THE LONDON COURT OF INTERNATIONAL ARBITRATION
UNDER THE LCIA RULES AND THE OFFICIAL RULES OF THE FOREIGN
DIRECT INVESTMENT INTERNATIONAL ARBITRATION MOOT

VASIUKI LLC

Claimant

v.

REPUBLIC OF BARANCASIA

Respondent

STATEMENT OF CASE
19 September 2015
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REQUEST FOR RELIEF
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<tr>
<td>12 Projects</td>
<td>12 solar power plants, namely Chi, Delta, Digama, Dzeta, Epsilon, Eta Fi, Gama, Ipsilon, Jota, Kapa and Kopa, that Claimant has decided to build in Respondent’s territory</td>
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<td>60 Projects</td>
<td>The planned projects that were to be constructed according to an alleged long-term plan of Claimant.</td>
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<td>Accession</td>
<td>Parties' accession to the EU on 1 May 2004</td>
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<td>Alpha</td>
<td>First solar power plant built by Claimant in Respondent’s territory</td>
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<td>Article/Articles</td>
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<td>BEA</td>
<td>Barancasia Energy Authority</td>
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<td>Beta</td>
<td>Second solar power plant built by Claimant in Respondent’s territory</td>
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<td>CCP</td>
<td>Common commercial policy of the EU</td>
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<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>Claimant</td>
<td>Vasiuki LLC</td>
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<td>Claimant’s Expert</td>
<td>Marko Kovič, Ph.D.</td>
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<td>Cogitatia</td>
<td>Federal Republic Cogitatia</td>
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<tr>
<td>Term</td>
<td>Definition</td>
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<td>Commission</td>
<td>European Commission</td>
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<tr>
<td>Council</td>
<td>Council of the EU</td>
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<td>DCF</td>
<td>Discounted Cash Flow method of valuation</td>
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<td>EU</td>
<td>European Union</td>
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<td>TEU, TFEU, Accession Agreements of the Republic of Barancasia and the Federal Republic Cogitatia</td>
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<td>Expert</td>
<td>Either Claimant's Expert or Respondent's Expert, as defined</td>
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<tr>
<td>FET</td>
<td>Fair and Equitable treatment standard</td>
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<td>FIT/FITs</td>
<td>Feed-in tariff / Feed-in tariffs within the meaning of the LRE.</td>
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<td>Ibid</td>
<td>In the same place</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>intra-EU BITs</td>
<td>Bilateral investment treaties entered into between European Union Member States</td>
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<td>LCIA</td>
<td>London Court of International Arbitration</td>
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<td>LRE</td>
<td>Law on Renewable Energy</td>
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<td><strong>Member State/Member States</strong></td>
<td>Any of the member state/member states of the EU</td>
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<td><strong>MST</strong></td>
<td>Minimum Standard of Treatment</td>
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<td>Juanita Priemo, MBA, C.A.</td>
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STATEMENT OF FACTS

I. Concerned Parties

1. Claimant, Vasiuki LLC, is a limited liability company incorporated under the laws of Cogitatia in 2002. Claimant's business is focused on development, construction and operation of small scale fossil fuel and wind turbine generator facilities.

2. Respondent is the Republic of Barancasia, an EU Member State that has endeavoured to meet its ambitious energy targets and thus began promoting renewable energy sources since 2007.\textsuperscript{1}

II. Legal Background

3. On 31 December 1998, the Parties entered into the BIT in order to develop economic cooperation and to create and maintain favourable conditions for the investors. On 1 August 2002 BIT became effective according to its Art. 13(1).\textsuperscript{2}

4. On 1 May 2004, both Cogitatia and Respondent joined the European Union. On 15 November 2006, Respondent issued a press release and announced its intention to terminate its intra-EU BITs, preferably by agreement, otherwise unilaterally.\textsuperscript{3} According to Respondent, intra-EU BITs are no longer necessary because of the EU's legal framework.\textsuperscript{4}

5. On 29 June 2007, Respondent notified Cogitatia of its intention to terminate the BIT without providing any explanation. Cogitatia's Ministry of Foreign Affairs confirmed receipt of Notification of Termination but has not expressly agreed with the BIT's termination.\textsuperscript{5}

6. On 1 May 2010, Respondent adopted the LRE providing for FIT according to RSPS for all licensed operators. Art. 4 of the LRE also stated that the FIT applicable at the issuance of the license would apply for 12 years. The LRE attracted several investors to the Respondent's market.

\textsuperscript{1} SoUF, paras. 7, 8.
\textsuperscript{2} SoUF, para. 1; PO 2, para 1.
\textsuperscript{3} Resolution
\textsuperscript{4} Press report dated 15 November 2006, paras. 6-7.
\textsuperscript{5} SoUF, paras. 6, 9; Notification of Receipt.
7. By the beginning of the year 2013, there have been over 7000 applications for licenses and around 6000 licenses were issued to both Respondent's and foreign investors.\(^6\)

8. On 3 January 2013, Respondent amended the LRE by article that enabled the annual recalculation of the FITs. The amendment came into force on 5 January 2015 with retroactive effect as of 1 January 2015.\(^7\) In the same month, the BEA retroactively recalculated and announced the new fixed FITs applicable from 1 January 2013. The new fixed FITs were decreased by 2/3 in comparison with the original fixed FITs which caused a substantial loss to Claimant.\(^8\)

III. Claimant's investments in the territory of Respondent

9. Claimant purchased land plots in the territory of Respondent in 2009 in order to launch Alpha and establish its presence in the field of renewable energy production in Respondent's territory.\(^9\)

10. A year later, Alpha was connected to the Respondent's grid. Subsequently, Claimant significantly expanded its investments by launching a second photovoltaic power plant - Beta and later on 12 Projects running on the innovative technology.\(^10\) Claimant also decided to invest into 60 Projects to benefit from its previous experience.

11. In 2010, Claimant applied for licenses for Alpha and Beta. Claimant's application for Alpha was rejected on the basis that the FIT is available only for new projects, though this limitation was not stated in the LRE. On 25 August 2015 Beta obtained license. Two years later Claimant received licenses from BEA for the remaining 12 Projects.\(^11\)

12. By the beginning of the year 2013, Claimant had invested into Alpha, Beta and the 12 Projects using both its own finances and bank loans. Claimant, relying on Respondent's conduct, had created a long-term strategy of investing into renewables, purchased land plots, hired personnel and paid a considerable sum of money for equipment.\(^12\)

\(^6\) PO 2, para. 13.
\(^7\) PO 3, para. 9.
\(^8\) SoUF, para. 35.
\(^9\) SoUF, para. 12.
\(^10\) SoUF, paras. 13, 27.
\(^11\) SoUF, paras. 22-23, 33.
\(^12\) SoUF, para. 36; for more detail Claimant’s Expert Report and PO 2, para. 28.
PART ONE: PRELIMINARY ISSUES

I. THE TRIBUNAL HAS JURISDICTION OVER THE CASE AT HAND

13. In order for Claimant to benefit from the substantive and procedural rights, the BIT must be applicable *ratione materiae, ratione personae* and *ratione temporis*. Tribunal's jurisdiction *ratione materiae* and *ratione personae* require that Claimant's economic activities qualify as investments covered by the BIT. Neither of those was disputed by Respondent.

14. On the contrary, Tribunal's jurisdiction *ratione temporis* was challenged by Respondent, arguing that its conduct regarding Claimant's investments was not subjected to the BIT, since it was no longer in force in the relevant time. It will be demonstrated below that the BIT was neither affected by Accession nor terminated in any other way and thus remains in force to the date and Tribunal has jurisdiction *ratione temporis*.

15. Alternatively, if the Tribunal considers the Notice of Termination issued by Respondent valid, Claimant submits, that it became effective on 1. August 2013. Since Claimant's investments preceded the termination of the BIT, they remain protected by its standards in accordance with Art. 13(3) of the BIT. The Tribunal thus possesses jurisdiction *ratione temporis* even if the BIT was unilaterally terminated by Respondent's Notice of Termination.

A. Claimant is an investor, who invested in Respondent's territory

16. Since the Tribunal's jurisdiction *ratione temporis* has been disputed, it is necessary to further specify investments relevant for the present case and clarify the moment when they were made.

17. The BIT's wide definition of investment covers any "[...] asset invested in connection with economic activities of an investor [...] in accordance with the laws and regulations" of the host state. Moreover, the BIT provides illustrative list of both tangible and intangible

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13 Schill, p. 71
14 Response, p. 2.
15 Art. 1(1) of the BIT.
assets including "... any right conferred by laws or under contract and any licenses and permits pursuant to laws."\textsuperscript{16}

18. In the present case, Respondent decided to promote the area of renewable energy sector and its support materialised in the LRE, which provides for the subsidies. In response to Respondent's actions Claimant choose to add photovoltaic power plants to the portfolio of its economic activities within Respondent's territory.\textsuperscript{17} It follows, that Claimant committed its resources and entailed the assumption of risk in expectation of commercial return\textsuperscript{18} based on the acquisition of licenses under the LRE.

19. Every property acquisition made by Claimant, including land, solar panels and related equipment, directly relates to and is connected with licenses under LRE issued with respect to Claimant's solar power projects. Even though Claimant's movable and immovable properties in Respondent's territory qualify by itself as an investment\textsuperscript{19} those acquisitions were conditioned by acquisition of the licenses.

