

Confidential

2015 FDI International Arbitration Moot Case: Bench Memorandum

Only for the use by the appointed arbitrators

Prepared by the case committee: Ms Inga Martinkute, Mr Ivo Skolil, Mr Wojciech Maciejewski,
Ms Karen Seif, Mr Pierre-Maurice Heijmen



2015 FDI International Arbitration Moot Case: Bench Memorandum

Contents

Introduction	3
List of Abbreviations and Symbols	4
Dramatis Personae.....	4
Timeline.....	4
Arguments and Analysis.....	6
Whether the tribunal has jurisdiction over the dispute under the Cogitatia-Barancasia BIT and whether the claims asserted by Claimant are admissible	6
Termination of the BIT by agreement.....	6
Unilateral termination of the BIT by Respondent.....	7
After the accession of both countries to the European Union the BIT becomes obsolete due to the overriding effect of the TFEU.....	8
If the Respondent would have successfully invoked above provisions of the VCLT, it may be argued that it is released from its BIT's obligations under Article 70 (1) b) VCLT.....	8
Whether Respondent's administrative and regulatory measures reducing the feed-in tariff amount to a breach of the Cogitatia-Barancasia BIT.....	10
Alleged violation of the fair and equitable treatment standard by undermining Claimant's legitimate expectations	10
Due process and transparency requirements.....	13
Claimant may argue that the Respondent acted in bad faith	14
Creeping expropriation rendering investment worthless.....	14
Whether Respondent's actions are exempted on the basis that they were necessary in order to meet its economic and renewable energy objectives and to adhere to its EU obligations	15



Whether Respondent can be ordered to rescind the LRE amended Article 4 or to continue to pay the pre-2013 feed-in tariff to Claimant 16

Whether Claimant’s basis for claiming and quantifying compensation 17

 Law applicable to the valuation of the investment..... 17

 Standard of valuation 18



Introduction



The purpose of this Bench Memorandum is to provide you with an outline of the potential arguments that could be risen in the FDI Moot 2015 Case and their analysis. For this purpose, the committee has included a short explanation and the main authorities for the relevant legal issues.

This Memorandum is only intended as an aid for arbitrators. It is the function of arbitrators to evaluate the quality of each argument and assess the advocates' knowledge of the 2015 Case, the relevant law and their advocacy skills. Thus, your personal evaluation of the merits of the Case or the views of the authors of the Bench Memorandum should not to be confused with the independent assessment of each argument. Please note that the Memorandum does not offer an exhaustive list of relevant cases and is not a comprehensive treatise on the legal issues raised in the 2015 Case.

Finally, please feel free to contact the authors with any suggestions or criticism. We look forward to meeting you in London.



List of Abbreviations and Symbols

BEA	The Barancasia Energy Authority
BIT	Agreement between the Republic of Barancasia and the Federal Republic of Cogitatia for the Promotion and Reciprocal Protection of Investments
FET	Fair and equitable treatment
ILC Articles	Draft Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts
Intra-EU	Between the European Union member states
LCIA	London Court of International Arbitration
LRE	Law on Renewable Energy
TFEU	Treaty on the Functioning of the European Union
VCLT	Vienna Convention on the Law of Treaties

Dramatis Personae

Cogitatia	The Federal Republic of Cogitatia
Claimant or Vasiuki	Vasiuki LLC incorporated under the laws of Cogitatia
Barancasia or Respondent	The Republic of Barancasia

Timeline

31 December 1998	The Republic of Barancasia (“Barancasia”) and the Federal Republic of Cogitatia (“Cogitatia”) concluded an Agreement for the Promotion and Reciprocal Protection of Investments
2002	Vasiuki LLC was established
1 August 2002	The last written notification through diplomatic channels of the fulfillment by the Contracting Parties of all the necessary internal procedures for bringing into force the Cogitatia- Barancasia BIT
1 May 2004	Barancasia and Cogitatia joined the European Union
15 November 2006	Barancasia announced its intention to terminate its Intra-European BITs
11 December 2006	The Government of Barancasia adopts a resolution on the measures for the termination of its all Intra-EU BITs



29 June 2007	Barancasia notified the Federal Republic of Cogitatia of its intention to immediately terminate the Cogitatia-Barancasia BIT
28 September 2007	The Minister of Foreign Affairs of Cogitatia confirmed the receipt of Barancasia's notification
28 November 2008	Barancasia removed the BIT with Cogitatia from the website list of valid BITs
May 2009	Vasiuki purchased land plots in Barancasia and decided to launch an experimental solar project "Alfa"
1 January 2010	The solar project Alfa becomes operational
May 2010	Barancasia adopted the Law on Renewable Energy
1 July 2010	The BEA announced publicly the fixed feed-in tariff
25 August 2010	The BEA denied a license for the Alfa Project, but granted a licence for the solar project Beta
September 2010	Land plots and equipment for the Beta project were bought
21 November 2010	Barancasian Foreign Ministry explained publicly that it informally contacted the Ministry of Foreign Affairs of the Federal Republic of Cogitatia several times, most recently on 3 November 2010, in order to confirm the termination of the BIT, but have had no official response from Cogitatia
30 January 2011	Beta project becomes operational
2011	A ground-breaking technology was developed making solar panels substantially cheaper
August 2011	Vasiuki decided to launch 12 new photovoltaic projects
1 September 2011	Vasiuki borrowed money from the United Bank of Cogitatia to acquire land suitable for the development of 12 new photovoltaic projects
February – May 2012	Barancasian public officials admitted that guaranteed profits for 12 years amounted to unfair windfall and that the whole renewable energy support scheme was unsustainable
1 April 2012	The application for 12 new photovoltaic licenses was made
5 May 2012	The Prime Minister of Barancasia opined that all Intra-EU BITs were terminated successfully
June 2012	Teachers of Barancasia organized national strikes demanding an increase of salaries and educational funding
1 July 2012	Vasiuki obtained licenses from the BEA for the development of all 12 photovoltaic power plants with an approved feed-in tariff
3 January 2013	The Barancasian Parliament adopted an amendment to the Law on Renewable Energy allowing review of the feed-in tariffs
5 January 2013	The Regulation entered into force with retroactive effect as of 1 January 2013
5 January 2013	BEA calculated and announced the new fixed feed-in tariffs: 0.15 EUR/kWh, applicable from 1 January 2013
31 January 2013	Equipment for new solar projects was shipped and Vasiuki continued with its plans regarding the 12 projects



