THE LONDON COURT OF INTERNATIONAL ARBITRATION

LCIA ARBITRATION NO. 00/2014

VASIUKI LLC  
Claimant

v.

REPUBLIC OF BARANCASIA  
Respondent

MEMORIAL FOR CLAIMANT
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<td>Prof.</td>
<td>Professor</td>
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<td>SCC</td>
<td>Stockholm Chamber of Commerce</td>
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<td>Treaty on the Functioning of the European Union</td>
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<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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STATEMENT OF FACTS

THE SUCCESSIVE TREATIES


Respondent unilaterally concluded that the BIT had become obsolete and notified Cogitatia of the same on June 29, 2007. The notification stated that the BIT would be terminated with effect from June 30, 2008, without providing any reasons. Cogitatia did not respond to this notification, apart from confirming receipt. It also did not respond to subsequent informal attempts made by Respondent to confirm termination.

THE CLAIMANT

Vasiuki LLC [“Claimant”] is a Cogitatian company, which was engaged in the small-scale fossil fuel and wind turbine generation sector. It expanded its renewable energy operations to take advantage of ‘green subsidies’ offered by States. It started an experimental solar project called Alfa [“Alfa”] in Barancasia in 2009. However, Alfa became economically unfeasible due to significant operational costs. The proposed tariff regime of the Respondent offered hope of survival to Alfa.

THE TARIFF REGIME

On May 1, 2010, Respondent enacted the Law on Renewable Energy [“LRE”] to encourage production of renewable energy by offering state support, till the total share of such energy amounted to no less than 20% of the country’s gross energy consumption. To this end, eligible photovoltaic producers were to be granted licenses by the Barancasian Energy Authority [“BEA”], the energy regulator in Barancasia. According to Article 4 of the LRE, such licensees would receive a fixed feed-in tariff for a period of 12 years, calculated on the basis of the Photovoltaic Support Regulation [“LRE Regulation”]. Article 5 of the LRE provided that existing producers could develop their capacity further only by obtaining a license under the LRE. However, the exact criteria for the grant of these licenses remained undisclosed.
On July 1, 2010 the BEA announced a feed-in tariff of 0.44 EUR/kWh for 12 years, which would guarantee an assured return of 8% to producers. Claimant’s application for a license for Alfa was denied. However, besides the fact that the Alfa was an ‘existing project’, reasons for such denial were not disclosed. Subsequently, Claimant decided to start a second project called Beta, which was granted a license by the BEA.

THE REDUCTION IN TARIFFS

During 2011, ground-breaking technology was developed which significantly reduced the costs of development and made solar panels cheaper to manufacture. However, the new technology was not compatible with existing projects like Alfa and Beta. Since the profitability of investments that used the latest technology and received the 0.44 EUR/kWh increased dramatically, the BEA received 7000 applications for solar producers. It estimated that if it were to grant licenses to all 7000 applicants, it would have to devote 15% of its state revenues to the photovoltaic sector. However, the BEA only granted licenses to 6000 producers. Despite this, it was not able to meet its stated target of 20% of total energy consumption.

The local media highlighted the windfall profits being made by the renewable energy producers. In June, 2012, widespread protests broke out among Barancasian teachers, because the projected expenditure on tariffs for 7000 applicants was more than the expenditure on education. In response to this, Respondent decided to review its legislation. However, in spite of such considerations, the BEA granted Claimant licenses to operate 12 new projects under the Barancasia Solar Installation Project [“New Projects”]. Upon obtaining the licenses, Claimant undertook a loan and made significant investments in these New Projects.

On January 3, 2013, following private consultations with certain stakeholders and industry representatives which did not include Claimant, Respondent passed an amendment to the LRE [“Amendment”], which provided for an annual review of the feed-in tariff to take into account the costs of the best available technology. This Amendment came into effect on January 5, 2013. Subsequently, the BEA drastically reduced the tariff to 0.15 EUR/kWh, with retroactive effect from January 1, 2015, depriving Beta of a return of 8% on investment. Aggrieved by the actions of Respondent, Claimant has approached this tribunal [“Tribunal”] under Article 8 of the BIT.
ARGUMENTS ADVANCED

I. THE TRIBUNAL HAS JURISDICTION IN THE PRESENT MATTER

1. The jurisdiction of an arbitral tribunal is derived from the consent of parties. In the BIT, this takes the form of an arbitration clause under Article 8, which Claimant has invoked in accordance with the requisite procedure. Such jurisdiction continues to exist because first, the BIT has not been terminated (Section A) and second, Article 8 of the BIT is not superseded by provisions of the TFEU as requirements under Article 30 of the VCLT are not met (Section B).

A. THE BIT HAS NOT BEEN TERMINATED

2. The termination of a treaty can take place only in accordance with the provisions of the treaty itself, by mutual consent, or in accordance with grounds specified in the VCLT. In the present case, termination of the BIT has not occurred in conformity with its provisions (Section 1), by mutual consent of the parties (Section 2) or on any of the grounds mentioned in the VCLT (Section 3).

1. The BIT has not been Terminated in Conformity with its Provisions

3. According to Article 54 of the VCLT, if a treaty contains a provision for its termination, compliance with such a provision can terminate the treaty. Article 13 of the BIT provides the procedure for termination at the volition of either party. As per this provision, the BIT comes into force upon the last written notification of the fulfillment of all necessary internal procedures for this purpose. The BIT came into force on August 1, 2002, and shall “remain in force for a period of ten years”. Therefore, as per Article 13, it can only be terminated after the ten-year period has elapsed i.e. on August 1, 2012. The notification issued by Respondent sought to terminate the BIT on June 30, 2008, which falls within this ten-year period. Therefore, the BIT has not been terminated in accordance with Article 13.

