1. I dissent from the majority's decision.

2. It is said that hard cases make bad law. It appears that easy cases do as well.

3. This is an easy case. The Czech Republic enacted legislation that provided unambiguous guarantees to investors in the renewable energy sector. These statutory guarantees provided that specified minimum tariffs would be paid for electricity produced by renewable energy sources for a period of 15 (later 20) years. The Claimants relied on these tariffs in making substantial investments in the Czech Republic. Thereafter, despite its guarantees, the Czech Republic imposed a levy that significantly reduced the tariffs payable to certain renewable energy sources, including the Claimants' solar plants (the "Solar Levy"). That breach of the Czech Republic's previous guarantees is an obvious violation of the Treaty between the Federal Republic of Germany and the Czech and Slovak Federal Republic on Encouragement and Reciprocal Protection of Investments (the "Treaty").

4. The majority refuses to accept this straightforward conclusion. Instead, the majority proposes a manifestly implausible interpretation of the relevant Czech legislation, which contradicts the plain language and obvious purposes of that legislation and which the Czech Republic itself has repeatedly rejected, including in this arbitration. The majority's conclusion may be regarded by some as expedient, but it is both demonstrably wrong and, in the long-term, destructive of the rule of law and the authority of the Czech Republic.

## I. THE TREATY'S FAIR AND EQUITABLE TREATMENT CLAUSE REQUIRES THE CZECH REPUBLIC TO HONOR ITS STABILIZATION COMMITMENTS TO FOREIGN INVESTORS

5. The Tribunal agrees on many issues in this case. The Tribunal agrees, of course, that the Treaty provides an unambiguous guarantee of fair and equitable treatment. Thus, Article 2(1) of the Treaty provides that "Each Contracting State shall in every case accord investment fair and equitable treatment." Unlike many investment protection treaties, this guarantee is unqualified, assuring investors fair and equitable treatment "in every case."[1]

6. The Tribunal is also in agreement that a provision for fair and equitable treatment, like that in Article 2(1) of the Treaty, requires a state to abide by its commitments to investors. In particular, as detailed below, where a state undertakes to provide an investor with specified treatment, protections or rights, whether by contract, statute, or otherwise, then its subsequent denial of that treatment or those rights will generally constitute a denial of fair and equitable treatment.

7. It is true that the obligation of fair and equitable treatment does not generally prevent a state from altering its legislative or regulatory regimes in response to changing economic, technological or other circumstances. In the words of one tribunal, "the fair and equitable treatment standard does not give a right to regulatory stability *per se*. The state has a right to regulate, and investors must expect that the legislation will change, absent a stabilization

[1] Treaty, Art. 2(1) ("Each Contracting State shall in its territory promote as far as possible investments by investors from the other Contracting State and admit such investments in accordance with its legislation. Each Contracting State shall in every case accord investments fair and equitable treatment.").

clause or other specific assurance giving rise to a legitimate expectation of stability."[2] Put differently, "[i]n order to adapt to changing economic, political and legal circumstances the State's regulatory powers still remain in place,"[3] notwithstanding obligations of fair and equitable treatment.

8. Nonetheless, it is equally well-established that a commitment to accord fair and equitable treatment provides investors with protections for their legal rights and legitimate expectations, including a right to compensation where a state's exercise of its legislative or regulatory authority frustrates those rights or expectations:

> "where the investor has acquired rights, or where the state has acted in such a way so as to generate a legitimate expectation in the investor and that investor has relied on that expectation to make its investment, action by the state that reverses or destroys those legitimate expectations will be in breach of the fair and equitable treatment standard and thus give rise to compensation."[4]

Other awards are to the same effect, holding in multiple circumstances that a state's frustration of an investor's legitimate expectations gives rise to liability under a fair and equitable treatment obligation.[5]

9. It is well-settled that these principles apply even where a state has not expressly provided assurances of stability or other treatment to an investor: "there is an obligation not

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[2] *Ioan Micula et al v. Romania,* ICSID Case No. ARB/05/20, Final Award, 11 December 2013, para. 666. *See also Sergei Paushok, et al v. The Government of Mongolia*, UNCITRAL Award on Jurisdiction and Liability, 28 April 2011, para. 305 ("An investor, without an agreement which limits or prohibits the possibility of tax increases, should not be surprised to be hit with tax increases in subsequent years and such an event could not be considered as 'unpredictable.'").

[3] *BG Group Plc. v. The Republic of Argentina*, UNCITRAL Ad Hoc Arbitration, Final Award, 24 December 2007, para. 298.

[4] *Ioan Micula et al v. Romania,* ICSID Case No. ARB/05/20, Final Award, 11 December 2013, para. 667. *See also ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary,* ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 423 ("The Tribunal cannot accept the Respondent's position that the actions taken by it against the Claimants were merely an exercise of its rights under international law to regulate its domestic economic and legal affairs. It is the Tribunal's understanding of the basic international law principles that while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries. As rightly pointed out by the Claimants, the rule of law, which includes treaty obligations, provides such boundaries. Therefore, when a State enters into a bilateral investment treaty like the one in this case, it becomes bound by it and the investment-protection obligations it undertook therein must be honoured rather than be ignored by a later argument of the State's right to regulate.").

[5] *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."); *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 with the foreign investor was induced to invest."); *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."); *El Paso Energy International Company v. The Argentine Republic,* ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 364; *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"); *Suez, Sociedad General de Aguas de Barcelona, S.A.* and *Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 and *AWG Group Ltd. v. The Argentine Republic*, UNCITRAL Decision on Liability, 30 July 2010, paras. 222-223.

to alter the legal and business environment in which the investment has been made,"[6] and "stable and equitable conditions are clearly part of the fair and equitable treatment standard under the ECT."[7] Or, in the words of another tribunal, "the Claimant's reasonable expectations to be entitled to protection under the Treaty need not be based on an explicit assurance [by a state]."[8]

10. Of course, however, these principles necessarily apply even more emphatically where a state provides express or implied assurances of particular treatment or guarantees of particular rights to an investor or a defined category of investors. In these circumstances, the state's failure to honor its undertakings to an investor (or category of investors) constitutes a denial of fair and equitable treatment, giving rise to liability for compensation under international law. Thus, authorities recognizing a state's freedom to revise or alter its legislative or regulatory regime also declare that a state may nonetheless make commitments to particular investors (or categories of investors) not to alter aspects of the relevant legal regime, and that the violation of these commitments will constitute a breach of obligations to accord investors fair and equitable treatment.[9] Indeed, the Czech Republic correctly recognizes that "a 'stabilization clause' creates an exception to the general rule that a State is free to amend or pass new laws without incurring BIT responsibility."[10]

11. As the majority acknowledges, it is also clear that a stabilization undertaking or assurance can arise either from a specific undertaking to an individual investor (for example, in a contract or similar instrument) or from a more general legislative or regulatory instrument (for example, a statute applicable to a class of investors).[11] Thus, it is well-settled that a state may, under international law, make a binding commitment to foreign investors in its legislation, rather than in individual contracts or specific representations to individual investors. The Czech Republic itself recognizes this well-settled principle: "What we're saying is that [legislation providing a stabilization guarantee] has to be very clear and explicit in terms of constituting a commitment of stabilization. *So, if the Legislature says we're going to stabilize this legal regime, then, of course, that would apply, certainly.* We're just

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[6] *Occidental Exploration and Production Company v. The Republic of Ecuador*, UNCITRAL Final Award, 1 July 2004, para. 191. Viewed rigorously, this analysis requires clarification. A state is ordinarily free to alter its "legal and business environment," notwithstanding an investor's legitimate expectations; nonetheless, if a state does so in a manner that frustrates an investor's (or category of investors') legitimate expectations, it will be liable under international law to that investor (or category of investors) for compensation and other relief.

[7] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 173.

[8] *Saluka Investments BV (The Netherlands) v. The Czech Republic,* Partial Award, 17 March 2006, para. 329. *See* authorities cited in note 5 above.

[9] *See, e.g., Perenco Ecuador Ltd. v. Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and Liability, 12 September 2014, para. 586 ("[I]t is well recognised in investment treaty arbitration that States retain flexibility to respond to changing circumstances *unless they have stabilised their relationship with an investor.*") (emphasis added); *Ioan Micula et al v. Romania,* ICSID Case No. ARB/05/20, Final Award, 11 December 2013, para. 529 ("Investors must expect that the legislation will change from time to time, a*bsent a stabilization clause or other specific assurances* giving rise to a legitimate expectation of stabilization.") (emphasis added); *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, para. 164 ("[C]hanges to general legislation, in the absence of *specific stabilization promises* to the foreign investor, reflect a legitimate exercise of the host State's governmental powers that are not prevented by a BIT's standard and are not in breach of the same.") (emphasis added). *See also* JAMES CRAWFORD, *Treaty and Contract in Investment Arbitration*, 24(3) ARBITRATION INTERNATIONAL 351 (2008), p. 370 ("In the absence of *express stabilisation*, investors take the risk that the obligations of the host State under its own law may change") (emphasis added).

[10] Respondent's Rejoinder, para. 407.

[11] Award, at paras. 407 and 409.

saying that was not the case here at all."[12] This concession was repeated on numerous other occasions.[13]

12. This conclusion is compelled by the nature of fair and equitable treatment analysis, which focuses on the legal framework of a state,[14] which seeks to ensure "fair," "equitable," and "just" conduct by states,[15] and which serves to protect the legitimate expectations of investors.[16] The decisive issue is not whether a state's undertaking is "specific" or "general," or statutory or contractual, but whether the statements and actions of the state provide a sufficiently clear commitment to give rise under international law to legitimate expectations or legal rights on the part of an investor.

13. Thus, long-settled international authority makes it clear that a state is fully entitled to make binding commitments to foreign investors by way of statutes or other legislative acts.

a. "The investor may rely … on representations and undertakings made by the host state *including those in legislation, treaties, decrees*, licenses, and contracts."[17]

b. "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

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[12] Transcript, Day 1, page 83, lines 12-17 (emphasis added).

[13] Transcript, Day 1, page 83, lines 5-10 ("[Arbitrator]: … [W]ould you accept as a general principle that a stabilization commitment or undertaking could be expressed by legislation as well as by contractual arrangement? [Counsel for Respondent]: We don't dispute that. We don't dispute that."); Transcript, Day 1, page 77, lines 7-12 ("But mere legislative changes cannot constitute BIT violations unless--unless--the changes actually contravene a genuine stabilization guarantee by the State, and the Czech Republic never issued a stabilization guarantee to the Claimants, *whether in the legislation itself* or in any other fashion.") (emphasis added); Transcript, Day 1, page 78, lines 17-23 ("For mere legislative changes to be deemed a violation of any of the three BIT provisions that the Claimants have invoked, you would have to conclude that one or more of *those clauses in the general legislation* actually amounted to 'stabilization guarantees' as that term has been understood in the investment arbitration--investment treaty law …") (emphasis added); Respondent's Rejoinder, para. 409 ("When States 'stabilize' legislation, they follow a particular process or procedure."). The Respondent argues instead that legislative commitments must be particularly clear and explicit to provide the basis for international liability on the part of a state. *Ibid*, at pp. 82 *et seq.*

[14] *See* paras. 15-16 below.

[15] 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."); 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* IOANA TUDOR, THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT (2008), p. 165 ("These expectations are qualified as 'legitimate', 'justified', 'basic,' 'reasonable 'or fundamental and all these adjectives are used in such a way that they are interchangeable."); 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.").

[16] *See* para. 13 below.

[17] *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL Final Award, 12 November 2010, para. 285 (emphasis added).

existing contractual or other relations between the investor and the host state, *but may also concern the general legal framework in the host state*."[18]

c. "[A]n investor may derive legitimate expectations either from (a) specific commitments addressed to it personally, for example in form of a stabilization clause, or (b) *rules that are not specifically addressed to a particular investor* but which are out in place with a specific aim to induce foreign investments and on which the foreign investor relied in making his investment."[19]

d. "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*."[20]

e. "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."[21]

f. "[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 representations and undertakings made by the host state *including those in legislation, treaties, decrees, licenses, and contracts.*"[22]

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[18] *Binder v. The Czech Republic*, UNCITRAL Final Award, 15 July 2011, para. 443.

[19] UNCTAD, FAIR AND EQUITABLE TREATMENT, UNCTAD Series on Issues in International Investment Agreement II (2012), p. 69. *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's state's legal framework and on any undertakings and representations made explicitly or implicitly by the host state."); 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).

