FOREIGN DIRECT INVESTMENT
INTERNATIONAL ARBITRATION MOOT COMPETITION
29 OCTOBER-1 NOVEMBER 2015

ARBITRATION PURSUANT TO THE RULES OF ARBITRATION OF THE LONDON COURT OF INTERNATIONAL ARBITRATION

Vasiuki LLC (Claimant)

v.

The Republic of Barancasia (Respondent)

MEMORIAL FOR CLAIMANT

19 September 2015
TABLE OF CONTENTS

LIST OF AUTHORITIES................................................................................................................................. iii
LIST OF LEGAL SOURCES ............................................................................................................................... vi
LIST OF ABBREVIATIONS................................................................................................................................. xi
STATEMENT OF FACTS ................................................................................................................................. 1
SUMMARY OF ARGUMENT .............................................................................................................................. 3
ARGUMENTS.......................................................................................................................................................... 4
PART ONE: JURISDICTION AND ADMISSIBILITY .......................................................................................... 4
I. THE TRIBUNAL HAS AND SHOULD EXERCISE JURISDICTION OVER THE PRESENT DISPUTE ................. 4
   A. The BIT remains in force after its Parties' accession to the EU ......................................................... 5
      a. No issues arise regarding the validity of the BIT under Article 59 VCLT ............................. 6
      b. Even if, arguendo, the BIT and EU treaties somehow share the same subject-matter, Article 30(3) VCLT is still inapplicable .......................................................... 8
   B. The BIT was not terminated by Barancasia on June 30, 2008, under either Article 13 BIT, or customary international law ................................................................. 10
      a. The BIT was not terminated on June 30, 2008, under Article 13 BIT ................................ 10
      b. The BIT was not terminated on June 30, 2008, under Article 54 VCLT ............................... 10
   C. The Tribunal should exercise its jurisdiction ....................................................................................... 11

PART TWO: MERITS .......................................................................................................................................... 13
II. RESPONDENT FAILED TO ACCORD CLAIMANT FAIR AND EQUITABLE TREATMENT ..................... 13
   A. The amendment of Article 4 LRE frustrated Claimant’s legitimate expectations for a stable legal framework .......................................................................................... 14
      a. Claimant legitimately expected a stable legal framework ......................................................... 14
      b. The retroactive 2013 amendment of the LRE smashed Claimant’s legitimate expectations to smithereens .................................................................................... 16
   B. Respondent’s decision to deprive Claimant of its right to be heard violated the principle of due process ............................................................................................................. 18
   C. The arbitrary denial of license for project Alfa constitutes an unequivocal FET violation ............................................................................................................. 19

III. RESPONDENT’S CONDUCT IS NOT EXEMPT UNDER THE BIT OR CUSTOMARY INTERNATIONAL LAW ............................................................................................................. 20
   A. Respondent’s unlawful actions cannot be justified under any provision of the BIT ............ 21
   B. Respondent actions cannot be justified under Article 25 ILC .................................................. 22
      a. The hypothetical burst of the solar bubble does not constitute a grave and imminent peril .................................................................................................................. 22
b. Respondent’s unlawful actions were not the “only means” to allegedly safeguard its interests, since reasonable alternatives existed.................................................................24

c. Respondent’s own conduct contributed to the unsustainability of the sector........25

C. Irrespective of the necessity defense, Respondent is still obliged to compensate Claimant .............................................................................................................................................26

PART THREE: REMEDIES .......................................................................................................27

IV. THE TRIBUNAL SHOULD ENTERTAIN CLAIMANT’S REQUEST FOR RESTITUTION ..............................................................................................................................27

A. Restitution is not materially impossible in the case at hand .....................................28

B. Restitution does not involve a burden out of all proportion .....................................29

V. ONLY IN THE ALTERNATIVE, THE TRIBUNAL SHOULD AWARD COMPENSATION OF €2.1 MILLION .........................................................................................................................30

A. DCF is the appropriate method to estimate Claimant’s losses ...................................31

B. Claimant is entitled to compensation of €2.1 million .................................................34

a. Claimant’s Alfa and Beta projects have suffered revenue losses .............................34

b. Compensation is due for the 12 new projects .........................................................35

c. The option for investment expansion should be compensated .............................36

C. The Tribunal should award compound interest of 8% ............................................37

PRAYER FOR RELIEF ........................................................................................................39
LIST OF AUTHORITIES

BOOKS


Marboe  Irmgard Marboe, Calculation of Compensation and Damages in International Investment Law (2009).

Reinisch EU  August Reinisch, Essentials of EU Law (2012).


Schreuer  Christoph Schreuer, Fair and Equitable Treatment Protection of Foreign Investments through Modern Treaty Arbitration-Diversity and Harmonization (2010).


Articles & Chapters


Subramanian  

Thjoernelund  

Tirado  

Wälde/Sabahi,  

**MISCELLANEOUS**

California Blackouts  

Crawford Report  

Del Rio/Artigues  

EFC  

IEA  

India Energy  

Olivet  

Papamichalopoulos/Douklias  

Papamichalopoulos/Douklias/Gonithellis  
LIST OF LEGAL SOURCES

ARBITRAL DECISIONS

ADC
ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16, Award (October 2, 2006).

Arif
Mr. Franck Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23, Award (April 8, 2013).

ATA
ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2, Award (May 18, 2010).

Bayindir
Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award (August 27, 2009).

BG
BG Group Plc. v. The Republic of Argentina, UNCITRAL, Final Award (December 24, 2007).

Binder
Binder v. Czech Republic, UNCITRAL, Award on Jurisdiction (June 6, 2007).

Burlington
Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability (December 14, 2012).

CME
CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, Final Award (March 14, 2003).

CMS
CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award (May 12, 2005).

Continental
Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Award (September 5, 2008).

Eastern Sugar

El Paso

El Paso Legal Opinion
Enron  

EURAM  
*European American Investment Bank AG (EURAM) v. Slovak Republic*, UNCITRAL, Award on Jurisdiction (October 22, 2012).

Eureko  
*Eureko B.V. v. The Slovak Republic*, UNCITRAL, Award on Jurisdiction, Arbitrability and Suspension, PCA Case No. 2008-13 (October 26, 2010).

Goetz  
*Antoine Goetz & Others and S.A. Affinage des Metaux v. Republic of Burundi*, ICSID Case No. ARB/01/2, Award (June 21, 2012).

Guaracachi  

Lemire  
*Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (January 14, 2010).

LG&E  

LG&E Liability  

Metalclad  
*Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (August 30, 2000).

Micula  

Micula Jurisdiction  

Micula Separate Opinion  

MTD  
*MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award (May 25, 2004).

National Grid  
Nykomb


Occidental

Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award (October 5, 2012).

Oostergetel

Jan Oostergetel and Theodora Laurentius v. The Slovak Republic, UNCITRAL, Decision on Jurisdiction (April 30, 2010).

PSEG

PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Award (July 29, 2008).

Rumeli

Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award (July 29, 2008).

S.D.Myers


Saluka

Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award (March 17, 2006).

Sempra

Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Award (September 28, 2007).

Siemens

Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Award (January 17, 2007).

Société Radio-Orient

L’Affaire de la Société Radio-Orient, 3 RIAA (1940).

Tecmed

Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003).

TEXACO


Thunderbird

International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Arbitral Award (January 26, 2006).

Total

Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01, Decision on Liability (December 27, 2010).

Unglaube

Marion Unglaube v. Republic of Costa Rica, ICSID Case No.ARB/08/1, Award (May 16, 2012).

Veteran Petroleum

Veteran Petroleum Limited (Cyprus) v. The Russian Federation, UNCITRAL, PCA Case No. AA 228, Final Award (July 18, 2014).
<table>
<thead>
<tr>
<th>Case</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Waste Management</strong></td>
<td><em>Waste Management, Inc. v. United Mexican States (&quot;Number 2&quot;), ICSID Case No. ARB(AF)/00/3</em>, Award (April 30, 2004).</td>
</tr>
<tr>
<td><strong>White Industries</strong></td>
<td><em>White Industries Australia Limited v. The Republic of India</em>, UNCITRAL, Final Award (November 30, 2011).</td>
</tr>
</tbody>
</table>

**INTERNATIONAL AND DOMESTIC COURT CASES**

<table>
<thead>
<tr>
<th>Case</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Chorzów</strong></td>
<td><em>Case concerning Factory at Chorzów (Germany v. Poland)</em>, ICJ, Judgment of the Court (September 13, 1928).</td>
</tr>
<tr>
<td><strong>Gabčíkovo-Nagymaros</strong></td>
<td><em>Case concerning the Gabčikovo-Nagymaros Project (Hungary v. Slovakia)</em>, ICJ, judgement of the Court (September 25, 1997).</td>
</tr>
<tr>
<td><strong>Wimbledon</strong></td>
<td><em>Case concerning the SS ‘Wimbledon’, (United Kingdom and ors v Germany)</em>, PCIJ, Judgment, (August 17, 1923).</td>
</tr>
</tbody>
</table>

**TREATIES**

<table>
<thead>
<tr>
<th>Treaty</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Accession Treaty</strong></td>
<td>Treaty of Accession to the European Union, between the acceding States of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, Slovakia and the European Union, signed on April 16, 2003 in Athens.</td>
</tr>
</tbody>
</table>
NAFTA  North America Free Trade Agreement, between Canada, the United
Mexican States and the United States of America, signed on

TFEU  Treaty on the Functioning of the European Union, opened for

VCLT  Vienna Convention on the Law of Treaties, opened for signature 23

MISCELLANEOUS


Council of 23 April 2009 on the promotion of the use of energy
from renewable sources and amending and subsequently repealing
Directives 2001/77/EC and 2003/30/EC.

Council of 23 April 2009 amending Directive 98/70/EC as regards
the specification of petrol, diesel and gas-oil and introducing a
mechanism to monitor and reduce greenhouse gas emissions and
amending Council Directive 1999/32/EC as regards the
specification of fuel used by inland waterway vessels and repealing
Directive 93/12/EEC.

Council on Energy Efficiency, Amending Directives 2009/125/EC
and 2010/30/EU and Repealing Directives 2004/8/EC and
2006/32/EC.

