

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Orazul International España Holdings S.L.

v.

Argentine Republic

(ICSID Case No. ARB/19/25)

DISSENTING OPINION – DAVID R. HAIGH, KC

Members of the Tribunal

Dr. Inka Hanefeld, President of the Tribunal
David R. Haigh, KC, Arbitrator
Prof. Alain Pellet, Arbitrator

Secretary of the Tribunal

Ms. Anna Toubiana, ICSID

Assistant to the Tribunal

Ms. Charlotte Matthews

A. INTRODUCTION

1. I have had the opportunity to meet with my colleagues on our Tribunal and to consider their draft Award in this matter. I have no difficulty concurring with their finding that our Tribunal has jurisdiction and that the Respondent's objections to jurisdiction and admissibility must be rejected.¹
2. I do not, however, agree with my colleagues (the **Majority**) on their proposed findings on liability. I have accordingly prepared this Dissenting Opinion to describe to some extent my reasons for this disagreement. In particular, I would find that the Respondent has breached its duty to extend fair and equitable treatment (**FET**) to the Claimant and should be liable for damages accordingly.

B. FAIR AND EQUITABLE TREATMENT

3. I have a number of points of disagreement with my colleagues' analysis and reasoning and will endeavour to identify some of the more significant of those differences. As I go through my own analysis, I will not attempt to replicate all of the submissions we have received. It is not, therefore, my objective to review all points considered, but rather to give a brief explanation for my disagreement with the Majority.
4. At the outset, I do not accept that the Majority has correctly framed the issue before us based on the Claimant's pleadings. The Majority has stated:²

634. ...the Claimant argues that the Respondent should have changed the regulatory framework as applicable in 2003. Specifically, the Claimant claims to have had the expectation that the market would be 'restored' by mid-2006, which is the basis for the Claimant's damages calculation. In the alternative, the Claimant submits that it expected the market to be restored at the latest in 2010 when the two FONINVEMEM I Plants went into operation. Such expectation forms the basis for the Claimant's alternative damages calculation.³

¹ I should note that I also do not disagree with my colleagues on certain other findings, such as their determination on the Claimant's case for expropriation or their determination on the inapplicability of the umbrella clause.

² Award, paras. 634 and 635.

³ Internal footnotes omitted.

635. ...The relevant question to be determined in this case is rather whether the Claimant had a legitimate expectation that the regulatory framework as existing in 2003 would be modified and, specifically, that it would be modified in the way alleged by the Claimant by mid-2006 or 2010.

5. With respect, in my opinion, this description of the Claimant's case turns the matter on its head. In fact, the real question before us is whether after 2003 the Energy Secretary's express representations that the 2003 regulations were transitory and temporary would be honoured so that certain mandatory parts of the Electricity Law would be restored by 2006 or, at the latest, by 2010.
6. With this framing of the issue, I would find that Argentina failed to act as the Energy Secretary said he would act. Thus, it is not, as the Majority states, a matter of the Claimant expecting that the regulatory framework would be modified, but rather that the 2003 regulatory departures from the requirements of the Electricity Law would be merely transitory, as promised and, accordingly, the Energy Secretary's compliance with the Electricity Law would be restored.
7. The basic resolutions in place in 2003 unambiguously demonstrate the promise that they were transitory or temporary. In fact, the context was set with Resolution 2/2002 which referenced adoption of "transitory measures."⁴ The Energy Secretary's Resolution 240/2003, dated 14 August 2003, stated in the fifth whereas clause:⁵

The provisions in this resolution contain partial and transitory rules which are both necessary and urgent to address the state of emergency affecting the country's economy, in as much as it has a detrimental effect on the WHOLESale ELECTRIC MARKET (WEM).

8. Article 1 of Resolution 406/2003 then stated:⁶

Article 1 – Given the depletion of the resources available in the WHOLESale ELECTRICITY MARKET Stabilization Fund and the differences between the Seasonal Price fixed and the Hourly Spot Market Prices recorded, the methodology described in this resolution is hereby temporarily established in order

⁴ Resolution 2/2002, dated 14 March 2002, fifth whereas clause (C-186).