[20] *Toto Costruzioni Generali S.P.A v. Republic of Lebanon*, Award, ICSID Case No ARB/07/12, 7 June 2012, para. 159.

[21] *BG Group Plc. v. The Republic of Argentina*, UNCITRAL Ad Hoc Arbitration, Final Award, 24 December 2007, para. 343. *See also 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.").

[22] *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 ("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."); *CMS Gas Transmission Company v. The Argentine Republic*, Award, ICSID Case No. ARB/01/8, 12 May 2005, para. 275; *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.").

14. Similarly, the very basis for this investment arbitration – a standing offer to arbitrate by the Czech Republic in the Treaty – confirms that states may make binding commitments, and investors may acquire protected international rights, from "general" legislative provisions. The Treaty's arbitration provisions apply to, and protect, all German investors, notwithstanding the absence of any contractual arbitration agreement or other "specific" commitment to arbitrate with the Claimants.[23] Precisely the same principles and logic apply to other types of guarantees provided by the Czech Republic, including guarantees in its domestic legislation.

15. In contemporary market economies, operating under the rule of law, it is both commonplace and essential for states to be able to provide undertakings to private parties by way of "general" legislative or regulatory instruments. In many circumstances, modern states cannot as a practical matter negotiate contracts with large numbers of parties, but must instead regulate the conduct of private parties through legislation and regulations. Indeed, this is a distinguishing feature of a system founded on the rule of law, where legislative and regulatory provisions, rather than individual governmental directions, govern private conduct. It would seriously impede the task of governance and regulation, and contradict aspirations for the rule of law, to deny states the ability to make commitments to private parties, including foreign investors, in the form of legislative (or regulatory) guarantees.

16. Put simply, and unsurprisingly, the Tribunal is in agreement that international law recognizes and gives effect to the power of states to make binding, internationally-enforceable commitments to private parties. Where a state undertakes, by contract, legislation or otherwise, to provide specified 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 provide fair and equitable treatment. In doing so, international law does not constrain the autonomy of states, but rather gives effect to it, by enabling states to provide reliable and enforceable commitments to private parties, in order to obtain necessary investments or other benefits from those parties.

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[23] RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2d ed. 2012), p. 254; ANDREA MARCO STEINGRUBER, CONSENT IN INTERNATIONAL ARBITRATION (2012), p. 202 ("It has been observed that in investment arbitration arbitral jurisdiction is no longer premised on the privity of contracts, ie on reciprocity of negotiated consent, as under this new concept reciprocity is renounced and replaced by a sort of compulsory jurisdiction against the host state."); *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, para. 70 ("Although it was the subject of some discussion in the early years of investment treaty arbitration, it is now uniformly accepted that the ratification of a bilateral investment treaty containing such provisions constitutes a State's written consent to arbitration of covered disputes."); *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, 5 June 2012, para. 331 ("If a tribunal's jurisdiction is based on an investment treaty, claimant does not negotiate an individual agreement with the host State but accepts a non-negotiable offer addressed to persons or entities that fulfil its conditions. That offer is contained in an investment treaty and its conditions are agreed between the parties to that investment treaty. Unlike in the context of investment contracts, the acceptance of an offer contained in an investment treaty cannot create an assumption that the claimant fulfils the conditions of that offer."). *See also* JAN PAULSSON, *Arbitration without Privity*, 10.2 ICSID REV. 232 (1995), p. 232 ("This new world of arbitration is one where the claimant need not to have a contractual relationship with the defendant [state]).")

## II. THE CZECH REPUBLIC GUARANTEED THAT IT WOULD MAINTAIN FEED-IN TARIFFS FOR RENEWABLE ENERGY SOURCES AT FIXED MINIMUM LEVELS FOR 15 YEARS

17. The application of the foregoing principles in this case should be straightforward. It is clear that the Claimants made substantial investments in the renewable energy sector in the Czech Republic in reliance on unequivocal statutory guarantees provided by the Act No. 180/2005 Coll., On The Support of Electricity Generation from Renewable Energy Sources (the "Act on Promotion" or the "Act"). In particular, as the majority acknowledges, the Claimants relied on the guarantees provided by Section 6 of the Act regarding the level of the "feed-in tariffs" ("FiTs") for electricity produced by photovoltaic solar plants.[24] As a consequence, the only question in this arbitration, and the only question that divides the Tribunal, is what these statutory guarantees provided.

18. In my view, the plain language and obvious purposes of Section 6(1) of the Act leave no serious doubt that the Claimants were guaranteed a minimum level of FiTs over a specified statutory period (first 15, later 20, years) for electricity produced by the renewable energy sources that they constructed in the Czech Republic. It is also clear, again as the majority concedes,[25] that the Czech Republic's 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. That reduction in the minimum level of FiTs provided by Section 6(1) of the Act contradicted the Act's statutory guarantees to solar investors and thereby violated the Treaty's fair and equitable treatment guarantees.

19. Section 6 of the Act is titled "*Amounts of Prices for Electricity* from Renewable Sources and Amounts of Green Bonuses." The obvious, and express, purpose of Section 6 was to prescribe the "*amounts of prices*" payable to electricity producers for electricity produced from a specific category of sources (namely, renewable energy sources). As discussed below, the Act prescribed these prices – which differed from the prices for all other types of electricity in the Czech Republic – for a critical public purpose, namely, to encourage the production of electricity from renewable energy sources and thus to satisfy the Czech Republic's commitments to the European Union regarding renewable energy.

20. Section 6 of the Act then goes on to provide, in the Czech Republic's translation of the Act, that "[t]he Office [or "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][26], for a period of 15 years* from the commissioning year of the facility, taking into account the industrial producer price index."[27] The text of Section 6 is unambiguous. Section 6 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" and the "revenues per unit of electricity" from the specified energy sources will be "*maintained as the minimum* for a

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[24] Award, at paras. 414 and 417.

[25] *Ibid.*, at para. 271. *See also* Transcript, Day 1, page 115, lines 17 to 19 ("Of course, you know, [the Claimants] suffered a financial detriment as a result of the Measures I believe. That's uncontested ... .") (Counsel for Respondent).

[26] Text in parentheses appears in the Czech Republic's original translation.

[27] Exhibit R-004 (Respondent's Translation of Article 6 of Act 180) (emphasis added).

period of 15 years" from the date of commissioning of each source, subject only to the possibility of upward (not downward) adjustment of the price for inflation.

21. Section 6 is unequivocal. It guarantees that the FiTs for electricity produced from specified renewable energy sources will be maintained for 15 (later 20) years from the date of commissioning of the 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 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.*"[28] As discussed below, this long-term guarantee of a specific minimum FiT for each renewable energy source, following its commissioning, was essential to the Act's structure and purposes.[29]

22. In my view, these provisions leave no serious question that the Act guaranteed owners of renewable energy sources fixed minimum FiTs for electricity produced by these sources for a period of 15 (later 20) years. There is no other plausible way to read Section 6, and particularly Section 6(1)(b)(2), of the Act. In turn, these guaranteed minimum FiTs were vitally important to the Act's objective of providing long-term stability for investors in renewable energy and to the Czech Republic's objective of attracting such investors and developing a renewable energy sector.

23. Despite the plain language and obvious purposes of the Act, the majority declares that "Section 6(1) of [the Act on Promotion] ... contains no separate guarantee of an absolute level of revenue, set independently of the FIT system that guarantees a 15 year payback of capital expenses and a return on investment of at least 7% per year over 15 (later 20) years."[30] Instead, the majority concludes, the Czech Republic only "promised that the buy-out on FiT would be set at a level ensuring a 15 year payback of capital expenses and a return on investment or profit of at least 7% per year over 15 years for those solar PV plants that met the relevant parameters."[31]

24. Simply put, the majority concludes that Section 6 of the Act did not guarantee 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, pursuant to Section 6 (1)(b)(2), but only guaranteed that the FiTs payable for electricity produced by renewable energy sources would allow a return of investment in 15 (later 20) years, pursuant to Section 6(1)(b)(1).[32] According to the majority, this interpretation of Section 6(1) follows from reading the Act "in

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[28] Act on Promotion, Section 6(1)(b)(2), Exhibit R-004 (Respondent's Translation of Article 6 of Act 180) (emphasis added).

[29] *See* paras. 27-38 below.

[30] Award, at para. 413.

[31] *Ibid.*, at para. 369.

[32] The majority's interpretation also introduces into its interpretation of Section 6(1)(b)(1) the notion that the Act guarantees a "profit of at least 7% per year" or "a return on investment of at least 7% per year;" Award, at para. 367. There is nothing in Section 6(1)(b)(1), or any other part of the Act, that refers to a "7% per year" profit or return on investment, or to any other return on investment. The figure seized upon by the majority, and converted into a statutory guarantee, is derived exclusively from later administrative rulings of the ERO, which have no basis in the text of the Act or its statutory guarantees.

its entirety,"[33] which supposedly indicates that there is "no separate guarantee of an absolute level of revenue"[34] and that "there is no abstract promise of 'revenues' to investors."[35]

25. The majority's interpretation of the Act is impossible to accept. The majority is correct in acknowledging that the Act provides a statutory guarantee to investors, which can be given effect by the Treaty's fair and equitable treatment clause. Nonetheless, the majority's interpretation of the content of this guarantee is fundamentally wrong. The majority's interpretation contradicts the unequivocal text of the Act on Promotion, the undisputed purposes of the Act and the Czech Republic's unambiguous confirmations of the Act's meaning. Indeed, the majority's reading of the Act ignores the Czech Republic's own repeated and explicit statements regarding Section 6 in this arbitration.

26. In assessing the majority's interpretation, it is useful to begin with the language of the Act. Section 6(1) provides:

> "*Amounts of Prices for Electricity* from Renewable Sources and Amounts of Green Bonuses
>
> (1) The Office 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 the Purchasing Prices, a fifteen year payback period on capital expenditures, provided technical and economic parameters are met, such parameters consisting of, in particular, cost per unit of installed capacity, exploitation efficiency of the primary energy content in the Renewable Source, and the period of use of the facility, such parameters being stipulated in an implementing legal regulation,
>
> 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][36], for a period of 15 years* from the commissioning year of the facility, taking into account the industrial producer price index; the commissioning of a facility is also deemed to include cases involving the completion of a rebuild of the technological part of existing equipment, a change of fuel, or the completion of modernization that raises the technical and ecological standard of an existing facility…"[37]

27. Contrary to the majority's interpretation, Section 6 plainly provided two separate, but related, guarantees. It is crystal clear that Section 6(1)(b)(1) guaranteed that the ERO would set FiTs ("the Purchasing Prices") intended to achieve at a minimum a 15-year return on

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[33] Award, at para. 367.
[34] *Ibid.*, at para. 413.
[35] *Ibid.*, at para. 367.
[36] Text in parentheses appears in the Czech Republic's original translation.
[37] Exhibit R-004 (Respondent's Translation of Article 6 of Act 180) (emphasis added). The Claimants submitted a different translation of Section 6 of the Act on Promotion, *see* Exhibit C-31 (Claimants' Translation of Article 6 of Act 180); Award, at para. 23.

investment, while Section 6(1)(b)(2) then guaranteed that those FiTs, once set by the ERO for renewable energy sources commissioned in a particular year, would not be reduced for 15 years for sources commissioned in that year. In the words of Section 6(1)(b)(2), "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], for a period of 15 years* ... ." This text, and the combined effect of Section 6(1)(b)(1) and 6(1)(b)(2), unequivocally guaranteed that, once the Purchasing Prices (or FiTs) for electricity produced by a particular category of renewable energy source were set by the ERO for sources commissioned in a particular year, neither those prices nor the resulting revenues per unit of electricity would be reduced for a 15-year period.

28. The majority's award excises Section 6(1)(b)(2)'s guarantee of a fixed minimum FiT, payable for 15 years after commissioning of a source, from the Act. In the majority's view, the Act does not provide a "guarantee of an absolute level of revenue." Rather, as noted above, in the majority's view, the Act only guarantees FiTs that would be set at a level that would provide a return of investment in 15 (later 20) years. That conclusion effectively rewrites the Act and is impossible to reconcile with the plain language of Section 6(1)(b)(2).

