LONDON COURT OF INTERNATIONAL ARBITRATION

Vasiuki LLC
(Claimant)

v.

Republic of Barancasia
(Respondent)

MEMORIAL FOR CLAIMANT
TABLE OF CONTENTS

LIST OF AUTHORITIES ........................................................................................................ v
LIST OF LEGAL RESOURCES .............................................................................................. x
LIST OF ABBREVIATIONS ...................................................................................................... xvi
STATEMENT OF FACTS ......................................................................................................... 1
ARGUMENTS .......................................................................................................................... 4
ARGUMENTS ON JURISDICTION .......................................................................................... 4

I. BC-BIT REMAINS VALID ................................................................................................. 4
   1. Accession to the EU does not supersede the BC-BIT ................................................... 4
      A. The subject matter of the BIT and TFEU are not the same. ...................................... 5
      B. There is no common intent to terminate .................................................................. 7
      C. The BC-BIT and TFEU are not incompatible ............................................................. 9
   2. The BC-BIT was not validly terminated ..................................................................... 10
      A. Termination was not compliant with Article 13 of the BC-BIT .................................. 10
      B. Termination of the BC-BIT was done unilaterally .................................................... 11
      C. In any case, Article 65 of the VCLT was not observed ............................................ 12
   3. In any event, BC-BIT’s sunset clause in Article 13(3) applies .................................... 13

II. THE TRIBUNAL HAS JURISDICTION RATIONE MATERIAE ......................................... 13
   1. The PVPs are protected investments ........................................................................ 13
      A. The PVPs are covered under the BC-BIT ............................................................... 13
      B. The licenses issued to Claimant are protected under the umbrella clause of the BC-BIT ........................................................................................................................................................................ 14

III. THE CLAIMS ARE ADMISSIBLE BECAUSE THE TRIBUNAL DOES NOT HAVE TO DEFER JURISDICTION TO THE EUROPEAN COURT JUSTICE (ECJ) ....... 15
   1. The ECJ is not the sole adjudicator over the claim ..................................................... 16
      A. The ECJ does not have exclusive jurisdiction ......................................................... 16
      B. In any case, the requisites for the ECJ to exercise interpretative monopoly have not been met ................................................................................................................. 18
   2. The Arbitral Tribunal is empowered to apply EU law in its decision ........................ 19
      A. The Tribunal can apply EU law .............................................................................. 19
      B. The Parties consented to the Tribunal’s power to apply EU law .............................. 20

ARGUMENTS ON MERITS .................................................................................................. 21

IV. RESPONDENT’S MEASURES RELATING TO THE LRE AMENDMENT BREACHED FET OF THE BC-BIT ......................................................................................... 21
1. Respondent’s amendment of LRE’s Article 4 frustrated Claimant’s legitimate expectation. ................................................................. 22
2. The Respondent’s failure to provide a “stable” legal framework frustrated legitimate expectations ........................................................................................ ........................................ 23
3. Denial of Alfa’s license was unreasonable and arbitrary .......................................................................................................................... 23
4. Respondent failed to satisfy the requirement of due process .................................................................................................................. 25
5. The violation of Claimant’s right to FET is akin to an Indirect Expropriation. ...... 26
V. RESPONDENT MAY NOT RELY ON THE NECESSITY DEFENSE IN ORDER TO ESCAPE LIABILITY FOR ITS BIT VIOLATIONS. ................................................................. 27
1. Respondent does not fall within the scope of Article 11 of the BIT. .............. 27
   A. The Respondent may not perform unilateral actions under the BIT. .......... 28
2. Respondent’s actions are not excused by the Customary International law defense of Necessity .................................................................................................................................................. 29
   A. Respondent failed to satisfy the “only means” element ................................ 30
   B. There was no grave and imminent peril .......................................................................................................................... 31
   C. Respondent Contributed to the Situation .......................................................................................................................... 32
   D. Respondent’s measures impair an essential interest of Cogitatia, and the international community. ................................................................. 33
3. The Respondent is not exempt under FCC .......................................................................................................................... 34
ARGUMENTS ON REMEDIES .......................................................................................................................................................... 36
VI. RESPONDENT CAN BE ORDERED TO CONTINUE PAYING THE PRE-2013 TARIFF .................................................................................................................................................. 36
1. The Tribunal is empowered to order payment of the pre-2013 tariffs. ............. 36
   A. International law empowers the Tribunal to order restitution. ................. 37
   B. The Parties have empowered the Tribunal. .................................................. 38
2. An order for the payment of the pre-2013 tariffs is consistent with international law. .................................................................................................................................................. 39
   A. This form of restitution is allowed under international law. ....................... 39
VII. CLAIMANT’S BASIS FOR CLAIMING AND QUANTIFYING COMPENSATION ARE APPROPRIATE. .................................................................................................................. 40
1. The Alfa Project is entitled to EUR 120, 621 .................................................................................................................................................. 42
2. Claimant’s calculations for damages on land and equipment for the 12PVPs are accurate .................................................................................................................................................. 43
3. Damages for Beta, and the 12 PV projects should be computed based on WACC to accurately reflect all costs. .................................................................................................................................................. 45
4. WACC must also be used to compute interest rate. ........................................... 47

5. Claimant should be compensated for the loss of its expected profits from its planned development of solar arrays. ................................................................. 48

PRAYER FOR RELIEF .......................................................................................... 49
# LIST OF AUTHORITIES

## CITED AS  FULL CITATION

### ARTICLES AND JOURNALS

<table>
<thead>
<tr>
<th>Author(s)</th>
<th>Citation</th>
</tr>
</thead>
<tbody>
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</tr>
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<td>Author(s)</td>
<td>Title</td>
</tr>
<tr>
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</tr>
</tbody>
</table>
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AKEHURST


ANTHONY/HAWKINS/MERCHANT


BLACK


BRIGHAM/HOUSTON


CORTEN/KLEIN


CRAWFORD


DUBUISSON


DOLZER/SCHREUR, 1ST ED.


DOLZER/SCHREUR, 2ND ED.


DUGAN/WALLACE/RUBINS/SABAHI


FITZMAURICE

Sir Gerald Gray Fitzmaurice

HORN


KANTOR

MANKIW  

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MISCELLANEOUS  

ICCA  

IFRS  

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REQUEST to the Court for an Opinion pursuant to Article 218(11) TFEU, made on 6 July 2009 by the Council of the European Union
Sweden Sverige

UCSA

UNCTAD IIA ISSUES NOTE No. 2
# LIST OF LEGAL RESOURCES

## STATUTES AND TREATIES

<table>
<thead>
<tr>
<th>CITED AS</th>
<th>FULL CITATION</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>ECHR, Protocol 1</strong></td>
<td>Council of Europe, Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (March 20, 1952)</td>
</tr>
<tr>
<td><strong>LRE</strong></td>
<td>The Republic of Barancasia Law on Renewable Energy (May 1, 2010)</td>
</tr>
<tr>
<td><strong>ECHR, Protocol 1</strong></td>
<td>Council of Europe, Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (March 20, 1952)</td>
</tr>
<tr>
<td><strong>GATT</strong></td>
<td>General Agreement on Tariffs and Trade (January 1, 1948)</td>
</tr>
<tr>
<td><strong>NAFTA</strong></td>
<td>North American Free Trade Agreement (January 1, 1994)</td>
</tr>
<tr>
<td><strong>Netherlands-Czech Republic BIT</strong></td>
<td>An Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, (April 29, 1991)</td>
</tr>
</tbody>
</table>
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<table>
<thead>
<tr>
<th>Case</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
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</tr>
<tr>
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<td>Enron Corporation v. Argentine Republic, Jurisdiction, ICSID CASE No. ARB/01/3 (January 14, 2004)</td>
</tr>
<tr>
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</tr>
<tr>
<td>Case Name</td>
<td>Details</td>
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<td>Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award (October 11, 2002)</td>
</tr>
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<td>MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award (May 21, 2004)</td>
</tr>
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</tr>
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</tr>
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<table>
<thead>
<tr>
<th>Case Title</th>
<th>Description</th>
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</thead>
<tbody>
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</tr>
<tr>
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</tr>
<tr>
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</tr>
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</tr>
<tr>
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</tr>
<tr>
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</tr>
<tr>
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</tr>
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Martini case  Italy v. Venezuela, American Journal of International Law, Vol. 25, 1931


MISCELLANEOUS


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<table>
<thead>
<tr>
<th>CITED AS</th>
<th>FULL CITATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>ARSIWA</td>
<td><em>ILC Articles on the Responsibility of States for Internationally Wrongful Acts</em></td>
</tr>
<tr>
<td>BC-BIT</td>
<td><em>Barancasia-Cogitatia Bilateral Investment Treaty</em></td>
</tr>
<tr>
<td>BEA</td>
<td><em>Barancasia Energy Authority</em></td>
</tr>
<tr>
<td>BIT</td>
<td><em>Bilateral Investment Treaty</em></td>
</tr>
<tr>
<td>COE</td>
<td><em>Cost of Equity</em></td>
</tr>
<tr>
<td>DCF</td>
<td><em>Discounted Cash Flow</em></td>
</tr>
<tr>
<td>ECJ</td>
<td><em>European Court of Justice</em></td>
</tr>
<tr>
<td>ECT</td>
<td><em>Energy Charter Treaty</em></td>
</tr>
<tr>
<td>EU</td>
<td><em>European Union</em></td>
</tr>
<tr>
<td>FCC</td>
<td><em>Fundamental change of circumstances</em></td>
</tr>
<tr>
<td>FDI</td>
<td><em>Foreign Direct Investment</em></td>
</tr>
<tr>
<td>FET</td>
<td><em>Fair and Equitable Treatment</em></td>
</tr>
<tr>
<td>FiT</td>
<td><em>Feed-in Tariff</em></td>
</tr>
<tr>
<td>ILC</td>
<td><em>International Law Commission</em></td>
</tr>
<tr>
<td>LCIA</td>
<td><em>London Court of International Arbitration</em></td>
</tr>
<tr>
<td>LRE</td>
<td><em>Law on Renewable Energy</em></td>
</tr>
<tr>
<td>NPV</td>
<td><em>Net Present Value</em></td>
</tr>
<tr>
<td>PPA</td>
<td><em>Purchase Power Agreements</em></td>
</tr>
<tr>
<td>PVP</td>
<td><em>Photo Voltaic Projects/ Photo Voltaic Power plants</em></td>
</tr>
<tr>
<td>Record</td>
<td><em>2015 FDI Moot Problem</em></td>
</tr>
<tr>
<td>TFEU</td>
<td><em>Treaty on the Functioning of the European Union</em></td>
</tr>
<tr>
<td>VCLT</td>
<td><em>Vienna Convention on the Law of Treaties</em></td>
</tr>
<tr>
<td>WACC</td>
<td><em>Weighted Average Cost of Capital</em></td>
</tr>
</tbody>
</table>
STATEMENT OF FACTS

1. Vasiuki LLC, a limited liability corporation incorporated under the laws of is the Claimant in this dispute. It was a “turnkey” provider of engineering and plant construction, but subsequently expanded its operations in renewable energy activities. Claimant operates 14 photovoltaic power plants (“PVP”) in Barancasia.