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1 Art. 54(a), VCLT.
2 Art. 53(b), VCLT.
3 Art. 42(2), VCLT.
4 Art. 13(1), BIT.
5 Procedural Order No. 2, ¶ 1.
6 Art. 13(2), BIT.
7 Uncontested Facts, ¶ 8.
2. The BIT has not been Terminated by Mutual Consent

4. Under Article 54(b) of the VCLT, a treaty can be terminated by mutual consent of parties.\(^8\) However, there was no such mutual consent in the instant case. Respondent notified Cogitatia of its intention to terminate the BIT on June 29, 2007,\(^9\) which was duly noted by Cogitatia, without any objections. Such absence of objections cannot be equated with consent to terminate the treaty. According to Article 2 of the VCLT, “full powers” or a “document emanating from the competent authority of a State” is required “for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty.”\(^10\) The parties’ consent to terminate the treaty must be clearly expressed, preferably in writing.\(^11\) In the absence of such expression, the BIT has not been terminated.

3. The BIT has not been Terminated on any of the Grounds Mentioned in the VCLT

5. Respondent has contended that the BIT was terminated due to entry into force of the TFEU. However, a termination on account of entry into force of a later treaty must satisfy the requirements of Article 59 of the VCLT, and follow the procedure for termination under Article 65 of the VCLT. In the present case, the requirements under Article 59 of the VCLT have not been met (Section a). Further, the procedure for termination has not been followed (Section b).

(a) The Requirements of Article 59 of the VCLT have not been Satisfied

6. Article 59 of the VCLT provides for implicit termination of a treaty by a successive treaty.\(^12\) In order to satisfy the requirements thereunder, Respondent must show that both the prior treaty and the successive treaty relate to the same subject matter (Section i). Thereafter, it must either be shown that there was common intention to have the later treaty govern the matter (Section ii) or that the provisions of treaties are so far incompatible that they cannot be applied at the same time (Section iii).\(^13\) None of these requirements have been met in the present case.

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\(^8\) Art. 54(b), VCLT.
\(^9\) Uncontested Facts, ¶ 9.
\(^10\) Art. 2, BIT.
\(^11\) Aust, p. 288.
\(^12\) Art. 59, VCLT.
\(^13\) Art. 59, VCLT.
i. **The Treaties do not Relate to the Same Subject Matter**

7. The test of same subject matter requires that the objects of the two treaties be identical.\(^{14}\) It is well established that this test should be strictly interpreted,\(^{15}\) and is not satisfied where a “general treaty impinges indirectly on the content of a particular provision of an earlier treaty.”\(^{16}\)

8. The object of the BIT is to encourage investments into the host State by affording a high level of *protection* to investments *once they have been made*.\(^{17}\) On the other hand, the object of the TFEU is to create a common economic market, by *removing restrictions on the free movement* of capital and services between Member States.\(^{18}\) While exclusive competence has been granted to the EU to develop a Common Commercial Policy [“**CCP**”], which involves, *inter alia*, abolition of restrictions on FDI,\(^{19}\) such competence has not been exercised by the EU.\(^{20}\)

9. The difference in the objects of the two treaties is also apparent from their respective provisions. The BIT provides several protections to investors such as FET,\(^{21}\) compensation in case of indirect expropriation,\(^{22}\) and protection in case of losses caused by exigent circumstances,\(^{23}\) which deal with the treatment of an investor *after* investment has been made in a Contracting State. Further, such protection is extended only to those investors that satisfy the definition of an “investor” under Article 1(2) of the BIT.\(^{24}\)

10. In contrast, the TFEU contains provisions of non-discrimination\(^{25}\) and freedom of establishment\(^{26}\), which protect the rights of *potential* investors to invest in EU Member States. At present, EU law only deals with the “entry” or “admission” of investments, while the BIT deals with the “post-entry” or “post-admission” phase.\(^{27}\)

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\(^{14}\) Dubuisson, p. 1335.

\(^{15}\) Eureko v. Slovakia (Jurisdiction), ¶ 79; Dubuisson, p. 1335; Sinclair, p. 98.

\(^{16}\) ILC Summary Records; Dubuisson, p. 1335.

\(^{17}\) Eilmansberger, p. 400.

\(^{18}\) Eilmansberger, p. 400.

\(^{19}\) Arts. 3 and 207, TFEU.

\(^{20}\) EC Communication, p. 10.

\(^{21}\) Art. 2, BIT.

\(^{22}\) Art. 5, BIT.

\(^{23}\) Art. 4, BIT.

\(^{24}\) Art. 2, BIT.

\(^{25}\) Art. 18, TFEU.

\(^{26}\) Art. 49, TFEU.

\(^{27}\) Eilmansberger, p. 400.
The EC itself has recognized that there exists such a “clear and complementary division of labour in the field of investment” between BITs and EU law. Therefore, the BIT and TFEU do not cover the same subject matter.

ii. *There is no Common Intention to have the Later Treaty Govern the Matter*

11. The intention to have the later treaty govern a matter may either be apparent from the text of the later treaty, or may be established otherwise. There is nothing in the TFEU that indicates an intention for it to solely govern the subject matter.

12. Although Respondent has indicated its intention to terminate the treaty on several occasions, Cogitatia has never accepted such termination in its communications. The absence of objections by Cogitatia cannot be equated to common intention. When a notification of termination does not mention any recognized grounds for termination, such as breach or fundamental change of circumstances, it is an ineffective termination and does not obligate the other State to raise objections. The doctrine of acquiescence only applies when a State, which is under a duty to object, fails to do so.

13. In the instant case, Claimant was under no such duty. Respondent has not effected termination on any recognized ground. A notification itself does not constitute such a recognized ground, as it is issued only after a particular ground of termination becomes effective. In the absence of such grounds, Cogitatia’s failure to raise objections cannot be used to infer common intention.

iii. *The Provisions are not so far Incompatible that they Cannot be Applied at the Same Time*

14. The test of incompatibility is satisfied if the fulfillment of obligations under one treaty necessarily violates obligations under the other treaty. Article 59 of the VCLT requires that all provisions of a treaty, as a whole, must be incompatible with

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28 EC Communication, p. 10.
29 Eastern Sugar v. Czech Republic (Jurisdiction), ¶ 159.
30 Dubuisson, p. 1336.
31 Eilmansberger, p. 395.
32 Fitzmaurice, p. 23.
33 MPEPIL, p. 5.
34 Eureko v. Slovakia (Jurisdiction), ¶ 241.
another treaty.\textsuperscript{35} Mere irreconcilability of \textit{certain} provisions does not constitute such incompatibility.\textsuperscript{36} No incompatibility exists between the BIT and the TFEU on the grounds of \textit{first}, exclusive competence of the EU in matters of FDI; \textit{second}, non-discrimination between member states; and \textit{third}, interpretative monopoly of the ECJ.

