DISSENTING OPINION OF MR GARY BORN

1. I agree with many aspects of the Tribunal's conclusions in this arbitration. I concur with the Tribunal's conclusions regarding its jurisdiction under the Treaty between the Federal Republic of Germany and the Czech and Slovak Federal Republic on Encouragement and Reciprocal Protection of Investments (the "Germany BIT") and the Energy Charter Treaty (the "ECT," when referred to jointly with the Germany BIT, the "Treaties"). I also concur with the Tribunal's conclusion that the Czech Republic did not violate its obligations under Article 2(1) of the Germany BIT or Article 10(1) of the ECT when it amended the Act on Income Tax by repealing the Income Tax Exemption for renewable energy producers.

2. I am, however, unable to join the Tribunal's conclusion that the Czech Republic did not breach its fair and equitable treatment and non-impairment obligations under the Treaties to the claimants in this arbitration – Antaris GmbH, a German commercial company, and Dr. Michael Göde (the "Claimants") – when it imposed a levy that reduced the tariffs payable to certain renewable energy sources, including the Claimants' solar plants (the "Solar Levy").[1] Given the significance of the legal issues involved, and notwithstanding my deep respect for my colleagues on the Tribunal, I am compelled to address these issues in this separate opinion.

3. Before addressing these issues, it is useful to summarize the essential elements of the Tribunal's reasoning. The Tribunal centers its analysis of the Claimants' fair and equitable treatment and non-impairment claims on the following questions:

> "The essential question is whether the combination of (1) the promotion of the Incentive Regime in its early days as a guarantee and (2) the deliberate non-retroactivity of the abolition of the 5% cap by Act 137/2010 for solar plants connected to the grid from 2011 and the abolition of the support by Act 330/2010 from March 11, 2011, gave rise to a legitimate expectation by solar investors in 2010 that there would be no other changes which would affect their investment. For this purpose, for the reasons given above, the imposition of the Solar Levy is to be treated as such a change."[2]

4. The Tribunal begins its analysis by relying on a selection of formulations of fair and equitable treatment and non-impairment standards from prior arbitral awards which it "summarize[s as] the present state of international law and practice" in the following "general propositions:"[3]

> (1) "An expectation may arise from what are construed as specific guarantees in legislation.
>
> (2) A specific representation may make a difference to the assessment of the investor's

[1] Regarding the four plants commissioned before 1 January 2011 (*see* Claimants' Opening Presentation, slides 47-50), but excepting the Holýšov plant, which was commissioned in 2008 and not affected by the Solar Levy. In my dissenting opinion, I have not considered the Respondent's allegations regarding irregularities surrounding the Mozolov plant.

[2] Award, para. 400.

[3] *Ibid.*, paras. 360-362.

knowledge and of the reasonableness and legitimacy of its expectation, but is not indispensable to establish a claim based on legitimate expectation which is advanced under the FET standard.

(3) Provisions of general legislation applicable to a plurality of persons or a category of persons, do not create legitimate expectations that there will be no change in the law; and given the State's regulatory powers, in order to rely on legitimate expectations the investor should inquire in advance regarding the prospects of a change in the regulatory framework in light of the then prevailing or reasonably to be expected changes in the economic and social conditions of the host State.

(4) An expectation may be engendered by changes to general legislation, but, at least in the absence of a stabilization clause, they are not prevented by the fair and equitable treatment standard if they do not exceed the exercise of the host State's normal regulatory power in the pursuance of a public interest and do not modify the regulatory framework relied upon by the investor at the time of its investment outside the acceptable margin of change.

(5) The requirements of legitimate expectations and legal stability as manifestations of the FET standard do not affect the State's rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances.

(6) 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.

(7) Except where specific promises or representations are made by the State to the investor, the latter may not rely on an investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable.

(8) Protection from arbitrary or unreasonable behaviour is subsumed under the FET standard.

(9) It will also fall within the obligation not to impair investments by 'unreasonable … measures' (Article 10(1), ECT) or 'arbitrary ... measures (Article 2(2), Czech Republic/Germany BIT).

(10) The investor is entitled to expect that the State will not act in a way which is manifestly inconsistent or unreasonable (i.e. unrelated to some rational policy)."[4]

5. Based on those "propositions," the Tribunal considers, and rejects the claim, that the Czech Republic breached the fair and equitable treatment and non-impairment protections under the Treaties when it imposed the Solar Levy.[5] Regarding the Claimants' legitimate expectations, the Tribunal states that:

"The Tribunal accepts that the Solar Levy was a transparent device to avoid what the Respondent had been advised might cause investor claims. That is clear from the minutes the Coordination Committee. But, in common with the Czech Constitutional Court, and the European Commission's Decision on state aid, the Tribunal does not consider that the modifications to the support scheme and the tax measures were retroactive, and considers that they did not violate the principle of legitimate expectation."[6]

6. Likewise, the Tribunal concludes that the Solar Levy was not an arbitrary or unreasonable change to the Czech Republic's legislative framework for renewable energy:

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4 *Ibid.*, para. 360 (footnotes omitted).

5 *Ibid.*, paras. 430, 441-446.

6 *Ibid.*, para. 430 (footnotes omitted).

> "The Tribunal accepts that the Solar Levy was designed (unnecessarily, in the view of the Tribunal) to disguise abolition of the 5% limit. But it was adopted as part of a package of measures which (1) introduced a State budget subsidy to limit the rise in consumer electricity prices caused, in large part, by the solar boom, and (2) sought to offset this new budget expenditure with new tax revenues. The Solar Levy was specifically targeted at those solar installations that received a FiT which was excessive. The Tribunal accepts the Respondent's case that for purposes of the reasonableness analysis, it does not matter whether a tribunal believes that a particular course of action is 'good' or 'bad,' that a different solution might have been 'better,' or that a State could have done 'more,' or that other States took different measures."[7]

7. I disagree with the Tribunal's conclusion that the Czech Republic did not, by enacting the Solar Levy, violate the Treaties' fair and equitable treatment and non-impairment protections. In my view, the evidentiary record shows that the Czech Republic enacted legislation that provided specific and unambiguous guarantees to investors in the renewable energy sector and that these commitments guaranteed that specified minimum tariffs would be payable for electricity produced by renewable energy sources for a period of 15 years. The Claimants relied on these specified tariffs in making substantial investments in the Czech Republic but, thereafter, despite its statutory guarantees, the Czech Republic adopted the Solar Levy, which materially reduced the tariffs that would be paid to certain renewable energy sources, including the Claimants' plants. In my view, that breach of the Czech Republic's previous guarantees is a violation of both the Germany BIT and the ECT.

8. More specifically, in my view, this case requires that three questions be addressed: (a) whether Section 6(1) of the Act No. 180/2005 Coll. of 31 March 2005 on the promotion or electricity production from renewable energy sources and amending certain acts (the "Act on Promotion" or the "Act") provided statutory guarantees to investors and, if so, whether these guarantees were breached by the Czech Republic's imposition of the Solar Levy; (b) whether breaches of statutory guarantees of specified treatment to particular classes of investors are capable of triggering fair and equitable treatment or non-impairment responsibility under the Treaties; and (c) whether the Claimants in this arbitration could rely on any breaches by the Czech Republic of its statutory guarantees.

9. In my view, all three questions must be answered affirmatively. In the following sections, I briefly address the points on which I disagree with the Tribunal's reasoning and conclusions. Since in my view the Czech Republic, by enacting the Solar Levy frustrated the Claimants' legitimate expectations, I find it unnecessary to address the second question considered by the Tribunal – that is, whether the Czech Republic changed its regulatory framework in an arbitrary or unreasonable manner.

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7 *Ibid.*, para. 443.

I. The Czech Republic guaranteed that it would maintain feed-in tariffs for renewable energy sources at fixed minimum levels for 15 years

10. In my view, it is clear that the Czech Republic guaranteed the Claimants and other investors that it would maintain feed-in tariffs ("FiTs" or "Purchasing Prices") for renewable energy sources at fixed minimum levels for a defined period (15 years) from the date of commissioning of such sources. It is also clear that the Czech Republic subsequently breached this undertaking by imposing the Solar Levy on renewable energy sources that had already been commissioned, thereby reducing the guaranteed FiTs for electricity produced by these sources.

11. The Tribunal accepts that the Act on Promotion guaranteed specified treatment to renewable energy producers and that the Czech Republic then actively promoted the Act's guarantee of stability to investors:

> "There can be no doubt that both the Respondent and the ERO described the incentive regime in terms of a guarantee or promise of stability, and that the Czech Government actively promoted the new regime at home and abroad, and described its main element in terms of a guarantee.
>
> The documents which establish this have already been referred to, and it is only necessary to mention that the Czech Ministry of Industry and Trade, when submitting the bill to Parliament, stated that one of the main objectives of the Act on Promotion was to establish a secure, stable and predictable regime; the 2003 Explanatory Report on the Act on Promotion stated that the support system was based 'on providing a guarantee to investors'; the former Minister of Environment stated that the most important principle of the law was the guarantee of a stable FiT for a 15 year period; the Respondent described the purpose of Section 6(1)(b)(2) as: 'providing guarantees to the investors and owners … that … revenue …will be maintained for a period of 15 years …'; and the ERO described the Act on Promotion as 'bringing a guarantee of long-term and stable promotion …' including a 'guarantee of revenues … for a period of 15 years'."[8]

12. I agree with that conclusion. In my view, however, the Czech Republic provided more than an abstract promise of stability: Section 6 of the Act on Promotion contains a statutory guarantee that specified minimum FiTs would be paid for fixed time periods to defined renewable energy sources. This conclusion is crystal clear from the Act's language and its object and purposes, and was publicly confirmed by the Czech Republic in numerous statements.

13. Section 6 of the Act is titled "*Amounts of Prices for Electricity* from Renewable Sources and Amounts of Green Bonuses." The purpose of this provision was to prescribe the "*amounts of prices*" that would be payable for electricity produced from a defined category of sources (specifically, certain renewable energy sources).[9] The Act guaranteed these prices – which were

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8 Award, paras. 366-367 (footnotes omitted).

9 Respondent's translation of the Act on Promotion (R-5).

different from the prices for other categories of electricity in the Czech Republic – for a vitally-important purpose. That purpose was to encourage the production and use of electricity from renewable energy sources and thereby achieve environmental protection objectives and satisfy commitments by the Czech Republic to the European Union regarding renewable energy.[10]

14. It is also clear that renewable energy installations generally require substantial initial capital investments, in often newly-developed technologies.[11] Absent a guarantee of fixed FiTs for electricity produced by renewable energy sources, it appears highly unlikely that investors would have constructed such sources or that lenders would have agreed to finance these investments.[12]

15. The Act on Promotion provides two separate, but critical, guarantees to investors in renewable energy: (i) a guarantee that the ERO will establish FiTs providing for individual categories of renewable energy sources commissioned in specific calendar years, at least a "fifteen year payback period;" and (ii) a guarantee that the FiTs established by the ERO for renewable energy sources commissioned in particular calendar years will not be reduced for 15 years (later extended to 20 years). Both of these guarantees are clear from the Act's text and history.

