The London Court of International Arbitration
IN THE PROCEEDING BETWEEN

VASIUKI LLC
(Claimant)

v

REPUBLIC OF BARANCASIA
(Respondent)

MEMORIAL FOR CLAIMANT

Arbitration No: 00/2014

19 September 2015
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A. Damages suffered by the Claimant with project Alfa amounts to € 120,621,00
B. Damages suffered by the Claimant with project Beta amounts to € 123,261,00
C. Respondent’s amendment to Article 4 of the LRE impacted negatively Barancasia Solar Project
   (i) Respondent must compensate Claimant’s wasted investments
   (ii) Alternatively, Respondent must compensate Claimant’s revenue losses

D. The damage of the amendment of the LRE on Claimant’s Additional Projects amounts to € 765,835,00
E. Interests at a rate of 8% must be added to the principal sum of past damages
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PRAYER FOR RELIEF
LIST OF AUTHORITIES

Arbitral Decisions

ADC v Hungary  ADC Affiliate Limited et al v Hungary, ICSID Case No. ARB/03/06, Award (2 October 2006)

AES v Hungary  AES Summit Generation v Hungary, ICSID Case No. ARB/07/22, Award (23 September 2010)

Azurix v Argentina  Azurix Corporation v Argentina, ICSID Case No. ARB/01/12, Award (14 July 2006)

Biwater Gauf v Tanzania  Biwater Gauf v Tanzania, ICSID Case No. ARB/05/22, Award (24 July 2008)

Burlington v Ecuador  Burlington Resources Inc. v Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Jurisdiction (2 June 2010)

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Electrabel v Hungary  Electrabel S.A v The Republic of Hungary. ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012)

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Impregilo v Argentina  Impregilo SpA v Argentina, ICSID Case No. ARB/07/17 (21 June 2011)

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Management v Mexico  Waste Management, Inc. v United Mexican States, ICSID Case N° ARB(AF)/00/3, Award (30 April 2005)

Merrill v Canada  Merrill & Ring Forestry LP v Canada, UNCITRAL, Award (31 March 2010)

Micula v Romania  Ioan Micula, Viorel Micula and others v Romania, ICSID Case No. ARB/05/20, Award (24 September 2008)

MTD v Chile  MTD Equity Sdn Bhd and MTD Chile SA v Chile, ICSID Case No. ARB/01/7, Award (25 May 2004)

National Grid v Argentina  National Grid Public Limited Company v Argentina, UNCITRAL, Award (3 November 2008)

Nykom v Latvia  Nykomb Synergetics Technology Holding v Latvia, SCC Institute, Award (16 December 2003)

Occidental v Ecuador  Occidental Exploration and Production Company v Ecuador, LCIA Case No UN3467, Final Award (1 July 2004)

Oostergetel v Slovak Republic  Oostergetel and Laurentius v. The Slovak Republic, UNCITRAL, Decision on Jurisdiction (10 April 2010)
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<td>Southern Pacific v Egypt</td>
<td><em>Southern Pacific Properties (Middle East) Limited v Egypt</em>, ICSID Case No. ARB/84/3, Award (20 May 1992)</td>
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<td>Tecmed v Mexico</td>
<td><em>Tecnicas Medioambientales Tecmed S.A. v The United Mexican States</em>, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003)</td>
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<td>Vivendi Universal v Argentina</td>
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<td>Harris</td>
<td>Cases and Materials on International Law.</td>
<td>London: Sweet and Maxwell, 2004</td>
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Articles

Brilmayer and Tesfalidet


Couture and Gagnon


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Lloyd


Mackendrick and Maxwell


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International Court Cases

**Arrest Warrant** (Congo v Belgium)  
*Case Concerning the Arrest Warrant of 11 April 2000 (Congo v Belgium)*, ICJ, Award (14 February 2002)

**Chorzów Factory**  

**ECJ Case 7/76, Opinion of AG Warner**  

**Free Zones and District of Gex**  

**Greco-Bulgarian, Advisory Opinion**  
Greco-Bulgarian “Communities”, Advisory Opinion, 1930, PCIJ, Series B, No. 17, p. 32.

**LaGrand (Germany v US)**  
*LaGrand Case (Germany v United States of America)*, ICJ, Award (5 March 1999)

**Lotus Case**  
*The Case of the S.S. “Lotus” (France v Turkey)*, PCIJ Series A No 10 (1927).

**Martini (Italy v Venezuela)**  
*Martini Case (Italy v Venezuela)*, ICJ, Award (1903)

**Rainbow Warrior (New Zealand v France)**  
*Rainbow Warrior Affair (New Zealand v France)*, ICJ, Award (30 April 1990)

**Teheran Hostages (US v Iran)**  
*Case Concerning the United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, ICJ, Award (29 November 1979)

**Temple (Cambodia v Thailand)**  
*Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)*, ICJ, Award (15 June 1962)

**Trail Smelter (US v Canada)**  
*Trail Smelter Case (United States v Canada)*, ICJ, Award (11 March 1941)

**Treatment of Polish Nationals, Advisory Opinion**  
*Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, 1932, PCIJ, Series A/B, No. 44.

**Wimbledon**  
*Wimbledon*, 1923, PCIJ, Series A, No. 1, p. 15.
Miscellaneous

BCCP: Brazil, Law No. 5.869 (1973) – Brazilian Code of Civil Procedure.


ICSID Rules: ICSID Regulations and Rules (as amended effective April 10, 2006).


Restatement: USA, Restatement (Second) Of Contracts (1981).


Treaties


# LIST OF ABBREVIATIONS

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<td>BEA</td>
<td>Barancasia Energy Authority</td>
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<td>BIT</td>
<td>Barancasia-Cogitatia Bilateral Investment Treaty</td>
</tr>
<tr>
<td>DCF</td>
<td>Discounted Cash Flow</td>
</tr>
<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
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<td>EU</td>
<td>European Union</td>
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<td>EUR</td>
<td>Euro (£)</td>
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<td>FDI</td>
<td>Foreign Direct Investment</td>
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<td>FET</td>
<td>Fair and Equitable Treatment</td>
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<td>FMV</td>
<td>Fair Market Value</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICSID</td>
<td>International Centre for Settlement of Investment Disputes</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<tr>
<td>kWh</td>
<td>kilowatt hour</td>
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<td>LCIA</td>
<td>London Court of International Arbitration</td>
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<td>LIBOR</td>
<td>London Interbank Offered Rate</td>
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<td>LRE</td>
<td>Barancasia's Law on Renewable Energy</td>
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<td>No.</td>
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<td>NPV</td>
<td>Net Present Value</td>
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<td>PCA</td>
<td>Permanent Court of Arbitration</td>
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<td>PV</td>
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<td>Res.</td>
<td>Resolution</td>
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<td>SCC</td>
<td>Stockholm Chamber of Commerce</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<td>TVM</td>
<td>Time Value of Money</td>
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<tr>
<td>UNCITRAL</td>
<td>United National Commission on International Trade Law</td>
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<td>VCLT</td>
<td>1969 Vienna Convention on the Law of Treaties</td>
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<td>WACC</td>
<td>Weighted Average Cost of Capital</td>
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STATEMENT OF FACTS

1. Vasiuki LLC (“Claimant”) is an investor in the energy field, incorporated under the laws of the Federal Republic of Cogitatia in 2002.\footnote{Facts, ¶ 3.} The Republic of Barancasia (“Respondent”) is a sovereign state that, in 2010, adopted the Law on Renewable Energy (“LRE”) to encourage the development of renewable energy sources in its territory.\footnote{Facts, ¶ 1, ¶ 14.}

2. In 1998, Respondent and Cogitatia concluded an Agreement for the Promotion and Reciprocal Protection of Investments (“BIT”)\footnote{Facts, ¶ 1.}, which came into force in August 2002.\footnote{Procedural Order No. 2, ¶ 1.} On 2004, both Respondent and Cogitatia joined the European Union (“EU”).\footnote{Facts, ¶ 5.} On 11 December 2006, Respondent adopted Resolution No. 1800, through which it considered five BITs – including the one this dispute relates to – as terminated.\footnote{Annex No. 6.} To this date, Cogitatia has not officially acknowledged the termination of the BIT.\footnote{Procedural Order No. 2, ¶ 3.}

3. Respondent enacted LRE in May 2010, providing that the production of renewable energy would be encouraged through the fixation of feed-in tariffs for energy providers. To be eligible to the tariff, renewable energy providers were required to obtain a license from the Barancasia Energy Authority (“BEA”).\footnote{Facts, ¶ 14, ¶ 16.} LRE also stated the fixed feed-in tariff calculated by the BEA and applicable at the time of issuance of a license would apply for 12 years.\footnote{Annex No. 2, Art. 4; Facts, ¶ 17}

4. For the implementation of the LRE, Respondent adopted the Regulation on the Support of the Photovoltaic Sector (“Regulation”),\footnote{Facts, ¶ 18.} which defined BEA’s competence to calculate and announce the feed-in tariffs\footnote{Annex No. 3, Art. 1.} and regulated the procedure for the calculation of tariffs.\footnote{Annex No. 3, Art. 2.}

5. Claimant has been operating in Respondent’s territory since 2009, when project Alfa was launched.\footnote{Facts, ¶ 12.} Thenceforth, Claimant has also developed projects Beta and Barancasia Solar Project. The latter consists of twelve photovoltaic power plants, with additional plans of
expansion.\textsuperscript{14} When the LRE was adopted, Claimant sought licenses for all its projects. However, Respondent denied a license to Alfa,\textsuperscript{15} whereas Beta and Barancasia Solar Project received their licenses on 30 January 2011 and 1 July 2012, respectively.\textsuperscript{16} The feed-in tariff applicable at the time was of 0.44 EUR/kWh.\textsuperscript{17}

6. In spite of the denial of Alfa’s license, Claimant continued with its projects, relying on the payment of the feed-in tariff of 0.44 EUR/kWh.\textsuperscript{18} The BEA announced the tariff in July 2010 and, following the announcement, Claimant borrowed large amounts of money\textsuperscript{19} to buy land and equipment for its new projects. On 30 January 2011, Beta became operational.\textsuperscript{20}

7. Between the completion of Beta and the beginning of the construction of the remaining twelve plants of Barancasia Solar Project, Respondent organized private hearings with the intention of amending the LRE.\textsuperscript{21} Claimant had no notice of such hearings and was not invited by Barancasian Government to participate in them.\textsuperscript{22}

8. After such hearings, Respondent amended Article 4 of the LRE to allow for an annual review of the feed-in tariff by the BEA.\textsuperscript{23} Following the amendment, the BEA recalculated the feed-in tariff, reducing it from the previous 0.44 EUR/kWh to 0.15 EUR/kWh, with retroactive effects from 1 January 2013.\textsuperscript{24}

9. Claimant has suffered significant losses as a result of Respondent’s actions.\textsuperscript{25} Beta was only allowed the fixed feed-in tariff of 0.44 EUR/kWh for two years, Alfa was never allowed such tariff\textsuperscript{26} and the Barancasia Solar Project was uncompleted when the new tariff was announced. Before such changes in the legal framework in which Claimant’s

\textsuperscript{14} Facts, ¶ 27; and Expert Report of Marko Kovic, ¶ 11.
\textsuperscript{15} Facts, ¶ 22.
\textsuperscript{16} Facts, ¶¶ 23 and 33.
\textsuperscript{17} Facts, ¶ 21.
\textsuperscript{18} Facts, ¶ 33.
\textsuperscript{19} Facts, ¶¶ 27 and 36.
\textsuperscript{20} Facts, ¶ 23.
\textsuperscript{21} Facts, ¶ 34.
\textsuperscript{22} Procedural Order No. 3, ¶ 6.
\textsuperscript{23} Facts, ¶ 34.
\textsuperscript{24} Facts, ¶ 35.
\textsuperscript{25} Facts, ¶36; and Expert Report of Marko Kovic, ¶ 5.
\textsuperscript{26} Facts, ¶ 22.
investment was inserted, Claimant considered abandoning the uncompleted part of its Barancansia Solar Project.  

