

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT  
DISPUTES**

In the arbitration proceedings between

**REENERGY S.à.r.l.**  
Claimant

and

**Kingdom of Spain**  
Respondent

**(ICSID Case No. ARB/14/18)**

**DISSENT ON LIABILITY AND QUANTUM**

**PROFESSOR PHILIPPE SANDS QC**

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1. The Tribunal in this case is but one of many that has found itself faced with the challenge of addressing the lawfulness of certain measures taken by Spain, as it faced a grave financial crisis and sought to balance the competing interests of protecting the environment (by encouraging the use of renewable energy sources), safeguarding the legitimate interests of investors, and preventing the collapse of the public purse. The tribunals that have addressed the many cases have come up with a multitude of different approaches, each based no doubt on the particularity of the evidence and arguments made before them. In years to come, no doubt, reasonable folk will question the wisdom of creating a system that allowed so many competing and contradictory awards to flower, and introduce the changes that seem so necessary. In the meantime, each arbitrator in an individual case is bound to proceed on the basis of the factual evidence and legal submissions put before them.
2. On this basis, I support the conclusions of the Tribunal that it has jurisdiction over large parts of the claims brought by Reenergy, including the dismissal of the Respondent's

intra-EU jurisdictional objection (Award, paras. 325-361), although not necessarily all of the reasons upon which those conclusions are reached (including in relation to the issue of applicable law, in which I find clearer and more persuasive the reasoning set forth in the Award in *Eurus Energy v Spain*).<sup>1</sup> I also support the conclusion that the Tribunal does not have jurisdiction with respect to the Tax on the Value of the Production of Electrical Energy (TVPEE) (Award, paras. 466-496).

3. I regret, however, that I am not able to agree with the Majority's conclusion that there has been a breach of the obligation to provide stable, fair and equitable treatment, as provided by Article 10(1) of the Energy Charter Treaty ('ECT').
4. Like many tribunals before it, the Majority has analysed the question of regulatory stability under the ECT (the 'ECT stability obligation') within the framework of a legitimate expectations inquiry. As set out below, and on the basis of the submissions and evidence in this case, my conclusion is that the Majority has misapplied the law on legitimate expectations and has fallen into error in finding that the Respondent has breached Art 10(1) ECT on this basis.
5. By way of context, I consider that it is misconceived for the Majority, in exploring the ECT stability obligation, to have located its analysis solely within the framework of legitimate expectations. Having reviewed the relevant awards, I conclude that the ECT stability obligation is related to the broader FET standard but that it is distinct from the doctrine of legitimate expectations. In other words, the FET standard as articulated in Art 10(1) ECT encompasses a stability obligation which is not present in (and accordingly differs from) the traditional formulations of the FET standard which do not contain a reference to stability. For the reasons set out below, on the basis of the evidence before the Tribunal I conclude that there has been no breach of the ECT stability obligation in the present case.

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<sup>1</sup> ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability, 17 March 2021 (James Crawford, Oscar Garibaldi, Andrea Giardina), Paras. 232-236.

## Legitimate Expectations

6. I agree with the Majority that tribunals have generally found that three elements must be established if a legitimate expectations claim is to be successful, namely there must be evidence of:
- (1) behaviour on the part of the respondent which gave rise to legitimate expectations on the part of the claimant;
  - (2) reliance by the claimant on those expectations; and
  - (3) subsequent behaviour by or attributed to the respondent which has the effect of frustrating the claimant's expectations.

In relation to (1) it is important to recognise that in order for the claimant's expectation to be legitimate, it must be one which would be shared by a reasonable or prudent investor. It is not enough for a claimant to simply point to its own subjective expectations. It is now axiomatic that investment treaties do not operate as an insurance system which protects any and all hopes which investors may have.<sup>2</sup>

### *Behaviour of the Respondent*

7. The Majority's analysis of the Claimant's legitimate expectations claim is divided into two elements. First, the Majority deals with the argument that the Claimant had an expectation based on legislative enactments and other statements that certain aspects of the regulatory framework would not change (the 'absolute stability expectation'). I agree with the Majority that the Claimant's expectation in this regard may not be characterised as reasonable, so that this element of its claim must fail.

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<sup>2</sup> *MTD Equity Sdn. And MTD Chile S.A. v Republic of Chile*, ICSID Case No. ARB/01/7, Annulment Proceeding, 21 March 2007 para 67; *Mobil Investments Canada Inc and Murphy Oil Corporation v Government of Canada (I)*, ICSID Case No. ARB(AF)/07/4, 22 May 2012, Decision on Liability and on Principles of Quantum, para 153; *HydroEnergy 1 and Hyrdroxana Sweden v Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020, para 584.

8. Second, the Majority considers the ECT stability obligation, finding that it could be characterised as giving rise to a legitimate expectation on the part of the Claimant that a situation of ‘relative stability’ would pertain. The Majority finds, on the facts and evidence on the record, that the Respondent’s obligation to fulfil this expectation has been breached. I find the analysis of this issue to raise concerns, and to be unpersuasive, for two reasons in particular.
9. The first reason relates to the source of the Claimant’s expectation. Normally, tribunals assessing a legitimate expectations claim consider whether the host state has made specific assurances or commitments relating to the regulatory framework. Such assurances or commitments can come in any form, but they almost always relate to a particular legislative enactment or course of conduct. They are limited, and not general in nature. In relation to expectation of relative stability, however, the Majority finds the source of the expectation to be the reference to stability in the first sentence of Art 10(1) ECT. This is a general commitment not tied to a specific measure or action. As will be explored further below, in my view this factor means that it is more persuasive to interpret the ECT stability obligation outside of the framework of legitimate expectations.
10. Moreover, even if the Majority’s approach is correct – that the analysis of the ECT stability obligation is to be interpreted and applied in connection with considerations of legitimate expectations – its analysis of the Respondent’s behaviour is flawed for a second reason. As noted above, the only expectations which are protected under the ECT (and other investment treaties) are those which are objectively ‘reasonable’ and would therefore be shared by a ‘prudent’ investor. A tribunal must therefore carry out an objective assessment of an investor’s expectations and not merely accept them as being protected under the treaty. Despite acknowledging this (Award, para. 638) and carrying out such an assessment in its analysis of the absolute stability expectation (Award, para. 660-679), the Majority makes no mention of the requirement when considering nature, scope or effect of the relative stability expectation. Nor does the Majority consider the impact which the Claimant’s total failure – on the basis of the evidence before the Tribunal - to have conducted any materially meaningful legal or financial due diligence prior to making its investment might have. Moreover, it is not

for a tribunal to concoct an expectation on the part of an investor in the absence of any clear evidence before it as to what exactly that expectation may be.