⁵ Resolution 240/2003, dated 14 August 2003, fifth whereas clause (C-8).

⁶ Resolution 406/2003, dated 8 September 2003, third whereas clause (C-9).

to preserve the supply required to meet demands not backed by Electric Power Agreements in the Term Market.

9. Resolution 406/2003 recited, in part:

Therefore, given the country's current state of public and economic emergency, this Office deems it convenient to establish a transitory mechanism for the assignment of scarce and insufficient resources to settle the receivables of the Agents of the Wholesale Electricity Market (WEM), in a manner that prioritizes the payment of accepted costs, with the purpose of ensuring the availability of supply to meet demands not backed by Electric power Agreements in the Term Market.⁷

10. The reference in this resolution to "a transitory mechanism" mirrored this same exact wording in a 2003 technical report recommending the enactment of this resolution.⁸

11. Resolution 240/2003 was itself suspended by the Energy Secretary in October 2003, based on revised forecasts for the availability of natural gas.⁹ As a result, it was not clear at the end of 2003, whether or to what extent this Resolution would be reinstated.

12. On 27 November 2003, the Energy Secretariat issued Resolution 943/2003 modifying Resolution 406/2003. Article 1 provided for modification of the amounts that would be paid to generators and stipulated that the modification would be "transitory."¹⁰

13. The terms "transitory" and "temporary" are easily understood. Their meaning must have been equally clear to the Energy Secretary and the generators operating in Argentina in 2003. Black's Law Dictionary defines "temporary" as an adjective meaning, "Lasting for a time only; existing or continuing for a limited (usu. short) time; transitory."¹¹ The term, "transitory", is defined by the Cambridge Business Dictionary as, "only lasting for a short period of time."¹²

14. Other, subsequent actions of the Energy Secretariat continued to express the transitory quality of these measures. For example, in the 2004-2008 National Energy Plan, the

⁷ Resolution 406/2003, dated 8 September 2003, third whereas clause (**C-9**).

⁸ Energy Secretariat, *Technical Report in Administrative Docket No. EXP-S01:143056/2003 (part 1)*, 2003, para. 2 (**C-103**).

⁹ Deputy Secretary of Energy, Note No. 526, dated 10 October 2003, para. 1 (**C-159**).

¹⁰ Resolution No. 943/2003, dated 27 November 2003, article 1 (**C-209**).

¹¹ *Black's Law Dictionary*, Seventh Edition, 1999.

¹² *Cambridge Business English Dictionary*, Cambridge University Press, 2022.

Government included a plan entitled, “Electrical Agreement for the Re-adaptation of the WEM until December 2006” with the objective of achieving the sustainability of the Wholesale Electricity Market in the medium term and identified a “Transition Period: May 2004 – December 2006.”¹³

15. The Majority finds that words such as “transitory” or “temporary” are “neither a specific promise nor an assurance to the Claimant that the Argentine electricity regulatory framework would be restored to the framework prevailing during the 1990s, even less so under the specific timeframe foreseen by Claimant.”¹⁴ I do not accept this conclusion. A generator such as the Claimant was perfectly entitled to take these words at their face value. The promise of the Energy Secretary was that his departure from the Electricity Law was temporary and the measures in 2003 were transitory. This is not about the “regulatory framework” prevailing in the 1990s, but rather about the Electricity Law which, in pertinent respects, remained unchanged and unamended at all relevant times up to the time of the hearing in this case. As for the timing expectations, one need merely refer to the National Energy Plan, as I have done in the immediately preceding paragraph, above, from which it is obvious that the 2003 measures were projected to lead to “readaptation” of the WEM by the end of 2006. The “Transition Period” is expressly acknowledged to cover the period “May 2004 – December 2006.” Generators would naturally anticipate that that projection could be relied upon.