Arguments and Analysis

Whether the tribunal has jurisdiction over the dispute under the Cogitativa-Barancasia BIT and whether the claims asserted by Claimant are admissible

The Respondent may argue that claims are inadmissible as at the time of the investment the BIT was terminated. On the contrary, the Claimant should argue that the claims are admissible as at the time of the investment the BIT was still in effect.

Termination of the BIT by agreement

The Respondent may argue that the BIT was terminated by the consent of its parties based on Article 54 (b) VCLT¹ as of June 30, 2008.²

The consent of the parties would be in the case of the Respondent its notification letter on the BIT termination dated June 29, 2007³ and in the case of the Claimant its confirmation dated September 28, 2007⁴ followed by its inactivity⁵ (i.e. tacit acceptance). The consent of the parties does not have to be in the same form as the BIT,⁶ therefore its tacit form may be satisfactory for fulfilment of conditions of Article 54 (b) VCLT. However the Respondent should prove that the consent of the Claimant was expressed above doubt.⁷

The remaining requirement of Article 54 (b) VCLT regarding consultation (in case of the BIT in fact between the Respondent and the Claimant) may have been satisfied in the period between exchange of communication as described above (the BIT termination notice and confirmation of its delivery may be constitute such onetime consultation) and effectiveness of the BIT termination as of June 30, 2008. For avoidance of doubt we point out that the Problem is intentionally silent on the issue of such mutual consultation.

¹ Claimant and Respondent are both parties to the VCLT, see Procedural Order no. 2, para. 5.

² See Annex 7.1.

³ See Annex 7.1.

⁴ See Annex 7.2.

⁵ See Statement of uncontested facts, para. 24.

⁶ O. Dörr, K. Schmalenbach, *Vienna convention on the law of treaties: a commentary*, Springer, 2012, p. 958, para. 40.

⁷ Ibid.



Provided that the Respondent satisfies conditions of Article 54 (b) VCLT as discussed above, the BIT might be considered terminated by the agreement of its parties and the Respondent would be released from its obligation from the BIT under Article 70 (1) (a) VCLT.

However, the Claimant may argue that it has only confirmed receipt of the termination notice and has not actively proceed with any further steps regarding the termination of the BIT.⁸ Further it may argue that application of Article 54 (b) VCLT requires consent which can be prove without doubts (see above) and claim that tacit consent cannot fulfil such condition. Finally it may claim that there was no consultation between parties of the BIT prior to its alleged date of termination as of June 30, 2008 as required by Article 54 (b) VCLT as the exchange of the BIT termination notice and confirmation of its delivery do not constitute consultation within the meaning of Article 54 (b) VCLT. Therefore conditions of Article 54 VCLT would not be met and the BIT cannot have been considered as terminated but would still remain in effect.

The Claimant may further raise an argument that the BIT cannot be terminated prior to its 10 years anniversary under Article 13 (2) BIT. Nevertheless such argument may be challenged by the Respondent claiming that the parties are “masters of their treaty”⁹ and can terminate it by the agreement regardless the provision of the BIT.

Unilateral termination of the BIT by Respondent

The Respondent may argue that the BIT was terminated unilaterally by its act dated June 29, 2007¹⁰ as of June 30, 2008¹¹ and as a consequence of such action it was released from its obligation under the Article 70 (1) (a) VCLT.

Nevertheless such argument is weak and can be easily challenged by the Claimant as the BIT does not allow such action prior its 10 years anniversary under its Article 13 (2) and only the VCLT has mechanism for treaties which do not contain provisions on their termination (see Article 56 VCLT) and conditions for invoking Article 54 VCLT are not met.

For clarity we point out that the BIT has its own mechanism for unilateral termination in Article 13. The BIT was supposed to be effective from August 1, 2002¹² until at least July 31, 2012.¹³ Only after that date

⁸ See Statement of uncontested facts para. 24 and 31 of the Problem.

⁹ O. Dörr, K. Schmalenbach, *Vienna convention on the law of treaties: a commentary*, Springer, 2012, p. 948 para. 10.

¹⁰ See Annex 7.1.

¹¹ See Annex 7.1 and 7.2.

¹² See Article 13 (1) of the BIT and the Procedural Order No. 2, para. 1.