20. The licenses represent an asset Claimant acquired in connection with its economic activities and in accordance with Respondents laws and regulations and thus qualify as investment under Art. 1(1) of the BIT. Furthermore, in its Art. 1(1)(e) the BIT explicitly recognizes licenses as protected investment.

21. In conclusion, the Tribunal has jurisdiction \textit{ratione materiae} since the licenses under the LRE constitute an investment as defined by the BIT. When assessing Tribunals jurisdiction \textit{ratione temporis}, it would suffice to prove, that the BIT was effective at the time of acquisition of the licenses.

22. As a legal person incorporated under the law of Cogitatia that has invested in Respondent's territory, Claimant qualifies as investor according to Art. 1(2) of the BIT. The Tribunal thus has jurisdiction \textit{ratione personae}.

\textsuperscript{16} Art. 1(1)(e) of the BIT.
\textsuperscript{17} SoUF, paras. 3, 7 and 8.
\textsuperscript{18} See Rule 23 in Douglas, p. 161.
\textsuperscript{19} Art. 1(1)(a) of the BIT.
B. Claimant's investments are covered by the temporal scope of the BIT

23. Tribunal's jurisdiction *ratione temporis* covers claims relating to the Claimant's investment, based on obligations in force and binding upon the Respondent at the time of their violation.\(^{20}\)

24. Since the Tribunal's jurisdictions stems from standing offer to arbitrate contained in Art. 8 of the BIT, the Tribunal lacks jurisdiction only if the BIT as a whole had been terminated or if its Art. 8 had become inapplicable before Claimant's investment occurred.

25. BIT contains no conflict rules, its interrelations with other international treaties are thus governed by conflict rules contained in the VCLT, to which both Parties are signatories.\(^{21}\) The *Eastern Sugar* tribunal made the same conclusion stating:

> "[...]In absence of more specific legal provisions, the effect of the Czech Republic’s accession to the European Union, a regional multilateral treaty, on the BIT must be judged according to the law of Nations, and in the particular the Vienna Convention on the Law of Treaties dated 1969 [...]."\(^{22}\)

26. Under international conflict rules contained in the VCLT it must be analysed whether the BIT was in accordance with Art. 59(1) of the VCLT and if not, whether any provision of the EU Treaties cause inapplicability of Art. 8 of the BIT according to Art. 30(3) of the VCLT resulting in lack of Tribunal jurisdiction *ratione temporis*.

27. Respondent argues that the BIT became obsolete upon Accession\(^{23}\) which implies automatic termination of the BIT under Art. 59(1) of the VCLT. Alternatively, Respondent claims, that the BIT was unilaterally terminated according to its Art. 13.\(^{24}\) As further addressed below, both Respondent's claims are unfounded

i. *The BIT and the EU Treaties do not cover the same subject matter*

28. Art. 59(1) of the VCLT contains *lex posterior derogat legi priori* rule which resolves the conflict of two concurrent international treaties providing that it is either the intention of the contracting parties or "[...] the provisions of the later treaty are so far incompatible

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\(^{20}\) Douglas, p. 328.
\(^{21}\) PO 2, para. 5.
\(^{22}\) *Eastern Sugar*, p. 156.
\(^{23}\) Response, p. 2.
\(^{24}\) Response, p. 2.
with those of the earlier one that the two treaties are not capable of being applied at the same time”.

29. Since application of Art. 59(1) of the VCLT results in termination of the earlier treaty *en bloc*, the concurrency between the treaties must be proportionate to such a serious outcome. In order to form the appropriate basis for application of Art. 59(1) of the VCLT, it is thus required that both treaties cover the same subject matter in its entirety. Even though the sameness here does not mean absolute identity, only minor overlaps do not suffice.25

30. The Parties concluded the BIT in order to establish mutual cooperation between them limited to promotion and protection of foreign direct investments. The Parties specified the object and purpose of the BIT in its preamble declaring, that they intend

"[...to create and maintain favourable conditions for investments and investors of one Contracting Party in the territory of the other Contracting Party” (p.7).

31. On the contrary, the EU Treaties on the other hand, constitutes a regional international organisation based on much broader objectives.27 The difference between objectives of the EU Treaties and the BIT was noted by the tribunal in *Oostergetel*:

"[...T]he Tribunal agrees [...] that the EC Treaty's objective to create a common market between all EU Member States is different from the objectives of a BIT. which provides for specific guarantees for the investor's investment in the host country pursuant to a bilateral agreement made between two countries. “28

32. In order to fulfil its objectives the BIT accords investors with guarantee that their investments will not be expropriated, discriminated against, subjected to unfair and inequitable treatment or otherwise maltreated once they are made.29 In addition to the substantial provisions, Art. 8 of the BIT contains standing offer to arbitrate, which entitles Claimant to initiate direct investor-state dispute settlement.30 To sum up, the main purpose

25 Achmea I., para. 242
26 Preamble of the BIT.
27 See in particular Preamble and Arts. 2 and 3 of the TEU.
28 Oostergetel, para. 75.
29 Guzman, p.644.
30 See Art. 8 of the BIT.
of the BIT is to regulate state conduct toward investors during the post-establishment phase of the investment.  

33. With regard to foreign investors, the EU Treaties focuses on eliminating impediments for cross-border movements of either their capital or investors themselves. Any effect on the post-establishment-phase of the investment is merely incidental and always related to Member State's provision which constitute an obstacle to the cross-border movement. In other words, the EU Treaties affect mainly the pre-establishment phase of the investment.  

34. Apart from the above, the EU Treaties fail to provide for the special procedural protection in form of a dispute settlement mechanism comparable to clauses contained in the majority of bilateral investment treaties and in particular Art. 8 of the BIT. The importance of investment protection provided by an independent tribunal was emphasised by Gas Natural tribunal which held that

"[t]he vast majority of bilateral investment treaties, and nearly all the recent ones, provide for independent international arbitration of investor-state disputes, [...] and such provisions are universally regarded – by opponents as well as by proponents – as essential to a regime of protection of foreign direct investment."  

35. The discrepancy between offered procedural protection of investors alone means, that the EU Treaties and the BIT do not overlap to the extent required by Art. 59 of the VCLT. The same conclusion was reached by tribunals in Eastern Sugar and Euram, which stressed that:

"[...The EU treaties] and the EU law rooted in, and flowing from them do not relate to the same subject matter as BITs or multilateral treaties for the protection of foreign investment. To accede to an economic community is simply not the same as to set up a specific investment protection regime providing for investor-[s]tate arbitration."  

36. In the light of the foregoing, the BIT was not terminated upon Accession since the overlap between the BIT and the EU Treaties required by Art. 59(1) of the VCLT is not sufficient.

31 Eilmansberger, p. 400.  
32 Eilmansberger, p. 401.  
33 Eastern Sugar, para. 164.  
34 Gas Natural, para. 29.  
35 Reinisch, p. 172.  
36 Eastern Sugar, para. 180.  
37 Euram, para. 184.
ii. *The Parties did not intend to terminate the BIT*

37. Even if the Tribunal concludes that the BIT and EU Treaties are concurrent to the extent required by Art. 59(1) of the VCLT its operation further conditioned by common intention of the Parties to govern the subject-matter of the BIT by the EU Treaties. The terminative intention of the Parties must be established beyond reasonable doubt and while Respondent's intention was clearly expressed, the position of Cogitatia remains unclear.

38. The only official response to the Notification of Termination was the Notification of Receipt, which merely acknowledged the delivery of Notification of Termination. To date, there was no official communication regarding the termination of the BIT from Cogitatia's side. On the contrary, Cogitatia have not officially recognized termination of any of its existing bilateral investment treaties concluded with other Member States including the BIT.

39. When taking into account the current debate regarding the intra-EU BITs, in particular the widespread reluctance of the majority of the EU member states to renounce achieved standards of investment protection, it cannot be assumed that Cogitatia expressed terminative intention implicitly.

40. Since Parties' common terminative intention cannot be ascertained beyond reasonable doubt, the requirement of Art. 59(1)(a) of the VCLT is not satisfied and the BIT therefore could not have been terminated based on this provision.

iii. *The provisions of both BIT and EU Treaties can be applied at the same time*

41. Provided that the Tribunal decide that the BIT and EU Treaties cover the same subject matter, Art. 59(1)(b) of the VCLT would result in automatic termination of the BIT treaty even in the absence of Cogitatia's terminative intention if the provisions of both concerned treaties are "[...]so far incompatible [...] that the two treaties are not capable of being applied at the same time."
42. The incompatibility would have to reach the threshold of incompatibility between the BIT and the EU Treaties which is extensive enough to prevent their simultaneous application. It covers the situations when the later treaty leaves no room for the application of the earlier treaty regulatory concept, since it supersedes the earlier treaty in its entirety.\textsuperscript{44}

43. The BIT constitutes grounds for both substantive and procedural rights accorded exclusively to the Parties' investors, while the EU Treaties preclude any discrimination based on the nationality of those who participate in the EU's common market.\textsuperscript{45} Even though both concepts appear \textit{prima facie} irreconcilable with each other the conflict can be, overcame by positive action toward investors who do not fall within the scope of the BIT. Moreover, the BIT explicitly enables investors to take advantage of any international agreement which governs the matter simultaneously with the BIT.\textsuperscript{46} Such a solution was suggested by the CJEU in the \textit{Matteucci}\textsuperscript{47} as well as by the \textit{Eastern Sugar} tribunal:

"If the BIT gives rights to the Netherlands and to Dutch investors that it does not give other EU countries and investors, it will be for those other countries and investors to claim their equal rights. But the fact that these rights are unequal does not make them incompatible."\textsuperscript{48}

44. Furthermore, Respondent's prime minister himself claimed in Press Report that bilateral investment treaties between Respondent and other Member States are not necessary within the legal framework of the EU\textsuperscript{49} which implies that he views the BIT as 'useless' rather than incompatible with the EU Treaties. With regard to the case at hand Respondent deliberately changed its position without further analysis claims that there is a material inconsistency between the BIT and the EU Treaties.\textsuperscript{50} Nevertheless, as was demonstrated above, there is no such material inconsistency.