ILC Articles  International Law Commission, Draft Articles on State

ILC Commentary  2001 ILC Articles on Responsibility of States for Internationally


**LIST OF ABBREVIATIONS**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>¶/¶</td>
<td>Paragraph(s)</td>
</tr>
<tr>
<td>Art(s)</td>
<td>Article(s)</td>
</tr>
<tr>
<td>BEA</td>
<td>Barancasia Energy Authority</td>
</tr>
<tr>
<td>BIT</td>
<td>Barancasia-Cogitata Bilateral Investment Treaty</td>
</tr>
<tr>
<td>CCP</td>
<td>Common Commercial Policy</td>
</tr>
<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
</tr>
<tr>
<td>DCF</td>
<td>Discounted Cash Flow</td>
</tr>
<tr>
<td>EC</td>
<td>European Commission</td>
</tr>
<tr>
<td>ECT</td>
<td>Energy Charter Treaty</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>EUR</td>
<td>Euros</td>
</tr>
<tr>
<td>Facts</td>
<td>Statement of Uncontested Facts</td>
</tr>
<tr>
<td>FDI</td>
<td>Foreign Direct Investment</td>
</tr>
<tr>
<td>FET</td>
<td>Fair and Equitable Treatment</td>
</tr>
<tr>
<td>FiT(s)</td>
<td>Feed-in Tariff(s)</td>
</tr>
<tr>
<td>ICSID</td>
<td>International Center for Settlement of Investment Disputes</td>
</tr>
<tr>
<td>Id.</td>
<td>Idem</td>
</tr>
<tr>
<td>ILC</td>
<td>International Law Commission</td>
</tr>
<tr>
<td>Kovič</td>
<td>Expert Report of Prof. Marco Kovič</td>
</tr>
<tr>
<td>kWh</td>
<td>kiloWatt per hour</td>
</tr>
<tr>
<td>LCIA</td>
<td>London Court of International Arbitration</td>
</tr>
<tr>
<td>LRE</td>
<td>Law on Renewable Energy</td>
</tr>
<tr>
<td>MST</td>
<td>Minimum Standard of Treatment</td>
</tr>
<tr>
<td>NPM</td>
<td>Non-Precluded Measures</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
</tr>
<tr>
<td>--------------</td>
<td>-----------</td>
</tr>
<tr>
<td>NPV</td>
<td>Net Present Value</td>
</tr>
<tr>
<td>p./pp.</td>
<td>Page(s)</td>
</tr>
<tr>
<td>PO2</td>
<td>Preliminary Order 2</td>
</tr>
<tr>
<td>PO3</td>
<td>Procedural Order 3</td>
</tr>
<tr>
<td>Priemo</td>
<td>Expert Report of Juanita Priemo</td>
</tr>
<tr>
<td>PV</td>
<td>Photovoltaic</td>
</tr>
<tr>
<td>Regulation</td>
<td>Regulation on the Support of Photovoltaic Sector</td>
</tr>
<tr>
<td>Request</td>
<td>Request for Arbitration</td>
</tr>
<tr>
<td>Response</td>
<td>Response to the Request for Arbitration</td>
</tr>
<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of European Union</td>
</tr>
<tr>
<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
</tr>
<tr>
<td>WACC</td>
<td>Weighted Average Cost of Capital</td>
</tr>
</tbody>
</table>
STATEMENT OF FACTS

1. Vasiuki (Claimant) is a Limited Liability Company incorporated under the laws of Cogitatia since 2002, operating in the energy sector. Claimant has a strong presence not only in its home-State, but also in the wider region, including the Republic of Barancasia (Respondent).  

2. Claimant’s operations in Barancasia were protected under the provisions of the Barancasia-Cogitatia Bilateral Investment Treaty (BIT) for the promotion and protection of investments, which entered into force on August 1, 2002.  

3. Two years later, on May 1, 2004 Barancasia and Cogitatia became Members of the European Union (EU). In the EU framework, Barancasia began developing its renewable energy sector in 2007, aiming at the security of energy supply.  

4. Consequently, in the same year, Claimant began surveying Barancasia’s legislative environment in relation to the promotion of renewable energy. As a result, in 2009 Claimant initiated its photovoltaic (PV) investment with the development of project Alfa, which became operational on January 1, 2010.  

5. Meanwhile, in May 2010, Respondent created a blossoming legal environment by adopting the Law on Renewable Energy (LRE), which aimed at the encouragement of the development of renewable energy sector. The LRE provided for a Feed-in Tariff (FiT) scheme, which allowed all licensed investors to benefit from a 12-year fixed amount. In particular, the FiT was calculated by the Barancasia Energy Authority (BEA) at 0.44 Euros/kiloWatt per hour (EUR/kWh) on July 1, 2010.  

6. This positive development in the legal framework of the renewable energy sector motivated Claimant to expand its investment by proceeding to its second installment, namely project Beta. The latter was granted the relevant license by the BEA on August 25, 2010 and
became operational on January 30, 2011. However, Claimant was denied a license for project Alfa by the BEA on August 25, 2010, despite the fact that it met the criteria set out in both in Article 5 LRE and Article 3 of the Regulation on the Support of Photovoltaic Sector (Regulation). The BEA did not provide adequate justification by invoking “confidentiality obligations”.

7. Incentivized by the technological advances of 2011, Claimant opted to once again expand its investment in the PV sector by initiating the construction of 12 additional installations. For this purpose, it resorted to debt financing, purchased land plots and obtained construction permits. This was the first step towards the creation of a “clustered farm” concept, which was supposed to be further expanded in the future. In fact, Claimant obtained licenses for the 12 new installations on July 1, 2012.

8. Nevertheless, Respondent amended Article 4 LRE on January 3, 2013, which guaranteed the fixed FiT scheme, only three years after its adoption. The decision for the amendment was based on the creation of a solar bubble, which was caused by the increase of applications for the BEA licenses after the 2011 technological advances. What is more, prior to the amendment private hearings were held in November 2012, where Claimant was absent, since it was not even informed.

9. Respondent altered the FiT scheme by revoking the 12-year fixed amount, ultimately replacing the previous version of Article 4 LRE. Subsequently, the BEA proceeded to the recalculation of the FiT, setting the new amount at 0.15 EUR/kWh, further providing for its annual review and its retroactive application since January 1, 2013.

10. Meanwhile, Respondent unilaterally considers the BIT as terminated on the grounds of its obsolescence after the 2004 EU accession and its debatable termination in 2008.

---

15 Facts, ¶23.  
16 Facts, ¶22.  
17 PO2, ¶16.  
18 Facts, ¶25.  
19 Facts, ¶27.  
20 Id.  
21 Facts, ¶33.  
22 Facts, ¶34.  
23 Facts, ¶25.  
24 PO2, ¶13.  
25 PO2, ¶15.  
26 PO3, ¶6.  
27 PO3, ¶8.  
28 Facts, ¶35.  
29 Facts, ¶¶5-6.  
30 Facts, ¶¶9-11.
SUMMARY OF ARGUMENT

11. This Tribunal has the competence to adjudicate upon the dispute arisen between Claimant and Respondent, contrary to Respondent’s unmeritorious allegations. The BIT was not terminated automatically after the accession of the Contracting States to the EU. Nor was it terminated pursuant to its own provisions or by the mutual consent of the Parties. Moreover, Barancasia’s sovereignty does not deprive this Tribunal of its power to award specific performance. (Part One)

12. In addition, Respondent has failed to accord Claimant fair and equitable treatment according to Article 2(2) BIT through a series of actions and omissions. The State not only frustrated Claimant’s legitimate expectations for a stable and predictable legal framework by retroactively amending LRE, but also violated procedural fairness by denying Claimant its right to be heard. Furthermore, the FET standard was also violated due to the arbitrary denial of a license for Vasiuki’s project Alfa. Even more, Respondent cannot be exempted under either Article 11 BIT, or the customary necessity defense. In any case, Claimant should be compensated for its material losses. (Part Two)

13. Finally, the Tribunal should not shy away from awarding restitution either in the form of the re-amendment of Article 4 LRE, or the provision of 0.44 EUR/kWh FiT to Claimant. Only in the alternative, compensation of €2.1 million calculated using the Discounted Cash Flow method should be ordered. For the full reparation to be achieved compound interest of 8% should be added. (Part Three)
ARGUMENTS

PART ONE: JURISDICTION AND ADMISSIBILITY

I. THE TRIBUNAL HAS AND SHOULD EXERCISE JURISDICTION OVER THE PRESENT DISPUTE

14. From the very beginning, Claimant has always been more than willing and prepared to settle this dispute with Respondent amicably. In fact, Claimant notified Barancasia of its intention to initiate negotiations on April 20, 2014. However, Respondent burnt all the bridges of communication by plainly declining negotiations. As a result, Claimant became aware of Respondent’s jurisdictional objections for the first time through Barancasia’s Response to the request for arbitration issued on November 21, 2014.

15. To start with, it is Claimant's submission that the Tribunal has and should exercise jurisdiction over the dispute, in accordance with Article 8 BIT. The BIT was concluded between Barancasia and Cogitatia on December 31, 1998 and entered into force on August 1, 2002. Article 13(2) BIT provides that the treaty will remain in force for a minimum period of 10 years, i.e. in any event, at least until July 31, 2012. Article 13(3) BIT, then, provides:

“In respect of investments made prior to the termination of this Agreement, the provisions of this Agreement shall continue to be effective for a period of ten years from the date of its termination”.

Hence, the BIT’s protections cover investments made at least until July 31, 2012, and can be invoked at least until July 31, 2022.

16. In the present dispute, Claimant, a covered investor who made a covered investment under Article 1 BIT, started its overall investment operation in Barancasia as early as 2009, approached Respondent so as to start negotiations on April 20, 2014, and submitted its Request for Arbitration (Request) on November 2, 2014. As a result, Claimant’s investment is in fact protected under the BIT, whose provisions continue to undisruptedly fully apply up until today.

17. The Tribunal should take due note of the fact that Respondent has not raised any jurisdictional objection in its Response to Request for Arbitration (Response) regarding the
above.\textsuperscript{38} In fact, it only limited itself to alleging, first, that the BIT has become obsolete due to the EU accession of both its Parties, and, second, that the BIT has been allegedly terminated on June 30, 2008.\textsuperscript{39}

18. Hence, should Respondent attempt to prematurely raise jurisdictional objections other than those included in its Response, this would seriously prejudice Claimant's due process rights; to recall, Article 23(3) of the applicable London Court of International Arbitration (LCIA) Rules dictates that objections should be raised “as soon as possible”, and for good reasons (founded upon due process considerations and orderly procedure) indeed.

19. But even those unnecessary jurisdictional objections which Respondent did raise, to the expense of this Tribunal's time and resources, are ill-supported and misconceived. The burden of proving these allegations naturally lies with the Respondent as the party asserting them. Still, and for the purposes of assisting the Tribunal in fruitfully resolving the present dispute, Claimant will establish, first, that the BIT has not been rendered obsolete after the accession of both Barancasia and Cogitatia to the EU in 2004 (A); second, that the BIT was not terminated on June 30, 2008, under either its own provisions or customary international law (B); and, finally, that any doubts regarding the admissibility of claims are readily cast away (C).

A. The BIT remains in force after its Parties' accession to the EU

20. The Tribunal should remain unimpressed by Respondent's allegation that, after the 2004 accession of Barancasia and Cogitatia to the EU, the BIT has been rendered obsolete.\textsuperscript{40}

21. To begin with, the argument regarding the alleged automatic termination or obsolescence of intra-EU BITs solely by virtue of EU accession is neither new, nor has it ever been successful. The Eastern Sugar, Eureko and EURAM tribunals, all constituted under intra-EU BITs, unequivocally dismissed any such alleged effects on the validity of intra-EU BITs.\textsuperscript{41} Domestic courts, such as the OLG Frankfurt,\textsuperscript{42} further reiterate this conclusion. Even the European Commission (EC) has acknowledged that intra-EU BITs are not automatically terminated upon EU accession and that it is rather left upon the discretion of the Member-States to terminate them.\textsuperscript{43}

\textsuperscript{38} Response, Objections.
\textsuperscript{39} Id.
\textsuperscript{40} Response, Objections; Facts, ¶5.
\textsuperscript{41} Eastern Sugar, ¶181; Eureko, ¶¶265-267,277,283; EURAM, ¶287.
\textsuperscript{42} OLG Frankfurt, ¶¶106,115,125.
\textsuperscript{43} Eastern Sugar, ¶119; Eureko, ¶182.
22. Moreover, Respondent cannot seek to rely on the allegedly exclusive applicability of EU law in the relations between Barancasia and Cogitatia. According to this Tribunal’s Procedural Order No 1, and by virtue of Article 16 of the LCIA Rules, the *lex arbitri* in the present proceedings is the law of the seat of arbitration, i.e. Caledonian law. Since Caledonia is not an EU Member-State, one cannot see how the exclusive applicability of EU law can anyhow be reconciled with this choice of Caledonian law as *lex arbitri*.