¹³ Article 13 (2) of the BIT.



the termination notice sent by the Respondent may become effective. Under Article 13 (1) BIT upon the termination notice the BIT would still remain effective for twelve months commencing from the date of termination notice. Only upon the expiry of this additional twelve month period the BIT would be terminated (i.e. as earliest on August 2, 2013). Until that date the investment of the Claimant would be protected under Article 13 (3) BIT.

After the accession of both countries to the European Union the BIT becomes obsolete due to the overriding effect of the TFEU

The Respondent might invoke Article 59 (1) b) VCLT and claim incompatibility of the TFEU with the BIT as they both cannot be applied at the same time on the same subject matter. The Respondent might argue “*Lex posterior derogat priori*”. However for this purpose the Respondent would need to prove that:

- (i) the BIT and TFEU govern same subject matter¹⁴; and
- (ii) incompatibility of the BIT with TFEU (i.e. to demonstrate the overlapping scope of the BIT and TFEU, to compare the provisions of the BIT regulating areas such as fair and equitable treatment, most favoured nation clause, etc. with the relevant provisions of the TFEU)¹⁵ – objective condition; or
- (iii) termination was the intention of the parties of the BIT as required under Article 59 (2) VCLT – subjective condition.

The Respondent would further probably support its arguments by the position of the European Commission which recently initiated infringement proceedings against its five member states in connection with intra EU BITs¹⁶ and acted as *amicus curiae* in various arbitration proceedings where it claimed for incompatibility of intra EU BITs with the law of the European Union,¹⁷ even though such position of the EU Commission has not yet been accepted by any arbitral tribunal.

If the Respondent would have successfully invoked above provisions of the VCLT, it may be argued that it is released from its BIT’s obligations under Article 70 (1) b) VCLT.

On the contrary, the Claimant could argue that:

¹⁴ In *European American Investment Bank AG (EURAM) v. Slovakia*, Award on Jurisdiction of 22 October 2012, the tribunal came to conclusion that the intra EU BIT and the TEU does not govern same subject matter.

¹⁵ See *Eastern Sugar v. Czech Republic*, SCC Case No. 088/2004, Partial Award of 27 march 2007, paras. 159 and 168 where the tribunal did not find incompatibility of the intra EU BIT and TEU.

¹⁶ See http://europa.eu/rapid/press-release_IP-15-5198_en.htm.

¹⁷ See *Electrabel v. Hungary*, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012.



- (i) the TFEU and the BIT do not govern same subject matter;¹⁸
 - (ii) the TFEU and the BIT are compatible and can be applied at the same time;
 - (iii) there was no intention of the parties to terminate the BIT by the conclusion of the TFEU;
- and therefore conditions for application of Article 59 VCLT are not met.

The Claimant may further argue that the legal principle “Pacta sunt servanda” included in Article 26 VCLT shall be invoked and that the Respondent should comply with its obligation arising from the BIT.

Alternatively the Claimant may invoke application of Article 30 (3) VCLT and argue that both treaties are applicable at the same time, however the BIT would be applicable only to the extent that it is compatible with the TFEU.¹⁹

¹⁸ In *Jan Oostergetel and Theodora Laurentius v. Slovakia*, Decision on Jurisdiction of 30 April 2010, para. 104, the tribunal finds that there is no incompatibility between particular intra EU BIT and the TEU.

¹⁹ In *Eureko v. Slovakia*, Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010, the tribunal finds that the bilateral investment treaty was not terminated in accordance with Article 59 VCLT, because (i) notification was not provided; (ii) the successive treaty does not relate to the same subject-matter as the entire bilateral investment treaty and Article 59 VCLT requires a broad incompatibility between the two treaties in question; and (iii) the investor's right to bring UNCITRAL arbitration proceedings cannot be equated simply with the legal right to bring legal proceedings before the national courts of the host state.



Whether Respondent's administrative and regulatory measures reducing the feed-in tariff amount to a breach of the Cogitatia-Barancasia BIT

Alleged violation of the fair and equitable treatment standard by undermining Claimant's legitimate expectations

The Claimant may provide several arguments in support of its claim that the Respondent violated the legitimate expectations of Vasiuki by amending LRE in 2013 and reducing retroactively the feed-in tariff from EUR 0.44/kWh to EUR 0.15/kWh.

First, the Claimant may explain that its expectation that the feed-in tariff of EUR 0.44/kWh would be valid for the period of 12 years was legitimate and reasonable in the light of all circumstances. The decision to launch the investment was made by the Claimant on the basis of the law applicable at that time which provided the feed-in tariff to be operational for the period of 12 years.²⁰

Consequently, the Claimant may argue that the amendments of LRE were obvious violation of the Claimant's obligation "*not to alter legal and business environment in which the investment has been made*".²¹ The Claimant can also claim that "*the guarantees given in this connection under the legal framework and its various components [in the case at hand i.e. LRE and further implementing acts guarantying feed-in tariff] were crucial for the investment decision*". Furthermore, the Claimant may point that the amendments to LRE hindered stability and predictability of the Respondent's regulatory framework and therefore constituted a breach of "*an essential element of the fair and equitable treatment*"²².