15. The exclusive competence conferred on the EU under Article 207 of the TFEU, with respect to FDI, is not incompatible with the BIT. Read together, Article 206 and Article 3 of the TFEU grant exclusive competence to the EU to formulate a CCP, which includes, \textit{inter alia}, the progressive abolition of restrictions to FDI.\textsuperscript{37} However, the EU has not exercised such exclusive competence and is still at the negotiation stage.\textsuperscript{38} This has been affirmed by Professor Thomas Eilmsmanberger, who has stated that “a case of actual incompatibility would only arise if an agreement concluded under the new competence contains provisions that are contradicted by provisions in Member States (sic) BITs.”\textsuperscript{39}

16. Further, there is no incompatibility between the BIT and the remaining provisions of the TFEU. This has been explicitly held in cases such as \textit{Eastern Sugar v. Czech Republic},\textsuperscript{40} \textit{Eureko v. Slovakia},\textsuperscript{41} and \textit{Oostergetel v. Slovak Republic}.\textsuperscript{42} Although these decisions examined incompatibility between BITs and the EC Treaty, which was the predecessor to the TFEU, the provisions on free movement of capital, the right to establishment and non-discrimination are nearly identical in both treaties. Therefore, the decisions in these cases continue to be relevant.

17. Further, the obligation of non-discrimination envisaged under Article 18 of the TFEU is not incompatible with the BIT. It does not the possibility of granting of unequal rights to only certain EU Member States through BITs. If some Member States are granted greater rights under BITs compared to other member countries, it is for those member countries to claim these rights.\textsuperscript{43} In case of unequal rights being granted, these rights should not be denied to countries, which have BITs, but should

\begin{footnotes}
\footnote{\textsuperscript{35} Dubuisson, p. 1342.}
\footnote{\textsuperscript{36} Dubuisson, p. 1342.}
\footnote{\textsuperscript{37} Arts. 3 and 206, TFEU.}
\footnote{\textsuperscript{38} Eilmansberger, p. 397.}
\footnote{\textsuperscript{39} Eastern Sugar v. Czech Republic (Jurisdiction), ¶ 168.}
\footnote{\textsuperscript{40} Eureko v. Slovakia (Jurisdiction), ¶ 264.}
\footnote{\textsuperscript{41} Oostergetel v. Slovak Republic (Jurisdiction), ¶ 74.}
\footnote{\textsuperscript{42} Eastern Sugar v. Czech Republic (Jurisdiction), ¶ 170.}
\end{footnotes}
be extended to those countries, which do not.\textsuperscript{44} The ECJ has endorsed this approach for dealing with violations of the non-discrimination provision in Matteuci v. Belgium.\textsuperscript{45} Hence there is no incompatibility between the BIT and Article 18 of the TFEU.

18. Finally, Article 344 of the TFEU is not incompatible with the provision to submit to arbitration under Article 8 of the BIT. Under Article 344 of the TFEU, Member States undertake to not submit any dispute concerning the interpretation and application of the \textit{EU treaties} to any method of dispute settlement other than those provided in the TFEU.\textsuperscript{46} This includes the ECJ and national courts of member states, which have the ability to make a preliminary reference to the ECJ.\textsuperscript{47}

19. However, the present dispute involves a violation of the BIT, which “does not form part of the EC (or EU) legal order” and “does not belong to the Treaties” under Article 344 of the TFEU.\textsuperscript{48} In Electrabel v. Hungary, the argument of interpretative monopoly of the ECJ was rejected on the ground that the case concerned a violation of the ECT, and not EU law.\textsuperscript{49}

20. In any event, the ECJ does not have interpretative monopoly in all matters pertaining to FDI. Article 344 of the TFEU does not prohibit courts of non-EU countries and arbitral tribunals from ruling on matters that incidentally involve the application and interpretation of EU law.\textsuperscript{50} In fact, the ECJ itself held in the \textit{Eco Swiss} case that arbitral tribunals are obligated to apply mandatory rules of EU law.\textsuperscript{51}

21. The mere fact that arbitral tribunals cannot make preliminary references and could thereby wrongfully apply EU law is not a sufficiently strong reason to exclude their jurisdiction for two reasons.\textsuperscript{52}

22. \textit{First}, such a possibility exists even in case of national courts of EU Member States, which refuse to make a preliminary reference. As noted by the tribunal in

\textsuperscript{44} Eureko v. Slovakia (Jurisdiction), ¶ 402; Eilmansberger, p. 402.
\textsuperscript{45} Matteuci v. Belgium, ¶ 23.
\textsuperscript{46} Art. 344, TFEU.
\textsuperscript{47} Art. 267, TFEU.
\textsuperscript{48} Eilmansberger, p. 404.
\textsuperscript{49} Electrabel v. Hungary (Jurisdiction), ¶ 4.157.
\textsuperscript{50} Electrabel v. Hungary (Jurisdiction), ¶ 4.152.
\textsuperscript{51} Eco Swiss v. Benetton, ¶ 40; Electrabel v. Hungary (Jurisdiction), ¶ 4.152.
\textsuperscript{52} Eilmansberger, p. 406.
Electrabel v. Hungary, “there is no automatic reference to or seizure by the ECJ, as soon as any question of EU law arises in a dispute before an EU national court” and “EU national courts retain a certain degree of discretion in their decision to refer a question of interpretation to the ECJ.”\(^5\) This creates the possibility that there may be divergent interpretations of EU law by national courts.\(^5\)

23. **Second,** there are other ways to secure the correct application of EU law.\(^5\) If an arbitral tribunal gives an award which violates EU law, the national courts of Member States can make a preliminary reference to the EU, at the stage of enforcement of such awards.\(^5\) Further, even if the national court enforces an award which violates EU law, the EC or other Member States may bring the matter before the ECJ under Article 258 and Article 259 of the TFEU respectively.\(^5\)

24. Therefore, there was no incompatibility between the provisions of the BIT and the TFEU.

(b) **In any case, the Procedure for Termination has not been Followed**

25. Even if the requirements of Article 59 of the VCLT are fulfilled, the BIT does not automatically stand terminated.\(^5\) In order to validly terminate a treaty under Article 59, the procedure for termination laid down in Article 65 and Article 67 of the VCLT must be followed.\(^5\) Article 65 and Article 67 of the VCLT provide procedural safeguards against arbitrary actions of states and must be strictly complied with.\(^5\) These procedural requirements have not been complied with in the instant case.