23. Nor is the principle of supremacy under EU law of any avail to Respondent. This principle is irrelevant in the present dispute, since it refers solely to the relationship between EU law and the domestic legal order of EU Member-States; as the *EURAM* Tribunal remarked, challenges regarding the BIT’s validity are governed by public international law, rather than unmeritorious attempts to resort to the principle of supremacy.

24. Hence, Claimant submits, first, that the BIT was not superseded by the EU treaties pursuant to Article 59 of the Vienna Convention on the Law of Treaties (VCLT) (a); and, second, that Article 30(3) VCLT is inapplicable in the case at hand (b).

   **a. No issues arise regarding the validity of the BIT under Article 59 VCLT**

25. Barancasia and Cogitatia signed the 2003 Treaty of Athens (Accession Treaty) in order to join the EU on May 1, 2004. Still, this alone does not suffice to trigger Article 59 VCLT, since the treaties in question do not share the same subject-matter (I); the Parties did not intend for EU law to prevail over the BIT (2); no incompatibilities arise, contrary to Respondent’s allegations (3).

   **(1) The BIT and the EU treaties do not share the same subject-matter**

26. Claimant submits that the BIT and the EU treaties do not share the same subject-matter, both on substantive, as well as a procedural level.

27. As far as the substantive protection is concerned, the different subject-matter of the BITs and the EU Treaties can be found on two different levels, the territorial and the temporal. BITs like the one at hand, aim at the protection of investments, once already made, and within the

---

44 PO1, ¶1.
45 PO2, ¶8.
46 Lavranos, p.288.
47 Söderlund, p.463.
48 EURAM, ¶¶71, 73.
49 Facts, ¶5.
50 VCLT, Art.59(1).
51 VCLT, Art.59(1(a)).
52 BIT, *Preamble*. 
territory of the host-State. As stated by the *Eastern Sugar* Tribunal, a BIT protects the post-establishment phase of the investment.

28. On the contrary, the Treaty on the Functioning of the European Union (TFEU), which encompasses the four fundamental freedoms of goods, persons, services and capital, aims at the overall abolishment of trade barriers within the economic block of the Union. Subsequently, the internal market that is created within the EU encourages cross-border investments in their pre-establishment phase by enabling market access.

29. On a procedural level, only a BIT offers the right to arbitration, so as the investors can directly claim any possible violation regarding the aforementioned substantive guarantees. On the other hand, the EU legal framework does not grant an investor the right to directly resort to the Court of Justice of the European Union (CJEU). The same conclusion was also reached by the *Eastern Sugar* Tribunal, which held that the arbitration clause constitutes the “best guarantee” for the protection of the investor. In the same vein, the *Eureko* Tribunal concluded that the BIT offers a greater degree of protection compared to the Lisbon Treaty and, consequently, the EU treaties cannot replace the BIT provisions.

30. Similarly, the *Eastern Sugar* Tribunal held that the free flow of capital and the protection of investments may be distinct things, but are “complementary” as well, posing no obstacle to the simultaneous application of the BIT and EU law.

(2) *The Parties never intended for the EU treaties to prevail over the BIT*

31. Not only do the two legal regimes lack sameness relating to their subject-matter, but also Barancasia and Cogitatia never intended for the prevalence of the EU treaties over the BIT. For, had they wished to, they could have done so, expressly.

32. More specifically, the Accession Treaty fails to include any provision whatsoever regarding the BIT, its binding character, or its applicability upon their accession to the EU.

---

53 Eilmansberger, p.400.
54 *Eastern Sugar*, ¶164.
55 TFEU, Art.28.
56 TFEU, Art.45.
57 TFEU, Art.56
58 TFEU, Art.63.
59 Reinisch, p.167.
60 *Oostergetel*, ¶¶74-75; *Eastern Sugar*, ¶160.
61 Reinisch, p.167.
62 Reinisch, p.171.
63 *Eastern Sugar*, ¶165.
64 *Eureko*, ¶264.
65 *Eastern Sugar*, ¶169.
66 EURAM, ¶¶92.
Article 1(1) of the Accession Treaty solely clarifies that acceding States accept and acknowledge EU law as applicable, but in parallel with already existing legal rules.

33. Similarly, the EU treaties themselves do not include any provision regarding the termination of intra-EU BITs. As the Eureko Tribunal concluded, “no evidence” of such intention can be found within the text of EU treaties.67

34. Hence, the Parties never intended for the termination of the BIT upon their EU accession.

(3) Article 207 TFEU is not incompatible with the provisions of the BIT

35. Respondent alleges that EU law, and in particular Article 207 TFEU, is materially inconsistent with the content of the BIT,68 but, once again, its allegations are not persuasive.

36. Articles 3 and 207 TFEU grant the EU exclusive competence over foreign direct investment (FDI),69 albeit restricted to the EU's external action, in the context of the EU’s Common Commercial Policy (CCP) with third States,70 i.e. obviously not including intra-EU BITs matters. As a result, no material inconsistency may arise in the first place, lacking any contextual overlap.

37. All in all, Claimant invites the Tribunal to follow the consistent arbitral jurisprudence declining the applicability of Article 59 VCLT in the case of intra-EU BITs, as is the case at hand.

b. Even if, arguendo, the BIT and EU treaties somehow share the same subject-matter, Article 30(3) VCLT is still inapplicable

38. Even in the remote case that this Tribunal finds that the BIT and EU treaties constitute successive treaties on the same subject-matter, Article 344 TFEU on the exclusive competence of the CJEU still do not prevail over Article 8 BIT; this is because Article 30(3) VCLT, which embodies the lex posterior principle and is applicable in cases of incompatibility between specific provisions of two successive treaties, is inapplicable.

39. Article 344 TFEU refers to the exclusive competence of the CJEU to interpret EU law.71 Nevertheless, and as stated by the Eureko Tribunal, courts and arbitration tribunals “interpret and apply EU law daily”.72 More specifically, the CJEU has the obligation to review only the

---

67 Eureko, ¶244.
68 Response, Objections.
69 Dimopoulos, p.20.
70 Dimopoulos, p.95.
71 TFEU, Art.344.
72 Eureko, ¶282.
“final and authoritative” interpretation of the EU legal regime,73 which guarantees the uniformity of EU law.

40. It is rather unclear how Article 344 TFEU and Article 8 BIT could somehow collide. The former refers to disputes between Member-States, arising from EU law,74 whereas the latter concerns investor-to-State disputes, arising from the provisions of the BIT; no more than meets the eye exists here.

41. Nor is the Commission v. Ireland (MoxPlant) decision pertinent here, since that difference arose at the inter-State level between Member-States, relating to an issue regulated by EU law;75 our case, an investor-State dispute regarding the breach of a BIT, is fundamentally different.

42. Similarly, no issues regarding interference with the uniform interpretation and application of EU law, arise here. During the enforcement stage of the award, the domestic courts of Barancasia will have the opportunity to send preliminary questions to the CJEU on the issue of interpretation, pursuant to Article 267 TFEU. This further highlights the lack of interpretative monopoly of the CJEU, as emphasized by the EURAM Tribunal76 and the OLG Frankfurt court.77

43. Furthermore, the compatibility of Article 8 BIT with Article 344 TFEU is also bolstered by its compatibility with Article 18 TFEU on non-discrimination; as the Binder Tribunal concluded,78 no discrimination arises by virtue of investor-State arbitration under intra-EU BITs. Rather, it is an indication that the intra-EU BIT Parties provided for a higher and veritable degree of protection under the BIT, as was pointed out by the Eastern Sugar Tribunal.79 In fact, the provision of the same level of protection under the EU legal order is rather “an internal EU law problem and not an issue of treaty compatibility”.80

44. Finally, it should be borne in mind that the EU has been making strides towards establishing a framework on dispute settlement mechanisms that includes arbitral proceedings. On the one hand, the accession of the EU to the International Center for Settlement of Investment Disputes (ICSID) Convention is a priority.81 On the other, the EU has been a

73 Id.
74 EURAM, ¶254.
75 Commission v. Ireland, ¶123.
76 EURAM, ¶252.
77 OLG Frankfurt, ¶107.
78 Binder, ¶¶65-66.
79 Eastern Sugar, ¶170.
80 EURAM, ¶270.
81 Lavranos EYIEL, p.215.
foundating Party to the Energy Charter Treaty (ECT), which explicitly provides for investor-State arbitration.\textsuperscript{82}

45. \textit{Ergo}, the Tribunal should find that the BIT remains unaffected by EU law.

B. The BIT was not terminated by Barancasia on June 30, 2008, under either Article 13 BIT, or customary international law

46. Claimant further submits that the BIT was not terminated by Barancasia on June 30, 2008. In particular, the BIT has not been terminated either pursuant to its own provisions (a), or under customary international law (b).

a. The BIT was not terminated on June 30, 2008, under Article 13 BIT

47. Claimant submits that, in order for the BIT to be terminated according to its own provisions, the procedure set out in Article 13(2) BIT must be followed. In particular, at some point after the expiration of the minimum period of application, namely August July 31, 2012, either Contracting Party could notify the other in writing regarding the termination of the BIT.

48. In \textit{casu}, a notification was sent by Respondent on June 29, 2007,\textsuperscript{83} and received by Cogitatia on July 10, 2007.\textsuperscript{84} Both dates are placed well prior to the expiration of the minimum period of the BIT's application on July 31, 2012.

49. Accordingly, Respondent's notification could in any event produce legal consequences only after July 31, 2012, when the minimum application period would have elapsed.\textsuperscript{85} 

50. Thus, under its own provisions, the BIT was not terminated on June 30, 2008, as Respondent alleges.

b. The BIT was not terminated on June 30, 2008, under Article 54 VCLT

51. Claimant submits that the only conceivable way for the BIT to have been terminated on June 30, 2008, \textit{i.e.} prior to the 10-year minimum period of application, as Respondent alleges, is by mutual consent of the Parties. This is the principle of early termination via mutual consent, which is envisaged in Article 54 VCLT. However, Cogitatia never gave its consent to the premature termination of the BIT.

\textsuperscript{82} ECT, Art.26.
\textsuperscript{83} Annex 7.1.
\textsuperscript{84} Annex 7.2.
\textsuperscript{85} Carska-Sheppard, p.761.
52. Considering that Article 54 VCLT forms an exception to the rule of *pacta sunt servanda*, the consent should be established beyond any reasonable doubt, which is clearly not the case here. Claimant’s home-State merely replied on September 28, 2007, that it had received the notification for the termination sent by Barancasia. It never gave a positive answer to the termination, thus not fulfilling the prerequisites set out in Article 54 VCLT.

53. In fact, and even though some EU Member-States may have officially accepted the termination of their respective intra-EU BITs, several other EU Member-States rejected any notion of explicit or implicit termination of intra-EU BITs. The same holds true for Cogitatia. From its perspective all its intra-EU BITs remain in force, since it has neither initiated any termination proceedings, nor has officially acknowledged any such alleged termination.

54. Consequently, any argumentation by Respondent based on the alleged explicit or implicit consent on behalf of Cogitatia for the termination of the BIT, is destined to fail.

### C. The Tribunal should exercise its jurisdiction

55. Lastly, the covert attempt by Respondent to find obstacles for the exercise of the Tribunal's jurisdiction over the present dispute is meritless.