11. In this regard, one would have expected the Tribunal to have had before it evidence of a legal due diligence in relation to the risk of regulatory change, having regard to a series of judgments of the Spanish Supreme Court (see Award, para. 164-186) which made it crystal clear that, as a matter of Spanish law, the investor could have no expectation of a right of stability in relation to its investment: these judgments, all available publicly and available to the Claimant's advisers, put the investor on notice that changes had already occurred, and might do so again in the future, without a right of recourse under Spanish law. One might have also expected the Tribunal to have had some evidence before it of a financial or economic due diligence, exploring the consequences that different possible changes in the rate of return might have for the long term viability (and profitability) of the investment. There was no such evidence. On the basis of the record before the Tribunal, despite the significant investment that seems to have been made, the Claimant's due diligence appears to have been less extensive than that which may have been carried out by a farmer purchasing a modest plot of land in Devon. Given the identity of the legal, financial and economic advisers it had available to it, this gives rise to the suspicion that either (a) a decision was taken not to obtain such legal, financial or economic due diligence, or (b) such legal, financial or economic diligence was obtained but not shared with the Tribunal (a fact which would allow the inference that the advice(s) would not have been helpful to the Claimant's case).
12. Despite seeking to deal with the issue of what it refers to as absolute and relative stability under legitimate expectations, the Majority's analysis of the latter is entirely different to that of the former. The Majority offers no explanation as to why the factors which led the Majority to conclude there was no legitimate expectation of absolute stability might not also be relevant to the question of relative stability – it is not immediately apparent what plausible explanation can be offered. In my view it is unarguable that, if conceived of as a question of legitimate expectations, the factors which led the Majority to reject the claim relating to an expectation of absolute stability ought to be equally relevant to the claim of an expectation of relative stability. The latter expectation should consequently be considered to be unreasonable for the same

(or analogous) reasons. By proceeding as it has, the effect of the Majority's approach is to eliminate the reasonableness requirement; this approach falls foul of the principle that it is not the function of an arbitral tribunal to allow a claimant to make use of an investment treaty as a form of insurance policy, one which allows their hopes and expectations to be recompensed no matter how (a) unrealistic, or (b) unsupported by any evidence of an exercise in due diligence. Insofar as the Majority seeks to analyse the issue under the doctrine of legitimate expectations, the reasonableness requirement appears indispensable. The Majority sets a dangerous precedent by suggesting otherwise, or doing so without offering any reasoning. In this way, the Award offers an impression of arbitral legislation.

### *Reliance*

13. As noted by the tribunal in *Micula v Romania*, “[i]t goes without saying that [the treaty] only protects investments made in reliance on legitimate expectations”.<sup>3</sup> The reliance requirement serves the important function of demonstrating that a claimant's loss was actually caused by the failure of a host state to honour commitments or assurances that have been made, and on which there is evidence that the investor has placed reliance. To ignore the requirement of evidence of reliance would lead to the unfortunate situation in which a claimant would be able to claim financial compensation in respect of one or more commitments which had not been shown to have had a direct bearing on the decision making process, and so did not (in a situation in which the commitment or assurance was withdrawn) actually cause any loss. It is for this reason that numerous tribunals have ruled that a claimant's failure to prove reliance will defeat a legitimate expectations claim.<sup>4</sup> There is some debate as to whether the claimant has to show mere

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<sup>3</sup> *Micula v Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para 722 (Arbs. Laurent Lévy, Stanimir A. Alexandrov, Georges Abi-Saab).

<sup>4</sup> *Mohammad Ammar Al-Bahloul v Republic of Tajikistan*, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability, 2 September 2009, para 210 (Arbs. Jeffrey M. Hertzfeld, Richard Happ, Ivan Zykin); *AWG Group v The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, para 226 (Arbs. Jeswald W. Salacuse, Gabrielle Kaufmann-Kohler, Pedro Nikken); *Micula v Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para 668 (Arbs. Laurent Lévy, Stanimir A. Alexandrov, Georges Abi-Saab); *Peter A. Allard v The Government of Barbados*, PCA Case No. 2012-06, Award, 26 June 2016, paras 217-226 (Arbs. Gavan Griffith, Andrew Newcombe, W. Michael Reisman); *RWE Innogy GMBH and RWE Innogy Aersa S.A.U. v Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum, paras 494-506 (Arbs. Anna Joubin-Bret, Judd L. Kessler, Samuel Wordsworth)

reliance or detrimental reliance,<sup>5</sup> but that issue is not one which this Tribunal needs to resolve.

14. In its analysis of the reliance requirement, the Majority firstly asserts that a particularly “low” evidential burden is appropriate in claims concerning a breach of the “Relative Stability” obligation.<sup>6</sup> It then states that the burden is satisfied if, at the time of investing, a claimant is aware of the essential elements of a regulatory regime, and if that regime had an impact on the profitability of the investment.<sup>7</sup> The formulation chosen by the Majority pays lip-service to the reliance requirement, but the effect of the path taken is to render the requirement a dead letter. Rather than requiring clear evidence to show that the Claimant relied on the existence of the regulatory regime, such as in the form of a due diligence exercise, the Majority treats knowledge of a regulatory regime as equivalent to reliance on it. In the present case, as the Majority accepts by its silence and failure to address the evidence, there is no evidence. The approach taken gives the Claimant the benefit of the doubt and assumes that the reliance requirement has been satisfied (and is credible) in the absence of ‘any special circumstances indicating otherwise’.<sup>8</sup> This has the effect of reversing the burden of proof and placing on a respondent the onerous obligation of proving ‘special circumstances’ (whatever they may be: the Majority offers no assistance whatsoever on this point).
15. The linchpin of the Majority’s analysis appears to be the statement that “the making of the investment itself usually implies reliance”.<sup>9</sup> This is ‘presumed reliance’ by another name, an approach that seems to dispense with the well-established requirement that a