29. The Act did not only provide (as it did in Section 6 (1)(b)(1)) that the ERO would establish FiTs that would provide at least a return of investment in 15 (later 20) years. The Act also provided, unequivocally (in Section 6(1)(b)(2)), that, once the ERO established a FiT, one year in advance, for renewable energy sources commissioned in the following year, that FiT would then be maintained for a 15 (later 20) year period. The majority's interpretation of the Act rewrites Section 6, deleting Section 6(1)(b)(2), and its fundamentally important guarantee of long-term price stability, from the statute.

30. The majority asserts that Section 6 of the Act must be read "in its entirety."[38] That is obvious, but does nothing to rescue the majority's reading of the Act. Instead, this rule confirms that the majority's interpretation of Section 6 is wrong.

31. As discussed above, Section 6(1) of the Act provides two separate, but related, guarantees to investors: (a) that the ERO would set FiTs to provide a "return of investment" within a "fifteen-year period of time;" and (b) that once a source was commissioned, "revenues ... per unit of electricity" and "Purchasing Prices" for electricity produced by that source would be "maintained" for a 15-year period. These were related, but separate, statutory guarantees. Implausibly, the majority simply reads the latter guarantee out of the Act in violation of the very rules of statutory interpretation that it invokes.

32. The majority's interpretation is also impossible to reconcile with Section 6(4) of the Act. Section 6(4) established a so-called "5% limit" or "5% brake rule," requiring the annual 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.[39] This 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."[40]

33. Section 6(4) inevitably created the possibility that the FiTs set by the ERO for a particular year ("the Purchasing Prices") would provide a higher rate of return than that

[38] Award, at para. 367.
[39] Act on Promotion, Section 6(4), Exhibit R-004 (Respondent's Translation of Article 6 of Act 180).
[40] *Ibidem.*

specified in Section 6(1)(b)(1).[41] Indeed, this was the specific and sole purpose of Section 6(4)'s brake rule – namely, to provide FiTs that were *higher* than those prescribed by Section 6(1)(b)(1).

34. Despite this, the majority reads Section 6(1)(b) as only maintaining FiTs at the level prescribed by Section 6(1)(b)(1)'s guarantee of a "return of investment" in 15 years. That reading is impossible to reconcile with either the language or the purpose of Section 6(4), which necessarily meant that there would be cases where the FiTs established by the ERO 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 majority ignores not only the plain language of Section 6(1)(b)(2), but also reads Section 6(4) out of the Act. That once more violates the very rules of statutory interpretation the majority purports to rely upon.

35. The majority cites text in Section 6(1)(b)(2) providing that the "amount of the revenues stays unchanged for the unit of the electricity from the renewable sources with the support of the buy-out prices for the period of time of 15 years."[42] According to the majority, because the ERO fixed "the buy-out prices" with the objective of producing return of investment in 15 years pursuant to Section 6(1)(b)(1), the fixed "amount of revenues … for the unit of electricity" under Section 6(1)(b)(2) did nothing more than provide a 15 year return on investment.[43] In the majority's words, which it is necessary to quote in full:

> "Subsection (b)(2) makes reference to the 'buy-out prices' mentioned in subsection (b)(1), expressly stating that they are to 'support' the 'revenues' of solar PV plants. The buy-out prices themselves are set following the criteria contained in the Technical Regulation and the ERO methodology, which state that the price will

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[41] This was confirmed by the Czech Republic's fact and expert witnesses: Transcript, Day 2, page 249, line 25 to page 250, line 12 ([redacted] "[The ERO] was supposed to set the tariffs for the subsequent periods, feed-in tariffs for these sources. As I have said with respect to other sources, there were no problems because there were no extremes. However, with regard to power solar stations, because the costs decreased sharply, the regulatory office was supposed to intervene and proportionately reduce the tariffs for the subsequent period. But that was not allowed by the law because the promotion act in one of the Clauses include the 5% ceiling for the feed-in tariff or for reduction of feed-in tariffs, and, therefore, that created the disproportionate situation."); Transcript, Day 2, page 462, line 19 to page 463, line 21 ("[Arbitrator]: I would like to go back quickly just to your Slide Number 4, where you say that the FITs in the Czech Republic were designed to offer a reasonable rate of return, and what I would like you to focus on is this 5% limit on the regression or reduction in the FITs and tell me if you agree with what I'm about to say. That aspect of the legislation was, in fact, intended to do something more than provide investors with a reasonable return. By definition, it was intended to do something else; is that correct? [Wynne Jones:] Not necessarily to give them a higher rate of return but to protect the level of tariff that is expected for when the plant does come to fruition. [Arbitrator:] But if you're in a world where technology is reducing the costs of constructing different kinds of plants, quite likely more than 5%, doesn't that necessarily mean that you will be giving investors more— [Wynne Jones:] Absolutely. If the 5% degression binds, and that means that the estimate of a fair FIT giving a reasonable return would imply a degression of greater than 5%, then by giving 5%, you're inevitably giving above the reasonable rate of return. [Arbitrator:] Exactly. *And so, the only time that the 5% ever comes into play will be in circumstances where, by definition, you're giving the Investor more than a 5%--more than a reasonable rate of return*? [Wynne Jones]: *Yes*.") (emphasis added). *See also* Respondent's Statement of Defence, para. 274 ("The inability of the RES Scheme to adjust to such an unanticipated but massive change of the external conditions that determined a key input for the level of the FITs (due to the maximum 5% variation that was permitted in the FITs year-on-year) created an opportunity for windfall profits. The return on capital invested became significantly in excess of the 7% p.a. that had been communicated to the investors by the regulator as the rate of return anticipated in the RES Scheme. The pay-back period of the investments dropped dramatically below the 15 years anticipated by the Act on Promotion.").

[42] Award, at para. 366.

[43] *Ibid*, at para. 367.

ensure a 15 year payback of capital expenses and a return on investment of at least 7% per year over 15 years. Thus, there is no abstract promise of 'revenues' to investors. The revenues are tied to the buy-out prices, and the buy-out prices are, in turn, tied to the guarantee of a 15 year payback of capital expenses and a return on investment or profit of at least 7% per year over 15 years."[44]

36. Although difficult to follow, this reasoning is plainly wrong. Section 6(1)(b)(2) expressly guarantees that 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]*[45], *for a period of 15 years*." There is no conceivable way for the "amount of revenues ... per unit of electricity" to be "*maintained*" if, as the majority concludes, the Purchasing Prices can be reduced after they have been fixed by the ERO. Rather, as Section 6(1)(b)(2) unequivocally provides, both the "revenues ... per unit of electricity" and the "Purchasing Prices" must be "maintained" for the 15 years. The majority's interpretation again squarely contradicts the statute's text.

37. The majority concludes that Section 6 does not provide for fixed minimum FiTs, but only for FiTs that provide a return on investment over 15 (later 20) years at 7% per annum.[46] As a consequence, according to the majority, FiTs could change every year, after they were established and applied to a particular source, increasing or decreasing, depending on the ERO's judgment, production and transmission costs and other factors. That conclusion is wholly contrary to Section 6(1)(b)(2)'s explicit guarantee that the "amount of revenues per unit of electricity from Renewable Sources" is "*maintained as the minimum* ... for a period of 15 years *from the commissioning year of the facility*." Likewise, the majority's conclusion is wholly contrary to Section 6(4) of the Act, which specifically provided for FiTs in excess of Section 6(1)(b)(1)'s formula.

38. The majority asserts that Section 6(1)(b)(2) provides "no abstract promise of revenues." That is again wrong and irrelevant. What Section 6(1)(b)(2) provides is a very specific and concrete promise that the "revenues ... per unit of electricity" fixed by the ERO under Section 6(1)(b)(1) for sources commissioned in a particular year will be "maintained" for that source for 15 (later 20) years. This is not an "abstract," but a very concrete, promise – a promise that is expressly provided by Section 6(1)(b)(2) and that is vitally important to the Act's regulatory and commercial purposes.

39. In sum, the majority's interpretation of Section 6 is impossible to reconcile with the language of the Act. The majority's interpretation contradicts the express terms of Sections 6(1)(b)(2) and 6(4) of the Act, effectively reading both provisions out of the Act. Simply put, the majority rewrites unequivocal statutory language to (supposedly) mean the opposite of what it says.

40. It is telling that the majority does not address any of the foregoing points in its reasoning. Nowhere, apart from a conclusory assertion of its views, does the majority engage with the specific guarantees in both Sections 6(1)(b)(1) and 6(1)(b)(2) or the text of Section 6(4). In my view, that silence confirms the plain meaning of the Act's guarantees.

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[44] *Ibid.*, at para. 367.

[45] Text in parentheses appears in the Czech Republic's original translation.

[46] As noted above, the 7% per annum figure relied on by the majority has no basis in the Act. *See* note 32 above. It is based entirely on later administrative regulations.

41. The majority also entirely ignores the regulatory and commercial purposes of the Act. It is clear that Section 6(1)(b)(2)'s guarantee of fixed FiTs payable for electricity produced by qualifying renewable energy sources over a specified period of time was central to the Act's purposes and objectives.

42. It is undisputed that the production of electricity from renewable energy sources in the Czech Republic was not economically feasible without very substantial state subsidies; the prices prevailing in the market for electricity, produced by other sources, were significantly below the prices that were required to justify either construction or financing of renewable energy sources.[47] This was especially true given the very substantial and disproportionate up-front capital investments, in newly-developed technologies, which were required for renewable energy installations.[48]

43. As a consequence, absent a legislative guarantee of fixed FiTs over a specified period for electricity produced by renewable energy sources, no investor would have constructed or operated such sources in the Czech Republic and, even more clearly, no lender would have agreed to finance such investments.[49] This relatively stark economic reality conflicted squarely, however, with the policy objectives and international commitments of the Czech Republic over the past two decades, which aimed to significantly increase the amounts of electricity that were produced from renewable energy sources in the Czech Republic.

44. Specifically, the Czech government was committed to increasing significantly the amount of electricity produced from renewable energy sources in the Czech Republic, both for domestic policy goals and to comply with commitments undertaken to the European Union (which established an indicative national target of 8% of electricity production from renewable energy sources).[50] These commitments to renewable energy were the results of a lengthy, sustained process of international cooperation, which included the 1992 United Nations Framework Convention on Climate Change (setting forth commitments to the reduction of greenhouse gases), the 1997 Kyoto Protocol (setting forth targets for the reduction of greenhouse gases) and, eventually, the EU's Renewable Energy Directive of

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[47] Wynne Jones First Report, p. 24, at para. 4.5. *See also* Exhibit ONYX3 (T. Couture and others, "A Policymaker's Guide to Feed-in Tariff Policy Design"), p. 25, at para. 4.2.1.1; Exhibit R-170 (English language transcript of a television interview by B. Němeček [Former Vice Chairman of the ERO] to "Hyde Park," Czech Public Television,), p. 4 ("[W]e could say the agreement across the sector, was that, although it was a risky business of renewable resources, i.e. [power] generation, which depended on numerous external factors, there was, nevertheless, a statutory guarantee and therefore it should be provided with the same profitability as the other regulated activities.").

[48] Transcript, Day 1, page 64, lines 2 to 6 ("[T]he costs of renewable energies are high, the capital costs are high, and, therefore, it made it difficult for producers to compete under normal market circumstances, and that's why they needed the Subsidies regime."). *See generally,* Exhibit ONYX7 (P. Mir-Artigues, "The Photovoltaic crisis and the demand-side generation in Spain," March 2013), p. 19 ("Moreover, on-site generation probably faces a higher cost of capital to finance the upfront investment than that applied to a loan requested by a commercial plant."); [redacted] Report, pp. 68-69, at para. 258 ("[I]nvestments in renewables rely on the stability, transparency and long-term guarantees of the regulatory framework, because these investments require a much larger proportion of the total investment cost to be made up-front, as compared to conventional electricity generation investments.").

[49] Wynne Jones First Report, p. 29, at para. 4.23 and p. 31, at para. 4.37; Exhibit CE-42 (Press article of 23 February 2005 available at IHNED.cz), p. 1 ("At the moment, when the owners of the power plants secure the first fifteen years of operation, they will have the possibility to obtain money from non-state sector … according to the Minister of Environment Libor Ambrozek.").

[50] Exhibit CE-28 (Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market), Art. 3, Annex.