56. The Tribunal’s power to discover whether it can award restitution should begin by referring to the arbitrators’ primary source of power, which is the BIT itself.

57. In the case at hand, the Tribunal’s power to order remedies derives from Article 8(3) of the BIT, which states that “[t]he arbitral awards shall be final and binding on both parties to the dispute”. The absence of an explicit reference to specific remedies in the aforementioned clause allows the Tribunal to award restitution.

58. This becomes apparent, by interpreting the term “award” in Article 8 BIT using the principle of *effet utile*. The latter interpretative principle, being an “integral part” of Article 31 VCLT, dictates that each treaty provision should be interpreted in such a way, so as no other provision is rendered ineffective. Accordingly, if the term “award” in Article 8(3) were to be interpreted as not including restitution, then Article 4 BIT which provides for restitution for losses suffered due to otherwise lawful acts would be rendered ineffective.

---

86 Dörr/Schmalenbach, p.948; Corten/Klein, p.1927.
87 Dörr/Schmalenbach, p.958; Corten/Klein, p.2373.
88 Annex 7.2; Facts, ¶10.
89 PO2, ¶2.
90 EFC, ¶17; Olivet, p.5.
91 PO2, ¶3.
92 BG, ¶95; Micula, ¶318.
93 Villiger, p.428; Dörr/Schmalenbach, pp.539-540; Corten/Klein, p.1309.
59. Furthermore, taking into account Article 22(1(vii)) LCIA Rules, the Tribunal clearly has the power “to order [...] specific performance”. In particular, unlike the LCIA Rules of 1998, the current version of 2014 casts away any doubt regarding the availability of this remedy, by specifically including specific performance in the Tribunal’s powers.\(^{94}\)

60. Besides, Respondent’s conveniently vague objection that restitution is “wholly inconsistent with [its] sovereignty”,\(^{95}\) is of no avail. Arbitral tribunals — both in the less recent past,\(^{96}\) as well as more contemporarily,\(^{97}\) have not hesitated to award juridical restitution against sovereigns.

61. For, as famously stated in the Wimbledon case, “the right of entering into international engagements is an attribute of State Sovereignty”.\(^{98}\) A fortiori, then, convenient invocations of sovereignty cannot operate so as to circumvent the reparation obligation for violations of international obligations freely entered into by States, such as Respondent.

62. Nor may sovereignty be resorted to, so as to cast doubt regarding the enforceability of this Tribunal’s award ordering restitution. Quite recently, the Micula Tribunal eloquently stated that “[r]emedies and enforcement are two distinct concepts”,\(^{99}\) when dismissing an enforceability objection by Romania; and this is exactly the path which Claimant urges this Tribunal to follow as well, and not shy away from ordering restitution.

63. For all the aforementioned reasons, Claimant respectfully asks the Tribunal to dismiss Respondent’s objections, assert its jurisdiction and adjudicate upon the claims of the dispute, as mandated by Article 8 BIT.

\(^{94}\) Scherer/Gerbay/Richman, p.249.
\(^{95}\) Response, Objections.
\(^{97}\) ATA, ¶¶131-132; Arif, ¶572, Goetz, ¶135.
\(^{98}\) Wimbledon, p.25.
\(^{99}\) Micula Jurisdiction, ¶166.
PART TWO: MERITS

64. Having assumed to jurisdiction, Claimant invites the Tribunal to find that the denial of license for the Alfa project and the 2013 amendment of the LRE violated Respondent’s obligation to provide Fair and Equitable Treatment (FET), as provided in Article 2(2) BIT (II). Furthermore, it is Claimant’s submission that Respondent’s actions are not exempted, either under the BIT, or under customary international law (III).

II. RESPONDENT FAILED TO ACCORD CLAIMANT FAIR AND EQUITABLE TREATMENT

65. The FET clause contained in Article 2(2) of the Cogitatia-Barancasia BIT provides in so many words:

“Investments of investors of either Contracting Party shall at all times be accorded fair equitable treatment […]”

66. Investment arbitral tribunals which have examined identical FET clauses in other BITs have concluded that the lack of any reference whatsoever to international law manifests that the standard set is autonomous, i.e. broader than the Minimum Standard of Treatment (MST) of aliens. In our case, had Barancasia and Cogitatia intended to equate the two, they would have done so expressis verbis, as may perhaps be the case under other BITs, but certainly not in the one applicable here.

67. As a result, the triggering of the FET clause in the Cogitatia-Barancasia BIT, properly interpreted according to the tenets of Article 31 VCLT, does not necessarily require a high degree of outrageousness or egregiousness, or bad faith, but rather sets a lower threshold of inappropriateness, to be applied on a case-by-case basis. And in any event, Claimant respectfully points this Tribunal's attention to the pertinent remark by the Saluka Tribunal that, when applied to the specific facts of a case, the difference between the autonomous FET standard and the MST "may well be more apparent than real".

68. Indeed, under Article 31(1) VCLT, the terms “fair” and “equitable” in Article 2(2) of the BIT must be interpreted, according to their ordinary meaning, as ‘just’, ‘even-handed’,

---

100 Enron, ¶258; MTD, ¶110-11; National Grid, ¶167.
102 UNCTAD I, p.13.
103 US Model BIT, Art.5; Canada Model BIT, Art.5.
104 Tecmed, ¶153.
105 CMS, ¶280; El Paso, ¶357.
106 Vivendi, ¶7.4.12.
107 Saluka, ¶291.
‘unbiased’, ‘legitimate’, taking into due account the BIT’s object and purpose as stated in its Preamble, i.e. "in the manner most conducive" to fulfill the objective of the BIT to "to create and maintain favourable conditions for investments of investors".

69. In the dispute at hand, Respondent’s acts and omissions with respect to the functioning of the renewable energy sector should be examined both isolated and in their totality, so as to provide an overall view of the situation and the negative consequences of the general behavior of Respondent to Claimant, as is reiterated by arbitral jurisprudence.

70. Accordingly, the 2013 amendment of the LRE combined with other acts of Respondent cumulatively resulted to a violation of Article 2(2) of the BIT since, Claimant's legitimate expectations for a stable legal framework were shattered (A), Claimant was denied of its right to be heard contrary to fundamental precepts of due process (B), and, the BEA’s denial of license for project Alfa is a textbook example of arbitrariness (C).

A. The amendment of Article 4 LRE frustrated Claimant’s legitimate expectations for a stable legal framework

71. Claimant submits that Respondent had been building up the investor’s legitimate expectations (a) only to suddenly shatter them by dismantling the regulatory framework with the retroactive 2013 LRE amendment (b).

a. Claimant legitimately expected a stable legal framework

72. Vasiuki was expecting nothing more than what it was promised, i.e. a stable legal environment. The stability of the investment climate is strongly correlated with an investor’s legitimate expectations, the latter being a prominent component of the FET standard. Claimant recalls the findings of the Tecmed Tribunal, which tied stability with investment, requiring the host-State to act “in a consistent manner”. Especially in cases of long-term investments, exactly as the one made by Claimant in Barancasia’s renewable energy sector ever since May 2009, the stability and predictability of legislation is of fundamental importance.

---

108 MTD, ¶112-113; Micula, ¶504; Saluka, ¶296-297.
109 MTD, ¶104.
110 BIT, Preamble.
111 Bayindir, ¶380; El Paso, ¶459.
112 Dolzer, p.17; LG&E Liability, ¶125; El Paso, ¶227; Tecmed, ¶154.
113 Tecmed, ¶154.
114 Facts, ¶12.
115 Dolzer/Schreuer, p.160.
73. Moreover, while legitimate expectations are indeed created at the time the investment is made, they may also be further reinforced during its lifespan. Particularly, a positive shift in the regulatory environment can generate legitimate expectations anew, especially if the investor relies upon it to expand its activities.

74. In the dispute at hand, the creation of Vasiuki’s legitimate expectations coincided with the initiation of its solar energy projects in Barancasia in 2009 and were bolstered in the subsequent years. These expectations derive from a compilation of factors. Initially, Claimant, after monitoring the legislative framework in Barancasia in 2007, became aware of Respondent’s endeavors to promote and develop the renewable energy sector. Claimant’s expectations were further strengthened in 2009, when the EU adopted the Renewable Energy Directive, setting the long-term goal of 20% increase in renewable energy production until 2020. This regulatory environment was decisive for luring Vasiuki into making its investment in Barancasia.

75. In addition, Claimant’s expectations were proliferated in May 2010, when Respondent adopted the LRE in order to implement the targets assigned by the Renewable Energy Directive. Vasiuki’s heavy reliance on the LRE is obvious by the fact that it progressed to the purchase of land plots and equipment for project Beta after becoming aware of the way the legislation was going to be implemented. In particular, the LRE established a 12-year fixed FiT regime, implemented through licenses issued by the BEA, which calculated a 0.44 EUR/kWh FiT, publically announced on July 1, 2010.

76. Claimant underlines that a license encapsulates the commitment of the State towards the investor and, therefore, serves as a specific assurance. As also highlighted by Professor Georges Abi-Saab and accepted by arbitral jurisprudence, an investor’s legitimate expectations are fortified via such governmental assurances.
77. In the present dispute, Claimant obtained licenses for project Beta on August 25, 2010, and licenses for its 12 additional installations on July 1, 2012, initializing its “clustered farm” project. These licenses, granted by Respondent, constitute nothing less that promises and specific assurances provided directly to Claimant, and further reinforce its, already existing, legitimate expectations for stability of the regulatory framework and the maintenance of the 0.44 EUR/kWh FiT for a 12-year fixed period.

b. The retroactive 2013 amendment of the LRE smashed Claimant’s legitimate expectations to smithereens

78. It is Claimant’s submission that its legitimate expectations for a stable and predictable framework have been violated, since the FiT reduction was abrupt and draconian (1), and was applied retroactively (2).

(1) The radical FiT reduction shatters any elementary notion of regulatory stability

79. Having obtained the aforementioned licenses for project Beta and its 12 additional installations, Claimant legitimately expected that the operation of its business would continue unabated. Therefore, it proceeded with its initial plan, namely the development of a “clustered farm”, and, subsequently, dedicated substantial sums of money to the purchase of land plots and equipment.133

80. However, Respondent utterly violated Claimant’s expectations on January 3, 2013, when the Barancasian Parliament amended Article 4 LRE. In particular, the 12-year safety net for the fixed amount of the FiT was downgraded to be annually reviewed by the BEA. As if this was not enough, the FiT was slashed to ⅓ of its original price, namely from 0.44 to 0.15 EUR/kWh. In essence, this is no more than what was found to be enough by the LG&E, Enron and BG Group tribunals when they decided that Argentina violated the FET standard by drastically disrupting promises provided via licenses granted to foreign investors.136

81. To be clear, Claimant is by no means suggesting that Respondent should have frozen its legal framework, regardless of the prevailing circumstances. Still, a dividing line can and should be struck between the legal certainty and predictability to which Claimant is entitled to under
Article 2(2) of the BIT, and a host-State's right to legitimate regulatory adjustments. In other words, a host-State's right to regulate is not limitless.

82. In our case, Respondent did not simply adjust its legal framework to technological advances, but effectively dismantled it, when implementing the draconian measure of horizontal reduction of FiTs. This dramatic alteration had irreversible consequences, both for projects using the previous as well as the new technology for renewable energy.