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<sup>5</sup> For authorities suggesting detrimental reliance is required see *International Thunderbird Gaming Corporation v The United Mexican States*, UNCITRAL, Award, 26 January 2006, para 147 (Arbs. Albert Jan van den Berg, Agustín Portal Ariosa, Thomas W. Wälde); *AWG Group v The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, para 226 (Arbs. Jeswald W. Salacuse, Gabrielle Kaufmann-Kohler, Pedro Nikken). For authorities suggesting that mere or reasonable reliance is sufficient see *Waste Management Inc v The United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para 98 (Arbs. James Crawford, Benjamin R. Civiletti, Eduardo Magallon Gomez); *EDF Services Limited v Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, para 216 (Arbs. Piero Bernardini, Arthur W. Rovine, Yves Derains).

<sup>6</sup> Majority’s Award para 701.

<sup>7</sup> Majority’s Award para 701.

<sup>8</sup> Majority’s Award, para 702.

<sup>9</sup> Majority’s Award, para 698.

claimant must show ‘actual reliance’. However this is entirely a creation of the Majority; it has not cited a single authority which supports this proposition, and I am aware of none. If taken to its logical conclusion, this proposition would treat the mere existence of an investment as offering conclusive evidence that a claimant has relied on the continued existence of a regulatory regime. This approach has the effect of opening the door to claimants recovering damages on the basis of regulatory changes without any evidence that the regulatory arrangements at the time of the investment had any bearing whatsoever on their decision to invest in the host State. Even if there is a close relationship between the making of an investment and reliance in many cases, I do not see how this justifies an approach which excuses a claimant from producing any evidence on the issue. If the Claimant in this case did rely on the continued existence of the regulatory regime in this case, why has it been unable to provide the arbitrators with even a shred of evidence of having done so?

16. To support its position the Majority has relied primarily on two arguments. First, it has referred to the principle that a claimant has an expectation that states “will not act unreasonably, contrary to the public interest or in a disproportionate manner”.<sup>10</sup> For reasons I will address below, I have serious doubts as to the relevance of this principle to the legitimate expectations inquiry, but even if it is relevant it can provide no support for the Majority’s analysis. The existence of any commitment or assurance giving rise to a reasonable expectation is necessarily a distinct and prior question to that of whether there was any evidence of reliance on that commitment or assurance the part of the claimant. This was recognised by the tribunal in *Al-Bahloul v Tajikistan*, also dealing with an FET claim under Art 10(1) ECT, which found “that the Claimant had a right to rely on the Respondent’s commitment [to issue additional exploration licenses], but his claim based on legitimate expectations fails for lack of evidence of actual reliance thereon”.<sup>11</sup>

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<sup>10</sup> Majority’s Award para 699 citing *Charanne B.V. and Construction Investments S.A.R.L. v Kingdom of Spain*, SCC Case No. 0612/2012, Final Award, 21 January 2016, para 514 (Arbs. Alexis Mourre, Guido Santiago Tawil, Claus von Wobeser).

<sup>11</sup> *Mohammad Ammar Al-Bahloul v Republic of Tajikistan*, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability, 2 September 2009, para 210 (Arbs. Jeffrey M. Hertzfeld, Richard Happ, Ivan Zykin).

17. Second, the Majority refers to various cases in which the reliance requirement was not explicitly dealt with by the tribunal,<sup>12</sup> but this itself is not enough to support the extraordinary proposition on which the Majority proceeds. Tribunals frequently omit to mention certain relevant issues for a number of reasons, and the Majority cannot legitimately deduce support for its approach from the silence of others. Further, as noted below, the better understanding of these cases is that they are not concerned with legitimate expectations at all, but with a separate and distinct stability obligation. To the extent that these cases do suggest that it is not necessary to show actual reliance in a legitimate expectations inquiry, I believe they have in effect legislated, and in so doing offered an approach which not justified and which should be subject to intense scrutiny.
18. In conclusion, the Majority has fallen into a significant error, in effect eliminating the reliance and reasonable requirements – as well as the need to prove by evidence the existence of the expectation and reliance upon it - in its analysis of the relative stability expectation. If these factors are considered, it is clear that the Claimant’s relative stability expectation claim should fail.

### A Distinct Stability Obligation

19. Art 10(1) ECT differs from other and traditional FET provision because it makes an explicit reference to the concept of stability. Most other tribunals interpreting and applying the provision have followed the same approach as the Majority and sought to accommodate this reference to stability within the framework of legitimate expectation. On closer consideration, however, and with careful scrutiny, it is apparent that this approach is strained and premised on confusions, as tribunals analysing the ECT stability obligation in this manner frequently fail to deal with key aspects of the legitimate expectations inquiry. In my view, the more plausible and better approach to interpreting and applying the ECT stability obligation is to treat it as an additional element of the FET standard, and one which is distinct from the established doctrine of legitimate expectations. To explain why I have come to this view, it is necessary first

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<sup>12</sup> Majority’s Award para 700.

to revisit the position in regard to ‘traditional’ FET provisions which do not contain a reference to stability.