16. First, Section 6(1)(b)(1) of the Act provides that the FiTs established by the ERO for particular sources in particular years would allow a return of an investor's capital investment in 15 (later 20) years. In the words of Section 6(1)(b)(1),

> "The Office [or the "ERO"] sets, one calendar year in advance, the purchasing prices for electricity from Renewable Sources (the 'Purchasing Prices'), separately for individual kinds of Renewable Sources, and sets green bonuses, so that […] (b) for facilities commissioned […] [1] after the effective date of this Act, there is attained, with the Support consisting of

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10 *See* statements by the Czech Minister of Environment regarding the implementation of Directive 2001/77/EC, Stenographic record of the meeting of the Chamber of Deputies, dated 13 February 2004 ("However, the 8% share of renewable resources in gross power consumption in 2010, which we undertook in the [accession treaty to the European Union], forces us to draft a bill which would facilitate private investment in this field, because it is impossible to fund it entirely from the Czech Energy Agency fund or from the State Environmental Fund. Since the energy market is still very deformed not just by the existence of obsolete power plants built under different economic conditions with material support of the state but mainly as a result of the insufficient internationalisation of external costs incurred by the power generation in classical power stations, the government proceeded to draft the bill, which should implement EP and EC Directive 2001/77/EC.") (C-24).

11 [redacted] and [redacted] Report, para. 1.13 ("Investment in RES involves a fundamental asymmetry between relatively large upfront, irreversible costs ('sunk costs'), and high revenue uncertainty given that generation can, in general, vary significantly depending on the availability of the renewable resource (e.g., sunlight, wind or rainfall). As a consequence, most support schemes attempt to provide for substantial revenue certainty so as to make renewable projects bankable.").

12 Newspaper article in "Ihned.cz", pp. 4-5 ("Once the plants' owners will have the first 15 years of operation guaranteed, they will have an opportunity to draw funds from non-governmental sectors. According to Mr Ambrozek, this is the only way to meet EU requirements.") (C-25); [redacted] and [redacted] Report, para. 3.26 ("If a regulatory framework does not offer investors a sufficient degree of predictability, investors will demand a higher rate of return or will directly choose to invest elsewhere. Similarly, lenders will not be willing to finance investors or will demand very high interest rates. This is more than theory: the negative impact of regulatory uncertainty on investment has been shown to be significant in the case of RES.").

> the Purchasing Prices, a fifteen year payback period on capital expenditures, provided technical and economic parameters are met […] ."[13]

Section 6(1)(b)(1) thus provided for the ERO to establish on an annual basis specified FiTs, for every category of renewable energy sources, which would apply to all such sources commissioned in that calendar year.

17. Second, and separately, Section 6 of the Act also very clearly and intentionally guaranteed that the FiTs established by the ERO would be maintained as a minimum for a certain period of time. Section 6(1)(b)(2) did so when it provided that

> "[the ERO] sets, one calendar year in advance, *the purchasing prices for electricity from Renewable Sources (the 'Purchasing Prices')*, separately for individual kinds of Renewable Sources, and sets green bonuses, so that […] (b) for facilities commissioned […] [2] after the effective date of this Act, *the amount of revenues per unit of electricity from Renewable Sources, assuming Support in the form of Purchasing Prices, is maintained as the minimum [amount of revenues] [14], for a period of 15 years* from the commissioning year of the facility, taking into account the industrial producer price index."[15]

18. Section 6(1)(b)(2) is unequivocal. It provides that the ERO will establish, one year in advance, the "Purchasing Prices" for electricity produced from specified renewable energy sources, and then guarantees that these "Purchasing Prices" established by the ERO, and the "revenues per unit of electricity" from the specified energy sources, will be "*maintained as the minimum* for a period of 15 years" from the date of commissioning of each source. The provision required that the FiTs for electricity produced from renewable energy sources commissioned in a particular year be fixed by the ERO, one year in advance, and then for these FiTs to be maintained (as a minimum) for a 15-year period following commissioning of a source – that is, "*for a period of 15 years from the commissioning year of the facility*." These fixed minimum "Purchasing Prices" and "revenues per unit of electricity" are subject only to the possibility of upward (not downward) adjustment under Section 6 for inflation.

19. Thus, Section 6 of the Act unambiguously guarantees that the FiTs for electricity produced from specified renewable energy sources will be fixed in advance and then maintained for 15 (later 20) years from the date of commissioning of the source. As discussed above, this long-term guarantee of a specific minimum FiT for each renewable energy source, following the date of its commissioning, was essential to the Act's structure and purposes.[16]

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13 Act on Promotion, Section 6(1). Respondent's translation of the Act on Promotion (R-5).

14 Text in parentheses appears in the Czech Republic's original translation.

15 Act on Promotion, Section 6(1). Respondent's translation of the Act on Promotion (R-5) (emphasis added).

16 *See* para. 14 above.

20. Importantly, the guarantee of minimum FiTs provided in Section 6(1)(b)(2) of the Act is a separate guarantee of an absolute level of revenue, in addition to Section 6(1)(b)(1)'s guarantee of a 15-year payback of capital expenses per year over 15 (later 20) years. Pursuant to Section 6(1) of the Act, the Czech Republic not only guaranteed that the FiTs payable for electricity produced by renewable energy sources would allow a return of capital investment in 15 (later 20) years – Section 6(1)(b)(1) – but also that the FiTs established by the ERO for energy sources commissioned in a particular year would be maintained, as a minimum, for 15 (later 20) years – Section 6(1)(b)(2).

21. This is confirmed by Section 6(4) of the Act. Section 6(4) established a so-called "5% brake rule," requiring the FiTs established by the ERO for a particular year to be no less than 5% lower than the FiTs that had been set for the preceding year.[17] This 5% brake rule provided that "Purchasing Prices set by the Office for the following calendar year shall not be less than 95% of the Purchasing Prices in effect in the year for which the setting decision is made."[18] Section 6(4) inevitably meant that the FiTs set by the ERO for a particular year ("the Purchasing Prices") would provide a higher rate of return than that specified in Section 6(1)(b)(1).[19] Indeed, this was the sole purpose of Section 6(4)'s brake rule – namely, to guarantee FiTs that were *higher* than those prescribed by Section 6(1)(b)(1).

22. Despite this, the Respondent asserts that Section 6(1)(b) only maintains FiTs at the level prescribed by Section 6(1)(b)(1)'s guarantee of a return of investment in 15 years.[20] That reading is impossible to reconcile with either the language or the purpose of Section 6 of the Act.

23. As noted above, Section 6(1)(b)(2) could not be clearer in requiring payment of fixed minimum FiTs, prescribed for sources commissioned in a particular year. Likewise, Section 6(4) necessarily meant that there would be cases where the FiTs established by the ERO for a particular year were *higher* than those provided by Section 6(1)(b)(1)'s 15-year return of investment period. By interpreting Section 6(1)(b)(2) as guaranteeing only FiTs that provided a 15-year return on investment, the Respondent ignores not only the plain language of Section 6(1)(b)(2), but also reads Section 6(4) out of the Act. That reading is not only impossible to square with the Act's language, but also contradicts the Respondent's own acknowledgment that

17 Act on Promotion, Section 6(4). Respondent's translation of the Act on Promotion (R-5).

18 *Ibidem*.

19 Respondent's Rejoinder, para. 309 ("ERO calculated the WACC for the RES sector as being equal to a post-tax rate of 7%. This rate was then used in setting the FIT for solar RES in all years except 2009 and 2010, when the 5% Limit prevented ERO from doing so.") (footnote omitted).

20 Respondent's Counter-Memorial, para. 5(j).

"Claimants are correct that the prospect of a simple return of investment, without a profit element, is normally insufficient to induce investment, even in relatively safe assets."[21]

24. The Respondent's interpretation of Section 6 also ignores the Czech Republic's own consistent descriptions of Section 6 and the Act on Promotion as providing a guarantee of minimum FiTs or Purchasing Prices for a 15-year period to investors in renewable energy sources, including the Czech Republic's statements in this arbitration.

a. In June 2005, shortly after the implementation of the Act on Promotion, Mr. Martin Bursík, Minister of Environment from 2007 to 2009, authored a newspaper article declaring that "*[t]he most important principle of the law for producers is the guarantee of a stable feed-in tariff for a 15-year period following the launch of the power station into operation*. In practice, this means that the valid feed-in tariff stipulated by the price assessment of the ERO in a year in which the producer supplies the first kWh into the grid remains preserved for 15 years and, moreover, will be adjusted based on the index of prices of industrial producers. This principle removes the greatest weakness of the existing promotion of renewable resources - i.e. *the risk that the ERO will reduce the feed-in tariffs on a year on year basis* and the producer's cash flow and ability to repay loans will be threatened."[22]

b. In a report submitted by the Czech Republic to the European Commission in 2005, the Czech Republic explained that the Act on Promotion "now provides previously missing guarantees for the long-term stability of the support needed for commercial decision-making,"[23] i.e. "an *unprecedented system of support in the form of fixed purchase (feed-in) prices* and, where necessary, supplements to market prices for electricity, and *also guarantees a level of return on each unit of electricity produced for a period of 15 years*."[24] The Czech Republic's statements were directed specifically to the guaranteed FiTs, over a 15-year period, and not on "return of investment" or payback period.

c. In a report submitted by the Czech Republic to the United Nations in 2006, the Czech Republic stated that "[t]he system of support [under Section 6 of the Act on Promotion] is based particularly on … providing *guarantees to the investors and owners of installations*, producing electricity from renewable sources who are subject to support pursuant to the Act, that *the amount of revenue per unit of produced electricity from renewable sources acquired by the producers from the support will be maintained for a period of 15 years* from bringing the installation into operation (or for a period of 15 years for installations that were brought into operation prior to the date of effect of the Act)."[25] The report also said that "Act No. 180/2000 Coll. newly introduced *a fifteen-year guarantee of minimum purchase prices from the date of bringing the installations into operation*…"[26] Again, the Czech Republic's statements specifically described the Act's guaranteed "revenue" and "minimum purchase prices" for a 15-year period, not a "return of investment" or payback period.

d. The ERO made presentations to investors both inside and outside of the Czech Republic, including presentations in Prague and Augsburg. These included powerpoint presentations that stated that the Act on Promotion provided a 15-year guarantee of fixed minimum FiTs.[27]

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21 Respondent's Rejoinder, para 62.