2001 (setting forth indicative targets for electricity production from renewable energy sources). In order to achieve these objectives, and to realize a significant increase in the use of renewable energy in the Czech Republic, it was clear that substantial governmental support for the renewable energy sector was required.[51]

45. Consequently, in order to encourage private investment, and to facilitate lending, in the renewable energy sector, the Czech Republic guaranteed that investors in renewable energy sources would receive specified FiTs, set in advance, for defined time periods. These FiTs ensured that investors, and their financial lenders, would receive a pre-determined, publicly-disclosed FiT for all electricity produced by qualifying sources over the predicted useful life of their investment – first 15 years, later extended to 20 years. In so doing, the FiTs provide the commercial incentives for investments and the necessary security for lenders that market prices alone would not provide.[52]

46. Absent these guarantees of specific minimum FiTs over a defined time period, neither the Claimants nor many other investors – nor their lenders – would have constructed solar and other renewable energy plants in the Czech Republic. Section 6(1)(b)(2) specifically guaranteed that, once fixed by the ERO, FiTs would be maintained for 15 (later 20) years precisely to protect investors against the risk of the ERO (or others) reducing the FiTs payable for electricity from a source after it had been constructed. In so doing, Section 6(1)(b)(2) provided the long-term stability for investors that the electricity market did not provide, but that was essential if a renewable energy sector was to be developed.

47. In my view, it is essential to appreciate this background, both regulatory and commercial. Put simply, the entire renewable energy sector in the Czech Republic (as in a number of other states) was based on the commitment of the state, like the commitments of other states, that the prices paid for electricity produced from renewable energy sources would be maintained unchanged (except for upward adjustments to reflect inflation) for a specified period of time, regardless of market conditions or regulatory judgments. In turn, this provided investors and lenders with the security that was otherwise absent in the renewable energy sector.

48. The majority's interpretation of the Act is wholly contrary to these straightforward legislative and regulatory objectives. The majority reads Section 6(1)(b)(2)'s guarantee of a fixed minimum FiT for 15 years out of the Act, and instead interprets the Act to allow repeated changes in the FiTs payable to renewable energy sources. Instead, as noted above, under the majority's interpretation of the Act, FiTs could be changed every year, or several times a year – so long as the ERO concluded that Section 6(1)(b)(2)'s 15 (later 20) year payback period for return of investment was satisfied. This possibility of continuous price

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[51] [redacted] Report, p. 33, at para. 104. *See also* Exhibit CE-32 (Statement by Milan Urban, Minister of Industry and Trade, during the parliamentary deliberations of the support scheme in the Chamber of Deputies on 12 February 2004), p. 1; Exhibit C-35 (Statement of Milan Urban, Minister of Industry and Trade of the Czech Republic, during the Parliamentary deliberations of the support scheme in the Chamber of Deputies on 31 March 2005), p. 1; Exhibit CE-42 (Press article of 23 February 2005 available at IHNED.cz), p. 1 ("According to the Government the Act [on Promotion] stabilizes the business environment and the private investors are waiting for it, these investors will help the state to fulfil the requirement of the European Union to produce eight per cent of the total electricity from renewable sources, i.e. in small water power plants, in biomass combustion plants and in wind power plants, till the year 2010. … Only in this manner it is possible to fulfil the requirements of the European Union according to the Minister of Environment Libor Ambrozek.").
[52] Exhibit R-162 (Report on the Achievement of the Indicative Target for Renewable Electricity Production in the Year 2007), p. 3.

fluctuations and uncertainty is antithetical to the Act's purposes, as well as the plain language of Section 6(1)(b)(2).

49. Simply put, the majority's interpretation makes no commercial sense and would have never attracted the investment in the renewable energy sector that the Czech Republic required. Moreover, the majority's interpretation produces profound unfairness and inequity. In reliance on Section 6's express statutory guarantees, the Claimants made substantial investments, providing the Czech Republic with the renewable energy and renewable energy sector that it desired. Once those investments were made, however, the Czech Republic imposed the Solar Levy, abrogating the guarantees it had previously provided. Neither that nor the majority's interpretation of the Act comports with the Treaty or with basic fairness and equity.

50. The majority's reading of Section 6(1)(b)(2) also ignores the multiple ways in which the Czech Republic itself has consistently described 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. These various descriptions are impossible to reconcile with the majority's assertion that the Act only guaranteed a particular "return on investment" and not minimum FiTs or Purchasing Prices for electricity. It is important to quote these descriptions in detail to ensure that their meaning is not mistaken or neglected.

a. The Czech Minister for Industry and Trade described the Act on Promotion, during the legislative approval process, as follows: "In the field of the support of electricity from renewable energy sources, the bill brings especially the *long-term guarantee of feed-in tariffs* and therefore it secures a stable business environment, which the potential investors call for intensively."[53] Other government ministers made similarly explicit statements confirming that FiTs for electricity produced from renewable energy were guaranteed for fixed periods.[54] These statements focused specifically on the guaranteed FiTs, over a 15-year period, and not, as the majority suggests, on FiTs that would produce a "return of investment" in 15 years.

b. The Czech Republic stated in a revised 2005 Report on the Act on Promotion 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

[53] Exhibit CE-35 (Statement of Milan Urban, Minister of Industry and Trade of the Czech Republic, during the Parliamentary deliberations of the support scheme in the Chamber of Deputies on 31 March 2005), p. 1 (emphasis added).

[54] Exhibit CE-42 (Press article of 23 February 2005 available at IHNED.cz), p. 1 ("At the moment, when the owners of the power plants *secure the first fifteen years of operation, they will have the possibility to obtain money from non-state sector* ... according to the Minister of Environment Libor Ambrozek.") (emphasis added); Exhibit CE-35 (Statement of Milan Urban, Minister of Industry and Trade, during the parliamentary deliberations of the support scheme in the Chamber of Deputies on 31 March 2005), p. 1. *See also* Exhibit CE-34 (Press article of 12 November 2003 available at www.tzb-info.cz), p. 1 ("Renewable sources will be supported by the Act on [Promotion], which should create a stable environment for energy producers leading to increased investment from private sources... The draft provides for *the support in form of stabilization of market conditions* for producers of so called green energy.") (emphasis added).

plants already in operation."[55] Again, these statements focused specifically on the guaranteed FiTs (or "revenue" and "feed-in tariffs"), over a 15-year period, and not, as the majority incorrectly reasons, on guaranteed "profit" or "return of investment."

c. The Czech Republic explained in a 2005 Report to the European Commission that the Act on Promotion "provides for 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*."[56] Once more, the Czech Republic's statements were directed specifically to the guaranteed FiTs, over a 15-year period, and not, as the majority suggests, on "return of investment."

d. The Czech Republic explained in another 2005 report to the United Nations 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)."[57] The same report stated 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*..."[58] Once more, these statements were directed specifically to guaranteed "revenue" and "minimum purchase prices" for a 15-year period, not to "profits" or "return of investment."

e. The ERO's Pricing Regulation for renewable energy provided, among other things, that "*Feed-in tariffs* and green bonuses determined pursuant to the [Act on Promotion] *shall apply throughout the entire expected lifetime of the facility producing electricity* as set out by the Public Notice implementing certain provisions of the [Act on Promotion]. *Throughout such lifetime of the facility producing electricity*, which falls in the relevant category determined pursuant to the type of renewable source used and date of putting into operation, *the feed-in tariffs shall be increased annually* taking in consideration the price index of industry manufacturers at least by 2% and at maximum by 4%, with the exception of facilities combusting biomass and biogas."[59] Again, the Czech Republic's focus was on guaranteed levels of "feed-in tariffs," not just "profits" or "return of investment."

f. The Czech Renewable Energy Agency's website, available to the public, stated that "The *amount of the feed-in tariffs is guaranteed for period of 15 years* and prices indices of industry products are taken in consideration here. In contrast to green bonuses, the *fifteen-year guarantee of amount of revenues* for electricity unit

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[55] Exhibit CE-100 (2006 Report on the Achievement of the Indicative Target for Renewable Electricity), p. 19 (emphasis added).
[56] Exhibit CE-99 (2004 Report on the Achievement of the Indicative Target for Renewable Electricity), p. 3 (emphasis added).
[57] Fourth National Communication of the Czech Republic on the UNFCC, 2005, p. 35, available at http://unfccc.int/resource/docs/natc/czenc4.pdf (last visited 11 June 2017) (emphasis added).
[58] *Ibid.*, at p. 41 (emphasis added).
[59] Exhibit CE-37 (Public notice 140/2009 Coll. of 11 May 2009 on Price Public notice in the Energy Sectors and on Price Public notice Methods), p. 2 (emphasis added).

since the year of putting the facility for production of electricity from renewable energy sources into operation *must not be influenced.*"[60] The Czech Renewable Energy Agency also confirmed on its website that the FiTs not only apply during the lifetime of the plant but are also adjusted based on the Index of Industrial Production and thereafter subsequently increased by a minimum of 2%.[61] Yet again, this refers unequivocally to guarantees of the "amounts of the feed-in-tariffs" and "amount of revenues for electricity unit," not "profits" or "return of investment."

g. The ERO stated in a 2007 Report on its activities that "From the perspective of *guaranteed support for renewable resources*, another major change was the amendment to public notice no. 150/2007, on regulatory methods in the energy industries and procedures for price control. *The new provisions set forth that feed-in tariffs and green premiums shall be applied throughout the service life of electricity generating* plants and also that *feed-in tariffs shall be increased annually to reflect PPI [the Index of Industrial Production]*, by at least two per cent but no more than by four per cent, throughout the service life of electricity generating plants, with the exception of those that fire biomass and biogas."[62] Once more, the focus was unequivocally on guaranteed FiTs, not profits or return of investment.

h. The ERO conducted presentations to foreign investors both inside and outside of the Czech Republic, including presentations in Prague, Warsaw and elsewhere. These road-shows included powerpoint presentations that told potential investors that the Act on Promotion provided a 15-year guarantee of FiTs.[63]

i. For example, in a 2006 presentation in Prague, the ERO stated that "[s]upport of electricity production from renewable sources in accordance with Act no. 180/2005 Coll" included "economic return 15 years" and "*keeping of support for 15 years* in due consideration of price index of industry producers (*regarding feed-in tariffs*)."[64]

ii. The following year, in a presentation in Warsaw entitled "Support of Renewable Electricity in the Czech Republic," the ERO reiterated that the Act on Promotion "guaranteed" a "15 years payback period of investments."[65] Similarly, the Czech Energy Agency stated in a presentation given in a 2006 workshop in Beroun that the Act on Promotion provided a "*guarantee for tariffs for 15 years* (tariff assessments of ER[O])."[66]

i. The Czech Republic's 2010 Action Plan, submitted to the European Union in July 2010, addressed the question "[h]ow 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]*."[67] The same

[60] Exhibit CE-44 (Information from the Czech Renewable Energy Agency about the support system of the Act on Support), p. 2.
[61] *Ibidem.*
[62] Exhibit CE-39 (The 2007 Report on the Activities and Finances of the Energy Regulatory Office), p. 22 (emphasis added).
[63] Exhibit CE-46 (Presentation given by the ERO in Prague on 26 January 2006); Exhibit CE-47 (Presentation given by the ERO in Warsaw on 29 February 2007).
[64] Exhibit CE-46 (Presentation given by the ERO in Prague on 26 January 2006), p. 2 (emphasis added).
[65] Exhibit CE-47 (Presentation given by the ERO in Warsaw on 29 February 2007), p. 1.
[66] Exhibit CE-48 (Presentation given by the Czech Energy Agency), p. 1 (emphasis added).
[67] Exhibit R-142 (Czech National Renewable Energy Action Plan), pp. 58-59 (emphasis added).

