INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

STRABAG SE, ERSTE NORDSEE-OFFSHORE HOLDING GMBH AND ZWEITE NORDSEE-OFFSHORE HOLDING GMBH

Claimants

and

FEDERAL REPUBLIC OF GERMANY

Respondent

ICSID Case No. ARB/19/29

PARTIAL DISSENTING OPINION

Prof. Dr. Maria Chiara Malaguti, Arbitrator

8th December 2024

1. I am writing this Partial Dissenting Opinion under Article 48(4) of the ICSID Convention.

2. It has been a privilege and a genuine pleasure to be part of the Arbitral Tribunal in this case. The deliberations have been enriching and rewarding, as well as intellectually honest. While we reached consensus on most of the findings, I found myself in disagreement with the assessment of the circumstances under the FET Standard in the end. Since it seems to me that this divergence derives essentially from a different reading of the scope of a State's undertakings under Article 10(1) ECT (first and second sentence) against its right to regulate, it is worth trying to express how I assess the facts of the dispute under my understanding. As this is a controversial issue that led various tribunals to diverge in their findings under Article 10(1) ECT, and without jeopardizing the integrity of the Award issued by the Tribunal Majority by any means, I feel it is my duty to express my dissent where in my view it is relevant to the interpretation of the ECT and international investment law in general.[1]

Summary of conclusions

3. I concur with my colleagues in the assessment of the Respondent's behaviors as for the claims linked to the GFT (Award, §§380-393).

4. I also concur with my colleagues in the assessment of the Respondent's behaviors related to the Offshore Wind Projects under the Full Protection and Security Standard (Award, §§484-490) and the Non-Impairment Standard (Award, §§508-517).[2]

5. I instead diverge in the assessment of the challenged measures under Article 10(1) ECT and, more precisely, the application of the FET Standard. Whether analyzed in its own right under the FET Standard or as part of investors' legitimate expectations, my interpretation differs as to the scope of the "stability undertaking" in relation to the State's right to regulate. The difference surfaces primarily in the actual assessment of both the challenged measures against the State's undertaking

[1] "*An investment treaty arbitrator should dissent where he or she discerns a principled basis to do so*", Laurence Shore & Kenneth Juan Figueros, *Dissents, Concurrences and a Necessary Divide Between Investment and Commercial Arbitration*, 3 Global Arb. Rev. 18, 20 (2008), footnote 22.

[2] To avoid any misunderstanding, I notice that some statements of the Tribunal Majority's assessment under the FET Standard on which I dissent, are referred to under the FPS and the Non-Impairment Standards. However, these statements do not affect the overall reasoning and findings of the Tribunal Majority under these two Standards, which are actually reinforced by the fact that, despite the reading of some behaviors as infringing Article 10(1) (and Article 13) ECT, the challenged measures did not amount to violation of the FPS and Non-Impairment Standards.

to encourage and create stable conditions for the investors, and what the Claimants should have reasonably expected at the time of making the investment.

6. As I shall describe, I would conclude that the Respondent violated the FET Standard under Article 10(1) ECT when, in 2017, it adopted the Renewable Energy Sources Act (Award, §136) without any form of compensation for those investors that had legitimately relied on the previous mechanisms for authorization and had taken active steps as well as undertaken exchanges with the regulator (and other relevant stakeholders) to follow such previous procedure, and accomplish the various different steps they were allowed to in order to (hopefully) achieve the final goal, but could not participate in the new compulsory tendering process. This constituted a radical change in the regulation that, although in furtherance of public interest, did not proportionately protect the positions of investors that had been legitimately acquired under the previous mechanism. In my understanding, all acts and behaviors before the 2017 Renewable Energy Sources Act were instead legitimate manifestations of the State's right to regulate, which did not constitute *per se* a radical change, were proportionate, and would not come as totally unexpected to investors.

7. In the light of my assessment of the Respondent's acts and behaviors when judging under FET, my analysis under the expropriation standard would also differ from that of the Tribunal Majority. I agree that the Respondent should be held liable under Article 13 ECT for creeping expropriation, but I consider that this was produced through a series of acts and behaviors which were legitimate *per se*, and that ultimately culminated with the 2017 Renewable Energy Sources Act, which crystallized the expropriation and thus led to the complete deprivation of the Claimants' investment. In the absence of such Act, expropriation would not have occurred.