20. A small number of cases at the beginning of this century suggested that the traditional FET provision did include a distinct obligation to ensure regulatory stability, usually on the basis of preambular statements which referred to stability.<sup>13</sup> The dominant approach in almost all of the more recent arbitral practice, however, is that the traditional FET provision does not contain a distinct stability obligation.
21. The overwhelming majority of tribunals interpreting traditional FET provisions started from the premise that, in signing a treaty which contains an FET provision, states do not commit to freezing their regulatory environments and therefore retain the right to change their laws. This is made particularly clear, by way of example, in the award by the tribunal in *El Paso v Argentina*. This stated:

“In the Tribunal’s view, if the often repeated formula to the effect that “the stability of the legal and business framework is an essential element of fair and equitable treatment” were true, legislation could never be changed: the mere enunciation of that proposition shows its irrelevance. Such a standard of behaviour, if strictly applied, is not realistic, nor is it the BITs’ purpose that States guarantee that the economic and legal conditions in which investments take place will remain unaltered ad infinitum”.<sup>14</sup>

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<sup>13</sup> *Occidental Exploration and Production Company v The Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004, para 183 (Arbs. Francisco Orrego Vicuña, Charles N. Brower, Patrick Berrera Sweeney); *CMS Gas Transmission Company v The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 (Arbs. Francisco Orrego Vicuña, Marc Lalonde, Francisco Rezek). See also *PSEG Global Inc. v Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, para 253 (Arbs. Francisco Orrego Vicuña, L. Yves Fortier, Gabrielle Kaufmann-Kohler); *Enron Corporation and Ponderosa Assets v The Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, paras 259-260 (Arbs. Francisco Orrego-Vicuña, Albert Jan van den Berg, Pierre-Yves Tschanz); *Sempra Energy International v The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, para 300 (Arbs. Francisco Orrego Vicuña, Marc Lalonde, Sandra Morelli Rico).

<sup>14</sup> *El Paso Energy International Company v The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para 350 (Arbs. Lucius Caflisch, Piero Bernardini, Brigitte Stern). See also *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para 305 (Arbs. Arthur Watts, L. Yves Fortier, Peter Behrens).

22. As a consequence, tribunals following this approach take the view that, in the absence of a clear commitment from the state, mere regulatory instability does not as such breach the FET standard. On this view, there is no stability obligation distinct from the obligation to observe claimants' legitimate expectations. The position was summed-up by the tribunal in *EDF v Romania*:

“The idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation. The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life. 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.”<sup>15</sup>

23. There are a small number of cases following this second approach which suggest that the FET provision may be breached if the state makes changes to its regulatory framework which are “total”<sup>16</sup> or “outside of the acceptable margin of change”,<sup>17</sup> which may suggest the existence of a more limited stability obligation. Yet tribunals which make such statements often claim that states have made a commitment not to make drastic changes by adopting the relevant regulatory framework in the first place. I find such reasoning somewhat artificial, and unpersuasive, but for present purposes it

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<sup>15</sup> *EDF (Services) Limited v Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, para 217 (Arbs. Piero Bernardino, Arthur W. Rovine and Yves Derains). See also *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/08, Award, 11 September 2007, para 332 (Arbs. Julian Lew, Marc Lalonde, Laurent Levy); *El Paso Energy International Company v The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para 374 (Arbs. Lucius Cafilisch, Piero Bernardini, Brigitte Stern).

<sup>16</sup> *El Paso Energy International Company v The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, paras 374 and 517 (Arbs. Lucius Cafilisch, Piero Bernardini, Brigitte Stern).

<sup>17</sup> *Philip Morris v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, para 346 (Arbs. Piero Bernardini, Gary Born, James Crawford).

is sufficient to note that these tribunals carry out their analysis within the limited confines of a legitimate expectations inquiry. Accordingly, their existence and approach do not support the notion that there is a free-standing stability obligation. I believe that the few tribunals which do not rely on state commitments in this way are not correct or logical in their approach, and that the awards they have issued do not offer persuasive authority.

24. The explicit reference to stability in the ECT requires a tribunal to take a different starting point in interpreting and applying Art 10(1) ECT. Art 31 of the Vienna Convention on the Law of Treaties, and the rules of general international law on treaty interpretation, require a tribunal to be sensitive to the distinct wording of Art 10(1), as drafted. That provision cannot be interpreted as if it were simply a traditional FET provision. Tribunals have recognised “that the ECT appears to place a greater emphasis on ‘stable’ conditions for investments than other treaties”,<sup>18</sup> whilst also reaffirming the principle that states retain “the inherent right [...] to alter the legal framework provided in response to changes in circumstances provided that there is an economic or social justification to do so”.<sup>19</sup>
  
25. As a result, tribunals have found that regulatory instability can breach the ECT FET standard in the absence of any commitments or representations. For example, the tribunal in *RWE Innogy v Spain* stated that “even absent a showing of specific commitments that the regulatory regime would not change, a breach of Article 10(1) may be established if there has been some form of total and unreasonable change to, or subversion of, the legal regime,”<sup>20</sup> whilst the tribunal in *Silver Ridge Power v Italy* noted that “both Parties accept[ed] the proposition that, even in the absence of specific commitments, the fair and equitable treatment standard protects foreign investors from fundamental or radical changes to the legal framework in which they made their

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<sup>18</sup> *The PV Investors v Kingdom of Spain*, PCA Case No. 2012-14, Final Award, 28 February 2020, para 566 (Arbs. Gabrielle Kaufmann-Kohler, Charles N. Brower, Bernardo Sepúlveda-Amor).

<sup>19</sup> *Infracapital FI S.a.r.l and Infracapital Solar B.V. v Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021, para 521 (Arbs. Eduardo Siqueiros T., Peter D. Cameron, Luis González García).

<sup>20</sup> *RWE Innogy v Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum, 30 December 2019, para 451 (Arbs. Samuel Wordsworth, Anna Joubin-Bret, Judd L. Kessler). See also para 550.

investment”.<sup>21</sup> A number of other tribunals interpreting and applying Art 10(1) ECT have also found that regulatory instability can lead to a breach of the ECT despite a lack of commitments or assurances from the state.<sup>22</sup> Such statements closely resemble the approach of the Majority on the issue of relative stability. Further, as the Majority points out, tribunals dealing with the ECT stability obligation rarely consider the claimant’s subjective expectations or whether the claimant has actually relied on its expectations.