Second, the Claimant may elucidate that its expectations were based upon the Respondent's clear representation not to withdraw its feed-in tariff scheme for a period of 12 years. The representation of the Respondent had not only regulatory (based on LRE and Photovoltaic Support Regulation), but also an individual character (based upon the licenses granted in 2010 and 2012).²³ It means that the Respondent directly and individually reassured the Claimant that the feed-in tariff would not be revoked over the period of 12 years. The commitment of the Respondent was based not only on the legitimate and reasonable believe in the Respondent's "regulatory fairness" but also on specific, individually addressed commitments—i.e. the licenses. The Claimant may therefore argue that "[t]he more specific the declaration to the addressee(s), the more credible the claim that such an addressee (the foreign investor concerned) was entitled to rely on it for the future in a context of reciprocal trust and good faith. Hence, this accounts for the emphasis in many awards on the government having given 'assurances', made 'promises',

²⁰ This issue was raised in many arbitral awards, e.g. *Enron v. Argentina*, Award of 22 May 2007, para. 262; *Feldman v. Mexico*, Award of 16 December 2002, para. 128.

²¹ *Occidental v. Ecuador*, Award of 1 July 2004, para. 191.

²² *CMS v. Argentina*, Award of 12 May 2005, paras. 274-276.

²³ Article 4 of LRE, and para. 33 of Uncontested Facts.



undertaken ‘commitments’, offered specific conditions, to a foreign investor, to the point of having solicited or induced that investor to make a given investment”.²⁴ All circumstances of the case consequently contributed to the Investor’s expectations that the feed-in tariff would not be withdrawn before the expiry of 12 years.

Third, the Claimant may contend that the feed-in tariff scheme had a purpose of contributing to EU and international efforts to fight climate changes, and therefore it was reasonable to expect that the support for renewable energy would not have been withdrawn or reduced until those targets are reached.²⁵ The Claimant may therefore argue that its legitimate expectations were not based on its “subjective motivations and considerations” but were fairly reasonable in the light of all circumstances of the case. They did correspond to the policy objectives of the Respondents, were in line with its international obligations and eventually did not “impose upon host States’ obligations which would be inappropriate and unrealistic”.²⁶ The Claimant may point out that the international commitments of the Respondent to fight the climate change should be taken into account as a fair basis of any legitimate expectations as “an evaluation of the fairness of the conduct of the host country towards an investor cannot be made in isolation, considering only their bilateral relations”²⁷.

Fifth, the Claimant can raise an argument, that the representations made by the Respondent were clear and directed at attraction of foreign investment into energy sector, without which, the share of renewables could not be increased significantly.²⁸ Therefore, it would be unreasonable to expect that the Respondent would withdraw the feed-in tariff as this withdrawal would simply hinder the realization of objectives of the Respondent’s energy policy.

Fourth, the Claimant may try argue that the 2013 amendment of LRE was beyond the usual State’s right to regulate and arbitrary,²⁹ as well as unreasonable in the light of sustained policy objectives.³⁰

The Respondent may provide a number of arguments to the contrary.

First, the Respondent could argue that it did not violate the Claimant’s legitimate expectations, because the Respondent acted reasonably, within scope of its regulatory power and in the public interest, as the amendments to the feed-in tariff scheme were necessary due to the changing circumstances (development of the technology and dramatic increase of the costs of support schemes for the renewable energy at the expense of other spheres of public life). The Respondent may contend that the FET cannot mean “the virtual freezing of the legal regulation of economic activities, in contrasts with the State’s

²⁴ *Total v. Argentina*, Decision on Liability of 27 December 2010, para. 121.

²⁵ Para. 14 of Uncontested Facts.

²⁶ *Saluka v. Czech Republic*, Partial Award of 17 March 2006, para. 304.

²⁷ *Total v. Argentina*, Decision on Liability of 27 December 2010, para. 123.

²⁸ *Micula v. Romania*, Award of 11 December 2013, para. 678.

²⁹ In *Nykomb v Latvia* the claimant contended that state company’s refusal to pay the full tariff which was valid before the statutory reduction was unreasonable and discriminatory.

³⁰ *Total v. Argentina*, Decision on Liability of 27 December 2010, paras. 119-120, 123.



normal regulatory power and the evolutionary character of economic life".³¹ The Respondent might invoke arbitral awards where tribunals decided to weigh investors' legitimate expectations against states' duty to act in public interests, and request the tribunal to follow this approach.³² The Respondent may argue that the feed-in tariff was changed because of changes circumstances, and in reasonable and transparent manner. Therefore, these amendments did not frustrate any of Investor's legitimate expectations. In particular, the Respondent may argue that the determination whether the measure undertaken (i.e. changes in the feed-in tariff) did breach FET, "*must be qualified in time*" and "*must take into account all the circumstances*".³³

In particular, the Respondent may argue that the Investor could also reasonably expect that the feed-in tariff would be adjusted in order to eliminate economic ineffectiveness as this had happened in other EU Member States (Spain, Italy, Czech Republic, etc).

Second, the Respondent may assert that the purpose of FET, as it is incorporated in the language of the applicable BIT, is not to provide any type of stabilization clauses which would freeze the regulatory environment in which the investment was made. This effect can be achieved only by a separate agreement in which the Respondent would have agreed not to alter the feed-in tariff system. However, in the case at hand, there was not any such an agreement as the level of feed-in tariff was regulated under discretionary power of an administrative body which acted on the basis of the relevant national law.³⁴

Third, the Respondent could maintain that no individual or specific representations that LRE would not be changed were made by the Respondent. The licenses which were granted to the Claimant cannot be deemed as an individual promise or assurance, and moreover their conditions were never changed, and they are still in force. The feed-in tariff system was introduced by the national law, and it is legitimate to expect that the law can be changed when public interest requires the State to respond to new challenges and changing circumstances, as "[a] State has the right to enact, modify or cancel a law at its own discretion" and "[a]s a matter of fact, any businessman or investor knows that laws will evolve over time"³⁵. In addition the Respondent may raise that the any policy aiming at encouraging foreign investment—as the feed-in tariff did aim at this—as "*a matter of general policy (...) did not entail a promise made specifically to the Claimants about the success of their proposed project*"³⁶.