10. Claimant resorts to this Tribunal to seek relief from Respondent’s actions. Before presenting its claim to this Tribunal, Claimant attempted to negotiate directly with Respondent on April 2014, following the procedure laid down on BIT Article 8. However, Respondent declined negotiations. Claimant, under BIT Article 8 (5)(d), requested the arbitration of the dispute for the London Court of International Arbitration ("LCIA"), seeking for Respondent to answer its claims. In 5 November 2014, LCIA notified Respondent of Claimant’s request for arbitration and, in 21 November 2014, Respondent presented its Response.

28 Claimant’s Request for Arbitration, Terms of The Arbitration Agreement; Annex No. 1, Art(s). 8(4) and 8(5).
29 Claimant’s Request for Arbitration, Terms of The Arbitration Agreement.
30 Arbitration No: 00/2014.
31 Respondent’s Response to Request for Arbitration.
SUMMARY OF ARGUMENTS

1. **Jurisdiction.** This Tribunal has jurisdiction over the present dispute. The BIT is valid and in force because it was not terminated according to its own terms, neither has it become obsolete due to the accession of Respondent and Cogitatia to the European Union, neither it was terminated by consent of the Parties (Section I).

2. **Merits.** Firstly, denying a license to Alfa was arbitrary and discriminatory. Secondly, the late change in the LRE violated Claimant’s legitimate expectations regarding Beta and Barancasia Solar Project, and the way this change was made violated the protection against arbitrary measures provided for the FET standard. Moreover, Responded violated specific obligations it had towards Beta and Barancasia Solar Project, which emerged from the licenses these investments had obtained. Thirdly, Respondent impaired conditions Claimant was counting on to develop the Additional Projects (Section II).

3. **Restitution and Specific Performance.** Firstly, restitution is the primary form of reparation, and repealing the amendment is a viable form of restitution because it is not materially impossible, nor a burden out of proportion. Secondly, the power to order specific performance, in addition to be something naturally implicit from the jurisdiction, is also entrenched the LCIA Rules of Procedure. Respondent cannot invoke its domestic law as an excuse for not accomplishing international obligations (Section III).

4. **Compensation.** Respondent must fully compensate the Claimant for the injuries its actions have caused. Full compensation covers all financially assessable damages Claimant has incurred, including loss of profits.
ARGUMENTS

I. THIS TRIBUNAL HAS JURISDICTION OVER THIS DISPUTE.

1. This dispute concerns the interpretation and application of a BIT that is valid and in force. Alfa, Beta, Barancasia Solar Project and Additional Projects are investments under the BIT, and Claimant is an investor in Respondent’s territory. Pursuant to this BIT, disputes between a Contracting Party and an investor of the other Contracting Party may be settled by the LCIA.

2. Respondent’s allegation that BIT has been terminated is inaccurate. The 1969 Vienna Convention on the Law of Treaties (“VCLT”), ratified by both Respondent and Cogitatia, establishes that “the termination of a treaty […] may take place only as a result of the application of the provisions of the treaty or of the present Convention”. According to the VCLT, there are limited conditions under which a treaty may be validly considered as terminated.

3. In view of the conditions VCLT imposes for termination of a treaty, the BIT is valid and in force. Firstly, it was not terminated according to its own terms. Secondly, the BIT and the Treaty on the Functioning of the EU (“TFEU”) do not have the same subject-matter and, even if they had, they would not be incompatible nor it could be established that Respondent and Cogitatia intended that promotion and reciprocal protection of investments should be governed by the TFEU. Thirdly, the BIT was not terminated by consent of the Parties.

A. The BIT was not terminated according to its own terms.

4. Respondent’s allegation that “[the BIT] has been terminated according to the BIT Article 13” is fallacious. Article 13 defined a 10-year period as the BIT minimum duration: “the agreement shall remain in force for a period of ten years”. As the BIT entered into force on 1 August 2002, Respondent’s notification of termination, dated of June 2007 – i.e. less than

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32 BIT, Art. 1(1)(e).
33 BIT, Art. 1(2)(b).
34 BIT, Art. 8(2)(d).
35 Response to Request for Arbitration.
36 Procedural Order No. 2, Quest 5
37 VCLT, Art. 42(2).
38 VCLT, Art. 54(a).
39 VCLT, Art. 59(1)(b).
40 VCLT, Art. 59(1)(a).
41 VCLT, Art. 54(b).
42 Response to Request of Arbitration.
43 BIT, Art. 13(2).
five years after the BIT had entered into force – is not in conformity with the provisions of the treaty.

B. The BIT was not terminated upon accession of Respondent and Cogitatia to the EU.

5. In its article 59, the VCLT enlists the requirements for tacit abrogation of a treaty in case of conclusion of a later treaty. A finding of implied termination presupposes (i) the conclusion of a treaty relating to the same subject matter,\(^\text{44}\) cumulated with (ii) so far incompatibility of provisions of the later treaty with those of the earlier that the two treaties are not capable of being applied at the same time,\(^\text{45}\) or (iii) intention of the Parties to have the subject matter covered by the earlier treaty governed by the later treaty.\(^\text{46}\) Claimant will further address in detail each of these three requirements to demonstrate that Respondent’s allegations that “[the BIT] has become obsolete due to the accession of both Cogitatia and Barancasia to the EU”\(^\text{47}\) and that “the BIT is therefore materially inconsistent with the EU legal order”\(^\text{48}\) are fallacious.

(i) The BIT and the TFEU do not relate to the same subject-matter.

6. Two treaties shall only be considered as covering the same subject matter if their object is identical and they both share a comparable degree of generality.\(^\text{49}\) Considering that (i) the BIT and the TFEU have different objects,\(^\text{50}\) (ii) the TFEU is much more general than the BIT, and (iii) the TFEU does not exhaust the field of investment protection,\(^\text{51}\) whereas the BIT does, they do not cover the same subject matter.\(^\text{52}\)

7. Firstly, the TFEU and the BIT have distinct objects. The former addresses the functioning of the EU,\(^\text{53}\) and it lays down regulation of the EU. The latter, by contrast, deals with the promotion and reciprocal protection of investments between Respondent and Cogitatia.\(^\text{54}\)

\(^{44}\) VCLT, Art. 59(1).
\(^{45}\) VCLT, Art. 59(1)(b).
\(^{46}\) VCLT, Art. 59(1)(a).
\(^{47}\) Response to Request of Arbitration.
\(^{48}\) Response to Request of Arbitration.
\(^{49}\) Dubuisson, pp. 1335-6; and Oostergetel v Slovakia, ¶ 79.
\(^{50}\) Oostergetel v Slovakia, ¶ 75.
\(^{51}\) Oostergetel v Slovakia, ¶ 79.
\(^{52}\) Eastern Sugar v Czech Republic, ¶ 159; Oostergetel v Slovakia, ¶ 74; and Eureko v Slovakia, ¶ 239.
\(^{53}\) TFEU, Art. 1(1).
\(^{54}\) BIT, Preamble and Art. 2(1).
8. According to the International Law Commission ("ILC"), two treaties deal with the same subject matter if the fulfillment of an obligation under one treaty strictly prevents the fulfillment of an obligation of the other treaty, or undermines its object and purpose.\(^{55}\) For clarification purposes, Claimant brings an example proposed on the book *The Vienna Convention on the Law of Treaties – A Commentary* to illustrate how different the BIT and the TFEU are regarding their scope.\(^{56}\) In this example, the TFEU would be the equivalent of a treaty of commerce and friendship, while the BIT would be a treaty specifically dealing with the trade in bananas. Given the criteria posed by the ILC, neither the fulfillment of an obligation under the treaty on the banana trade prevents the fulfillment of an obligation under the treaty of commerce and friendship, neither the treaty on the banana trade undermines the object and purpose of the other treaty. Accordingly, the BIT does not undermine the object and purpose of the TFEU, which is the functioning and regulation of the EU. Both treaties can coexist, once neither of them strictly prevents the proper application of the other treaty.

9. Furthermore, two treaties may apply to the same factual situation, but that does not mean they deal with the same subject matter.\(^{57}\) For instance, the treaty of commerce and friendship and the treaty on the banana trade may apply to the same factual situation – *i.e.* trade of bananas –, but the subject matter with which they deal is different. One deals with commerce and friendship, the other deals with trade on bananas. Accordingly, even if this Tribunal rules that the BIT and the TFEU apply to the same factual situation – *i.e.* Foreign Direct Investment ("FDI") –, they do not cover the same subject matter, because “the subject-matter of a treaty is inherent in the treaty itself and refers to the issues with which its provisions deal, *i.e.* its topic or substance”.\(^{58}\)

10. Moreover, the same report by the ILC states that determining the object that is being regulated depends on “an abstract characterization of an issue” \(^{59}\) and is difficult because very often “many characterizations may be applied to a single problem” \(^{60}\) – which is the case of the TFEU. It also alerts that a party “may have an interest to characterize the problem in different

\(^{55}\) ILC Report, ¶ 254.
\(^{56}\) Dubuisson, pp. 1335-6.
\(^{57}\) EA Investment Bank v Slovakia, ¶ 169.
\(^{58}\) EA Investment Bank v Slovakia, ¶ 172.
\(^{59}\) ILC Report, ¶ 256.
\(^{60}\) ILC Report, ¶ 256.
ways”. Respondent, for instance, may be trying to characterize TFEU’s subject-matter as FDI, which is hard to prove, once FDI appears in few articles of that treaty and is not its substance.

11. Secondly, the TFEU is much more general than the BIT. It deals with the functioning of the EU and the relation between all its Member States, their citizens and trade. Meanwhile, the BIT is very specific. It deals with the promotion and reciprocal protection of investments between Respondent and Cogitatia. The TFEU, for instance, guarantees free movement of capital within the EU. By contrast, the BIT provides substantive legal protection to investors during the investor’s investment in two specific host countries. Free movement of capital and substantive legal protection to investors are distinct, but complementary.