Action Plan also stated, in response to a question whether "any tariff adjustment [is] foreseen in the scheme," by stating 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*."[68] The same document stated that there were no caps on the amounts of electricity eligible for the guaranteed tariffs.[69] As with all the Czech Republic's other statements, the Action Plan referred to guaranteed "tariffs" and "feed-in-prices," not "return of investment."

j. A "Frequently Asked Questions" section on the ERO's website reproduces the provisions of Public Notice No 150/2007, including the statements that the "*feed-in-tariffs and green bonuses apply throughout the useful life of the plants*" and that the "*the feed-in tariffs are adjusted annually to the Index for Industrial Production and increased – except for plants producing biomass and biogas energy – by at least 2%, however no more than 4%.*"[70] The FAQs also address the question whether "it [is] correct, that the anticipated useful life for the photovoltaic systems was extended and hence also the time period the feed-in-tariff ... to be paid" by confirming that "*feed-in-tariffs and green bonus for the photovoltaic systems commissioned after 1 January 2008 may be claimed for 20 years.*"[71] One again, the references are to guaranteed "feed-in-tariffs," not "return of investment."

k. Public statements made throughout the relevant time period by the representatives of the Czech Republic consistently emphasized the government's commitment to providing a stable legal framework for the investors and guaranteed FiTs for a 20-year period.[72] Similarly, Czech authorities repeatedly declared that governmental support under the Act on Promotion provided a "stable business environment"[73] for specific categories of renewable energy investors,[74] including assurances that "the *amount of the feed-in tariffs is guaranteed for period of 15 years*."[75]

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[68] *Ibid.*, p. 59 (emphasis added).
[69] *Ibid.*, p. 58.
[70] Exhibit CE-40 (Excerpt from the FAQ section on the Energy Regulatory Office's homepage dated 15 November 2009), p. 1 (emphasis added).
[71] *Ibidem* (emphasis added).
[72] Exhibit CE-50 (Press article of 10 March 2008 available at www.tzb-info.cz), p. 1 ("The amount of feed-in tariffs for systems constructed after January 1, 2008 amounts to 13.46 CZK/kWh and at the same time the period of time for photovoltaic electricity feed-in was extended to 20 years"); Exhibit CE-34 (Press article of 12 November 2003 available at www.tzb-info.cz), p. 1 ("Renewable sources will be supported by the Act on Support, which should create a stable environment for energy producers leading to increased investment from private sources."); Exhibit CE-51 (Press article of 7 August 2008 available at www.ceskatelevize.cz/ct24), p. 1 ("The current situation should be changed by the advantageous feed-in tariff guaranteed for 20 years.").
[73] The ERO lecture on support of renewable energy sources, October 26, 2006, available at www.schaumann.cz/ke-stazeni/produktove-letaky/prednaska-cea.pdf; Exhibit CE-32 (Statement by Milan Urban, Minister of Industry and Trade, during the parliamentary deliberations of the support scheme in the Chamber of Deputies on 12 February 2004), p. 1; Exhibit C-35 (Statement of Milan Urban, Minister of Industry and Trade of the Czech Republic, during the Parliamentary deliberations of the support scheme in the Chamber of Deputies on 31 March 2005), p. 1.
[74] Exhibit CE-43 (Summary of Act 180/2005 on the homepage of the Ministry of Industry and Trade), p. 1.
[75] Exhibit CE-44 (Information from the Czech Renewable Energy Agency about the support system of the Act on Support), p. 2; Fourth National Communication of the Czech Republic on the UNFCC, 2005, p. 41, available at http://unfccc.int/resource/docs/natc/czenc4.pdf (last visited 11 June 2017).

51. These statements by the Czech Republic leave no conceivable doubt that, contrary to the majority's view, Section 6(1)(b)(2) means just what it says – "minimum purchasing prices," "feed-in tariffs" 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 in renewable energy, and their lenders, that fixed minimum feed-in tariffs 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 unequivocal representations, made consistently and uniformly over many years, by numerous different governmental representatives in the Czech Republic.

52. The majority asserts that "some representations [by the Czech Republic] admittedly do ambiguously mention preservation of the level of feed-in-tariffs for 15 years."[76] That is false.

53. The representations of the Czech Republic detailed above do not "ambiguously" guarantee minimum FiTs for 15 years: they unequivocally and explicitly do so, as a review of those quotations, set forth in detail above, makes clear. Likewise, it is not "some" representations of the Czech Republic that provide this unambiguous interpretation of Section 6(1)(b)(2): it is every single historical statement by the Czech Republic about the Act which is in the record that does so.

54. Notably, the majority does not quote or address the language of the numerous governmental statements (quoted above at length) or make any effort to explain the repeated and specific references in these various statements to "feed-in tariffs," "prices," "Feed-in Guarantee Price," "tariffs," "revenue," "Minimum Purchasing Price," "buy-out prices," or "revenue per electricity unit." All of these phrases unambiguously refer to the amount of the FiTs for electricity, not merely to return of investments or profits. All of these phrases expressly reiterate, and reinforce, the specific language of Section 6(1)(b)(2) – making it clear that the Act on Promotion provided a statutory guarantee that fixed minimum FiTs would be paid for 15 (later, 20) years from the commissioning of a renewable energy source. It is gain telling that the majority provides no reasoned response to this consistent record of statements by the Czech Republic.

55. The majority asserts in passing that these multiple statements "contain no details of the level of the FIT that is guaranteed."[77] That is again flatly wrong.

56. The FiT that the Czech Republic assured investors as being "guaranteed," "maintained," "preserved," "fixed" or "applied" for 15 years was – obviously – the FiT that was established at the beginning of the statutory 15-year period, when a renewable energy source was commissioned. Again, that is crystal clear from the Czech Republic's repeated assurances of "the guarantee of revenue per unit of electricity produced over a 15-year period *as of the date a plant is put into operation*," "preservation of the level of feed-in tariffs for 15 years for plants already *in operation*," "fixed purchase (feed-in-prices)," a "guarantee … that the amount of revenues per unit of produced electricity … will be maintained for a period of 15 years *from bringing the installation into operation*," "a fifteen year guaranteed of minimum purchase prices *from the date of bringing the installation into operation*," a guarantee that "[f]eed-in tariffs … shall apply throughout the *entire expected lifetime of the facility*," and "[t]he amount of the feed-in tariffs is guaranteed for period of 15 years." The

[76] Award, at para. 422.
[77] *Ibidem.*

majority's interpretation of the Act – as allowing reductions of the FiTs during the statutory 15-year period – is wholly impossible to reconcile with these unequivocal statements by the Czech Republic.

57. The majority's interpretation of the Act also contradicts other unequivocal statements by the Czech Republic. The Czech Republic itself specifically acknowledged in this arbitration that the text of Section 6(1)(b)(2) required that the Purchasing Price fixed by the ERO be maintained for a 15-year period following commissioning of a Renewable Source. Thus, the Czech Republic conceded that the "*FITs granted upon commissioning ... were to remain constant*, except for an (upward) annual adjustment based on the producer price index of industrial producers (the "PPI"), for a period of 15 years from the commissioning of the relevant plant."[78] Remarkably, despite that concession and the plain language of the Act, the majority interprets Section 6(1) to mean exactly the opposite, effectively reading Section 6(1)(b)(2) out of the statute, in contradiction to the Czech Republic's interpretation of its own law.

58. Similarly, the majority's interpretation of the Act contradicts the testimony of the Czech Republic's own representatives and witnesses in this arbitration, who expressly conceded that Section 6(1)(b)(2) contained a statutory guarantee of fixed minimum feed-in tariffs. In the words of Mr. [redacted]:

> "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.*"[79]

> "[Counsel for Claimant]: And if I may, I will read it out to you what Section 6(b).2 says: 'After the date of the effect of this act, the amount of revenues stays unchanged for the unit of electricity from Renewable Sources with the support of buy-out prices for the period of 15 years since the year when the device was put into operation as a minimum amount.' ... So, this price at the time when the plant is put in operation was guaranteed for a period of 15, later extended to 20 years; is that correct?
>
> [redacted]: For the sources at that given period that were under the price tariff or Price Decision, *yes, for those this is correct.*"[80]

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[78] Statement of Defense, para. 30 (emphasis added). *See* Transcript, Day 1, page 83, line 21 to page 84, line 5.

[79] [redacted] Witness Statement, para. 6 (emphasis added).

[80] Transcript, Day 2, page 253, line 19 to page 254, line 8 (emphasis added). Respondent's witness Mr. [redacted] went on to confirm that because said guarantee was contained in a legislative act, which is published in the collection of laws, it was publicly available to everyone, including investors, *see* Transcript Day 2, page 253, line 19 to page 254, line 15 ("[Counsel for Claimant]: And if I may, I will read it out to you what Section 6(b).2 says: 'After the date of the effect of this act, the amount of revenues stays unchanged for the unit of electricity from Renewable Sources with the support of buy-out prices for the period of 15 years since the year when the device was put into operation as a minimum amount.' ... So, this price at the time when the plant is put in operation was guaranteed for a period of 15, later extended to 20 years; is that correct? [redacted]: For the sources at that given period that were under the price tariff or Price Decision, yes, for those this is correct. [Counsel for Claimant]: And this was also communicated by the ERO to investors via their homepage, via the ERO homepage, is that correct? [redacted]: ...[T]his was a public act. It was published in the collection of laws, and so it was available to everyone.").

"[Counsel for Claimant]: [The Q&A section from the ERO homepage] says in the English translation: 'As explained above, the current law defines that feed-in tariffs and green bonus for photovoltaic systems commissioned after 1 January 2008 may be claimed for 20 years.' Is that correct?

[redacted]: Yes."[81]

"[Arbitrator]: Mr. Di Rosa, just so I understand it because I didn't pick this up in your first description of the Act on Promotion, if I understand what you've just said, you would accept that in Section 6 the Act guaranteed for a 15-year period a specified Purchasing Price for tariff?

[Counsel for Respondent]: *That's what the--that's what the statute contemplated, yes.*"[82]

59. These repeated explanations of Section 6 of the Act by the Czech Republic's representatives and witnesses could not have been clearer. Again, it is impossible to reconcile these explanations with the majority's interpretation of the Act, much less to reconcile the majority's disregard for the Czech Republic's acknowledgements about the meaning of its own legislation, with the Tribunal's mandate.

60. The majority also suggests that the Claimants may not have reviewed various of the numerous representations made by Czech governmental representatives regarding Section 6(1)(b)(2) (with the award referring to the Explanatory Note on the Act on Promotion).[83] That is again wrong, both factually and legally.

61. First, it is uncontroverted that the Claimants, like many other investors, did rely on some of the numerous governmental representations identified above.[84] Given the very public character of those representations, and the frequency with which they were repeated, that is hardly surprising.

62. More fundamentally, these representations are significant because they provide public confirmation by the Czech Republic of the meaning of statutory instruments, and specifically Section 6(1)(b)(2) of the Act on Promotion.[85] The majority's suggestion that an investor

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[81] Transcript, Day 2, page 256, lines 19-25 (emphasis added).
[82] Transcript, Day 1, page 19, lines 11 to 18 (emphasis added).
[83] Award, at paras. 421 and 423.
[84] Statement of Claim, paras. 30-71. [redacted] Witness Statement, para. 22 ("None of these measures, however, were sufficient to prevent the geometric increase in installed solar capacity, as investors, most of them domestic, and many of them with no prior experience in the solar sector, *rushed to take advantage of what was widely perceived as an opportunity to earn very high profits.*") (emphasis added); Transcript, Day 1, page 167, lines 12-21 ("[Counsel for Respondent]: You indicated earlier in response to a question from your counsel that the yield of the investment was the determining factor, I think you said, something like that. So, this means that the anticipated rate of return on any investment in the Czech Republic was the critical aspect for you; correct? [Wirtgen]: The yield was--for us, was the reason for taking the overall risk that I just described, and it consisted of several factors. It was the decisive factor for us to consider this investment step."); Transcript, Day, 1, page 130, lines 4-8 ("*[T]his well-intentioned approach effectively resulted in investors taking advantage of it* to pile on as quickly as possible, and so the problem skyrocketed in 2011, effectively by adopting a prospective change that was going to take effect almost a year later.") (Mr. Evseev) (emphasis added).
[85] The representations here were not ad hoc statements about the exercise of governmental discretion or the treatment of a particular investor.

cannot rely on a state's public statements about the meaning of its own legislation is impossible to reconcile with either common sense or the rule of law.

63. A state's explanation of its legislative enactments plays a vital role in ensuring and furthering the rule of law in a democracy; those explanations are routinely relied upon, therefore, in the interpretation of legislation in adjudicative proceedings[86] and in the public's understanding of the meaning of such legislation.[87] The majority's suggestion that the Claimants cannot similarly rely upon such representations by the Czech Republic about the meaning of its own legislation is impossible to accept as a matter of principle. And, as discussed above, those representations make it crystal clear that Section 6 of the Act means precisely what its text provides – and precisely the opposite of what the majority asserts.