22 Newspaper article in "Moderniobec.cz" (Czech original and English translation), pp. 10-11 (C-32).

23 2004 Report on the Achievement of the Indicative Target for Renewable Electricity, p. 18 (R-165).

24 *Ibid.*, p. 3 (R-165) (emphasis added).

25 Fourth National Communication of the Czech Republic on the UN Framework Convention on Climate Change, p. 35 (C-72) (emphasis added).

26 *Ibid.*, p. 41 (C-72) (emphasis added).

27 Lecture by ERO at the conference "Energy from the Sun," Prague, 26 January 2006 (C-34); ERO presentation by Mr. Stanislav Trávníček, Augsburg, 9 October 2008 (C-230).

i. In a 2006 presentation in Prague, the ERO stated that "[p]romotion of power generation from renewable resources pursuant to Act no. 180/2005 Coll." included "economic return – 15 years" and "*preservation of promotion for 15 years while, taking into account the industrial producers price index (in feed-in tariffs)*."[28]

ii. Two years later in a presentation in Augsburg entitled "Support of Renewable Electricity in the Czech Republic," the ERO reiterated that the Act on Promotion "guaranteed" a "15 years (sic) payback period of investments."[29] Similarly, the Czech Energy Agency stated in a presentation given in a 2006 workshop in Beroun that the Act on Promotion provided "*Guaranteed prices for 15 years (ERO price assessment)*."[30]

e. The Czech Republic said in a 2006 Report on the Act that: "Act No 180/2005 on the promotion of electricity produced from renewable energy sources, which *guaranteed the long-term, stable support required for business decisions*, entered into effect on 1 August 2005. As of 1 January 2006 this Act introduced a new support system, the key features of which are: … *the guarantee of revenue per unit of electricity produced over a 15-year period* as of the date a plant is put into operation [and] the *preservation of the level of feed-in tariffs for 15 years* for plants already in operation."[31] Once more, the Czech Republic's statements focused on the guaranteed FiTs (or "revenue" and "feed-in tariffs"), over a 15-year period, and not on "return of investment" or payback period.

f. An Action Plan, submitted by the Czech Republic to the European Union in July 2010, addressed the question "how long is the *fixed tariff guaranteed*," by stating "*[t]ariffs are guaranteed* according to the following table," listing a "*Feed-in price guarantee* (in years)" for photovoltaic sources as "*20 [years]*."[32] The 2010 Action Plan also stated, in answering a question whether "any tariff adjustment [is] foreseen in the scheme," that "Feed-in prices for new production installations are calculated on an annual basis, taking into account current investment costs. *For existing sources, i.e. production installations already in operation, the prices are increased by 2 to 4 percent according to the development of the industrial producer price index*."[33] The Action Plan said specifically that there were no caps or ceilings on the volume of electricity that was eligible for the guaranteed minimum tariffs.[34] As with the Czech Republic's statements quoted above, the Action Plan referred to guaranteed "tariffs" and "feed-in-prices," not "return of investment."

g. A "Questions & Answers" section on the ERO's website quotes, both in English and German, the provisions of Decree No. 150/2007, including the statements that the "*Purchase Price and Green Bonus are claimed according to Regulation No. 150/2007 coll. on the lifespan of facilities generating electricity*" and that the "*Purchase Prices … will increase annually considering the price index of industrial manufacturers by 2 % minimum and 4 % maximum - with the exception of those facilities incinerating biomass and biogas*."[35] The website also addresses the question whether "it [is] true that lifespan and pertinent payment of Purchase Prices was extended for photovoltaic power plants" stating "*Purchase Price and Green Bonus for photovoltaic plants with a start-up of operations on or after 1 January 2008 can be claimed for a term of 20 years*."[36] Once again, the references are to guaranteed "Purchase Prices," not "return of investment."

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28 Lecture by ERO at the conference "Energy from the Sun," Prague, 26 January 2006, p. 12 (C-34) (emphasis added).

29 ERO presentation by Mr. Stanislav Trávníček in Augsburg on 9 October 2008, p. 4 (C-230).

30 Lecture by ERO on support of renewable energy sources, 26 October 2006, p. 13 (C-35) (emphasis added).

31 "2006 Report on the Achievement of the Indicative Target for Renewable Electricity", p. 19 (R-259) (emphasis added).

32 National Renewable Energy Action Plan of July 2010 published by the Ministry of Industry and Trade, pp. 58-59 (C-73) (emphasis added).

33 *Ibid.*, p. 59 (emphasis added).

34 *Ibid.*, p. 58.

35 Q&A tool available on the ERO's website in 2009, pp. 4-5, Göde FWS, Annex II (emphasis added).

36 *Ibid.*, p. 11 (emphasis added).

25. One of the Czech Republic's principal fact witnesses in this arbitration, Mr. Josef Fiřt, also expressly conceded that Section 6(1)(b)(2) of the Act provided a statutory guarantee of fixed minimum FiTs for the statutorily prescribed 15-year period: "The Act on Promotion required that, provided the investment met technical and economic benchmarks, the Subsidy level would be sufficient to receive a payback of the investment costs within 15 years. To accomplish this objective, *the Subsidy for each installation was to be fixed at the date of commissioning for a period of at least 15 years, subject to an annual adjustment for inflation."*[37]

26. In my view, these statements by the Czech Republic leave no doubt, as the Tribunal correctly recognizes, that the Czech Republic affirmatively described the Act on Promotion to investors as a guarantee of stability. In addition, however, these statements also leave no doubt that Section 6(1)(b)(2) means just what it says – "minimum purchasing prices," "feed-in tariffs," "revenue," or "Purchasing Prices" for electricity from renewable energy sources would be "maintained as the minimum for a period of 15 years." These statements unequivocally assured investors, and their lenders, that fixed minimum FiTs were guaranteed for a period of 15 (later, 20) years from the date of commissioning of a solar energy installation. There is no other plausible interpretation of these unambiguous statements, made repeatedly and uniformly over a number of years, by numerous different representatives of the Czech Republic.

27. These statements by the Czech Republic were not limited, as suggested by the Tribunal,[38] to the early days of the Act on Promotion. Rather, as the quotations in paragraph 24 make clear, they were made consistently, from 2005 until 2010 (including in 2008, 2009 and 2010).

28. Finally, it is clear, as the Tribunal acknowledges, that the Solar Levy reduced the level of the FiTs payable to the Claimants and other investors in solar power plants. In the Tribunal's words, "the essence of the Solar Levy was the reduction of certain FiTs."[39] Likewise, the Respondent also concedes its imposition of the Solar Levy reduced the level of FiTs payable under the Act to the Claimants and other investors in the solar energy sector.[40] These acknowledgments are plainly correct: the Solar Levy indisputably was intended to, and did, reduce the level of the FiTs payable to investors under Section 6 the Act.

II. The treaties' fair and equitable treatment clauses require the Czech Republic to honor its stabilization commitments to foreign investors

[37] Josef Fiřt Witness Statement, para. 6 (emphasis added).

[38] Award, para. 400.

[39] Award, para. 251.

[40] Transcript, Day 1, page 208, lines 3-5.

29. In my view, the Czech Republic's largely undisputed refusal to honor its unambiguous undertaking in Section 6 of the Act to maintain fixed minimum FiTs for 15 (later, 20) years is an unmistakable violation of the Treaties' guarantees of fair and equitable treatment. None of the Tribunal's efforts to justify the Czech Republic's breach of its undertakings is either supported by the Treaties' text or international law and, on the contrary, contradicts both.

30. As the Tribunal observes, the Treaties provide unambiguous guarantees of fair and equitable treatment. Article 2(1) of the Germany BIT provides in relevant part that "Each Contracting Party shall in all cases accord investments fair and equitable treatment," while Article 10(1) of the ECT provides that "Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment."

31. Unlike the terms of some investment protection treaties, the guarantees of fair and equitable treatment in the Treaties are unqualified. They assure investors fair and equitable treatment "*in all cases*"[41] and "*at all times*."[42]

32. It is clear that fair and equitable treatment and non-impairment protections, like those in the Treaties, apply even in circumstances in which a state has not provided express assurances of stability or other specified treatment to investors: "there is certainly an obligation not to alter the legal and business environment in which the investment has been made,"[43] and "stable and equitable conditions are clearly part of the fair and equitable treatment standard under the ECT."[44] Or, as another tribunal reasoned, "the Claimant's reasonable expectations to be entitled to protection under the Treaty need not be based on an explicit assurance [from a government]."[45] Other arbitral awards by other investment tribunals are to the same effect, holding in multiple

41 Germany BIT, Article 2(1) (C-1) (emphasis added).

42 ECT, Article 10(1) (emphasis added).

43 *Occidental Exploration and Production Company v. The Republic of Ecuador*, UNCITRAL Final Award, 1 July 2004, para. 191 (CLA-38).

44 *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 173 (RLA-2).

45 *Saluka Investments BV (The Netherlands) v. The Czech Republic*, Partial Award, 17 March 2006, para. 329, (RLA-16).

circumstances that a state's frustration of an investor's legitimate expectations gives rise to liability under a fair and equitable treatment obligation. [46]

33. Importantly, however, if a state does provide an express or implied assurance of specified treatment to investors, that state's failure to honor its undertakings constitutes a denial of fair and equitable treatment, giving rise to liability under international law. In particular, as detailed below, where a state undertakes to provide an investor with specified treatment, protections or rights, regardless if it does so by contract, statute, or otherwise, then the state's subsequent denial of that treatment or those rights will generally constitute a denial of fair and equitable treatment.

