

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES**

In the arbitration proceeding between
RREEF Infrastructure (G.P.) Limited and
RREEF Pan-European Infrastructure Two Lux S.à r.l.
Claimants
and
Kingdom of Spain
Respondent

ICSID Case No. ARB/13/30

PARTIALLY DISSENTING OPINION OF
PROFESSOR ROBERT VOLTERRA
TO THE DECISION ON RESPONSIBILITY AND THE PRINCIPLES OF QUANTUM

Members of the Tribunal
Professor Alain Pellet, President
Professor Pedro Nikken
Professor Robert Volterra

Secretary of the Tribunal
Mr. Gonzalo Flores

I. Introduction

1. One of the basic duties of an arbitrator is to sign the decisions and awards in the case in which she or he sits. The act of signing does not necessarily signify that the arbitrator agrees with all, most or even any of the contents of the decision or award. It does signify that the arbitrator confirms that the decision or award being signed is the official decision or award of the tribunal. It matters not whether the decision or award is reached by unanimity or majority or a mix of both. Each arbitrator on the tribunal must sign it.
2. In the present case, I have participated actively and fully in the drafting of the Decision on Responsibility and the Principles of Quantum (the “**Decision**”).¹ I agree with much of the Decision. I do not agree with all of it.
3. There is usually no obligation on an arbitrator who does not agree with all or part of a decision or award to append to it a separate or dissenting opinion. It might be argued that the arbitral process would be best served if arbitrators generally did not append separate or dissenting opinions. In the present case, however, I append a partially dissenting opinion to the Decision (the “**Partially Dissenting Opinion**”). The reason that I have done so is that the Decision provides for at least two and possibly more further stages in the present arbitration. Each of these further stages will require a degree of participation by both Parties. In this specific context, I have concluded that it may assist both of the Parties (to each of which I owe equal obligations, as an arbitrator) to understand aspects of my analysis of their dispute and this proceeding to date.

II. The Parties’ requests and the Tribunal’s decision

4. The Claimants expressed their request to the Tribunal in paragraph 584 of their Memorial on the Merits of 21 November 2014 (confirmed in paragraph 816 of their Reply on the Merits of 22 December 2016) in the following terms:

584. For all of the foregoing reasons, the Claimants respectfully request that the Tribunal enter an award in their favour and against the Kingdom of Spain as follows:

- (a) DECLARING that Spain has breached Article 10(1) of the ECT; and
 - (b) ORDERING that Spain:
 - (i) provide full restitution to the Claimants by re-establishing the situation which existed prior to Spain’s breaches of the ECT, together with compensation for all losses suffered before restitution; or
 - (ii) pay the Claimants compensation for all losses suffered as a result of Spain’s breaches of the ECT; and
- in any event:

¹ This Partial Dissenting Opinion uses words and acronyms as defined in the Decision, unless otherwise defined for ease of reference here.

(iii) pay the Claimants pre-award interest at a rate of 2.07% compounded monthly; and

(iv) pay post-award interest, compounded monthly at a rate to be determined by the Tribunal on the amounts awarded until full payment thereof; and

(v) pay the Claimants the costs of this arbitration on a full-indemnity basis, including all expenses that the Claimants have incurred or will incur in respect of the fees and expenses of the arbitrators, ICSID, legal counsel, experts and consultants; and

(vi) any such other and further relief that the Tribunal shall deem just and proper.

5. The Respondent expressed its request to the Tribunal in paragraph 1075 of its Counter-Memorial on the Merits of 15 July 2016 in the following terms:

1075. In light of the arguments expressed in this Document, the Kingdom of Spain respectfully requests the Arbitral Tribunal:

b) To dismiss all the claims of the Claimant's Memorial because the Kingdom of Spain has not breached the ECT in any way, in accordance with section III of this Document, on the substance of the matter.

c) Secondarily, to dismiss all the Claimant's claims for damages as said claims are not entitled to compensation, in accordance with section IV of this Document; and

d) To sentence the Claimant to pay all costs and expenses derived from this arbitration, including ICSID administrative expenses, arbitrators' fees and the fees of the legal representatives of the Kingdom of Spain, their experts and advisers, as well as any other cost or expense that has been incurred, all of this including a reasonable rate of interest from the date on which these costs are incurred and the date of their actual payment.