³¹ *EDF v. Romania*, Award of 8 October 2009, para 217.

³² E.g. *Lemire v. Ukraine*, Decision on Jurisdiction and Liability of 14 January 2010, para. 285; *Sempra v. Argentina*, Award of 28 September 2007, paras. 298-299.

³³ *National Grid v. Argentina*, Award of 3 November 2008, para. 180.

³⁴ *Parkerings v. Lithuania*, Award of 11 September 2007, para. 336.

³⁵ *Ibid.*, para. 332.

³⁶ *PSEG v. Turkey*, Award of 19 January 2007, para. 243; similarly, e.g. *Continental Casualty v. Argentina*, Award of 5 September 2008, para. 261(i).



Finally, the Respondent clearly stated that the feed-in tariff had an objective to ensure that renewable energy producers would earn fixed profit rate on the level of 8%, and therefore, in the light of all circumstances, the amendment of LRE should have been expected by the Investor in light of technological changes.³⁷ Therefore, the 2013 amendment of LRE did not render the investments worthless, because it still guaranteed recovery of all operational costs, amortization of the investment and a reasonable return over time on the similar level that was envisaged initially. Consequently, the Respondent can conclude that the amendments to LRE were fair, reasonable and not arbitrary.³⁸

Due process and transparency requirements

The Claimant may argue that the Respondent breached the due process and transparency requirements, as well as denied justice to the Claimant by rejecting in 2010 the Claimant's application for a license for the Alpha project without disclosing the criteria for the granting of a license under the support scheme. Due to the lack of disclosure of the above-mentioned criteria, the Claimant was deprived of due process as in such circumstances it was impossible for the Claimant to prepare and substantiate its potential appeal.

The Claimant may claim that it was entitled - due to FET - *"to expect that the government's actions would be free from any ambiguity that might affect the early assessment made by the foreign investor of its real legal situation or the situation affecting its investment and the actions the investor should take to act accordingly"*³⁹. In essence the Claimant may raise that it was deprived of the right to be heard—which should also be recognized as violation of due process⁴⁰ - as in fact the Claimant has no opportunity to appear and explain its legal position to administrative and judicial authorities, and that both these authorities remain bound by the procedural standard of fairness required by BIT, as they *"can also engage the State's international responsibility by denying justice"*.⁴¹

The Respondent may answer that BEA was responsible for granting licenses under the feed-in tariff scheme, which acted on the grounds of LRE and Photovoltaic Support Regulation which were publicly known. Further the Respondent may argue that the Claimant cannot claim the violation of due process as it did not appeal the decision of the BEA to the administrative court, and therefore it did not exhaust local remedies⁴².

³⁷ Para. 21 of Uncontested Facts.

³⁸ *Total v. Argentina*, Decision on Liability of 27 December 2010, para. 122.

³⁹ *Tecmed v. Mexico*, Award of 29 May 2003, para. 167.

⁴⁰ *Metalclad v. Mexico*, Award of 30 August 2000, para. 91.

⁴¹ *Rumeli v. Kazakhstan*, Award of 25 March 2010, para. 623.

⁴² *Toto v. Lebanon*, Decision on Jurisdiction of 11 September 2009, para. 164.



In addition to this, the Respondent may invoke an argument that the standard of procedural fairness in administrative proceedings is lower than in the judicial process.⁴³ The Respondent may stress in this context that it was not the Respondent which denied of the right to be heard and bring a case under the judicial review, but that it was the Claimant which did not appeal and decided therefore not to execute its right to due process. Moreover, the Claimant was given standing in a procedure aiming at issuance by BEA licenses always when the Respondent filed its applications. In addition, in a number of other application field (in 2010 and 2012) the requested licenses were granted.

Finally, the Respondent may argue that the object and purpose of LRE was to encourage the establishment of new renewable energy facilities, not to support existing ones.⁴⁴

Claimant may argue that the Respondent acted in bad faith

The Claimant may argue that the Respondent acted in bad faith which was demonstrated by lack of transparency, and the conspiracy in the legislation process for the amendment of LRE.⁴⁵ The Claimant could highlight that it was deprived of the opportunity to participate in public and legislative debate on this issue. Moreover, the Claimant could claim that the Respondent organized private and secret hearing in November 2012 in order to consult the changes of relevant law, in which only selected stakeholders could participate.

The Respondent could answer that the state was addressing in good faith the regulatory problem created by imperfect renewable energy support scheme. Further, the Respondent may argue that the legislation process was conducted in accordance with national law, and the changes in LRE could be expected by the Claimant as they were undertaken as a result of open and wide public debate, which was accompanied *inter alia* by strikes.

Creeping expropriation rendering investment worthless

Under the facts of the case an expropriation claim might be a bit of a reach, but Claimant may want to rise it relying on *Nykomb v Latvia*.⁴⁶ The main difficulty associated with this type of claim is that the bar

⁴³ *Thunderbird v. Mexico*, Award of 26 January 2006, para. 200.