34. The foregoing principles are non-controversial and are acknowledged expressly by the Tribunal:

> "The Tribunal does not […] accept the Respondent's suggestion that no legitimate expectations as to stability can arise in the absence of a legislative or contractual stabilization arrangement."[47]
>
> "The Tribunal accepts that promises or representations to investors may be inferred from domestic legislation in the context of its background, including official statements. It is not essential that the official statements have legal force."[48]

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46 *See International Thunderbird Gaming Corporation v. The United Mexican States*, Award, 26 January 2006, para. 147 ("where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.") (CLA-56); *CME Czech Republic B.V. v. The Czech Republic*, Partial Award, 13 September 2001, para. 611 ("breached its obligation of fair and equitable treatment by evisceration of the arrangements in reliance upon which the foreign investor was induced to invest.") (CLA-44); *Waste Management, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award 30 April 2004, para. 98 ("it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.") (RLA-179); *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 364 ("the legitimate expectations of a foreign investor can only be examined by having due regard to the general proposition that the State should not unreasonably modify the legal framework or modify it in contradiction with a specific commitment not to do so") (RLA-39); *LG&E Energy Corp et al v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 125 ("the stability of the legal and business framework in the State party is an essential element in the standard of what is fair and equitable treatment") (CLA-51); *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, UNCITRAL Decision on Liability, 30 July 2010, paras. 222-223 ("When an investor undertakes an investment, a host government through its laws, regulations, declared policies and statements creates in the investor certain expectations about the nature of the treatment that it may anticipate from the host State. The resulting reasonable and legitimate expectations are important factors that influence initial investment decisions and afterwards the manner in which the investment is to be managed. The theoretical basis of this approach no doubt is found in the work of the eminent scholar Max Weber, who advanced the idea that one of the main contributions of law to any social system is to make economic life more calculable and also argued that capitalism arose in Europe because European law demonstrated a high degree of 'calculability.' An investor's expectations, created by law of a host country, are in effect calculations about the future. Where a government through its actions subsequently frustrates or thwarts those legitimate expectations, arbitral tribunals have found that such host government has failed to accord the investments of that investor fair and equitable treatment.") (RLA-19).

47 Award, para. 365 (footnote omitted).

48 *Ibid.*, para. 366.

Similarly, the Czech Republic itself recognized these well-settled principles in this arbitration.[49] In my view, these acknowledgements are correct and reflect basic rules of international law: it is well-settled that a state may, under international law, make a binding commitment to foreign investors in its legislation.

35. This principle follows from the basic character of fair and equitable treatment protections, which focus on the legal framework of a state, which seek to ensure "fair," "equitable," and "just" conduct by states,[50] and which protect the legitimate expectations of investors.[51] The decisive issue is not the form of a state's undertaking (as a contract, statute, decree or regulation) to investors, but whether the statements and actions of the state provide a sufficiently clear commitment regarding future treatment to give rise to legal rights or legitimate expectations on the part of an investor.

36. It is well-settled that a state may make binding commitments to foreign investors through the medium of statutes or other legislative acts. That principle is affirmed by authorities too numerous to fully recite:

> a. "[S]tability means that the investor's legitimate expectations based on this legal framework and on *any undertakings and representations made explicitly or implicitly by the host state will be protected*. The investor may rely on that legal framework as well as on

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49 Respondent's Counter-Memorial, para. 544 ("If a State wishes to "stabilize" its legislation — i.e., to render the legislation immutable and to make any changes to the legislation actionable — a particular process or procedure must typically be followed by the relevant State under its law.").

50 RUDOLF DOLZER, *Fair and Equitable Treatment: Today's Contours*, 12 SANTA CLARA J. INT'L L. 7 (2014), p. 12 ("The acceptance of the standard is directly linked to the fundamental moral and legal grounding of the notion of fairness, anchored in a universally accepted sense of justice, but also in classic rules of customary law governing the protection of foreign nationals and companies.") (CLA-43); STEPHAN W. SCHILL, *Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law* in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 151 (Stephan W. Schill ed. 2010), p. 159 ("[M]ore recent arbitral jurisprudence increasingly converges in its application of fair and equitable treatment. It uses the standard to restrict the exercise of sovereign powers by host states, thus interpreting fair and equitable treatment as a public law concept."). *See also* MARC JACOB & STEPHAN W. SCHILL, *Fair and Equitable Treatment: Content, Practice, Method*, in INTERNATIONAL INVESTMENT LAW: A HANDBOOK 700 (Marc Bungenberg et al. eds. 2015), p. 761 ("[T]he [FET] standard can be understood as an embodiment of the rule of law as it is familiar to numerous domestic and international legal regimes.").

51 *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, para. 7.78 ("Fairness and consistency must be assessed against the background of information that the investor knew and should reasonably have known at the time of the investment and of the conduct of the host State. While specific assurances given by the host State may reinforce the investor's expectations, such an assurance is not always indispensable .... Specific assurances will simply make a difference in the assessment of the investor's knowledge and of the reasonability and legitimacy of its expectations.") (CLA-88).

representations and undertakings made by the host state *including those in legislation, treaties, decrees, licenses, and contracts*."[52]

b. "Legitimate expectations may follow from *explicit or implicit representations made by the host state*, or from its contractual commitments. The investor may even sometimes be entitled to presume that the *overall legal framework of the investment will remain stable*."[53]

c. "What the investor may legitimately expect must be evaluated in the light of all circumstances in each given case. The expectations may relate not only to the existing contractual or other relations between the investor and the host state, *but may also concern the general legal framework in the host state*." [54]

d. "[A]n investor may derive legitimate expectations either from (a) specific commitments addressed to it personally, for example in the form of a stabilization clause, or (b) *rules that are not specifically addressed to a particular investor* but which are put in place with a specific aim to induce foreign investments and on which the foreign investor relied in making his investment."[55]

37. These conclusions are also eminently sensible. In today's market economies, it is essential for states to have the ability to provide undertakings to private parties by way of "general" legislative or regulatory instruments. Modern states cannot negotiate contracts with large numbers of private actors, but as a practical matter must instead regulate the conduct of private actors through legislation. This is a common and distinguishing feature of an economic system based on the

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52 *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL Final Award, 12 November 2010, para. 285. *See also Binder v. The Czech Republic*, UNCITRAL Final Award, 15 July 2011, para. 443 (CLA-42); *CMS Gas Transmission Company v. The Argentine Republic*, Award, ICSID Case No. ARB/01/8, 12 May 2005, para. 275 (CLA-48); *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, 8 October 2009, para. 217 ("Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable.") (RLA-175).

53 *Toto Costruzioni Generali S.P.A v. Republic of Lebanon*, Award, ICSID Case No ARB/07/12, 7 June 2012, para. 159 (RLA-41).

54 *Binder v. The Czech Republic*, UNCITRAL Final Award, 15 July 2011, para. 443 (CLA-42).

55 UNCTAD, FAIR AND EQUITABLE TREATMENT, UNCTAD Series on Issues in International Investment Agreement II (2012), p. 69 (footnotes omitted) (CLA-85). *See also* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2d ed. 2012), p. 145 ("The investor's legitimate expectations are based on the host state's legal framework and on any undertakings and representations made explicitly or implicitly by the host state.") (CLA-35); MARC JACOB & STEPHAN W. SCHILL, *Fair and Equitable Treatment: Content, Practice, Method*, in INTERNATIONAL INVESTMENT LAW: A HANDBOOK 700 (Marc Bungenberg et al. eds. 2015), p. 748 ("[W]hen a foreign investor merely relies on the general legal framework without any specific commitments on behalf of the host State to attract foreign investor those concepts [of legitimate expectations predictability, and legal stability] may only have a more marginal scope of application. *They might still come into play, however, especially with respect to legislation with retroactive effect*.") (emphasis added). *See also BG Group Plc. v. The Republic of Argentina*, UNCITRAL Ad Hoc Arbitration, Final Award, 24 December 2007, para. 343 ("Thus, withdrawal of undertakings and assurances given in good faith to investors as an inducement to their making an investments (sic) is by definition unreasonable.") (RLA-123); *Sempra Energy International v. The Argentine Republic,* ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 298 ("The essence of the protection sought was well explained in Tecmed, where the tribunal held in the light of the good faith requirement that under international law, the foreign investment must be treated in a manner such that it 'will not affect the basic expectations that were taken into account by foreign investor to make the investment.' This requirement becomes particularly meaningful when the investment has been attracted and induced by means of assurances and representations, as has been established in the jurisprudence that the Claimant has invoked.") (RLA-234).

rule of law, where legislative provisions, rather than individual governmental commands or directives, govern private conduct. It would gravely obstruct a state's governance and regulation, and undermine the rule of law, to deny states the power to make binding commitments to private parties, including investors, by way of legislative (or regulatory) guarantees.

38. Put simply, the members of the Tribunal and the Respondent agree that international law generally recognizes and gives binding effect to the authority of states to make binding, internationally-enforceable commitments to private actors that are capable of giving rise to the investor's legitimate expectations that the state will not renege on that commitment. Despite this, however, the Tribunal suggests that "[p]rovisions of general legislation applicable to a plurality of persons or a category of persons" are incapable of giving rise to legitimate expectations on the part of those persons "that there will be no change in the law."[56]

39. The Tribunal apparently takes the view that when a state makes a commitment to investors in "general legislation applicable to a plurality of persons or a category of persons" – as opposed to by a contract or (individual) administrative act – that commitment is incapable of creating legitimate expectations that the law will remain unchanged. Relying on the award in *Philip Morris Brands SÀRL v. Uruguay*, the Tribunal says that "the State's rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances [remains unaffected]" if those legislative changes "do not exceed the exercise of the host State's normal regulatory power in the pursuance of a public interest and do not modify the regulatory framework relied upon by the investor at the time of its investment outside the acceptable margin of change."[57] In short, the Tribunal holds that if a state makes undertakings to a class of investors through the medium of "general legislation," the investor's legitimate expectations that the law will remain unchanged will be limited to changes that do not modify the regulatory framework for the investment beyond "an acceptable margin of change."

40. Similarly, citing awards in *Saluka Investments BV v. Czech Republic, Electrabel SA v. Hungary, and Arif v. Republic of Moldova*, the Tribunal also says that [t]he 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."[58]

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56 Award, para. 360, no. 1.

57 *Ibid.,* para. 360, nos. 7 and 8.

58 *Ibid.*, para. 360, no. 9 (emphasis added).

41. References to "an acceptable margin of change," a "balancing or weighing exercise by the State" and "a high measure of deference … to the [state's] right to regulate" appear to parallel the "margin of appreciation doctrine." The margin of appreciation, as summarized by one commentator, "is most famously a doctrine of deference employed by the [European Court of Human Rights ("ECtHR")] for resolving a state's compliance with its obligations under the [European Convention on Human Rights ("ECHR")]. The basic idea is that the state is entitled to a certain 'space for maneuver,' within which its conduct is exempt from fullfledged review."[59] Paralleling this analysis, the Tribunal appears to conclude that the state retains a margin of discretion to balance the investor's expectations against public policy objectives and that only exercise of regulatory power exceeding that margin can constitute a breach of that state's obligations under the Treaties' fair and equitable treatment and non-impairment standards, even where an undertaking to investors has been made.

42. I disagree fundamentally with the Tribunal's analysis. The fact that a state makes an undertaking to investors in general legislation does not "limit" the legitimate expectations of investors nor afford the state with a margin of appreciation to refuse to honor the commitments it has made (whether by statute, treaty, contract or otherwise). As discussed above, the principle that legitimate expectations may arise from general legislation, i.e. "*rules that are not specifically addressed to a particular investor* but which are put in place with a specific aim to induce foreign investments"[60] is affirmed by numerous authorities. In my view, unless the language of the investment protection treaty says otherwise, there is no room for the proposition that states retain a margin of discretion to modify or disregard undertakings given to investors through "general legislation."