26. As noted, most tribunals dealing with the provision have couched their analysis in the language of legitimate expectations.<sup>23</sup> In my view, however, it is better to recognise the ECT stability obligation as a distinct element of the ECT FET standard. First, the ECT stability obligation has a different legal foundation than the obligation to respect investors’ legitimate expectations. Whereas the latter is based on the claimant’s expectations, by reference to reliance upon commitments or assurances made by the host state, the ECT stability obligation operates independently of any such expectations, which do not have to be established. Rather, the text of Article 10(1) indicates that the ECT stability obligation is free-standing, based on the explicit reference to stability in the first sentence of that provision.<sup>24</sup> Second, the introduction of the language of legitimate expectations, which is drawn from the traditional FET obligation, is apt to

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<sup>21</sup> *Silver Ridge Power BV v Italian Republic*, ICSID Case No. ARB/15/37, Award, 26 February 2021, para 402 (Arbs. Bruno Simma, O. Thomas Johnson, Bernardo M. Cremades).

<sup>22</sup> *Plama Consortium v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para 173 (Arbs. Carl F. Salans, Albert Jan van den Berg, V. V. Veeder); *Charanne B.V. and Construction Investments S.A.R.L. v Kingdom of Spain*, SCC Case No. 0612/2012, Final Award, 21 January 2016, paras 512-517 (Arbs. Alexis Mourre, Guido Santiago Tawil, Claus von Wobeser); *Blusun S.A., Jean-Pierre Lecorquier and Michael Stein v Italian Republic*, ICSID Case No. ARB/14/3, Final Award, 27 December 2016, para 319(5) (Arbs. James Crawford, Stanimir Alexandrov, Pierre-Marie Dupuy); *Foresight Luxembourg Solar I S.A.R.L. v The Kingdom of Spain*, SCC Case No. 2015/150, Final Award, 14 November 2018, paras 356-359 (Arbs. Michael Moser, Klaus Michael Sachs, Raúl Emilio Vinuesa); *Eurus Energy Holdings Corporation v Kingdom of Spain*, ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability, 17 March 2021, para 319 (Arbs. James Crawford, Oscar Garibaldi, Andrea Giardina).

<sup>23</sup> For example *Charanne B.V. and Construction Investments S.A.R.L. v Kingdom of Spain*, SCC Case No. 0612/2012, Final Award, 21 January 2016, para 514 (Arbs. Alexis Mourre, Guido Santiago Tawil, Claus von Wobeser); *Silver Ridge Power BV v Italian Republic*, ICSID Case No. ARB/15/37, Award, 26 February 2021, paras 415-416 (Arbs. Bruno Simma, O. Thomas Johnson, Bernardo M. Cremades); *Eurus Energy Holdings Corporation v Kingdom of Spain*, ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability, 17 March 2021, para 317 (Arbs. James Crawford, Oscar Garibaldi, Andrea Giardina).

<sup>24</sup> For an example of a case in which the stability obligation seems to have been treated as distinct from the legitimate expectations, see *Plama Consortium v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, paras 163-177 (Arbs. Carl F. Salans, Albert Jan van den Berg, V. V. Veeder); *RWE Innogy v Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum, 30 December 2019, paras 461-461, 550-551 (Arbs. Samuel Wordsworth, Anna Joubin-Bret, Judd L. Kessler).

confuse. As noted above, traditional FET provisions may encompass an obligation to respect investors' legitimate expectations, but they do not provide for a stability requirement. Third, treating the ECT stability obligation as distinct necessarily informs the approach to be taken to the interpretation and application of its scope and limits. This is addressed below.

27. A number of tribunals have acknowledged the commitment to, and importance of, stability in Art 10(1) ECT. They have not, however, taken the position that the ECT stability obligation operates as a stabilisation clause which requires states to freeze their regulatory frameworks. Rather, stability has been recognised as one aspect of an FET standard, which is subject to the continuing right of states to alter their regulations in the public interest.<sup>25</sup> The tribunal in *Infracapital v Spain* argued that “[s]uch changes may even be significant, complex and/or constant, yet would not, per se, give rise to a breach of the FET standard”.<sup>26</sup> This seems to me to be the correct approach. Like many other investment treaties, the preamble to the ECT emphasises the importance of state sovereignty and other public interest objectives such as environmental objectives. Such preambular language cannot give rise to a distinct cause of action, but it may be taken into account in interpreting and applying the substantive treaty provisions.
28. This raises the issue of when a state may be in breach of the ECT stability obligation. Tribunals analysing the issue as one of legitimate expectations have identified a number of factors they are minded to take into account, including: the extent of the change;<sup>27</sup>

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<sup>25</sup> *Infracapital F1 S.a.r.l and Infracapital Solar B.V. v Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021, para 521 (Arbs. Eduardo Siqueiros T., Peter D. Cameron, Luis González García).

<sup>26</sup> *Infracapital F1 S.a.r.l and Infracapital Solar B.V. v Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021, para 528 (Arbs. Eduardo Siqueiros T., Peter D. Cameron, Luis González García).

<sup>27</sup> *RWE Innogy v Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum, 30 December 2019, para 451 (Arbs. Samuel Wordsworth, Anna Joubin-Bret, Judd L. Kessler); *Silver Ridge Power BV v Italian Republic*, ICSID Case No. ARB/15/37, Award, 26 February 2021, para 402 (Arbs. Bruno Simma, O. Thomas Johnson, Bernardo M. Cremades); *Infracapital F1 S.a.r.l and Infracapital Solar B.V. v Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021, para 527 (Arbs. Eduardo Siqueiros T., Peter D. Cameron, Luis González García).

predictability/foreseeability;<sup>28</sup> proportionality;<sup>29</sup> arbitrariness;<sup>30</sup> discrimination;<sup>31</sup> reasonableness;<sup>32</sup> consistency;<sup>33</sup> and the public interest.<sup>34</sup> The Majority has also referred to prior legislative practice and statements of assurance as being relevant factors.<sup>35</sup>

29. In my view, most of these factors may be relevant to the assessment, but not all of them. In this regard, I do not consider that a tribunal should rely on arbitrariness, because to do so risks eroding the distinction between the FET standard and the minimum standard of treatment which exists in customary international law (‘MST’), as arbitrariness is an important aspect of the MST. There is a difference between the two standards, which

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<sup>28</sup> *Electrabel S.A. v The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para 7.77 (Arbs. Gabrielle Kaufmann-Kohler, Brigitte Stern, V. V. Veeder); *Charanne B.V. and Construction Investments S.A.R.L. v Kingdom of Spain*, SCC Case No. 0612/2012, Final Award, 21 January 2016, para 517 (Arbs. Alexis Mourre, Guido Santiago Tawil, Claus von Wobeser.); *Silver Ridge Power BV v Italian Republic*, ICSID Case No. ARB/15/37, Award, 26 February 2021, para 419 (Arbs. Bruno Simma, O. Thomas Johnson, Bernardo M. Cremades).