[N.B., alpha-numerics as presented in the English translation of the Counter-Memorial.]

6. The Respondent expressed its request to the Tribunal in paragraph 1174 of its Rejoinder on the Merits of 8 February 2017 in the following terms:

1174. In view of the arguments set forth in this Document, the Kingdom of Spain respectfully requests the Arbitral Tribunal to:

a) Declare its lack of jurisdiction to hear the claim concerning an alleged infringement by the Kingdom of Spain of Article 10 (1) of the EC Treaty by introducing the Tax on the Value of Electric Power Production (IVPEE) By Act 15/2012.

b) Dismiss all the claims of the Claimant regarding the other contested measures, since the Kingdom of Spain has not in any way failed to comply with the ECT, in accordance with what is stated in Sections (A) y (B) of section II and III of this Statement.

c) Subsidiarily, all claims for compensation of the Claimant should be dismissed as they are not entitled to compensation in accordance with Section IV of this Statement and

d) Order that the Claimant pays all costs and expenses arising from this arbitration, including administrative expenses and the fees of the Court's Arbitrators, as well as the fees of the legal representation of the Kingdom of Spain, its experts and advisers, and any other costs or expenses that may have incurred, all of which include a reasonable interest rate from the date these costs are incurred until the date of their actual payment.

7. The Decision sets out the decision of the Tribunal in Section VIII at paragraph 600 as follows:

600. For the reasons set forth above, the Tribunal decides as follows:

(1) Unanimously: The Tribunal does not have jurisdiction to decide on the 7% levy;

(2) Unanimously: The Respondent is in breach of its obligations under the ECT for the retroactive application of the new regime; this breach concerns both the Wind plants and the CSP plants belonging to the Claimants;

(3) By majority: With respect to each of the CSP Plants, the Respondent is in breach of its obligation to insure a reasonable return to the Claimants' investment insofar as this return per plant is lower than the WACC + 1% as defined by the Tribunal;

(4) By majority: All other claims and requests of the Parties are dismissed;

(5) By majority: The Parties are directed to attempt to reach an agreement on the amount of compensation to be paid by the Respondent to the Claimants in respect of its breaches of its obligations as defined in paragraphs (3) and (4) above, in accordance with the Tribunal's findings;

(6) By majority: Absent an agreement within the period specified in conformity with paragraph (7) below, the Tribunal will proceed to the nomination of an independent expert to assist it in the calculation of the final amount of damages;

(7) By majority: The Parties are directed to find an agreement within ten days following the notification of the present decision on a reasonable

schedule for the implementation of paragraph (5) above; failing an agreement on this point, the Tribunal will fix a schedule to this end.

(8) By majority: The decisions on interest, tax and costs are reserved and will be fixed in the final Award.

8. The three members of the Tribunal are in agreement about many parts of the Decision. My fellow arbitrators and I agree that the Respondent has breached the ECT. Furthermore, we are all agreed that the Respondent must pay the Claimants compensation for the damage caused by its breaches of its international law obligations arising under the ECT. The President of the Tribunal and I are in agreement about even more.
9. However, I do not agree with my fellow arbitrators about the extent of the Respondent's breaches of the ECT, as set out in the Decision. And I do not agree with the method that my fellow arbitrators have devised for resolving the question of the amount of compensation due to be paid by the Respondent, as set out in the Decision. In seeking to assist the Parties in the further stages of the case, this Partially Dissenting Opinion will only address central elements of the Decision that may be relevant to those further stages. In particular, I will provide observations on central elements of the Decision with which I disagree. I set this out in summary, in Section III below. In Section IV, below, I provide more detailed observations on the central elements of the Decision with which I disagree.
10. The views that I have reached in relation to this case are based, *inter alia*, on the pleadings as submitted by the Parties and its particular facts, as presented in the evidence that has been put on the record by the Parties and as found by the Tribunal. Every experienced litigator knows that cases with factual similarities are nonetheless unique. They are made distinct in part by the different manner in which they are pleaded by the parties' counsel, the different manner in which witnesses and experts appear under examination and so on.