83. Projects established before the new technology, like Claimant's Project Beta, could not adapt to the new technology and take advantage of the reduced costs entailed. Equally unfair was the 2013 LRE amendment for the new projects, since Respondent plainly refused to duly consider that every investor relies upon sovereign assurances given when making decisions regarding its project finance and business strategy.

84. In our case, Claimant borrowed substantial sums of money on September 1, 2011 to finance its new projects, after the technological advances took place. Had Vasiuki expected the LRE amendment, it would not find itself today in a situation of facing difficulties in servicing its bank loans.

85. Moreover, the unreasonableness of Respondent’s measures becomes crystal clear when compared to the reaction of other European countries. Spain and the Czech Republic, for instance, when they initially faced a similar problem, adopted a more lenient approach by reducing the FiTs by 27% and 30% respectively. This gave room to investors to adapt to the new regime, whereas Barancasia proceeded to an acute 66% decrease of the FiT, abandoning the investors in a state of economic asphyxiation. Even though other courses of action existed for Respondent, it instead opted for rushed and ill-conceived measures, which are divorced from reality and, even taken alone, violate Article 2(2) of the BIT.

---

137 Facts, ¶25; PO2, ¶30.
138 PO2, ¶11.
139 Facts, ¶25.
140 PO3, ¶20.
141 Del Rio/Artigues, p.16.
142 Czech Policies.
143 Facts, ¶35.
(2) The retroactive application of the LRE amendment completely demolished the foundations of a predictable framework

86. Following the diminution of the FiT amount, its retroactive application\textsuperscript{144} was the cherry on top, irremediably betraying Claimant's expectations. As stated by the Total Tribunal, the retroactive amendment of legislation substantially contributes to the violation of FET.\textsuperscript{145}

87. Indeed, Claimant could never have expected the retrospective application of the amendment. Respondent, however, stipulated, out of the blue, that the FiT recalculation would have a retroactive nature, since it would apply from January 1, 2013.\textsuperscript{146} In addition, the amended Regulation also has a similar effect, since it was adopted on January 5, 2013 with its results commencing from January 1, 2013 as well.\textsuperscript{147}

88. It bears also to be noted that, when Claimant made its investment in Barancasia, Barancasian law contained no provision specifically allowing retroactive laws, as is still the case today.\textsuperscript{148} Moreover, the record here indicates that "[I]aws that were arguably retroactive have been enacted exceptionally" (emphasis added),\textsuperscript{149} in other words, that the LRE amendment was arguably the first law with genuinely and explicitly retroactive effects, to the detrimental and unjust surprise of Claimant.

89. To recap, the retroactive character of the LRE amendment blindsided Claimant, who heavily, albeit reasonably, relied on the predictability of the legal framework, as any prudent investor would, especially one with a long-term business strategy expanding throughout the next decade (as Claimant).\textsuperscript{150}

90. On these grounds as well, Respondent bears international responsibility for the violation of Article 2(2) of the BIT.

B. Respondent’s decision to deprive Claimant of its right to be heard violated the principle of due process

91. Claimant further submits that Respondent failed to guarantee fair procedure and, more specifically, the investor’s right to be heard.\textsuperscript{151} It has been established by jurisprudence that

\textsuperscript{144} Facts, ¶35; PO3, ¶9.
\textsuperscript{145} Total, ¶444.
\textsuperscript{146} Facts, ¶35.
\textsuperscript{147} PO3, ¶9.
\textsuperscript{148} PO2, ¶19.
\textsuperscript{149} PO2, ¶20.
\textsuperscript{150} Ković, ¶14; Ković-Annex 4.
\textsuperscript{151} Dolzer/Schreuer, p.154.
shortage of fair procedure or substantial procedural faults must be considered as breaches of FET.  

92. This principle was also highlighted by the *Metalclad* Tribunal where the municipality refused to grant a construction permit, without previously hearing the investor. The Tribunal decided that there had been a lack of procedural propriety, due to the fact that this municipal decision was adopted in an official meeting, without previously hearing or notifying the investor.  

93. In the same vein, in the *Tecmed* case, the investor was denied a license renewal, without having an opportunity to “express its position”. The Tribunal concluded that this lack of transparency violated the FET clause of the BIT. Similarly, the *Thunderbird* Tribunal did not find a FET violation since the investor was indeed given the opportunity to present its position.  

94. In the present dispute, the process followed by the Barancasian Parliament was far from meeting fundamental due process considerations. More specifically, before the adoption of the LRE amendment, the Parliamentary Energy Committee held private hearings, in November 2012, inviting only a select group of investors. Claimant was not even aware that these proceedings took place, and, was hence deprived a fair opportunity to express its position and be heard regarding a drastic regulatory dismantling which was catastrophic for its legitimate business interests.  

95. Thus, the State failed to follow due process by neglecting to inform the investor of the hearings, as well as allow it to voice its opinion on the regulatory change.  

C. The arbitrary denial of license for project Alfa constitutes an unequivocal FET violation  

96. Finally, Claimant states that Respondent acted in an arbitrary manner. As it was highlighted by the *LG&E* Tribunal, arbitrary measures are those  

“that affect the investments of nationals of the other Party without engaging in a rational decision-making process.”

---

152 *Tecmed*, ¶162; *Rumeli*, ¶¶617-618; *Waste Management*, ¶98.  
153 *Metalclad*, ¶91.  
154 *Metalclad*, ¶¶91, 93.  
155 *Tecmed*, ¶162.  
156 *Tecmed*, ¶162.  
157 *Thunderbird*, ¶¶197-201.  
158 Facts, ¶34.  
159 PO3, ¶6.  
160 PO2, ¶15.
This is exactly what happened in our case, since the denial of license for project Alfa was evidently the outcome of an irrational decision-making process.

Article 5 LRE and Article 3 of the subsequent Regulation specifically stipulate that the new draconian FiT regime applies across the board to both new and existing projects, without making any rational distinction whatsoever regarding the various classes of affected investors and providing for reasonable exceptions. It is both irrational and illegitimate to horizontally treat different situations alike, and this is what Claimant suffered.

In particular, the rejection of the license for project Alfa solely and exclusively on the basis that it was an already existing project and lacking any other criteria and/or justifications, falls way short of any common conceptions of non-arbitrariness.

Moreover, not only did Respondent arbitrarily deny the license, but it even arbitrarily denied to disclose the reasoning behind its decision, on the grounds of confidentiality. It has been underlined by the Metalclad Tribunal that any action of the State relating to the investment must be at all times known and accessible to the investor; otherwise, it violates the FET. In the same vein, the Lemire Tribunal concluded that the denial of a license without any reasoning qualifies as a violation of the aforementioned protection standard.

Hence, the rejection of Claimant's license for project Alfa and the refusal of Respondent to even disclose the grounds for this denial, is tainted by gross arbitrariness and an egregious lack of transparency. This stands in stark contrast to Respondent's international obligation to employ a rational decision-making process when harmfully affecting investors under Article 2(2) BIT.

For all the aforementioned reasons, both separately and taken together, Claimant respectfully asks the Tribunal to find Respondent liable for violating its international obligation to provide FET, as dictated by Article 2(2) BIT.

III. RESPONDENT’S CONDUCT IS NOT EXEMPT UNDER THE BIT OR CUSTOMARY INTERNATIONAL LAW

Claimant submits that Respondent not only failed to accord Claimant FET, but also invokes exogenous factors as an escape route, so as to justify its wrongdoings.

---

161 Facts, ¶22.
162 PO2, ¶16.
163 Metalclad, ¶76.
164 Lemire, ¶371.
104. At issue here, is whether Respondent’s actions are excused on the grounds that they allegedly served certain renewable energy and economic objectives. However, it is more than evident that Barancasia’s actions cannot be exempted from liability either under Article 11 BIT, since no “international peace or security” issues have arisen (A), or under the provisions of Article 25 of the International Law Commission (ILC) (B). Even if the Tribunal accepts the plea of necessity, Respondent’s obligation for compensation should not be overlooked (C).

A. Respondent’s unlawful actions cannot be justified under any provision of the BIT

105. It is Claimant’s submission that the only clause in the BIT that could possibly lift the wrongful character of Respondent’s actions is the Non-Precluded Measures (NPM) clause of Article 11.

106. However, Barancasia’s conduct clearly does not fall under its scope. According to the ordinary meaning of the Article’s wording, Respondent’s actions are not wrongful, only when undertaken with respect to “international peace or security.” This particular phrase has an indisputable interpretation, namely the obligation of the States to comply with the mandates set by the United Nations Security Council.

107. Since the United Nations has in no way interfered, it becomes evident that Respondent’s renewable energy and economic objectives are by no means related to the “maintenance of international peace or security”. If the Parties intended to protect such domestic interests, they would have done so expressis verbis.

108. In particular, when the parties aimed at protecting environmental interests, such as the renewable energy objectives invoked by Respondent, they drafted specific provisions. For instance, the Canadian Model BIT provides that measures taken for the protection of natural resources are precluded from wrongfulness.

109. On the other hand, economic crises have been invoked as a ground for precluding wrongfulness only in cases where the NPM clauses included a specific reference to "essential security interests" in their main text. For instance, Argentina, which faced an unprecedented economic crisis, invoked its essential security interests under the US-Argentina BIT in order to

---

165 PO1, ¶4.
166 VCLT, Art.31(1); Villiger, pp.426-427; Corten/Klein, pp.1311-1312.
167 Burke-White/VonStaden, p.355.
168 India Model BIT, Art.161(v)); NAFTA, Art.1106(6(c)).
169 Canada Model BIT, Art.10(1(c)).
be exempt. This BIT though, like many others, draws a clear distinction between “international peace or security” and “essential security interests”, thus allowing the State to invoke this defense.

110. Having in mind the abovementioned, the BIT at hand protects only international peace or security interests and therefore Respondent’s conduct is under no circumstances justified under Article 11 BIT.

B. Respondent actions cannot be justified under Article 25 ILC

111. Since the BIT is not applicable, Respondent’s last resort would be Article 25 ILC, which codifies the state of necessity under customary international law. Nevertheless, the necessity defense is of exceptional character and sets a high threshold for its invocation, as indicated by the negative wording of the Article as well.

112. Claimant submits that, in order for Article 25 ILC to apply, its prerequisites should be met cumulatively. However, in the dispute at hand no grave and imminent peril existed in Barancasia (a), while the measures taken were not the only way to confront the situation (b). Lastly, Respondent contributed substantially to the supposed predicament (c).

   a. The hypothetical burst of the solar bubble does not constitute a grave and imminent peril

113. Claimant states that the situation in Barancasia does not qualify as “a grave and imminent peril” under Article 25 ILC. For the purposes of this Article, the peril must be “objectively established and not merely apprehended as possible.” In our case, the State was not dealing with a crisis, relating either to its economy or to energy security. It was merely brainstorming on a hypothetical burst of the solar bubble.

114. From the beginning of 2012 Barancasian officials publicly admitted the creation of a solar bubble which generated from the exceeding number of license applications to the BEA. However, this situation did not raise any significant concerns to the Barancasian Government,
since it did not deem it as grave and imminent. On the contrary, soon thereafter, the Prime Minister herself declared publicly that

“foreign direct investment policy has been a tremendous success, which undeniably promoted the economic growth of the country”.179

Therefore, it is evident that the alleged peril was far from reaching the high threshold set by Article 25. This is what is reasonably deducted from the government’s reaction.