43. The Tribunal's suggestion that, absent specific commitments, general legislation is only capable of giving rise to "limited" legitimate expectations of stabilization (here, of tariff levels) is, in my view, contrary to the basic character of a state's obligation to accord investments fair and equitable treatment. This obligation ensures fairness, equity, basic justice and rule of law; it is not directed towards formalities or technicalities.[61]

44. As a consequence, where a state is found to have provided undertakings or commitments to a class of investors of specified treatment, for a prescribed period of time, in its general legislation, obligations of fair and equitable treatment apply no less than where the state has made a specific

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59 JULIAN ARATO, *The Margin of Appreciation in International Investment Law*, 54 VA. J. INT'L L. 545 (2013-2014), pp. 549-550.

60 UNCTAD, FAIR AND EQUITABLE TREATMENT, UNCTAD Series on Issues in International Investment Agreement II (2012), p. 69 (footnotes omitted) (CLA-85).

61 *See* paras. 32-37 above.

stabilization commitment to an individual investor. Fairness, justice and the rule of law apply no less to democratically-enacted laws than to a state's contractual commitments or executive declarations. As discussed above, the focus is not on artificial or arbitrary distinctions between "statutory" and "contractual" undertakings or "general legislation" and "specific assurances," but on whether the state's actions and statements have provided undertakings to investors which it would be unfair or inequitable for the state to dishonor.[62]

45. Similarly, the fair and equitable treatment doctrine is directed towards the protection of the legitimate expectations of investors. There is no requirement that those expectations arise only from contractual instruments, or "specific" representations;[63] indeed, as noted above, fair and equitable treatment analysis focuses on a state's overall legal framework. The decisive question is not the form of a state's representations but whether the content and character of those representations is sufficiently clear to give rise to legitimate investor expectations that the state will abide by its commitments.

46. As discussed in detail above, that is plainly what the Czech Republic did in Section 6 of the Act: it unambiguously guaranteed investors in renewable energy fixed minimum FiTs for a 15 (later 20) year period. As a consequence, investors who made investments in compliance with the Act on Promotion's requirements could legitimately expect that the Czech Republic would honor its undertaking to maintain the fixed minimum FiTs for the specified time period. The fact that the Czech Republic made this guarantee to a number of investors, not just one investor, is irrelevant to the question whether that guarantee must be honored: as detailed above, it is well-settled that a state may make binding commitments through statutes and legislative acts, as well as otherwise.

47. Similarly, in my view, the Tribunal's reliance on a "margin of discretion" or "margin of change" in the context of a state's breaches of statutory or contractual guarantees of specified treatment to investors is fundamentally contrary to the text, objects and purposes of the Treaties and to the weight of well-reasoned authority on the topic. Indeed, in applying a "margin of discretion" or "margin of change" to a state's breach of its own guarantee of treatment to investors, the Tribunal adopts an unprecedented and, in my view, indefensible position.

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62 *See* para. 33 above.

63 *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, para. 7.78 ("Fairness and consistency must be assessed against the background of information that the investor knew and should reasonably have known at the time of the investment and of the conduct of the host State. *While specific assurances given by the host State may reinforce the investor's expectations, such an assurance is not always indispensable .... Specific assurances will simply make a difference in the assessment of the investor's knowledge and of the reasonability and legitimacy of its expectations*.") (CLA-88) (emphasis added).

48. First, I disagree with the Tribunal's suggestion that the proposition that a state is entitled to a "margin of appreciation" or some kind of margin of discretion in all circumstances reflects the "present state of international law and practice."[64] The application of a margin of appreciation to a state's fair and equitable treatment obligations under investment treaties is not a generally accepted principle of international law.[65] On the contrary, outside the specific ECHR context, the decisive weight of international authority correctly rejects application of a margin of appreciation as a general principle of international law:

a. The International Court of Justice refused to apply a margin of discretion in *Oil Platforms*.[66] Instead, the Court held that "the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for a 'measure of discretion'."[67]

b. The International Military Tribunal for the Nuremberg trials refused to afford a margin of appreciation to decisions by German authorities in World War II, holding instead that "whether the action taken under the claim of self-defense was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced."[68]

c. An investment tribunal in *Pezold v. Zimbabwe* rejected the application of a margin of appreciation in the following terms: "[D]ue caution should be exercised in importing concepts from other legal regimes (in this case European human rights law) without a solid basis for doing so. Balancing competing (and non-absolute) human rights and the need to grant States a margin of appreciation when making those balancing decisions is well established in human rights law, but the Tribunal is not aware that the concept has found much support in international investment law. … This is a very different situation from that in which margin of appreciation is usually used. Here, the Government has agreed to specific international obligations and there is no 'margin of appreciation' qualification within the BITs at issue. Moreover, the margin of appreciation doctrine has not achieved customary status. Therefore the Tribunal declines to apply this doctrine."[69]

d. In *Quasar de Valors*, another investment tribunal rejected the application of a margin of appreciation outside the context of human rights protections: "For one thing, human rights conventions establish minimum standards to which all individuals are entitled irrespective of any act of volition on their part, whereas investment-protection treaties contain undertakings which are explicitly designed to induce foreigners to make investments in reliance upon them. It therefore makes sense that the reliability of an instrument of the latter kind should not be diluted by precisely the same notions of 'margins of appreciation, that apply to the former."[70]

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64 Award, para. 360.

65 *See* JULIAN ARATO, *The Margin of Appreciation in International Investment Law*, 54 VA. J. INT'L L. 545 (2013-2014), p. 554.

66 *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgement, 2003 ICJ REP. 161.

67 *Ibid.*, para. 73.

68 International Military Tribunal (Nuremberg), Judgment and Sentences, 1 October 1946, 1 AMERICAN JOURNAL OF INTERNATIONAL LAW 172 (1947), p. 207.

69 *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, paras. 465-466. The tribunal went further, noting at paras. 467-468: "In any case, the Claimants have noted that neither the "margin of appreciation" nor the proportionality doctrine can be used to justify illegal conduct, such as a breach of an obligation *erga omnes,* by engaging in racial discrimination … there is ample evidence that the Claimants were targeted in the present case on the basis of skin colour. Accordingly, the Respondent's arguments relating to the margin of appreciation are also dismissed."

70 *Quasar de Valors SICAV S.A. and others (formerly Renta 4 S.V.S.A and others) v. Russian Federation*, SCC Case No. 24/2007, Award, 20 July 2012, para. 22 (CLA-15).

49. In my view, these authorities are clearly correct. The awards cited by the Tribunal are outliers, which are neither well-considered nor reflective of the weight of authority on the topic.[71] There is certainly no basis, given these authorities, for concluding that the application of a margin of discretion represents the present state of international law and practice.

50. Second, there is no reference to any "margin of discretion" or analogous standard of deference in either of the Treaties providing a textual basis for the Tribunal's decision to abstain from a meaningful review of the Czech Republic's acts under the Treaties and, in particular, there is no reference to any such margin in either of the Treaties' fair and equitable treatment or non-impairment protections. On the contrary, as noted above, both Treaties provide the investors unqualified protections of fair and equitable treatment.[72]

51. Third, the Tribunal's reliance on a margin of discretion is even less justifiable – and is instead deeply flawed – where a state has made specific promises or representations to investors, as is the case here. As discussed above, the Respondent enacted statutory provisions guaranteeing investors not only general stability of the legal framework applicable to renewable energy but that specified minimum FiTs would be paid for electricity produced by renewable energy sources for a period of 15 (later 20) years. In these circumstances, application of a margin of discretion under the Treaties is wholly unjustifiable.

52. Most fundamentally, application of a margin of discretion (or change) in cases involving state guarantees of specified treatment to investors directly contradicts both the terms and purposes of such guarantees and, by extension, of fair and equitable treatment protections. The whole point of a state's guarantee of specified treatment – like fixed minimum tariffs for a defined time period – is to exclude the possibility of later legislative change in breach of these guarantees. Applying a "margin of discretion" in this context fundamentally contradicts the basic purposes of state guarantees and, in turn, fair and equitable treatment protections.

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71 The different tribunals' formulations of, or references to, a margin of appreciation on which the Tribunal relies differ widely in both the underlying rationale for the application of such a doctrine as well as in the degree of deference adopted vis-à-vis the state actions. JULIAN ARATO, *The Margin of Appreciation in International Investment Law*, 54 VA. J. INT'L L. 545 (2013-2014), p. 551. Commentators have identified a variety of rationales for deference in investor-state arbitration, see, *e.g.*, CAROLINE HENCKELS, *Balancing investment protection and the public interest: the role of the standard of review and the importance of deference in investor-state arbitration* 4 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 197 (2013), pp. 203 *et seq*.

72 This is particularly evident in the case of the ECT, which narrowly circumscribes in Article 24 the non-precluded measures applicable to Article 10(1). That provision does not contain a general "margin of appreciation" or public policy exception, the ECT instead sets forth very specific exceptions relating to human and animal health, security interests and public order (not pleaded by the Respondent and plainly not applicable here). *See* ALEXANDER REUTER, *Die nachträgliche Kürzung der Förderung erneuerbarer Energien auf dem Prüfstand völkerrechtlicher Investitutionsschutzabkommen [Retrospective Cuts to Renewable Energy Support on the Test Bench of International Investment Protection Treaties]*, 1-2 RECHT DER INTERNATIONALEN WIRTSCHAFT (RIW) 43 (2014), p. 49.

53. This has been uniformly recognized in those awards addressing this issue. As the tribunal held in *BG Group v. Argentina*:

> "withdrawal of undertakings and assurances given in good faith to investors as an inducement to their making an investments (sic) is by definition unreasonable."[73]

Similarly, the tribunal in *EDF v. Romania*, on whose findings the Tribunal relies, held that "*[e]xcept where specific promises or representations are made by the State to the investor*, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework."[74]

54. On the Tribunal's reasoning, a state's contractual and other stabilization commitments to investors would apparently be subject to a "margin of discretion." These commitments would not mean either what they said or what the state promised: they would only mean what the state later appreciated, in the exercise of its discretion. In my view, that betrays the expectations of investors, denies states the power to make internationally binding commitments and contradicts basic principles of international law.