8. In the light of my assessment, it is apparent that the point in time for the initiation of the violations under both Article 10(1) and Article 13 ECT would differ from that established by the Tribunal Majority and be set at the time of adoption of the 2017 Offshore Wind Energy Act. This would affect also the valuation date, to be postponed to early 2017.

On the applicable legal standard under Article 10(1) ECT

9. By concurring with the Tribunal Majority that the first sentence of Article 10(1) ECT forms part of the context of the second sentence of Article 10(1), and thus informs and defines the FET Standard (Award, §368), I feel the need firstly to elaborate on the relationship between the State's undertaking to encourage and create stable conditions under Article 10(1) and its right to regulate.

Undertaking to encourage and create stable conditions and the State's right to regulate

10. Where an investor makes an investment in a domestic energy sector, relying on the regulatory and legal framework at the date of the investment for its financing and economic feasibility analysis, it is vulnerable to future regulatory changes. The purpose of Article 10(1) ECT is to assuage investors' fears: the Contracting States undertake to promote a "stable" legal framework commensurate with the relevant energy sector or source. This is why the ECT places greater emphasis on stable conditions for investments than other treaties.[3]

11. However, the undertaking to encourage and create stable conditions is not absolute. National legislation and regulation are dynamic by nature, and States enjoy a sovereign right to amend their laws and regulations and to adopt new ones in furtherance of the public interest. In the global energy transition necessary to achieve the climate change mitigation and adaptation goals pursuant to the UN Framework Convention on Climate Change ("UNFCCC") and agreements thereunder, it is critical that States are understood to continue to enjoy such sovereign rights. The ECT's stable conditions requirement therefore does not operate as a stabilization clause requiring States to freeze their regulatory framework for foreign investors.[4]

12. Furthermore, when a market – as the one at stake in the relevant years – is still immature, the dynamic nature of regulation is even more impelling, and the room for the State powers to regulate even wider.

13. This general understanding has been expressed by several tribunals in previous cases. In *Silver Ridge*, the tribunal for instance clarifies:

> "In order to draw the proper line between acceptable adaptations and non-acceptable alterations of the legal framework, in the Tribunal's view, the ECT requires that a balance be struck between two principles [...]: on the one hand, the interest of investors in a stable and transparent legal framework [...], and on the other, the host State's sovereignty, notably

[3] I am using almost *verbatim* the language found in *Encavis*, a recently issued award that Parties did not submit, but which is publicly available: *Encavis AG and others v. Italian Republic*, ICSID Case No. ARB/20/39, Award, 11 March 2024 (Prof. Juan Fernández-Armesto, Ms. Wendy Miles KC, Mr. Alexis Mourre) ("*Encavis*"), §651.
[4] *Encavis*, §652.

including the ability to adapt its legislative and regulatory framework to new developments, which are unavoidable in a long-term cooperation."[5]

14. The *Antaris* tribunal adds:

> "The host State is not required to elevate the interests of the investor above all other considerations, and the application of the FET standard allows for a balancing or weighing exercise by the State and the determination of a breach of the FET standard must be made in the light of the high measure of deference which international law generally extends to the right of national authorities to regulate matters within their own borders."[6]

15. Against the background of these cases, with which I agree, the State's undertaking to encourage and create stable conditions within its legal framework must be read jointly and balanced with the State's sovereign right to manage and modify its regulatory regime and adapt it to changing circumstances.

16. Tribunals adjudicating investors' claims that the stable conditions requirement was breached, have variously considered and weighed these principles. As summarized in *Encavis*:

a. One factor of special relevance is whether the regulatory change is radical or fundamental in character. If the amendment provokes a radical change in an existing regulatory regime, it is more likely to result in a violation of the stable conditions requirement. The assessment of whether a change meets these characteristics is not a determination to be made in the abstract, but a judgement which requires that the tribunal consider the specific circumstances of the case.

b. A second factor is whether the State acted in public interest and exercised its regulatory powers proportionally. Regulatory changes adopted proportionally to respond to public interest concerns will not fall afoul of the stable conditions' requirement.[7]

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[5] RL-0260, *Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB/15/37, Award, 26 February 2021 (Judge Bruno Simma, Judge O. Thomas Johnson, Prof. Bernardo M. Cremades) ("*Silver Ridge*"), §411. References to other previous awards are found at §§412-413 of the *Silver Ridge* award.