<sup>29</sup> *The PV Investors v Kingdom of Spain*, PCA Case No. 2012-14, Final Award, 28 February 2020, para 565 (Arbs. Gabrielle Kaufmann-Kohler, Charles N. Brower, Bernardo Sepúlveda-Amor); *Eurus Energy Holdings Corporation v Kingdom of Spain*, ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability, 17 March 2021, paras 319, 315 and 356 (Arbs. James Crawford, Oscar Garibaldi, Andrea Giardina); *Infracapital F1 S.a.r.l and Infracapital Solar B.V. v Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021, para 519 (Arbs. Eduardo Siqueiros T., Peter D. Cameron, Luis González García).

<sup>30</sup> *The PV Investors v Kingdom of Spain*, PCA Case No. 2012-14, Final Award, 28 February 2020, para 565 (Arbs. Gabrielle Kaufmann-Kohler, Charles N. Brower, Bernardo Sepúlveda-Amor); *Infracapital F1 S.a.r.l and Infracapital Solar B.V. v Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021, para 518 (Arbs. Eduardo Siqueiros T., Peter D. Cameron, Luis González García).

<sup>31</sup> *Infracapital F1 S.a.r.l and Infracapital Solar B.V. v Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021, para 531 (Arbs. Eduardo Siqueiros T., Peter D. Cameron, Luis González García)

<sup>32</sup> *Silver Ridge Power BV v Italian Republic*, ICSID Case No. ARB/15/37, Award, 26 February 2021, para 416 (Arbs. Bruno Simma, O. Thomas Johnson, Bernardo M. Cremades); *Infracapital F1 S.a.r.l and Infracapital Solar B.V. v Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021, para 527 (Arbs. Eduardo Siqueiros T., Peter D. Cameron, Luis González García)

<sup>33</sup> *Electrabel S.A. v The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para 7.77 (Arbs. Gabrielle Kaufmann-Kohler, Brigitte Stern, V. V. Veeder); *Silver Ridge Power BV v Italian Republic*, ICSID Case No. ARB/15/37, Award, 26 February 2021, para 415 (Arbs. Bruno Simma, O. Thomas Johnson, Bernardo M. Cremades).

<sup>34</sup> *The PV Investors v Kingdom of Spain*, PCA Case No. 2012-14, Final Award, 28 February 2020, para 577 (Arbs. Gabrielle Kaufmann-Kohler, Charles N. Brower, Bernardo Sepúlveda-Amor); *Eurus Energy Holdings Corporation v Kingdom of Spain*, ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability, 17 March 2021, para 335 (Arbs. James Crawford, Oscar Garibaldi, Andrea Giardina); *Infracapital F1 S.a.r.l and Infracapital Solar B.V. v Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021, para 521 (Arbs. Eduardo Siqueiros T., Peter D. Cameron, Luis González García).

<sup>35</sup> Majority’s Award, para 681.

need to be recognised if the intention of treaty parties to negotiate different levels of investment protection is to be protected. To invoke arbitrariness here may lead a tribunal to equate MST and FET. In any event, conduct which is arbitrary will also fall foul of the other factors. It is not apparent that the concept of arbitrariness is of material utility.

30. As regards predictability/foreseeability, I consider that this is not a pertinent element, because to take it into account is to ignore the conclusion (as noted above) that the ECT stability obligation is not part of the obligation to respect investors' legitimate expectations. As noted, the ECT stability obligation is based on the particular language of Art 10(1) ECT, not on any commitment that may be made by the host state or the investor's own expectations. The investor's interest in having a predictable framework is recognised by the language of the stability obligation itself, as well as other factors such as the extent of the change. To reintroduce notions of predictability/foreseeability in deciding whether the stability obligation has been breached risks 'double-counting' the investor's interest and giving it more weight than it should be given. Accordingly, it is not apparent that predictability or foreseeability is relevant.
31. Similar reasoning underpins my view that the Majority has fallen into error in invoking prior legislative practice and assurances of stability. If understood as distinct from the doctrine of legitimate expectations, the existence and scope of the ECT stability obligation does not depend in any way on any commitment or assurance that may have been made by the host state, or any consequential expectation on the part of the investor. It is a distinct and constant obligation which operates to prevent a state from making regulatory changes which go beyond a certain acceptable margin, whether or not the investor had any expectations regarding those changes. In my view, considering prior legislative practice and statements of assurance introduces an element of subjectivity which has no place in the proper interpretation and application of the stability obligation.
32. Consequently, in my view the central issue that arises in relation to the ECT stability obligation is not whether the regulatory changes were foreseeable, but whether, in making the contested regulatory changes, the Respondent acted in the public interest and in a manner which was proportionate, reasonable, consistent and non-

discriminatory. These factors may overlap, and there is inevitably a degree of uncertainty in seeking to delineate the acceptable scope of change.