26. **First,** Article 65 of the VCLT requires that the notification of termination must clearly state the measure to be taken as well as the reasons or grounds for taking the same, in order to enable the other party to raise objections.\(^5\) A notification which does not state recognized grounds or reasons is considered “invalid and, in itself,
ineffective to terminate the treaty.” In the instant case, the notification issued on June 29, 2007 merely stated that the BIT was to be terminated with effect from June 30, 2008. It did not provide any reasons for the same. Hence, the notification was not valid and the procedure for termination under Article 65 of the VCLT has not been complied with.

27. Second, Article 67 of the VCLT requires that a formal instrument of termination, which must be signed by the Minister of Foreign Affairs, Head of State, Head of Government or any other person with full powers, be communicated to the other party. Such an instrument is separate from, and must be executed subsequent to the notification. This is indicated by the fact that the revocation of the notification and the instrument of termination are provided separately in Article 68. If the notification and instrument of termination were to be communicated simultaneously, there would be no need to provide for separate revocation for these two instruments.

28. The ILC has clarified that informal communication cannot be “a substitute for the formal act which diplomatic propriety and legal regularity would seem to require.” In the instant case, there was no formal instrument of termination communicated to Cogitatio after the notification. Although there were informal communications and declarations, this is not sufficient to satisfy the requirements of Article 67 of the VCLT.

29. Hence, the requisite procedure was not followed and the treaty was not terminated validly.

B. THE APPLICATION OF ARTICLE 8 OF THE BIT HAS NOT BEEN SUPERSEDED BY THE TFEU

30. Article 8 of the BIT has not been superseded by Article 344 of the TFEU because there is no ‘incompatibility’ between the two Articles, as required under Article 30 of the VCLT. In any case, even if there were such incompatibility, the conflict clause under Article 10 of the BIT would prevail.

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62 Fitzmaurice, p. 23.
63 Annex No. 7.1.
64 Art. 67(2), VCLT.
65 Art. 68, VCLT.
66 VCLT Commentary, 264.
67 Uncontested Facts, ¶ 10.
68 Uncontested Facts, ¶¶ 24 and 31.
31. Article 30 of the VCLT allows for the later treaty to prevail only when there exists an incompatibility between the provisions of successive treaties. The standard for determining conflict or incompatibility is the same for Article 59 and Article 30 of the VCLT. As argued earlier, there is no incompatibility between Article 8 of the BIT and Article 344 of the TFEU. Therefore, the TFEU cannot be given precedence under Article 30(3) of the VCLT.

32. In any event, Article 30(3) only applies as a residual rule, in the absence of an express conflict clause under the earlier treaty. In the present instance, Article 30(3) of the VCLT is not applicable, as Article 10 of the BIT constitutes a ‘conflict clause’.

33. As per Article 10 of the BIT, obligations under the BIT must assume precedence over obligations under any other treaty, if so chosen by the investor. The provision explicitly states that –

“[when] a matter is governed simultaneously both by this Agreement and by another international agreement to which both Contracting Parties are parties, nothing in this Agreement shall prevent […] investors […] from taking advantage of whichever rules are more favourable to [their] case.”

[emphasis supplied]

34. As per Article 30(2) of the VCLT, where the treaty itself stipulates “how far one treaty is supposed to prejudice the applicability of another, or defer to it,” the ‘conflict clause’ in the treaty must prevail over any other mechanism for resolution of treaty conflicts. This norm is applicable not only to clauses that stipulate the precedence of ‘that other treaty’, but also to clauses “asserting the primacy of the treaty in question over other treaties.” Since Article 10 is of such nature, it constitutes applicable law for determining the hierarchy of conflicting obligations under the BIT and the TFEU.

35. Article 10 of the BIT would, in any case, determine the precedence of obligations. Lex specialis is a widely accepted norm for resolution of treaty conflict that allows for such conflicts to be resolved in accordance with “the consent and

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69 Aust, p. 216.
70 Aust, p. 215.
71 Art. 10, BIT.
72 Orakhelashvili, p. 786.
73 Orakhelashvili, p. 786; Waldock, p. 216.
intentions of the parties.” Accordingly, it recognizes that specific provisions are ordinarily more effective than general provisions. Since Article 30 of the VCLT does not enlist the applicable norms for resolution of treaty conflicts exhaustively, the *lex specialis* rule continues to find application as an alternate norm outside the VCLT framework. Clauses similar to Article 10 of the BIT have been recognized as constituting *lex specialis*.

36. In the present instance, the provisions of the Barancasia-Cogitatia BIT are more favourable to the interests of the investor than the TFEU. Therefore, as per Article 10, Respondent’s obligations under the BIT must precede its obligations under the TFEU. Thus, Article 8 of the BIT will remain applicable.

II. **RESPONDENT’S ACTIONS CONSTITUTE A BREACH OF ITS FET OBLIGATIONS UNDER THE BIT**

37. The administrative and regulatory measures of Respondent constitute a violation of the FET clause under Article 2(2) of the BIT.

38. Article 2(2) of the BIT provides that investments and investors “shall at all times be accorded fair equitable treatment.” The FET clause requires the State to guarantee certain rights to investors, such as transparency, protection of legitimate expectations, due process and non-discrimination. The scope of the FET clause is wider than the International Minimum Standard [“IMS”]. Thus, a violation of the FET clause may be established without proving gross misconduct on the part of the State. Any interpretation to the contrary would defeat the very purpose of the BIT, which is to “create and maintain favourable conditions for investments and investors”.

