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September 22, 2022

VIA EMAIL

Dissertation Council and Science Committee
JSC “M.S. Narikbayev KAZGUU University”
Korgalzhyn 8, Astana, Kazakhstan

Re: Recommendation Letter for Bagdat G. Kuzhatov

Dear Sir or Madam:

I am writing this letter of recommendation in support of Bagdat G. Kuzhatov’s application to defend his PhD thesis “Revision of balance between regulatory rights and investment protection under fair and equitable treatment: The Energy Charter Treaty framework”.

I am a partner in the international arbitration group of Curtis Mallet-Prevost Colt & Mosle LLP in Washington, D.C. I specialize in representing sovereigns in complex international arbitration disputes, particularly disputes in the energy and other industrial sectors which arise under various investment treaties. I am also an adjunct professor of law at Georgetown University Law Center (“Georgetown”) where I have been co-teaching a seminar entitled “Investor-State Dispute Resolution” for the past fifteen years. I also serve as Co-Director of the International Law Institute’s Investment Law Center, and Co-Editor-in-Chief of the Brill Research Perspectives on International Investment Law & Arbitration. I am an author, co-author, and editor of more than 50 publications, including more than ten books on various aspects of international investment law and arbitration, and my writings have been cited by international tribunals and the United States and Switzerland Supreme Courts.

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I have acted as an international advisor for Mr. Kuzhatov for the past 15 months. I provided all academic guidance and support and spent a significant amount of time reviewing and commenting on various drafts of his thesis, discussing the drafts with him, and overall, actively advising him in the research, analysis, and writing process. In light of that, I have the following observations and recommendations for Mr. Kuzhatov's thesis:

The topic of the thesis is complex, controversial, and yet timely. In fact, fair and equitable treatment ("FET") is probably the most-discussed standard of protection and almost at the center of every modern investment treaty dispute, particularly under the Energy Charter Treaty ("ECT"). Modernization of the ECT provides a unique opportunity to try to determine the scope of FET in the new ECT in such a way as to safeguard modern concerns such as environment and sustainable development, and in the meantime try to avoid criticisms of the system of investor-State arbitration ("ISDS"). That is why Mr. Kuzhatov's research is timely and useful.

His approach to tackling the topic is methodic, has evolved and improved throughout the work. As it stands, the thesis first discusses specific features of the energy sector in the mid-1990s when ECT was negotiated, and in modern times where there is paradigm shift and interest in protecting the environment, and sustainable development, rather than just protecting large investments into the fossil fuel sector. It is on the back of these findings that Mr. Kuzhatov next moves to examine historical legal tools utilized to protect investments in the energy sector prior to the advent of the ECT, leading to the negotiation and conclusion of ECT, and laying the foundation for discussion in Chapter 2.

In Chapter 2, he examines the historical origins of FET, the evolution of the concept, various delicts subsumed under FET such as arbitrariness, denial of justice, and so forth, treatment of the same by international tribunals, and its tension with the State right to regulate in the public interest, discussing some key ISDS cases and commentaries. The second half of this chapter is dedicated specifically to Article 10 of the old ECT on FET.

In Chapter 3, building upon his discussion of standards in Chapter 2, Mr. Kuzhatov formulates his proposed FET language. Among others, he proposes to omit provisions guaranteeing stability and legitimate expectations, which have been at the center of many disputes

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discussed in Chapter 2 of the dissertation. The chapter also formulates a provision for the reservation of rights to enable States to adopt suitable regulatory measures in matters of public interest. The second part of this chapter then is dedicated to testing the scope of the proposed FET language using real life case studies, and his own personal experience representing Kazakhstan. The objective is to determine how the proposed FET language is likely to be interpreted in situations involving modern challenges such as matters involving environmental disputes, covid, energy prices, and sanctions.

In summary, Mr. Kuzhatov has done independent scientific research, employs a robust methodology, a detailed outline, and has managed to execute and address the relevant topics with a good amount of research and analysis, all in a foreign language, which presents its own challenges. The thesis deals with a very important and timely issue and contributes to the current discussion on the balance between investment protection and the right to regulate.

Therefore, the thesis is recommended for public defense.

Sincerely,

A handwritten signature in blue ink that reads "Borzu Sabahi".

Dr. Borzu Sabahi