12. Thirdly, the substantive legal protection to investors afforded by the BIT is not comparable to the safeguards found under the TFEU. The BIT addresses National and Most-Favoured-Nation Treatment, Compensation for Losses, Expropriation, Transfers, Subrogation and, most importantly, determines a Settlement Mechanism for disputes involving a Contracting Party and an investor of the other Contracting Party, concerning the interpretation and application of the BIT. The fact that the TFEU does not afford those rights cannot prevent the BIT to provide them. “There is no reason why those rights should not be fulfilled and upheld in addition to the rights protected by EU Law”, determined PCA award on the case Eureko v Slovakia. Moreover, the Arbitration Institute of the SCC concluded, on the Eastern Sugar v Czech Republic case:

“From the point of view of the promotion and protection of investments, the arbitration clause is in practice the most essential provision of BITs. […] EU law does not provide such a guarantee.”

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61 ILC Report, ¶ 256. 
62 TFEU, Art(s). 20, 21, 22, 23, 24, and 25. 
63 TFEU, Art(s). 28, 29, 30, 31, 32, 33, 34, 35, 36 and 37. 
64 BIT, Preamble and Art. 2(1). 
65 TFEU, Art. 26(2). 
66 BIT, Art. 2(2). 
67 Eastern Sugar v Czech Republic, ¶ 169. 
68 Oostergetel v Slovakia, ¶ 76. 
69 BIT, Art. 3. 
70 BIT, Art. 4. 
71 BIT, Art. 5. 
72 BIT, Art. 6. 
73 BIT, Art. 7. 
74 BIT, Art. 8. 
75 Eureko v Slovakia, ¶ 263. 
76 Eastern Sugar v Czech Republic, ¶ 165.
13. In other words, the TFEU does not provide “equivalent to one of, if not the most important feature of the BIT regime, namely, the dispute settlement mechanism providing for investor-State arbitration”.77

14. Given that the BIT and the TFEU have different subject-matters, the first condition for termination under Articles 59(1)(a) and 59(1)(b) of the VCLT, therefore, is not fulfilled.

   (ii) The BIT and the TFEU are not incompatible with each other and can be applied at the same time.

15. The BIT and the TFEU can be applied “in parallel and be interpreted in harmony”.78 Even if this Tribunal deems that the BIT and the TFEU relate to the same subject-matter, it may take into account these treaties are not so far incompatible with each other that they cannot be simultaneously applied. As many tribunals have found,79 BIT and TFEU can be applied at the same time.

16. In EA Investment Bank v Slovakia, the PCA award determined that the VCLT limits incompatibility “to the case where one treaty requires what the other treaty prohibits”80 – i.e. if compliance with the BIT necessarily caused the breach of the TFEU. Nonetheless, PCA did not consider that “incompatibility extends to a situation where something that is forbidden under the BIT is merely permitted by EU Law, or vice versa”.81

17. Furthermore, even if this Tribunal deems that there is a minor overlap, it does not mean that the BIT and the TFEU are incompatible:

   “Nothing in Article 59 requires that the two treaties should be in all respects coextensive; but the later treaty must have more than a minor or incidental overlap with the earlier treaty.”82

18. Respondent argues the BIT is “materially inconsistent”83 with Article 207 of the TFEU. Nonetheless, this article is in the fifth part of the treaty, regarding the “External Action by the

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77 Oostergetel v Slovakia, ¶ 77.
78 EA Investment Bank v Slovakia, ¶ 236.
79 Eureko v Slovakia, ¶ 244; Eastern Sugar v Czech Republic, ¶¶ 168-9; EA Investment Bank v Slovakia, ¶ 216; and Oostergetel v Slovakia, ¶ 86.
80 EA Investment Bank v Slovakia, ¶ 216.
81 EA Investment Bank v Slovakia, ¶ 216.
82 Eureko v Slovakia, ¶ 242.
83 Response to Request of Arbitration.
Union”. Therefore, it does not apply to the present case – i.e. a dispute concerning a BIT ratified by two EU Member States.

19. EU’s Common Commercial Policy does not address intra-EU, but extra-EU foreign direct investment policy,\textsuperscript{84} such as a BIT between an EU Member State and a Third State. Meanwhile, the BIT specifically addresses a matter related to intra-EU FDI policy, once it aims to promote and reciprocally protect investments between Respondent and Cogitatia, both EU Member States.\textsuperscript{85}

20. Incompatibility of provisions, the second condition for termination under Article 59(1)(b) of the VCLT, therefore, is not fulfilled either.

\begin{itemize}
\item \textit{(iii) Parties did not intend foreign direct investment to be governed by the TFEU.}
\end{itemize}

21. Again, even if this Tribunal deems that the BIT and the TFEU relate to the same subject-matter, it may also take into account it cannot be established that Respondent and Cogitatia intended that the TFEU superseded the BIT.

22. The BIT is not automatically affected by the act of accession.\textsuperscript{86} “Neither the Europe Agreement nor the Accession Treaty provide expressly that the BIT is terminated”,\textsuperscript{87} determined the Arbitration Institute of the SCC on the Eastern Sugar v Czech Republic case. In EA Investment Bank v Slovakia, PCA considered that no desire or intention to terminate the BIT existed as “something implicit in the text of the treaty”.\textsuperscript{88} Finally, in Oostergetel v Slovakia, the tribunal decided that any agreement relevant to accession to the EU, such as the Accession Treaty, “contained any provision that could have caused the termination of the BIT”.\textsuperscript{89}

23. Therefore, when Respondent and Cogitatia acceded to the EU, they did not intend that their FDI policy should be governed by EU Law.

24. All things considered, in the present case none of the requirements for implicit abrogation of a treaty by conclusion of a later treaty is fulfilled.

\begin{itemize}
\item \textsuperscript{84} TFEU, Art. 207.
\item \textsuperscript{85} BIT, Preamble and Art. 2(1).
\item \textsuperscript{86} Söderlund, p. 464.
\item \textsuperscript{87} Eastern Sugar v Czech Republic, ¶ 143.
\item \textsuperscript{88} EA Investment Bank v Slovakia, ¶ 203.
\item \textsuperscript{89} Oostergetel v Slovakia, ¶ 80.
\end{itemize}
C. The BIT was not terminated by consent of the Parties

25. Termination by consent requires the fulfilment of two conditions: (i) consultation and, naturally, (ii) consent of all the Parties to the treaty. In the present case, neither Cogitatia consented to terminate the BIT, neither Respondent fulfilled the obligation to consult prior to send a notification of termination. Most importantly, the BIT was not bilaterally terminated: Respondent adopted Resolution No. 1800 and merely communicated Cogitatia of the termination the BIT. Thus, Respondent invalidly denounced the BIT.

26. In this section, Claimant proves that (i) termination of the BIT was unilateral and arbitrary. If this Tribunal deems that VCLT article 54(b), regarding termination by consent of the Parties, applies to the present case, Claimant proves that (ii) Respondent did not fulfill the obligation to consult Cogitatia prior to send a notification of termination, and (iii) Cogitatia did not consent to termination of the BIT.

(i) Termination of the BIT was unilateral and arbitrary.

27. Respondent enacted Resolution No. 1800, based on which it considered the BIT involved in the present dispute – as well as four others – as terminated. Afterwards, it sent a notification to Cogitatia to inform the BIT was terminated [sic], effective as of 30 June 2008.90

28. Follows from the pacta sunt servanda principle91 that it “is the normal state of affairs for treaties to continue in force”,92 In other words, “no general right of unilateral withdrawal exists”.93 The very existence of an entire section in the VCLT regarding invalidity, termination and suspension of treaties94 indicates that, in order to preserve the stability of treaties under international law95, there are limited grounds of exceptions to the pacta sunt servanda principle96, all of them detailed in the VCLT. Claimant will further advance why Respondent’s notification is not a valid form of terminating the BIT.

29. In a technical sense, Respondent’s notification to Cogitatia is called denunciation. Denunciation “can be defined as a unilateral declaration by which a party terminates its

92 Brilmayer and Tesfalidet.
93 Brilmayer and Tesfalidet.
94 VCLT, Part V.
95 Odendhal, p. 733.
participation in a treaty.” The notification’s content suggests Respondent never negotiated the termination of the BIT with Cogitatia, nor consulted Cogitatia about its consent to terminate the BIT. It was merely a denunciation. Claimant recalls that even the structure of the notification indicates this is a case of denunciation of treaty:

“Notices of denunciation and withdrawal are generally short, stylized letters of two or three paragraphs that inform the treaty depository that a State is quitting a particular agreement on a specified future date.”

30. If one can held as true that “denunciation of a bilateral treaty, if done in due form, puts an end to the treaty”, therefore it is also true that denunciation of a bilateral treaty, if not done in due form – as is the present case – does not produce legal effects, in view of the principle of validity and continuance in force of treaties entrenched in the VCLT. As Claimant pointed out in section A, in the present case the due form for denunciation was the one prescribed in the BIT: after ten years in force, a Party could denounced the treaty through a notification in writing to the other. Respondent did not follow that rule.

31. Because this is a case of invalid denunciation of treaty, the question this Tribunal shall address is not whether or not Cogitatia consented to the termination of the BIT. It is whether or not Respondent’s denunciation of the BIT was done in a due form. Once it was not, denunciation of the BIT is, therefore, invalid.

(ii) Respondent did not fulfill the obligation to consult Cogitatia prior to send a notification of termination.

32. In the remote event this Tribunal deems appropriate to analyze the facts of the present case in view of the rules provided for in the VCLT article 54(b), regarding termination by consent of the Parties, it shall take into account that Respondent did not fulfill the obligation to consult Cogitatia prior to send a notification of termination.

33. Once both countries ratified the VCLT, the fact that the obligation to consult is conventional does not make it less important than the customary consent. Respondent and Cogitatia are bound to the requirements for termination of a treaty established by the VCLT. What happens is that those requirements were not fulfilled: Respondent did not consult

97 Giegerich, p. 951.
98 Helfer, p. 643.
99 Kohen and Heathcote, p. 1020.
100 VCLT, Art. 42(2).
101 BIT, Art. 13(2).
Cogitatia prior to sending the notification of termination of the BIT, on June 29, 2007. It was simply a notification of a decision that had been made exclusively by one of the Parties, which does not configures consultation.

(iii) *Cogitatia did not consent to the termination of the BIT.*

34. On June 29 2007, Respondent notified Cogitatia that the BIT would not be effective as of 30 June 2008, but Cogitatia never agreed with it. The Ministry of Foreign Affairs confirmed on 28 September 2007 that it had received the notification on 10 July 2007.\(^\text{102}\) However, in no way does it mean Cogitatia consented to termination.