55. Finally, finding that the state has made undertakings through general legislation does not mean that it is stripped of its regulatory power and put under the obligation to "crystallize" its regulatory framework. On the contrary, I agree with the Tribunal's observation that "[t]he requirements of legitimate expectations and legal stability as manifestations of the FET standard do not affect the State's rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances"[75] – but despite maintaining its freedom to regulate the state is under the obligation to redress the damage suffered by an investor whose expectations were frustrated.[76]

56. When a state undertakes, by contract, legislation or otherwise, to provide particular treatment to a foreign investor, that undertaking will be given effect under international law, and violations of that undertaking will give rise to claims for compensation by the investor under commitments to

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[73] *BG Group Plc. v. The Republic of Argentina*, UNCITRAL Ad Hoc Arbitration, Final Award, 24 December 2007, para. 343 (RLA-123).

[74] *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, 8 October 2009, para. 217 (RLA-175) (emphasis added).

[75] Award, para. 360, no. 8.

[76] *Charanne and Construction Investments v. Spain*, SCC Case No. V 062/2012, Guido Santiago Tawil's Partial Dissenting Opinion, 21 December 2015, para. 11 (RLA-156).

provide fair and equitable treatment.[77] In doing so, international law does not constrain the autonomy of states, but rather gives effect to it, by enabling states to provide enforceable commitments to private actors, in order to obtain valuable investments or other benefits from those actors.

57. As discussed in detail above, the Czech Republic unequivocally guaranteed specified minimum FiTs for a fixed statutory time period (of 15, later 20 years): Section 6(1)(b)(2) guarantees that the "revenues per unit of electricity," and the "Purchasing Prices" for electricity, produced from specified renewable energy sources will be "maintained as the minimum for a period of 15 years," subject only to the possibility of upward (not downward) adjustment of the price for inflation. That legislative guarantee, which was, as also discussed above, repeatedly reaffirmed in governmental statements, provided investors with an enforceable right to, and legitimate expectation of, stabilized FiTs for 15 (later 20) years – an expectation that the Czech Republic frustrated when it reduced those FiTs by imposing the Solar Levy.

58. That conclusion suffices to establish a violation of the Treaties' fair and equitable treatment protections, entitling the Claimants to compensation. As discussed in detail above, international law, as well as Article 2(1) of the Germany BIT and Article 10(1) of the ECT, recognizes and gives effect to the power of the Czech Republic to make binding, internationally enforceable commitments to private parties.[78] Where the Czech Republic makes, and then breaches, such a commitment, it violates the Treaties' fair and equitable treatment guarantees and international law. Here, the Czech Republic provided, and then breached, guarantees of fixed minimum FiTs for the electricity produced by the Claimants' solar plants for a 15 (later 20) year period. That violates the Treaties' guarantees of fair and equitable treatment entitling the Claimants to compensation.

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77 The same conclusion follows under the Treaties' non-impairment guarantees. Article 2(2) of the Germany BIT (C-1) provides that "Neither Contracting Party shall in any way impair by arbitrary or discriminatory measures the management, maintenance, use, or enjoyment of investments in its territory by investors of the other Contracting Party," and Article 10(1) of the ECT provides that "Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting State shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal."

78 *See* paras. 29-38 above.

III. The Claimants had no reason to expect the Czech Republic to withdraw these guarantees retrospectively

59. Although the Tribunal acknowledges that the Czech Republic adopted and repeatedly referred to the Act on Promotion as a guarantee of stability, the Tribunal also denies that this guarantee gave rise to a legitimate expectation by solar investors in mid-2010 that there would be no reductions in Section 6's minimum FiTs. I do not believe that the evidence can be reconciled with this conclusion.

60. The Tribunal's Award accepts the Respondent's argument that, by mid-2010, the Claimants should have expected that further changes in the regulatory framework were likely. The Award states:

> "It was clear from mid-2010 that the Government might resort to taxation measures to deal with the solar boom, and statements to that effect by the Prime Minister, Minister of Industry and Trade, and the Minister of Environment were widely reported."[79]
>
> "The Tribunal accepts that the Solar Levy was a transparent device to avoid what the Respondent had been advised might cause investor claims. That is clear from the minutes the Coordination Committee. But, in common with the Czech Constitutional Court, and the European Commission's Decision on state aid, the Tribunal does not consider that the modifications to the support scheme and the tax measures were retroactive, and considers that they did not violate the principle of legitimate expectation."[80]

61. The Tribunal also concludes that:

> "Dr Göde was essentially an opportunistic investor who saw a window of opportunity and who was aware, or should have been aware, that dealing with the solar boom was a fast-moving and controversial political issue."[81]
>
> "He of course knew of, and endeavoured to take advantage of, the fact that the 5% limit had been removed only from 2011. But he was also aware that the Czech Government had been deeply concerned about the effect of the solar boom from 2009 and should have been aware that other legislative changes, especially with regard to tax, were in the air. The Claimants had avoided the February 2010 moratorium by taking assignments of the binding statements in relation to three of their largest projects."[82]

62. The Tribunal therefore holds that the Claimants had "a speculative hope – as opposed to an internationally-protected expectation."[83] The Tribunal bases this conclusion on two principal categories of evidence: statements made by representatives of the Czech Republic in 2010 and the asserted lack of specific due diligence by Dr. Göde. In my view, none of this evidence, nor the other evidence in the record, supports the Tribunal's conclusions.

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79 Award, para. 425.

80 *Ibid.*, para. 430 (footnotes omitted).

81 *Ibid*., para. 431.

82 *Ibid*., para. 433.

83 *Ibid.,* para. 435 *citing* Respondent's Counter-Memorial, para 5(k).

63. First, it is in my view highly important to consider carefully what the Czech Republic said and did during the relevant time period (from mid-2009 to late 2010). In doing so, it is essential to have regard to the fact that most of the Claimants' investments were made prior to or during the summer of 2010.[84] During this time, the Czech Republic said and did the following:

a. On 24 August 2009, the Czech Ministry of Industry and Trade announced for the first time its intention to seek amendments to the Act on Promotion to reduce incentives for solar energy. The Ministry made this proposal because of concerns that an excessive number of solar plants were being planned by potential investors and that construction of these plants would result in an undue financial burden on the Czech Republic (which, as discussed above, had guaranteed the FiTs payable to these plants). Importantly, in considering a possible reduction in incentives for solar energy, the Ministry directed its attention only to the so-called 5% brake rule in Section 6(4) of the Act on Promotion, which the Ministry proposed abolishing prospectively (in January 2010), while also making it clear that the proposed changes would not affect the 15-year assurance of minimum FiTs for existing solar facilities.[85] Thus, while addressing imbalances in the renewable energy sector, the Ministry's proposal was directed only to the level of guaranteed minimum FiTs for *future* solar installations, not for *existing* solar installations which had already been commissioned.

b. The day after the Ministry of Industry and Trade's 24 August announcement, the Ministry's press department clarified the scope of the proposed changes in an interview published in a Czech newspaper (*Právo*). The Ministry explained that "the payback period of the investment will be guaranteed, specifically by *a guarantee which is already included in the law saying that the investment in the solar system has to be paid off within 15 years.*"[86] There was again no suggestion by the Ministry that the guaranteed FiTs under Section 6(1)(b)(2) for existing solar installations would be affected.

c. A letter from the Ministry of Industry and Trade to the ERO on 28 August 2009 confirmed the Ministry's intention to preserve the treatment of existing solar installations which had already been commissioned, explaining that this was due in part to concerns about claims by existing renewable energy investors. The Ministry stated: "the goal of section 6(4) … was to ensure the investors in renewable sources *certainty of payback of their investments, transparency, and predictability*. A simple cancellation could thus entail a *risk of suits filed by investors against the Czech Republic on grounds of lost investments*."[87] Again, the Ministry emphasized that existing projects would not be affected by any amendments to the Act, which would entail only a prospective amendment to Section 6(4)'s 5% brake rule.

d. In September 2009, the ERO wrote an open letter to the Czech Chamber of Deputies, citing delays in the introduction of legislative changes to Section 6(4)'s 5% brake rule and again stating that any amendments to the Act's guaranteed FiTs would only affect new

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84 The Claimants' expectations that the Czech Republic would not reduce the FiTs of installations commissioned before 1 January 2011 are limited to those investments made prior to the Czech government's decision to adopt the Solar Levy (20 October 2010). Here, all four plants affected by the Solar Levy were commissioned before 1 January 2011 (Stříbro plant on [redacted] Úsilné plant on [redacted] Osečná plant on [redacted] Mozolov plant on [redacted]). Moreover, the capital for these plants was, in most cases, committed well before these dates (and long before summer 2010 and the press reports cited by the Tribunal). The only apparent exception involves loans made by the Claimants to [redacted] and [redacted] on [redacted] (*see* Award, paras. 407, 409).

85 "Ministry of Industry and Trade will Equalize the Support of Renewable Energy Sources," Ministry of Industry and Trade Press Release (mpo.cz) (Czech and English original), p. 1 ("The Ministry of Industry and Trade is planning to change the maximum 5% limit by which the Energy Regulation Office can reduce the purchase price of electricity from renewable energy sources annually. … The Ministry of Industry and Trade is trying to ensure that the new act comes into force on 1 January next year.") (R-138).

86 "Ministry of Industry and Trade wants to reduce support of solar power plants," Pravo (Czech original and English translation), p. 1 (R-139) (emphasis added).

87 Letter from R. Portužak to B. Němeček, 28 August 2009. p. 1 (R-145) (emphasis added).

sources commissioned after "*1 January 2011*."[88] The ERO explicitly stated that this delay would enable solar investors that were already in the process of completing investments "*to prepare sufficiently in advance for the change in the conditions for investing which should eliminate entirely the risk of possible lawsuits in the Czech Republic regarding protection of investments*."[89]

e. Adopting the ERO's recommendations, the Czech government proposed an amendment to the Act on Promotion in November 2009. The Explanatory Report to that Draft Act 137/2010 once more confirmed the Czech government's commitment to preserving the statutorily-guaranteed treatment of solar installations that had already been commissioned. The Report stated that one of the aims of "[t]he proposed wording …[was to] enable the [ERO] to adjust the prices for solar power … *as of 1 January 2011*."[90] The Report repeated the explanation, provided in the ERO's earlier statements, that the prospective character of the amendment was intended to provide "*[i]nvestors ... [to] prepare sufficiently in advance for amendment of the conditions for investment, which should entirely eliminate the risk of potential lawsuits against the Czech Republic related to protection of investments*."[91]

f. The amendment to the Act on Promotion was approved by the Chamber of Deputies on 17 March 2010 and came into force on 20 May 2010.[92] The amendment provided only for the prospective elimination of Section 6(4)'s 5% brake rule for solar facilities commissioned after 1 January 2011 (not for facilities commissioned after January 2010).[93] The proposed amendment did not alter the guaranteed FiTs under Section 6(1)(b)(2) for existing solar installations that had already been commissioned or that would be commissioned prior to 1 January 2011. As Mr. Vladimír Tošovský, the Czech Minister of Industry and Trade, explained at a press conference on 16 November 2009, the decision to apply the elimination of the 5% brake rule only to solar plants commissioned after 1 January 2011 was deliberately taken to protect existing investments and investors' expectations: "It is because some projects are currently under way and the investors or banks have already invested in them. If we did this, it would mean changing the terms and conditions under which they invested in the course of the development, which could pose a threat to their investment. That is why it is 2011."[94]

g. In February 2010, TSO and DSOs agreed on a moratorium refusing *"new connection requests*" for photovoltaic installations.[95] The moratorium was intended to address the predicted regulatory imbalance in the solar energy sector, but it only affected new installations, not existing investments. This was confirmed by the representatives of the Czech Republic.[96]

h. In July 2010, the Czech Republic's 2010 Action Plan (submitted to the EU) stated that "*[t]ariffs are guaranteed* according to the following table," listing a "*Feed-in price guarantee* (in years)" for photovoltaic sources as "*20 [years]*."[97] The same document contained various

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88 Letter from J. Fiřt to O. Vojíř, p. 2 (C-201) ("The proposed wording will enable the Office with *effect from 1st January 2011* to adjust the prices for photovoltaics in harmony with the principles used for other types of renewable resources thus removing the current discrimination against other types of renewable resources.").