[6] CL-0130, *Antaris GmbH and Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award, 2 May 2018 (Lord Collins of Mapesbury, Mr. Gary Born, H.E. Judge Peter Tomka) ("*Antaris*"), §360(9). The *Antaris* tribunal cites various other awards to the same end at footnote 544.

[7] *Encavis*, §656.

Legitimate expectations arising from general measures

17. Secondly, I would like to quickly preface the elements included under legitimate expectations according to the FET Standard to further assess the expectations of the Claimants.

18. As is well-known, legitimate expectations are usually meant to comprise three elements: a) behavior by the State, or by entities whose conduct is attributable to the State, which has given rise to legitimate expectations on the part of the investor, to be assessed at the time the investor decided to make the investment; b) reliance by the investor on those expectations when making the investment; and c) subsequent measures adopted by or attributed to the State which frustrate the investor's expectation.

19. As for State behaviors apt to create legitimate expectations, although it is still somehow controversial, various tribunals agree that legitimate expectations may in principle arise either from specific commitments addressed by the State to the specific investor, or from general legislation created with the purpose of attracting investments. However, when legitimate expectations arise from a general measure, tribunals generally underline that the measure must have been created with the specific purpose of attracting investment, so that not all general measures would *per se* be apt to generate legitimate expectations.

20. In *Silver Ridge*, the tribunal recognized the possibility for a State to create legitimate expectations by enacting general legislation, emphasizing the characteristics that such general legislation should have to constitute a valid basis for legitimate expectations:

> "[A] State may make specific commitments to investors also by virtue of legislative or regulatory acts which are not addressed to particular individuals, provided that these acts are sufficiently specific regarding their content and their object and purpose. In this context, the Tribunal considers the creation of legitimate expectations more likely where a State has adopted legislative or regulatory acts 'with a specific aim to induce [...] investments'."[8]

Legitimate expectations of stability

21. As for the reliance by the investor, the main issue in this case seems to be whether, once legitimate expectations by the Claimants were proven, Article 10(1) ECT would be considered violated by

[8] RL-0260, *Silver Ridge*, §408.

the sole fact that such expectations were infringed, or whether also in this case the public interest motivation, reasonableness and proportionality of the State's behavior would justify the measure.

22. In my understanding, the undertaking by the State to ensure stable conditions is subject to the same limits as when it is considered on its own under FET.

23. The *Blusun* tribunal, commenting on the prior case *Charanne*,[9] states:

> "It [the *Charanne* tribunal] concluded:
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> > 'under international law ... in the absence of a specific commitment toward stability, an investor cannot have a legitimate expectation that a regulatory framework such as that at issue in this arbitration is to not be modified at any time to adapt to the needs of the market and to the public interest'.
>
> But this did not mean the ECT imposed no constraint on legislative change:
>
> > 'an investor has a legitimate expectation that, when modifying the existing regulation based on which the investment was made, the State will not act unreasonably, disproportionately or contrary to the public interest'."[10]

24. The *Blusun* tribunal also describes the inherent limits in the assessment by a tribunal of the State's right to regulate:

> "Of the three criteria suggested in *Charanne*, 'public interest' is largely indeterminate and is, anyway, a judgement entrusted to the authorities of the host state. Except perhaps in very clear cases, it is not for an investment tribunal to decide, contrary to the considered view of those authorities, the content of the public interest of their state, nor to weigh against it the largely incommensurable public interest of the capital-exporting state. The criterion of 'unreasonableness' can be criticized on similar grounds, as an open-ended mandate to second-guess the host state's policies. By contrast, disproportionality carries in-built limitations

[9] RL-0263, *Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain*, SCC Case No. 062/2012, Award, 21 January 2016 (Mr. Alexis Mourre, Prof. Dr. Guido Santiago Tawil, Dr. Claus Von Wobeser) ("*Charanne*").