III. Summary

11. In their submissions, the Claimants request that the Tribunal decide that the Respondent has breached Article 10(1) of the ECT. In its submission, the Respondent requests that the Tribunal decide that it has not breached the ECT. The Decision confirms that the Respondent has breached the ECT. My fellow arbitrators and I are in agreement about this.
12. The Claimants also request that the Tribunal order the Respondent either to restore the situation to what it was before the Respondent's breach of the ECT, with compensation, or to pay the Claimants compensation for all losses suffered as a result of the Respondent's breaches of the ECT. The Respondent requests that the Tribunal dismiss all of the Claimants' claims for compensation. The Decision confirms that the Respondent must pay the Claimants compensation for all losses suffered as a result of the Respondent's breaches of the ECT. My fellow arbitrators and I are in agreement about this.
13. In my view, it is important to state expressly these two unanimous, decisive findings of the Tribunal.

14. Turning to the operative part of Part VIII the Decision, paragraph 600(1) of the Decision confirms that the Tribunal does not have jurisdiction over, and thus the Tribunal cannot decide the Claimants' claim, in relation to the Tax. My fellow arbitrators and I are in agreement about this.
15. Paragraph 600(2) of the Decision confirms that the Respondent is in breach of its obligations under the ECT for the retroactive application of the New Regime; this breach concerns both the Wind plants and the CSP plants belonging to the Claimants. My fellow arbitrators and I are in agreement about this.
16. Paragraph 600(3) of the Decision confirms that, with respect to each of the CSP Plants, the Respondent is in breach of its obligation to ensure a reasonable return to the Claimants' investment insofar as this return per plant is lower than the WACC + 1% as defined in the Decision. My fellow arbitrators and I are in agreement about this, insofar as it reflects the Tribunal's decision that the Respondent has breached its obligations under the ECT in relation to the Claimants' investments in each of the CSP Plants. I am not in agreement with my fellow arbitrators about this, to the extent that it contemplates that there were no additional breaches of the ECT by the Respondent or that this is a suitable method of calculating damages and assessing compensation due to be paid from the Respondent to the Claimants for the former's breach of its obligations under the ECT in relation to those investments.
17. Paragraph 600(4) of the Decision confirms that all other claims and requests of the Parties are dismissed. I am not in agreement with my fellow arbitrators about this, insofar as it relates to the claims of the Claimants dealt with in the Decision, other than in relation to the Tax.
18. I do not agree with my fellow arbitrators' approach to the resolution of the quantum issues in this case. This includes the further procedures as set out in paragraphs 600(5-8) of the Decision. My disagreement with paragraph 600(8) is consequent on my overarching disagreement with the further procedures set out in paragraphs 600(5-8). In relation to paragraph 600(8) itself, my fellow arbitrators and I agree that the steps set out there must be taken. I thus do not disagree that, as a consequence of the Decision, they must now as a matter of logic be taken subsequent to the further procedures set out in paragraphs 600(5-7).

IV. Brief observations

19. My fellow arbitrators take the view that, non-retroactivity aside, the only breach by the Respondent of its obligations under the ECT in relation to the Claimants' investments was failing to ensure that they had a "reasonable rate of return". The Decision calculates this reasonable rate of return to be "WACC + 1% as defined by the Tribunal". I am unable to agree with my fellow arbitrators about the extent of the Respondent's breaches under the ECT. Nor am I able to agree with their conclusion that, in the present case, WACC +1% is a reasonable rate of return.
20. As a general proposition of international law, there is no doubt that, absent an express stabilisation commitment on the part of a State, no municipal legal or regulatory regime can reasonably be expected never to change in relation to an investor. Therefore, any general expectation on the part of an investor that this would be the case cannot be

reasonable. However, this does not mean that States have an unlimited right to change their municipal legal and regulatory regimes consequence-free, insofar as they are bound by international law obligations such as exist under the ECT. In this context, both Parties in this case made submission on the concept of a “margin of appreciation”.