C. REVIEW OF THE REASONING OF THE MAJORITY

16. The Majority have addressed their findings in “six analytical steps.”¹⁵ I will briefly address these analyses and provide my own views of those findings in a summary way.
17. The Majority says “the Claimant’s subjective expectations do not suffice as a basis for legitimate expectations.”¹⁶ As I have already indicated, I disagree that the Claimant’s expectations were merely subjective. Instead, I find that the Claimant’s expectations were based solidly on what the Energy Secretary expressly stated in Resolution 240/2003 and Resolution 406/2003, reinforced by subsequent communications, all under the overarching requirements of the Electricity Law. The information shown in the Claimant’s

¹³ Minister of Federal Planning, Investment and Services and Energy Secretary, National Energy Plan 2004-2008, p. 21 (C-154).

¹⁴ Award, para. 668.

¹⁵ *Id.*, para. 637.

¹⁶ *Id.*, para. 637.

2004 Budget Review simply corroborates the expectation held by the Claimant. In other words, it was a real, contemporaneous, as opposed to an after-the-fact, expectation.¹⁷ It was also an expectation shared by other generators, such as *Petrobras Energía Participaciones S.A.*¹⁸

18. The Majority explains that, in their view, conditions in place at the time of the investment, that is around December 2003, "... were marked by the ongoing crisis and ongoing changes."¹⁹ The Majority further comments that, "[i]t was a time of regulatory change and a time of constant economic changes and there was no clarity which further changes would happen and within which timeframe."²⁰ The Majority says there was, therefore, "...no basis for the legitimate expectation that the Respondent would restore the regulatory framework as applicable in the 1990s."²¹
19. I disagree with these determinations. I would point, for example, to the message sent to Congress by the National Executive Branch on 16 September 2003, which stated, "[t]he Bill of the National Administration's General Budget reflects the macroeconomic context with a significant recovery of the economic activity from mid-2002, emphasized in 2003".²² A year later, the same body confirmed, "[i]n 2003, activity recovered steadily, reaching a GDP growth level of 8.8% (a magnitude that had not been observed since 1997), in a context of low inflation (only 3.7% in the case of the CPI)."²³ The Respondent's Rejoinder on the Merits sets out a graph which shows Argentina's GDP per capita steadily increasing from 2003 onwards to 2010, rising from slightly more than US\$2,000 to over US\$10,000 in that period.²⁴ In the case of *Total v Argentina*, the tribunal found that by the time President Kirchner took office in May 2003, "Argentina had emerged from the crisis as commentators, international organizations and other arbitral tribunals in investment disputes against Argentina have recognized."²⁵ And, further, "[i]t is generally recognized

¹⁷ DEI Group, Budget Assumptions 2005, dated 15 November dated 2004 (**C-67**).

¹⁸ *Petrobras Energía Participaciones S.A.*, Form 6-K, 1 April 2004 (**C-10**).

¹⁹ Award, para. 637.

²⁰ *Id.*, para. 652.

²¹ *Id.*, para. 637.

²² Message Sent to Congress by Argentine National Executive Branch Regarding the 2004 Budget, dated 16 September 2003, p. 1 (**C-244**).

²³ Message Sent to Congress by Argentine National Executive Branch Regarding 2005 Budget, dated 15 September 2004, p. 22 (**C-250**).

²⁴ Respondent's Rejoinder, para 130, graph prepared by Respondent based on data from the World Bank, Evolution of Argentina's GDP per capita 1997-2010 (**A RA-362**).