45. Since the BIT and the EU Treaties are capable of application on the same time, the requirement laid down by Art. 59(1)(b) of the VCLT was not fulfilled and as a result, the BIT remains in force regardless of the Accession.

\textsuperscript{44} Dörr/Schmalenbach, p. 1019.
\textsuperscript{45} See Art. 18 of the TFEU.
\textsuperscript{46} Article 10(1) of the BIT.
\textsuperscript{47} \textit{Matteucci}, para. 23.
\textsuperscript{48} \textit{Eastern Sugar} para 170.
\textsuperscript{49} Press Report.
\textsuperscript{50} Response, p. 2.
iv. **Investor-state dispute settlement mechanism under the BIT is applicable**

46. As was demonstrated above, the BIT is not terminated under Art. 59(1) of the VCLT. Nevertheless, in accordance with Art. 30(3) of the VCLT, the individual provisions of the BIT are applicable only to the extent they comply with provisions of the EU Treaties. Regarding Tribunal's jurisdiction, it is necessary to preserve applicability of Art 8 of the BIT which entitles investors to bring their claims before independent international tribunals.

47. However, Art. 30(3) of the VCLT requires that both treaties cover the same subject matter and for the reasons analysed above this precondition is not satisfied. Even if the Tribunal decides that the BIT and the EU Treaties cover the same subject matter operation of Art. 30(3) of the VCLT further demand incompatibility between Art. 8 of the BIT and the EU Treaties.

48. The EU Treaties do not preclude investor-state arbitration itself as was noted by the tribunals in *Achmea I.* and *Electrabel*, in which the tribunal held that

"[...] even when disputes raising issues of EU law are decided by international arbitration, if the resulting award is honoured voluntarily by the EU Member State or enforced judicially within the European Union against that Member State, the ECJ retains the possibility, through different mechanisms for both ICSID and non-ICSID awards under the EU Treaties, to exercise its traditional role as the ultimate guardian of EU law."\(^53\)

49. Therefore, the Art. 8 of the BIT is applicable to the full extend and Claimant is entitled to take advantage it, by submitting its claims to the Tribunal.

v. **The Notification of Termination became effective after Claimant had made its investments**

50. By conclusion of the BIT Respondent deliberately renounced an element of its sovereignty in return for benefits related to the increase of foreign investments. Therefore provisions contained in the BIT are no longer subjected to Respondent's unilateral decision.\(^54\)

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\(^{51}\) Similarly in *Oostergetel*, para. 104.

\(^{52}\) *Achmea I.*, para. 274.

\(^{53}\) *Electrabel*, para. 4.162.

\(^{54}\) Dolzer/Schreuer, p. 23.
51. In the case at hand Respondent officially decided to terminate its bilateral investment treaties concluded with certain Member States in 2006 by issuing Resolution which authorized Respondent’s Ministry of Finance to commence negotiations with the concerned Member States including Cogitatia. According to the Resolution, Respondent preferred termination of the BIT by consent of both Parties. However, there is no evidence that Respondent ever initiated any negotiations between the Parties in order to reach agreement on termination.

52. On the contrary, half a year after the Resolution was adopted Respondent attempted for unilateral termination of the BIT before expiration of initial ten years period contained in its Art. 13(2). As demonstrated above, however, the terms of the BIT including the initial period of its effectiveness could not be unilaterally amended by Respondent.

53. According to its Art. 13(2) the BIT is terminated after expiration of twelve month period from the date either Party gives written notification of its terminative intention to the other Party.

54. The Notification of Termination satisfies the requirements set out in Art. 13(2) of the BIT and Respondent had not changed its position. Therefore the Notification of Termination resulted in termination of the BIT twelve months after Respondent could have initiated the unilateral termination of the BIT. Since the initial period of the BIT expired on 1 August 2012, the Notification of Termination resulted in termination of the BIT effective as of 1 August 2013.

55. Respondent’s conduct disputed by Claimant in the case at hand took place prior to termination of the BIT, more particularly between 25 August 2010 and 3 January 2013. Claimant is therefore entitled to rights under the BIT until 1 August 2023 in accordance with Art. 13(3) of the BIT and the case at hand thus fall under the temporal scope of Tribunal’s jurisdiction.

55 Notice of Termination.
56 Salacuse, p. 389
57 Alpha was denied the license under the LRE by the BEA.
58 BEA announced the reduction of the FIT.
C. **Present case is admissible since the requirement of negotiation period prescribed by the BIT was fulfilled**

56. Under Art. 8(4) of the BIT, any investor-state dispute "shall be settled, if possible, by negotiations between the parties to the dispute". The dispute might can be submitted to an arbitration only if it is not amicably settled within six months from the written notification of a claim. The admissibility of a particular claim is thus conditioned by prior attempt of reconciliation.

57. Claimant notified Respondent’s Ministry of Foreign Affairs of the present dispute on 20 April 2014. However, Respondent declined negotiations by which it frustrated Claimant’s attempt for amicable solution of the present dispute.

58. Claimant nevertheless respected requirements laid down in Art. 8(4) of the BIT and submitted to the Tribunal by RfA on 2 November 2014 – more than six months after Respondent was notified of the dispute.

59. In the light of the foregoing, Claimant's claims are submitted maturely, in accordance with the relevant provisions of the BIT and the case at hand is thus admissible.

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59 Art. 8(5) of the BIT  
60 RfA, p. 2.
PART TWO: MERITS

II. RESPONDENT FAILED TO ACCORD FET TO CLAIMANT’S INVESTMENTS

A. Factual background of the case and introduction

60. By ratifying the BIT, Respondent bound itself to accord Claimant's investment fair and equitable treatment and full protection and security. However, by its arbitrary refusal to issue license to Alpha, the retroactive reduction of the FITs that was disproportionate and devastated Claimant's investments, Respondent repeatedly failed to honour this obligation, as further explained below.

B. Introduction of the FET standard

61. This concept is the most frequently claimed standard in investor-state disputes and is also often the reason behind the success of a claim.\(^{61}\) There is no precise definition of FET and thus the standard is being interpreted in (almost) every investor-state arbitration, giving arbitrators the possibility to articulate the range of diverse manifestations of the standard necessary to provide sufficient protection to investors and to address manifold types of deterring governmental conduct that more specific rules cannot comprise.\(^{62}\)

62. As Dolzer stated, FET is:

"[... A] response to the danger of the ‘obsolescent bargain’ which may threaten an investor who was welcomed by the host state before his investment, who sunk its money into the project, but who later on finds itself subject to the upper hand of the host state."\(^{63}\)

63. Art. 2(2) of the BIT therefore cannot be understood in a manner that the state’s passive behaviour is expected but to promote, to create, to stimulate a stable framework for investment and the effective use of economic resources. With the words of the tribunal in the Azurix case FET is a treatment "[...] in an even-handed and just manner, conductive to fostering the promotion of foreign investment"\(^{64}\).

64. The definition of what FET actually is has been developing since the past century. Through the years, experts defined that FET consists of many sub-elements. The investors in their claims do not always claim the breach of the very same sub-elements and the

\(^{61}\) Dolzer/Schreuer, p. 119.
\(^{62}\) Dolzer 2, p. 90
\(^{63}\) Dolzer, p. 12.
\(^{64}\) Azurix, para. 360.
Tribunals often find that some of the claimed sub-elements were breached while others were not. This leads to the conclusion that the sub-elements are interchangeable and thus the violation of one leads to the violation of the FET standard itself.\textsuperscript{65}

65. Below is further specified which sub-elements of the FET were breached by Respondent. There are two views when FET is approached. One sees the FET as a standard which is on the same level as MST; the other states the contrary. Claimant’s will thus in Section C below explain its view that the FET precedes the MST.