2. The Respondent is the Republic of Barancasia. Respondent enacted legislation that changed the guaranteed feed-in tariff (“FiT”) to renewable energy providers, including Vasiuki’s projects. The original 0.44EUR/kWh was reduced to 0.15EUR/kWh, causing financial losses to its solar energy providers.

The Barancasia-Cogitatia BIT and Accession to the European Union


4. In June 2007, Barancasia informed Cogitatia of its intention to terminate the BC-BIT. Cogitatia acknowledge receipt of the notice, but there was no official response. In 2008, Barancasia removed the BC-BIT from the section listing valid and binding international agreements in its Ministry of Finance website.

Barancasia’s Law on Renewable Energy (“LRE”) and the PVP

5. Starting in 2007, Barancasia has endeavored to meet the climate and energy targets set by the EU. As part of the plan to meet the EU climate and energy package, Barancasia began to promote generous government subsidies to renewable energy providers.

6. In May 2009 that Vasiuki started “Alfa”, an experimental solar project. Alfa became operational after it became connected to the grid in January 2010. Project Alfa was
operating at a heavy loss due to defects in the installation, delays, and budget overruns. However, when Barancasia enacted its Law on Renewable Energy (“LRE”) in early 2010, Vasiuki’s managers saw this as an opportunity to help Alfa survive.

7. Barancasia adopted the LRE in May 2010, aimed at promoting the production of energy from renewable sources with state subsidies until it reaches its target of not less than 20% of electricity is generated from renewable sources. To date, Barancasia has not reached this target. The LRE also encouraged the development of PVPs by fixing general “FiTs” for providers who obtain a license from the Barancasia Energy Authority (“BEA”). The LRE guaranteed that FiT in place at the time of the issuance of the license would be applicable for 12 years.

8. On July 1, 2010, the BEA announced that the FiT would be at 0.44EUR/kWh. Vasiuki tried to apply for a license for Alfa but this was denied, as the FiT would only be available for new projects. This limitation was not stated in the LRE. However, Vasiuki successfully obtained a license with the 0.44EUR/kWh FiT for its second project, “Beta”. Then on July 12, 2012, Vasiuki was able to get licenses for its additional 12 PVPs under the 0.44EUR/kWh FiT.

9. The development of a groundbreaking technology in 2011 resulted in a substantial reduction of development cost and a dramatic increase in profitability. This technology was not compatible with older projects; but due to its promising profitability, brought in over 7000 applications for licenses to develop PVPs, Vasiuki included. 6000 licenses were approved. Vasiuki was applying for licenses for 12 more PVPs.

10. The LRE had created a “solar bubble”, and along with it came the fear that guaranteed profits for 12 years would amount to an unfair windfall. Since the renewable energy support system was financed from the state budget, the scheme would demand a higher share than other public financial allocations.
11. On January 3, 2013, without proper consultation with its investors, Barancasia amended Article 4 of its LRE, providing, among others, for an annual review of its FiT. It also reduced the FiT from 0.44EUR/kWh to 0.15EUR/kWh and made it applicable retroactively.

12. At the time of the amendment, Vasiuki had incurred a considerable amount of credit for the development of its 12 new PVPs.

**Proceedings before the London Court of International Arbitration**

13. On November 2, 2014, Vasiuki commenced arbitral proceedings before the London Court of International Arbitration (“LCIA”) pursuant to Article 8(2) of the Barancasia-Cogitatia BIT.
ARGUMENTS

ARGUMENTS ON JURISDICTION

14. Claimant, presents a *prima facie* treaty claim. This Tribunal’s jurisdiction is outlined in Article 8(2)(d) of the BC-BIT, which states that the settlement of any dispute between an investor of one Contracting Party, and another Party may be submitted to the LCIA for arbitration.

15. This Tribunal has jurisdiction over the claims because: (I) the BC-BIT remains valid despite of accession to EU and Respondent’s unilateral termination; (II) it has jurisdiction *ratione materiae*; and, (III) the deference of the claims to the European Court of Justice (“ECJ”) is not required.

I. *BC-BIT REMAINS VALID.*

16. The accessions of Cogitatia, Claimant’s country of incorporation, and Respondent to the EU, does not affect the existence of BC-BIT. The treaty remains in force and effect because there is no cause for its termination. Claimant submits that: (1) The TFEU did not supersede the BC-BIT; (2) Respondent’s unilateral termination of the BC-BIT is invalid; and, (3) in any event, the investments are protected by a sunset clause.

1. **Accession to the EU does not supersede the BC-BIT.**

17. While Claimant does not deny that both State-Parties to the BC-BIT acceded to the EU, it contends that Article 59 is inapplicable. Article 59 requires three elements in order for an earlier treaty to be terminated by a later treaty, between the same parties; (A) that they deal with the same subject matter, (B) there is a common intent to terminate, and (C) the treaties are incompatible.

---

1 BC-BIT, Article 8(2)(d)
A. The subject matter of the BIT and TFEU are not the same.

18. Article 59 contemplates tacit abrogation, and the terms ‘treaty relating to the same subject matter’ must be strictly interpreted. The requisite of ‘the same subject matter’ is fulfilled if the object of the treaties are identical and presents a comparable degree of generality.

19. The Eastern Sugar Tribunal analyzed that the Netherlands-Czech Republic BIT and the TFEU did not involve the same subject matter. The BIT grants specific rights for the protection of investments at the very moment they are made, while the TFEU provides for general economic guarantees to member states. The TFEU’s objective is to create a common market between all the EU member-States, while the BIT aims to provide for specific guarantees for the investor’s investment in the host country pursuant to a bilateral agreement.

20. In Eureko, Claimant argued that the term “relating to the same subject matter” must be interpreted strictly and narrowly. The Tribunal stated that even if the TFEU offers some investment protection, this does not mean that the BIT and the TFEU relate to the same subject matter. The fact that one claim does not lie within the protections afforded by TFEU concludes that the BIT offers a wider protection.

21. The Oostergetel Tribunal supported this view in deciding the termination of the Netherlands-Slovak Republic BIT. The Tribunal opined that as the TFEU stands, including Article 206 and 207, the requirement of “same subject matter” has not been met because there is no complete identity in the overall objectives of the treaties.

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2 Dubuisson par.23, p.1335
3 Id. par.24
4 Id. par.24
5 Eastern Sugar BV v. Czech Republic, par.159
6 Id. par.159-166
7 Id. par.79
8 Id. par.249
9 Id. par.259
10 Oostergetel v. Slovak Republic, par.79
22. Here, the BC-BIT, provides for specific rights to an investor including fair and equitable treatment (“FET”), full protection and security, national and most-favored nation treatment, compensation for losses, expropriation, and free transfer of payment. The TFEU provides for the following economic rights to citizens: freedom of establishment, non-discrimination, free movement of capital, and expropriation. These rights are not the same nor overlap with one another.

23. The rights under the BC-BIT seek to encourage and create favorable conditions for investors of Barancasia and Cogitatia, within their territory. However, the rights under the TFEU eliminates obstacles to capital movements and prohibits adverse post-investment measures.

24. A FET violation claim, is a right given to Claimant under the BC-BIT. FET is different from non-discrimination. There is no identity that would lead to res judicata. The BC-BIT offers a broader FET protection, not entirely covered by a prohibition on discrimination. The principles of proportionality, legitimate expectation, and of procedural fairness are not yet established in the TFEU.

25. If this court decides to terminate the BC-BIT, Claimant’s only recourse would be the national courts, applying national laws and EU laws on non-discrimination. This Tribunal's jurisdiction is different because it is an international tribunal, applying specific

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11 BC-BIT, Art.2(2)  
12 Id.  
13 Id., Art.3(1)  
14 Id., Art.4  
15 Id., Art.5  
16 BC-BIT, Article 6  
17 TFEU, Article 49  
18 Id., Art.18  
19 Id., Art.63  
20 ECHR, Protocol 1  
21 BC-BIT, Article 2(1)  
22 TFEU, Article 63  
23 Eureko v. Slovak Republic, par.250  
24 Id. par.254  
25 Id. par.250  
26 TFEU, Article 288
laws under the BC-BIT. The fact that this is a right that can only be exercised by the Claimant under BC-BIT, means that a wider protection is given.

26. Also, full protection unlike freedom of establishment subsists for as long as the investment remains in place, no matter the length of establishment and whether or not the treatment is discriminatory.\(^{27}\) Expropriation under the BC-BIT includes assets and investments; while under the TFEU, it only entails the narrower concept of possessions and property.\(^{28}\)

27. Further, TFEU’s Article 206 and 207 inclusion of FDI in the EU common commercial policy does not create an identical objective with the BC-BIT. The objective of these articles is to grant the EU a shared right with member-States to regulate FDIs for a stable internal market.\(^{29}\) The BC-BIT’s objective is the promotion and reciprocal protection of FDI to stimulate business initiative between two member-States.\(^{30}\) In any case, it is doubtful if member-States have come to an agreement about the inclusion of Intra-EU FDIs in these articles and it has never been applied to such claims.\(^{31}\)

28. Thus, specific rights under the BC-BIT are not replicated under the TFEU. Even if some rights under the TFEU share similar characteristics with rights under the BC-BIT, there is no complete overlap because the principles do not relate to the same subject matter.

B. **There is no common intent to terminate.**

29. This subjective criteria requires that the intention of the parties to terminate the earlier treaty is expressed or established by other means.\(^{32}\) There can be no presumption of termination when there is a presence of certain clauses in the earlier treaty.\(^{33}\)

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\(^{27}\) Eureko v. Slovak Republic, par.260  
\(^{28}\) Id par.261  
\(^{29}\) TFEU, Article 2  
\(^{30}\) BC-BIT, Preamble  
\(^{31}\) Commission v. Sweden; Commission v Finland; Commission v Austria  
\(^{32}\) Dubuisson, par.35, p.1339  
\(^{33}\) Id. par. 36
30. The *Eastern Sugar* Tribunal stated that there is nothing in the TFEU that can be taken to imply intent to terminate the *Netherlands-Czech Republic BIT*, and the fact that the BIT was still listed as one of the international treaties to which they are a Party contradicts the assertion. Thus, the novel question that the BIT was implicitly superseded by accession cannot be granted.