⁴⁴ Para. 22 of Uncontested Facts.

⁴⁵ E.g. *Waste Management v. Mexico*, Final Award of 30 April 2004, para. 138; *Saluka v. Czech Republic*, Partial Award of 17 March 2006, para. 307.

⁴⁶ *Nykomb v. Latvia*, Award of 16 December 2003.



for an expropriation claim is higher than for violation of the fair and equitable treatment standard, as demonstrated by *Methanex* case.⁴⁷ It could be construed that if a regulatory measure from the standpoint of international law was made for a public purpose, motivated by the honest belief, held in good faith and on reasonable scientific grounds, if it was non-discriminatory, and was accomplished by due process, it would not amount to expropriation.

Under the case law of international tribunals, a taking must be a substantial deprivation of the economic use and enjoyment of the rights to the property or of identifiable distinct parts thereof and if the expropriation is alleged to result from a loss of economic value, the loss must be substantial.⁴⁸

Furthermore, if the investor has not suffered the total destruction of its business, a state could avoid liability and international arbitrators usually tend to allow national authorities certain discretion in policy choices.⁴⁹

Whether Respondent's actions are exempted on the basis that they were necessary in order to meet its economic and renewable energy objectives and to adhere to its EU obligations

The motivation behind certain regulatory actions does not exclude the liability of the state for the breaches of the BIT, but may impact the qualification of the actions, for example it could work as a counter-argument to the claim, that the regulatory action is arbitrary or discriminatory.⁵⁰

⁴⁷ *Methanex Corp. v. United States of America*, Award of 5 August 2005.

⁴⁸ See *Wena Hotels v. Egypt*, *Tecmed v. Mexico*, *CMS Gas Transmission v. Argentina*, *LG&E v. Argentina*, *Occidental Exploration v. Ecuador*, *PSEG v. Turkey*, *Pope & Talbot v. Canada*, *Bayindir v. Pakistan*, *Total v. Argentina*, *Bogdanov v. Moldova*, *Telenor v. Hungary*, *Alpha Projectholding v. Ukraine*, *Continental Casualty v. Argentina*.

⁴⁹ *LG&E v. Argentina*.

⁵⁰ See *ADC v. Hungary*, *Siemens v. Argentina*, *Siag v. Egypt* for the discussion of public purpose.



Whether Respondent can be ordered to rescind the LRE amended Article 4 or to continue to pay the pre-2013 feed-in tariff to Claimant

Upon establishment of the state's liability the Claimant is entitled to the following broad remedies: compensation for expropriation and for other breaches, or non-pecuniary relief (restitution, or specific performance or satisfaction).

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (1) is not materially impossible; (2) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation. In other words, restitution is the default remedy, but when it is impossible or unfair, compensation comes into play.⁵¹

Specific performance is unlikely to be awarded against a sovereign. Usually the arbitral tribunals give priority to the monetary compensation for the breach of BITs⁵² over the specific performance, i.e. an order to rescind the LRE amended Article 4 or to continue to pay the pre-2013 feed-in tariff to the Claimant. The specific performance could be ordered only in exceptional cases. This is mainly due to sovereignty issues, but a state can always pay compensation for its actions.

Alternatively, restitution, which arguably may include some form of annulment of the LRE amendment, is mentioned *inter alia* among other settlement in Article 4 of the BIT, which relates to the losses suffered due to war, armed conflict, a state of national emergency, riots or other similar events. If the Claimant successfully argues the preconditions of the Article 4 of the BIT, then the Claimant could invoke restitution and discuss the relevant form it may take.

⁵¹ *Nykomb v. Latvia* Award holds that restitution is the primary remedy for reparation but awards compensation rather than ordering the State to make payment in accordance with a contract.

⁵² *CMS v Argentina, ADC v Hungary*.



Whether Claimant's basis for claiming and quantifying compensation is appropriate

Law applicable to the valuation of the investment

The question of the applicable law is the starting point of the analysis on valuation. A well-structured pleading would ideally begin by addressing the applicable law issue, then define the applicable standard of valuation before moving on the technical details. Bonus points should be awarded to those teams who are able to discuss the legal principle/rule from which the applicable valuation standard flows.

In this context the main challenge for the Claimant is to identify the legal basis for its compensation: BIT or customary international law.

At the outset, the BIT contains two articles that pertain generally to valuation. First, Article 4 of the BIT, providing for restitution or “just and adequate compensation” for losses sustained due to, amongst other issues, “national emergency” or “state of necessity”. Second, Article 5 of the BIT provides for “prompt, adequate and effective compensation” equal to the fair market value of the investment expropriated immediately before expropriation.⁵³

Unless the Claimant argues that his investment was harmed through expropriation, or through a state of necessity or revolt, the treaty contains no provision that provides for the method of valuation regarding illegal acts of the host state. Therefore, there may be a range of positions adopted regarding the applicable law, with two extremes and a middle ground. Some contestants may attempt to “fit” the issue of applicable law to the valuation under the BIT, while others will commence their argument on the basis that the BIT does not apply regarding compensation issues. Others may attempt to argue both under the BIT and under customary international law, and present each argument as an alternative to the other.

Alternatively, the Claimant may argue that the BIT should not apply to determine valuation of the investment. The argument would be based on the premise that neither Article 4, nor Article 5 of the BIT are applicable under the circumstances, since there is neither a “state of necessity” nor any expropriation.