64. The majority also refers in passing to decisions of the Czech Constitutional Court and the Czech Supreme Administrative Court, assertedly reaching "similar conclusions to those of the majority."[88] As the majority appears to accept, these domestic decisions are of no weight in determining whether Section 6(1)(b)(2) of the Act on Promotion" provided a guarantee of a minimum FiT for purposes of the Treaty's fair and equitable treatment protection. Rather, the Tribunal has an independent mandate, and obligation, under international law to apply the Treaty in light of the Act's provisions.[89]

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[86] These statements form part of any legislation's drafting history, which may be described as "the surrounding corpus of public knowledge relative to [the Act's] introduction into Parliament as a Bill, subsequent progress through, and ultimate passing by, Parliament," FRANCIS BENNION, BENNION ON STATUTORY INTERPRETATION (6th ed. 2013), Section 230. Although the interpretative weight courts accord to such extrinsic sources varies across jurisdictions, judicial reliance on legislative history constitutes an extended practice, *see* ROBERT J. ARAUJO, *The Use of Legislative History in Statutory Interpretation: A Look at Regents v. Bakke*, 16 SETON HALL LEGIS. J. 57 (1992), pp. 122 *et seq.*; WILLIAM S. III JORDAN, *Legislative History and Statutory Interpretation: The Relevance of English Practice*, 29 U.S.F. L. REV. 1, 42 (1994), p. 42; CLAIRE M. GERMAIN, *Approaches to Statutory Interpretation and Legislative History in France*, 13 DUKE J. COMP. & INT'L L. 195 (2003), p. 202; NIAL FENNELLY, *Legal Interpretation at the European Court of Justice Legal Interpretation at the European Court of Justice*, 20 FORDHAM INT'L L.J. 656 (1996), p. 666. *See also* FRANCIS BENNION, BENNION ON STATUTORY INTERPRETATION (6th ed. 2013), Section 231 ("Official statements by the government department administering an Act, or by any other authority concerned with the Act, may be taken into account as persuasive authority on the legal meaning of its provisions.").

[87] The majority at para. 421 cites *Invesmart B.V. v. Czech Republic*, UNCITRAL Award, 26 June 2009, paras. 252-253, for the proposition that the Claimants cannot rely on the Czech Republic's public explanations of the Act on Promotion. Although omitted from the majority's quotations of the *Invesmart* award, the tribunal there dealt only with a claimant's effort to rely on "the content of *internal governmental discussions*," not public explanations and assurances about the meaning of legislation. *Ibid.*, at para. 253 (emphasis added). Moreover, contrary to the majority's reasoning, the *Invesmart* award concluded that even internal governmental discussions could "confirm a claimed expectation."

[88] Award, at para. 370.

[89] *See* ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS (paperback ed. 2012), pp. 81 *et seq.* ("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 into the void.").

65. In any event, the majority also fundamentally mischaracterizes the nature and content of the Czech Constitutional Court's judgment. That judgment provides no support for the majority's interpretation of Section 6 of the Act, and instead plainly contradicts the majority's construction.

66. In the judgment on which the majority relies, the Czech Constitutional Court did not reach "similar conclusions to those of the majority,"[90] i.e., that "the Czech Republic promised that the buy-out price or FIT would be set at a level ensuring a 15 year payback of capital expenses and a return on investment or profit over 15 years for those solar plants that met the relevant parameters."[91] There is nothing in the Czech judgment that adopts such a statutory interpretation of Section 6 of the Act – as the absence of any quotation in the award supporting the majority's analysis suggests.

67. On the contrary, the judgment of the Czech Constitutional Court makes it clear that the Court held – as a matter of Czech constitutional law – that 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."[92] Thus, the Czech Court's judgment states that the issue presented to, and decided by, the Court "involve[d] a challenge of constitutionality of a law, that does not interfere with constitutionally protected rights and freedoms but which *has the effect of reducing the state support stipulated in an earlier law* ... ."[93] In response to this question, the 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 of the constitutionally-guaranteed rights of the affected entities."[94] In the Court's view, "a simple payback period on investment of 15 years" does not violate the Czech Constitution. [95]

68. This conclusion is in no way an interpretation of Section 6 "similar" to that of the majority – that is, as not guaranteeing minimum FiTs for 15 years. There is no analysis of the statutory text, history or purposes of Section 6 by the Czech Constitutional Court that adopts or that would support such an interpretation of the Act. The Czech Constitutional Court's decision is instead a conclusion that changes in the Czech regulatory regime – specifically, "the enactment of the challenged provisions [which] reduced the support provided to operators" of solar plants – did not violate the Czech Constitution.[96] This is a conclusion about the meaning of the Czech Constitution and its constitutional protections for private parties, not an endorsement of the majority's statutory interpretation of Section 6 of the Act on Promotion.

69. On the contrary, the Czech Constitutional Court's judgments clearly contradict the interpretation of the Act suggested by the majority. Thus, the Czech Court expressly recognizes – contrary to the majority's analysis - that the Solar Levy "has the effect of *reducing the state support stipulated in an earlier law*,"[97] namely the support guaranteed by Section 6 of the Act. Likewise, the Court declared that "the enactment of the challenged

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[90] Award, at para. 370.
[91] *Ibid.*, at para. 369.
[92] Exhibit R-84 (Decision of the Constitutional Court of the Czech Republic, 15 May 2012, Ref. No. Pl. ÚS 17/11), para. 87.
[93] *Ibid.*, para. 77 (emphasis added).
[94] *Ibid.*, para. 90 (emphasis added).
[95] *Ibid.*, para. 71.
[96] *Ibid.*, para. 90 (emphasis added).
[97] *Ibid.*, para. 77 (emphasis added).

provisions *reduced the support provided to operators.*"[98] Those conclusions by the Czech Constitutional Court are not "similar" to the majority's interpretation of Section 6. They are instead the exact opposite (just as all the other interpretations of Section 6, cited above, are also the exact opposite of the majority's view).

70. Each one of these statements by the Czech Constitutional Court makes clear that the Solar Levy "has the effect of reducing the state support stipulated in an earlier law," and "reduced the support provided to operators." Those statements manifestly recognize – contrary to the majority – that the Solar Levy deprived solar producers of the minimum FiTs guaranteed by Section 6 of the Act on Promotion. The majority's contrary suggestion is again plainly wrong.

71. The majority also refers in passing to the European Commission's asserted interpretation of the Act on Promotion.[99] That reference also provides no support for the majority's interpretation of the Act. The European 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 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 any weight, much less greater weight than the Czech Constitutional Court and Czech government.

72. In sum, the majority is wrong about every aspect of the Act on Promotion. Its award ignores the plain language of Sections 6(1)(b)(2) and 6(4), effectively rewriting the unequivocal text of the statute. It disregards the obvious legislative and regulatory purposes of the Act, producing an implausible result that was never imagined by Czech legislators or regulators. It ignores multiple unambiguous statements by the Czech Republic about the Act, including in this arbitration, again adopting a conclusion that was never contemplated. Simply put, the majority rewrites the Act to serve its own purposes – not to faithfully interpret what the Act was really intended and understood to mean.

73. The majority does not dispute, however, that the Solar Levy reduced the level of the FiTs payable to the Claimants and other investors in solar power plants. In the majority's words, "while the Solar Levy as a matter of law did not directly reduce the FIT, the effect is that the Claimants' revenue is reduced by the amount of the Levy."[100] That acknowledgment is plainly correct: the Solar Levy indisputably was intended to, and did, reduce the level of the FiTs payable to investors under the Act.

74. That conclusion clearly suffices to establish a violation of the Treaty's fair and equitable treatment protection. As discussed above, Section 6 of the Act plainly guaranteed investors in renewable energy fixed minimum FiTs for a 15 (later 20) year period; the majority's contrary assertions are simply wrong. Likewise, the Solar Levy plainly deprived investors of minimum FiTs guaranteed by the Act. That constitutes a violation of the Treaty's fair and equitable treatment provisions, entitling the Claimants to compensation.

75. As discussed in detail above, international law, and Article 2(1) of the Treaty, recognizes and gives effect to the power of the Czech Republic to make binding[101]

[98] *Ibid.*, para. 90.
[99] Award, at paras. 371 and 373.
[100] *Ibid.*, at para. 271.
[101] *See* paras. 6-16 above.

internationally enforceable commitments to private parties. Where the Czech Republic makes, and then breaches, such a commitment, it violates Article 2(1)'s fair and equitable treatment guarantee and international law. Here, the Czech Republic plainly 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 plainly violates the Treaty's guarantee of fair and equitable treatment entitling the Claimants to compensation.

## III. THE RESPONDENT'S OTHER DEFENSES ARE WITHOUT MERIT

76. The Respondent, but not the majority, raises a number of additional defenses to the Claimants' fair and equitable treatment claims. In my view, none of these defenses provides a basis for denying relief to the Claimants.

77. First, the Respondent (but not the majority) relies on Section 6's reference to "the Office" or the ERO, reasoning that Section 6 is not directed to, and may not be relied on by, investors because it is only an instruction to the ERO.[102] This analysis ignores both the text of the Act and the Czech Republic's repeated descriptions and explanations of the Act. Notably, the majority does not rely upon this reasoning.

78. The Respondent's syllogism – that Section 6 is not directed to investors, because it is an instruction to the ERO – is a classic example of a *non sequitur*. The fact that Section 6 is directed, in the first instance, to the ERO does not suggest that Section 6 is not also directed to investors. The ERO does not set tariffs under Section 6 as an abstract academic exercise or as an empty bureaucratic formality; the ERO sets tariffs under Section 6 for the very practical purpose of providing producers of electricity from renewable energy with specific minimum prices and revenues for that electricity. As its historical and commercial background make clear, the whole point of Section 6 is to regulate the prices that are paid by consumers to producers of electricity from renewable sources. The fact that Section 6 is directed, in the first instance, to the ERO reflects only the ERO's initial role in setting the long-term (15 or 20 years) tariffs for producers, and is in no way inconsistent with the provision also guaranteeing that those tariffs will, in the words of Section 6, be "maintained as the minimum for a period of 15 years."

79. The Respondent's interpretation of Section 6 – as not being directed to investors – is also impossible to reconcile with either logic or the commercial purposes of the Act on Promotion. That interpretation produces an implausible, commercially-nonsensical regulatory regime that frustrates the most fundamental purpose of the Act – namely, to provide assurances to investors and lenders in the renewable energy sector.

80. That is confirmed by the title of Section 6, which makes clear that the provision addresses the "Amounts of Prices for Electricity from Renewable Sources and Amounts of Green Bonuses." The provision is not directed merely to the ERO's authority, or the formal

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[102] *See* Transcript, Day 1, page 84, line 22 to page 85 line 4 ("Another important thing to remember about this [Act on Promotion], about this provision and this section, is that these are--and maybe at some point later in this Hearing we will show you the relevant clauses, but these provisions were intended as guidance or directions to the regulator about what to do with the regime. They were not open-ended promises directed to the Investor. So, it's an important distinction, I think, to keep in mind."); Transcript, Day 1, page 111, lines 9-17 ("Now, we come back again to the Act on Promotion in Section 6. One important point that my colleague has alluded to, Section 6 says what ERO shall do. It says the office shall--and some translations are ERO shall as a reference to ERO, so it is a legislative direction to the regulator saying how does the regulator do what it does? So, the regulator is directed to set the subsidies in a way that provides a 15-year payback period on capital expenditures.").

terms of the tariffs that the ERO sets, but instead to the fundamental, and commercially-decisive, question of the "amounts of prices" that will be paid to producers of electricity from renewable energy sources. That text is precisely consistent with the obvious commercial and regulatory purposes of the Act (and precisely inconsistent with the Respondent's implausible construction of the statute).

81. Indeed, considered carefully, the Act on Promotion's approach to FiTs – by providing for the ERO to set such tariffs based on a legislative requirement that FiTs be maintained at a minimum level for 15 years – underscored the Czech Republic's commitment to the guaranteed levels of Purchasing Prices. The requirement that the ERO – an independent regulatory authority – fix tariffs enhanced the stability and reliability of the tariff-setting process, by insulating it from political and similar considerations. The fact that Section 6 was directed to the ERO in the first instance therefore in no way suggests that it was less of a commitment to investors in renewable energy; this merely reflected the basic structure of the Act on Promotion and the Czech regulatory regime for electricity prices, and underscored the Czech Republic's commitment to a 15-year guaranteed minimum FiT.