²⁵ *Total S.A. v Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, dated 27 December 2010 (**Total v Argentina Decision on Liability**), para. 171 (**CL-29**).

that Argentina's economy quickly recovered from the crisis—by the end of 2003 and the beginning of 2004.”²⁶

20. The Majority states that, even if there had been a legitimate expectation that the Respondent would take regulatory measures on the basis of the Electricity Law, the Claimant's claim would not be founded because, "... the Electricity Law did not contain a guarantee of stability with respect to the regulatory conditions as applicable during the 1990s.”²⁷ I disagree with this characterization of the claim. The Claimant's claim is not that there should be "a guarantee of stability" for regulatory conditions in the 1990s, but rather that the Energy Secretary would follow the mandatory requirements of the Electricity Law from which he had temporarily diverged. Articles 35 and 36 of the Electricity Law state:²⁸

Article 35. The Energy Secretariat shall lay down the rules to govern the operation of the DNDC [CMMESA]. Such rules shall ensure transparency and fairness in decisions, and the following principles shall be considered:

- a. To allow the execution of freely agreed contracts between the parties, such parties being generation companies ..., large users and distribution companies (term market);
- b. To dispatch the required demand on the basis of recognition of energy and capacity prices as set in the following article, which market participants shall expressly undertake to accept, in order to be entitled to supply or receive electricity not freely agreed upon by the parties.

Article 36. The Energy Secretariat shall issue a resolution with the economic dispatch rules to be applied by the DNDC [CMMESA] to the energy and capacity transactions provided in Article 35(b) above. This rule shall provide that all generation companies shall receive a uniform price for the electricity they sell at each point of delivery to be defined by the DNDC, based on the economic cost of the system. In calculating such price, the cost that the unsupplied electricity represents for the community shall be taken into account.

²⁶ *Id.*, para. 172.

²⁷ Award, paras. 637 and 670.

²⁸ Law No. 24,065, dated 16 January 1992 (C-2).

21. The Majority finds that, "... the language of Articles 35 and 36 of the Electricity Law leaves considerable discretion to the Energy Secretariat in the setting of capacity payments. It does not prescribe any specific currency, method of calculation or price that the Energy Secretariat should reflect in its resolutions."²⁹ I disagree with this conclusion. The mandatory verb, "shall", appears several times in these two articles. It is perfectly clear that Article 35a contemplates the execution of "freely agreed contracts between the parties". It is equally clear that energy was to be dispatched on the basis of prices as set under Article 36. That Article, in turn, required that all generation companies "shall receive a uniform price for the electricity they sell at each point of delivery" and that such uniform price was to be defined by CAMMESA, "based on the economic cost of the system". These requirements in Articles 35 and 36 did not leave the Energy Secretariat with considerable discretion in relation to "freely agreed contracts" nor in relation to the requirement for a "uniform price" based on the economic cost of the system. Unless Articles 35 and 36 of the Electricity Law were amended, the Energy Secretary was compelled to follow their strictures at all relevant times.
22. These requirements in the Electricity Law describe exactly what a generator such as the Claimant was entitled to expect from the Government of Argentina. These phrases in Articles 35 and 36 set forth the principles that the Claimant and, no doubt, other generators, expected would be followed. Resolutions are, under Argentina's legal regime, subordinate to a law, such as the Electricity Law and, it follows, that a resolution of the Energy Secretary could not over-rule or displace the Electricity Law.
23. The Electricity Law at all relevant times remained unamended and unchanged in this respect. The language used in Articles 35 and 36 does not raise a question of some idyllic return to market conditions in the 1990s, as the Award repeatedly appears to infer, although the Argentine electricity markets had functioned well at that time. I disagree with how the Majority construes the Claimant's case as though it expected regulatory conditions applicable in the 1990s, for example through Resolution 61/92, to be restored. Nor does the language in Articles 35 and 36 require a guarantee of regulatory stability. But, the Claimant expected, quite legitimately in my opinion, that the mandatory provisions of these two articles in the Electricity Law, as quoted above, would be restored and observed. If this restoration was not the Government's intention, then it should not have

²⁹ Award, para. 676.

continually referred to the measures interfering with the requirements of that law as transitory or temporary. In any event, if the Government's intention was to vary the Electricity Law on a long-term basis, then the Electricity Law in these articles should have been amended by the legislature. In fact, it was never changed or amended in this respect and so should have been followed by the state's regulators.³⁰