21. There are examples of international courts and tribunals referencing something called a “margin of appreciation”, when analysing the conduct of a State in a given context. However, the concept of a “margin of appreciation” is not a legal standard under international law. It is an analytical tool that can be useful in evaluating the conduct of a State that is acting within its legal authority but in a manner that brings into question its compliance otherwise with its legal obligations. It would be incorrect to juxtapose as a binary legal choice, in evaluating the conduct of a State in this context, either that a State enjoys a margin of appreciation so broad that it is always allowed to do whatever it likes consequence-free or that an implicit stabilisation obligation exists that limits a State’s conduct.
22. The evidence on the record of this case establishes that the Respondent breached the ECT in multiple ways, not merely in relation to a “reasonable rate of return”. As the Decision notes throughout, in relation to the Respondent’s approach to its renewable energy sector during the relevant period, the Respondent initially was actively trying to attract investment to its renewable energy sector. For example, the Decision notes, at paragraph 95:

Against this background, Spain made efforts to encourage investments in RE by promoting itself as an attractive destination for renewable energy investments. These efforts appear to have been carried out by the Ministry of Industry, Tourism and Commerce (the “Ministry”), in conjunction with a State-owned company for the Promotion and Attraction of Foreign Investment, known as InvestInSpain. [Footnotes omitted.]

The Decision also notes at paragraph 386 that the Respondent achieved this:

through particular means designed at attracting investments in a sector which was unattractive at market prices; hence the various advantages granted to the producers under the special regime (including the Claimants), notably the FIT that generated important revenue streams and other advantages like the unconditional right of priority of grid access and priority of dispatch.

23. Furthermore, the Tribunal recognised at paragraph 587 of the Decision that:
- the Respondent attracted investments in the renewable energy sector by raising hope of above-average profits.
24. The Decision notes, at paragraphs 98 and 99, that electricity demand subsequently dropped. This reduced the source of income – payments for electricity from consumers – that the Respondent had to that point been using to pay renewable energy subsidies. And then, the Decision notes at paragraph 102:

On 20 July 2012, Spain signed a Memorandum of Understanding with the European Union, regarding among others, Spain’s 2012-2015 financial stability and the adoption of certain measures of macroeconomic control. Under this

MoU Spain committed to “address the electricity tariff deficit in a comprehensive way.” [Footnotes omitted.]

The Respondent decided to address these factors, *inter alia*, by altering the subsidies received by renewable energy producers.

25. These events did not, of course, happen in isolation. Nor did they occur by coincidence.
26. It is difficult to conclude otherwise than that what the Tribunal found unanimously that the Respondent did as a matter of fact amounts to what is known colloquially as “bait-and-switch”. As the Decision identifies, the Respondent initially sought to and did attract investments in its renewable energy sector by raising hopes in investors, such as the Claimants, of above-average profits. That was the “bait”. As the Decision also identifies, the Respondent’s economy thereafter suffered under the financial crisis. And the European Commission thereupon required the Respondent to deal with its budget deficit, caused in part by the increasing deficit caused by the reduced consumer payments used previously to pay subsidies to the renewable energy sector. The Respondent chose to do so by changing the levels of remuneration and profit for the Claimants in the manner that it did. This was the “switch”.
27. The Respondent’s pleadings in the present case around this question have been inconsistent. However, the Respondent’s own submissions underscore this bait-and-switch narrative. For example, in its post-hearing brief, at paragraphs 205 and 206, the Respondent claimed that:

the regime under RD 661/2007 had to be modified not only due to the need to reduce the costs of the SES but also because of the obligation to put an end to situations of over-remuneration.