39. The FET clause has been violated on three grounds. *First*, the denial of license to Alfa violated the obligation of transparency (Section A). *Second*, the reduction in tariff to 0.15 EUR/kWh violated the obligation of protection of legitimate

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74 Lindroos, pp. 36-37.
75 Lindroos, p. 35.
76 Villiger, p. 403; Orakhelashvili, pp. 773-774.
77 Lindroos, pp. 38-39; Sinclair, pp. 96-97.
78 Villiger, p. 403; Subedi, p. 91.
79 Art. 2(2), BIT.
80 Klager, p. 154; Dolzer and Scheurer, p. 145.
81 Vivendi v. Argentina (Award), ¶ 7.4.12.
82 Vivendi v. Argentina (Award), ¶ 7.4.7; Mann, p. 244.
83 Preamble, BIT.
expectations of the investor (Section B). Third, the reduction in tariff, without having provided Claimant an opportunity to be heard, violated the due process requirement under the FET clause (Section C).

A. DENIAL OF LICENSE TO ALFA VIOLATED THE OBLIGATION OF TRANSPARENCY

40. The obligation of transparency requires the State to act in a transparent and unambiguous manner. The State must ensure that its actions are:

“[free] from ambiguity and totally transparent in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives.”

41. The LRE sought to increase the share of renewable energy by incentivizing investment in the photovoltaic sector. To this end, a feed-in tariff of 0.44 EUR/kWh was announced on July 1, 2010 that was made available to licensees under the LRE. The denial of license to Claimant’s Alfa Project violated the transparency obligation under the FET clause.

42. A State must ensure that “all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made are capable of being readily known to all affected investors.” Thereby, Respondent’s refusal to disclose the reasons for denial of license to Alfa, on grounds of confidentiality, violated its transparency obligations.

43. Further, the license was denied on grounds not specified in the parent statute, the LRE.

84 Parkerings v. Lituania (Award), ¶ 320; Occidental v. Ecuador (Merits), ¶ 185; LG&E v. Argentina (Decision on Liability), ¶ 131.
85 Occidental v. Ecuador (Award), ¶ 185.
86 Art. 2, LRE.
87 Uncontested Facts, ¶ 21.
88 Uncontested Facts, ¶ 22.
89 Metalclad v. Mexico (Award), ¶ 76.
90 Procedural Order No. 2, ¶ 16.
Article 5 of the LRE states:

“[Existing] capacity of electricity production from renewable energy sources may be developed […] only upon obtaining a license from the BEA.”

[emphasis supplied]

Further, Article 3 of the LRE Regulation states:

“[a] renewable energy provider, upon obtaining a license for the development of existing or new photovoltaic capacity, is entitled to the feed-in tariff.”

[emphasis supplied]

44. This indicates that the LRE did envisage granting of licenses to existing producers. Therefore, the BEA’s decision to deny a license to Alfa was contrary to the LRE. It is an established principle of administrative law that a licensing authority cannot exercise its discretion on grounds that are not specified in the parent statute. For instance, in Metalclad v. Mexico the Municipality’s denial of a permit for reasons other than those specified in the parent statute was considered improper.

45. At the very least, Article 5 is ambiguous regarding the eligibility of existing producers to obtain a license under the LRE. It has been established that a public authority has to “bear the risks of ambiguity” and interpretations of such ambiguity cannot be permitted “if their effect is to disadvantage a foreign investor.”

46. Thus, denial of a license to Alfa violated the obligation of transparency.

**B. REDUCTION IN TARIFF VIOLATED THE LEGITIMATE EXPECTATIONS OF CLAIMANT**

47. The FET clause envisages protection of the legitimate expectations of investors. Respondent’s actions violated Claimant’s expectation of a fixed feed-in tariff (Section 1), and a stable legal and business environment (Section 2), which it relied on while investing in Beta and the New Projects. Further, the actions of Respondent cannot be justified as a legitimate exercise of regulatory powers (Section 3).

91 Art. 5, LRE.
92 Art. 3, LRE Regulation.
93 Wade and Forsyth, p. 401; Craig, p. 510; Metalclad v. Mexico (Award), ¶ 85.
94 Metalclad v. Mexico (Award), ¶ 86.
95 Thunderbird v. Mexico (Walde Separate Opinion), ¶ 50.
1. The Expectation of a Fixed Feed-in Tariff was Violated

48. Favourable changes in the legal framework of a state, accompanied by assurances of its continuity, give rise to legitimate expectations among investors.96

49. In the instant case, Respondent had made assurances regarding the feed-in tariff. The BEA announced a feed-in tariff of 0.44 EUR/kWh on July 1, 2010.97 Article 4 of the LRE 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.”98 Further, Article 2 of the LRE Regulation, on the basis of which the feed-in tariff was calculated, clearly stated that the tariff was to be “fixed”.99 Claimant relied on these assurances while making its investments.

50. In LG&E v. Argentina, an Argentine decree provided protection from risks of currency devaluation, by stating that gas tariffs “shall be calculated in United States dollars.”100 This was held to be a “guarantee laid down in the tariff system” and not merely “an economic and monetary policy of the Argentine Government.” Therefore, when Argentina removed this guarantee, it was held to be a violation of the investor’s legitimate expectations.101 In Nykomb v. Latvia, Latvian law provided for a double tariff to be paid to wind farm producers during the initial 8 years of production. The tribunal held that the investor had a “statutory” right to receive the double tariff for an eight-year period.102

51. The feed-in tariff of 0.44 EUR/kWh was in the nature of an assurance provided by Respondent. Further, Claimant’s decision to invest in project Beta and the New Projects was based on this assurance. Therefore, the subsequent reduction of such tariff to 0.15 EUR/kWh violates the legitimate expectations of Claimant. In Czechoslovakia and Spain, a similar reduction in the feed-in tariff rates for renewable