115. The high threshold for the establishment of “grave and imminent peril” is further illustrated by jurisprudence regarding the Argentine crisis. Argentina was witnessing exceptional circumstances, since almost half of the population lived below the poverty line, unemployment had almost reached 25% and the health sector was on the brink of collapse.180

116. Although acknowledging the severity of the situation, the CMS, *Enron* and *Sempra* tribunals, rejected the state of necessity defense, because the situation did not result in social and economic collapse.181 Even the *LG&E* Tribunal, which accepted the existence of state of necessity,182 did so by declaring that “all major economic indicators reached catastrophic proportions”.183

117. On the contrary, Respondent was not facing such an unprecedented situation, which could justify its conduct. So far, no budget reallocation for the support of the FiT scheme has taken place,184 while only a few peaceful strikes were organized by Barancasian teachers.185 However, the aforementioned are not sufficient to establish an economic crisis, let alone a severe one.

118. Besides, the situation in Barancasia does not qualify as an energy crisis threatening Respondent’s security of energy supply, also endorsed by EU-driven energy objectives.186 This becomes apparent by drawing a comparison with other States that have actually faced an energy crisis, such as California, India, or Egypt.

119. In California, the deficiencies of the electricity system along with energy shortages triggered rolling blackouts, leaving 400,000 consumers without power.187 In the same vein, the energy crisis in India disrupted railways, hospitals and other services like water treatment plants, while 300 million people were deprived of electricity.188 Finally, Egypt, also battling

---

179 Annex No.8; Facts, ¶31.
180 *LG&E* Liability, ¶234.
181 *CMS*, ¶¶322,355; *Enron*, ¶¶306,313; *Sempra*, ¶¶348.
182 *LG&E* Liability ¶259.
183 *LG&E* Liability, ¶232.
184 PO3, ¶1.
185 Facts, ¶32; PO2, ¶17.
186 Directives, 2009/28/EC; 2009/30/EC; 2012/27/EU.
187 California Blackouts.
188 India Energy.
with an energy crisis, was experiencing up to 6 power-cuts a day, with a longevity of two hours each.\textsuperscript{189}

120. Respondent, on the other hand, cannot raise any concern regarding its energy security. The comments made by Barancasian politicians that it would not be possible to connect all new users to the grid\textsuperscript{190} are not \textit{per se} enough to prove the State’s inability to provide electricity and establish an energy crisis.

121. To conclude, Claimant invites the Tribunal to see the facts for what they are. It is evident that the situation in Barancasia is far from qualifying as an economic emergency or a danger to energy security. Thus, the required prerequisite of “grave and imminent peril” is not met.

\textbf{b. Respondent’s unlawful actions were not the “only means” to allegedly safeguard its interests, since reasonable alternatives existed}

122. Respondent argues that it was not in a position to sustain the FiT scheme and the only way to confront the solar bubble was the reduction of the FiTs.\textsuperscript{191} However, Article 25(1(a)) provides that in case other measures exist, even if they are “more costly or less convenient”, the necessity defense cannot be invoked.\textsuperscript{192} It is Claimant’s submission that indeed other ways existed for Barancasia, as it is evident from the different policies adopted by several European countries, which faced similar problems.

123. In particular, the Government of Italy decided to adopt a more investor-friendly spectrum of measures, which gave the investors the possibility to choose between three different options regarding the range of FiT reduction and the duration of the scheme.\textsuperscript{193} Thus, Italy provided the investors with the discretion to opt for the measures that suited them better, contrary to Barancasia which left no alternative to its PV producers.

124. Another significant measure adopted by Spain and Greece was the reduction of the FiTs in proportion to the technological cost assumed by each project.\textsuperscript{194} Barancasia, however, imposed a horizontal reduction, without taking into account that older projects, like Vasiuki’s Alfa and Beta bore higher technological costs, compared to newer ones.\textsuperscript{195}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{189} Kingsley.
\item \textsuperscript{190} Facts, ¶29.
\item \textsuperscript{191} Facts, ¶¶29,35.
\item \textsuperscript{192} ILC Commentary, p.83; CMS, ¶324.
\item \textsuperscript{193} Tirado, pp.9,10.
\item \textsuperscript{194} Tirado, p.6; Papamichalopoulos/Douklias/Gonithellis, p.2.
\item \textsuperscript{195} Facts, ¶25.
\end{enumerate}
\end{footnotesize}
Finally, as far as the alleged unsustainability of the grid is concerned, this problem could have been prevented by imposing caps on the projects’ operating hours, like Spain did, or on the MegaWatt produced per system/year, like Greece. Barancasia could also imitate Greece’s measure regarding the suspension of the issuance of new licenses, since Respondent itself admits that a problem would occur only in the case of an exceeding number of licensees, namely 7,000. However, no problem has occurred with the already existing ones, since the grid is fully operational without defects at the level of 6,000 licenses.

All the aforementioned lead to the conclusion that Barancasia neglected to examine and implement alternative measures. Respondent preferred to adopt a legal regime convenient for the State, but rather unfair for the investor, thus, severely impairing Claimant’s interests.

c. Respondent’s own conduct contributed to the unsustainability of the sector

In its Response, Respondent raises the objection that its actions were dictated by exogenous factors, namely the EU laws, relieving it from liability. Despite Respondent’s allegations, Claimant submits that the EU never dictated the course of action that the State should have implemented in support of its renewable energy policy. In addition, Respondent can by no means invoke technological advances to avail itself from wrongfulness.

The EU Directives are only binding in regards to their ultimate outcome, leaving it to the discretion of the EU Member-State to select the way to achieve the EU mandated goals. More specifically, the Directive 2009/28/EC provides that each Member-State has its own assigned target, in order to materialize the overall EU objectives. In particular, Barancasia, aiming at 20% gross consumption from renewable energy, opted to adopt the 12-year FiT scheme and the 0.44 EUR/kWh tariff, which consequently led to the alleged solar bubble and the 2013 amendment.

---

196 Facts, ¶29.
197 Tirado, p.6.
198 Papamichalopoulos/Douklias/Gonithellis, p.2.
199 Papamichalopoulos/Douklias, p.2.
200 Facts, ¶29.
201 PO2, ¶13.
202 Response, Objections.
203 Reinisch EU, p.39.
205 LRE, Art.2; Facts, ¶15.
206 Facts, ¶21.
207 Facts, ¶28.
208 Facts, ¶34.
129. Furthermore, the technological advances of 2011 cannot serve as grounds precluding Respondent’s responsibility. In particular, the State could foresee the rapid technological development of the PV sector, especially since acceleration and development of clean energy technologies have long been an international goal.

130. In any event, the mere existence of exogenous factors does not rule out the State’s contribution, as highlighted by the CMS Tribunal:

“[G]overnment policies and their shortcomings significantly contributed to the crisis and the emergency and while exogenous factors did fuel additional difficulties they do not exempt the Respondent from its responsibility in the matter.”

131. Conclusively, it becomes apparent that Respondent does not meet the criteria set out in Article 25 ILC. In particular, Barancasia did not face such a severe danger, it failed to examine all the equally effective alternatives, while it was the sole actor in its own supposed drama.

C. Irrespective of the necessity defense, Respondent is still obliged to compensate Claimant

132. In the event the Tribunal accepts that Respondent was acting under a state of necessity, Claimant should not bear the cost of its losses during that period. According to Article 27 ILC, compensation is not excluded even in cases of successful invocation of a customary defense. When the injured Party has played no part in the emergence of the problematic situation, it is entitled to compensation, despite the state of defense.

133. In fact, regarding Article 25 ILC, Special Rapporteur, Professor James Crawford stated that “there is a strong case for compensation for actual loss where a State relies on necessity.”

134. Finally, Respondent is obliged to bring its measures into conformity with its international obligations once the state of necessity has been lifted.

---

209 Facts, ¶25.
210 IEA, p.22.
211 IEA, p.5.
212 CMS, ¶329.
213 ILC Commentary, p.86.
214 Ripinsky, p.7; Crawford Report, p.53; CMS, ¶390.
215 Crawford Report, p.53.
216 Ripinsky, p.4.
PART THREE: REMEDIES

135. Claimant submits that Respondent should be ordered to rescind the amendment of Article 4 LRE or to continue providing the 0.44 EUR/kWh FiT for twelve years to Claimant (IV). Alternatively, Claimant invites the Tribunal to award due compensation (V).

IV. THE TRIBUNAL SHOULD ENTERTAIN CLAIMANT’S REQUEST FOR RESTITUTION

136. As clearly set forth by the Permanent Court of International Justice in the Chorzów Factory case:

“[...] reparation must, 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.”

137. The principle of full reparation, approvingly endorsed by numerous arbitral tribunals is reflected in the ILC Articles on State Responsibility, themselves expressive of the customary international law on the issue. More specifically, Article 31 ILC provides for the full reparation standard in cases of internationally wrongful acts, for which the primary form of reparation is restitution; the latter is governed by Article 35 ILC.

138. Claimant has already established that this Tribunal has the power to award restitution, according to Article 8 BIT and the LCIA Arbitration Rules. In the absence of a BIT provision referring to remedies for unlawful acts, such as the violation of the FET standard, Claimant submits that Article 35 ILC applies.

139. Under Article 35 ILC itself, Respondent is indeed under an obligation to make restitution, which is "to re-establish the situation which existed before the wrongful act was committed", unless it is materially impossible or involves a burden out of all proportion. The relevant burden of proof lies with Respondent as the party asserting the unavailability of restitution as a remedy in the present case.

140. Be that as it may, Claimant will demonstrate that the Tribunal should order Respondent to revoke the amendment of Article 4 LRE, or, alternatively, to continue to pay Claimant the

217 Chorzów, p.47.
218 Metalclad, ¶122; MT MTD, ¶238; Texaco, ¶102; Arif, ¶559; CME, ¶616.
219 ILC Commentary, pp.91.
220 ADC, ¶486.
221 ILC Commentary, pp.96-97.
222 see Section I(C(b)).
0.44 EUR/kWh FiT for 12 years, since both remedies are far from being materially impossible (A) and do not involve a burden out of all proportion (B).

A. Restitution is not materially impossible in the case at hand

141. According to Article 35(a) ILC, restitution must be materially possible in order to be awarded. Material impossibility, however, is narrowly defined and covers only these cases where the object in question has been permanently lost or destroyed or gravely deteriorated. Hence, the ILC commentary on Article 35(a) forcefully clarifies that

“restitution is not impossible merely on grounds of legal or practical difficulties, even though the responsible State may have to make special efforts to overcome these. [...] the mere fact of political or administrative obstacles to restitution does not amount to impossibility.”

This proposition is further reiterated by eminent scholars, such as Professor James Crawford.

142. In the context of the present dispute, it is obvious that the restitution requested by Claimant, i.e. the revocation of the amendment of Article 4 LRE, or, alternatively, the continuance of paying Claimant the 0.44 EUR/kWh FiT for 12 years, is anything but materially impossible; rather, both reliefs sought constitute perfectly realizable options for Respondent.

143. For, it is one thing to doubt (for good reasons, indeed) the Hobbesian proposition that a sovereign is incapable of injustice or injury; it is quite another, and far more difficult, to ignore the fact that the material capacity to make good of injustices and injury at the domestic level goes hand-in-hand with any sovereign's power.

144. Hence, it is perfectly possible for Respondent to exert its legislative power so as to revoke the LRE amendment. Alternatively, it is equally possible (and effective) to provide the tariff differential solely to Claimant, exactly as the Nykomb Tribunal ordered.