[10] RL-0292, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016 (Judge James Crawford AC, Dr. Stanimir Alexandrov, Prof. Pierre-Marie Dupuy) ("*Blusun*"), §317.

> and is more determinate. It is a criterion which administrative law courts, and human rights courts, have become accustomed to applying to governmental action."[11]

25. On the other hand, the tribunal in *Antin* offers some indications on how to establish when a change is radical and what reliance of investors deserves to be protected:

> "[...] considering the context, object and purpose of the ECT, the Tribunal concludes that the obligation under Article 10(1) of the ECT to provide FET to protected investments comprises an obligation to afford fundamental stability in the essential characteristics of the legal regime relied upon by the investors in making long-term investments. This does not mean that the legal framework cannot evolve or that a State Party to the ECT is precluded from exercising its regulatory powers to adapt the regime to the changing circumstances in the public interest. It rather means that a regulatory regime specifically created to induce investments in the energy sector cannot be radically altered —i.e., stripped of its key features— as applied to existing investments in ways that affect investors who invested in reliance on those regimes."[12]

26. The criteria used to analyze the "stability undertaking" both on its own under FET and through the lens of the investors' legitimate expectations seem to coincide.

27. Either as an autonomous standard embedded in FET, or as a component of legitimate expectation, it is my understanding that the undertaking of encouraging and creating stable conditions for investments should thus be applied within the abovementioned boundaries.

On the challenged measures

28. As stated in the Award, "the Claimants' case is that the Respondent breached the FET standard, in relation to both the GFT and the Offshore Wind Projects, by dismantling the key components of the regulatory framework governing offshore wind energy. According to the Claimants, these changes were implemented by four sets of measures: (i) the Development Freeze; (ii) the shift to a centralized grid connection system; (iii) the reduction of expansion targets and halting the

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[11] RL-0292, *Blusun*, §318.
[12] CL-0033, *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.*, ICSID Case No. ARB/13/31, Award, 15 June 2018 (Dr. Eduardo Zuleta, Mr. J. Christopher Thomas KC, Prof. Francisco Orrego Vicuña) ("*Antin*"), §532.

development in areas further away from shore; and (iv) the introduction of a compulsory tender procedure by way of the 2017 Renewable Energy Sources Act and the Offshore Wind Energy Act" (Award, §371).

29. The Tribunal Majority finds that "the Development Freeze was a legitimate regulatory measure at the time it was enacted and did not amount to a breach of the FET standard in relation to the Claimants' Offshore Wind Projects, regardless of whether the applicable FET standard is stated in terms of legitimate expectations, regulatory stability or proportionality" (Award, §398).

30. The Tribunal Majority also finds that "the 2012 Energy Act substantially modified the system for obtaining grid connections by introducing the annual O-NEPs for the EEZ in the North Sea" (Award, §400). However, "the centralized grid connection system introduced by [this] Act was on its face a justified and legitimate measure in view of the challenges faced by the offshore wind energy industry at the time, and did not necessarily have to result in additional delay in granting grid connections" (Award, §422).

31. I agree with these findings.

32. Conversely, the Tribunal Majority considers that "the way in which the O-NEPs were in fact implemented did result in substantial additional delay" (Award, §422). Moreover, the Claimants had "reasonably expected at the time they made their investments that the delivery time for a grid connection indicated in the 2009 BNA Position Paper would not be unreasonably delayed" (Award, §423). Such expectations would however be frustrated "when O-NEPs 2013, 2014 and 2015 established grid connection dates that were much later than the delayed dates envisaged by TenneT at the time when the Development Freeze was introduced" (Award, §424). The precise moment for the violation is set in March 2015, when a BSH Circular endorsed the priority given by the O-NEPs to projects closer to shore regardless of their stage of development (Award, §426).

33. While I agree with the further finding that the policy change enacted by 2014 Renewable Energy Sources Act did not amount to a breach of FET (Award, §428), I disagree with the assessment made of the legitimate expectations of the Claimants on which the violation is based, on the one side, and the illegitimacy of the O-NEPs under the FET Standard, on the other.