⁵³ *CMS v Argentina*, Award of 12 May 2005 quoting the International Glossary of Business Valuation Terms of the American Society of Appraisers defines the fair market value as “The price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arms length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.”



In the event that the Claimant raised expropriation and/or necessity regarding the merits, the Respondent could then argue that the BIT standards of compensation under Articles 4 and/or Article 5 must apply for valuation. Therefore, if the BIT applies, customary international law does not apply.

As a consequence, the only applicable law to the valuation issue for the breach of treatment standards is customary international law “but-for principle” derived from the oft-cited Chorzow factory case, where the PCIJ stipulated the “essential principle [...] that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed”.⁵⁴

These customary international law principles are affirmed by the ILC Articles that adopt the principle of full reparation⁵⁵. In particular, Article 36 of the ILC Articles states that:

“1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established”.

Standard of valuation

In principle, the damages awarded must place the Claimant in the situation that would have existed but-for the illegal act. Once the issue of the applicable law has been resolved, the next question to turn to is that of the appropriate valuation to be used. Of the main valuation methods,⁵⁶ the Claimant’s expert has predominantly applied the income-based approach⁵⁷ (which estimates the present value of a business using forward-looking calculations that factor in anticipated income the business is expected

⁵⁴ Case Concerning the Factory at Chorzów (*Germany v. Poland*), Claim for Indemnity (Merits), No. 13, Judgment of Permanent Court of International Justice of 13 September 1928.

⁵⁵ See Article 31(1) ILC Articles: “The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act”. See also Article 34 ILC Articles: “Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter”.

⁵⁶ See M. Kantor, *Valuation for Arbitration - Compensation Standards, Valuations Methods and Expert Evidence*, Kluwer, 2008, p. 8-9, discussing the Income-Based Approach, the Market-Based Approach and the Asset-Based Approach.

⁵⁷ *Ibid.*, p. 10: “The value of a business is based, under the assumption of purely financial objectives, on the present value of net cash flows from the business to the owner (net receipts of the owner of the business). This means that the value of the business is based solely on its ability to earn business profits for the owner”.



to make in the future), and has proposed that wasted investments be compensation for its second head of damage.⁵⁸

In principle, tribunals have discretion in determining the appropriate methodology to be used to calculate damages. This has been highlighted in numerous cases,⁵⁹ and applies particularly to situations where no valuation method is provided in the treaty. In FET cases, tribunals have applied the Chorzow Factory standard.⁶⁰

Claimants calculation of damages

Vasiuki's expert attests to its "demonstrated track of profitability"⁶¹ and the report is based on Vasiuki's projections for the future.⁶² The Claimant could argue that according to all indicators, it was set to make a good profit from its investment (over and above costs), and that it is entitled to all amounts that it would have made "but-for" the state's breaches.

The Claimant could argue that its investment was harmed in three ways:

- Alfa was denied the 0.44 EUR/kWh tariff⁶³ and Beta was allowed the tariff for only 2 years⁶⁴;
- decrease in value of investment in land and equipment due to decrease in tariff from 0.44 to 0.15 EUR/kWh⁶⁵;
- loss of profit due to change in 0.44 EUR/kWh tariff.⁶⁶

Applying the standard of compensation under customary international law, it follows that "but-for" the state's breaches, the value of the investment would be as follows:

⁵⁸ *Ibid.*, p. 42-43: "If the legal compensation standard employed by arbitrators for injury to a business is not based on a complete loss of market value, common valuation alternatives include "sunk investment" amounts and "business interruption" (BI) amounts. These valuation approaches proceed from very different starting points. The "sunk investments" approach, also referred to as "wasted investments," is a measure of the reliance interest; it seeks to place the injured party in the same position as if the investment had never been made – recovery of invested sums plus a reasonable rate of return until the date of recovery. The "sunk investments" approach has no relation at all to market value – the sales amount between a willing seller and a willing buyer" (emphasis added).

⁵⁹ See e.g. *LG&E v. Argentina*, Award of 25 July 2007, para. 40, stating that the absence of treaty provisions on compensation means that determining the appropriate measure of compensation is in the tribunal's discretion.

⁶⁰ *Azurix Corp. v. Argentina*, Award of 14 July 2006, paras. 424-425. See also *Gold Reserve Inc. v. Venezuela*, Award of 22 September 2014, para. 681.

⁶¹ Kovic Expert Report, paras. 3-4.

⁶² *Ibid.*, para. 4.

⁶³ *Ibid.*, para. 5.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*



- €120,621 for Alpha, representing the difference in tariff;⁶⁷
- €123,261 for Beta, also due to the difference in tariff;⁶⁸
- €690,056 for expenditures on land and construction,⁶⁹ or alternatively, €1,427,500 for lost profits that the project would have generated, in the event the land and construction was used to its intended purpose.⁷⁰ These are referred to as the “Barancasia Solar Project”.⁷¹
- €765,835 for future projects that Claimant expected to develop.⁷² These are the “follow-on Barancasia Solar Installations”.⁷³

The claims above correspond to separate heads of damage: 1) loss of value/profit generated for projects Alpha (a) and Beta (b) due to the change in tariff; 2) wasted investment for which Claimant seeks compensation for out-of-pocket reliance expenditures made in reliance on the Energy Law, or alternatively, loss of future value/profit due to the reduced tariff under the assumption that the project is completed; 3) loss of future value/profit due to the reduced tariff for future projects that Claimant planned on executing.