31. The Tribunal opined that termination could not be argued due to Article 3.3 of that BIT. This states that nothing should be construed to oblige either Party to accord preferences similar to those granted to investors of a third State through membership to any existing or future economic unions, or similar institutions.

32. The *Oostergetel* Tribunal provided a similar reasoning when it took notice of an identical provision in the *Netherlands-Slovak Republic BIT*. The Tribunal concluded that in acceding to the EU, Parties expressed their consent to be bound by the TFEU, and membership to the EU is without prejudice to the continued application and validity of the existing BIT.

33. Nothing in the TFEU can be taken to imply a common intent to terminate the BC-BIT. While Respondent may have taken down the BC-BIT from its Ministry of Finance website, Cogitatia did not do the same. Thus, there is no common intent to terminate the BC-BIT between the State-Parties.

34. Article 3(3) of the BC-BIT expresses a similar provision by stating that there is no obligation to extend to the investors and their investments the benefit of any treatment, preference or privilege extended by virtue of an international agreement to any customs

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34 Eastern Sugar BV v Czech Republic, par.154
35 Id. par.155
36 Id. par.157
37 Oostergetel v. Slovak Republic, par.81
38 Id. par.83
39 Records, p.20, par.11
40 Record, p.57, par.3
union or free trade area. Thus, it cannot be said that the BC-BIT was terminated by the TFEU through the VCLT’s Article 59.

C. The BC-BIT and TFEU are not incompatible.

35. Incompatibility is an objective criterion for the termination of an earlier treaty by a later treaty. Article 59(1)(b) of the VCLT states:

provisions of the later treaty are so far incompatible with those of the earlier one that that the two treaties are not capable of being applied at the same time.

Fitzmaurice indicated that it is the impossibility to apply the two treaties simultaneously that constitutes the decisive criterion of incompatibility.

36. The Eastern Sugar Tribunal viewed that the Netherlands-Czech Republic BIT provides for arbitration of mixed or diagonal type between an investor and the host state that is not guaranteed under EU law. That the BIT gives rights to Dutch investors that it does not give to other EU countries and investors do not make them incompatible with EU law on non-discrimination.

37. The Eureko Tribunal added that incompatibility could only arise if there is a law that forbade arbitration, not if the State simply had the freedom to arbitrate. Eilmansberger reinforced this, stating that irrespective of a violation of relevant BIT guarantees, both investor and the EU can initiate proceedings before national courts or the ECJ; the investor-state dispute mechanism under the BIT is neither prohibited, nor excluded by the TFEU.

41 Dubuisson, par.38, p.1341
42 Fitzmaurice, p.44
43 Eastern Sugar BV v. Czech Republic, par.164
44 Id. par.171
45 Id. par.258
46 Eilmansberger, p.406
38. It is possible to apply the BC-BIT and the TFEU simultaneously. In fact, the two remedies can proceed independently with one another.\textsuperscript{47}

39. The fact that Cogitatian investors are granted the option of availing arbitration in dispute settlement does not make the BC-BIT incompatible with the TFEU. Barancasia should extend the same right to investors of other EU member-States;\textsuperscript{48} its refusal to extend the same constitutes a violation of the TFEU, not the mere existence of such treatment in the BC-BIT.\textsuperscript{49} Thus, the investor-state dispute settlement under the BC-BIT is not incompatible with the TFEU.

2. The BC-BIT was not validly terminated.

40. VCLT’s Article 54 states that treaty termination takes place in conformity with its provisions, or at any time by consent of all parties after consultation.\textsuperscript{50} The above provision reaffirms the rule of \textit{pacta sunt servanda}\textsuperscript{51} in governing the termination of treaties.\textsuperscript{52} Claimant submits that the alleged termination of the BC-BIT (A) did not comply with Article 13, and (B) was done unilaterally by Respondent. (C) In any case, VCLT Article 65 was not observed.

A. Termination was not compliant with Article 13 of the BC-BIT.

41. VCLT’s Article 54(a) provides that States cannot release themselves from treaty obligations at will.\textsuperscript{53} The ILC states that when a treaty is terminated through its provisions, it is independent from the will of the parties, and will be based on the interpretation of said treaty.\textsuperscript{54}

\textsuperscript{47} Eilmansberger, p.406
\textsuperscript{48} Id. p.402
\textsuperscript{49} Id. p.407
\textsuperscript{50} Corten/Klein, par. 4, p.1238
\textsuperscript{51} Nossum, p.102
\textsuperscript{52} Id, par. 4, p.1238
\textsuperscript{53} Akehurst, p.987
\textsuperscript{54} Plender, p.137
42. The United Nations Conference on Trade and Development stated that a common approach in BITs is to specify a period for its initial duration. The treaty cannot be terminated before the expiration of this term, unless there are exceptional circumstances. Most BITs specify that at the end of the fixed period, each party may terminate the treaty, usually with one year’s written notice. If the agreement is not terminated at the end of the initial fixed term, it shall continue to be in force. 55

43. In Oostergetel, the Tribunal stated that in order to terminate the treaty upon accession to the EU, it should be done in accordance with the procedure set out in the BIT. 56 BC-BIT’s Article 13(1) provides that its date of entry into force enters is the date of the last written notification. 57 Here, the last written notification was on August 1, 2002. Thus, that is also the date of entry into force. 58

44. Termination of the BC-BIT can only be done according to Article 13(2):

this agreement shall remain in force for a period of ten years. Thereafter, it shall remain in force until the expiration of a twelve month period from the date either Contracting Party notifies the other in writing of its intention to terminate the Agreement. 59

Following the provisions of Article 13 in good faith, the BC-BIT can only be terminated after July 31, 2012. A unilateral termination cannot be effective as of June 30, 2008 as this is contrary to Article 13. Hence, there is no termination in accordance to the BC-BIT.

B. Termination of the BC-BIT was done unilaterally.

45. VCLT’s Article 54(b) 60 states that termination of a treaty takes place by according to two conditions: consent of all parties to the withdrawal, and consultation. 61

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55 UNCTAD, IIA Issues Note No. 2, December 2010  
56 Oostergetel vs. Slovak Republic, par.96  
57 BC-BIT, Article 13(1)  
58 Record, p.57  
59 BC-BIT, Article 13(2)  
60 VCLT, Article 54(b)  
61 Corten/Klein, par. 5, p.1238
46. While Respondent consulted with Cogitatia regarding the termination of the BC-BIT through notification, Cogitatia did not give its consent. Cogitatia’s reply\(^{62}\) to Respondent as a matter of diplomatic courtesy should not be construed as consent on its part. If consent was given, Respondent would not have constantly insisted on a more affirmative reply to the termination note.\(^{63}\) Nowhere in that acknowledgement did Cogitatia accept the claim of Respondent for termination of the BC-BIT.

47. Thus, termination of the BC-BIT under Article 54(b) cannot be successfully invoked based only on the alleged consultation and tacit consent of Cogitatia.

C. In any case, Article 65 of the VCLT was not observed.

48. Article 65(2) provides that the notifying party carries out the proposed measure in accordance with Article 67.\(^{64}\) Article 67(2) states that any act terminating a treaty shall be carried out through an instrument communicated to the other parties.\(^{65}\)

49. On June 29, 2007, Respondent sent a notification\(^{66}\) to Cogitatia of its intention to terminate the BC-BIT.\(^{67}\) While Respondent did inform Cogitatia of its initial intent to terminate the BC-BIT, this hardly operates as an instrument for final termination under international law. No second notice was made to finalize the termination. Without a proper second notice, it would be futile to discuss whether the requirements under international law were complied with. This does not satisfy the requirement in Article 65(2)\(^{68}\), because this is merely an initial notification. Thus, the BC-BIT was not validly terminated under international law.

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\(^{62}\) Record, p. 40  
\(^{63}\) Record p. 21, par.24; Record p. 22, par.31  
\(^{64}\) VCLT, Article 65(2)  
\(^{65}\) Id., Article 67(2)  
\(^{66}\) Record, p.38  
\(^{67}\) Record, p.20  
\(^{68}\) Supra 64
3. **In any event, BC-BIT’s sunset clause in Article 13(3) applies.**

50. The BC-BIT provides for a sunset provision which extends the application of the BC-BIT to investments made prior to the termination of the BC-BIT. Under Article 13(3) of the BC-BIT, investments made prior to the termination of this Agreement, shall continue to be protected for a period of ten years from its termination. This provision extends protection to all investments made prior to termination until July 31, 2022. Alfa project was made operational on January 1, 2010, Beta project became operational on January 30, 2011, and the 12 other photovoltaic projects obtained licenses on April 1, 2012. Thus, even if the BC-BIT were terminated on July 31, 2012, all of Claimant’s investments would still remain protected until July 31, 2022.

II. **THE TRIBUNAL HAS JURISDICTION RATIONE MATERIAE.**

51. Claimant submits that the present dispute deals with (1) photovoltaic projects that are investment under the BC-BIT, (2) violations of the BC-BIT attributed to the state of Respondent.

1. **The PVPs are protected investments.**

52. The Tribunal has jurisdiction *ratione materiae* over the claims because (A) they involve investments covered under the BC-BIT, and (B) the Claimant’s licenses are protected under an umbrella clause.

   A. **The PVPs are covered under the BC-BIT.**

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69 Record, p.21, par.13
70 Record, p.21
71 Record, p.22
53. Under the BC-BIT, investments include claims to any contract that has a financial value associated with an investment,\textsuperscript{72} and any right conferred by laws or under contract and any licenses and permits, pursuant to laws.\textsuperscript{73}

54. The Energy Charter Treaty ("ECT") defines investments as contractual claims that have an economic value, and are associated with investments,\textsuperscript{74} as well as “a right conferred by law or contract or by virtue of any licenses and permits granted pursuant to law.”\textsuperscript{75}

55. In \textit{Electrabel}, the Tribunal was asked to exercise jurisdiction over investments made to the Dunamenti power plant. Under Hungarian law, a Purchase Power Agreement (PPA) was concluded between the owner and operator of the power plant, and a state entity, for FiTs.\textsuperscript{76} The Tribunal stated that the PPA constitutes an investment representing a contractual claim conferred by law, with an economic value associated with an investment, under the ECT.\textsuperscript{77}

56. Respondent issued licenses for Claimant’s Alfa, Beta, and the 12 PVPs. Thus, they are classified as investments within the definition of the BC-BIT, and fall under its protection.