24. In their fourth point, the Majority finds that the 2003 resolutions, "... even if they confirmed the transitory and temporary nature of the measures, cannot serve as a basis for the Claimant's legitimate expectations at the time of the investment."³¹ The Majority holds that, "... with respect to the alleged restriction of the Claimant's ability to sell on the term market through Resolution 956/2004, Resolution 1,281/06, and Resolution 95/13, the [Majority] notes that all these resolutions were adopted after the Claimant's investment."³² According to the Majority, it is obvious, therefore, that these resolutions could not have been a basis for the Claimant's expectations.³³ The Majority further develops its conclusion in relation to the impacts that these three resolutions had on the term market for PPAs, namely: a surcharge to existing PPAs pursuant to Resolution 956/2004;³⁴ a differential treatment for large users benefitting only PPAs entered into with new plants pursuant to Resolution 1,281/2006;³⁵ and temporary suspension of the execution of new PPAs in the term market and the introduction of *Energía Plus*, pursuant to Resolution 95/2013.³⁶
25. If the Claimant was relying on these particular resolutions, standing alone, to demonstrate what its reasonable or legitimate expectations were at the time of its investment, then the Majority's conclusion could be arguable. However, it is my understanding that the Claimant's contention is not that these later, specific Resolutions were the basis for its expectations, by themselves, but rather that these later resolutions perpetuated the breach

³⁰ In focussing my analysis on the Electricity Law, I am not overlooking or disregarding the significance of the Claimant's submissions based on the promises made in the Selling Memorandum (*Selling Memorandum for the Privatization of Hidroeléctrica Norpatagónica S.A.* dated December 1992, **C-6**), or the Concession Contract (Concession Contract, **C-79**, especially articles 8 and 70), or the terms in the FONINVEMEM I Agreement (**C-36**, Article 1 and specifically the *Adhesion Contract*, **C-211** and **C-106**) and other, similar contentions. As I explain in my Dissenting Opinion, the Electricity Law simply expresses the fundamental principles on which the Claimant's legitimate expectations were based. These other submissions only go to reinforce those principles.

³¹ Award, para. 690.

³² *Id.*, para. 691.

³³ *Id.*, para. 695.

³⁴ Resolution No. 956/2004, dated 28 September 2004 (**C-210**).

³⁵ Resolution No. 1,281/2006, dated 4 September 2006 (**C-176**).

³⁶ Resolution No. 95/2013, dated 22 March 2013 (**C-21**).

of the Claimant's expectations based on the Electricity Law, expectations that were formed at the time of its investment at the end of 2003.³⁷

26. The Claimant pleads that, "... Resolution 240/03 did not change the criteria for dispatching energy. However, it did change the criteria for calculating the Spot Price by excluding higher liquid fuels and water value (if it was more expensive than natural gas) from the VCP calculation."³⁸ In support of this assertion, the Claimant quotes CAMMESA:

[D]ispatch continues to be carried out based on the actual fuels used [by generators] but for the calculation of the spot price, it is considered that all dispatched generation has an unrestricted supply of natural gas and the value of the water is not considered [for the calculation] to fix prices if it is higher than ... natural gas.³⁹

27. The Claimant says that, "[p]rior to Resolution 240/03, the maximum Spot Price varied in order to reflect the risk of failure or outages. Following the enactment of Resolution 240/03 however, the Spot Price was capped at AR\$ 120/MWh."⁴⁰

28. The Claimant has submitted that:⁴¹

...instead of fulfilling its promises and reversing the Measures that led to the unsustainability of the system in the first place, Argentina extended the temporary regime. Even worst, [*sic*] Argentina imposed additional Measures that further interfered with Orazul's investments, while at the same time offering new power plants more favourable, ...market-based terms through specific pro-investment programs, like *Energia Plus*...

29. In addition, the Claimant has further submitted that:⁴²

Following Orazul's investment in Cerros Colorados, the Government adopted additional Measures that were inconsistent with the Electricity Law and increasingly interfered with Cerros Colorado. Throughout its adoption of these

³⁷ Claimant's Memorial on the Merits, paras. 202-203 *ff.*

³⁸ *Id.*, para. 198.

