EVERSHEDS SUTHERLAND

Eversheds Sutherland
Paseo de Castellana 66
28046 Madrid Spain
Tel.: 34 914294333
Fax: + 34 914299100
www.eversheds-sutherland.com

January 30, 2023

VIA EMAIL
Dissertation Council
JSC "M.S. Narikbayev KAZGUU University"
Korgalzhyn 8, Astana, Kazakhstan

RE: RECOMMENDATION LETTER FOR BAGDAT G. KUZHATOV

Dear Honorable Dissertation Council Chair and Members,

It is a great pleasure to write this recommendation letter in support of Bagdat G. Kuzhatov's application to defend his Ph.D. thesis *"Revision of balance between regulatory rights and investment protection under fair and equitable treatment: The Energy Charter Treaty framework"*.

I. INTRODUCTORY REMARKS

I am a Professor of Law at Universidad Pontificia de Comillas and an Of Counsel in the international arbitration group of the law firm Eversheds Sutherland in Madrid, Spain.

Before joining Eversheds, I was a deputy head of the International Arbitration Department of the General Attorney's Office, Department of Justice of the Kingdom of Spain. During my work in the Spanish Government, I represented the Kingdom of Spain over around 35 arbitration cases under Energy Charter Treaty raised due to the renewable energy reforms.

I have more than 20 years of legal professional experience. I have the Madrid and New York Bar certifications and graduated with honors from Columbia Law School (Harlan Fiske Stone academic honors) and Universidad Complutense de Madrid and I have also a diploma from Harvard Law School in Negotiation, Mediation and Controversies Resolution.

I have also been a Counselor of Justice in the EU where I participated in the negotiation of the Lisbon Treaty, investment treaties, and many regulations such as the Rome I, Rome II, and Company Law and Financial Regulations. I was appointed

chair of the EU Civil Law Committee and of the special group created by the Council of the EU to assess the legal respects of the Financial and Economic crisis. I have participated in many international negotiations being Spain's representative at the Hague Conference of International Law.

I have also been Spain's delegate for the ICSID and Energy Charter Treaty modernization efforts.

Several months ago, Mr. Bagdat G. Kuzhatov approached me as a subject-matter expert and as a legal counsel in Spanish arbitration disputes. He explained that he was writing a Ph.D. dissertation on the problems of Fair and Equitable Treatment ("**FET**") under Article 10 (1) of the Energy Charter Treaty ("**ECT**") and asked to critically assess his findings and proposals, as well as to share practical insights on problems of FET during arbitration disputes.

I have been a legal counsel for the Kingdom of Spain in well-known arbitration cases under the ECT such as CSP Equity v Spain, Stardwerke v. Spain, BayWa v Spain, etc. Taking into account my experience I absolutely and comprehensively understand this research topic, therefore, I was personally interested to review the Ph.D. thesis of Mr. Bagdat G. Kuzhatov and assess the theoretical findings and practical proposals.

II. MY COMMENTS ON THE FINDINGS AND PROPOSALS

It is well-known that in the last 10 years, Spain has been subject to more investment arbitration lawsuits than any other country. Between 2012-2022 Spain received a total of 51 investment claims under the ECT, inter alia, alleged breach of FET provision under Article 10 (1) of the ECT.

Out of 51 claims 27 have already been resolved, 21 of them in favor of the investor. This means that in eight out of ten claims the investors won. According to the Spanish government, the total amount claimed by foreign investors amounts to almost €8 billion.

Accordingly, in the example of Spain, I certainly believe that a balance issue between the sovereign rights of the State to regulate for public purposes and investment protection under FET is a complex, controversial and timely raised topic in light of ECT modernization reforms. In line with Spain, there are other ECT Contracting States such as Italy and the Czech Republic which faced arbitration claims under FET of the ECT.

In Chapters 1 and 2, he approached to tackling the problem structurally and fundamentally. He well demonstrated the analysis of the whole theoretical base of FET in International Investment Law from equality, denial of justice and international minimum standard to Bilateral Investment Treaties ("BIT"). He well substantiated the position that FET origin comes from the Friendship, Commerce and Navigation ("FCN") treaties and proposals of the US State Department during the transition from FCNs to BITs. The findings and results provide us with the understanding that the doctrinal concept of FET is a conventional norm (treaty obligation).

In his analysis, he referred to a substantial number of writings of well-known academics and decisions of tribunals.

Further, he theoretically and practically well demonstrated the absence of balance between the regulatory rights of States and their obligation for the provision of protection under FET of the ECT.

He well analyzed the two most important points of FET: the provision of a stable and predictable regulatory framework and the protection of legitimate expectations. Two provided awards as case studies: *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain and The NextEra Energy Global Holdings B.V.* and *NextEra Energy Spain Holdings B.V. v. the Kingdom of Spain* well revealed all aspects of the balance issue and shortcomings of Article 10 (1) of the ECT.

Further analysis of regulatory space in the FET based on the *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. the Kingdom of Spain* and *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. the Republic of Albania* (*RREEF v. Spain*) awards added that there is no uniform approach to the deference to regulatory rights of States under the application of FET.

I would like to add also that many tribunals on Spanish cases went far and concluded that a decrease in IRR or rate of return of investors as a result of regulatory measures led to the frustration of legitimate expectations of the investors and a breach of stability obligation.

I agree with the findings and conclusions of the thesis in Chapters 1 and 2.

In Chapter 3, he proposed a new construction of FET and the right to regulate provisions. The closed list of the FET delicts is well substantiated from the perspective of theoretical origin and practical significance. He analyzed each of the delicts, their background and the overlaps between them and finally, he sorted out each of them that could qualify as a FET delict.

I agree with the approach.

The most important proposal in Chapter 3 is the role of the proposed right to regulate provision. The proposed wording of the right to regulate embraces the reservation for various regulatory measures including the protection of public health, safety, the environment, climate-change mitigation, adaptation, and social or consumer protection, the importance of which were discussed in Chapter 1.

In this context, he proposed that the protection of the public interests should be one of the primary purposes of ECT Contracting States. In this context, the new ECT investment protection framework should be established based on the right to regulate as the centerpiece. Moreover, he proposed that the burden of proof on the investor is to prove that the measure is not exercised in a bona fide manner and is abusive, targeted discrimination, and blatant arbitrariness. Therefore, the measures that are not treated as legitimate and bona fide do not give rise to the obligation to compensate those affected.

Furthermore, the application of the right to regulate provisions as a centerpiece provision is well substantiated under different practical examples. Provided practical examples from his experience are valuable for States and investors.

Proposals have theoretical and practical significance and are well substantiated.

I certainly believe that conducted research could be useful guidance material for academics and scholars as a theoretical basis for further research; practicing lawyers wanting to better understand the scope of the FET; government bodies wanting to understand the relationship between regulatory measures and how they fit with FET; ECT Contracting Parties in the framework of modernization reforms; States to take into account of if they wish to incorporate the FET standard in future international investment agreements; investors to take into account relevant regulatory measures.

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In conclusion, Mr. Kuzhatov has done significant independent research and his thesis deals with a very important and timely issue and contributes to the development of International Investment Law.

Yours sincerely,
Rafael Gil Nievas,

Professor of Law, Universidad Pontificia de Comillas (ICADE)
Of Counsel, Eversheds Sutherland

T: +34 914 294 333
M: +34 627 537 348
rgil@eversheds-sutherland.es
www.eversheds-sutherland.es
Paseo de la Castellana, 66
28046 Madrid