145. Furthermore, in the isolated instances where legal impossibility, properly distinct from material impossibility, was seen as a bar to restitution, it only related to cases of terminated concession contracts, as for instance in the Occidental and Burlington cases.

146. Surpassing, arguendo, the fact that other arbitral tribunals, such as Goetz and Texaco, did award restitution, even when terminated concession contracts were at issue, still, any attempt of Respondent to allegedly rely on legal impossibility is misplaced and destined to

---

223 ILC Commentary, p.98.
224 Id.
225 Crawford, p.513.
226 Nykomb, ¶¶5.1-5.2.
227 Occidental, ¶79.
228 Burlington, ¶70.
229 Goetz, ¶135.
230 Texaco, ¶¶1,58,112.
fail. So even if Respondent attempts to rely on Occidental and Burlington, these precedents themselves still demonstrate the necessary conceptual distinction between restitution as a remedy for unlawfully terminated concession contracts, and restitution for licenses which were unlawfully interfered with but remain in force (as is the case of Claimant).

147. Thus, restitution here is neither materially impossible, nor may Respondent allegedly invoke any legal impediments respectively.

**B. Restitution does not involve a burden out of all proportion**

148. Under Article 35(b) ILC, restitution is indeed an available remedy to the extent that it “does not involve a burden out of all proportion”. Proportionality refers to the balance that needs to be struck between the benefit enjoyed by the investor and the cost suffered by the responsible State when restitution, instead of compensation, is provided. Thus, as far as the second prerequisite set in Article 35 is concerned, Claimant submits that both the remedies of re-amending Article 4 LRE, and, alternatively, the provision of the original FiT to Claimant, are not gravely disproportionate.

149. In particular, re-establishing the status quo ante via restitution in either requested form, would enable Claimant to recover the beneficial FiT for the already licensed projects, and also expand its investment in the PV sector. Vasiuki has already decided to continue its plans concerning its 12 projects, which will evolve into a “clustered farm” and enlarge its existing projects through additional developments.

150. More specifically, the revocation of the LRE amendment would provide Claimant with a stable legal framework to further develop its investment activities, a possibility excluded in case restitution is not awarded and Respondent is still allowed to continue its unlawful practices, contrary to its obligations under the BIT.

151. If Respondent is, alternatively, ordered to continue to pay the 0.44 EUR/kWh FiT for 12 years, this would still allow Claimant to secure the prosperity of its already licensed projects. For, any calculation of compensation is based on a hypothetical price given by the BEA and it is not, therefore, sure that it will incorporate Claimant’s actual losses, since the FiT will be annually reviewed according to the amended Article 4 LRE. Therefore, restitution, in either of the forms sought, is essential for Claimant's interests.

---

231 ILC Commentary, p.98.
232 Crawford, p.514.
233 PO2, ¶26.
234 Facts, ¶27; Kovič, ¶11; PO2, ¶28.
152. On the other hand, by revoking the amendment of the LRE, Barancasia will become a highly competitive market when compared to other European countries such as the Czech Republic and Spain who have already drastically diminished their renewable energy sector subsidies, and will attract a plethora of investors. These massive inflows, if correctly managed, will allow Respondent to meet the 20-20-20 objectives set by the EU, while at the same time secure its energy supplies. It is therefore clear that restitution, far from entailing a burden out of all proportion for Respondent, rather puts it in a position to fulfill its EU and domestic energy objectives, as well as to gradually become a green and investor friendly economy.

153. In addition, nor does the suggested alternative relief sought, i.e. to continue providing the beneficial FiT solely to Claimant, raise any grave disproportionality issues for Respondent. For, when compared to compensation, this option does not involve any additional, not to say disproportionate, burden, since, either way, Barancasia is still obliged and expected to make full reparation.

154. Therefore, the Tribunal should entertain Claimant's request for restitution, in the form of either of the two carefully weighted alternatives presented, since no alleged grave disproportionality issues arise; rather the remedies requested by Claimant are beneficial for both parties in dispute.

V. ONLY IN THE ALTERNATIVE, THE TRIBUNAL SHOULD AWARD COMPENSATION OF €2.1 MILLION

155. As already established, January 1, 2013 was a turning point for Claimant’s investment in Barancasia. Although Claimant’s investment did not cease to exist, the State’s unlawful action diminished its revenues. In particular, Claimant submits that Alfa and Beta projects which are operational, have suffered a substantial reduction of their profitability, since the former was not issued a license for the 0.44 EUR/kWh FiT, whereas the latter has benefited from the previous regime for only two years. In addition, Claimant’s 12 new licensed projects, as well as their future expansions, will not generate the expected profits, as they will receive a reduced FiT.

236 Czech Policies; Del Rio/Artigues, pp.16,18,20.
237 Directive 2009/28/EC.
238 Directives 2009/28/EC; 2009/30/EC; 2012/27/EU.
239 LRE, Art.1; Fact, ¶7.
240 ILC, Art.31.
156. Regarding Claimant’s reparation for these damages, the BIT does not contain a relevant provision concerning the applicable standard of compensation in cases of unlawful acts. Contrary, Article 5 BIT, which refers to compensation in cases of lawful expropriation, is irrelevant. As established by the Tribunal in ADC, it would be irrational to equate the reparation provided for lawful and unlawful acts.\textsuperscript{241} Several tribunals have confirmed that in such a case it is the customary international law that determines the applicable standard of reparation.\textsuperscript{242} In particular, as previously mentioned,\textsuperscript{243} Article 31 ILC, embodying the Chorzów dictum,\textsuperscript{244} stipulates that the responsible State is under an obligation to fully repair the injured party’s damages.\textsuperscript{245}

157. In our case, “insofar as that the damage is not made good by restitution”,\textsuperscript{246} compensation should be awarded, according to Article 36 ILC. The latter dictates that the injured party should be restored in the situation that would have existed but for the wrongful act.\textsuperscript{247}

158. Specifically, Claimant submits that, by applying the Discounted Cash Flow (DCF) as the appropriate quantification method (A), Vasiuki’s total damages amount to €2.1 million (B). Adding to the above, the full reparation standard cannot be achieved, unless an 8\% compound interest is imposed on the final amount (C).

A. DCF is the appropriate method to estimate Claimant’s losses

159. Claimant submits that the proper valuation technique is the DCF, a method well established in international arbitration practice.\textsuperscript{248} DCF estimates the investment’s present value through a three-step process: first, it calculates the company’s future net cash flows; second, it determines the future costs and finally, discounts future profits to the valuation date via the appropriate discount rate.\textsuperscript{249}

160. Not only has this method been described as “a sound tool used internationally to value companies”,\textsuperscript{250} but it also qualifies as the appropriate one in casu.

\textsuperscript{241}ADC, ¶481; Sabahi, pp.98-99.
\textsuperscript{242}Siemens, ¶349; ADC, ¶483; LG&E, ¶¶30-31; MTD, ¶238.
\textsuperscript{243}see Section IV.
\textsuperscript{244}Chorzów, p.47.
\textsuperscript{245}ILC, Art.31.
\textsuperscript{246}ILC, Art.36.
\textsuperscript{247}ILC Commentary, p.99; Chorzów, p.47.
\textsuperscript{248}Rubins, p. 13; Guaracachi, ¶445; El Paso, ¶711; CMS, ¶411; CME, ¶161; Sempra, ¶416.
\textsuperscript{249}Sabahi, p.119; CMS, ¶403.
\textsuperscript{250}Enron, ¶385.
161. Having demonstrated a profitability track record, Vasiuki qualifies as a going concern and, in any case, its future profits are guaranteed due to Respondent’s contractual commitment. Specifically, with the minor exception of 2008, Claimant has been generating net income since 2004 and has been expecting steady profits for the duration of its licenses. Therefore, since DCF is a forward-looking method which applies when future profitability is established, it is also the appropriate method in the present dispute.

162. More precisely, Vasiuki’s revenues have significantly decreased due to the unlawful act. Consequently, DCF is applied here so as to calculate the Net Present Value (NPV) of the revenue losses incurred due to the deviation between the expected and the allowed FiT. This method was applied in a similar manner in the LG&E case, where the State’s “measures […] have resulted in a significant decrease in the Licensees’ revenues […].”

163. Subsequently, it is crucial to determine the valuation date and calculate the NPV using the appropriate discount rate. Claimant asserts that in cases of an unlawful act the valuation date should reflect the full reparation objective. In the present dispute, this can be achieved by using the date of the FiT reduction, (i.e. January 1, 2013), as the date of the valuation, since this was the starting-point for Claimant’s losses.

164. As far as the discount rate used in the DCF method, it is a bright line rule that the rate used to convert future cash flows to their present value should mirror the risk associated with these cash flows. In this vein, when risks associated with both debt and equity have been undertaken, the appropriate discount rate should be the Weighted Average Cost of Capital (WACC). The latter reflects the cost of obtaining both debt and equity, in order to express the value of the revenue losses on the valuation date.

165. Strictly following the aforementioned approach, Prof. Kovič has correctly used the 8% WACC in its expert report to discount future amounts. Indeed, Claimant’s reports leave no doubts: its projects are equally financed from both debt and equity and, therefore, WACC is the appropriate discount rate in the present calculation. More specifically, since its

251 Vasiuki Dataset, tab 3.
252 Chappuis/Nessi, pp.274-275,277; National Grid, ¶276; CMS, ¶416; Enron, ¶385; Siemens, ¶355.
253 LG&E, ¶¶48, 60.
254 Kantor, p.41.
255 Marboe Limits, p.751-753.
256 Facts, ¶35.
257 Kantor, p.143.
258 Kantor, p.159.
259 Kantor, p.160; Corporate Finance, p.414; CME, ¶164.
260 Kovič, ¶12.
261 Kovič, ¶12.
262 Vasiuki Dataset, tab 3; Vasiuki Dataset, tab 5.
incorporation, Vasiuki has been borrowing substantial sums of money to launch all its new projects and expand those already existing.\textsuperscript{263} This is evident from Vasiuki’s Income\textsuperscript{264} and Cash Flow statements,\textsuperscript{265} which show that Claimant is obliged to repay its debts and interest expenses throughout the years. Since Vasiuki has faced difficulties to honor its loans,\textsuperscript{266} it is clear that it would definitely take into account its debt obligations along with its shareholders’ demands, when allocating its future revenues.

166. On the contrary, Prof. Priemo uses the 12% cost of equity as the discount rate,\textsuperscript{267} which is utterly inappropriate. First of all, using the cost of equity constitutes a fundamental error, since it assumes that Claimant only bears the risk of equity repayment, completely disregarding Claimant’s debt obligations. Another misconception that led to the use of an inappropriate discount rate is the false assessment of Prof. Ković’s Report. Contrary to her allegations, rather than discounting cash flows to equity, Claimant’s expert discounts Vasiuki’s revenue losses, as explained above. The notion of revenue losses is by no means identical to that of cash flows to equity and, as a result, Respondent’s expert opinion is fundamentally flawed.