C. FET precedes the MST

66. There are two views in relation to the FET standard. The first theory is that FET and MST are the same or equivalent\textsuperscript{66}. This is mostly the view of tribunals deciding about disputes arising out of NAFTA which in its Art. 1105 regulates the FET the same manner as the MST. The other, more respected and widespread theory is, that FET precedes the MST.\textsuperscript{67} Claimant also sees the FET standard as broader, thus below will explain its view.\textsuperscript{68}

67. FET is an independent and autonomous standard\textsuperscript{69} that is higher than the general MST and can be granted if explicitly stated in the contract, while MST is granted to all alien investors without the necessity of explicitly stating such protection in the treaty.\textsuperscript{70}

68. The main difference between FET and MST is the threshold of the state’s conduct that can be seen as a violation of the investment treaty. MST has a generally higher threshold of liability and regards the state’s conduct as breach of the treaty only in very serious acts of maladministration. On the other side, FET clauses are not limited to serious breaches and a state conduct which is unfair towards the claimant can be seen as violation of FET.\textsuperscript{71}

69. The above mentioned arguments are also supported by internationally respected authors, such as Dolzer and Stevens\textsuperscript{72} or Mann, who promoted FET as an independent concept in his work\textsuperscript{73} as follows:

\textsuperscript{65} Paushok, para. 253; Rumeli, para. 609; Oostergetel, para. 221; MTD Equity, para 109.
\textsuperscript{66} Lauder, para. 292.
\textsuperscript{67} Paushok, para. 329, Total, para. 125, Biwater, para. 591, Vivendi, paras. 7.4.5-7.4.11.
\textsuperscript{68} UNCTAD, IIIA, p. 13.
\textsuperscript{69} Mann, 241, 244.
\textsuperscript{70} Saluka, 292-294.
\textsuperscript{71} UNCTAD, IIIA, p. 13.
\textsuperscript{72} Dolzer/Stevens, p. 60.
\textsuperscript{73} Mann, supra footnote 2.
"The terms "fair and equitable treatment" envisage conduct which goes far beyond the minimum standard and afford protection to a greater extent and according to a much more objective standard than any previously employed form of words. A tribunal would not concerned with a minimum, maximum or average standard. It will have to decide whether in all circumstances the conduct in issue is fair and equitable or unfair and inequitable. No standard is defined by other words is likely to be material. The terms are to be understood and applied independently and autonomously."

D. Respondent frustrated Claimant’s legitimate expectations

70. Protection of legitimate expectations is the core of the FET standard and thus tribunals often decide whether an investor’s legitimate expectations were breached by the host state. This sub-element of the FET requires that the host state treats international investments in a manner which does not affect the basic expectations according to which the foreign investor decided to make its investment.

71. Even though there is no stabilisation clause in the BIT, a stable legal and business environment is still an essential element of the FET. Despite the fact that a state has the power and right to regulate, it is important that it does so without breaching the FET standard. An inconsistent conduct of a host state confuses the investor, making it impossible to plan properly and is not conductive to an investment-friendly climate. A host state has the right to pursue its interests in the light of new circumstances, but does not have the right to ignore the interests of its investors who had earlier adjusted their conduct to the previous course required by the host state. Thus, the power to regulate operates within the limits of right conferred upon the investor and a host state should at least try to mitigate the consequences of its actions.

72. When determining if an investor's legitimate expectations were breached, tribunals consider whether: (i) the state's conduct created reasonable and justifiable expectations for the investor; (ii) the investor relied on the conduct of the host state; (iii) the state must fail to honour the created expectations; and whether (iv) there was a consequent damage caused to the investor. In present case, all criteria have been met.

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74 EDF, para. 216; Electrabel, para. 7.75; Saluka, para. 304; Ulysseas, para. 240.
75 Choudhury, p. 308, also see Tecmed, para. 154.
76 Occidental, paras. 183, 191; CMS, para. 274.
77 Dolzer 3, pp. 20-23.
78 Arif, para. 537; Saluka, para. 305.
79 Thunderbird, para. 147; Al-Bahloul, para. 200.
73. According to several cases, such as the CME, when a host state must not breach an investor's legitimate expectations, it should not act to undermine the investor's business.\textsuperscript{80}

74. In the present case Claimant’s legitimately expected that the FIT would remain unchanged for 12 years. This means that the business environment was supposed to be stable and remain unregulated, if possible. Claimant dared to invest into further projects (amounting to 14 projects in total) because it relied on the promised FIT.

75. Art. 4 of the LRE guaranteed that the FIT would remain over the 12 years unchanged. Relying on this information, Claimant not only decided that it could keep its Alpha because due to the FIT it could be operational but also decided to make further investments. Claimant made these investments relying on the fact that it would be able to meet its obligations towards its creditors due to the FIT. In respect of the Alpha, Claimant applied for the license based on the expectation that all photovoltaic plants whose capacity does not exceed 30 kWh will be granted a license.

76. Claimant expected that Respondent would act transparently, free from ambiguity, in order for Claimant to know the rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices to be able to plan its investments.\textsuperscript{81} Investing into renewable energy represents a long-term investment for which stable business environment is presumed and required. Claimant would not have had invested in Respondent's territory, had it known that Respondent would change its legislation so quickly and so drastically.

77. Some tribunals in similar situations found that such change of the host state's regulatory framework amounted to the violation of FET due to frustration of the investor’s legitimate expectations. The tribunal in Total found that:

"[...] claim to stability can be based on the inherently prospective nature of the regulation at issue aimed at providing a defined Framework for future operations. This is the case for regimes, which are applicable to long-term investments and operations, and/or providing for 'fall backs' or contingent rights in case the relevant framework would be changed in unforeseen circumstances or in case certain listed events materialize."\textsuperscript{82} (emphasis added)

\textsuperscript{80} CME, para. 611
\textsuperscript{81} Tecmed, para. 154.
\textsuperscript{82} Total, para. 122.
78. With regard to the above, Respondent clearly failed to honour these expectations by amending the LRE and subsequently significantly and retroactively lowering the FIT. These measures constitute the Respondent’s failure to provide a stable business environment. These conducts undermined Claimant's investment thus causing it damage that is in direct connection with Respondent's conduct. By violating the Claimant's legitimate expectations Respondent also breached the BIT which granted foreign investors fair and equitable treatment. 83

E. Respondent's regulative measures also violate its obligation to refrain from acting arbitrarily

79. Respondent failed to avoid acting arbitrarily when its authority, BEA, decided without due legal bases not to grant Alpha a license.

80. A state acts arbitrarily when it decides that an investor is no longer entitled to certain rights even though it had been entitled to them when the investment was made. An arbitrary conduct is also making a decision that is shocking and has no legal basis. In this case, Claimant's project Alpha was not granted a license, even though the RSPS clearly states in Art. 1 that the fixed FIT is meant for power plants whose installed capacity does not exceed 30 kW. 84 Since Alpha’s capacity is 30 kWh and therefore it does not exceed the limit set in the RSPS, it should be entitled to be granted a license and subsequently the FIT. The decision to not to grant Alpha a license without reason legal basis amounts to the violation of FET. The decision of the tribunal in CMS 85 stating that "any measure that might involve arbitrariness [...] is in itself contrary to [...] fair and equitable treatment" also proves that an arbitrary manner leads to the violation of the FET standard.

81. Furthermore, in the Tecmed the tribunal held that:

"The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities."

82. Other tribunals interpreted arbitrariness as follows:

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83 Art. 2(2) of the BIT.
84 Art. 1 of the RSPS; SoUF, para. 21.
85 CMS, para. 290.
"Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law … It is a wilful disregard of due process of law, an act which shocks or at least surprises, a sense of judicial property."\(^{86}\) (emphasis added)

To demonstrate at present case, the element of shock or at least surprise lies in BEA’s decision and interpretation (its reasoning for not granting Alpha the license) of the LRE and RSPS.

83. The decision not to grant Alpha a license should be based on reason arising out of Respondent’s legislation and must not be arbitrary or irrational. In this case, Claimant applied for license in good faith that it is entitled to the FIT due to the clear wording of Art. 1 of the RSPS. BEA decided not to issue Alpha the license stating that the FIT was available only for new projects, not for existing ones.\(^{87}\) There is no basis in the LRE or the RSPS for such interpretation nor in any other of Respondent's legislations.

84. Similarly, in the present case Claimant relied on obtaining a license for Alpha, whereas BEA decided not to issue the license providing explanation which is inconsistent with Respondent's legislation.

85. Besides, Respondent could have and should have thought about the fact that its national grid has a certain capacity and therefore only a certain amount of photovoltaic plants can be connected to it. Respondent could have and should have set clear rules of which operators (for example those that produce the most energy from renewable sources) and which power plants (for example only those running on the newest technology and that are the most efficient) will be granted a license.

86. In respect of all that was stated above, Respondent acted in an arbitrary way due to the wilful interpretation of its energy authority of the LRE and RSPS. By acting arbitrarily, Respondent breached the FET and subsequently violated Art. 2(2) of the BIT.

87. But even if the Tribunal was to find that this action of Respondent was not arbitrary, it does not lead to the conclusion, that the decision was fair and equitable. For example the tribunal in \textit{LG\&E} found, that

\(^{86}\) \textit{ELSI}, p. 15.
\(^{87}\) SoUF, para. 22.
"[…C]haracterising the measures as not arbitrary does not mean that such measures are characterised as fair and equitable."\textsuperscript{88}

\textbf{F. Respondent's decision to lower the FIT by 2/3 was disproportionate to the damage caused to Claimant}

88. Lastly, Respondent's decision to lower to FIT by as much as by 2/3 was excessive and does not reflect the requirement that a host state should not interfere with investments more than what is strictly necessary for attaining the aim it pursues.