35. Furthermore, on 21 November 2010, a Barancasian Foreign Ministry spokesperson admitted that Respondent informally contacted the Ministry of Foreign Affairs of Cogitatia several times in order to confirm the termination of the BIT, but never got an official response.\(^\text{103}\) Those attempts to reach out the Government of Cogitatia – seeking for an official response – prove that not even Respondent believes Cogitatia tacitly consented to termination of the BIT.

36. For all the above-mentioned reasons, Claimant respectfully requests this Tribunal to find that the BIT is valid and in force and, therefore, that this Tribunal has jurisdiction over the present dispute.

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\(^{102}\) Annex No. 7.2.

\(^{103}\) Facts, ¶ 24.
II. **Respondent Has Violated Articles 2(1), 2(2) and 2(3) of the BIT.**

37. Respondent breached Article 2(1) of the BIT by revoking favourable conditions for investors. Respondent also breached Article 2(2) of the BIT by failing to provide Fair and Equitable Treatment (“FET”) to Claimant’s investments. Finally, Respondent breached Article 2(3) of the BIT by disrespecting specific obligations it had with regard to Claimant’s investments.

38. The present case comprises more than one investment, therefore, Claimant addresses the violations Respondent committed regarding each investment – namely, Alfa, Beta, Barancasia Solar Project and Additional Projects - separately. Firstly, Respondent acted in an arbitrary and discriminatory manner when denied a license under the LRE to Alfa. Secondly, Respondent made a legislative change that was arbitrary and that frustrated Claimant’s legitimate expectations regarding the investment in Beta. Moreover, such legislative change also disrespected the specific obligation Respondent had regarding Beta due to the license possessed by Beta. Thirdly, Respondent frustrated Claimant’s legitimate expectations related to the investment in the Barancasia Solar Project, and, for the same reasons involving Beta, disrespected the specific commitments it had. Fourthly, the amendment to the LRE impaired the conditions Claimant was counting on to develop the Additional Projects.

39. Additionally, in light of what Article 2(2) provides for, the BIT encompasses fair and equitable treatment as an autonomous and broad standard. As the BIT does not refer to the international law regime, FET shall be understood as an autonomous treaty standard\(^\text{104}\) that guarantees a higher level of protection to the investor compared to the customary standard of minimum treatment.\(^\text{105}\) Consequently, Respondent’s actions do not need to configure a breach of customary international law to amounts to a violation of BIT Article 2(2).\(^\text{106}\)

A. **Respondent has treated Claimant’s Investment in Alfa in an arbitrary and discriminatory manner.**

40. Respondent denied a license under the LRE to Claimant’s investment in Alfa in an arbitrary and discriminatory manner. In doing so, Respondent has violated BIT Article 2(2).

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\(^{104}\) *Saluka v Czech Republic*, ¶¶ 286-95 and *Deutsche Bank v Sri Lanka*, ¶ 418.

\(^{105}\) *Occidental v Ecuador*, ¶¶ 189 and 190 and *Enron v Argentina*, ¶ 258.

\(^{106}\) *Tecmed v Mexico*, ¶¶ 154-6.
41. State’s obligation to refrain from arbitrary or discriminatory measures is included in its obligation to provide FET because “any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment”. In other words, “any arbitrary or discriminatory measure, by definition, fails to be fair and equitable”. Additionally, protection of arbitrariness may be considered a general principle of law and a duty that exists under the customary international law of treatment of aliens.

42. A measure does not need to be arbitrary as well as discriminatory to amount to a violation of FET. However, Respondent’s action is arbitrary and is discriminatory.

(i) Respondent has acted in an arbitrary manner

43. Arbitral tribunals have frequently resorted to Black’s Law Dictionary definition to ascertain the meaning of the term ‘arbitrary’ in a legal sense. Black’s Law Dictionary defines arbitrary as:

“1. [a conduct] depending on individual discretion; [...] determined by a judge rather than by fixed rules, procedures, or law. 2. [...] founded on prejudice or preference rather than on reason or fact”.

44. In view of this definition, BEA denial of Claimant’s license request for Alfa because “a fixed feed-in tariff would only be available for new projects, not for existing ones” is an example of arbitrary action. Neither the LRE nor its Regulation imposed such condition; and even if had imposed it, it would not be an imposition founded on reason or fact.

45. A first criterion to ascertain arbitrariness is examining the legal foundations of a measure in domestic law. Nothing in the LRE nor in its Regulation provided that only new projects could receive a license under the LRE. When the BEA created this brand-new requisite, it overstepped the margin of discretion it had as the State-agency responsible for issuing licenses. In other words, BEA may have authority to evaluate if an applicant fulfill the requisites the law imposes to receive a license. However, it does not have authority to create

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107 CMS v Argentina, ¶ 290.
108 Lemire v Ukraine, ¶ 259.
109 Merrill v Canada, ¶ 187.
110 Glamis v United States, ¶ 626.
111 Lauder v Czech Republic, ¶ 221; Occidental v Ecuador, ¶ 162; and CMS v Argentina, ¶¶ 291-2.
112 Black’s Law, p. 321.
113 Facts, ¶ 22.
114 Annex Nº 2.
115 Annex Nº 3.
116 Azurix v Argentina, ¶ 393; Saluka v Czech Republic, ¶ 467; and Lauder v Czech Republic, ¶ 232.
117 Facts, ¶ 22.
requisites. In summary, BEA acted in a manner that amounts to arbitrary conduct because established a condition *sine qua non* for granting licenses under the LRE that the law does not provide for – not even implicitly. Therefore, because the “conduct of any State organ shall be considered an act of that State under international law”, Respondent has acted in an arbitrary manner.118

46. A second criterion that can be used to ascertain arbitrariness is whether the measure was founded on reason, in order to achieve a public purpose, as opposite to found on mere preference.119 Even if law provided that licenses would be available only for new projects, Respondent would still be acting in an arbitrary manner because its conduct is not align to a rational policy – *i.e.*, there would be no rational relationship to justify such measure.120 Given the purpose and aim of the LRE,121 it is unreasonable that existing projects cannot receive a license. In doing so, Respondent neglects that existing projects are necessary to achieve its target share of no less than 20% of electricity generated from renewable sources and punish those who first had the initiative of developing renewable energy sources in its territory.122

(ii) *Respondent has acted in a discriminatory manner*

47. Giving different treatment to similar investments without a reasonable justification amounts to prohibited discrimination.123 Prohibited discrimination, in its turn, amounts to a violation of FET, given that “discrimination is in itself contrary to fair and equitable treatment”.124

48. The criterion BEA created to concede licenses under the LRE established a *de facto* discriminatory treatment between similar investments. If this tribunal accepts that BEA could impose the condition that licenses were available only for new projects, Respondent has yet the burden of proving that such condition is reasonable justifiable.125

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118 ILC Articles, Art. 4(1).  
119 *AES v Hungary*, ¶ 10.3.7-10.3.9; *Saluka v Czech Republic*, ¶ 460; *Biwater Gauf v Tanzania*, ¶ 693; and *LG&E v Argentina*, ¶ 162.  
120 *Saluka v Czech Republic*, ¶ 460.  
121 Annex Nº 2, Art. 1.  
122 Annex Nº 2, Art. 2.  
123 *Lemire v Ukraine*, ¶ 261.  
124 *CMS v Argentina*, ¶ 290.  
125 *Nykomb v Latvia*, ¶ 4.3.2(a).
B. **Respondent has breached obligations it had regarding Beta**

49. Claimant’s investment in Beta was also subject to unfair and inequitable treatment. Additionally, due to the license Beta had obtained, Respondent had obligations with that investment that were violated by the legislative change.

50. Firstly, the amendment of the LRE offended Claimant’s legitimate expectations concerning its investment in Beta. Secondly, such legislative change was arbitrary. Thirdly, by passing a legislative change to the LRE that affected the terms of the license Beta had received, Respondent violated specific obligations it had with regard to that investment.

   (i) **LRE’s amendment offended legitimate expectations of Claimant regarding Beta**

51. FET encompasses the protection of investor’s legitimate expectations. Indeed, as recalled in Electrabel v Hungary, “it is widely accepted that the most important function of the fair and equitable treatment standard is the protection of the investor’s reasonable and legitimate expectations”. Moreover, BIT’s preamble makes clear that the context of such treaty is one of recognition that business initiatives would be stimulated by the protection of investments. The object and purpose of the BIT was to “create and maintain favorable conditions for investments”. Both assertions lead to the conclusion that the FET standard protects the legitimate expectations of investors induced to invest because of the BIT.

52. Respondent’s amendment to the LRE violated Claimant’s reasonable and legitimate expectations of predictability and stability that helped form the basis of Claimant’s decision to develop Beta. Claimant’s first project in solar power plants faced construction difficulties that could have discouraged a new attempt at investing in this sector. However, the provision of the recently enacted LRE lead Claimant to develop a new project, because fixed feed-in tariff payments usually “provide adequate investment security to attract investor interest”. To assess whether Claimant’s expectation to receive a feed-in tariff of 0.44 EUR/kWh for its investment in Beta is legitimate, this tribunal may use Respondent’s legal order as a starting point.

LRE established that a renewable energy provider, upon obtaining a license, would receive a fixed feed-in tariff for twelve years, based on the tariff applicable at the time of

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126 **Tecmed v Mexico**, ¶ 154.
127 **Electrabel v Hungary**, Part VII, ¶ 7.75.
128 **CME x Czech Republic**, ¶ 611.
129 Couture and Gagnon, p. 957.
130 **Dolzer**, p. 22; **Frontier v Czech Republic**, ¶ 287; **Enron v Argentina**, ¶ 262; and **AES v Hungary**, ¶¶ 9.3.8-9.3.18.
issuance of the license. The tariff applicable when Beta received its license was of 0.44 EUR/kWh.

53. Respondent had a duty to maintain the fixed feed-in tariff in the conditions LRE provided for – ie, the duty to maintain a stable legal framework. Even if this tribunal deems Respondent can invoke its right to regulate, it must take into account that, by entering into the BIT, Respondent became bound by obligations that pose a limit to its regulatory power. Therefore, Respondent cannot justify such alteration in its legal framework by invoking a right to regulate.

54. Claimant’s investment in Beta was undermined by the change in the LRE. Beta was built using the technology available at the time of its construction, before the development of the ground-breaking, cheaper technology. Therefore, the costs for its construction were far greater than the costs incurred by investors who developed plants using such new technology created in 2011. Claimant invested using the technology available at the time of the investment, and it had legitimate expectations towards the payment of the fixed feed-in tariff.

55. In Micula v Romania, the tribunal decided that “in order to establish a breach of the fair and equitable treatment obligation based on an allegation that [Respondent] undermined the Claimant’s legitimate expectations”, Claimant must explicit a promise or assurance made by Respondent which was relied on by the Claimant to invest, and that Claimant’s expectations reliance were reasonable.