89 *Ibidem*.

90 Explanatory Report to Draft Act No. 137/2010 Coll., p. 5 (R-147) (emphasis added).

91 *Ibidem* (emphasis added).

92 Respondent's Statement of Defense, para 56.

93 *See* Article II of Act No. 137/2010 Coll., p. 27 (R-5).

94 Czech Government's press conference (Czech original and English translation), p. 2 (C-197).

95 Respondent's Counter-Memorial, para. 101 (emphasis added).

96 Josef Fiřt Witness Statement, para. 21 ("Around the same time, the Czech transmission system operator, fearing for the stability of the electricity grid, insisted that the distribution companies observe a moratorium on issuing new grid connection approvals for new solar and wind plants.").

97 National Renewable Energy Action Plan, published by the Ministry of Industry and Trade, pp. 58-59 (C-73) (emphasis added).

further assurances to existing solar investors.[98] There was no suggestion of any sort in the 2010 Action Plan, or any associated documents that the FiTs which had been previously established and guaranteed for existing solar plants would be changed, notwithstanding the Czech government's awareness of imbalances in the renewable energy sector.

i. In September 2010, the Czech government again considered legislation that would have reduced the financial costs of subsidies for renewable energy. In connection with proposed legislation, an Explanatory Report confirmed again that changes to FiTs for solar plants would only take effect with respect to solar installations commissioned after "1 January 2011." The Report also made clear that the proposed legislation would not be applicable to "[p]hotovoltaic power plants *already connected to the electric power system*" and that the investors' "*right to claim support [would be] preserved under existing conditions*."[99] Furthermore, the government explicitly stated that "[f]acilities *not yet connected to the electric power system but which started operation before January 1, 2011 will have 12 months to be connected to the electric power system*" and would also have "*their right to claim support … preserved*."[100]

64. At the Hearing, the Respondent's expert acknowledged that these statements and regulatory actions gave investors in solar projects in the Czech Republic further comfort that plants commissioned in 2010 would not be affected by the changes.[101] He confirmed that in his view investors could draw comfort from the September 2010 legislative amendment that no changes would be implemented for plants commissioned in 2010:

> "[Counsel for Claimants:] Now, this is September 15, 2010, so, by now, I think that they should have known very well what was going to happen in September 2010. This is a Government proposal which abolished all incentives related to large PV plants, from March 2011, and which was eventually approved by the Parliament on 3 November 2010.
>
> Now, may I take you to the last page, when there are some interim provisions. And it says to – Section 2 –, it says: – It is a legislative change of claim for the support of production of electricity from Renewable Energy Sources, – 'photovoltaic power plants already connected to the electric power system will have the right to claim support preserved under existing conditions.'
>
> *Now, don't you think that, from an investor perspective again, this gave further comfort that no changes would have been implemented for the existing plants, for plants already connected in 2010?*
>
> *[Mr. Wynne Jones]: I think that's probably a fair comment.*"[102]

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98 *See* para. 24(f) above.

99 Explanatory Report to Draft Act No. 330/2010 Coll. (Czech original and partial English translation), p. 6 (R-172) (emphasis added).

100 *Ibidem* (emphasis added).

101 Transcript, Day 3, page 530, lines 6-22 ("[Counsel for Claimants]: Now, may I take you to Tab 21 in your bundle. And, this is actually this is the actual Government proposal for the Act that eventually amended the 5% Rule, and it's dated 16 November 2009. If we go at Page 5, you can find at the bottom of the page exactly the same wording that was used by Mr. Fiřt in its letter. So, the Government transposed Mr. Fiřt's proposal and wording into an Act of the Government, proposed to the Parliament. Now, don't you think that this proposal, coming directly from the Government of the Czech Republic, provided an even stronger reassurance to PV investors that investments, or PV plants connected in 2000 by the end of 2010, they would have received that feed in tariffs for 20 years? A. Well, I think it's probably more important that the Government gives that assurance than the Regulator proposes it. So, in that sense, yes."); Transcript, Day 3, page 567, line 19 to page 568, line 11.

102 Transcript, Day 3, page 567, line 19 to page 568, line 11 (emphasis added).

65. As noted above, it is undisputed that virtually all of the investments made by the Claimants which are at issue in this arbitration were made during the foregoing time period (with Dr. Göde's last investment being made in summer 2010).[103] Thus, virtually all of the Claimants' investments were made at a time (i) when Section 6(1)(b)(2) of the Act explicitly guaranteed fixed minimum FiTs, (ii) when the Czech Republic had repeatedly reiterated that guarantee in its public statements and (iii) when steps had been taken to adopt prospective changes in order to address concerns about expected imbalances in the renewable energy sector, but without in any way questioning the rights of existing solar energy plants under Section 6(1)(b)(2) (or otherwise). On the contrary, the Czech Government had repeatedly assured investors that only future plants, commissioned in later years, would be affected by any legislative changes, and that plants commissioned in 2009 and 2010 would not be affected.

66. In these circumstances, it is in my view impossible to see why the Claimants were not entitled, prior to late 2010, to rely on the Czech Republic's legislative, regulatory and other assurances guaranteeing the levels of FiTs for their investments. All of the proposals for change during this time period involved only prospective changes for solar plants commissioned in future years and carefully preserved the rights of plants that had already been commissioned within the existing statutory time-limits.

67. It was only subsequently, in late October 2010, months after the Claimants had made virtually all of their investments,[104] that the Czech government abruptly changed its regulatory policy and, for the first time, proposed a "Solar Levy" that would reduce the FiTs for existing solar installations that had already been commissioned.[105]

68. Despite this, the Tribunal cites four articles published in Czech newspapers between late July and mid-September 2010, which supposedly suggested that changes in FiTs were a possibility.[106] In my view, these articles clearly indicate only that the Czech government was aware of the

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103 *See* note 85 above.

104 *Ibidem*.

105 The earliest discussion of a potentially retroactive levy apparently occurred at a meeting of the "Coordination Committee for the assessment of the impact of support of renewable energy sources on electricity prices" on 4 October 2010. The minutes of the meeting were not, however, made public and the first draft of Act 402/2010 submitted by the Czech government to the Chamber of Deputies on 14 October 2010 did not contain potentially retrospective provisions, *see* Minutes of the 2nd Meeting of the Coordination Committee for the assessment of the impact of support of renewable energy sources on electricity prices (Czech original and English translation), pp. 7-8 (R-235); Czech Constitutional Court, Judgment Pl. ÚS 17/11, 15 May 2012, para. 15 (R-248). The Solar Levy was only subsequently introduced for the first time in the legislative draft of Act 402/2010, *see* "Government against rapid price hikes on electricity," pp. 1-2 (R-270). The Czech Republic enacted that Solar Levy two months later. *See* Article 1 of Act 402/2010 (C-37).

106 Award, paras. 426-429.

imbalances in the renewable energy sector and was considering different mechanisms to reduce the FiTs. In particular, none of the sources cited by the Tribunal states that reductions of FiTs which might be adopted would apply to facilities commissioned before the end of 2010.

69. On the contrary, as Czech Prime Minister Nečas said, the Czech Republic had repeatedly stated that it "cannot interfere with the pending administrative periods, from the constitutional point of view … [t]he Czech Republic may face arbitrations."[107] While it is clear that rumors of a possible reduction in incentives to renewable energy producers had begun circulating in mid-2009,[108] the Tribunal reads into the governmental statements of the Czech Republic during the decisive time period a meaning which simply is not there and which contradicts the express assurances by the Czech Republic at the relevant time.

70. In my judgment, a careful review of the evidentiary record demonstrates the opposite of what the Tribunal asserts in this regard. That record instead shows that the Czech government was aware of the expected imbalances in the renewable energy sector, but repeatedly reiterated from mid-2009 until October 2010 that the FiTs for sources, which had already been commissioned, would not be changed and that changes to address the regulatory imbalances would be directed prospectively only to renewable energy sources that were commissioned in the future.[109]

71. Contrary to the Tribunal's suggestion, none of the Czech Republic's statements or actions should have led the Claimants to believe that the guaranteed FiTs for solar plants that had already been commissioned (or would be commissioned before 1 January 2011) would be reduced or otherwise affected. In fact, the Czech government had repeatedly said exactly the opposite – namely, that steps had been taken to address excess solar capacity in the future, but that guaranteed minimum FiTs for existing facilities would be maintained.

72. Second, the Tribunal criticizes Mr. Göde's due diligence, asserting that "there is no evidence of any real due diligence by Dr. Göde" and that his "actions were essentially opportunistic, and that the investment protection regime was never intended to promote and safeguard those who …

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107 "Solar business will slow down, yet the price of electricity will soar," Mlada Fronta Dnes (Czech original and English translation), p. 1 (R-162).

108 Claimants' Reply, para. 175. *See also* Award, para. 370.

109 One of the Respondent's experts, explained why the Czech government could have wished not to disclose its intentions of applying tariff adjustments to existing renewable installations: "If [policymakers and regulators] attempt to introduce prospective reductions to the feed in tariff or a tariff mechanism that automatically responds to installed capacity, this will cause PV investors to rush in to qualify their projects under the existing scheme, thereby exacerbating the very problem that the change is trying to solve. Policymakers and regulators simply do not have the option of implementing a smooth adjustment to tariffs or telling investors in advance." *See* Wynne Jones First Report, p. 59, para. 5.50.