The Legal Framework the Claimants relied upon at the time of the Investment

34. The Claimants made their investment between 2010 and 2011. At that time the 2009 Spatial Planning Ordinance (Award, §97), the 2009 Renewable Energy Sources Act (Award, §91) and the

2002 Offshore Installations Ordinance (Award, §86) were all in place. Such measures were the result of (in some cases repeated) amendments to the original acts of a decade before. Some regulatory changes had thus already occurred since the very first regulatory measure governing offshore wind energy projects in Germany's EEZ, the 1997 Offshore Installation Ordinance, some of which not irrelevant in regulating the mechanisms for obtaining connection to the grid and the consequent rights of applicants (Award, §§78 ff.).

35. In particular, the objective of the 2009 Spatial Planning Ordinance was to facilitate the economic and scientific use of the EEZ, while ensuring the safety and ease of maritime navigation and protection of the marine environment. It was based on the establishment of priority areas for each of the activities to be ensured (shipping, exploitation of non-living resources, pipelines and submarine cables, marine scientific research, energy production – wind energy in particular – fisheries and mariculture, and marine environment), and set holistic guidelines for spatial (joint) development. Some areas would be exclusively devoted to specific activities, and in its entirety the plan would have to respond and support the Respondent's Sustainability Strategy. The 2009 Spatial Planning Ordinance was indeed based *inter alia* on the "Strategy of the Federal Government for the Use of Wind Energy at Sea", which was in turn part of the Federal Government's Sustainability Strategy. The Strategy on Wind Energy at Sea was oriented in particular towards exploiting the potential for wind energy as quickly as possible.[13]

36. In this context, the Ordinance "identified three priority areas for the development of offshore wind projects, each located relatively close to the coastline. In these areas, the production of wind energy was granted priority over other spatially significant uses, and spatially significant planning, measures and projects that were not compatible with the function of the wind energy priority areas were prohibited" (Award, §98).

37. The measures described are all general in nature, and do not address the Claimants specifically, nor an easily defined specific category of operators.

38. As stated, in my understanding legitimate expectations can arise from general measures provided that they were created with the purpose of attracting investments ("legislative or regulatory acts 'with a specific aim to induce [...] investments'": *Silver Ridge*, *supra*, at §20). I do not believe this was the case: the measures were addressed without distinction to anyone wanting to enter the wind energy market, either national or foreign, and irrespective of status. They also included incentives

[13] RL-0198, 2009 Spatial Planning Ordinance, Section 2.3, p. 4

to energy production (but this did not directly concern the issue of the connection to the grid, which was a pre-condition to the obtainment of an authorization leading to incentives), of course, but if establishing a mechanism of incentives by law aimed at the expansion of a new market were enough to satisfy the condition, basically any measure in the renewable energy sector would be qualified as a commitment creating legitimate expectations.

39. Moreover, the legislation in force at the time of the investment was already the result of progressive amendments to the regulatory framework, and thus investors should have been aware of the continuous changes, at least if reasonably within the general principles applicable to the sector. This would also include the 2009 Spatial Planning Ordinance, which already included divisions into zones and priorities, as well as the principles under which precedence was to be given to projects or areas where the potential for wind energy could seemingly be exploited as quickly as possible. Finally, it was clear that any plan had to be consistent with the overall sustainability goals established in the Respondent's Sustainability Strategy, going beyond wind energy production.

40. I also dissent on the reliance that could be derived from the 2009 BNA Position Paper.

41. The Tribunal Majority considers that this was a non-binding instrument, and did not create a legal right to a 30-months delivery time for grid connection, as indicated in the Position Paper itself (Award, §422). I agree.

42. I also agree with the statement that "it [the 2009 BNA Position Paper] [...] was an authoritative indication [...] of the expected timeframe at the time of its adoption" (Award, §422).