167. As if this was not enough, Prof. Priemo’s calculations are based on arbitrary and unfounded assumptions relating to Vasiuki’s capital structure. To elaborate, by using the cost of equity as the appropriate discount rate, she falsely assumes that Vasiuki only has common shareholders and excludes the possibility of also having preferred stock. More specifically, a company’s shareholders are classified in two categories, namely the common and the preferred ones.\textsuperscript{268} The key difference between the two, is that the preferred shareholders receive a fixed rate of return when it comes to the distribution of dividends, just as the debtholders receive interest.\textsuperscript{269} This, however, does not apply to common shareholders, who earn dividends.\textsuperscript{270} Due to this fact, preferred shareholders should be treated as creditors from an accounting perspective, commonly referred to as \textit{“debtors in disguise”}.\textsuperscript{271}

168. Therefore, Prof. Priemo arbitrarily uses the cost of equity as a discount rate. Not being aware of Vasiuki’s capital structure and by neglecting the existence of debt obligations, she falsely omits to include the cost of debt in the discounting process. Respondent should have

\begin{itemize}
\item \textsuperscript{263} PO2, ¶11; PO3, ¶19.
\item \textsuperscript{264} Vasiuki Dataset, tabs 3,6.
\item \textsuperscript{265} Vasiuki Dataset, tab 7.
\item \textsuperscript{266} PO3, ¶20.
\item \textsuperscript{267} Priemo, ¶9.
\item \textsuperscript{268} Corporate Finance, p.216.
\item \textsuperscript{269} Corporate Finance, p.218.
\item \textsuperscript{270} Corporate Finance, p.216.
\item \textsuperscript{271} Corporate Finance, p.219.
\end{itemize}
submitted to the Tribunal more evidence regarding the use of cost of equity as the appropriate
discounting rate and not proceed to unfounded and unjustified assumptions.

169. For the aforementioned reasons, DCF, using the WACC as discount rate, is the proper
way to calculate the NPV of Claimant’s revenue losses.

**B. Claimant is entitled to compensation of €2.1 million**

170. Vasiuki’s damages amount to €120.621 for the Alfa project and €123.261 regarding the
Beta project (a), €690.056 or alternatively €1.427.500 as far as the 12 new projects are
concerned (b), and €765.835 for the further development of its solar arrays (c).

   **a. Claimant’s Alfa and Beta projects have suffered revenue losses**

171. Claimant submits that, regarding project Alfa, this project was never granted the
beneficial FiT.\textsuperscript{272} It, therefore, suffered losses, since the denial of license forced it to operate at
a lower price.\textsuperscript{273} Prof. Priemo’s first argument, which focuses on project Alfa’s ineligibility to
be granted a license, finds no merit in the LRE, since the latter does not contain any such
limitation.\textsuperscript{274} Even the BEA invokes confidentiality reasons to cover up the arbitrariness of this
denial.\textsuperscript{275}

172. Furthermore, Alfa’s capacity has already increased by 2.2% and is expected to reach its
designed capacity, \textit{i.e.} 21% by 2013.\textsuperscript{276} The know-how acquired in the first years of operation
of the Alfa project and affirmed in Beta project’s undeniable success,\textsuperscript{277} is the key factor that
guarantees the progressive increase of Alfa’s capacity. Therefore, since project Alfa was
entitled to the 0.44 EUR/kWh license and will reach its design capacity by 2013, compensation
is due. The latter is calculated at €120,621 by applying the DCF and the WACC as the
appropriate discount rate.\textsuperscript{278}

173. What is more, Beta project, albeit having been granted the 0.44 EUR/kWh FiT, has been
deprived of its acquired right since January 1, 2013 due to the legislation amendment.\textsuperscript{279} The
revenue losses which are taken into account refer to those occurred during the license period.\textsuperscript{280}

\textsuperscript{272} Facts, ¶23.
\textsuperscript{273} Priemo, ¶5.
\textsuperscript{274} Facts, ¶22.
\textsuperscript{275} PO2, ¶16.
\textsuperscript{276} Kovič, ¶6.
\textsuperscript{277} Facts, ¶23; Priemo, ¶12.
\textsuperscript{278} Kovič, ¶7; Kovič-Annex 1(A).
\textsuperscript{279} Facts, ¶34.
\textsuperscript{280} Kovič-Annex 1(B).
As reaffirmed by Professor Borzu Sabahi, “the duration of the license determines the duration of forecast”, regarding compensation.\textsuperscript{281}

174. Therefore, Claimant respectfully concludes that the proper amount for compensation equals to €120,621 for the Alfa and €123,261 for the Beta project.

\textbf{b. Compensation is due for the 12 new projects}

175. In addition, Claimant’s losses for its 12 new projects should also be compensated. Based on the success of the Beta project\textsuperscript{282} and the reassurances of the LRE, Claimant decided to expand its initial investment.\textsuperscript{283} In fact, if Vasiuki was aware that its expectations would be distorted, it could have proceeded to a more profitable investment and not have applied and obtained licenses for 12 new PV projects. By the time of the violation, however, Claimant, relying on the licenses, had already borrowed money, bought land plots and paid considerable amounts for equipment,\textsuperscript{284} which was shipped on January 31, 2013.\textsuperscript{285}

176. Vasiuki has already proceeded to these expenditures, but the investment has not yet materialized. As accepted by the S.D. Myers Tribunal, “out of pocket expenses” which were used to support the investor’s initiative, constitute also part of the compensable amount.\textsuperscript{286} Claimant, therefore, requests for €690,056 which reflect the out-of-pocket reliance expenditures,\textsuperscript{287} since six months was not enough time for Claimant to either recoup its substantial investment or gain a profit.\textsuperscript{288}

177. In any case, even if Vasiuki proceeds to the development of the 12 projects, as it intends to,\textsuperscript{289} it should be compensated for its revenue losses. Despite Respondent’s allegations, the profitability of the 12 projects is in fact guaranteed. Claimant’s initial trial and error has led to the progressive improvement of project Alfa\textsuperscript{290} and the indisputable success of project Beta.\textsuperscript{291} Consequently, after the proven acquisition of know-how, the 12 projects are destined to succeed.

\textsuperscript{281} Sabahi, p.119.
\textsuperscript{282} Facts, ¶23; Priemo, ¶12.
\textsuperscript{283} Facts, ¶27.
\textsuperscript{284} Facts, ¶¶27,33,36.
\textsuperscript{285} PO2, ¶12.
\textsuperscript{286} S.D.Myers, ¶163.
\textsuperscript{287} Ković-Annex 2.
\textsuperscript{288} Ković, ¶9.
\textsuperscript{289} PO2, ¶26.
\textsuperscript{290} Ković, ¶6.
\textsuperscript{291} Facts, ¶23; Priemo, ¶12.
178. The calculation of the projects’ future inflows will therefore be based on the capacity of 21% and the expected 0.44 EUR/kWh FiT. As clearly established by the PSEG Tribunal:

“a self-contained and fully detailed contract can well determine a basis for the calculation of future profits”

179. The calculation of the compensation for the 12 projects once again follows the DCF method with a 8% discount rate. In this case, an amount of €1,427,500 is therefore due.

c. The option for investment expansion should be compensated

180. Claimant submits that it should be compensated for its future projects, which form an indispensable part of its overall investment operation.

181. Actually, Vasiuki invested in the PV sector for the first time in 2009 with its project Alfa, while two years later it used its acquired know-how to proceed to the creation of the successful project Beta. Based on the success of Beta project, the company had taken the first steps in order to launch 12 more projects until 2014. This progressive development of the solar investment along with the witness statement of a local manager prove that Vasiuki would expand even further, by launching new developments on a biannual basis.

182. In particular, Vasiuki’s plan was carefully drafted from the very beginning. Claimant intended to create “clustered farms”, consisting of 12 generators connected to a single transmission. The investment that began with 12 projects in 2012 would evolve into a massive-scale concept consisting of six dozens of projects by 2023. The debt financing of this composite operation has in fact already begun and will continue in the future. More specifically, on September 1, 2011 Vasiuki borrowed substantial sums of money whilst acquiring multiple suitable land plots and obtaining construction permits during the same...
year. To conclude, what Prof. Priemo calls “unsupported speculation” is in fact an indispensable part of an investment already underway.

183. Conclusively, this option for expansion should be considered as a part of the already established investment. Therefore, damages resulting from the reduced feed-in tariff concerning the future expansions are calculated in the amount of €765,835, by applying the DCF method and an 8% discount rate.  

C. The Tribunal should award compound interest of 8%

184. Finally, pursuant to Article 38 ILC, the Tribunal should award interest on the amount payable in order for full reparation to be achieved. The Tribunal’s power to award interest is also underlined by the LCIA rules. In addition, both pre-award and post-award interest should be awarded, as illustrated by steady jurisprudential practice.

185. Pre-award interest should be ordered, since the injured party must be compensated from the date that the financially assessable damage occurs. Furthermore, in order to avoid the phenomenon of invalid round trips, the pre-award interest rate payable should coincide with the discount rate. This is necessary because, when discounting the cash flows using an interest rate, the value of money of a certain period of time is estimated. At the same time, when awarding interest, the value of money is again calculated for the exact same period of time. It is, thus, concluded that the rate for both discounting and awarding interest should be the same. Consequently, since a discount rate of 8% is used, an 8% interest rate should be applied as well.

186. As far as the type of interest is concerned, Claimant submits that compound interest should be awarded by the Tribunal. Compound interest is no longer an exception but rather the rule in international arbitral practice, better reflecting contemporary financial practice. The reason behind this position is once again the time value of money and the lost chance of the injured party to invest the compensable amount receiving compound interest.

308 Priemo, ¶14.
309 see Section V(A).
310 ILC, Art. 38.
311 Siemens, ¶396; LG&E, ¶58; ILC Commentary, p.107.
312 LCIA, Art.26(4).
313 El Paso, ¶747; ADC, ¶¶521-522; PSEG, ¶341.
314 Marbeo, p.391.
315 Abdala/Zadicoff/Spiller, p.4.
316 Abdala/Zadicoff/Spiller, pp.8-10.
317 Vivendi, ¶2.4; Guaracachi, ¶616; Tecmed, ¶196; MTD, ¶251; Siemens, ¶401.
318 Veteran Petroleum, ¶1670; LG&E, ¶103.
187. Since Claimant would have had the chance to utilize the sums of money that Respondent deprived it of by receiving compound interest, it is concluded that compound interest should be awarded. According to international arbitral jurisprudence, interest should be compounded either on a monthly basis\textsuperscript{320} or semi-annually.\textsuperscript{321}

188. As far as post-award interest is concerned, it functions as an effective incentive for Respondent to comply without delay with the award.\textsuperscript{322} In addition, it has been suggested both in jurisprudence\textsuperscript{323} and doctrine\textsuperscript{324} that the rate of the post-award interest should be equal to the pre-award rate, which in \textit{casu} is 8%.

189. To conclude, Claimant urges the Tribunal to award compensation amounting to €2.1 million and a compound interest of 8%, so as to achieve the full reparation standard.

\begin{flushright}
\textsuperscript{320} ADC, ¶522; Occidental, ¶849.
\textsuperscript{321} Enron, ¶452; Sempra, ¶486; Lemire, ¶361.
\textsuperscript{322} Veteran Petroleum, ¶1657; Marboe, p.327.
\textsuperscript{323} Veteran Petroleum, ¶1672; PSEG, ¶¶341,351.
\textsuperscript{324} Wälde/Sabahi, p.1109.
\end{flushright}
PRAYER FOR RELIEF

190. Claimant respectfully requests this Tribunal to find that:

(1) It has jurisdiction over the present dispute;
(2) The submitted claims are admissible;
(3) Respondent’s measures violated the FET standard, under Article 2(2) BIT;
(4) Respondent is not exempted from violating Article 2(2) BIT;
(5) Restitution should be awarded;
(6) Alternatively, the Tribunal should award compensation of €2.1 million.

Respectfully Submitted on September 19, 2015

By

Team Fleischhauer
On Behalf of Claimant
Vasiuki LLC