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96 Scheurer and Kriebaum, pp. 273-274; Vandevalde, p. 66; LG&E v. Argentina (Decision on Liability), ¶ 134; Nykomb v. Latvia (Merits), ¶ 29.
97 Uncontested Facts, ¶ 21.
98 Art. 4, LRE.
99 Art. 2, LRE Regulation.
100 LG&E v. Argentina (Decision on Liability), ¶ 134.
101 LG&E v. Argentina (Decision on Liability), ¶ 134.
102 Nykomb v. Latvia (Merits), ¶ 29.
energy producers has been criticized as violative of the FET clause and has prompted investors to initiate arbitral proceedings under the ECT.\textsuperscript{103}

2. **The Expectation of Stability and Predictability of the Legal and Business Environment was Violated**

52. The stability and predictability of the legal and business environment surrounding the investment forms a crucial component of the legitimate expectations of an investor.\textsuperscript{104} Laws in the host state cannot be changed in a manner that introduces instability and unpredictability in the legal and business environment surrounding the investment. Such instability can arise due to retroactive application of laws.\textsuperscript{105}

53. The LRE was amended on January 5, 2013 to allow the BEA to annually review the quantum of the feed-in tariff.\textsuperscript{106} However, this Amendment was made operational with retroactive effect from January 1, 2013, setting a dangerous precedent for the future.\textsuperscript{107} In *Occidental v. Ecuador*, the Ecuadorian tax authority, contrary to its established practice of refunding value-added tax to oil companies, refused to grant tax refunds and retroactively claimed payment of refunds provided.\textsuperscript{108} The tribunal considered that such retroactive application introduced instability and unpredictability in the legal and business environment.\textsuperscript{109} Therefore, the retroactive application of the Amendment violates the FET clause.

3. **There was no Legitimate Exercise of Regulatory Powers**

54. The protection of legitimate interests of an investor must be balanced against the regulatory powers of the State.\textsuperscript{110} However, exercise of such regulatory powers must be necessitated by a legitimate public purpose.\textsuperscript{111} Tribunals have consistently

\begin{footnotes}
\textsuperscript{103} The Economist Report; Bird & Bird Report; Winston and Strawn LLP Report.
\textsuperscript{104} *Occidental v. Ecuador* (Award), ¶ 183; LG&E v. Argentina (Decision on Liability), ¶ 125; Dolzer and Scheurer, p. 145; Vandeveld, p. 69.
\textsuperscript{105} Barak-Erez, p. 589; Gotz, p. 139.
\textsuperscript{106} Procedural Order No. 3, ¶ 9.
\textsuperscript{107} Uncontested Facts, ¶ 34.
\textsuperscript{108} *Occidental v. Ecuador* (Award), ¶ 170.
\textsuperscript{109} *Occidental v. Ecuador* (Award), ¶ 452.
\textsuperscript{110} Dolzer and Scheurer, p. 141.
\textsuperscript{111} Vandeveld, p. 55; Eureko v. Poland (Partial Award), ¶ 233; Metaclad v. Mexico (Award), ¶ 92; Vivendi v. Argentina (Award), ¶ 7.4.45.
\end{footnotes}
held that unfair and inequitable treatment of investor cannot be justified due to “political”, “nationalistic” or populist reasons.112

55. In the instant case, the decision to reduce the feed-in tariff regime was prompted by domestic opposition to the pre-Amendment rate of tariff, and not by economic and fiscal considerations.113 Respondent’s fiscal concerns were only hypothetical since it did not eventually grant licenses to all 7000 applicants.114 Further, such fiscal concerns were raised in the beginning of 2012.115 Respondent promised to review its legislation much later in June 2012, immediately after protests broke out and opinion polls criticized the tariff regime.116 The Tribunal is entitled to draw reasonable inferences from the facts of the case.117 It can be reasonably inferred that the reduction was not instigated by fiscal concerns, but was in direct response to the protest and popular criticism.

56. In Vivendi v. Argentina, a foreign investor was granted a concession to operate a water distribution system. Harmless discoloration of the water stirred local opposition, prompting the authorities to take actions that adversely affected the foreign investor.118 The tribunal held that such actions could not be considered as being in pursuance of a legitimate public purpose.119 Similarly, in Eureko v. Poland, the privatization of an insurance company was terminated in light of political considerations. The tribunal found that such a measure, taken for “purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons” did not constitute a legitimate exercise of regulatory powers.120

57. Therefore, Respondent’s actions were not for a legitimate public purpose and cannot be justified.

112 Vandevelde, p. 60; Eureko v. Poland (Partial Award), ¶ 233; Metalclad v. Mexico (Award), ¶ 92; Vivendi v. Argentina (Award), ¶ 7.4.45.
113 Uncontested Facts, ¶ 32.
115 Uncontested Facts, ¶ 29.
116 Uncontested Facts, ¶ 32.
117 Thunderbird v. Mexico (Walde Separate Opinion), ¶ 3.
118 Vivendi v. Argentina (Award), ¶ 7.4.26.
119 Vivendi v. Argentina (Award), ¶ 7.4.45.
120 Eureko v. Poland (Partial Award), ¶ 233
C. THE MANNER IN WHICH THE TARIFF WAS REDUCED VIOLATES THE DUE PROCESS REQUIREMENT

58. Administrative due process requires that when a State exercises its regulatory powers to the detriment of a foreign investor, it must provide the investor with a mechanism to address its legitimate interests, such as the opportunity to be heard.\textsuperscript{121}

59. In the instant case, the reduction in tariff detrimentally affected Claimant. This was particularly with regard to project Beta, which could not adopt the technology discovered in 2011 and was not able to earn an 8% return on investment under the 0.15 EUR/kWh regime.\textsuperscript{122} The decision to reduce the tariff was taken without providing Claimant an opportunity to be heard.\textsuperscript{123}

In ADC v Hungary, the tribunal found a violation of the due process requirement because the Hungarian Government issued a decree taking over the airport operations of ADC, without providing basic legal protections such as advance notice and right to be heard.\textsuperscript{124} Similarly, in Genin v. Estonia, the license of a bank was revoked by the Estonian Government.\textsuperscript{125} This action was criticized by the tribunal because no opportunity had been given to the bank to participate in the decision-making process.\textsuperscript{126}

60. Hence, the reduction of tariff without hearing Claimant violates the due process requirement under the FET clause.

III. RESPONDENT CANNOT PLEAD ITS OBLIGATIONS UNDER EU LAW AS GROUNDS FOR EXEMPTING ITS BREACH OF THE BARANCASIA-COGITATIA BIT

61. Respondent cannot invoke its obligations under the TFEU to justify its derogations from the BIT. There is no inherent supremacy of obligations under the TFEU, and any conflict between the TFEU and BIT must be determined in accordance with general principles of international law.\textsuperscript{127} Ordinarily, as established, Respondent’s obligations under the Barancasia-Cogitatia BIT take precedence over its

\textsuperscript{121} Klager, p. 225; Genin v. Estonia (Award), ¶ 364; ADC v. Hungary (Merits), ¶ 435; Thunderbird v. Mexico (Award), ¶¶ 197-201.