33. There is no doubt in my mind that the Respondent acted in the public interest. As acknowledged by the Majority the sustainability and reliability of a state's electricity system is of vital public importance, and this was all the more so in the context of the global financial crisis which the Respondent faced after 2008. There is no evidence before the Tribunal that the Respondent was acting for any other purpose than to address the grave financial crisis that it faced. States may have a number of competing public interest objectives, but the ECT does not place any limits on which objectives it is legitimate to pursue and investment tribunals are in no position to question a state's policy choices.
34. Moreover, there was no evidence before the Tribunal that the regulatory changes on which the Majority form their conclusions were discriminatory or applied inconsistently. The next issue, therefore, is whether these changes were reasonable and proportionate in light of the legitimate public interest objective being pursued. The question of proportionality has not been considered by the Majority. When making this assessment it is important to recognise both that the Respondent did not have the benefit of hindsight which this Tribunal did (I note in this regard that the Tribunal has taken three years to assess whether the regulatory changes imposed excessive burdens on the Claimant, whereas the Respondent had far less time available to determine what steps had to be taken to balance the state budget and the interests of the Claimant). Moreover, a tribunal must be sensitive to the fact that there will inevitably be a number of legitimate ways of achieving any given objective, and this means that it should not be overly prescriptive, and should allow a state that is pursuing a legitimate objective some margin of error or appreciation in relation to the manner in which it proceeds.
35. Against this background, I have no difficulty in understanding the Majority's analysis of the evidence relating to the changes of the regulatory framework and the impact on the Claimant. The contested measures did have a significant economic impact on the Claimant's facilities, but there were only two notable changes to the remuneration regime which related to the importance of the production levels and the level of

remuneration deemed reasonable by the Respondent.<sup>36</sup> In my view, the contested measures were not disproportionate or unreasonable. Although there were changes to the regulatory environment, they were not excessive or manifestly unnecessary. In the circumstances in which the Respondent found itself, the degree of financial burden imposed on the Claimant was not unreasonable in light of objective to secure the sustainability and reliability of the electricity system, and to protect the state budget. Indeed, failing to take these measures may have resulted in the collapse of the Respondent's electricity sector, which would have caused the Claimant to suffer *more* financial harm. Moreover, I am not aware of any reasonably available alternative measures which would have had a lesser impact but achieved the same aim.

### Quantum

36. In this regard, I am bound to say that the Majority's analysis in concluding that the burden imposed on the Claimant was excessive is not readily comprehensible. In essence, this is addressed in the Majority's treatment of quantum. At paragraph 1030 of the Award the majority summarises its position as follows:

“As per the Tribunal's findings on liability, the Respondent breached the FET standard by exceeding the acceptable margin of legislative change, thus violating the Claimant's legitimate expectation of Relative Stability. The illegality of the Disputed Measures under the ECT is therefore limited to that portion which exceeds the acceptable margin.”

37. The Majority here melds matters of liability and quantum. In effect, it concludes (erroneously, as I indicate above) that the Claimant relied on a legitimate expectation that any change to the rate of return it expected to receive would not exceed an “acceptable margin”. There is no evidence before the Tribunal that the Respondent offered any commitment or assurance that change would not exceed an “acceptable margin” or that the Claimant placed reliance on any such commitment or assurance. As

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<sup>36</sup> Award, paras. 713-776.

acknowledged by the Majority,<sup>37</sup> the relevant legislation and domestic court judgments only ever referred to a “reasonable rate of return” and did not give any indication that the Claimant could expect a minimum or guaranteed rate of return. Nor is there any evidence that the Claimant engaged in a due diligence exercise which indicated that its investment was premised on a reliance that any change to the rate of return would not exceed an “acceptable margin”. Indeed, there is no evidence before the Tribunal that the Claimant ever turned its mind to issues of regulatory change, a “reasonable rate of return”, or the concept of an “acceptable margin” of change.

38. Notwithstanding these silences, or perhaps because of them, the Majority has faced the tricky issue of working out what an “acceptable margin” might be. It has, in effect, put itself in the position of inquiring what the Claimant would have determined – if it had put its mind to the issue prior to making its investment, which it did not, according to the evidence – was the limit beyond which any change (or margin of change) would no longer be acceptable. Understandably, this exercise took a considerable amount of time, one reason why more than three years has passed between the close of the hearing and this issuance of the Award: paras. 68-116 offer an account of the procedural steps taken by the Tribunal to, in effect, calculate a reasonable margin for change.
39. On the basis of further submissions over two years, the Majority has concluded that the “acceptable margin” is to be valued at EUR 32,896,240 (I would note that a prudent state, in the situation faced by Spain as a consequence of a grave financial crisis, did not have the time available to the Tribunal to act to protect in a balanced way a multitude of competing interests; this only serves to make it even more troubling that the Majority, with the benefit of time and hindsight should now step in and substitute the Respondent’s view of what should have been done with its own view). In other words, if the regulatory changes made had offered the Claimant a rate of return that would have amounted to that sum, there would have been no breach of ECT Article 10(1), because this amount reflected the bottom line of what the Claimant’s expectation would have been if it had had one (which it did not) duly backed by an exercise in due diligence (which was either carried out and not made available to the Tribunal, or not carried out at all). There is not a shred of evidence in the record before the Tribunal to

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<sup>37</sup> Award, paras 717.

support the conclusion reached by the Majority, in the absence of any due diligence exercise, or any other means to work out what the Claimant's expectation was. The Majority explicitly recognises that damages cannot be "determined with mechanical precision"; it passes in silence on the fact that an expectation too cannot be determined with mechanical precision.

40. The computation of the valuation will not be comprehensible to an ordinary reader, and it is not comprehensible to this arbitrator. What I would have liked to have seen is an amount based on evidence to prove the actual expectation of the Claimant, not an expectation which is assumed. In the absence of any such evidence, the Majority has engaged in a "finger in the air" exercise, an *ex post facto* determination by a tribunal of what an investor might have expected if it had put its mind to the matter, untroubled by the fact that there is no evidence before the Tribunal that it actually did so.
41. The process by which the Majority has sought to calculate the value of the thwarted expectation which it has managed to find, and the consequential damages which are said to follow, merely compounds my concern,
42. No doubt the measures adopted by the Respondent between 2010 and 2014 affected the extent of the economic returns generated by the investments. In the face of the global financial crisis, the reality and consequences of which were not challenged, and which the Majority has recognised, the Respondent was bound to act to limit an economic crisis and reduce a burgeoning budget deficit. It did so by reducing the rate of return on the Claimant's investment. The plants were still profitable, but they were less profitable, and the rate of return granted by Spain was, nonetheless, still generally aligned with those granted by other European Union Member States.<sup>38</sup>
43. Given the dire circumstances faced by Spain, and the urgency situation, the change that occurred did not "exceed the exercise of the host State's normal regulatory power in the pursuance of a public interest", and it did not "modify the regulatory framework relied upon by the investor at the time of its investment outside the acceptable margin

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<sup>38</sup> Such as France, Italy, Estonia and Latvia. See: *Decision of the European Commission C(2017) 7384 final – State aid SA.40348 (2015/NN) – Spain, Support for electricity generation from renewable energy sources, cogeneration and waste*, 10 November 2017, [RL-0116] para. 120.

of change.”<sup>39</sup> The Respondent was faced with a delicate balancing act: it had to reduce public expenditures without imposing excessive burdens on consumers of electricity and citizens, while at the same time continuing to encourage environmental protection and the renewable energy sector, and protecting the legitimate rights of existing investors in the sector.