\textbf{B. The licenses issued to Claimant are protected under the umbrella clause of the BC-BIT.}

57. The BC-BIT’s Article 2(3) states that, “each contracting party shall observe any other obligation it may have with regard to a specific investment.” The \textit{Noble Ventures} tribunal clarified that States may agree to include a breach of its contractual obligation towards a

\textsuperscript{72} BC-BIT, Art.1(c)
\textsuperscript{73} Id. Art.1(e)
\textsuperscript{74} ECT, Art. 1(6c)
\textsuperscript{75} Id. Art. 1(6f)
\textsuperscript{76} Electrabel v Hungary par.2.6
\textsuperscript{77} Id. par.5.52-5.57
private investor, as being “internationalized” to the effect of incurring international responsibility under the BIT.78

58. In Electrabel, a unilateral decrease of the financial benefits in the PPA triggered the umbrella clause under the ECT.79 The Tribunal stated that the PPA was considered to be a specific obligation that Hungary had taken with respect to the Dunamenti power plant, to provide a fixed FiT in consideration of the supply of electricity provided.

59. The licenses issued under the LRE represent a specific contractual obligation of Barancasia to Claimant for the payment of 0.44 EUR/kWh FiTs,80 for twelve (12) years.81 This contractual obligation was suddenly changed by the amendment to Article 4 of the LRE, which lowered the fixed FiTs, in breach of the contract.82 Therefore, the contractual claims under the LRE licenses are protected by the umbrella clause, and the Tribunal may exercise jurisdiction over them through the BC-BIT.

III. THE CLAIMS ARE ADMISSIBLE BECAUSE THE TRIBUNAL DOES NOT HAVE TO DEFER JURISDICTION TO THE EUROPEAN COURT JUSTICE (ECJ).

60. Article 30(3) of the VCLT provides that “when all parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59 of the VCLT, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.”83

61. In light of the continued existence of both of the BC-BIT and the TFEU simultaneously, Article 8(2) of the BC-BIT is not obsolete due to incompatibility, and the claims are not

78 Noble Ventures v Romania, par.64
79 Electrabel v. Hungary, par.5.39
80 Record, p.22, par.21
81 Record, p.32, Art.2
82 Record, p.24, par.34,
83 VCLT, Art.30(3)
inadmissible before the Tribunal. The fact that the TFEU requires that an interpretation of EU law must be decided only by the ECJ, is in applicable in this case because: (i) the ECJ is not the sole adjudicator over the claim, and (ii) the Tribunal is allowed to apply EU law.

1. **The ECJ is not the sole adjudicator over the claim.**

62. This case does not turn to an interpretation of any EU Treaty. The dispute was voluntarily brought to the Tribunal for an alleged violation of an Intra-EU BIT by Respondent, and does not question any alleged violation of EU law.\(^{84}\)

63. The provisions of EU law that provides for the jurisdiction of the ECJ are reflected under Article 267 and 344 of the TFEU. Under Article 267, the power of the ECJ to give preliminary rulings extends to the interpretation of the EU Treaties, even “where such a question is raised before any court or tribunal of a Member State.”\(^{85}\) While Article 344 provides that “Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.”\(^{86}\)

64. However, these powers (A) do not mandate the exclusive jurisdiction of the ECJ over Intra-EU claims, and (B) granting arguendo, the requisites for the ECJ to exercise interpretative monopoly is not present.

A. **The ECJ does not have exclusive jurisdiction.**

65. The *Eastern Sugar BV* Tribunal also dealt with the question of the admissibility of an Intra-EU BIT claim. While it was contended that the ECJ should exercise jurisdiction,\(^{87}\) the

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\(^{84}\) Record, p.4  
\(^{85}\) TFEU, Art.267  
\(^{86}\) TFEU, Art.344  
\(^{87}\) Eastern Sugar v Czech Republic, p. 22, par.109
Tribunal stated that Article 267 of the TFEU does not apply to arbitral tribunals even if has its seat in the European Union in accordance with EU case law.88

66. In Denuit v Transorient, the reason for the exclusion of arbitral tribunals was explained. The case involved a claim arising from the interpretation of an EU Council Directive filed before the Collège d'arbitrage de la Commission de Litiges Voyages, which referred the claim to the ECJ for preliminary ruling.89 However, the ECJ rejected jurisdiction because: (1) the parties are under no obligation to refer their dispute to arbitration, (2) and the public authorities of the Member State concerned are not involved in the decision to opt for arbitration.90

67. The reference of these claims to this Tribunal was not obligatory. Under Article 8 of the BC-BIT, the forums for the settlement of disputes include both the Barancasian national courts and international arbitration.91 Also, the option to select is solely at the discretion of the investor. Neither of the EU Member States is involved in the selection.

68. Further, Article 344 of the TFEU did not apply since the dispute in that case did not involve two EU Member States, but an investor and a Member State. There is no provision in EU law that requires reference of a claim dealing with investor-state arbitration, under an international instrument, to the ECJ.92

69. In fact, in Opinion 1/09 of the ECJ (Full Court) of 8 March 2011, the ECJ stated that a court established by an international agreement for disputes involving individuals cannot be in conflict with Article 344 TFEU. That article merely prohibits a Member State from submitting a dispute concerning the EU Treaty to any methods of settlement other than

88 Id. p.30, par.131
89 Guy Denuit v Transorient, par.10
90 Id. par.13
91 BC-BIT, Art. 8(2).
92 Electrabel vs. Hungary, par.4.153
those provided for in the Treaties; it does not affect the jurisdiction relating to disputes involving individuals.”

70. This case concerns an international arbitration between a private party, who is the national of an EU member State, and an EU Member State. It is subject to the jurisdiction of an international tribunal, established under an international instrument. There is no express or implied rule in EU law that requires such an international arbitration to be relinquish jurisdiction to the ECJ. Thus, the Tribunal is not mandated to relinquish jurisdiction of the case to the ECJ.

B. In any case, the requisites for the ECJ to exercise interpretative monopoly have not been met.

71. In support of the admissibility of an Intra-EU BIT claim before it, the Eureko Tribunal stated that arbitration tribunals throughout the EU interpret and apply EU law daily. Reference of questions regarding EU law to the ECJ is required only in accordance with the acte clair doctrine.

72. In CILFIT v. Ministry of Health, the acte clair doctrine was clarified with by the ECJ. The Court explained that raising a question concerning the interpretation of EU law does not automatically compel a tribunal to abide by Article 267 of the TFEU. Reference is only necessary when a decision on the question of EU laws necessary to enable them to give judgment. There is no need to make a reference when the answer to that question, regardless of what it may, can in no way affect the outcome of the case.

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93 Request for an Opinion pursuant to Article 218(11) TFEU
94 Record, p.20, par.3
95 Record, p.20, par.1
96 BC-BIT, Art. 8(2)(d)
97 Eureko vs Slovak Republic, par.282
98 Id.
99 Eastern Sugar BV v. Czech Republic, par.9
100 Id., par.13
Assuming that the Tribunal is bound by the jurisdiction of the ECJ, reference of the case is still not required. A clarification of the rights of an investor covered by EU law is convenient, but it does not disable this Tribunal from giving judgment. That determination is irrelevant because the BC-BIT already recognizes the claims as investments that are accorded specific protections that Respondent failed to respect. The outcome of a decision based on the BC-BIT is not affected by the determination of investor rights under TFEU. Thus, the ECJ does not have interpretative monopoly over the claims.

2. The Arbitral Tribunal is empowered to apply EU law in its decision.

Even if the TFEU has included foreign direct investments under its common commercial policy, the Tribunal can apply EU law because: (A) EU law allows it, and (B) the parties have consented to the same.

A. The Tribunal can apply EU law.

In *Eco Swiss*, an arbitration dispute was brought to the ECJ because it involved an interpretation of the TFEU in a final award. The Court explained that since arbitrators are not in a position to request for a preliminary ruling on interpretations of EU laws, it is in the manifest interest of the EU legal order that a tribunal should apply EU provision in a uniform manner.

This was buttressed by the *Electrabel* Tribunal, which stated that with respect to arbitration, it has long been recognized by the ECJ that such are frequently held within the EU, interpreting and applying EU law, and it does not infringe on the monopoly of EU law by the ECJ.

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101 TFEU Arts.206, 207
102 Eco Swiss v. Benetton, par.40
103 Electrabel v. Hungary, par.4.152
77. This Tribunal can apply the pertinent EU provisions even if it is necessary to interpret EU law to determine the legality of Respondent’s actions and the extent of the breach of Claimant’s rights. The application of EU law would be in the manifest interest of the Union’s legal order. The ability to address a possible interpretation of EU law would aid the Tribunal to make a holistic adjudication of the matter. This would allow it to fulfill its mandate under the BIT to reach a final and binding award that is consistent with a uniform interpretation of EU provisions.\textsuperscript{104}

78. Thus, the possibility of answering a question of EU law does not prevent this Tribunal from exercising jurisdiction, because EU case law recognizes application of EU law in arbitration.

B. The Parties consented to the Tribunal’s power to apply EU law.

79. A Tribunal formed under the Rules of the LCIA is granted the power to decide a dispute in accordance with the laws or rules, which it considers appropriate.\textsuperscript{105}

80. The power of the Tribunal emanates from Article 8(2)(d) of the BC-BIT, which was consented to by the parties. It provides that the settlement of any dispute between an investor of one Contracting Party and the other Contracting Party can be submitted to the LCIA for arbitration under its Rules. The parties explicitly empowered this Tribunal to adjudicate the dispute by applying the laws or rules that it considers appropriate, including the use of EU law if warranted.

81. Thus, the Tribunal can apply EU law because the parties has empowered it to so, and it is permitted by the ECJ.

\textsuperscript{104} BC-BIT, Art. 8(2)
\textsuperscript{105} LCIA Rules, Art.22.3
ARGUMENTS ON MERITS

IV. RESPONDENT’S MEASURES RELATING TO THE LRE AMENDMENT BREACHED FET OF THE BC-BIT.

82. Article 2(2) of the BC-BIT states that investments made by investors of either party shall be accorded FET.\textsuperscript{106} In interpreting FET, the Tribunals have to decide on case-to-case basis.\textsuperscript{107} The Inmaris Tribunal held that in the absence of a statement limiting a BIT to a required standard by customary international law, any act that is unfair and inequitable is a breach of FET obligation.\textsuperscript{108}

83. Here, BC-BIT’s Article 2(2) clearly states that the investments shall at all times be accorded FET. Also, since there is no reference to international law, the purpose of the clause should be interpreted in its ordinary meaning.

84. Thus, Claimant now submits that Respondent violated its right to FET when it: (1) frustrated Claimant’s legitimate expectations; (2) failed to meet its obligation to provide a “stable” legal framework; (3) unreasonably and arbitrarily denied project Alfa’s license; (4) failed to satisfy the requirement of due process; and (5) indirectly expropriated the Claimant’s investments.