89. Proportionality is another sub-element of the FET. The requirement of proportionality under the FET is that the host state's measures must not cause more economic harm than what is the legitimate aim pursued, as was also stated by the \textit{EDF} tribunal:

\begin{quote}
"[…]n addition to a legitimate aim in the public interest there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realized."\textsuperscript{89}
\end{quote}

90. Another definition of the proportionality under FET is by an internationally well-respected author Kläger:

\begin{quote}
"This element presupposes that any state measure affecting the investment is built upon a \textit{reasonable and traceable rationale} and that the investment is not unnecessarily strained by state measure."
\end{quote}

91. For further illustration, in the \textit{Occidental} the tribunal cited many cases that dealt with proportionality. In particular:

\begin{quote}
"The \textit{Azurix} tribunal endorsed the reliance in \textit{Tecmed} on case law from the European Court of Human Rights – in particular the case of James and Others\textsuperscript{90} - and placed particular emphasis on the need for proportionality between the means employed and the aim sought to be realized." (emphasis added)
\end{quote}

92. In present case Respondent's argument is that (i) there was a national strike and that protesters demanded the decrease of solar panel support; and (ii) that the FIT under the LRE was no longer sustainable because of the huge number of solar panel operators. According to Respondent, if all applications were to be approved, it needed to borrow money in order to guarantee the FIT.\textsuperscript{91} But even if Respondent had legitimate concerns in

\textsuperscript{88} \textit{LG&E}, para. 162.
\textsuperscript{89} \textit{EDF}, para. 293.
\textsuperscript{90} \textit{In the case of James and Others}, Judgment of 21 February 1986.
\textsuperscript{91} \textit{SoUF}, paras. 29-30 and 32.
connection with financing the FIT, such a huge change in Respondent’s legislation can hardly justify the complete destruction of Claimant’s business. As the above-mentioned cases also state, there must be proportionality between the host state’s measures and their purpose and between the consequences of such measures.

93. Even if the Tribunal was to find that Claimant’s legitimate expectations weren’t breached and that Respondent did not act in an arbitrary way (which is strongly denied), the dramatic reduction of the FIT lead to a significant loss of Claimant causing consequential damage to it. The decision of Respondent to lower the FIT from the original amount of 0.44 EUR/kWh to the amount of 0.15 EUR/kWh (i.e. to lower it by 2/3) lead to significant losses to Claimant who has two projects running on the old technology and 12 other projects using the new one. The measure to lower the FIT so drastically is by no means built upon a reasonable and traceable rationale, and therefore the Claimant’s investment was unnecessarily strained by this state measure which leads to the conclusion that Respondent's measure was disproportionate compared to the damage it caused to Claimant.

94. Also, if Respondent’s public interests and priorities changed such that it wished to reduce the FIT given to solar panels operators, it should have negotiated with all investors and not only a few chosen ones, it should have communicated to the public its intention to considerably reduce the FIT and it should have reduced the FIT by a smaller percentage.

III. RESPONDENT IS FULLY LIABLE FOR ITS VIOLATION OF THE BIT

95. Since the BIT remains effective in respect of Claimant's investments in accordance with Art. 13(3) of the BIT Respondent is bound to perform its obligation under the BIT in accordance with the pacta sunt servanda principle as expressed in Art. 26 of the VCLT.

96. Nevertheless Respondent failed to accord Claimant's investments fair and equitable treatment and thus violated its obligations under the BIT. Respondent argues that its conduct was necessary due to 'external factors' and refers to its obligations under the EU law and its national renewable energy and economic objectives as sufficient basis for

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92 See more detail in Claimant's Expert Report
93 SoUF, para. 33.
94 Art. 26 of the VCLT reads: Every treaty in force is binding upon the parties to it and must be performed by them in good faith
exclusion from responsibility. As demonstrated below, both Respondent’s claims are unfounded and Respondent is thus liable for its violation of the BIT.

A. Respondent’s actions cannot be exempted on the basis of its EU obligations

97. Respondent does not specify which of its provisions under the EU law nullify its obligations under the BIT. Nonetheless as further addressed below, Respondent cannot be exempted from its liability for violating the BIT based on its EU obligations.

98. As was analysed above, Respondent failed to accord Claimant its rights under Art. 2 of the BIT. EU Treaties and the BIT do not cover the same subject matter, which is necessary precondition for operation of Art. 30(3) of the VCLT. Even if Tribunal decides otherwise, Respondent would be exempted from its violation of Art. 2 of the BIT only if its incompatible with provisions of the EU Treaties to the extent that would cause its inapplicability.

99. Respecting the unique and autonomous nature of the FET standard, as addressed above, the provision in the EU Treaties regarding non-discrimination and freedom of do not supersede it. The same conclusion was reached by the tribunal in Achmea I:

"The Tribunal does not accept the submission that the protection afforded by the BIT provision on fair and equitable treatment is entirely covered by a prohibition on discrimination. Respondent does not allege that there is any principle of EU law that specifically forbids treatment that is not fair and equitable. The Tribunal does not consider that any such principle, independent of concepts of non-discrimination, proportionality, legitimate expectation and of procedural fairness, is yet established in EU law."96

100. Therefore Respondent’s EU obligations stemming from EU Treaties could not cause inapplicability of Art. 2 of the BIT. As a result, Respondent's EU obligations do not affects its liability for violating the BIT.

B. Respondent's actions were not necessary in order to meet its economic and renewable energy objectives

101. Respondent claims that its actions were necessary in order to meet the EU climate and energy targets, the so called 2020 climate & energy package. Claimant however

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95 Response, p. 2.
96 Achmea I., para. 250.
97 Response, p. 2.
emphasises that Respondent was not compelled to perform its actions as according to publicly available information, the European Commission did not challenge Respondent to back out from its intra-EU obligations.\textsuperscript{99} Moreover, renewable energy and economic objective on national level cannot justify non-compliance of the state of its international obligations arising out of the BIT.\textsuperscript{100}

102. Respondent showed in Art. 2 of the LRE that its intention is to support the production of energy from renewable sources and that such production

"shall be incentivized by state measures until the share of electricity generated from renewable sources amounts to no less than 20 percent as compared with the country’s gross consumption of energy." (emphasis added)\textsuperscript{101}

According to available data, this goal was never reached.\textsuperscript{102}

103. Claimant’s aim is to produce energy from renewable energy sources and for fulfilling this goal, it invested into 14 projects in total and intended to invest into 60 Projects.\textsuperscript{103}

104. Respondent attracted to its market investors, such as Claimant itself, in order to raise the overall share of renewable energy production in its territory to meet its renewable energy objectives.\textsuperscript{104} Respondent created favourable conditions to investors by granting them a FIT. However, by not granting licenses and by lowering the FIT the Respondent goes against its own goal because investors will not be attracted to Respondent’s market anymore. Current investors, such as the Claimant itself, whose projects run entirely or partially on the old technology have suffered loss and will not be able to invest as much money in new projects as it would be able prior to the recalculation of the FIT.

105. Even if the Respondent's actions were legitimate and lawful under its national law that does not lead to the conclusion that they conform to the BIT or to international law. Therefore Respondent’s actions cannot be exempted because they were not necessary in order to meet Respondent’s renewable energy and economic objectives.

\textsuperscript{99} PO 2, para. 4.  
\textsuperscript{100} LG&E, para. 94.  
\textsuperscript{101} Art. 2 of the LRE  
\textsuperscript{102} PO 2, para. 10.  
\textsuperscript{103} SoUF, paras. 27, 33; PO 2, para. 28.  
\textsuperscript{104} supra, 76
IV. CUSTOMARY INTERNATIONAL LAW SHALL APPLY WITH RESPECT TO THE REMEDIES

106. As the BIT does not specify a type of remedy that shall be awarded in case of breach of the FET standard, relevant rules as provided under customary international law shall apply.

107. With this respect, investment tribunals generally turn to the following sources of customary rules on reparation: Firstly, ICL Articles the codification of which was highly influenced by the principles as set out in the below mentioned case and secondly, decisions of courts and tribunals establishing the content of customary rules, in particular, the famous judgement in *Chorzów Factory*.

108. In accordance with Art. 31(1) of the ILC Articles, Respondent "[...]is under an obligation to make full reparation for the injury caused by the international wrongful act." Therefore, according to the said rule taken in conjunction with the judgement in *Chorzów Factory*, Respondent, in order to make full reparation, is obliged to

"[...]as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”

109. Furthermore, Art. 34 of the ILC Articles provides for the three forms of reparation; restitution, compensation and satisfaction. According to Art. 35 thereof, Respondent

"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” is not materially impossible or disproportionate."

110. It is generally accepted that the restitution is a primary form of reparation under international law. Following this reason, for example the tribunal in *CMS* stated that "[...]quite naturally compensation is only called for when the damage is not made good by restitution." Furthermore, as it is also generally confirmed that an injured party is entitled to choose between available forms of reparations, Claimant opts for the

105 Ripinsky/Williams, p. 27.
106 *Chorzów Factory*, para. 47.
107 Ibid.
108 *CMS*, para. 401.
109 ILC Articles Commentary, Art. 43(6).
restitution. Therefore, as proven below, Claimant is entitled to receive the restitution in the form of the specific performance to be carried out by Respondent.

111. Alternatively, if the previous would not be granted, Respondent shall be found obliged to compensate Claimant in the quantum presented below, as a secondary form of reparation.

V. THE TRIBUNAL HAS A POWER TO AWARD SPECIFIC PERFORMANCE

112. As Respondents actions in breach of the BIT constitutes an internationally wrongful act, the status-quo shall be restored by awarding Claimant the appropriate form of full reparation.