82. Second, the Respondent cites a few examples of legislative provisions which prior arbitral tribunals have held to constitute stabilization guarantees, and notes aspects of those legislative provisions that are absent in the Act on Promotion in this case (for example, legislation containing statements that provisions "may not be unilaterally modified by law…" or that "modifications will not affect the investment receiving companies [whose] tax stability is protected").[103] That analysis is also flawed.

83. None of the awards cited by the Respondent suggested that the presence of the particular language which the Respondent relies upon was necessary for a conclusion that the statutory provision constituted a stabilization guarantee. Instead, these awards all formulated the standards for an investor's legitimate expectations expansively, without reliance on the particular formulae cited by the Respondent.[104] Likewise, other investor-state awards also frame the inquiry into legitimate expectations more broadly, without imposing any form requirement of the sort demanded by the Respondent; instead, these awards expressly contemplate the possibility that stabilization guarantees may arise from statutory text

[103] Respondent's Opening Presentation, slides 22 and 23 (citing *Noble Energy v. Ecuador* and *Duke v. Peru*).
[104] *Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 March 2008, para. 162. ("to violate its own domestic laws such as the legal rights and guarantees established in the Ecuadorian Constitution, the Investment Law, the Electricity Law, the Investment Decree, the Electricity Decree, and Decision CAN 536, among other" is unfair and inequitable."); *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Award, 18 August 2008, para. 299 ("The Tribunal begins by observing that both the general statutory rate and the special decelerated rate were part of the tax regime in place at the time the Egenor LSA was executed.").

because, as with the Act on Promotion, that text guarantees specific treatment for a prescribed time period.[105]

84. This well-settled approach to fair and equitable treatment makes perfect sense (but is incompatible with an insistence on particular statutory formulae). The touchstone for analysis is not the presence or absence of particular formulae in statutory provisions. Instead, the fair and equitable treatment doctrine requires addressing the more straightforward question whether an investor could reasonably understand (that is, legitimately expect) that the state had guaranteed particular treatment for a specified time period. Where the answer to that question is in the affirmative, then a fair and equitable treatment guarantee will ordinarily protect the investor's expectations.

85. There is no room in this analysis for the type of form requirement suggested by the Respondent, demanding that a statutory stabilization guarantee contain text specifically stating that legislative treatment has been "stabilized." Such a form requirement is unsupported by any prior authority, either in the form of arbitral awards or commentary. A form requirement like that demanded by the Respondent is also inconsistent with the basic character of the fair and equitable treatment doctrine,[106] which focuses on substance, not form, equity, not formalism, and fairness, not formulae.

86. When one focuses on substance and fairness, it is clear that Article 6(1)(b)(2) constitutes a statutory stabilization guarantee of a minimum FiT for the 15 (or 20) year period specified by Czech law. As discussed above, that is what the text of Article 6(1)(b)(2) plainly means when it provides that the Purchasing Price for electricity from 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. It is also what the Czech government plainly meant when it repeatedly referred to the Article 6(1)(b)(2) FiTs as a "*long-term guarantee of feed-in tariffs*," "an unprecedented system of support in the form of *fixed purchase (feed-in) prices*," "a fifteen-year *guarantee of minimum purchase prices*," "the *fifteen-year guarantee of amount of revenues* for electricity," "[providing that the] *amount of the feed-in tariffs is guaranteed for period of 15 years*," and "*[t]ariffs are guaranteed.*"

87. These representations explicitly addressed the level of feed-in tariffs, not an investor's rate of return or profitability. These representations were unequivocal guarantees to investors

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[105] UNCTAD, FAIR AND EQUITABLE TREATMENT, UNCTAD Series on Issues in International Investment Agreements II (2012), p. 69 ("Arbitral decisions suggest in this regard that an 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.*") (emphasis added); *Toto Costruzioni Generali S.P.A v. Republic of Lebanon*, Award, ICSID Case No ARB/07/12, 7 June 2012, para. 159; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 364; *LG&E Energy Corp et al v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 125. *See also* JAMES CRAWFORD, *Treaty and Contract in Investment Arbitration*, 24(3) ARBITRATION INTERNATIONAL 351 (2008), p. 369 ("In the absence of *express stabilization*, investors take the risk that the obligations of the host State under its own law may change") (emphasis added).

[106] *See* paras. 6-10 above.

(as the majority's own analysis of Section 6(1)(b)(1) acknowledges). The language of these representations, like the text of Section 6(1)(b)(2) could not be any clearer.[107]

88. Finally, the Respondent also contends that regulatory framework for solar PV energy in the Czech Republic was in a state of flux, and therefore that the Claimants should have expected that further changes in the regulatory framework were likely. Notably, the majority again does not appear to accept this argument. In my view, that is because the argument ignores the relevant regulatory actions and governmental statements of the Czech Republic during the decisive time period.

89. According to the Respondent, statements and actions by the Czech government in 2009 and 2010 should have led the Claimants to conclude that the solar PV regulatory framework was imbalanced and that changes were forthcoming. The Respondent cites various statements by various Czech governmental sources between August 2009 and July 2010, supposedly indicating that the Claimants knew, or should have known, that that changes in FiTs were a possibility."[108]

90. Preliminarily, it is important to distinguish analytically between two distinct questions, which the Respondent conflates. First, and as addressed above, did the Act on Promotion provide a guarantee of fixed minimum FiTs (or, put differently, a stabilization undertaking or commitment)? Second, assuming that the Act on Promotion did provide such a guarantee, should the Claimants here have expected this guarantee to be unilaterally withdrawn or abrogated? The Respondent's analysis confuses these two issues and, as discussed below, arrives at the wrong conclusion with respect to the latter, as well as the former.

91. In my view, the Respondent's description of Czech governmental statements and actions regarding FiTs for renewable energy sources in 2009 and 2010 is inaccurate. In fact, a careful review of the full evidentiary record demonstrates the opposite of what the Respondent asserts – namely, 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 existing renewable energy sources would not be changed and that changes to address the regulatory imbalances would be directed only to renewable energy sources that were commissioned in the future.[109] Far from undermining the Claimants' case, this directly supports it, confirming that the FiTs for their investments were, as Section 6(1)(b)(2) provided, guaranteed for a 15 (and later, 20) year period.

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[107] I also dissent from the majority's conclusions regarding the Treaty's umbrella clause (in Article 7(2)) and full protection and security protection (in Article 4(1)). In each case, the majority's decision rests on the conclusion that the Czech government did not provide guarantees of minimum FiTs to the Claimants. As discussed in text, that conclusion is, in my view, incorrect.

[108] Respondent's Opening Presentation, slides 55-61.

[109] In his "Conclusion on challenges across Europe and PV subsidies," the Respondent's expert offers an explanation for the reason the Czech government could have been tempted not to disclose its intentions of applying tariff adjustments to existing renewable installations. Wynne Jones First Report, p. 59, at para. 5.50 ("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.").

92. It is important to consider carefully precisely what the Czech Republic said and did during the relevant time period (from mid-2009 to late 2010):

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 proposed doing so because of concerns that too many solar installations were being planned and that this would result in a financial burden on the Czech Republic (which, as discussed above, had guaranteed the FiTs payable to such installations). Importantly, in addressing a 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 it proposed abolishing prospectively (in January 2010), while also making it clear that the proposed changes would not affect the 15-year guarantee of minimum FiTs for existing solar facilities.[110] Thus, while expecting 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.

b. The day after the Ministry of Industry and Trade's 24 August announcement, the Ministry's press department clarified the limited scope of the proposed changes in an interview published in a Czech newspaper (*Právo*) explaining 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.*"[111] There was again no suggestion by the Ministry that the guaranteed FiTs for existing solar installations under Section 6(1)(b)(2) would be affected.

c. A letter from the Ministry of Industry and Trade to the ERO of 28 August 2009 confirmed the Ministry's intention to preserve the treatment of existing solar installations, explaining that this was motivated in part by concerns about claims by existing investors in renewable energy. According to the Ministry, "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*."[112] Again, the Ministry was at pains to emphasize that the rights of existing investors would not be affected by any amendments to the Act on Promotion, 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 any legislative changes to Section 6(4)'s 5% brake rule and again explaining that any amendments to the FiTs would only affect energy sources commissioned after "*1 January 2011*."[113] The ERO noted that

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[110] Exhibit R-175 ("Ministry of Industry and Trade will equalize the support of renewable energy sources," Ministry of Industry and Trade Press Release (www.mpo.cz), 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.").

[111] Exhibit R-176 ("Ministry of Industry and Trade wants to reduce support of solar plants," Právo), p. 1.

[112] Exhibit R-182 (Letter from R. Portužák to B. Němeček), p. 1 (emphasis added).

[113] Exhibit R-183 (Letter from J. Fiřt to O. Vojíř), p. 2 ("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.").

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.*"[114]

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 made clear 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.*"[115] 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.*"[116]

f. The proposed amendment to the Act on Promotion was adopted on 21 April 2010. 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 January 2010).[117] 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. The Czech Republic's witnesses confirmed, in cross-examination, that the proposed amendment (and reduced FiTs) would apply only to solar installations commissioned after 1 January 2011, and not to installations previously commissioned.[118]

g. In February 2010, TSO and DSOs agreed on a moratorium refusing *"new connection requests*" for photovoltaic installations.[119] The moratorium was intended to address the expected regulatory imbalance in the renewable energy sector, but only affected new installations, not existing investments. This was confirmed by the Czech Republic's witnesses: "It was already--in February 2010 there was a Moratorium on grid connection, so no more *new connections* for approval to the grid were being issued. There were still some speculative connections that had been issued in the past that were sort of bought and sold in the market, and that's why a lot of the Parties were able to commission plants notwithstanding the Moratorium."[120]

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[114] *Ibidem.*
[115] Exhibit R-185 (Explanatory Report to Draft Act No. 137/2010 Coll.), p. 5 (emphasis added).
[116] *Ibidem* (emphasis added).
[117] *See* Arts. 1 and 2 of Act 137/2010, Exhibit CE-59 (Act 137/2010 of April 21, 2010 which Amends Act No. 180/2005 Coll., on support of electricity production from renewable energy sources and on amendment of other acts), p. 1.
[118] Transcript, Day 2, page 265, lines 14-20 ("[Scherpf:] So, in March 2010, the legislative amendment to abolish the 5% brake rule was then passed after your efforts to get the attention of the Parliament; right? So, this change was a purely prospective change that would have not affected operating plants or plants that would connect in that year; is that correct? [redacted] That's correct.").
[119] Respondent's Rejoinder, para. 94 (emphasis added).
[120] Transcript, Day 1, page 132, lines 5-12. *See also* [redacted] 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.").

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]*."[121] The same document contained various further assurances to existing solar investors.[122] There was no suggestion that the FiTs which had been guaranteed for existing investors 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 burden of subsidies for renewable energy. In connection with proposed legislation addressing the issue, an Explanatory Report confirmed again that changes to FiTs 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.*"[123] 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.*"[124]

93. It is undisputed that all of the Claimants' investments in this arbitration were made during the foregoing time period. All of the Claimants' investments were made at a time when Section 6(1)(b)(2) explicitly guaranteed fixed minimum feed-in tariffs, when the Czech Republic had repeatedly reiterated that guarantee in its public statements and when steps had been taken to address concerns about expected imbalances in the renewable energy sector, but without in any way questioning the rights of existing solar energy installations under Section 6(1)(b)(2) (or otherwise).[125] In these circumstances, it is impossible to see why the Claimants were not entitled to rely on the Czech Republic's legislative, regulatory and other assurances guaranteeing the levels of feed-in tariffs for their investments.