The challenged measures put an end to the unsustainable situation of the SES and also to the over-remuneration situations detected.

28. In so pleading, the Respondent admits – indeed it argues affirmatively – that one of its two objectives in changing the subsidisation of its renewable energy sector, which led to the dispute in the present case, was to reduce the profit levels of investors. The Respondent presents this objective as being separate to the objective of reducing the costs of the SES. This admission is notable. Indeed, it is fatal to the Respondent’s case-theory on this point.
29. It is one thing to argue, as the Respondent did and as the Decision accepts, that the Respondent had a “margin of appreciation” about how to deal with its budget deficit because of the costs of the SES. It is quite another proposition to say that the “margin of appreciation” of the Respondent included – on its own as a stand-alone objective – the reduction of remuneration to investors. This is particularly so when, as the Decision identifies:

the Respondent attracted investments in the renewable energy sector by raising hope of above-average profits. (Decision, paragraph 587)

30. Indeed, the Respondent notably admitted in its post-hearing brief at paragraphs 207 and 208 that the budget deficit problem caused by the gap between production costs and market price, for renewable energy facilities, has still not been addressed:

The so-called “gap” between the production cost and the market price is not eliminated because the new system continues to provide a great amount of public subsidies to the facilities in which the Claimants invested ...

The “gap” persists but what has changed is the over-remuneration above and beyond the reasonable rate of return ...

The Respondent thus admits that its actions have not eliminated its tariff deficit but that its actions have extinguished the hopes of investors in the renewable energy sector for above-average profits. It bears repeating that these are the profits that the Tribunal has found that the Respondent deliberately raised hopes of, in its efforts to entice investors to invest in its renewable energy sector. It is difficult to see how the Respondent’s focus on eliminating what it considers to be over-remuneration (the “switch”), which according to the Respondent was caused by its original subsidy regimes (the “bait”), supports the Respondent’s case-theory and the Decision’s conclusions on this issue.

31. I turn now to examine another problem in the Respondent’s case-theory that arises from its own pleadings. This is the issue of the cost of money in the capital markets. The Respondent’s case theory is that its regulatory decisions to restructure the subsidy system were made by reference to the cost of money in capital markets. Yet it is telling that, throughout these proceedings, the Respondent has failed to provide any evidence that the cost of money in capital markets had changed between 2007 (when RD 661/2007 was passed) and 2013 (when the New Regime repealed RD 661/2007). Even the Respondent’s quantum expert, Mr Perez of BDO, was unable to provide a response to this under cross-examination:

Q – [Y]our expert opinion is that the reason that [the Reasonable Return] has decreased is because the cost of money in capital markets has decreased; isn’t that right?

Mr Perez – I insist yet again: you’re trying to get me to say if it’s been reduced or not, but I can’t answer that because I don’t know what the capital cost was precisely in 2007, so I don’t know if it went down.²

32. Mr Perez asserted under oath that he did not know whether the cost of capital had risen or dropped during the relevant period. He asserted that he was unaware of this fact, despite it being the essential fact required to support his client’s principal defence on this issue. It is not credible that the Respondent’s own expert did not know the indispensable factual premise of his client’s central case-theory that the Respondent has presented to explain its conduct.³ Such testimony from an expert should inform many conclusions reached by a trier of fact.

33. As noted above, and mindful of the context of Mr Perez’s testimony, it is worth observing once more that, throughout these proceedings, the Respondent has failed to

² HT/5/87/8-14.

³ For example, see the Respondent’s Counter-Memorial paragraphs 222, 227, 243.

provide any evidence that the cost of money in capital markets had changed between 2007 (when RD 661/2007 was passed) and 2013 (when the New Regime repealed RD 661/2007). Thus, the Respondent failed to establish the critical fact on which its case-theory is based.