56. In the present case, Respondent did assure the Claimant that it would receive a fixed feed-in tariff of 0.44 EUR/kWh for twelve years, and Claimant relied on this assurance to make its decision to invest.

57. Likewise, the Tribunal recognized that, in spite of a country’s sovereignty, “it cannot be fair and equitable for a state to offer advantages to investors with the purpose of attracting investment in an otherwise unattractive region (…), and then maintain the formal shell of the

131 Annex No. 2, Article 4
132 Facts, ¶ 21 and 23.
133 Tecmed v Mexico, ¶ 154; Occidental v Ecuador, ¶ 183 and 191; and LG&E v Argentina, ¶ 124-5.
134 ADC v Hungary, ¶ 423-4; Lotus case, p. 18.
135 Impregilo v Argentina, ¶ 291.
137 Micula v Romania, ¶ 668.
regime but eviscerate it of all (or substantially all) content”. By amending the LRE, Respondent maintained the “formal shell” of its law, withdrawing the content that attracted investors and guaranteed a fair return for investments under LRE.

58. In sum, Claimant had a legitimate expectation to receive the fixed tariff of 0.44 EUR/kWh for twelve years. The legislative change provided for the annual adjustment of the tariff, which soon thereafter was reduced in nearly two-thirds – for 0.15 EUR/kWh. Thus, the Respondent violated Claimant’s legitimate expectations.

(ii) Respondent’s legislative change was arbitrary

59. The complete lack of transparency and candor in Respondent’s law-making process amounts to arbitrariness and are a violation of the FET standard.

60. Respondent’s conduct in the legislative process that led to the amendment of LRE Article 4 was arbitrary. Article 4 was designed to guarantee safety and stability for investors, aiming for the development of renewable energy sources. Respondent has amended the provision unilaterally and arbitrarily, taking away the guarantees it first accorded and breaching the duty of maintaining a stable legal framework. Although a State has the right to change its legislation, it cannot revoke pre-existing decisions or dispense the previous framework altogether. In addition, such changes should be transparent and in accordance to due process.

61. Claimant expected that Respondent would be transparent in relation to laws and requirements governing the investment, so that Claimant could be able to make a conscious decision to invest. It also expected that Respondent would use the legal instruments governing investments in conformity with their function, and not to deprive investors of their compensation. However, Respondent did not meet such expectations. In fact, Respondent made use of its legal instruments to reduce Claimant’s earnings, going against the good faith principle established by international law.

138 Micula v Romania, ¶ 687.
139 Waste Management v Mexico, ¶ 98.
140 Vandeveld, pp. 52-3.
141 Occidental v Ecuador, ¶ 183.
142 Vandeveld, p. 66.
143 Tecmed v Mexico, ¶ 154.
144 CMS v Argentina, ¶ 277.
145 Micula v Romania, ¶ 529.
62. Claimant did not have the opportunity to participate in the process of reviewing Article 4. Respondent notified solely “specially invited representatives of industry and certain stakeholder groups” to present their testimonies\(^{146}\) regarding the feed-in tariff experience, as well as their opinions regarding the eventual amendment of Article 4, and Claimant was not one of them. Respondent’s attitude violated Claimant’s right to be heard in such situation.\(^{147}\)

63. On the contrary, as Claimant could not be present in the private hearings held previously to the amendment\(^{148}\) in order to have its testimony taken, it has actually been discriminated by Respondent. There has never been news of who were the representatives of industry and stakeholder groups present at the hearings.\(^{149}\) This lack of information, and therefore transparency, may lead one to believe that that only major investors would have protection of their interests assured by Respondent. This assumption leads to the conclusion that Claimant has been discriminated\(^{150}\), which once again violates the FET clause on the BIT.

\[(iii) \textit{Respondent violated specific obligations it had toward Beta}\]

64. The BIT provides that “each Contracting Party shall observe any other obligation it may have with regard to a specific investment of an investor”\(^{151}\). Thus, in addition to violating the obligation to provide FET, Respondent failed to observe a specific obligation it had toward Beta – namely, respecting the terms of the license. At the time Beta’s license was issued, the feed-in tariff was fixed – 0.44 EUR/kWh – and applicable for twelve years.

\[(iv) \textit{Inapplicability of the retroactive effect of the LRE amendment to Claimant’s investment in Beta}\]

65. “[T]here is a general principle common to the laws of all [EU] Member States preventing the retroactive application of legislation”.\(^{152}\) This reasoning leads to the conclusion that only licenses issued after 1 January 2013 would be subject to an adjustable feed-in tariff. Article 4 of the LRE, before its amendment, stated that “the feed-in tariff announced by the BEA and applicable at the time of issuance of a license will apply for twelve years”.\(^{153}\)

\(^{146}\) Facts, ¶ 34.
\(^{147}\) Tecmed v Mexico, ¶ 162; and ADC v Hungary, ¶ 435.
\(^{148}\) Facts, ¶ 34; Procedural Order No 2, ¶ 15.
\(^{149}\) Procedural Order No. 3, ¶ 5.
\(^{150}\) Lemire v Ukraine, ¶ 259.
\(^{151}\) BIT, Art. 2(3).
\(^{152}\) ECJ Case 7/76, Opinion of AG Warner, ¶ 1232.
\(^{153}\) Annex No. 2, Art. 4.
Therefore, as the license issued to Beta dated from before the amendment\textsuperscript{154}, the tariff applicable at the time of issuing of Beta’s license should be maintained, guaranteeing the payment of the feed-in tariff of 0.44 EUR/kWh.

C. Respondent has breached obligations it had regarding the Barancasia Solar Project

66. Claimant’s plants $Chi$, $Delta$, $Digama$, $Dzeta$, $Epsilon$, $Eta$, $Fi$, $Gama$, $Ipsilon$, $Jota$, $Kapa$ and $Kopa$ – collectively referred as Barancasia Solar Project – were similarly subject to a breach of FET and of specific obligation by the Respondent. Firstly, as mentioned, the amendment of the LRE was arbitrary. In that respect, the Claimant reiterates its arguments, since the amendment of the LRE yielded losses for the Claimant’s investment in the Barancasia Solar Project, as well as in Beta. Secondly, such legislative change offended its legitimate expectations concerning the Barancasia Solar Project. Thirdly, by passing a legislative change to the LRE that affected the terms of the licenses that the Barancasia Solar Project had received, Respondent violated specific obligations it had with regard to that investment.

(i) LRE’s amendment offended legitimate expectations of Claimant in reference to Barancasia Solar Project

67. FET standard protects the legitimate expectations of investors induced to invest because of the BIT.\textsuperscript{155} Claimant applied for licenses to the plants that compose the Barancasia Solar Project on 1 April 2012,\textsuperscript{156} and by 1 July 2012, BEA had issued licenses for all twelve plants.\textsuperscript{157} Following Beta’s example, Claimant would receive a fixed feed-in tariff of 0.44 EUR/kWh for each project for twelve years.\textsuperscript{158}

68. Relying on the expectations generated by the enactment of the LRE, Claimant decided to make a significant investment on Respondent’s territory. It borrowed a considerable amount of money from banks and incurred in debt to acquire the land necessary to the installation of the 12 plants.\textsuperscript{159} At that time, when Claimant decided to invest and applied for a license, no one could have predicted that a change in the LRE would take place.

\textsuperscript{154} Facts, ¶ 23.
\textsuperscript{155} CME v Czech Republic, ¶ 611.
\textsuperscript{156} Procedural Order No. 2, ¶ 9.
\textsuperscript{157} Facts, ¶ 33.
\textsuperscript{158} Facts, ¶¶ 21, 33 and 35.
\textsuperscript{159} Facts, ¶ 27; and Procedural Order No. 2, ¶ 11.
69. Similarly to Claimant’s investment in Beta, and especially considering the significant size of Barancasia Solar Project, this investment also relied on the fixed feed-in tariff. Article 4 of the LRE originally provided a guarantee over the returns of the investment. However, the amendment of Article 4 of the LRE took away that guarantee, constituting a violation of Claimant’s legitimate expectations.

70. Tribunals have recognized that investor’s legitimate expectations should be understood as those expectations that were taken into account to make the investment. Tribunals have also recognized that such expectations are based on the conditions offered by the host State at the time of the investment. Therefore, it is imperative to explicit the moment in which Claimant decided to invest in order to prove that Claimant had legitimate expectations toward Barancasia Solar Project.

71. Claimant decided to launch the Barancasia Solar Project in 2011, borrowing money, acquiring land plots and obtaining construction permits for the twelve photovoltaic plants. Thus, considering that the time of the investment for Barancasia Solar Project is the year of 2011, there were no signs that the LRE would be amended, as well as no signs of popular opinions against the LRE. It was only in the following year that Respondent and the population begin to emit unfavorable opinions towards Respondent’s policy on the encouragement of renewable energy production. Therefore, Respondent failed to meet Claimant’s expectations, amending the LRE to alter the tariff in which Claimant relied when it decided to invest.

(ii) Respondent violated specific obligations it had toward Barancasia Solar Project

72. As previously argued, in addition to violate the obligation to provide FET, Respondent failed to observe a specific obligation it had toward the Barancasia Solar Project – namely, respecting the terms of the license.
(iii) **Inapplicability of the retroactive effect of the LRE amendment to all 12 plants of Barancasia Solar Project**

73. The change of Article 4 of the LRE cannot affect the licenses that were issued previously to the amendment. Following the example of Beta, the licenses for the Claimant’s other 12 projects were also issued before the amendment.\(^{165}\) Thus, the tariff applicable at the time of issuing the licenses, 0.44 EUR/kWh, should also be maintained for the Barancasia Solar Project, guaranteeing the payment of the feed-in tariff established by law to the Claimant.

**D. Respondent’s actions impaired the conditions Claimant was counting on to develop the Additional Projects**

74. Claimant had plans to expand the Barancasia Solar Project,\(^{166}\) and the amendment to the LRE impaired this long term goal of the company.\(^{167}\) Under the BIT Article 2(1), Respondent had the “obligation to create favorable conditions for investors”.\(^{168}\) In the present case, Respondent revoked favorable conditions. It follows from an *a minori, ad maius* interpretation of the rule that, if not creating favorable conditions amounts to a violation of the BIT, so it does revoking favorable conditions.

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\(^{165}\) **Facts, ¶¶ 33 and 35.**

\(^{166}\) **Expert Report Prof. Kovic, ¶ 11.**

\(^{167}\) **Procedural Order No. 3, ¶ 28.**

\(^{168}\) **BIT, Art. 2(1).**
III. RESPONDENT SHALL REPEAL THE AMENDMENT OR CONTINUE TO PAY THE FEED-IN TARIFF FOR CLAIMANT’S INVESTMENTS FOR TWELVE YEARS

75. “In any legal system there must be liability for failure to observe obligations imposed by its rules”. Such liability is known as responsibility in international law. Responsibility is a general principle of international law, as well as “the necessary corollary of a right”. The notion of responsibility translates into the following premise: from the breach of a duty it follows the obligation to provide full reparation for the injuries caused.