\textsuperscript{106} BC-BIT, Art.2(2)
\textsuperscript{107} Dolzer/Schreuer, p. 135, 2nd ed.
\textsuperscript{108} Inmaris v. Ukraine, par.265
1. Respondent’s amendment of LRE’s Article 4 frustrated Claimant’s legitimate expectation.

85. The legitimate expectations of Claimant were violated when Respondent amended Article 4 of the LRE and applied it retroactively, affecting Claimant’s Project Beta and its twelve photovoltaic projects.

86. Several Tribunal have held, including National Grid, that legitimate expectations are based on the legal framework existing at the time when the investment was made.109 Any undertakings or specific representations made by the host state create legitimate expectations. A reversal of these assurances results in FET violation.110

87. When the Respondent adopted the LRE it included a guaranteed FiT of 0.44 EUR/kWh for twelve years from the time of the issuance of the investor’s license.111 These were the assurances made available to investors, including Claimant’s Beta and 12 projects. However, Respondent’s LRE amendment reduced the guaranteed FiT by nearly two-thirds, from 0.44 EUR/kWh to 0.15 EUR/kWh. It was also made annually reviewable for adjustment.112 Thus, this resulted to: (1) A substantial reduction in the FiT, and (2) a reduction of the time by which Claimant’s Beta and 12 projects could receive the guaranteed rate. Beta was only able to collect this for three years and the twelve projects for six months instead of the promised 12.

88. Thus, in amending Article 4 of the LRE and applying it retroactively to Claimant’s investments, Respondent breached the legitimate expectations protected under the FET standard in the BIT.

109 Dolzer/Schreuer, p.145, 2nd ed.
110 Dolzer/Schreuer, p.145, 2nd ed.; Reisman/Arsanjani; Vasciannic, 146-7; Walde
111 Record, p.22, par.16-7
112 Record, p.24, par. 34-5
2. The Respondent’s failure to provide a “stable” legal framework frustrated legitimate expectations.

89. Closely related to the breach of legitimate expectations is failure to provide a stable legal environment.\(^\text{113}\)

90. Numerous tribunals have ruled that a host state determines its own legal and economic order. Investors invest in a state because of that guaranteed order. A host state’s legal and economic order forms the basis of investor’s legitimate expectations.\(^\text{114}\)

91. The CMS Tribunal held that a stable legal and business environment was an essential element of FET.\(^\text{115}\) Similarly, Parkerings held that failure to maintain a stable and practicable legal framework frustrates an investor’s legitimate expectations.

92. Here, Respondent, through the adoption of the LRE, made an assurance to investors to provide them with a consistent legal and economic system.\(^\text{116}\) The legal order on which Claimant has relied on at the time of its investment has been changed. Thus this amounted to a violation of legitimate expectations vis-à-vis a stable legal environment.

3. Denial of Alfa’s license was unreasonable and arbitrary.

93. The FET protection accorded under the BC-BIT was breached when Respondent unreasonably and arbitrarily denied Alfa’s license.

\(^{113}\) SD Myers v Canada; Feldman v Mexico, par.128; Mondev v US, par.156  
\(^{114}\) Dolzer/Schreuer, p.146, 2nd ed.  
\(^{115}\) CMS v. Argentina, par.76  
\(^{116}\) Record, p.20, par.14
94. The principle of FET involves a standard of protection against arbitrariness.\textsuperscript{117} Several tribunals have agreed that in observing FET, a state has an obligation to refrain from arbitrary conduct.\textsuperscript{118}

95. Tribunals have interpreted ‘Arbitrariness’ based on its ordinary meaning. An arbitrary decision is one “depending on individual discretion; … founded on prejudice or preference rather than on reason of fact.”\textsuperscript{119} In \textit{ELSI}, the ICJ defined arbitrariness as “a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.”\textsuperscript{120}

96. The \textit{LG&E} Tribunal held that arbitrary measures are those that affect investments of foreign investors without a rational decision-making process.\textsuperscript{121} In \textit{Abaclat}, it was held that arbitrary promulgation and implementation of regulations and laws can amount to an unfair and inequitable treatment.\textsuperscript{122}

97. Here, the LRE assured that Respondent’s government would back green subsidies like Claimant by providing them with a guaranteed FiT of 0.44 EUR/kWh for 12 years from the time of their license’s issuance. This is why Claimant applied for a license for Alfa after the LRE was enacted. It was hoping that the guaranteed FiT would help Alfa to survive as it was operating at a loss.\textsuperscript{123}

98. However Alfa was denied a license under the LRE because the Respondent stated that it could only apply to new projects and not existing ones like Alfa.\textsuperscript{124} This limitation was

\textsuperscript{117} CMS v Argentina, par.290
\textsuperscript{118} El Paso v Argentina, par.230
\textsuperscript{119} CMS v Argentina, par.291; Lauder v Czech Republic, par.221; Occidental v. Ecuador, par.162
\textsuperscript{120} Dolzer/Schreuer, p.140, 2\textsuperscript{nd} ed.; \textit{ELSI}, par.128
\textsuperscript{121} LG& E v. Argentina, par.158
\textsuperscript{122} Abaclat v. Argentina, par.314
\textsuperscript{123} Record, p.20-1, paras.14&22
\textsuperscript{124} Record, p.21, par.22
never stated in the LRE.\textsuperscript{125} In fact, Articles 3\textsuperscript{126} and 5\textsuperscript{127} states that existing or new projects are allowed to secure a license. Evidently, pre-existing projects are allowed to obtain the license.

99. Thus, Respondent violated FET when it unreasonably and arbitrarily denied Claimant’s license to operate Alfa under the LRE.

4. \textbf{Respondent failed to satisfy the requirement of due process.}

100. Respondent breached FET when it failed to accord due process. This is an element of FET.\textsuperscript{128} For example under the US Model BIT of 2012, the FET standard covers protection from denial of justice and guarantees due process.\textsuperscript{129}

101. Due process is violated when a party is not given the right to be heard.\textsuperscript{130} In \textit{Enron}, it was held that any process of negotiation requires that the parties genuinely agree on the outcome and this cannot be imposed…upon one party.\textsuperscript{131}

102. In \textit{Metalclad}, there was a finding of lack of procedural due process when the investor was not given the opportunity to appear at the meeting wherein its permit was denied.\textsuperscript{132} Likewise, Tecmed’s right to due process was violated when the government failed to notify the investor when it revoked the latter’s license.\textsuperscript{133}

\textsuperscript{125} Record, p.21, par.22
\textsuperscript{126} LRE, Art.3
\textsuperscript{127} LRE, Art.5
\textsuperscript{128} Dolzer/Schreuer, 2\textsuperscript{nd} ed, p.154
\textsuperscript{129} US Model BIT 2012, Art.5(2)(a)
\textsuperscript{130} Dolzer/Schreuer, p.145
\textsuperscript{131} Enron v. Argentina, par.186
\textsuperscript{132} Metalclad v. Mexico, par.91
\textsuperscript{133} Tecmed v. Mexico, par.162
103. Here, Respondent failed to satisfy due process because it did not give the Claimant the opportunity to be heard when it amended the LRE.

104. In amending the LRE, the Barancasia Parliamentary Energy Committee only held private meetings wherein select few stakeholders were invited to attend. Also, there is no evidence to prove that Claimant was invited to the meeting. Hence, adopting the amendment without giving Claimant the chance to participate violates its right to FET.

5. **The violation of Claimant’s right to FET is akin to an Indirect Expropriation.**

105. An indirect expropriation, while maintaining an investor’s title, deprives him of the chance to utilize the investment in a meaningful way. A number of tribunals have construed indirect expropriation narrowly, and ruled that there was a violation of FET.

106. In *Tecmed*, it was held that there was indirect expropriation when the claimant, after it had relied on the government’s assurances, was denied of its license to operate. In that case it was emphasized, along with *Siemens*, that when it comes to indirect expropriation what matters are the measures taken, and not the intention to expropriate. Similarly in *Starret Housing*, it was explained that property rights may be restricted by a state even if it did not intend to expropriate, and the legal title remains with the original owner. Moreover, there is expropriation when an investor is deprived of the value of its specific rights.

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134 Record, p.22-3, paras. 29, 34  
135 Record, p.62  
136 Dolzer/Schreur, p.92, 1st ed.  
137 Dolzer/Schreur, p.93, 1st ed.  
138 Dolzer/Schreur, p.106, 1st ed.; *Tecmed* v. Mexico, paras. 149,116  
139 *Starret Housing Corp.* v. Iran, par.154  
140 *Middle East Cement* v. Egypt, paras 107, 143-144
107. Here when the value of FiT due on the Claimant’s licenses was substantially reduced, and when the LRE amendment made the FiT annually reviewable for adjustment,\textsuperscript{141} there was indirect expropriation vis-à-vis a violation of Claimant’s right to FET. This is because it was deprived of its right to fully utilize that part of its property in a significant way. The Respondent’s tariff reduction deprived Claimant of its right to be subsidized based on the original value of the guaranteed rate of 0.44 EUR/kWh. This caused a loss to its investments that were made based on the original terms of the LRE. Hence, the violation of Claimant’s right to FET is analogous to an indirect expropriation.

V. **RESPONDENT MAY NOT RELY ON THE NECESSITY DEFENSE IN ORDER TO ESCAPE LIABILITY FOR ITS BIT VIOLATIONS.**

108. Necessity could not exist because (1) Respondent may not rely on the BC-BIT’s Article 11 since the LRE amendment was unnecessary to safeguard the Respondent’s essential security interests; (2) It may not invoke Art. 25 of the Articles on the Responsibility of States for Wrongful Acts (“ARSIWA”) to excuse its actions because its requisites have not been met; and (3) There was no Fundamental Change of Circumstances (“FCC”) that would excuse it from treaty obligation.

1. **Respondent does not fall within the scope of Article 11 of the BIT.**

109. Respondent’s breach of FET towards Claimant does not fall in the Essential Security Interest clause of the BC-BIT. This excuses a party from fulfilling treaty responsibilities if its actions were necessary for the “maintenance of international peace or security.”\textsuperscript{142}

110. Essential Security clauses or Non-Precluded Measures (“NPM”) clauses are included in BITs to excuse parties from treaty obligations. These may only be used in exceptional

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\textsuperscript{141} Record, p.23, paras 34-5
\textsuperscript{142} BC-BIT, Art 11
situations. Consequently, NPM provisions are limited to certain types of acts. Moreover, under the VCLT, a treaty should be interpreted in good faith according to its plain meaning.