113. In the present case, this can be best achieved by restitution. A power of the Tribunal to make such and order is inherent as it is recognized by the relevant case law. Moreover, there are not any rules to the contrary. On this basis, an adequate form of specific performance that shall be ordered in the present case is the rescission of the amendment of the LRE. If the Tribunal denies rescinding the amendment, Claimant’s closest way of achieving a state which existed before the wrongful act was committed, is to be granted an award imposing a duty on Respondent to continue to pay the pre-amendment FIT to Claimant. Finally, in order to achieve the goal of full reparation, the Tribunal shall order Respondent to issue a license for Alpha, which it had formerly rejected without justifiable reason.

A. The tribunal has the power to order specific performance as a remedy

114. As noted above, since the BIT does not provide for a remedy applicable with respect to the breach of the FET, customary international law rules shall apply. Similarly, Endicott noted:

"In the absence of express limitation or choice of another applicable law, the range of remedies that an investor-[s]tate tribunal has power to grant is coextensive with that in public international law."\(^{110}\)

115. This reasoning is supported at least on two grounds. Firstly, if there is no express limitation of powers of a tribunal contained in the arbitration agreement, the arbitration rules, the applicable substantive or procedural law, there is no remaining source of limitation

\(^{110}\) Endicott, p. 2.
available. Secondly, the existence of this power is recognised by way of its limitation contained in other treaties.\(^{111}\)

116. As to the first possible restriction, it was already noted that there are no provisions in the BIT specifying the Tribunal's power with respect to remedies available for the breach of the FET, neither such restriction can be found in public international law. As to the applicable institutional rules, Art. 22(vii) of the LCIA Rules expressly provides that "[…]the Arbitral Tribunal may decide to order […] specific performance[…]".

117. Thus, neither of the applicable institutional rules limit the scope of remedial authority of the Tribunal. On the contrary, they specifically recognize the Tribunal's power to grant specific performance.

118. The second supportive reason is based on the fact that when states want to exclude specific performance as a remedy, they namely do so in their treaties. For example, Art. 1135(1)(b) of the NAFTA provides that the tribunal may award

"[…] restitution of property, in which case the award shall provide that the disputing [p]arty may pay monetary damages and any applicable interest in lieu of restitution."

119. Similarly, according to Art. 26(8) of the ECT an award "[…]shall provide that the [state] may pay monetary damages in lieu of any other remedy granted." For example, almost the same wording is also included in Art. 34(1)(b) of the US Model BIT and in Art. 44(1)(b) of the Canada Model BIT.

120. These limitations show that states feel the need to specify their will in the scope of remedies granted as they recognize the power of the tribunals to go beyond that scope and, especially, order a specific performance. The same was noted for example by Schreuer stating that "[t]hese special provisions only underscore the basic capacity of [a] tribunal to order non-pecuniary remedies."\(^{112}\) Based on these reasons, Schreuer concluded that the power of a tribunal "[…] clearly extends to ordering specific performance."\(^{113}\)

121. Furthermore, the power of tribunals to order specific performance is recognized by the relevant arbitral practice. For example, as the tribunal in Enron held:

\(^{111}\) Ibid., pp. 2-3.

\(^{112}\) Schreuer, p. 332.

\(^{113}\) Ibid.
"An examination of the powers of international courts and tribunals to order measures concerning performance or injunction and of the ample practice that is available in this respect, leaves this Tribunal in no doubt about the fact that these powers are indeed available."  

114 Enron, para. 79.

115 Ibid, para. 81.

116 Micula, para. 166.

117 Al-Bahloul II, para. 47.

118 CMS, para. 406.

119 Response, p. 10.

120 Schill, p. 582.

122. Subsequently, the tribunal affirmed that "[…] it has the power to order measures involving performance or injunction of certain acts." 115 On the same basis, the tribunal in Micula stated that it "[…] has the power to order pecuniary or non-pecuniary remedies, including restitution[…]" 116 Similarly, the tribunal in Al-Bahloul II. stated that:

"Specific performance is a permissible remedy in international law. An international tribunal has the power to grant specific performance." 117

123. Finally, restitution is not only available form of remedy in the present case; it is the one most appropriate. With this respect, it was stated by the tribunal in CMS:

"Restitution is by far the most reliable choice to make the injured party whole as it aims at reestablishment of the situation existing prior to the wrongful act." 118

124. Taking into account all above stated, the Tribunal shall found that it possesses the power to award Claimant with restitution in the form of specific performance. Moreover, such form of a remedy is the most suitable one. This is true particularly in the present case, as it is proven below.

B. Respondent can be ordered to rescind the LRE amendment

125. Respondent argues that remedy of specific performance in the form of abrogation of the LRE amendment as requested by Claimant "[…] is wholly inconsistent with Respondent's sovereignty and [therefore] beyond the powers of any arbitration tribunal." 119 However, this objection is ill-supported; the Tribunal has such power.

126. As was described by Schill, position of tribunal and states is presented by "[…] the institutional relationship between the states as decision-making bodies and the tribunals as the reviewing bodies," 120 Under this relationship tribunals are reviewing the exercise of
public authority of states and in many cases, from the states perspective, tribunals are deciding administrative or constitutional law matters.\footnote{Ibid. p. 587.}

127. However, deciding these matters in deference of the state's sovereignty would accord no deference to the investor, and would be thus in breach of the fundamental principle of arbitration, the equality of the parties. Such an approach was denoted as arbitral heresy and shall be thus not applied in the present case.

128. Furthermore, invoking the sovereignty in order to construe the BIT as not providing the Tribunal with a power to order such specific performance is alien to the VCLT and to customary law principles of treaty interpretation. With this regard, Schill noted that

"[...] being deferent to one contracting state's sovereignty means disregarding the other contracting state's entitlement to have its treaty right enforced."\footnote{Schill, p. 582.}

129. On the same basis, arguments invoking state's sovereignty were rejected in the great majority of cases. For example the tribunal in Loewen stated that: "[...W]e do not accept the Respondent's submission that [...] treaties are to be interpreted in deference to the sovereignty of states."\footnote{Loewen, para. 51.} Similarly, the Achmea I tribunal rejected this argument. on the same basis.

130. As Respondent is fully able to rescind the amendment of the LRE, there is nothing that would impede the restitution. Condition of its possibility as provided under Art. 35(a) of the ILC Articles is therefore met.

131. Furthermore, a benefit gained from legal restitution as requested by Claimant would not be disproportionate to costs that Respondent has to incur in order to perform such reparation.

132. Pursuant to Art. 35(b) of the ILC Articles, Respondent is under an obligation to make restitution, "[...]provided and to the extent that [it] does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation."
When considering the fulfilment of the proportionality requirement, regard shall be held on the benefit which would be gained not only by the Claimant, by also by any victim of the breach.\(^{124}\)

Therefore, costs of such restitution would amount to the benefit of all holders of the pre-amendment licenses. Legal restitution as Claimant requested is thus in compliance with the condition of proportionality.

Taking into account the position of the Tribunal as a reviewing body, a need for disregarding Respondent's sovereignty in order to comply with the principle of equality of the parties to arbitration, no existing obstacle precluding possibility of the legal restitution requested as well as its proportionality, the Tribunal shall find it has the power to rescind the amendment of the LRE.

C. Alternatively, Respondent can be ordered to continue to pay pre-amendment FIT

Alternatively, if the Tribunal decides not to grant the specific performance in the form of abrogation of the LRE amendment, it shall have the power to order Respondent to continue to pay Claimant the pre-amendment FIT.

Firstly, if the Tribunal considers first alternative claim for specific performance as being disproportionate, this form of restitution would meet such condition as it would be effective only with respect to Claimant. The benefit Claimant would gain from this form of remedy would amount to cost Respondent needs to incur in order to perform it.

Secondly, a balance of the need for restitution and the state's ability to legislate would be achieved, as Claimant would be in the situation that had existed before the wrongful act of Respondent took place and at the same time it would not be interfering with Respondent's ability to regulate.

Following these reasons, there is no need to consider admissibility of this form of restitution at all, as it in fact amounts to a pecuniary kind of remedy, compensation. Same approach was adopted by the court in *Occidental II*, conducting the challenge proceedings and dealing with the issue whether the arbitral tribunal was able to award injunctive relief resulting in the abrogation of national law, more specifically, whether the claimant was entitled to receive tax refunds improperly gained by the respondent.

\(^{124}\) ILC Articles Commentary, Art. 35(5).
The court characterised an imposition of such obligation as amounting to a monetary rather than non-pecuniary form of remedy.\textsuperscript{125}

140. This reasoning is applicable in the present case. Claimant's request for continued payment of the pre-amendment FIT essentially presents monetary kind of remedy. The Tribunal shall thus find that it has such a power and in the alternative to the first claim impose on Respondent this form of duty.

D. The Tribunal has the power to order Respondent to issue license for Alpha

141. As proven above, Respondent in breach of the FET has not granted a license for Alpha. Therefore, in order to comply with the standard of full reparation,\textsuperscript{126} Respondent is obliged to issue the mentioned license. The Tribunal shall find its power to impose such duty.

142. Especially in cases where the government action in question was administrative in nature and narrow in scope, the tribunals were not reluctant to grant some form of specific performance.\textsuperscript{127} Given that the LRE licenses are issued by the BEA within its internal administrative process and since the issuance of such license for Alpha is a matter of insignificant scope, request for restitution with this respect meets described criteria.