34. On the contrary, the undisputed evidence on the record of this case establishes, as a matter of fact, the opposite: that the cost of money in the relevant capital markets did not change between 2007 and 2013.⁴ Once more, such evidence should inform many conclusions reached by a trier of fact.
35. This evidentiary failure on the part of the Respondent necessarily exposes the Respondent's submissions fatally, on this factual issue. If there were no changes in the cost of money in the capital markets during the relevant period, it is not possible that the Respondent could have logically or in good faith concluded that there was any change in the reasonable profits of the Claimants, "dynamic" or otherwise. Even leaving aside the question of "over-remuneration" discussed above, the Respondent's submission that it eliminated "over-remuneration" by reference to the cost of money in the capital markets is flatly contradicted by the only evidence on the record of this case.

36. The Decision at paragraph 390 states, in part:

It can certainly be said in the present case that the State's conduct and representation gave rise to legitimate expectations, regardless of the "umbrella clause" in the last sentence of Article 10(1) ECT ...

[Footnotes omitted.]

My fellow arbitrators and I agree about that.

37. The paragraph continues:

... insofar as the Claimants were entitled to expect that the Respondent would not significantly modify the legal framework applicable to the investors as provided for in its domestic law at the time when the investments were made.

[Footnote omitted.]

My fellow arbitrators and I agree about that. I disagree with my fellow arbitrators, however, that this is the only legitimate expectation that the Claimants had.

38. Furthermore, paragraph 379 of the Decision states:

The Tribunal has already ruled that the Claimants had no legitimate expectation that the regime provided for in RD 661/2007 would remain unchanged throughout the term of the investment. The only – but crucial – question is therefore whether the challenged modifications introduced after 2012 constitute "a drastic and radical change" – as the Claimants put it – affecting unexpectedly the conditions of the investments.

[Footnotes omitted.]

⁴ Brattle/Reg2/PP211-212, Fig. 23; Brattle/Reg/Opening/Slide 13.

39. As with paragraph 390, my fellow arbitrators and I agree about this conclusion, in relation to the law. I do not agree with my fellow arbitrators as to its application to the facts of the present case. The Decision concludes that the challenged modifications did not constitute a sufficient change to violate the legitimate expectations of the Claimants. I do not agree with my fellow arbitrations about this conclusion.
40. It follows that a difference of view between me and my fellow arbitrators about the scope of the legitimate expectations of the Claimants, combined with a difference in appreciation of the conduct of the Respondent (re “over-remuneration” and the cost of capital issue) – as noted above, both on the basis of the respective cases as pleaded by the Parties and on the evidence before the Tribunal – necessarily results in our different opinions about the outcome of the application of different legal standards to the facts of this case.
41. It follows from these observations that I approach the question of quantum and compensation, as pleaded by the Parties in this case, differently from my fellow arbitrators. The Decision at paragraph 515 criticises certain tribunals that found a breach of Article 10(1) of the ECT to mean that, since the respondent in those cases had been found to be in breach of Article 10 of the ECT, it was obliged to make full reparation for the losses suffered. In particular, the Decision states:

This last position would be illogical in the present case since the Tribunal accepted that the Claimants were not immune from reasonable changes in the regime applicable to its investment; therefore, it is only to the extent that the modifications would have exceeded the limits of what is reasonable that compensation would be due and should be calculated.

42. My fellow arbitrators and I agree that the Claimants were not immune from reasonable changes in the regime applicable to their investments. We also agree that it is only to the extent that the modifications would have exceeded the limits of what is reasonable that compensation would be due and should be calculated. However, I do not agree with my fellow arbitrators that this means that the approach taken by the tribunals criticised in paragraph 515 would necessarily be illogical in the present case. This last observation flows from my analysis above of the Respondent’s submissions in relation to its cost of money in the capital markets case-theory and the evidence referred to above on the record of this case.