'pile in' to take advantage of laws which they must know may be in a state of flux caused essentially by investors of that type."[110] In my view, this analysis is unpersuasive.

73. In my view, it is not the role of the Tribunal to pass abstract judgment on the quality of the Dr. Göde's due diligence. Due diligence is only relevant in a case such as this if it would have provided the Claimants with information that contradicted their asserted expectations. If due diligence inquiries by Dr. Göde would only have confirmed the fixed minimum FiTs that Section 6 of the Act, and the other governmental statements outlined above, guaranteed, then the failure of Dr. Göde to have conducted that due diligence is irrelevant.

74. Due diligence is not a condition to protection of an investment under international law, whether under the fair and equitable treatment standards prescribed by the Treaties or more generally. What is sometimes referred to as an obligation to conduct due diligence is relevant only where particular inquiries would have led an investor to alter its expectations about national law protections.[111] An investor is under no abstract duty to conduct due diligence.

75. The principle that an investor has no abstract duty to conduct a legal due diligence prior to making an investment was made clear by a recent investment award:

> "[A]n investor cannot be required to conduct an extensive legal investigation. To determine whether the expectations invoked by the investor are reasonable, key elements are what every prudent investor needs to know about the regulatory framework before investing and the actual information held by an investor […]. In particular, a legitimate investor expectation cannot be induced by a regulatory framework when the investor's actual information allowed him to foresee and anticipate the unfavorable development of this regulatory framework before making the investment. In order to breach the legitimate expectations of the investor, the new regulatory measures should not have been foreseeable, either by a prudent investor or by an investor who, by reason of his personal situation, had specific reasons to foresee those measures."[112]

76. In this case, as discussed above, further due diligence on the part of Dr. Göde would have revealed nothing different from what Section 6(1)(b)(2) of the Act on Promotion, and the Czech Republic's representations, made clear: solar plants commissioned in 2010 would receive the FiTs prescribed for plants commissioned in 2010 by the ERO. As also discussed above, a careful review of the Czech government's statements between January 2009 and October 2010 would have provided no reasons to doubt the Czech Republic's commitments. As a

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110 Award, paras. 432, 435.

111 *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 6 December 2016, para. 506 ("The scope of the due diligence depends on the particular circumstances of each case, such as the general business environment, and includes ensuring that a proposed investment complies with local laws, as well as investigating the reliability of a business partner and that partner's representations before deciding to invest.").

112 *Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case V2013/153, Final Award, 17 July 2016, para. 781 (free translation).

consequence, the Tribunal's conclusions about Dr. Göde's due diligence are irrelevant as a matter of principle.

77. In any event, the Tribunal's assessment of Dr. Göde's due diligence fails to take into account the factual context of their investments. The Claimants' investments were not particularly large by the standards of many cross-border investments – involving an aggregate amount of some [redacted] euros spread across several different installations.[113] Moreover, the Claimants were investing in a Member State of the European Union, in a legal environment promising certainty, stability and the rule of law.[114] International law protects small investments as well as large ones; equally, neither international law nor the drafters of investment treaties condition investment protection on unrealistic or uncommercial requirements. Any criticism of Dr. Göde's due diligence must take both the nature of his investments, and the clarity of the Czech government's commitments, into account.[115]

78. The Tribunal also refers in passing to a 2012 judgment of the Czech Constitutional Court[116] and a 2016 Decision on State Aid of the European Commission,[117] assertedly also reaching the decision that the modifications to the support scheme, including the Solar Levy, did not violate the principle of legitimate expectation:

> "The Tribunal accepts that the Solar Levy was a transparent device to avoid what the Respondent had been advised might cause investor claims. That is clear from the minutes the Coordination Committee. But, in common with the Czech Constitutional Court, and the European Commission's Decision on state aid, the Tribunal does not consider that the modifications to the support scheme and the tax measures were retroactive, and considers that they did not violate the principle of legitimate expectation."[118]

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113 Award, paras. 404-409.

114 The Copenhagen criteria set out in 1993, now embodied in Arts. 2 and 49 of the Treaty on European Union, explicitly require for European Union membership "that the candidate country has achieved stability of institutions guaranteeing democracy, *the rule of law*, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union." *See* Copenhagen European Council – 21-22 June 1993, Conclusions of the Presidency, p. 13, available at http://www.consilium.europa.eu/media/21225/72921.pdf (last visited 25 January 2018). In accordance with the commitment to the rule of law that it requires from its Member States, the European Union stated in its 2013 "European Commission guidance for the design of renewables support schemes" that "Member States have introduced several unannounced measures that caught investors by surprise, altered expected returns, and diminished confidence in the entire energy sector," and recommended "no unannounced interim changes" and "[c]lear commitments to avoid changes that alter the return on investments already made and undermine investors' legitimate expectations." (Second [redacted] Report, Exhibit 2.2).

115 *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 6 December 2016, para. 506.

116 Czech Constitutional Court, Judgment Pl. ÚS 17/11 (R-248).

117 European Commission's decision in State aid case SA.40171 (2015/NN) – Czech Republic (Promotion of electricity production from renewable energy sources) dated November 28, 2016 and made public on January 23, 2017 (R-366).

118 Award, para. 430 (footnotes omitted).

79. These decisions of the Czech Constitutional Court and European Commission are not decisive in determining whether Section 6(1)(b)(2) of the Act provided a guarantee of a minimum FiT for purposes of the Treaties' fair and equitable treatment protections. Rather, the Tribunal has an independent mandate, and obligation, under international law to apply the Treaties in light of the Act's provisions.[119]

80. The Czech Constitutional Court did not conclude, as the Tribunal suggests, that the Solar Levy was not retroactive, much less that the Solar Levy was not retroactive, or otherwise wrongful, for purposes of the fair and equitable treatment protections of the Treaties. Instead, the Constitutional Court held that the enactment of the Solar Levy was indeed quasi-retroactive,[120] but that – as a matter of Czech constitutional law – the expectations of renewable energy suppliers for fixed minimum FiTs for a 15-year period did "not attain the intensity of a constitutional-law issue."[121]

81. Thus, the Constitutional Court's opinion states that the issue presented to, and decided by, that Court "involve[d] a challenge of the constitutionality of a law, a law that does not interfere with constitutionally-guaranteed rights and freedoms but which *has the effect of reducing the state support stipulated in an earlier law* … ."[122] In response to this question, the Constitutional Court concluded that "although the enactment of the challenged provisions *reduced the support provided to operators of PVPP*, … this did not constitute interference that would cause a breach

[119] *See* ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS (2009), p. 81 ("The law applicable to the issue of liability for a claim upon an investment treaty obligation is the investment treaty as supplemented by general international law. … Investment treaty obligations are formulated as general concepts of minimum investment protection standards. Those concepts are not controversial because they are formulated at such a general level of abstraction. In defending an investor's claim based upon the fair and equitable treatment, a state does not insist that foreign investments should be treated unfairly and inequitably. There is, in other words, no dispute that the state must conform to a fair and equitable standard of treatment in its conduct in respect of the foreign investment. The concept itself is not controversial: rather, it is the application of that concept to the circumstances of the specific case. What the parties argue about, and what the tribunal must ultimately decide, is the particular conception of the fair and equitable standard of treatment that must be applied to the case. … [I]n arriving at a conception of the investment treaty protection standards, the tribunal must inevitably have recourse to general international law and conventional international law for otherwise it would be interpreting the legal standards in a void.") (RLA-124).

[120] Czech Constitutional Court, Judgment Pl. ÚS 17/11, para. 48 ("In this regard, the Constitutional Court notes that the provisions of Sections 7a to 7i of the challenged act in essence bring forth the effects of pseudo retroactivity, since in consequence of such provisions, for those electricity producers for whom the fifteen year guaranteed period pursuant to Section 6(1) of Act No. 180/2005 Coll. began to run before Act No. 402/2010 Coll. entered into effect the amount of support ends up being reduced in the future by the amount of the levy.") (R-248).

[121] *Ibid.*, para. 87.

[122] *Ibid.*, para. 77 (emphasis added).

of the constitutionally-guaranteed rights of the affected entities."[123] In the Court's opinion, "a simple payback period on investment of 15 years" does not violate the Czech Constitution. [124]

82. The Tribunal also refers to the interpretation of the Act on Promotion in the European Commission's State Aid Decision.[125] In that decision the European Commission stated that "according to the case-law [of the CJEU], traders are not protected against future changes to an on-going situation, and the immediate application of the new rule is the general rule for the application in time of new rules. Therefore, the Commission takes the view – just like the Czech Constitutional Court – that the modifications to the support scheme and the tax measures were not retroactive, and did not violate the principle of legitimate expectation."[126] These conclusions are of no relevance for the purpose of determining the Act's guarantees for purposes of the Treaties' fair and equitable treatment protections.

83. The European Commission's assessment – which is currently on appeal to the General Court of the European Union[127] – that the amendments to the Act on Promotion, including the Solar Levy, did not violate the principle of legitimate expectations is limited to the general principle of legitimate expectations under EU law. That is of no material relevance to the interpretation of the Treaties in this arbitration.

84. Furthermore, the Commission was permitted to make *amicus curiae* submissions in this proceeding only on limited issues of EU law (where the Commission has special expertise), not on other issues, such as Czech law (where the Commission has no such expertise). The Tribunal decided not to consider the *amicus curiae* submission of the European Commission as it refused to bear the reasonable costs of the Parties resulting from the submission. In these circumstances, I see no basis for according weight to the Commission's observations about Czech municipal law. I also note that, unlike this Tribunal, the Commission conducted no adjudicative proceedings, and sought no specialized expertise, in arriving at its observations about Czech law. In these circumstances, there is no reason to give the Commission's apparent views about the content of Czech law any material weight.

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123 *Ibid.*, para. 90 (emphasis added).

124 *Ibid.*, para. 71.

125 Award, para. 430.

126 European Commission's decision in State aid case SA.40171 (2015/NN) – Czech Republic (Promotion of electricity production from renewable energy sources) dated November 28, 2016 and made public on January 23, 2017, para. 135 (R-366).

127 *FVE Holýšov I and Others v Commission* (Case T-217/17), Action brought on 3 April 2017.

85. In sum, I agree with many of the Tribunal's conclusions, but also part company with the Award on a number of important issues. In my view, the Tribunal's conclusions fail adequately to consider the repeated and specific undertakings of the Czech Republic, as well as its concessions in this arbitration. The Tribunal also misconstrues the principles of fair and equitable treatment, significantly limiting the scope of the protections afforded by those principles. With regret, I must therefore dissent.

Gary Born