143. Restitution of this scope was granted for example in \textit{Texaco} imposed on the defendant as duty to perform certain contracts and to give them full effect.\textsuperscript{128} Similarly, in \textit{Goetz} the respondent was under the final award obliged to reimburse illegally imposed taxes and stamp duties and to issue a so called free certificate granting tax and customs exemptions.\textsuperscript{129}

144. Therefore, having regard to the narrow scope and administrative nature of the requested restitution and according to the relevant arbitral practice, the Tribunal shall impose on Respondent a duty to issue the LRE license for the Alpha.

145. Having regard to abovementioned, as the Tribunal has the power to order specific performance, it shall order Respondent to rescind the LRE amendment. Alternatively, Respondent shall be ordered to continue to pay to Claimant the pre-amendment FIT.

\textsuperscript{125} \textit{Occidental 2}, paras. 122-125.
\textsuperscript{126} \textit{Chorzów Factory}, para. 47.
\textsuperscript{127} Ritwik, p. 531.
\textsuperscript{128} \textit{Texaco}, para. 508.
\textsuperscript{129} \textit{Goetz}, para. 518.
Finally, in order to fully compensate Claimant the Tribunal shall impose on Respondent duty to issue a license for Alpha.

**VI. CLAIMANT’S QUANTUM IS SUFFICIENTLY CERTAIN**

146. Alternatively, if the Tribunal decides not to grant any of the forms of restitution requested, it shall award Claimant with compensation in the amount as quantified by Claimant's Expert. Claimant's business in the territory of Respondent is presented by its Solar Power Project that consists of several solar power facilities, namely Alpha, Beta, 12 Projects and 60 Projects. The value of the Solar Power Project, as in cases of similar businesses, amounts to profits it can generate.\(^{130}\)

147. Therefore, in order to estimate the value of harm done to Solar Power Project, Claimant's Expert makes quantification of lost profits with respect to its solar power facilities named above with one exception. Regarding 12 Projects, two alternative valuations are presented. Firstly, as the expenses incurred in order to construct 12 Projects are wasted, the harm is estimated by reference to the Investment Expenditure. Alternatively, if the Tribunal considers such method of valuation of the harm inappropriate, Claimant presents quantification of lost profits that would have resulted if the 12 Projects had been completed.

148. Method of valuation by reference to lost profits is conceptually similar with the DCF method. Similarly, valuation of investment based on the approach dealing with amounts invested is the same as the award of investment expenditure.\(^{131}\) Therefore, conceptual rules governing valuation on the basis of these methods are applicable also with respect to the valuation of harm as presented by Claimant. As Ripinsky/Williams noted:

"[…B]y reason of the DCF’s exclusive focus on the future, it is the only true method of assessing the value of income-producing assets.”\(^{132}\)

149. As further stated, valuations based on the DCF method are even more suitable in cases dealing with projects with limited lifespan, such as licenses granted for a specific period of time.\(^{133}\)

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\(^{130}\) Pryles, p. 3.

\(^{131}\) Ripinsky/Williams, p. 263.

\(^{132}\) Ibid., p. 195.

\(^{133}\) Ibid., p. 196.
When estimating the amount of lost profits, tribunals were requiring whether they can be established with reasonable certainty. As was held in *Rudloff*:

"Damages to be recoverable must be shown with a reasonable degree of certainty and cannot be recovered for an uncertain loss[...]."\(^{134}\)

Pryles furthermore noted that

"[... ] it is important to distinguish between cases such as this where the quantum of loss is uncertain, and cases where the existence of loss is uncertain. While uncertainty as to the quantum of loss will not preclude recovery, if it is not clear that loss has in fact been suffered, the claimant will be unable to recover damages."

As proven below, the existence of Claimant's loss is presented with sufficient certainty. Quantification of loss incurred by the Solar Power Project is divided into three heads of damages, each with regard to separate group of solar power facilities of Claimant.

A. **Quantum of loss relating to Alpha and the Beta is sufficiently certain**

In its expert report, Respondent's Expert argues that Claimant's Expert committed two errors while calculating loss profits with regard to Alpha.\(^{135}\) Firstly, Alpha was not constructed in response to the LRE and thus should not be compensated for the loss of profits. Secondly, Respondent's Expert submits, that the calculation for Alpha is erroneous for its initial performance issues. These contentions are unsupported.

As for Beta, Respondent's Expert only disagrees with applicable discount rate and as to the interest. However, this issue is dealt with in the separate section below.

As to the first contention, it is already established above that there are no grounds for not granting a license under the LRE also for the pre-existing projects. Thus, there is no need to deal with the presented issue at this point again.

Regarding initial operating problems, Respondent's Expert stresses the fact, that Alpha commenced its operation at 12.1 % as compared to the projected 21 % of design capacity, a decisive factor in calculation of the income with respect to photovoltaics.

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\(^{134}\) *Rudloff*, pp. 258-259.

\(^{135}\) Respondent’s Expert Report, para. 7.
157. Contrary to Respondent's Expert's contention, quantification is not based on the assumption that the performance problems "will quickly go away".\textsuperscript{136} Claimant has resolved the described difficulties and has already recorded continuous increase of design capacity at 2.2 \% per year.\textsuperscript{137} The only assumption made by Claimant's Expert is that the design capacity will continue to increase up to 21 \% which also Respondent's Expert confirms to be normal capacity rate of photovoltaics\textsuperscript{138} and which is also the rate at which Beta operates.

158. This initial issue was experienced by Claimant only given the fact that Alpha presents the first experience of Claimant with photovoltaics;\textsuperscript{139} However, the described initial problem was resolved during the subsequent construction of Beta. Thus, there is no need to assume that Claimant will not be able to use experience gained during the construction of Beta and apply them in order to have Alpha reach its design capacity.

159. Claimant's Expert's assumption is therefore supported by both, the factual improvement in performance of Alpha that has already been recorded, as well as by the subsequent experience with Claimant's similar project.

160. It was already stated that the absolute certainty in proving the lost profits is not required by tribunals. Furthermore, in most cases it is not even possible; approximations are inherent and inevitable with this regard.\textsuperscript{140}

161. Taking aside the issue of applicable discount rate and interest which is separately addressed below, Claimant's quantum of loss relating to first head of damages is sufficiently certain and Claimant is thus entitled to receive the amount of compensation as calculated in Claimant's Expert Report.

B. **Claimant presented sufficiently certain quantum of loss as to the 12 Project**

162. As to the second head of damages, compensation claimed is calculated by reference to the Investment Expenditure that has been wasted as a result of Respondent's actions. Alternatively, if the Tribunal considers this method of quantification inappropriate, the

\textsuperscript{136} Respondent’s Expert Report, para. 7.
\textsuperscript{137} Claimant’s Expert Report, para. 6.; Ković-Annex I(A).
\textsuperscript{138} Respondent’s Expert Report, para. 12.
\textsuperscript{139} Annex No. 9 Vasiuki LLC Dataset, tab 5.
\textsuperscript{140} Ripinsky/Williams, p. 281.
harm is presented by the loss profits that would be gained had the 12 Projects been completed.

i. **Respondent’s actions made the Investment Expenditure wasted**

163. The Investment Expenditure is presented by expenses relating to physical installations, including land, photovoltaic panels, and 50% deposit on remaining panels, and other costs, including labour and bank interest.\(^{141}\)

164. As was established in *Biloune*\(^{142}\) or *Metalclad*\(^{143}\) construction materials, equipment, or generally cost of particular assets contributed to the investment, and thus also Claimant’s physical installations are recoverable investment expenses. Similarly, according to *Siemens*,\(^{144}\) *MTD*\(^{145}\) or *SPP*,\(^{146}\) capital contributions, loans and related expenses, other financial cost including bank interest, as well as labour are also types of recoverable expenditure.

165. Therefore, the Investment Expenditure consists of recoverable types of expenses in accordance with relevant arbitral practise. As proven below, Respondent’s measures in breach of the BIT made the Investment Expenditure wasted.

166. It is evidenced that as a result of Respondent’s measure land acquired by Claimant has lost 72.5% of its pre-LRE amendment value.\(^{147}\) Value of the land, directly connected with photovoltaic installations, decreased because of the lower returns on investments in photovoltaic facilities which lead to lesser attractiveness of this energetic sector. Thus, even the relevant equipment, especially photovoltaic panels, suffered substantial decrease in value. Moreover, as shown below, the mentioned equipment had become practically worthless and unsalable due to Respondent’s actions.

167. Respondent however argues that Claimant has omitted its obligation to mitigate the loss. Nonetheless, as *Middle East Cement* tribunal held

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\(^{141}\) Ković-Annex 2.
\(^{142}\) *Biloune*, para. 172.
\(^{143}\) *Metalclad*, para. 222.
\(^{144}\) *Siemens*, para. 321.
\(^{145}\) *MTD*, para. 195.
\(^{146}\) *SPP*, para. 216.
\(^{147}\) PO 2, para 29.
"[...] the burden of proof for the facts establishing a duty to mitigate and the failure of claimant to carry out this duty is on respondent." 148

168. In the present case, Respondent failed to submit evidence proving that there is an actual loss that could be mitigated by Claimant and if so, that Claimant failed to do so. Despite this fact, Claimant below proves that at least with respect to the photovoltaic panels there is no loss that could be mitigated.