\textsuperscript{122} Procedural Order No. 2, ¶ 30.

\textsuperscript{123} Uncontested Facts, ¶ 34; Procedural Order No. 2, ¶ 15.

\textsuperscript{124} ADC v. Hungary (Merits), ¶ 435.

\textsuperscript{125} Genin v. Estonia (Award), ¶¶ 55-60.

\textsuperscript{126} Genin v. Estonia (Award), ¶ 364.

\textsuperscript{127} Elimansberger, pp. 424-425; Eastern Sugar v. Czech Republic (Partial Award), ¶ 156.
obligations under the TFEU by virtue of Article 10 of the BIT. In any case, there was no irreconcilable conflict between the provisions of the BIT and the TFEU, as is required under Article 30 of the VCLT.

62. As per Article 30(3) of the VCLT, the lex posterior derogate priori rule only applies when treaty obligations are in direct conflict and cannot be complied with simultaneously. In the absence of such irreconcilable conflict, obligations under the earlier treaty must prevail. To this end, a harmonious interpretation of treaties should be given primacy. In the present case, there was no inconsistency between the provisions of the BIT and the TFEU. Therefore, Respondent’s obligations under the BIT, which constitutes lex prior, must precede its obligations under the TFEU. More specifically, Respondent’s obligations under the BIT were compatible with its obligations under Article 107 of the TFEU (Section A), and Article 126 of the TFEU (Section B).

A. RESPONDENT’S OBLIGATIONS UNDER THE BIT ARE COMPATIBLE WITH ITS OBLIGATIONS UNDER ARTICLE 107 OF THE TFEU

63. Article 107 of the TFEU, while prohibiting aid that distorts competition, allows State Aid that promotes common European interest. The EAG 2008, which were the applicable Guidelines on State Aid at the time of the Amendment, expressly recognize aid for increasing share of renewable energy in total energy production as being compatible with the internal market. This is in light of the climate and energy targets mandated by the Commission. In fact, the Commission has repeatedly emphasized the significance of State Aid in incentivizing production of photovoltaic energy, and promoting common interest. Thus, there was no prima facie conflict between Respondent’s obligation to pay the pre-Amendment rate of tariff and its obligations under the rules of State Aid.

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128 See Part I(B) of this Memorandum.
129 Villiger, pp. 405-406; Ghouri, pp. 163-164.
130 Ghouri, p. 166; Burgstaller, p. 189.
131 Villiger, p. 402.
132 Art. 107(3), TFEU.
133 EAG 2014, ¶ 248.
134 EAG 2008, ¶¶ 48 and 71.
135 Art. 3(1), Renewable Energy Directive.
137 State Aid Action Plan, p. 10.
64. In any case, it is only the Commission that could have declared the prevailing rate of tariff to be unlawful.\textsuperscript{138} The EAG 2008 explicitly states that “\textit{the Commission will apply these Guidelines} to all notified aid measures in respect of which it is called upon to take a decision.”\textsuperscript{139} In both \textit{AES Summit} and \textit{Electrabel}, Hungary only terminated its Power Purchase Agreements [“PPA”] with the respective claimants, in breach of its BIT obligations, after a \textit{conclusive finding} by the Commission that the PPAs constituted unlawful State Aid.\textsuperscript{140} In fact, the Tribunal in \textit{AES Summit} noted:

\begin{quote}
“[As] long as the Commission’s state aid decision was not issued, Hungary had no legal obligation to act in accordance with what it believed could be the result of the decision and to start a limitation of potential state aid.”\textsuperscript{141}
\end{quote}

65. In the present instance, the Commission did not, by any means, indicate that the pre-Amendment rate of tariff constituted unlawful State Aid.\textsuperscript{142}

66. A presumption of conflict between the two treaties by Respondent will not allow for its obligations under the TFEU to prevail. Article 30(3) of the VCLT envisages a “direct incompatibility” between the provisions of treaties, which cannot be found to exist where compliance with one treaty only requires a State to refrain from the exercise of discretion accorded by another.\textsuperscript{143} It has been recognized that:

\begin{quote}
“EC Law origin of the measure cannot exculpate the host State if it had some discretion as to the interpretation or application of the EC law provisions in question. Relevant BIT investment protection guarantees oblige Member States to exercise this discretion in the most investor-friendly (and investment sparing) way.”\textsuperscript{144}
\end{quote}

67. Further, the Tribunal in \textit{Eureko} recognized that the rights of an investor under a valid BIT must not be prejudiced by the \textit{possibility} that it \textit{may}, at a later time, conflict with the obligations of the State under another treaty.\textsuperscript{145}

68. Thus, no \textit{real conflict} existed between Respondent’s obligations under the BIT and Article 107 of the TFEU. Its obligations under the Barancasia-Cogitatia BIT must prevail.