³⁹ CAMMESA, 2004 Annual Report, p. 3 (C-72).

⁴⁰ Claimant's Memorial on the Merits, para. 199.

⁴¹ *Id.*, para. 202.

⁴² *Id.*, para. 203.

Measures, however, the Government continued reassuring power generators that the original market-based rules would be restored.

30. These excerpts from the Claimant's pleading show that the expectation on which the Claimant is relying is that Argentina would obey its own Electricity Law, especially in relation to the mandatory requirements for a "uniform price" and "freely" negotiated contracts for the sale of electricity.⁴³
31. Accordingly, I find that I cannot agree with the Majority's conclusion that the Claimant is relying on these later Resolutions of the Energy Secretary as a basis for its legitimate expectations at the time of its investment in December 2003. That conclusion, in my opinion, is knocking down a straw man argument that the Claimant has not made.
32. The Majority's fifth point concerns the FONINVEMEM Agreements. As with their fourth point, the Majority point to the fact that these "legal acts" date from a point in time after the Claimant's investment. The Majority says that, "... the Claimant has not shown that they breached its legitimate expectations."⁴⁴
33. In response to this conclusion, I am obliged to observe that the Claimant did not, as I understand it, rely on the FONINVEMEM Agreements as the basis for its expectations at the time of the investment. On the contrary, the Claimant has continually relied on the provisions of the Electricity Law, as I have earlier noted. Those provisions were obviously in place in December 2003.
34. I find it convenient to refer to the determination of the tribunal in the case of *Total v Argentina* which found that the FONINVEMEM scheme was an abuse of authority and a breach of the FET protection under the BIT.⁴⁵

336. The Tribunal agrees with [the claimant] that [the forced conversion of receivables into a stake in FONINVEMEM] resulted in a *de facto* refusal by Argentina to pay power generators their receivables, even at the reduced values resulting from the measures.

⁴³ *Id.*, paras. 204 *et seq.*

⁴⁴ Award, para. 696.

⁴⁵ *Total v. Argentina* Decision on Liability, paras. 336-338 (CL-29).

337. The Tribunal is not convinced by Argentina's argument that generators who decided to participate in FONINVEMEM ... did so on a voluntary basis. On the contrary, based on the evidence submitted, the Tribunal agrees with [the claimant] that the conversion offered by Argentina as of August 11, 2004 cannot be defined as "voluntary." If not "forced," it was certainly strongly induced by putting generators in a situation where they had no choice other than to accept the scheme or otherwise risk suffering higher losses. First, generators were faced with a situation in which the institution (CAMMESA), which was appointed by the public regulator to manage the market efficiently, was unable to pay for the electricity produced and distributed to consumers because consumers were charged an insufficient tariff. Second, the generators were put in the position of choosing either to contribute 65% of their past and future receivables to FININVEMEM and become shareholders of the generators that were to be built with the corresponding funds, or to hold unpaid receivables, payment of which was legally and factually uncertain in regards to when, how, and how much would be paid.

338. This scheme must be considered as a kind of forced, inequitable, debt-for-equity swap, not due to unfavourable market conditions or a company's crisis (as is usually the premise of such swaps in the private market), but due to governmental policy and conduct by Argentina. As such, in the view of the Tribunal it represents a clear breach of the [FET] obligation of the BIT for which Argentina is liable to pay damages. The liability of Argentina is not excluded by the fact that the shares resulting from the conversion have a market value as adduced by Argentina, since the generators have been or are being installed. The determination of the value of those shares is relevant to the valuation of damages and will have to be taken into account in the quantum phase.