76. This Tribunal may resort to the established principles of customary international law to rule on the applicable form of reparation. Claimant advances two reliefs this Tribunal may preferably use to provide full reparation for the injuries Claimant incurred with respect to its investments in Beta and in Barancasia Solar Project as a result of Respondent's actions.

77. Firstly, Claimant enlists the motives that makes restitution the most adequate form of reparation. Secondly, it requests this Tribunal to order Respondent to repeal the amendment of Article 4 of the LRE, given this is materially possible and not a burden out of proportion. Thirdly, in the event this Tribunal does not grant the aforementioned request, Claimant deems appropriate to stress that this Tribunal has power to order reparation in form of specific performance – either in view of the implicit power that follows its competence to rule on this dispute, either in view of the LCIA Rules of Procedure. Fourthly, it requests this Tribunal to order Respondent to continue to pay the 0.44 EUR/kWh feed-in tariff for twelve years to Claimant’s investments in Beta and in Barancasia Solar Project and recalls that Respondent cannot invoke its national law as an excuse to do not fulfill its internationally assumed obligations.

A. Restitution is the primary form of reparation

78. Among the variety of forms of reparation, restitution has the primacy because:

“[it] most closely conforms to the general principle that the responsible State is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not been committed”.

169 Harris, p. 504.
170 Brownlie, p. 434.
171 Brownlie, p. 435.
172 ILC Articles, Art. 31.
173 Nykomb v Latvia, Section 5.1, ¶¶ 38-9.
174 ILC Articles, Art. 35, Commentary No. 3.
79. In view of international law, the primacy of restitution over other forms of reparation was enunciated by the Permanent Court of International Justice (“PCIJ”). In the often-cited *Chorzow Factory* case, PCIJ said that the obligation to pay the value of the indemnification, *ie* to compensate, comes after the obligation to restore the undertaking, *ie* to restitute, and only if restitution is impossible.\(^{175}\) Later on, the ILC authoritatively restated\(^ {176}\) this principle on the *Draft Articles on State Responsibility for Internationally Wrongful Acts* (“ILC Articles”).\(^ {177}\)

80. When it comes to ascertain what is prevalent understanding among investment arbitration practice, Claimant stresses that many tribunals have referred to the principle of primacy of restitution over other forms of reparations in the in the reasoning of their awards.\(^ {178}\) As pointed by the tribunal in *CMS v Argentina*, “restitution is by far the most reliable choice to make the injured party whole as it aims at the reestablishment of the situation existing prior to the wrongful act”.\(^ {179}\)

81. In sum, this Tribunal is not limited to award reparation merely by monetary compensation. Any difficulty that restitution may encounter in practice cannot prevent this Tribunal from determining the best remedy for the present dispute. In this sense, one shall bear in mind that “the role of investment Tribunals cannot be limited to providing financial redress for past wrongs”.\(^ {180}\)

**B. Respondent shall repeal the amendment to Article 4 of the LRE**

82. Restitution can assume different forms, and one of them is the reversal of a juridical act. The so-called *juridical restitution* occurs when “restitution requires or involves the modification of a legal situation”.\(^ {181}\) As pointed by the ILC, “such cases include the revocation, annulment or amendment of a constitutional or legislative provision enacted in violation of a rule of international law […].”\(^ {182}\)

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\(^{175}\) *Chorzów Factory*, p. 48.

\(^{176}\) *Nykomb v Latvia*, Section 5.1, ¶ 38-9.

\(^{177}\) ILC Articles, Art. 35.

\(^{178}\) *ADC v Hungary*, ¶ 494-5; *Chevron and Texaco v Ecuador*, ¶ 118; *EDF v Romania*, ¶ 185 and 213; *Gustav Hamester v Ghana*, Sections VHI-IX; and *Burlington v Ecuador*, ¶ 70.

\(^{179}\) *CMS v Argentina*, ¶ 401.

\(^{180}\) Stephens-Chu, p. 19.

\(^{181}\) ILC Articles, Art. 35, Commentary No. 5.

\(^{182}\) ILC Articles, Art. 35, Commentary No. 5.
83. Claimant will demonstrate why repealing the amendment to Article 4 of the LRE is a viable form of restitution, given that (i) it is not materially impossible, (ii) nor disproportional. Indeed, in a case similar to this, the tribunal of Nykomb v Latvia reasoned that:

“Restitution in the present case is conceivable, either through a juridical restitution of provisions of Latvian law ensuring Windau’s right to the double tariff as it was ensured under the Entrepreneurial Law, or through a monetary restitution to Windau of the missing payments of the difference between the contractually established double tariff and 0.75 of the tariff actually paid.”

84. Firstly, “it should be noted that restitution is not material impossible merely because of legal or practical difficulties”. Material impossibility is configured when “the property to be restored has been permanently lost or destroyed”, which is not the present case. In fact, one could even say that a juridical restitution, precisely because it does not have a material aspect, will never be materially impossible.

85. Secondly, repealing the amendment is not a burden out of proportion. There is not “grave disproportionality between the burden which restitution would impose” on Respondent and "the benefit which would be gained" by the injured party. Respondent enacted the LRE to encourage the development of renewable energy sources in its territory. LRE provided that state incentives – namely, fixed feed-in tariffs – would be used until the share of electricity generated from renewable sources amounted no less than 20% of its energy matrix, what has not happened until this date. The least Respondent must do is bear the costs of repealing the amendment to Article 4 of the LRE in order to repair the Claimant and to fulfill with the obligations it have in view of the BIT.

86. All things considered, Respondent shall repeal the amendment to Article 4 of the LRE to reestablish the situation that would have existed if the wrongful act had not been committed – ie, the status quo ante.

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183 Nykomb v Latvia, ¶ 39.
184 Crawford, p. 513; and ILC Articles, Art. 35, Commentary No. 8.
185 ILC Articles, Art. 35, Commentary No. 8.
186 Harris, p. 541.
187 Harris, p. 541.
188 Facts, ¶ 14.
189 Annex No. 2, Art. 2.
190 Procedural Order No. 2, ¶ 10.
C. The Tribunal has power to order specific performance

87. This Tribunal has power to order specific performance, more specifically, to compel the Respondent to continue to pay the feed-in tariff, in order to achieve the purposes of the BIT. Specific performance is the alternative to this Tribunal constrain Respondent to accomplish with its agreed duties, which remain in force and must be followed.

88. Respondent argues that the Tribunal does not have the power to order specific performance,¹⁹¹ but this is untrue for three different reasons. Firstly, the BIT does not limit in any form the remedies available, nor the Tribunal’s power to order specific performance. Secondly, a tribunal does not need explicit provisions allowing it to order specific performance. The understating that every tribunal with jurisdiction over a dispute has an implicit power to order specific performance is supported both by international practice and academic literature. Thirdly, in view of a breach of legal obligation, such as the ones entrenched in BIT Articles 2(1), 2(2) and 2(3) that Respondent has violated, LCIA Rules of Procedure provides for specific performance as a form of reparation.

(i) BIT does not restrain the use of specific performance as a form of reparation

89. As pointed by Dugan et al., it is not common for investment treaties to establish the power of the tribunal to determine specific performance.¹⁹² That is by no means necessary. Given that every tribunal has an implicit power to order specific performance, only the limits to it must come explicitly stated in the BIT.¹⁹³ That is precisely what some present-day BITs – eg from US¹⁹⁴ and Canada¹⁹⁵ – have done.

90. In sum, the Tribunal does not need to have a previous rule allowing it to order specific performance. Indeed, it is the opposite: if the Parties had any interest in restrain this power, they would have expressly limited it in the BIT.

(ii) Every tribunal has an implicit power to order specific performance

91. The assumption that any Court or Tribunal has an implicit power to order a remedy by specific performance is rooted in the practice of international courts and arbitral tribunals. The International Court of Justice (“ICJ”), when revisiting the discussion on adequate form of

¹⁹¹ Response to Request for Arbitration.
¹⁹² Dugan et al, p. 570.
¹⁹³ Micula v Romania, ¶167.
¹⁹⁴ U.S. BIT, art. 34.
¹⁹⁵ Canada BIT, art. 44
reparation, has mentioned the power to order specific performance based on the implicit powers of a Court derived from its competence, and also related to a continuous breach of international obligation.196

92. The arbitral practice also supports the understanding that every tribunal has an implicit power to order specific performance. In Enron v Argentina, for instance, it was acknowledged that the power to order performance is available in accordance with the international courts and tribunals ample practice.197

93. In addition to the cases above-mentioned, it is also worth to mention the cases Goetz v Burundi198, Tehran Hostages199, Martini200, Trail Smelter201, Temple202, LaGrand203 and Arrest Warrant204. This vast case law demonstrates that every court and tribunal has an implicit power to order specific performance.

94. Referring that a tribunal has implicit power to order specific performance translates into acknowledging that the power to order specific performance comes from lex causae.205 Many authors, like Michael E. Schneider,206 have demonstrated that the notion of implicit power is adopted as a matter of principle. Other renowned scholars207 mention that granting specific performance is an implicit power of the Court. According to Muñoz, in some cases, this possibility comes to the interpretation observing the “maximum utility” of the arbitration clause.208 Similarly, Schreuer notes that the power of a Court to decide for a non-pecuniary solution is already supported by the international judicial practice.209

196 Rainbow Warrior (New Zealand v France), ¶114.
197 Enron v Argentina, ¶79.
198 Goetz v Burundi.
199 Tehran Hostages (US v Iran).
200 Martini (Italy v Venezuela).
201 Trail Smelter (US v Canada).
202 Temple (Cambodia v Thailand).
203 La Grand (Germany v US).
204 Arrest Warrant (Congo v Belgium).
205 Schneider, p. 43.
206 Muñoz, p. 107.
207 Schreuer; Mourre, Stephens-Chu; Muñoz.
208 Schneider, p. 6.
209 Schreuer, p. 331.
95. Therefrom, this Tribunal has the implicit power to order Respondent to continue to pay the feed-in tariff of 0.44 EUR/kWh for Claimant’s investments once it finds support in the implicit competence derived from its *jurisdiction*.

(iii) *LCIA Rules of Procedure allows this tribunal to order specific performance*

96. LCIA Rules of Procedure, in its Article 22, entitled *Additional Powers*, allows this Tribunal to determine specific performance of any agreement. Claimant recalls that Respondent did not fulfill three legal obligations imposed by the BIT: (i) to create favorable conditions for investors, (ii) to provide fair and equitable treatment, and (iii) to observe other assumed obligations.

97. In view of the obligations not performed, Claimant requests this Tribunal to order specific performance to achieve the final purposes of the agreement, and to comply with a legal assumed obligation. One cannot but conclude that this Tribunal has power to order Respondent to continue to pay the feed-in tariff established by the LRE, once it is Claimant’s right derived from an agreement. Therefore, LCIA Rules of Procedure allows this Tribunal to order specific performance.