169. Each of the equipment was acquired after issuance of the relevant license149 and its value as income-generating asset is directly related thereto. Given that Respondent made the LRE amendment applicable retroactively and thereby significantly decreased returns on investments in photovoltaic panels and related equipment, such pre-amendment acquired equipment became unsalable as there is already new technology on the market which is both more effective and cheaper. Therefore, as to the photovoltaic panels and related equipment, there is no mitigation that could be performed.

170. Having regard to abovementioned, it is evident that since the Investment Expenditure is of the type that is recoverable and as it is wasted as a result of Respondent's actions, Claimant shall be compensated in the amount calculated in Claimant's Expert Report.

   ii. Alternatively, had 12 Projects been completed, Claimant would have suffered a loss of profits

171. With this regard, Respondent's Expert alleges that Claimant's Expert projections of future losses of 12 Projects are based on small history of successful operation of Claimant's solar power facilities. However, Claimant's Expert omits other important facts that need to be taken into consideration. Based on these facts, the quantum of lost profits is proven with sufficient certainty.

172. The approaches suggesting rejection of claims for loss of profits stressing lack of earnings record or operation history has been strongly criticized for leaving the injured party less than whole and failing to achieve the goal of full compensation.150 Following this reasoning, it was suggested by Ripinsky/Williams that lost profits

148 Middle East Cement, para. 167.
149 SoUF, para. 33.
150 Gotanda I., p. 99.
"should be awarded where they can be proven with reasonable certainty and calculated on a rational basis, even if the claimant is a new business." 

173. Specific contractual provisions can provide a relevant evidentiary basis with this regard. As the *Himpurna* tribunal confirmed, where the relevant contract guaranteed that Indonesia would purchase from the investor predefined quantities of electricity on predefined terms. Described contractual certainty was held providing sufficient evidentiary basis for calculation of lost profits. Similarly, also the *Middle East Cement* tribunal relied on the concluded contracts in order to calculate lost profits. Given that the licenses are of quazi-contractual nature, same reasoning is applicable in the present case.

174. Another relevant fact is the extent to which the necessary investments that has to be made in order to complete the projects were already carried out. The *Phillips Petroleum* tribunal based its calculation pointing at the fact that the claimant has largely completed its expenditure program. In the present case, it follows from the list of expenses already incurred and from Claimant's projections describing required expenses with regard to each solar installation that as to the 12 Projects, Claimant has already completed more than 85% of its expenditure program when disregarding financial expenses. Furthermore, Claimant has already started with construction of the 12 Projects.

175. Moreover, Claimant's successful experience with similar projects is also a relevant factor in estimating the quantum of loss. As was held by the tribunal in *Vivendi*:

"[A] claimant might be able to establish clearly that an investment [...] would have been profitable by presenting sufficient evidence of its expertise and proven record of profitability of concessions it (or indeed others) had operated in similar circumstances."

176. In the present case, it is evident from the data provided by Claimant that it has for more than 10 years constructed and successfully operated facilities similar to the Solar Power
Project including gas, wind and solar fuelled power plants. Moreover, in the mentioned decision the tribunal took into consideration the successful operation and reached profitability of others in similar circumstances. As already stressed above, even Respondent's Expert confirmed that Claimant's projected performance, a significant factor in estimating future earnings, is normal in the business with photovoltaics.

177. Taking into account all relevant circumstances described above, Claimant's quantification of lost profits relating to 12 Projects is sufficiently certain and shall be thus awarded in the amount calculated by Claimant's Expert.

C. Regarding 60 Projects, Claimant presented sufficiently certain quantum of the loss of business opportunity

178. Claimant last head of damages is calculated as an equivalent the loss of profits – loss of business opportunity.

179. This concept is widely recognised in national legal systems as well as within international instruments such as UNIDROIT Principles. In the Sapphire, the tribunal considered a claim for \textit{lucrum cessans} arising from the breached oil concession agreement in an early stage of the whole project before any oil was discovered. The tribunal decided on the basis of the expert's report according to which there was a strong chance of the oil discovery that the claimant is entitled for loss of business opportunity.

180. Compared to the case at hand, there is not only a chance of Claimant starting with construction of its facilities and generating profits, Claimant has already started with incurring necessary expenses, construction as well as the operation of the Solar Power Project. So far, this project was completed to the extent of Alpha, Beta and partial construction of 12 Projects. However, by means of its actions, Respondent, significantly decreasing a rate of return, made investments in photovoltaics much less attractive and risky. Thereby, Respondent deprived Claimant of business opportunity which amounts to loss of profits that would be generated by 60 Projects the construction of which was part of the long-term plan of Claimant.

\footnotesize

159 \footnotemark
161 Ripinsky/Williams, p. 291.
162 UNIDROIT Principles of International Commercial Contracts, Art. 7.4.3(2).
163 Sapphire, para. 188.
164 PO 2, para. 28.
with Claimant’s Expert Report\textsuperscript{165} and shall be awarded in accordance with the relevant arbitral practise.

D. Claimant has chosen a correct discount rate that shall be also applicable as to the interest

i. Claimant’s WACC shall be used in order to discount future earnings

181. When applying DCF method of valuation, projected future net revenues of an income-generating property have to be converted to their present value. In order to arrive at the net present value of the calculated future earnings, Claimant's WACC of 8\% shall be used as an appropriate discount rate.

182. When making such a calculation, widely accepted financial and economic theory prescribes discounting at the opportunity cost of investment, specifically the WACC.\textsuperscript{166} Same was noted by Brealey/Myers when stating that "[e]ach project should be evaluated at its own opportunity cost of capital."\textsuperscript{167} The WACC was also recognized as an appropriate discount rate by the *Sempra* tribunal.\textsuperscript{168}

183. Application of this rate is generally accepted as being appropriate since it reflects time value of money and the return on investment that investors demand for assuming the risk connected with a particular investment, the so called risk premium. As including these factors, WACC reflects a risk of the cash flows generating ability of a particular investment and thus presents an appropriate rate, at which future sums shall be discounted. Therefore, Claimant’s WACC of 8\% as recorded in its documentation\textsuperscript{169} shall be used as an appropriate discount rate in the present case.

ii. The same rate used for discounting future earnings shall be used as interest

184. In order to make Claimant full in its compensation, an appropriate rate of interest shall apply. Awarding interest is also in accordance with relevant arbitral practise. For example the tribunal in *Asian Agricultural Products* held that

\begin{flushleft}
\footnotesize
\textsuperscript{165} Kovič-Annex 4, p. 2. \\
\textsuperscript{166} Knull, p. 14. \\
\textsuperscript{167} Brealey/Myers, p. 185. \\
\textsuperscript{168} *Sempra*, paras. 430-431. \\
\textsuperscript{169} Annex No. 9 Vasiuki LLC Dataset, tab 5.
\end{flushleft}
"[...]interest becomes an integral part of the compensation itself, and should run consequently from the date when the State's international responsibility became engaged”170

185. However, in order to avoid an unwanted effect denoted as invalid roundtrip, the same rate applicable on discounting future earnings shall be used also as interest.

186. Invalid roundtrip occurs in the situation where the interest is applied in a rate that substantially differs from a rate at which future loses are discounted to the valuation date – in the present case, 1 January 2013. Application of such different rates would have either resulted in over-compensation or in under-compensation171 of Claimant which would be contrary to the well-established principle of full compensation. Following the described reasons, the discount rate of 8 % shall be applied as interest on the past sums.

187. Furthermore, the Tribunal shall apply interest at the specified rate compounded annually as it is both, reasonable in the case at hand, as well as in accordance with the prevailing arbitral practise. As observed by Gotanda II.:

"[...A]lmost all financing and investment vehicles involve compound interest [as] it is neither logical, nor equitable to award the claimant only simple interest." 172

188. Reasoning behind this statement is based on the fact that the respondent’s actions could have caused Claimant either to incur finance costs including compound interest or to lost opportunities which would have a compounding effect on its investment.173 Furthermore, application of compounding interest is also in compliance with the prevailing arbitral practise of the more than last 10 years.174 For these reasons, the compound interest shall be applied in the present case.

189. Having regard to aforementioned, Claimants quantum of loss is proven with reasonable certainty and Claimant shall be thus awarded compensation in the amount as presented in its Expert Report.

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170 Asian Agricultural Products, para. 113.
171 Abdala/Zadicoff/Spiller, p. 5.
172 Gotanda II., p. 17.
173 ibid.
174 Ripinsky/Williams, p. 384, see cited arbitral decisions therein.
REQUEST FOR RELIEF

On the basis of the arguments and submitted proofs, Claimant hereby respectfully requests the Tribunal to:

1. find that it has jurisdiction over the dispute and the claims asserted by Claimant are admissible;

2. find that Respondent breached the BIT, in particular the FET standard;

3. find that Respondent's actions are not exempted as they were not necessary for it to meet its economic and renewable energy objectives and to adhere to its EU obligations;

4. find that Respondent is obliged to rescind the LRE amendment or alternatively to order Respondent to continue to pay the pre-amendment FIT to Claimant;

5. to order Respondent to issue a license for Alpha;

6. in alternative to the fourth claim, to find that Respondent is obliged to compensate Claimant in the amount as quantified in its Expert Report;

7. order Respondent to pay all costs incurred in connection with these arbitration proceedings, including the costs of Respondent's legal representation; and

8. order Respondent to pay any other remedy the Tribunal deems appropriate.

Respectfully submitted on 19 September 2015
by

Team Cancado

on behalf of Claimant, Vasiuki LLC