35. I concur fully with these determinations and would make virtually the same finding in this case. The coercion of generators into accepting FONINVEMEM and entering into the Adhesion Contract was not consistent with the Electricity Law in any sense whatsoever.
36. My colleagues have set out some of the provisions of the Adhesion Contract, including Article a1 which indicated that, "[t]he aim of this document is to establish the basis on which the WHOLESALE ELECTRIC MARKET (MEM) would be restored, meaning that it would be readjusted to normalize the regular operation of the MEM as a competitive market, with sufficient supply, in which Generators, Distributors, Traders, Participants and Large energy Users can buy and sell electricity at prices determined by the offer and the

demand, without regulatory distortions and within the framework established by law 24,065.”⁴⁶ In my opinion, this language, drafted by the Energy Secretariat, is referring directly to the requirements of Article 35a of the Electricity Law, that is, “freely agreed contracts between the parties, such parties being generation companies ... large users and distribution companies (term market).”⁴⁷

37. Any possible doubt in this regard is resolved later in Article a1 of the Adhesion Contract itself. It provided, *inter alia*, that, “The Energy Secretary shall:

(iv) When the Market is restored once the new equipment built with FONINVEMEM resources commences commercial operations, abrogate Resolution 240 of the ENERGY SECRETARIAT dated 14 August 2003, and remunerate generators with the System’s Marginal Price as set under “THE PROCEDURES”, in a free spot market, considering the cost of unsupplied energy, with a water value that represents the thermal replacement value.”⁴⁸

38. This language made it perfectly clear that the Energy Secretary was promising to withdraw Resolution 240/2003 upon commencement of commercial operations by the generators built with other generators’ money and then to restore a free spot market. To have done so would have complied with the requirements of the Electricity Law, as I have already noted them. As it happened, however, that is not what occurred. When the new generating facilities came on stream, the Energy Secretary did not act in accord with the obligatory language, above.

39. I therefore disagree with my colleagues forming the Majority and would instead find that the Claimant’s reasonable and legitimate expectations, based on the Electricity Law, and further evidenced by the FONINVEMEM Agreement, were breached by the Energy Secretary.

40. The Majority’s sixth reason for their decision to deny the Claimant’s claim in this case is that prior investment arbitration cases on the Argentine electricity framework do not change the Majority’s conclusion. I am surprised by this determination. The Majority’s

⁴⁶ FONINVEMEM Adhesion Contract, dated 6 December 2004, article a1 (C-211).

⁴⁷ Law No. 24,065, dated 16 January 1992 (C-2).

⁴⁸ FONINVEMEM Adhesion Contract, dated 6 December 2004, article a1 (C-211).

view is that “it has strong reasons to distinguish the circumstances of this case from those of both the *Total* and *El Paso* cases.”⁴⁹

41. The Majority note that, “[b]oth Total and El Paso made their investments in a favorable legal environment where the Electricity Law and the regime prevailing in the 1990s was the relevant benchmark against which to assess any rights or expectations.”⁵⁰ They then hold that:⁵¹

709. The Claimant’s investment, in contrast, took place as late as December 2003, i.e., in a crisis environment where the Emergency Law and a different regulatory regime under the Electricity Law were in place, generators had not been able to collect their past and future receivables in full since June 2003 [internal footnotes omitted], and where, pursuant to Resolution 943/2003, past and future receivables would be paid only when the Unified Fund was able to do so, at a date to be determined by the Energy Secretariat in the future. Accordingly, Total’s or El Paso’s situations are not comparable to that of the Claimant and, thus, those tribunal’s findings do not change the Tribunal’s conclusion.

42. I have already shown earlier in this Dissenting Opinion that by the time the Claimant made its investment at the end of December 2003, the Argentine economy had made a strong recovery from the 2002 crisis. In any event, what is more critical to my disagreement with the Majority’s opinion in this regard is that the Electricity Law in its essential features, particularly those I have highlighted from Articles 35 and 36, remained intact and unamended for the duration of not only Total’s and El Paso’s investments but the Claimant’s as well. What the tribunals in the cases of *Total v Argentina* and *El Paso v Argentina*⁵² found to be contrary to the Electricity Law and breaches of the relevant BITs are the very same actions under consideration in this arbitration.