111. Here, Article 11 pertains to measures with respect to the “maintenance of international peace or security.” Thus, the matter must pertain to peace and security interests that would affect other states, and the international community as a whole.

112. Historically, the concept of international security has been associated with defense matters, or violence between states. This stems from the interpretation of the UN Charter which gives the Security Council a right to interfere in any issue it deems a threat to international peace and security. This is based on the view that international security comprises the territorial integrity of nations, and the greatest threat to such are wars between states.

113. Here, depletion of a state’s budget, is not included in the scope of acts that would help maintain international peace or security. Albeit, there is no evidence that the LRE amendment was necessary to preserve international peace or security. There was no political unrest, armed warfare, or social turmoil that threatened regional or international peace or security. Thus, Respondent’s actions are not excused under the essential security interest as it is inapplicable.

A. The Respondent may not perform unilateral actions under the BIT.

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143 Jung & Han, p.400  
144 VCLT, Art. 31(1)  
145 BC-BIT, Art 11  
146 Nye Jr., Lynn-Jones, p.5-27  
147 UN Charter, Preamble, Arts.37(2), 48(1), 1(1), 2(3,6), 42, 73,11(3), 12(2)  
148 St. Jean, p.9  
149 Nye Jr., Lynn-Jones, p.5-27
114. There is nothing in Article 11 which expressly shapes the BIT’s self-judging nature. A state’s right to determine on its own whether a measure is necessary may be done in exceptional circumstances. This right must be expressly stated in the BIT.\textsuperscript{150} For instance, other treaties such as the \textit{US-Russia BIT}, \textit{US-Bahrain BIT}, and the \textit{General Agreement on Trade and Tariffs ("GATT")} contain the words “which it (a party) determines.” This gives the state a right to unilaterally determine the legitimacy of measures it took that amounted to non-compliance with its obligations.\textsuperscript{151} Here, Article 11 of the BIT does not contain a similar phrase.

115. In \textit{CMS} it was held that if the legitimacy of a state’s measure is challenged then it would be up to the tribunal to decide whether a state may be exempted from liability.\textsuperscript{152} Here, Respondent amended the LRE in order to save its national budget. However, its actions would still have to be judged by an independent tribunal. Respondent cannot on its own declare that the amendment of the LRE was a necessary measure to protect an essential security interest. Its actions will have to be judged by objective criteria, and not on its own subjective assertions.

116. Lastly, it has been held that a state that has substantially contributed to the crisis at hand may not be rescued by the essential security provision.\textsuperscript{153} Here, it was the Respondent itself that enacted the LRE, and caused it to be amended. Hence, it is clear that the essential security provision should not excuse the Respondent’s unilateral actions.

2. \textbf{Respondent’s actions are not excused by the Customary International law defense of Necessity.}

117. Secondarily the customary international law defense of necessity applies. This is in Article 25 of the ARSIWA.\textsuperscript{154}

\textsuperscript{150}CMS v. Argentina, par.370
\textsuperscript{151}Id. par.368-373
\textsuperscript{152}Id. par.373
\textsuperscript{153}El Paso v. Argentina, par.665
\textsuperscript{154}Gabcikovo-Nagymaros Project, par.32
118. In order to prevent a situation wherein a state may easily be exempt from breaching its obligation, all the requisites of Article 25 have to be met.\textsuperscript{155}

119. Here, Respondent failed to meet the strict requirements of the defense of necessity because: (A) Its amendment of the LRE was not the only way for it to safeguard an essential interest--to meet its objectives, and comply with its EU obligations; (B) The absence of a grave and imminent peril; (C) It substantially contributed to the situation; (D) Its measures seriously impair an essential interest of Cogitatia and the international community as a whole.

A. \textbf{Respondent failed to satisfy the “only means” element.}

120. Respondent’s LRE amendment was not the only way for it to safeguard an essential interest--to meet its economic and renewable energy objectives and comply with its EU obligations.\textsuperscript{156}

121. The ILC clearly indicates that in order to invoke the defense of necessity, the measures taken must have been the “only way” available to safeguard an essential interest against a grave and imminent peril.\textsuperscript{157} This means that the amendment of the LRE should be the only way available that would allow the Respondent to achieve its objectives and comply with its obligations.

122. In \textit{Gabcikovo-Nagymaros}, the ICJ held that Hungary could not invoke Necessity because it could have resorted to other means instead of suspending and abandoning the work on the Nagymaros dam.\textsuperscript{158} Similarly in CMS held that regardless of the best alternative, Argentina may not invoke Necessity because the measures it took were not the only means

\textsuperscript{155} Hoelck Thjoernelund, p.432  
\textsuperscript{156} Record, p.17  
\textsuperscript{157} ILC Art.25(1)  
\textsuperscript{158} Gabcikovo-Nagymaros Project, par.43
available for it to cope with its crisis. It emphasized that it is beyond the duties of the Tribunal to determine which policy alternative would have been most suitable. Furthermore, for as long as there are other ways, even if they be more costly, Necessity may not be invoked to avoid liability.\textsuperscript{159}

123. Here, the amendment of the LRE was not the only way for the Respondent to meet its objectives and comply with its EU obligations to promote renewable energy in light of its national budget issues. There are other ways. It could tax the production of non-renewable energy instead in order to meet its renewable energy goals. This is being done in some European countries, such as Sweden and Denmark, for example.

124. Moreover, it could continue to pay the guaranteed rate, and continue to charge the subsidies on its national budget. This is because there really was no grave and imminent peril to avoid.

\textbf{B. \hspace{0.5em} There was no grave and imminent peril.}

125. The Respondent’s situation could not be considered as a grave and imminent peril. For there to be such peril or threat, it has to be objectively established, and not merely apprehended as possible.\textsuperscript{160} The threat must be extremely grave and imminent,\textsuperscript{161} and it has to be something that would occur soon.\textsuperscript{162}

126. In \textit{Sempra Energy}, and \textit{Enron} it was held that there was no grave and imminent peril because there was not enough proof that events had become “unmanageable or out of control.”\textsuperscript{163} Moreover in \textit{CMS}, the Tribunal stated that there was a lack of such peril because there is no evidence of “total economic and social collapse”\textsuperscript{164}

\begin{footnotes}
\textsuperscript{159} CMS v. Argentina, par.323
\textsuperscript{160} Hoelck Thjoernelund, p.437
\textsuperscript{161} LG&E v. Argentina, par.253; Robert, p.20
\textsuperscript{162} LG&E v. Argentina, par.253; James, p.31
\textsuperscript{163} Newcombe & Paradell, p.518; Enron v. Argentina, par.307; Sempra v. Argentina, par.349
\textsuperscript{164} CMS v. Argentina, par.355
\end{footnotes}
127. Similarly in *LG&E*, wherein it was held that the Respondent was in a state of Necessity from 1 December 2001 to 26 April 2003.\(^{165}\) The Tribunal stated that the Argentine state faced an extremely serious threat to its existence because its political and economic survival were put at risk.\(^{166}\) There, public disorder was at hand. News of an “economic catastrophe”, “massive strikes” plagued the state. Moreover “schools, businesses, transportation, energy, banking, and health services” were shut down. There were “demonstrations across the country, and a plummeting of stock market.” This culminated in a “massive social explosion in which five presidential administrations resigned within a month.”\(^{167}\)

128. Here, there is not enough proof that events had become unmanageable or out of control. The fact that 15% of state revenues would be diverted to finance solar FITs, and would have a higher share than the educational system,\(^{168}\) as well as the Respondent’s exceeding of its borrowing limits are not enough proof that there was a grave and imminent peril. In fact, the Respondent even confirmed thru its prime minister on May 5, 2012 that its foreign direct investment policy was a success “which undeniably promoted the economic growth of the country.”\(^{169}\) This was after the groundbreaking technology in 2011,\(^{170}\) and the time when the Respondent realized that the LRE was a “mistake, and had created a solar bubble.”\(^{171}\) Clearly, there was no grave and imminent peril.

C. **Respondent Contributed to the Situation.**

129. The Respondent’s actions are not justifiable, and it may not invoke the defense of Necessity because it has contributed to the situation. Article 25 of the ARSIWA emphasizes that a state invoking Necessity may not be invoked as a defense if the “state has contributed to

\(^{165}\) LG&E v. Argentina, par.266
\(^{166}\) Id. par.257
\(^{167}\) Id. par.216
\(^{168}\) Record, p.22, par.29
\(^{169}\) Record, p.40
\(^{170}\) Record, p.22, par.25
\(^{171}\) Record, p.22, par.28
the situation of Necessity.”172 A state must not have provoked “either deliberately or by negligence, the occurrence of the state of necessity.”173 This is because it would be unfair and unjust to allow a state to produce a situation that would harm investors, and then use that situation to preclude liability.174

130. In CMS, the Tribunal held that Argentina substantially contributed to the situation, and although exogenous factors did fuel to the situation, the Respondent’s contribution annuls its right to be exempted. Similarly in Sempra, it was stated that although there were exogenous factors aside from its substantial contribution, it still could not be excused for breaching its obligations. It must therefore be held responsible for the whole situation.175

131. Here, the groundbreaking technology that reduced the cost of developing solar panels was already developed in 2011. Yet, the Respondent still approved around 6000 license applications. It did so without adequately considering its budget constraints.176 Therefore, it had negligently overestimated its capability to pay license-holders. It even admitted that the LRE was a “mistake”, and had created a “solar bubble.”177 Hence, its negligence was the main reason for its decrease in national budget, and it has substantially contributed to the situation.

D. Respondent’s measures impair an essential interest of Cogitatia, and the international community.

132. A state’s businesses and its entities, be they legal or natural, are part of its essential interest.178 Respondent’s measures resulted in investment loss for the Claimant, a
Moreover, there are around 7000 license-holders in the Respondent state whose investments were also affected by the change in law. These license-holders may be both foreign and local investors.

Retroactive tariff changes, particularly when it comes to solar PVPs, result not only in the loss of investments, employment, but also in the loss of confidence in the investing environment.

Hence, the Respondent’s measures impaired an essential interest of Cogitatia as a counterpart of the BC-BIT, and the international community as a whole.

3. The Respondent is not exempt under FCC.

An unforeseeable FCC or *rebus sic stantibus* would exempt a party from fulfilling its obligations under a contract. This is a universally accepted principle, and it is based on the premise that the parties would not have entered into a contract had they known that a situation existing at the conclusion of a contract would completely change. If given a broad interpretation, this principle is considered as a dangerous exception to the sanctity of contracts. That is why it is given a strict interpretation.

In ICC Award No. 6281, it was stated that if this principle were applied in a broad sense, “any business transaction would be exposed to uncertainty.”