43. At paragraph 567, the Decision states:

As the Tribunal already stressed, the Respondent has the possibility to modify this return as long as it remains reasonable. The Tribunal then considers that this return is not fixed and may evolve, depending on the cost of money in the capital market. In other words: (1) what could have been considered as reasonable in 2007 might not be reasonable anymore in 2012 or 2014 and (2) “reasonable” is not an absolute notion and a reasonable return does not correspond, even at a given date to a fix number; but rather to a range of possible numbers.

I am unable to agree with this conclusion, in the context of the evidence before the Tribunal in the present case. It is one thing to conclude that the Claimants did not have a right for the regime not be changed. This is correct, in law. It is quite another to

conclude from that that the Respondent was reasonable in altering the regime so as to eliminate what it considers to be “over-remuneration” to the Claimants, in the circumstances where the evidence on the record confirms that the Respondent had attracted investments in its renewable energy sector by raising hope of above-average profits and, furthermore, that the Respondent’s own, self-identified reference point for a standard of measurement as to profit (the cost of money in the capital market) had not changed. The evidence on the record of this case does not support this conclusion.

44. It must be recalled that the only evidence on the record of this case on cost of money issue is that the cost of money on the capital markets did not change during the relevant period. It is not apparent to me how this fact cannot be taken into consideration, in terms of assessing the reasonability of the conduct of the Respondent in relation to the Claimants. It must surely be a decisive fact, from the legal consequences of which the Respondent is unable to escape.
45. This is one of the facts on the record of this case that cause me to be concerned about the statements made in paragraph 569 of the Decision. My fellow arbitrators have concluded there, in relation to the Wind Assets, that: “these returns are obviously reasonable when referenced to the cost of money in the capital market.” It does not seem to me that the evidence on the record of this case supports a conclusion, without more, that the returns for the Wind Assets are “obviously” reasonable.
46. To that end, I turn now to paragraph 577 of the Decision. There, the Decision states:

Considering that the reasonable return provided by the Respondent is allocated to the project, it seems logical to take into consideration the financial structure of the whole project.

It is logical – and also necessary as a matter of law – to take into consideration the financial structure of the whole projects, the whole of the investments, made by the Claimants in the present case. My fellow arbitrators and I are thus agreed about the proposition contained in the above quotation, as a matter of business and economics and law. However, if this proposition is accepted in the abstract, when applied to the case at hand it militates for a more global assessment of the damage on the Claimants’ investments caused by the Respondent’s breaches of the ECT than that which is provided in the Decision. This observation applies to the Wind Assets but also to the other investments.

47. This goes beyond a limited consideration of what might theoretically comprise a reasonable return, had there been a change in the cost of money in the capital markets (which, in any event, the evidence available to the Tribunal in the present case shows there was not). Both Parties and both sets of quantum experts in these proceedings conducted such global assessments. This approach to analysing quantum issues is orthodox.
48. The approach to damages and quantum in the Decision, including at paragraph 577 and related paragraphs of the Decision and including the discussion of risk, departs from the orthodox. I do not agree with my fellow arbitrators about the approach to quantum in the Decision.

49. I also do not agree to the further procedures set out in paragraphs 600(5-8) of the Decision for the calculation of damages. In relation to the decision of the Tribunal to appoint its own quantum expert, the Decision cites with approval the Interim Decision on the Environmental Counterclaim, 11 August 2015, in the *Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* case (ICSID Case No. ARB/08/6). In that Interim Decision, the tribunal decided that it needed an additional phase of fact-finding, and to appoint an independent environmental expert, in order to determine a question of liability. This is not the same thing as a tribunal in an investment treaty arbitration deciding to appoint an accounting expert to help it calculate the quantum of damages due.
50. As noted at the outset, I decided to append this Partial Dissenting Opinion to the Decision with the intention of assisting both of the Parties in the further stages of this case. The Parties may also wish to consider why further stages have been set out in the manner that they have and how they each can best assist the Tribunal going forward.

[*Signed*]

Robert G. Volterra
30 November 2018