D. **Respondent Shall Continue to Pay the 0.44 EUR/kWh Feed-In Tariff for Twelve Years**

98. In the event this Tribunal does not concede the request for restitution, it shall order Respondent to continue to pay the 0.44 EUR/kWh feed-in tariff for Claimant’s investments for twelve years. Firstly, Respondent must follow the general principle of *pacta sunt servanda* and accomplish with the obligations stated in Article 2 of the BIT. Secondly, Respondent cannot invoke its domestic law to do not accomplish obligations it has assumed under the BIT.

   (i) *Continuing to pay the feed-in tariff preserves the pacta sunt servanda.*

99. Respondent had specific obligations regarding Claimant’s investments that were breached by the amendment of the LRE. The licenses manifest legal obligations Respondent assumed, and they must be respected. Said differently, before the amendment, the LRE provided a fixed feed-in tariff to the plants that owned a license. Therefore, this Tribunal shall

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order specific performance in order to compel Respondent to fulfill its obligations under the BIT.

100. Finally, by issuing the license to Claimant’s investment in Beta and Barancasia Solar Project, Respondent became bound by a specific obligation with regard to these projects, in view of BIT article 2(3): paying the 0.44 EUR/kWh feed-in tariff for twelve years, once that was the tariff applicable at the time of issuing the license. Respondent may have amended the LRE, but, given the BIT, all the obligations it assumed under the previous law remain. Therefore, Respondent shall continue to pay the feed-in tariff in order to repair the violation of its admitted obligations.

(ii) Respondent cannot invoke its domestic law as an excuse to disregard assumed obligations.

101. According to the VCLT, a State cannot invoke its internal law to do not accomplish the commitments assumed.211 This is also stated by the ILC Articles, where is defined that a State will not be out of scope to be liable for its international illegal acts once it is in conformity with its domestic law.212 The ILC Articles goes beyond and includes that “conformity with the provisions of internal law in no way precludes conduct being characterized as internationally wrongful is equally well settled”213. If that was possible, a State could assume obligations under a treaty, and, when it does no longer represent advantages, the State could change its own law to not be submitted to the commitments anymore.

102. Moreover, the restriction to invoke internal law to do not accomplish with assumed international obligations is a generally accepted principle of international law,214 exactly as the legislative regulatory power is limited by assumed international obligations.215 For this reason Respondent’s own legislation cannot represent a way to escape of its duties.216 Therefore, Respondent cannot invoke the amendment it has made to Article 4 of the LRE as an obstacle from continuing to pay the 0.44 EUR/kWh feed-in tariff for Claimant’s investments. In sum, Respondent cannot be allowed to change its legislation, in violation of the BIT, and use it for the purpose of not accomplish obligations it had under the BIT.

211 VCLT, Art. 27.
212 ILC Articles, art. 3.
213 ILC Articles, art. 3, commentary nº 3.
214 Greco-Bulgarian Advisory Opinion, p. 32.
215 Lotus Case, p. 18.
216 Free Zones and District of Gex, p. 12; Wimbledon, pp. 29-30; Treatment of Polish Nationals, p. 24.
IV. **Respondent Shall Pay Damages to Claimant in Order to Compensate Its Losses.**

103. In the event this Tribunal does not concede Claimant’s request for restitution or specific performance, it shall order Respondent to fully reparate the material harm it has caused.\(^{217}\) As a result of Respondent violation of the BIT,\(^ {218}\) Claimant suffered *damnun emergens* and *lucrum cessans*. Therefore, Respondent bears the duty to provide compensation.\(^ {219}\)

104. In order to evaluate the extent of such injury in financial terms, this Tribunal must consider all harm caused to Claimant’s investments. Firstly, this Tribunal must consider the damages resulted from Respondent’s denial to issue a license for Alfa – and, consequently, the denial of the 0.44 EUR/kWh feed-in tariff. Secondly, although Beta received a license under the LRE, the project enjoyed the 0.44 EUR/kWh feed-in tariff for only two years from the promised twelve. Thus, the profits Claimant would have earned if the tariff had remained unchanged must be calculated. Thirdly, Respondent must either compensate Claimant’s wasted investment in Barancasia Solar Project or pay Claimant the profits it would have earned if Barancasia Solar Project had been completed and operating under the 0.44 EUR/kWh tariff laid down in LRE. Fourthly, this Tribunal must consider Claimant’s Additional Projects to be developed every two years of the twelve-year period foreseen in LRE. Fifthly, the tribunal must apply an interest rate of 8% to the sum of Claimant’s losses in order to equal the total of damages to the obligation of full reparation under international law. Finally, Claimant requests that Respondent pay for all costs related to these proceedings.

105. In case law, there is no consensus over the standard of compensation. Claimant stresses that compensation is applicable at the present case and it “should be based upon the fair market value of the property calculated by reference to its ‘highest and best use’”.\(^ {220}\) Also, the absence of a clear standard in the BIT for compensation does not relieve the Respondent of its obligation to repair the Claimant adequately:

> Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.\(^ {221}\)

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\(^{217}\) ILC Articles, Art. 31.

\(^{218}\) Marboe, p. 29.

\(^{219}\) ILC Articles, Art. 36.

\(^{220}\) *Santa Elena v Costa Rica*, ¶ 70.

\(^{221}\) *Chorzów Factory*, ¶ 21.
106. Therefrom, as the tribunal of *S.D. Myers v Canada* concluded, a tribunal might adopt the fair market value ("FMV") standard, which is usually applied to estimate damages in expropriation cases.\(^\text{222}\) According to the World Bank, adequate compensation corresponds to the FMV of the investment.\(^\text{223}\)

107. In order to calculate the FMV of Claimant’s investments and losses, the discounted cash-flow method ("DCF") shall be applied.\(^\text{224}\) This method is defined as:

\[ \text{DCF} = \frac{\text{Cash receipts realistically expected from the enterprise in each future year of its economic life as reasonably projected minus that year’s expected cash expenditure, after discounting this net cash flow for each year by a factor which reflects the time value of money, expected inflation, and the risk associated with such cash flow under realistic circumstances.} \]

108. The time value of money ("TVM") means “the value of future income decreases with its distance in the future”. In other words, the present money is worth more than the same amount in the future, because the first can be immediately spent or invested, while the latter is affected by inflation and exchange rates.\(^\text{226}\)

109. According to *Phillips Petroleum v Iran*, to evaluate monetary compensation, calculation must consider only future variables, such as the expected size of future capacity. The tribunal must apply past data solely to estimate a reasonable rate of return applicable to the calculation of future losses, once that past earnings are unreliable in such cases due to unpredictable changes in the future – such as the price of energy.

110. For the present case, the Weighted Average Cost of Capital ("WACC") coincides with such reasonable rate of return, once that this Tribunal must use past data only to estimate the discount rate – WACC – according to which the future cash flows will be discounted to a present value. The sum of the values for each future year represents the total.

111. Claimant’s *damnum emergens* should be simply obtained by the tariff differential applied to the revenue loss calculation – operating hours x size x tariff differential. The resulting value must then be updated to 1 January 2013, as Mr. Kovic demonstrates in Claimant’s Expert

\(^\text{222}\) *SD Myers v Canada*, Second Partial Award, ¶ 94.

\(^\text{223}\) World Bank, Chapter IV, ¶ 3.

\(^\text{224}\) *National Grid v Argentina, Enron v Argentina, Sempra Energy v Argentina and CMS v Argentina*.

\(^\text{225}\) World Bank, Chapter IV, ¶ 6.

\(^\text{226}\) Lloyd, p. 12.
Report. The sum of damnum emergens and lucrum cessans provides the total the damages that Respondent must pay to Claimant.

112. The calculation of WACC for each head of damages must consider the following formula:

\[
(1) \text{WACC} = \frac{MV_e}{MV_e + MV_d} \cdot Re + \frac{MV_d}{MV_e + MV_d} \cdot Rd \cdot (1 - t)
\]

Where:
- \(Re\): cost of equity
- \(Rd\): cost of debt
- \(MV_e\): market value of equity
- \(MV_d\): market value of debt
- \(t\): tax rate

113. As established by Mr. Kovic, a discount rate – WACC – of 8% shall be applied to the revenue losses of Claimant’s investments in Respondent’s territory. The development of the formula above for each head of damages, as demonstrated below, results in the same 8% discount rate. The future sections are dedicated to develop and explain such calculations on damages suffered by Claimant.

A. Damages suffered by the Claimant with project Alfa amounts to € 120,621,00.

114. Considering Alfa’s initial capacity of 12,1% in 2009 and an annual improve capacity of 2.2 percent, Alfa will operate at a design operating capacity of 21% in 2013. The following capacities for the years 2010, 2011, 2012 and 2013 are the result of the sum of 2.2 percent to the initial capacity of 12,1% in 2009 and so on.

<table>
<thead>
<tr>
<th>Year</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alfa' Capacity</td>
<td>12,1%</td>
<td>14,3%</td>
<td>16,5%</td>
<td>18,7%</td>
<td>21,0%</td>
</tr>
</tbody>
</table>

115. Such improvement in Alfa’s capacity results in an increase in its annual operating hours. The operating hours for each project are the result of the multiplication of 8,760 (hours) by its capacity (%). Therefore, in 2013 Alfa would have reach the total of 1,840 operating hours and, consequently, its designed operating capacity. This standard will endure until 2023, the expiration term of the 0.44 EUR/kWh tariff.
116. Claimant’s damages must be calculated from 25 August 2010 (when BEA denied Claimant’s the license that would have entitled Alfa to receive the feed-in tariff) until 2023, when the twelve years of the fixed feed-in tariff would expire. In order to estimate Claimant’s losses regarding Alfa, the difference between the expected tariff (0.44 EUR/kWh) and the allowed tariff (0.20 EUR/kWh, variable at an annual rate of 1.011%) are considered in the revenue loss calculation. As Claimant’s Expert Report indicates, the number of operating hours and the difference in these tariffs for each year in these twelve years interval should be multiplied by the size of Alfa (30kW).

117. Considering the following values for Alfa’s (i) cost of equity, (ii) cost of debt, (iii) market value of equity, (iv) market value of debt and (v) tax rate in the formula of WACC:

\[
(2) \ WACC_\alpha = \frac{MV_e}{MV_d+MV_e} \cdot Re + \frac{MV_d}{MV_d+MV_e} \cdot Rd \cdot (1 - t)
\]

Where:
- Cost of equity: 12%
- Cost of debt: 5%
- MVd: € 93,775,00 (50% of € 187,550,00 – Alfa’s project cost)
- MVe: € 93,775,00 (50% of € 187,550,00 – Alfa’s project cost)
- Tax rate: 20%

Then:

\[
(3) \ WACC_\alpha = \frac{93,775,00}{187,550,00} \cdot 12\% + \frac{93,775,00}{187,550,00} \cdot 5\% \cdot (1 - 20\%)
\]

\[
(4) \ WACC_\alpha = 8\%
\]

118. The resulting WACC of 8% must be the discount rate applied to the DCF method. The result corresponds to the Net Present Value (“NPV”) of the damages of each year to their present value as 1 January 2013. The sum of each year’s damage totals Claimant’s revenue losses with Project Alfa.