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179 Record, p.19, par.3  
180 Record, p.22, par.26  
181 del Rio, p.23  
182 Horn, p.25.  
183 Schmitthoff, p.146  
184 ICC Award No. 1512, p.129  
185 Van Houtte, p.115  
186 ICC Award No. 6281; Yearbook Commercial Arbitration (1990), p.98
137. Here, there was no fundamental change of circumstances that allows Respondent to alter its obligations on the licenses it originally issued. The technology change in 2011, which reduced development costs of solar panels, is not an unforeseeable event that fundamentally changed the circumstances surrounding the original contract between the parties.

138. Technology develops all the time. In fact in practice, states allow for scheduled revisions, and degression rates to apply on FiTs. This provides a mechanism to adjust a state’s support level over time to take into consideration changes of costs. In Germany, Luxembourg, and Italy for example, FiTs are subjected to degression that decreases it based on a forecasted change of costs of solar PVPs. Here, the Respondent clearly did not take these changes into consideration. The LRE guaranteed fixed FiT for 12 years without any degression mechanism. Thus, the reduced development costs of solar panels due to the technology change was not a FCC.

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187 Record, p.22, par.25
188 Del Rio and Mir-Artigues, p.33
189 Klein/Merkel/Pfluger/Held/Ragwitz, p.39-42
190 Record, p.21, paras.17,21
ARGUMENTS ON REMEDIES

VI. RESPONDENT CAN BE ORDERED TO CONTINUE PAYING THE PRE-2013 TARIFF.

139. Under ARSIWA, full reparation for a wrongful act takes the form of restitution, compensation, or satisfaction, either singularly or in combination.191 “Restitution involves the obligation of a State to re-establish the situation that existed before the commission of the internationally wrongful act”.192

140. The Claimant submits that: (1) Tribunal is empowered to order Respondent to continue paying the pre-2013 tariffs, and (2) such an award is consistent with international law.

1. The Tribunal is empowered to order payment of the pre-2013 tariffs.

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191 ARSIWA, Art.34
192 ARSIWA, Art.35
141. Several tribunals\textsuperscript{193} have supported the view that international law grants the power to order non-pecuniary measures. Restitution is an inherent power of the tribunal.\textsuperscript{194} It is also a basic principle that tribunals are empowered to act specifically based on the agreement of the parties.\textsuperscript{195} Claimant submits that this Tribunal is empowered to order payment of the pre-2014 tariffs because of (A) international law, and (B) the BC-BIT.

\textbf{A. International law empowers the Tribunal to order restitution.}

142. In \textit{Enron}, a challenge against the Tribunal’s power to declare taxes arising from legislation unlawful was brought to the fore.\textsuperscript{196} The Tribunal stated that it is possible for cases to involve disputes arising from ongoing relationships in which an award for specific performance is relevant.\textsuperscript{197} Similarly, the \textit{Micula} Tribunal stated that because it was granted the power of restitution under the rules of the Tribunal, without a limitation of such power in the BIT, it can order such remedy.\textsuperscript{198}

143. In \textit{Rainbow Warrior}, the ICJ declared that the authority to issue an order for the discontinuance of a wrongful act comes from an inherent power of a competent tribunal confronted with a continuing breach of an international obligation that is in force and continues to be in force. This power requires two essential conditions, (1) the wrongful act continues to exist, and (2) the violated rule remains in force at the time of the order. This is because Tribunals can determine the existence of a violation of an international obligation and, if necessary, hold the domestic law has been the cause of this violation.\textsuperscript{199}

144. The source of this dispute is the amendment made to Article 4 of the LRE. The amendment effectively breached the promise of Respondent to provide for 0.44 EUR/kWh FiTs in the

\textsuperscript{193} Martini case, p.554; Trail Smelter case, p.1905
\textsuperscript{194} YILC vol.II 1988, p.21
\textsuperscript{195} Redfern and Hunter, p.278
\textsuperscript{196} Enron v Argentina, par. 75
\textsuperscript{197} Id., par. 77
\textsuperscript{198} Micula v Romania, par.167
\textsuperscript{199} Rainbow Warrior, par.114
licenses issued to Claimant. This is in violation of the obligation to accord FET to investors under an existing BC-BIT.

145. Assuming *arguendo* that the amendment was enacted only after the last date of the BC-BIT, the licensed photovoltaic projects are accorded this protection under a sunset clause in Article 13(3). That article states that investments made before the final date of termination, are accorded the protection of the BC-BIT for a period of 10 years after such date. Clearly, the licenses are investments that were made before the expiry date of the BC-BIT, July 31, 2012.

146. Thus, Tribunal can be required to take action in order to redress the situation because the amendment to Article 4 is a continuing violation of an existing protection accorded to the investments under BC-BIT.

**B. The Parties have empowered the Tribunal.**

147. It is elementary in international investment arbitration that the Parties to arbitration may confer express powers onto a tribunal. They may also confer indirect powers on the tribunal by providing for a set arbitral rules.

148. Article 8(2)(d) of the BC-BIT provides that an investor-state dispute should be settled in accordance with the LCIA rules. Article 22.1(vii) of the LCIA rules provides this Tribunal with the power to order compliance with any legal obligation and specific performance. Further, the BC-BIT under Article 4(3) specifically recognizes the remedy of restitution for compensation of losses to an investor.

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200 LCIA Rules, Art.22.1(vii)
149. Clearly, the parties to this dispute have recognized the power of this Tribunal to order the payment of the pre-2013 tariffs.

2. **An order for the payment of the pre-2013 tariffs is consistent with international law.**

150. The *Chorzów Factory Case* is the essential authority in defining the powers of a tribunal for restitution. In that case, restitution was defined as a remedy that wipes out all the consequences of the illegal act and re-establishes the situation, which would have existed if the act had not been committed.\(^{201}\) Payment of the pre-2014 tariffs completely restores Claimant to its position prior to the amendment of the LRE. This order is: (A) allowed under international law.

### A. This form of restitution is allowed under international law.

151. Judicial restitution involves the modification of a legal situation within the legal system of the responsible state. These cases require revocation, annulment or amendment of a legislative provision enacted in violation of a rule of international law.

152. The *Nycomb Synergentics* Tribunal that juridical restitution of a Latvian law ensuring the investor to the double tariff was conceivable because it is appropriate in a situation where the State has instituted actions directly against the investor.\(^{202}\) This was in light of a broad–sweeping offer to double tariff as an investment incentive, which was gradually decreased and eventually abolished by a statute.\(^{203}\)

153. The original LRE indiscriminately provided for the issuance of licenses to any existing or new photovoltaic power plants.\(^{204}\) This entitled Claimant to pre-2014 feed-in tariff of 0.44

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\(^{201}\) Chorzów Factory, p.48

\(^{202}\) Nykomb v Latvia, par.154

\(^{203}\) Id., par. 76

\(^{204}\) LRE, Art.5
EUR/kWh for a period of ten years. The legislative amendment to the LRE that decreased the feed-in tariffs by half represents the internationally wrongful act, which must be revoked in order to truly re-establish the situation between the disputing parties. Thus, an order for the payment of the pre-2014 feed-in tariffs is consistent with international law.

VII. CLAIMANT’S BASIS FOR CLAIMING AND QUANTIFYING COMPENSATION ARE APPROPRIATE.

154. Alternatively, Claimant submits that its basis for claiming and quantifying compensation are reasonable because the Respondent’s measures violated its right to FET, thereby unfairly causing a loss to its investments.

155. In international arbitration, the goal is to establish a claim for damages and be compensated for the loss suffered. Article 4(2c) of the BC-BIT states that investors of one contracting party who suffered losses due to the “destruction of their property” by the other party are entitled to “just and adequate compensation.”

156. The proceeding’s main stage only addresses the breach of FET. Here, the scope of Article 4 is applicable to FET violations, and is not exclusive to expropriation. In fact Article 5, a separate provision, discusses expropriation and its compensation. Hence, a destruction of property in accordance with Article 4(2c) could be a FET violation, and may be compensable.

157. Respondent’s actions destroyed Claimant’s profit mechanism. This indirectly destroyed Claimant’s property. The reduction of the guaranteed rate, its annual review, and the denial

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205 Record p.21, par.21  
206 Record p.23, par.34  
207 Ramsey, p.1212  
208 BC-BIT, Art.4(2c)  
209 Record, p.18  
40
of Alfa’s license would force the Claimant to increase the selling price of electricity in the spot market. This is so it could recover income to operate and maintain its operation.

158. The law of demand states that a commodity with a high price has a low demand.\textsuperscript{210} This implies that less consumers would purchase expensive renewable energy. Consequently, investors would lose confidence on Claimant’s business. They may transfer their investments to other companies with higher returns.

159. In any event if Article 4 is inapplicable, FET violations are compensable even without a specific treaty provision. In fact most treaties do not contain a compensation clause for other breaches aside from expropriation. Nonetheless, tribunals still come up with practical approaches to grant compensation for other treaty breaches.\textsuperscript{211}

160. In \textit{CMS}, the Tribunal held that although expropriation did not occur, other treaty breaches, such as FET were committed. Thus, the Respondent is liable for damages. The Tribunal used the fair market value compensation approach, similar to the one used for expropriation, to quantify damages.\textsuperscript{212} Similarly in \textit{Azurix} and \textit{Occidental}, damages were also awarded for breach of FET based respectively on the fair market value\textsuperscript{213}, and the case-specific approaches.\textsuperscript{214}

161. Here, there was a violation of Claimant’s right to legitimate expectations, due process, to be treated in a manner that is free from arbitrariness, and an indirect expropriation akin to a FET violation. These are principles embraced under FET\textsuperscript{215}, and hence the breach of these violated the Claimant’s right to FET.

\begin{footnotesize}
\begin{enumerate}
\item Mankiw, p.79, 6\textsuperscript{th} ed.
\item Dugan/Wallace/Rubins/Sabahi, p.579(2); LG&E v. Argentina, par.30; CMS v. Argentina, par.409, SD Myers v. Canada, par.94, MTD v. Chile, par.238
\item CMS v. Argentina, par.410
\item Azurix v. Argentina, par.420
\item Occidental v. Ecuauador, par.210; Sabahi, p.587-8
\item Dolzer/Schreur, p. 133, 1\textsuperscript{st} ed.
\end{enumerate}
\end{footnotesize}
162. In quantifying compensation, the experts have agreed that the methods used for calculating are correct. Therefore, the dispute relates to the disagreements between the experts. Marco Kovic, Claimant’s expert, submits that total losses amount to EUR 1,579,152 or EUR 2,316,596. The difference depends on which alternative the Tribunal opts to adopt for the losses of the 12 PVP projects.