43. However, in my understanding this statement cannot make the Position Paper amount to a valid basis for legitimate expectations under the ECT. The 2009 BNA Position Paper was a general, non-binding instrument addressing the market at large and offering general indication with an apparent double function: providing the agency with interpretation of the law (the 2009 Energy Act) and offering simultaneous guidance on conditions to be satisfied to obtain a grid connection under the circumstances. I do see that these kinds of documents issued by the relevant authority intend to reduce uncertainty and provide guidance in the market, thus generating some level of expectation on their content, but they cannot by themselves be read as a commitment on which to base legitimate expectations to be protected under the FET, in the light of their general nature and the fact that they can be overcome and are clearly meant to address the specific circumstances at the time they are issued.

44. This does not mean that the Respondent was thus free to behave under no constraints. Following *Blusun* (*supra*, §23), "an investor has a legitimate expectation that, when modifying the existing regulation based on which the investment was made, the State will not act unreasonably, disproportionately or contrary to the public interest". Or, applying the stability standard autonomously, the Respondent must act in public interest, exercise its regulatory powers proportionally and not disrupt systems under which the Claimants had made their investment (*supra*, §16).

Framing of O-NEPs in the Domestic Regulatory Context

45. The various measures adopted from 2012 to 2016 did not depart from the principles established in the measures in force at the time of making the investment. Changes occurred, also relevant, but they did not disrupt the general regulatory framework. I concur with the Tribunal Majority in reaching this conclusion, on which I do not need to elaborate further.

46. O-NEPs were subsidiary measures (adopted by the BNA based on a proposal made by the TSO) implementing a legitimate legislative act (the 2012 Energy Act), found not to be in violation of the ECT. They were legitimately adopted within the competences of the BNA. Furthermore, they established their plan within the boundaries set by the 2012 Energy Act:

> "Section 17b – Offshore grid development plan
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> [...]
>
> (2) [...] Criteria for the timing of implementation may include, in particular, the progress of realization of the offshore plants to be connected, the efficient use of the connection capacity to be built, the spatial proximity to the coast, and the planned commissioning of the grid connection points."[14]

47. The BNA did apply these criteria by legitimately choosing to elaborate its plan based primarily on spatial proximity to the coast. I dissent from the statement by the Tribunal Majority that the prioritization of this criterion against the others established in Section 17b(2) was an indication of illegitimate behavior (Award, §425). Criteria were not listed in order of priority, and nothing indicated that the authority would not be able to rely primarily on any of these ("*may* include").

[14] C-0035.

48. Furthermore, the choice is in line with the overall regulation of the EEZ, including the principles expressed in the measures in force at the time of the investment, including the 2009 Spatial Planning Ordinance. The O-NEPs also seem to be in line with the general sustainability principles established in the Sustainability Strategy of the Federal Republic of Germany and may also respond to the criteria of an efficient use of the connection capacity to be built.

49. On the other hand, I would follow the indication by the *Blusun* tribunal not to second-guess the host State's policies, as it is impossible to establish whether the choice of one of the other criteria would have produced less adverse consequences on investors or would have been more efficient. They might have produced less adverse consequences on the Claimants, but possibly more adverse consequences on other investors, in the light of the general constraints.

50. O-NEPs were general regulatory enactments properly approved and enacted in accordance with municipal administrative law, intended to apply to an entire, heavily regulated sector, and promulgated in the furtherance of the common good, in compliance with a set of legislative acts consistent with the ECT. In this context, I would consider them reasonable and a proportionate response to the public interest that was being pursued.

The 2017 Offshore Wind Energy Act

51. Finally, the Tribunal Majority finds that the 2017 Offshore Wind Energy Act (the "2017 Act") "formalized as a matter of law the effects of the March 2015 Circular" (Award, §429).

52. In light of my reading of the O-NEPs within the domestic regulatory framework, I cannot share this finding. The 2017 Act did terminate the plan approval process and replaced it with a new, mandatory centralized tender procedure. This was a radical change, which was further complemented by a modification in the remuneration regime as it eliminated the feed-in tariff (Award, §430). However, I cannot share the finding that the 2017 Act merely formalized the effects of measures already taken earlier "as the approval processes had *de facto* been suspended already since 2013-2014 for projects located further away from shore" (Award, §430).