B. Damages suffered by the Claimant with project Beta amounts to € 123,261,00.

119. Project Beta enjoyed the 0.44 EUR/kWh tariff for the first two years of the twelve-year period established by the LRE. Consequently, the calculation of damages must consider Claimant’s \textit{lucrum cessans} regarding Beta from 2013 to 2023.
120. As well as in Alfa’s valuation of damages, the application of project’s values for (i) cost of equity, (ii) cost of debt, (iii) market value of equity, (iv) market value of debt and (v) tax rate, when in the formula of WACC, results in a discount rate of 8%:

\[
(5) \ WACC = \frac{MVe}{MVd+MVe} \cdot Re + \frac{MVd}{MVd+MVe} \cdot Rd \cdot (1 - t)
\]

Where:
- Cost of equity: 12%
- Cost of debt: 5%
- MVd: € 182,936,50 (50% of € 365,873,00 – Beta’s project cost)
- MVe: € 182,936,50 (50% of € 365,873,00 – Beta’s project cost)
- Tax rate: 20%

Then:

\[
(6) WACC = \frac{182,936,50}{365,873,00} \cdot 12\% + \frac{182,936,50}{365,873,00} \cdot 5\% \cdot (1 - 20\%)
\]

\[
(7) WACC = 8\%
\]

121. As demonstrated in Claimant’s Export Report, Claimant’s revenue losses with Beta from 2013 to 2023, after submitted to the discount rate of 8%, sum a NPV of € 123,261,00 as of 1 January 2013.

C. Respondent’s amendment to Article 4 of the LRE impacted negatively Barancasia Solar Project.

122. Claimant obtained licenses from BEA for the development of the Barancasia Solar Project under the feed-in tariff of 0.44 EUR/kWh on 12 July 2012. However, the project enjoyed them for only six months: from 3 January 2013 on, the tariff applicable to the Barancasia Solar Project has been 0.15 EUR/kWh. Considering that such investment was made in reliance of the LRE, this short period of time under the feed-in tariff of 0.44 EUR/kWh was quite insufficient for the Claimant to recuperate its investment and, consequently, enjoy profits.

123. Furthermore, Respondent must compensate Claimant for its losses. Claimant considers two alternatives for compensation on this investment: (i) compensation for wasted investment (out-of-pocket costs); or (ii) lost profits as if the investment was completed but the article 4 of LRE had never occurred.
Respondent must compensate Claimant’s wasted investments

124. Claimant’s investments undertaken before the amendment of LRE, such as land, labor, photovoltaic panels and related equipment acquired for Barancasia Solar Project, must be compensated by Respondent. Compensation shall take place as a repayment of Claimant’s investment value in Barancasia Solar Project. As ICSID Tribunal decided in *PESEG v Turkey*, Respondent must refund expenses undertaken by Claimant, “even if the investment had not been finally agreed upon”. The aforementioned tribunal recognized that even during the preparatory stage of planned investments, there are investments undertaken and expenses derived from the preparation and negotiation of them.

125. Considering the customary international law standard, full reparation will be best obtained through the repayment of the investments and expenses undertaken plus an appropriate rate of interest. This is justified because (i) the compensation must take the investor back to the same position as if the lost investment had been made; and (ii) the investor would have invested its money in another investment with a market rate of return.

126. Claimant’s expenses in fixed asset costs include expenditures in land (€ 300,000), photovoltaic panels already delivered (€ 301,950) and deposit for the remaining panels (€ 52,006). Additionally, the tribunal must consider costs Claimant has already incurred to make such project feasible, such as labor (€ 27,250) and bank interests (€ 8,850). The final amount of damages regarding Barancasia Solar Project consists of the sum of all these costs, resulting in a total of € 690,056 by 1 January 2013.

Alternatively, Respondent must compensate Claimant’s revenue losses.

127. Alternatively, this Tribunal should consider compensation for Claimant’s lost revenues regarding Barancasia Solar Project, instead of the investment value already undertaken. Such alternative is justified by the fact that Respondent’s violation of its legal obligations resulted in a diminution in the project revenue. The payment of the 0.44 EUR/kWh tariff for six months was not enough to the investment to restore itself. As the tribunal valuated in *CMS v Argentina*,

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228 *PESEG v Turkey*, ¶ 316.
230 Kantor, p. 55.
231 Kantor, pp. 41-42.
the tribunal shall calculate the initially expected outcome with the actual outcome for the affected period of time.232

128. As demonstrated in Claimant’s Expert Report, when the expected revenue at the reduced tariff of € 0.15/kWh is subtracted from the expected revenue at the tariff of 0.44 EUR/kWh, one can reach the annual damage suffered by Claimant from 2013 to 2023. In order to discount this damage to their value by 1 January 2013, a discount rate of 8% must be applied. In this case, a WACC of 8% is obtained through the following calculation:

\[
(8) \quad WACC = \alpha \frac{MV_e}{MV_d + MV_e} \cdot Re + \beta \frac{MV_d}{MV_d + MV_e} \cdot Rd \cdot (1 - t)
\]

Where:
- Cost of equity: 12%
- Cost of debt: 5%
- MVd: € 202,981,00 (50% of € 405,962,00 – project cost)
- MVe: € 202,981,00 (50% of € 405,962,00 – project cost)
- Tax rate: 20%

Then:

\[
(9) \quad WACC = \frac{202,981,00}{405,962,00} \cdot 12\% + \frac{202,981,00}{405,962,00} \cdot 5\% \cdot (1 - 20\%) 
\]

(10) \quad WACC = 8\%

129. With a discount rate of 8% on Claimant’s revenue losses from 2012 to 2023, the total of damages regarding Barancasía Solar Project amounts to € 1,427,500,00.

D. The damage of the amendment of the LRE on Claimant’s Additional Projects amounts to € 765,835,00.

130. Claimant planned to expand its investments in solar arrays in Respondent’s territory. It planned to develop Additional Projects every two years during the twelve-year period of the promised fixed tariff.233 However, Respondent’s change in tariff structure revoked the favorable conditions Claimant was counting on to develop its future investments.

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232 CMS v Argentina, ¶ 422 and 434.
131. Therefore, Respondent must compensate Claimant for its revenue losses. The total of damages of the period 2013-2023, when discounted to their NPV at a WACC of 8%, sums €765,835,00 as by 1 January 2013.

E. Interests at a rate of 8% must be added to the principal sum of past damages.

132. This Tribunal must apply interest to the past damages suffered by Claimant to fully compensate its losses. In the present case, the non-applicability of pre-award interest (compensatory interest) would configure an incomplete compensation, since the Claimant was deprived of a certain amount of money until the final award of this tribunal. Such amount of money could have been invested in other investments with market-related basis interest rates, which must also be considered by the Tribunal. In this case, the payment of interest is a consequence of the duty to fully repair the injury caused.

133. It is worth to stress that the tendency in international arbitration is to calculate compound interest. This is a direct result of the principle of full reparation settled in Chorzów Factory, and it converges with the economic reality – where lending and borrowing interest are usually compounded. A seminal decision noting this trend among arbitral practice was Santa Elena v Costa Rica. Nowadays, little uncertainty remains with respect to awarding compound interest in investor-state arbitration and this reflected in numbers, as the ones highlighted in Siag v Egypt. According to the tribunal, since 2000, 15 out of 16 tribunals have awarded compound interest on damages in investment disputes.

134. Considering that the present case consists in a breach of obligation under international law, the rate of interest must be more individualized than those applied in expropriation cases, which usually apply interbank interest rates as LIBOR. As highlighted in Unglaude, the interest rate applied to achieve full reparation should be the same rate the Claimant could have earned had the compensation been paid on the date of the wrongful act and subsequently been invested by the investor in its home country. So, at an annual interest rate of 8%, the same

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234 ILC Articles, Art. 38.
235 Facts, ¶ 34.
236 Marboe, pp. 319-320.
237 Marboe, p. 399 and Simmons and Joshua, p. 219. MTD Equity et al v Chile (2005), ¶ 251.
238 Myers v Canada.
239 Marboe, p. 399.
rate used to discount Claimant’s losses to their NPV must be applied to the total sum of past damages.

F. Respondent shall bear all the costs related to these proceedings

135. “The legal costs incurred in obtaining the indemnification must be considered part and parcel of the compensation”.241 Therefrom, Claimant requests this Tribunal to order Respondent to pay all costs related to these proceedings.

136. The costs follow the event principle sets that the losing party has to “bear the expenses of the winning party, at least in proportion to the degree to which the other side has prevailed”.242 When allocating costs, most jurisdictions around the world use this criterion,243 which is also widely accepted among international arbitration.244 Moreover, the costs follow the event principle is also embedded in the LCIA Rules of Procedure.245

137. Given that Respondent is liable for violating obligations it had under the BIT, therefore, liable for creating the chain of events that generated this dispute, the Tribunal shall order Respondent to pay all costs related to this proceeding – i.e., the costs of arbitration, legal expenses and further costs Claimant incurred.

138. It is worth to stress that, whichever form of reparation is applied, Respondent shall pay all the legal expenses Claimant incurred as a result of these proceedings. As Claimant advanced two alternative requests for reparation, namely specific performance or damages, in spite of its preference for the former, receiving any of them means that Claimant has completely succeeded. In that sense, as the tribunal in S.D. Myers v Canada noted, a Claimant that has been forced to go through a process in order to achieve success “should not be penalized by having to pay for the process itself”.246

241 Southern Pacific v Egypt, ¶ 207.
242 Dugan et al., p. 612.
244 Dugan et al., p. 613.
245 LCIA Rules of Procedure, Art. 28(2).
246 S.D. Myers v Canada, ¶ 15.
PRAYER FOR RELIEF

For all the above-mentioned reasons, Claimant respectfully requests the Tribunal to find that:

1. It has jurisdiction over the present dispute;

2. Respondent breached its obligations under the BIT articles 2(1), 2(2) and 2(3); namely, to create favorable conditions for investors, to provide fair and equitable treatment, and to respect specific obligations it had with regard to Claimant’s investments;

3. Respondent shall restitute the *status quo ante* the amendment to Article 4 of the LRE by repealing the amendment or, as least, by continuing to pay the €0.44 feed-in tariff for Claimant’s investments for twelve years;

4. In the event the tribunal does not accept Claimant’s request No. 3, Respondent shall fully compensate the Claimant for the losses incurred as a result of Respondent’s violations of the BIT; and

5. Respondent shall bear all the costs related to this arbitration, including legal expenses and further costs Claimant incurred.

Respectfully submitted on 19 September 2015.

On behalf of Claimant,
Team Mosler.