44. The ample case-law available does not support the kind of relative immutability embraced by the Majority, making clear, that “the requirements of legitimate expectations and legal stability as manifestations of the FET standard do not affect the State’s rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances”.<sup>40</sup> The case-law confirms that Spain was not required to elevate the interests of the investors above all other considerations; the application of the stability and FET standards allow for a balancing exercise by the State.<sup>41</sup>
45. The path taken by Spain was the subject of consideration and consultation. No doubt a range of alternative options were available to it. The Respondent might have decided to sacrifice the Claimants’ investments, or it might have decided to protect the Claimants’ economic returns and profitability and imposed greater costs on electricity consumers, or on the public purse, knowing that such an approach risked exacerbating the economic crisis. It chose neither path, opting instead for something of a middle course, a revised and reduced rate of economic return that nevertheless fell within parameters accepted and approved by the European Commission.<sup>42</sup>
46. In short, the Claimant was not deprived of their investments, although the income generated was reduced. In my view, the reduction fell within “the acceptable margin of change”; against the background of the economic and environmental challenges urgently faced by Spain, and the generous rates of return offered by RD 661/2007, which created a bubble of significant profitability for investors, Spain opted instead for

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<sup>39</sup> *Philip Morris*, 8 July 2016, para. 388 (recognising a “margin of appreciation enjoyed by national regulatory agencies when dealing with public policy determinations.”) and para. 423.

<sup>40</sup> *Philip Morris*, para. 422.

<sup>41</sup> *Saluka Investments B.V. v Czech Republic* (Watts, Fortier, Behrens), 17 March 2006, paras. 305-306; *Electrabel SA v Hungary* (Veeder, Kaufmann-Kohler, Stern), 25 November 2015, para. 165.

<sup>42</sup> *Decision of the European Commission 10.11.2017 C(2017) 7384 final*, [RL-0116] para. 120.

a balanced approach. It did so supported by decisions of its own Supreme Court, some of which were known to the Claimant before it made its investment.

47. In the absence of evidence, the decision of the Majority will be seen as prioritising the interests of foreign investors over and above the interests of all other social actors. That it does so on the basis of a wholly concocted understanding of “reliance”, and an evidentiary record that offers no evidence of the Claimant’s actual expectation, or reliance upon such an expectation, is a matter of considerable concern. The Majority has treated the ECT rules on FET as being akin to a modest insurance mechanism, one that allows the Claimants to benefit from a regulatory framework that was widely seen to be generous in creating windfall profits in the face of an unprecedented economic crisis and historically low rates of interest.<sup>43</sup>
48. The case-law confirms that in the absence of a specific promise or representation 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”.<sup>44</sup> The expectation of a relatively (or absolutely) immutable rate of return identified by the Majority is not supported by the evidence or the case-law. It is an approach that is neither legitimate nor reasonable,<sup>45</sup> and will only serve to foster a greater distrust in the system of investor-state arbitration, one seen in many quarters as favouring the interests of lawyers and arbitrators, and banks and those working in the financial services sector, but not many others or the public good. It also has the unfortunate effect of setting in soft stone a regulatory framework that must necessarily be allowed to change in the face of technological changes that reduce reliance upon greenhouse gas emitting fossil fuels. In this way, I fear that the Majority’s approach

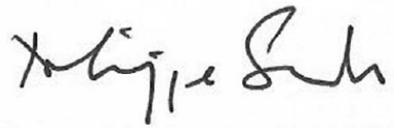
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<sup>43</sup> For effects of excessive tariffs, see for example: Mahalingam, A. & Reiner, D.M.: *Energy subsidies at times of economic crisis: A comparative study and scenario analysis of Italy and Spain*, Energy Policy Research Group – Working Paper, 23 January 2016, retrieved at: <https://www.eprg.group.cam.ac.uk/wp-content/uploads/2016/02/1603-PDF.pdf>; *New York Times – Spain’s Solar Market Crash Offers a Cautionary Tale About Feed-In Tariffs*, 18 August 2009, retrieved at: <https://archive.nytimes.com/www.nytimes.com/gwire/2009/08/18/18greenwire-spains-solar-market-crash-offers-a-cautionary-88308.html?pagewanted=1>; *Financial Times – Shadow Falls Across Spanish Solar Energy Industry*, 31 May 2010, retrieved at: <https://www.ft.com/content/275db4d0-6cdf-11df-91c8-00144feab49a>.

<sup>44</sup> *Philip Morris*, para. 423-424, citing to: *EDF (Services) Ltd v Romania* (Bernardini, Derains, Rovine), 8 October 2009, para. 219.

<sup>45</sup> *Philip Morris*, para. 424 (*Antaris*, Principle 10).

(which is by no means an isolated one) tends to undermine efforts to allow states to take the actions necessary to address the serious threat of global warming and climate change. By making certain technologies more expensive than they need be, the approach offers support for those who see the ECT as setting out obsolescent rules that reflect a bygone era, a legal carbuncle negotiated in an earlier age that will limit efforts truly to transform energy supply systems and offer protections to our common environment.<sup>46</sup>



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Professor Philippe Sands QC

22 April 2022

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<sup>46</sup> See ECT, Preamble (“Recalling the United Nations Framework Convention on Climate Change, the Convention on Long-Range Transboundary Air Pollution and its protocols, and other international environmental agreements with energy-related aspects; and Recognizing the increasingly urgent need for measures to protect the environment, including the decommissioning of energy installations and waste disposal, and for internationally-agreed objectives and criteria for these purposes”).