**RL-0059**) *Blusun v. Italy*, para. 319(5). "*In the absence of a specific commitment, the state has no obligation to grant subsidies such as feed-in tariffs, or to maintain them unchanged once granted. But if they are lawfully granted, and if it becomes necessary to modify them, this should be done in a manner which is not disproportionate to the aim of the legislative amendment, and should have due regard to the reasonable reliance interests of recipients who may have committed substantial resources on the basis of the earlier regime*."

[32] (**RL-0033**) *Charanne v. Spain,* Final Award, paras. 493 and 510.

[33] Counter-Memorial, para. 965.

[34] (**RL-0131**) *Stadtwerke v. Spain*, Award, para. 264.

[35] Florian Dupuy and Pierre-Marie Dupuy, *What to expect from Legitimate Expectations? A Critical Appraisal and Look into the Future of the "Legitimate Expectations" Doctrine in International Investments Law*, in Festschrift Ahmed Sadek El-Kosheri, M.A.Raouf, Ph. Leboulanger, N.Ziadé (Edts.), Wolters Kluwer (2015), 273-298.

account in no way constitutes the application of a general principle of international law which simply does not exist in the matter.[36]

35. Indeed, it was because, unlike in the present case, there were individual and specific promises made to investors in another case involving Spain, that I was able, in contrast to the present one, not to prevent the *InfraRed* award from being adopted unanimously, i.e. with my assent.[37] In any event, once again, in the present case, there was no special promise made to any of the investors concerned.

36. Synthetically, as rightly recalled by the tribunal in the *PV Investors* case, "*the standard of protection of legitimate expectations is an objective and not a subjective one*"; "*must be assessed at the time of making the investment*"; "*investor's legitimate expectations must be balanced with the State's right to regulate in the public interest*"; "*it is not sufficient that a change in the regulatory framework is detrimental to the investors' interests in order to entail State responsibility under the ECT. The change must also be "unreasonable"*; "*it is also recognized that States, as the entities tasked with balancing the often competing interests involved, enjoy a margin of appreciation in the field of economic regulation*".[38]

37. These quotations reflect for all of them my own views quite accurately. Unfortunately, they were not issued by the Tribunal in the present case but by another one, although the legal framework within which the investment had taken place was the same.

[36] Obligation to negotiate an access to the Pacific Ocean, (*Bolivia v. Chile*) Judgment of 1 October 2018, para. 162.

[37] (**RL-144**) *InfraRed Environmental Infrastructure GP Limited et al. v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Award, 2 August 2019.

[38] (**RL-0145**) *PV Investors v. Spain*, Award, para. 273 et seq.; cited in the Respondent's Post Hearing Brief, para.230.

(5) Impairment

38. In the present case, after examining whether the content of the decrees and the further establishment of the new regime were likely to create legitimate expectations, my distinguished colleagues considered to what extent the expectations thus established, having been recognised by them as legitimate, investors have or have not suffered an impairment.

39. For my part, I appreciated the fact that the majority did not give an unequivocal answer in this respect, but that they reached different conclusions depending on the investments under consideration, by taking into account all the data applicable to each particular situation.

40. Be that as it may, in the most decisive cases, in which they gave a positive response in terms of the existence of an impairment, the members of the majority did so mainly on the basis of the extent of the change noted in the legislative framework in which these investments had initially taken place. It seems unfortunate, however, that there is no place in the Decision for such an actual examination of the concrete situation.

41. In fact, the question of the reality of the impairment must, first of all, be evaluated on its merits: did the investors suffer a harm to their interests such that their investments saw their respective profitability disappear?

42. If the answer to this last question is in the negative, why have these investors not lodged an arbitration claim for expropriation (ECT Art. 13)?

43. Are these investors still established in Spain and are they established on the basis of the investments in question?

44. The answers to these interrogations seem to be decisive, as they determine whether the new legislative and regulatory measures adopted were reasonable, whether they were appropriate for the defense of the public interest in question and, last but not least, whether the damage suffered by the investors was such as to give rise to liability on the part of the Spanish Government.