163. Professor Kovic’s arguments are that the (A) Losses for Project Alfa amount to EUR 120,621; (B) Claimant’s damages for land and equipment of the 12 projects are accurate; (C) Weighted Average Cost of Capital (“WACC”), not Cost of Equity, should be used to calculate damages for Projects Beta to Kopa, as well as interests; and (D) Claimant’s basis for computing planned development of solar arrays are accurate.

164. The valuation dates for these are from: July 1, 2010 - 2023 for Alfa, 2013-2023 for Beta, the 12 PVPs, and the land and equipment installations under the fair market value approach, and 2014-2023 for its planned expansion relating to future projects.

1. **The Alfa Project is entitled to EUR 120,621.**

165. The denial of Alfa’s license entitles it to a compensation EUR120,621. This is based on the guaranteed EUR0.44 EUR/kWh that it should have received had its license been approved.

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216 Record, p.58  
217 Kovic’s Annex 1(A), 1(B), 2  
218 Kovic’s Annex 1(A), 1(B), 3  
219 Record, p.50, paras.9-10  
220 Kovic’s Annex 1(A), 1(B), 2, 3, 4; Priemo’s Annex 1, 2
166. Respondent states that Claimant inaccurately forecasted the profitable performance of Alfa because (1) it had an overrun of more than 50% of the estimated project cost; and (2) the solar installations performance resulted in 12.1% design capacity vs. Claimant’s 21%.\textsuperscript{221}

167. Claimant argues that the expected profitability of Alfa is unaffected by its past budget overruns because these are sunk costs, or costs that have been incurred. Sunk costs do not affect future profitability. Profit is the money remaining after the company pays its costs and expenses.\textsuperscript{222} Therefore, it is irrelevant to consider the actual costs incurred by Alfa to determine its future profits because they differ.

168. In \textit{EDF}, it was stated that it is normal for businesses to go overbudget at the early stages of its operations, and it is only after subsequent years when economic returns will materialize.\textsuperscript{223} Moreover the design capacity is not an ironclad figure carved in stone. It is normal for it to differ, and to be lower than the design capacity. Hence, actual capacity is not an accurate gauge of productivity.

169. Moreover economic returns are highly probable because Claimant has an impressive track record as a successful developer of various electrical projects.\textsuperscript{224} Therefore, despite budget overruns, and the difference of capacities, it could still earn the projected EUR 120,621.

2. \textbf{Claimant’s calculations for damages on land and equipment for the 12PVPs are accurate.}

170. While relying on the Energy law that fixed FiTs for 12 years at €0.44 EUR/kWh, Claimant made substantial investments on land and equipment for its 12 PVPs. However, due to

\textsuperscript{221} Record, p.53, par.7  
\textsuperscript{222} Monger, p.25  
\textsuperscript{223} EDF v. Argentina, par.357  
\textsuperscript{224} Record, p.49, par.4
Respondent’s sudden change in policy, this FiT was only maintained for six months. Consequently, it did not have enough time to recoup its investment to gain profit.

171. Claimant’s expert presents two alternatives for wasted expenditure of the 12 projects. These computations are based on the 1) asset/ investment approach, and 2) Discounted Cash Flow (“DCF”) approach.

172. Under the first alternative, the claim is €690,056 as of 1 January 2013. This was derived by adding costs from expenditures for physical installations (land, pv panels delivered, and 50% deposit on remaining pv panels), and other costs (labor, bank interest) to get total damages.

173. Respondent argues this claim could be lowered because land and equipment could be resold for profit. However Claimant maintains that these could not be done because these assets could not be sold without doing so at a loss. The equipment for the 12 projects were ordered on a per project basis, arguably they are project-specific. Moreover, with the lowering, and annual review of FiTs it is highly unlikely for other solar investors to continue to buy more equipment.

174. Moreover exposure to solar facilities leads to land degradation, and habitat loss. This makes it unattractive to potential buyers because they are located in remote areas, and are of low quality. Hence, Claimant could not lower the value of these assets, as it could not resell or reuse them, without doing so at a loss.

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225 Record, p.50, par.9
226 Record, p.50, paras.9-10
227 Kovic’s Annex 2
228 Record, p.54, par.11
229 Record, p.23, par.33
175. The arguments under the second alternative will be discussed along with Project Beta because Claimant calculated them based on the weighted average cost of capital ("WACC") at 8%, and similar arguments apply to them.

3. **Damages for Beta, and the 12 PV projects should be computed based on WACC to accurately reflect all costs.**

176. Claimant maintains that WACC or 8% should be used for Beta, and the 12 projects. This is because (1) The Claimant has a proportional share of debt and equity, and (2) Its profits would be undermined if it uses Cost of Equity as suggested by the Respondent.

177. Looking at the computations of both experts, it is clear that they used DCF to calculate damages for Beta, and the second alternative computation for the twelve projects.

178. The DCF looks at a company, or a project in this case, like a property, and determines how much profit that property could generate in the future.\(^{230}\) It is common error to assume that revenues per year, based on the guaranteed rate, could be added to get total revenue. Consider the computations of the experts for the revenues loss of Beta and the 12 projects’ land and equipment for example. These are in Annex 1(B) v. Annex 1, and Annex 3 v. Annex 2 respectively.

179. In the computation of damages for Beta,\(^{231}\) both experts agree that the “revenue loss” would be EUR16,614/year for the 2012-2023 period. Similarly for the 12 projects\(^{232}\), the experts agree that the “revenue at reduced tariff” and “damages suffered by Claimant per year are the same for the said period. Thus, both experts concur that revenue loss per year for Beta and the 12 projects, if based on the guaranteed rate, is the same. However, instead

\(^{230}\) Friedland/Wong, p. 407

\(^{231}\) Annex 1(B) v. Annex 1

\(^{232}\) Annex 3 v. Annex 2
of adding these, and getting similar results for total damages, the experts derived the net present value ("NPV").

180. The computations of both experts differed when they computed for the NPV. This is where the conflict lies. The derivation of NPV is necessary because the value of money erodes over time. This is due to several factors such as technology changes, and inflation. So for example, EUR50 could buy a BigMac burger today, but in ten years the same amount of money would not be able to buy that. Thus, the DCF discounts or divides revenues loss with a rate that reflects the risk of value erosion in order to derive the NPV/year. This rate is either WACC or Cost of Equity ("COE"). These are needed in order to derive total losses under the DCF.

181. Accordingly, Claimant maintains that the rate used should be 8% or WACC, and not COE. Numerous tribunals, such as Enron, Sempra, EDF, and Guaracachi have used WACC as an acceptable rate in the DCF method. It is the most commonly used rate to gauge lost profits because it reflects all risks by considering every source of a project’s funding or capital. It considers both the cost of debt and equity, and thus comes up with accurate projections.

182. In finance, unless otherwise indicated, the NPV value computed refers to the total asset value of the business, which comprises the fair value of all liabilities and equity. WACC considers this because it includes all capital sources—common stock, preferred stock, bonds and any other long-term debt. It is used when a company’s debt and equity are proportional.

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233 Anthony/Hawkins/Merchant, p.842-3
234 Alberro, p. 7
235 Enron v. Argentina, par.411; Sempra v. Argentina, paras 429-430; EDF v. Argentina, paras 1277-9; Guaracachi v Bolivia, par.453
236 Brigham/Houston, p.371-3
237 IFRS, p.68
183. Here, if we look at Claimant’s dataset, its project financing is sourced from 50% debt and 50% equity. This means that it has a proportional share of debt and equity. Hence, WACC should be used to derive NPV.

184. Moreover in the computations of Beta and the 12 PVPs, the cash flow or income projection measure was not specially identified as cash flows to equity. When this is identified as cash flows to equity, only cash flows due to stockholders should be considered. If not, then the cash flow should consider both debt due to creditors and equity to have a more accurate projection. Furthermore, if we used COE instead of WACC, the Claimant’s projected profits would be greatly undervalued. There would be a difference of EUR 18,859 for Beta, and EUR 188,803 for the 12 projects. This is the difference of the computations of the experts for Project Beta’s and the 12 projects’ total damages.

185. Hence, since the income or cash flow measure was not specifically identified as cash flows to equity in this case, WACC should be used. This allows a more accurate projection of the Claimant’s profit loss.

4. **WACC must also be used to compute interest rate.**

186. Claimant maintains that it is entitled to interest at 8%. This is in line with the practice that the rate that was used for discounting cash flows should also be applied to interest. This prevents an invalid round trip which undercompensates claimants, and fails to guarantee the principle of full compensation under international law. An invalid round trip is a typical mistake in international arbitration awards because it grants a pre-judgment interest that is considerably lower than the rate used to calculate future profits or damages. Here,

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238 Record, p. 48.
239 Kovic’s Annex 1(B), 3; Priemo’s Annex 3, 2
240 IFRS, p.36-9
241 Supra 239
242 Abdala/Zadicoff/Spiller, p.19
Claimant used WACC or 8% to calculate total damages. Hence, WACC should also be used to calculate interest.

5. **Claimant should be compensated for the loss of its expected profits from its planned development of solar arrays.**

187. Claimant submits that profit loss from planned developments should be compensated because this is part of its overall business plan.\(^{243}\) This loss totals EUR765,835.\(^{244}\)

188. In AAPL, SPP, and Metalclad, the Tribunals held that when it comes to claiming damages, the loss must be attributable to a wrongful act, foreseeable, and non-speculative.\(^{245}\) Here, Claimant’s management has assured to develop the Barancasia Project every two years during the 12 year period of the guaranteed FiT. In fact it has already borrowed money,\(^{246}\) and could not pay these loans because of the LRE amendment.\(^{247}\) Therefore, the damages sought for planned developments is not baseless.

\(^{243}\) Record, p.60, par.28
\(^{244}\) Record, p.51, par.11
\(^{245}\) AAPL v. Sri Lanka, paras 105-8; SPP v. Egypt, paras 186-9; Metalclad v. Mexico, paras 123-4
\(^{246}\) Record, p.63, par.19
\(^{247}\) Id., par.20
PRAYER FOR RELIEF

The Claimant respectfully asks that the Tribunal to find that:

1. It has jurisdiction over the present dispute under the BC-BIT and the claims are admissible;
2. Respondent’s administrative and regulatory measures amount to a breach of the FET standard of the BC-BIT.
3. Respondent’s actions cannot invoke necessity to excuse its breach of the BC-BIT.
4. Respondent can be ordered to rescind the amendment of LRE’s Article 4 or continue paying the pre-2013 FiTs to the Claimant; and
5. The Claimant’s basis for claiming and quantifying compensation is appropriate.

TEAM LACHS

On behalf of Claimant