94. It was only subsequently, in late October 2010, after the Claimants had made their investments and the ERO had issued the licenses for their facilities,[126] that the Czech government abruptly changed course and, for the first time, proposed a "Solar Levy" that would reduce the feed-in-tariffs for existing solar installations that had already been

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[121] Exhibit R-142 (Czech National Renewable Energy Action Plan), pp. 58-59 (emphasis added).
[122] *See* para. 50(j) above.
[123] Exhibit R-201 (Explanatory Report to Draft Act No. 333/210 Coll.), p. 6 (emphasis added).
[124] *Ibidem* (emphasis added).
[125] Respondent's witness Mr. [redacted] specified at the Hearing that, in 2009, investors, including the Claimants, whose Struhařov plant had already been commissioned at that time, could not possibly have foreseen the enactment of the Solar Levy in 2009 – only the abolition of the 5% brake rule, *see* Transcript, Day 2, page 269, line 15 to page 270, line 9 ("[Counsel for Claimant]: I would like to take you to Paragraph 19 of your Witness Statement, ... 'Any diligent investor,' you say here, 'should have been aware at least by the middle of 2009 that change in the regime was likely.' ... So, this refers to the foreseeability, I suppose, of the abolition of the 5% brake rule, ... is that correct? [Mr. [redacted]]: Yes, that's correct.").
[126] Exhibits C-6 (License for the generation of electricity at Struhařov issued by the Energy Public notice Authority for Struhařov (ERO-License) of 14 December 2009), C-10 License for the generation of electricity issued by the Energy Public notice Authority for Svetla (ERO-License) of 22 September 2010), C-14 (License for the generation of electricity issued by the Energy Public notice Authority for PV-plant at Vernéřov (ERU-License) of 11 October 2010).

commissioned.[127] Prior to this date, there had been no prior indications, in any of the ERO's or other Czech government statements, that any such measure was under consideration.[128]

95. Given this history, I see no factual basis for the Respondent's conclusion that the Czech government's statements and actions should have led the Claimants to conclude that the solar PV regulatory framework was imbalanced and that changes were forthcoming. Contrary to the Respondent's suggestion, none of these statements and actions should have led the Claimants to conclude that the guaranteed FiTs for solar installations that had already been commissioned (or would be commissioned before 1 January 2011) would be withdrawn or reduced. In fact, the Czech government had repeatedly said exactly the opposite – namely, that various steps had been taken to address excess solar capacity in the future, but that guaranteed minimum FiTs for existing facilities would be maintained.

96. None of the sources cited by the Respondent does anything to alter this conclusion. Those sources said only that FiTs for *future* solar installations would be reduced, while FiTs for *existing* installations would be maintained.[129] Those statements do not support, but instead contradict, the Respondent's submissions on this point.

97. The Respondent also criticizes the Claimants' due diligence, asserting that it was inadequate and that the Claimants easily could have discovered that … significant changes to the RES Scheme and the tax regime were likely if they had performed adequate due diligence.[130] In my view, this analysis is unsustainable, both legally and factually.

98. First, it is not the role of the Tribunal to pass abstract judgment on the quality of the Claimants' due diligence. Due diligence is only relevant if it would have provided the Claimants with information that contradicted their asserted expectations. If due diligence inquiries by the Claimants would only have confirmed the fixed minimum FiTs that the Act on Promotion, and other Czech governmental statements outlined above, guaranteed, then the failure to have conducted that due diligence is irrelevant.

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[127] The first discussion of a potentially retroactive levy took place 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. These minutes were, however, not 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 the disputed provisions, see Exhibit R-212 (Minutes of the 2nd Meeting of the Coordination Committee for the assessment of the impact of support of renewable energy sources on electricity prices), pp. 7-8; Exhibit R-84 (Decision of the Constitutional Court of the Czech Republic, 15 May 2012, Ref. No. Pl. ÚS 17/11), para. 15. The Solar Levy was only subsequently introduced in the legislative draft of Act 402/2010, the first reading of which took place on 29 October 2010. Exhibit CE-70 (Announcement of the Government of the Czech Republic dated 9 November 2010), pp. 1-2. Two months later, the Czech Republic enacted that "Solar levy." *See* Article 1 of Act 402/2010; Exhibit CE-65 (Act 402/2010 Sb. As of December 14, 2010 to Alter Act No. 180/2005 Sb., on the Support of Electricity Generation from Renewable Sources of Energy and on Amendment of Some Other Acts).

[128] In the words of the Claimants' expert Mr. [redacted]: "Concerning the retroactive changes, I think that they were not reasonable, first of all, for investors. A prudent investor could not have foreseen any retroactive measure because he has not the insight enough to see these changes in the near future, and I think that only the Government and the regulator have had this level of insight." Transcript, Day 2, page 310, lines 17-23.

[129] *See* Exhibits R-168 (Explanatory Report to draft Decree No. 409/2009 Coll.), pp. 3-4, R-197 ("Legislative environment and the promotion of the electricity produced from photovoltaic power plants in 2009," ERO Presentation), R-178 ("Photovoltaic power plants – installed capacity in 2009, preliminary estimate," Czech RE Agency) and R-175 ("Ministry of Industry and Trade will equalize the support of renewable energy sources," Ministry of Industry and Trade Press Release).

[130] Respondent's Rejoinder, paras. 169 and 172.

99. Due diligence is not a condition to protection of an investment under international law, whether under the fair and equitable treatment standard or otherwise. 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.[131] An investor is under no abstract duty to conduct due diligence.

100. This absence of an investor's abstract duty to conduct a legal due diligence prior to making an investment has recently been highlighted by the *Isolux* tribunal:

> "[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."[132]

101. Here, as discussed above, due diligence by the Claimants would have shown nothing more than what Section 6(1)(b)(2) of the Act on Promotion, and the Czech Republic's multiple representations, made clear: Solar installations commissioned in 2010 would be guaranteed to receive the FiTs prescribed for 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 investor with sound reasons to doubt the Czech Republic's commitments. As a consequence, the Respondent's claims about the "adequacy" of the Claimants' due diligence is irrelevant as a matter of principle.

102. In any event, the Respondent's factual assessment of the Claimants' due diligence is flawed. In particular, the Respondent ignores, or distorts, the due diligence conducted by the Claimants prior to making their investments in the Czech energy sector.

103. Preliminarily, the Claimants' investments in this case were not particularly large by the standards of many cross-border investments – involving an aggregate amount of some [redacted] million euros spread across several different installations.[133] In these circumstances, the type of due diligence that is appropriate differs significantly from larger investments. International law protects small investments as well as large ones; equally, neither international law nor the drafters of bilateral investment treaties condition investment protection on unrealistic or uncommercial requirements. Any criticism of the Claimants' due

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[131] *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."). *See also MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, Award, ICSID Case No ARB/01/17, 25 May 2004, para. 178.

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

[133] Statement of Claim, para. 110.

diligence must take both the nature of their investments, and the clarity of the Czech government's commitments, into account.[134]

104. Moreover, it is undisputed that the Claimants retained legal advisers in the Czech Republic to advise them specifically regarding the investments at issue in this arbitration and to provide them with formal written legal advice about the stability of the Czech regulatory regime.[135] That is hardly a lack of due diligence, particularly in the context of the investments that the Claimants were making. That is particularly true given that the Claimants were investing in a Member State of the European Union, in a legal environment promising certainty, stability and the rule of law.[136]

105. The Respondent criticizes the legal advice obtained by the Claimants regarding their investments, on the grounds that the opinion was only a one and half page due diligence report, prepared by a German lawyer who was not licensed to advise on Czech law matters, and, apparently, that the opinion was (or might be) incorrect. This criticism is mistaken.

106. The evidence shows that the legal advice obtained by the Claimants was prepared by a law firm located in the Czech Republic that was fully licensed to practice Czech law and to provide legal advice in the Czech Republic.[137] The law firm's advice was signed by a German lawyer because the advice – for a German client – was in German, but the advice remained advice about Czech law from a Czech law firm. The Respondent's criticism of the Claimants' action in this regard is unwarranted (and would come as a surprise to the numerous lawyers around the world who practice, successfully and constructively, outside their home jurisdictions).

107. The Respondent also impliedly criticizes the length of the legal advice obtained by the Claimants. Again, that criticism ignores the context and magnitude of the Claimants' investments and the substance of the advice received, while instead imposing unrealistic and artificial requirements on practical advice provided in the ordinary course of business affairs. Investment arbitration awards may run to hundreds of pages, but that provides neither guidance for practical business counsel nor a model of good practice for commercial advisers.

108. Finally, the Respondent also suggests that legal advice provided to the Claimants was wrong, on the apparent theory that it was questionable whether the principle of "*Bestandsschutz*" exists in Czech law. In fact, the evidence shows that Czech law does recognize the principles of legal certainty and protection of legitimate expectations, including

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[134] *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.

[135] Exhibit CE-54 (Legal opinion concerning the duration of power feed-in remuneration when erecting photovoltaic systems in the Czech Republic by Ueltzhöffer Balada, 2009).

[136] 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/en/european-council/conclusions/1993-2003/ (last visited 11 June 2017). In accordance with the commitment to the rule of law it requires from its Member States, the European Union suggests in its "Guidance for renewables support schemes" that "unannounced or retroactive changes to support schemes should be avoided as they undermine investor confidence and prevent future investment," available at http://ec.europa.eu/energy/en/topics/renewable-energy/support-schemes (last visited 11 June 2017).

[137] Exhibit CE-96 (Letter from Ueltzhöffer to Mr [redacted] of 18 August 2015), para. 9.

the principle cited in the Claimants' legal advice (with the Czech Constitutional Court expressly relying on that principle[138]). In these circumstances, criticism of the Claimants' due diligence falls particularly far from the mark. More fundamentally, it would be wrong to require the Claimants not only to conduct due diligence, but to conduct due diligence that reaches the "right" result. Even assuming that the Claimants' legal advisers made a mistake, much less reached a "questionable" conclusion, that is no grounds for denying the Claimants the protections of the Treaty or international law.

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109. In sum, the majority ignores, and effectively rewrites, the plain language of the relevant Czech legislation. It also ignores, and thereby gravely distorts, the obvious legislative and regulatory purposes of the Czech legislation, as well as the repeated, unequivocal representations of the Czech Republic, including in this arbitration, about the meaning of this legislation.

110. The majority's interpretation of the Act might be regarded by some as expedient. But that decision ultimately contradicts both the Tribunal's mandate and the rule of law, denying the Czech Act on Promotion the meaning it was manifestly intended and understood to have. In so doing, the majority not only frustrates the intentions of the Treaty and the Czech legislature, but also undermines the ability of the Czech Republic to provide meaningful legislative guarantees to investors and others in the future. Put simply, if Czech legislation can be ignored or rewritten here, then the same can happen in other cases. Neither future investors nor others will ignore that unfortunate fact. The majority's decision thus effectively deprives the Czech Republic of the ability to provide reliable legislative guarantees to investors or others in the future.

111. In doing so, the majority gravely undermines the rule of law and the authority of states to address pressing economic and social problems. It is critical, in societies governed by the rule of law, for states to have the authority to make binding commitments to private

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[138] Exhibit R-84 (Decision of the Constitutional Court of the Czech Republic, 15 May 2012, Ref. No. Pl. ÚS 17/11), para. 53 ("While true retroactivity is admissible only in exceptional cases, in the case of pseudo retroactivity it can be said that such retroactivity is generally admissible. In this case, legal theory in fact acknowledges exceptions consisting of situations where pseudo retroactivity is not admissible in view of the principle of protection of confidence in the law. Such a situation is involved if 'this interferes with confidence in factual circumstances and the significance of the lawmakers' wishes for the public does not outweigh, or does not attain the level of, an individual's interest in the continued existence of the existing law' (Pieroth, B. Rückwirkung und Übergangsrecht. Verfassungsrechtliche Maßstäbe für intemporale Gesetzgebung, Berlin, 1981, pp. 380-381, c.f. also the decision of the Federal Constitutional Court of Germany dated 19 December 1961 File No. 2 BvR 1/60; BVerfGE 13,274, 278). This view is also reflected in the settled case-law of the German Federal Constitutional Court, according to which pseudo retroactivity is in compliance with the principle of protection of confidence in the law if it is suitable and necessary to achieve the objective pursued by the law and when the bounds of what is tenable are not exceeded when one weighs the "betrayed" confidence against the importance and urgency of the legal change (Cf. the decision of the German Federal Constitutional Court dated 7 July 2010 File No. 2 BvL 14/02, paragraph 58)."). Confidence in the law and in the protection of acquired rights have been relied upon by the Czech Constitutional Court since its inception. *See* MAHULENA HOŠKOVÁ, *Rechtsstaatlichkeit in der Tschechischen Republik [Rule of Law in the Czech Republic]* in RECHTSSTAATLICHKEIT IN EUROPA [RULE OF LAW IN EUROPE] 251 (Rainer Hoffman et al. eds. 1996), pp. 262-263.

parties. The majority denies both the Czech Republic, and by analogy, other states, that ability. That betrays both the Claimants in this case and, in the long-term, the people of the Czech Republic.

112. I dissent from that result.

Gary Born