45. The reality is that the adoption of the new regulatory regime has been welcomed by the most informed economic observers, starting with the International Monetary Fund and the Commission of the European Union,[39] who were quick to note its beneficial effects on the Spanish economy as a whole and on the sustainability of the SES. As a matter of fact, the new regulatory regime has attracted more than 5 billion euros in investment in Spain in 2015[40]. The investors themselves have remained in Spain, and one could suggest that this is not because they are willing to make economic sacrifices, but rather because they consider the continued profitability of their investment to be 'reasonable' in every sense of the word[41]. It is therefore possible for me to question the severity of the impairment that they did suffer.

46. The foregoing considerations have thus led me to conclude that, in none of the investments in question, had the host State derogated from its obligation to guarantee compliance with the RRR, given the rates of remuneration from which those investors continued to benefit beyond the successive measures adopted by Spain, even after the adoption of the New Regulatory Regime, which remained faithful to the principle of the RRR.

(6) Reparation

47. I could refrain from commenting on the part of this Decision that concerns reparation, since my own conclusions differ from those of the majority concerning the reality of damage actually invoked by the Claimants.

48. I would nevertheless like to express my absolute disagreement with the Decision's reference to the *Chorzów Factory* case decided by the Permanent Court of

[39] Counter-Memorial, para. 1041.

[40] Ibid, para. 1040. See also at para. 1049 the result of the test taken out of the *AES v. Hungary* Case. See also (**RL-0131**) *Stadtwerke v. Spain*, Award, para. 318 et seq. and more generally, on the reasonableness of the measures taken by Spain, ibid. at para. 354.

[41] The reasonableness of the actual RRR resulting from the adoption of the regulatory changes, which is 7,398 % (pre-taxation) is presented and commented in the Counter-Memorial, para. 1063 et seq.

International Justice.[42] This reference, which has become almost a ritual in too many arbitrations between states and foreign investors, is unfounded. A serious examination of this case, carried out elsewhere by this author[43], shows that it was a purely inter-State case which the Court had itself taken care to distinguish rigorously from situations in which the responsibility of a State vis-à-vis a foreign private person is at issue[44]. What is more, the PCIJ had to rule on compliance with or breach of a *lex specialis*, constituted by a bilateral treaty between Germany and Poland. This judgment cannot be interpreted as constituting the legal basis for any general principle of international law of *restitutio in integrum* applicable beyond a relationship between States; thus, the references made to the draft codification of international liability law by many of the arbitrators who cited the *Chorzów Factory* case always met with Judge James Crawford's disapproval[45]. Yet this eminent jurist combined the two qualities of having been at the same time, the special rapporteur of the International Law Commission on the question of the international liability of States, and a particularly experienced arbitrator in the context of arbitrations between States and foreign investors.

49. It is undoubtedly possible to accept in international investment law a principle aimed at achieving a full reparation of damage, subject to the possible reservation of the extent to which the private investor concerned may itself have contributed to the creation of the damage suffered; but it is certainly not possible to invoke, in the name of a custom of international law that does not exist, the direct application of the above-mentioned case law of the PCIJ, which would make *restitutio in intergrum* a principle of international investment law.

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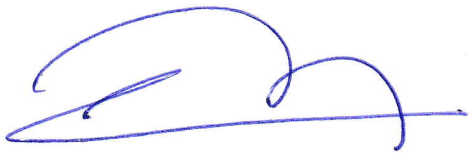
[42] (**CL-65**) *Case Concerning Factory at Chorzów (Germany v. Poland)*, Judgment 13, PCIJ, Sept. 13, 1928 (1928 PCIJ, Series A. No. 17)

[43] See Pierre-Marie Dupuy, Concluding Remarks: ARSIWA- A Reference Text Partially Victim of its Own Success?, in Special Issue on 20th Anniversary of ARSIWA *ICSID Review*, Vol. 37, No. 1-2 (2022), pp. 601–61: https://doi.org/10.1093/icsidreview/siab044. Published Advance Access 18 March 2022.

[44] Pierre-Marie Dupuy, A Guided Tour of the *Chorzów Factory*, in *Liber Amicorum Emmanuel Gaillard*, Brill-Martinus Nijhoff, to be published in 2024.

[45] Ibid.

50. There are several other considerations or conclusions adopted by the authors of this Decision that I cannot endorse but, as I indicated at the outset, I felt it more important to highlight the main features that led me to disagree.



Pierre-Marie Dupuy