Respondent's calculation of damage

Respondent will claim that the Claimant has little experience in electric projects, and wind energy projects are a new line of business, therefore its projects are overly-speculative and not based on actual results but simply on future projections that are flawed and would not be realized.⁷⁴ Therefore, Respondent's main argument, that applies to all forward-looking Claimant's valuations, is that Claimant over-estimated the income it would receive, and therefore that its calculations are not reliable because they are based on unlikely assumptions.

Legal authorities highlight that compensation should be strictly limited to establishing the situation that would have existed but-for the breach.⁷⁵ An equally established principle of valuation is that in

⁶⁷ Ibid., para. 7. See also Kovic Annex 1[A].

⁶⁸ Kovic Expert Report, para. 8. See also Kovic Annex 1[B].

⁶⁹ Kovic Expert Report, para. 9. See also Kovic Annex 2.

⁷⁰ Kovic Expert Report, para. 10. See also Kovic Annex 3.

⁷¹ Ibid.

⁷² Kovic Expert Report, para. 11.

⁷³ Kovic Annex 4.

⁷⁴ Priemo Expert Report, para. 5.

⁷⁵ Article 36 ILC Articles, Commentary 4: “[T]he function of compensation is to address the actual losses incurred as a result of the internationally wrongful act. In other words, the function of article 36 is purely compensatory, as its title indicates. Compensation corresponds to the financially assessable damage suffered by the injured State or



order for the harm to be repaired, it must not be too speculative, meaning that a fair amount of certainty must be demonstrated.⁷⁶ Authorities supporting this principle are plentiful.⁷⁷

First head of damage: Alpha and Beta projects

Respondent's expert argued that the Alpha project should not be included at all in valuation calculations. Alternatively, the Claimant's valuation for Alpha is grossly inflated because it does not take into account that the project costs were unexpectedly high, and the projector's performance was poor (much less than the estimated capacity).⁷⁸ Alpha's value is significantly less than what the Claimant claims, because of the many difficulties that the Alpha project would have to overcome to become profitable.⁷⁹ Therefore, since the alleged harm has not been shown with certainty and is speculative, no reparation is due for Alpha.⁸⁰

Respondent's position regarding Beta is different. Unlike its position on Alpha (where Respondent has stated that no compensation whatsoever is due projected profits are too speculative), Respondent has argued that in the event compensation is due, it disagrees with Claimant's calculations. Its position is that the value of the Beta project was miscalculated, since the Claimant's expert discounted cash flows to equity, without doing the same for debt.⁸¹ Thus, the value of Beta should be no more than €104,402.⁸²

Second head of damage: Barancasia Solar Project

The Claimant spent €690,056 on land and equipment, and is claiming €1,427,500 for lost profits. Firstly, the cost of land and equipment can be easily mitigated, and is not lost value (and therefore, should not be included in the computation of damages).⁸³ Secondly, the alternative sum is based on assumptions that construction would be completed with no delays, and no operational problems, which is entirely

its nationals. It is not concerned to punish the responsible State, nor does compensation have an expressive or exemplary character".

⁷⁶ *Amoco International Finance Corporation v. Iran* (1987), 15 Iran-United States Claims Tribunal 189, para. 238: "One of the best settled rules of the law on international responsibility of States is that no reparation for speculative or uncertain damage can be awarded". See also *BG Group Plc. v. Republic of Argentina*, Award of 24 December 2007, para. 429: "Provided that the damage is not speculative, indirect, remote or uncertain, the Arbitral Tribunal may have recourse to such methodology as it deems appropriate in order to achieve the full reparation for the injury caused to BG by Respondent's breach of Article 2.2 of the Argentina-U.K. BIT". See also M. Kantor, *Valuation for Arbitration - Compensation Standards, Valuations Methods and Expert Evidence*, Kluwer, 2008, p. 70-71.

⁷⁷ See *Metaclad v. Mexico*, Final Award of 30 August 2000; *Tecmed v. Mexico*, Award of 29 May 2003; *Wena Hotels Ltd. v. Egypt*, Award of 8 December 2000.

⁷⁸ Priemo Expert Report, para. 7.

⁷⁹ *Ibid.*

⁸⁰ See *Tza Yap Shum v. Peru*, Award of 7 July 2011, para 263, where the Tribunal found that forward-looking methods of valuation cannot be used since there is an insufficient history of favourable results.

⁸¹ Priemo Expert Report, para. 9.

⁸² Priemo Annex 1.

⁸³ Priemo Expert Report, para. 11.



speculative given the little operational history.⁸⁴ Consequently, the forward-looking calculations based on assumed future profits should be disregarded altogether, since it is based on very limited historical performance. Thirdly, even if these assumptions were to be plausible, the correct valuation is not more than €1,238,697.⁸⁵

Third head of damage: follow-on Barancasia Solar Installations

In addition to the argument that there can be no reparation for investments that have not been made, there is no documented evidence that the Claimant intended to develop further projects.⁸⁶ The projected future profits from the alleged investments that are yet to be made are entirely speculative. Therefore, the €765,835 claimed for future developments must not be included in the computation of damages.

⁸⁴ Ibid., para. 12.

⁸⁵ Ibid, para. 13. See also Priemo Annex 2.

⁸⁶ Priemo Expert Report, para. 14.