53. O-NEPs were secondary measures, which could always be modified by a legislative act. The suspension operated by the O-NEPs could have been interrupted in any way and the connection procedures reinstated. In fact, if the 2017 Act had not modified the procedure for obtaining the connection and excluded plants such as those of the Claimants, this or any other alternative legislative act could have instead restored the Claimants to their rights. The delays could have been

cushioned. It is the 2017 Act, as a legislative act that radically changes the method of obtaining the connection and that excludes plants designed far from the coast, that determines the effective impossibility for the Claimants to continue with the procedures for requesting the necessary authorizations. The previous delays are the factual, not legal, cause of the exclusion of the Claimants' plants, and could still have been remedied.

54. I do not intend to ignore in this way the effects of the long delays produced by the O-NEPs, and the vanishing of efforts and activities of the Claimants because of the *de facto* blockage produced by the progression of the various challenged measures. However, *per se* such measures could be considered reasonable and proportionate until the definitive change of regime occurred and there was no longer any possibility of curing the previous delays or blockages.

55. I wonder whether it would be possible to state that the breach of Article 10(1) ECT by the 2017 Act could be confirmed and reinforced by the circumstances of the case. The progression of measures undertaken before its enactment, *de facto* making the participation to the new system by the Claimants impossible, contributed to the fact that the change in regulation was in breach of Article 10(1). If it is more likely that a change results in a violation of the stable conditions requirement if it provokes a radical change in an existing regulatory regime (*Encavis*, *supra*, §16), such likeness may indeed be reinforced by the context formed by the previous State acts immediately preceding the regulation of the grid connection.

Effects on the assessment of the Respondent's behavior under Article 13

56. At the outset, I agree with the statement by the Tribunal Majority that a breach of Article 10(1) ECT does not entail that the measures in violation also amount, *ipso jure*, to an unlawful expropriation (Award, §460).

57. I equally agree that the regulatory measures taken by Germany during the 2012-2017 period gradually resulted, as a matter of fact, in a total loss of the value of the NOH 2 projects (Award, §461).

58. However, consistent with its conclusions under Article 10(1), the Tribunal Majority considers that what amounts to creeping indirect expropriation was composed by a series of administrative acts in violation of the ECT starting in 2013 (Award, §462).

59. I disagree.

60. I rather qualify the situation as entailing legitimate State measures whose progression led to expropriation which crystallized only with the adoption of the 2017 Act, as the act that indeed caused the definitive loss of value of the investment.

61. UNCTAD has defined a creeping expropriation as a sub-category of indirect expropriation formed by an "incremental encroachment on one or more of the ownership rights of a foreign investor that eventually destroys (or nearly destroys) the value of his or her investment or deprives him or her of control over the investment." Thus, "[a] series of separate State acts, usually taken within a limited time span, are then regarded as constituent parts of the unified treatment of the investor or investment."[15]

62. Indeed, the decisive factor in classifying indirect expropriation as a creeping expropriation is whether the expropriation results from a series of acts, each of which by itself is not sufficient to crystallize an expropriation:

> "By definition, creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation. If the process stops before it reaches that point, then expropriation would not occur. This does not necessarily mean that no adverse effects would have occurred. Obviously, each step must have an adverse effect but by itself may not be significant or considered an illegal act. The last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel's back. The preceding straws may not have had a perceptible effect but are part of the process that led to the break."[16] [emphasis added]

63. Finally, since in my understanding the expropriation crystallized with the 2017 Offshore Wind Energy Act (if the process had stopped before it reached that point, then expropriation would not have occurred: *supra*, §62), and the violation thus occurred at that point in time, I consider that the valuation date should be at a time immediately preceding such crystallization, thus the same as the validation date in relation to the violation of Article 10(1) ECT.

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[15] United Nations, *Expropriation: UNCTAD Series on Issues in International Investment Agreements* II (2012), p. 11.
[16] *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 (Dr. Andrés Rigo Sureda, Judge Charles N. Brower, Prof. Domingo Bello Janeiro), §263.

64. I thus conclude that the Respondent violated Article 10(1) and Article 13 ECT by adopting the 2017 Offshore Wind Energy Act, while no violation occurred by prior measures, and that the validation date under both legal bases should be established in early 2017.

Prof. Dr. Maria Chiara Malaguti