43. Thus, the tribunal in *Total v Argentina* held:⁵³

328. It cannot be disputed however, that the pricing system the SoE progressively put in place after 2002 is at odds with those principles as spelled out in the Electricity

⁴⁹ Award, para. 705.

⁵⁰ *Id.*, para. 708.

⁵¹ *Id.*, para. 709.

⁵² *El Paso International Company v The Argentine Republic*, ICSID Case No. ARB/03/15, Award, dated 31 October 2011 (*El Paso v Argentina*) (CL-23).

⁵³ *Total v Argentina* Decision on Liability paras. 328-330 (CL-29).

Law, even leaving pesification out of consideration. After 2002, the market has been characterized by unreasonably low tariffs [internal footnote omitted]. These, in turn, have massively reduced the returns of generators, barely permitting them to cover their variable costs, contrary to sound economic management principles for power generators operating within a regulated system of public utilities [internal footnote omitted]. The low prices encouraged a substantial increase in consumption that could not be matched by a parallel increase in supply, since the producers could not finance new investments under the rigid administrative pricing system in place [internal footnote omitted]. The unsoundness of such a policy in light of practices generally followed in modern societies to ensure electricity supply, when this is left to private companies, is demonstrated by the subsequent lack of investment, power failures and the need to import electricity to Argentina (while the country was previously self-sufficient or even an exporter to neighbouring countries) [internal footnote omitted].

329. The *Energia Plus* program and the FONINVEMEM scheme (to finance new generators through the use of unpaid receivables of existing generators) show that the pricing mechanisms put in place after 2002 were not economically sustainable. The Tribunal recalls that new electricity producers are to be remunerated at higher prices under the *Energia Plus* program so as to encourage new investments since existing generators lacked resources to expand due to default of CAMMESA and the Stabilization Fund. This mechanism is in contrast with the principle of uniform price, which should reflect the economic cost of the system and ensure that new investments are made according to the demand [internal footnote omitted].

330. The Tribunal considers that this situation, brought about by the SoE with full awareness of its negative impact on affected generators operating under sound economic principles, cannot be reconciled with the fair and equitable treatment standard of Article 3 of the BIT. As a consequence, the Tribunal finds that Argentina has violated the BIT in this respect.

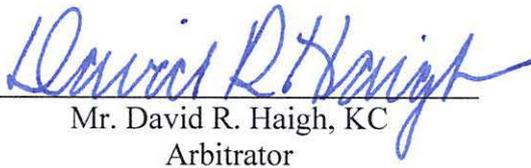
44. I fully agree with that tribunal's reasoning and see no reason whatsoever to dismiss it on the basis that Total had invested at a different time or in a different economic climate than the Claimant in this case. Their reasoning and condemnation of the Energy Secretary's measures obviously do not turn on when Total invested. As I stated earlier, what remains consistent are the relevant provisions of the Electricity Law and Argentina's duty to extend FET pursuant to the BIT applicable here. I do not accept the Majority's distinguishing of this case from that of *Total v Argentina*. Accordingly, while my colleagues say that they

recognize that “achieving a coherent body of law is an important objective,”⁵⁴ it is one that in my opinion they have failed to uphold. I would make similar observations about the *El Paso v Argentina* case and the determination by that tribunal that Argentina’s actions breached the FET standard of protection.

45. My colleagues have concluded that, “having reached the finding that the Respondent did not breach any obligations under international law, the Tribunal equally rejects the Claimant’s claim for compensation and interest.”⁵⁵ While it is evident that I do not share their finding on liability in this case, I agree that it is pointless to consider the quantum to be awarded. Accordingly, I will not review the requests for damages made by the Claimant. Suffice it to say that I would have awarded the Claimant substantial damages for Argentina’s breach of the FET protection under the BIT.
46. I would likewise have awarded the Claimant its full costs of this arbitration as it was successful not only on the jurisdiction of this Tribunal, but should have been successful in its claim on liability.

⁵⁴ Award, para. 705.

⁵⁵ *Id.*, para. 1024.


Mr. David R. Haigh, KC
Arbitrator

Date: 12 December 2023