\textsuperscript{138} EAG 2008, ¶ 41; Art. 108(2), TFEU.
\textsuperscript{139} EAG 2008, ¶¶ 204-205.
\textsuperscript{140} Electrabel v. Hungary (Jurisdiction), ¶¶ 4.70 and 6.4; AES Summit v. Hungary (Award), ¶ 10.3.16.
\textsuperscript{141} AES Summit v. Hungary (Award), ¶ 10.3.16.
\textsuperscript{142} Procedural Order No. 2, ¶ 4.
\textsuperscript{143} Orakhelashvili, p. 776.
\textsuperscript{144} Elimansberger, p. 42.
\textsuperscript{145} Eureko v. Poland (Partial Award), ¶ 226.
B. RESPONDENT’S OBLIGATIONS UNDER THE BIT DID NOT CONFLICT WITH ARTICLE 126 OF THE TFEU

69. Article 126 of the TFEU requires Member States to exercise fiscal discipline, empowering the Commission to monitor such compliance.146 As per the applicable law, when the level sovereign debt in the Member State either exceeds 60 percent of the gross domestic product,147 or diverges significantly from the State’s medium-term budgetary objectives, the Commission,148 or Council,149 respectively, are required to warn the State. In the present instance, no such warning was issued.

70. As is evident from the Austria, Sweden and Finland cases, a question of conflict between obligations under a BIT, and under EU treaties, only arises when the existence of such conflict has been notified by the Commission.150 In the present instance, a conflict between Respondent’s obligations under the BIT and Article 126 of the TFEU would be found if the Commission had notified Respondent of a risk of its breaching its borrowing limits. However, no action was initiated by the Commission in this respect, as required under the TFEU.151 Mere conjecture by Respondent that it may breach its obligations under Article 126 of the TFEU,152 does not meet the threshold of direct conflict envisaged under Article 30(3) of the VCLT. Thus, there was no incompatibility between Respondent’s obligations under the BIT, and under Article 126 of the TFEU.

71. In the absence of such irreconcilable conflict between Respondent’s obligations under the BIT and the TFEU, its obligations under the BIT must prevail.

IV. THE DEFENCE OF NECESSITY CANNOT PRECLUDE RESPONDENT’S ACTIONS FROM WRONGFULNESS

72. Respondent’s breach of obligations under the BIT cannot be excused by means of the Essential Security Interest [“ESI”] clause under Article 11 of the BIT, as the Amendment was not enacted for the maintenance of international peace or
security (Section A). Further, the requirements for invoking the defence of necessity under customary international law have not been met (Section B).

A. RESPONDENT’S BREACH OF OBLIGATIONS IS NOT EXEMPT UNDER ARTICLE 11 OF THE BIT

73. As per Article 11 of the BIT, any measure taken by Respondent for the “maintenance of international peace or security” is exempt from wrongfulness.153 Such a provision excludes the operation of the substantive provisions of the treaty,154 in that there is no breach of treaty obligations, and no liability arises.155 The customary defence of necessity, on the other hand, is an excuse, which is only relevant after a breach of substantive obligations has been established.156

74. In the present instance, Article 11 does not allow Respondent to act unilaterally in derogating from its obligations under the BIT (Section 1). Further, Respondent’s actions cannot be excused as it economic crisis did not pose a threat to international peace or security (Section 2).

1. Article 11 of the BIT is not Self-Judging

75. Respondent could not have “subjectively determined” whether there existed a threat to international peace or security.157 Such right of unilateral derogation from treaty obligations is only available when clearly stated in the BIT, in the form of a self-judging clause.158

76. A comparison of certain existing BITs brings out the distinction between self-judging and non self-judging ESI clauses. The ESI clauses under the 2004 Model U.S. BIT and GATT, which permit the State to take measures that “it considers necessary,”159 are considered explicitly self-judging.160 On the other hand, the 1992 Model U.S. BIT and the Argentina-U.S. BIT,161 which use the terms “measures necessary for” have been found to be non self-judging due to the absence of the ‘it

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153 Art. 11, BIT.
154 Markert, p. 164.
155 Sornarajah, p. 463.
156 CMS v. Argentine Republic (Annulment Proceeding), ¶¶ 129-134; Newcombe and Paradell, pp. 495-496.
157 Sornarajah, p. 459.
158 Newcombe and Paradell, p. 493; Enron v. Argentine Republic (Award), ¶327.
160 Newcombe and Paradell, p. 493; CMS v. Argentine Republic (Award), ¶¶368-73.
considers necessary’ language. The ICJ has also emphasized the significance of language in determining the self-judging nature of such clauses:

“[The] GATT, contemplating exceptions to the normal implementation of the General Agreement, stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action which it ‘considers necessary for the protection of its essential security interests,’ in such fields as nuclear fission, arms, etc. The 1956 Treaty, on the contrary, speaks simply of ‘necessary’ measures, not of those considered by a party to be such.”

[emphasis supplied]

77. Article 11 of the BIT uses the words "measures [for] maintenance of international peace or security", and does not employ the phrase ‘measures which it considers necessary’. Hence it is not a self-judging clause, and Respondent cannot unilaterally determine whether the Amendment fulfills the requirements for precluding wrongfulness under Article 11 of the BIT. The same must be determined objectively, by the Tribunal.

2. There was no Threat to International Peace or Security in Barancasia

78. Article 11 of the BIT precludes from wrongfulness any measure taken by Respondent for the “maintenance of international peace or security.”

79. According to the principles established in the VCLT, the phrase ‘international peace or security’ must be interpreted in accordance with its ordinary meaning, and in light of the object and purpose of the Barancasia-Cogitatia BIT. The ordinary meaning of a term generally refers to its lexical definition. It follows that Article 11 can only be invoked in crises with cross-border implications and effects.

80. This interpretation has found approval among tribunals and commentators. The US-Argentina BIT also contains an identical phrase, stating:

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162 Newcombe and Paradell, pp. 489-490; Sornarajah, p. 460; LG&E v. Argentine Republic (Award), ¶ 212.
163 Nicaragua v. U.S.A., ¶ 222.
164 Art. 31(1), VCLT.
165 Linderfalk, p. 62.
166 Oxford English Dictionary, accessed online.
“This Treaty shall not preclude the application by either Party of measures necessary for the [...] maintenance or restoration of international peace or [security].”\textsuperscript{167} [emphasis supplied]

81. The phrase ‘international peace or security’ thereunder was interpreted by the Enron tribunal as referring to obligations under the UN Charter.\textsuperscript{168} Under the UN Charter, the requirement of maintaining international peace and security refers to the obligation of abstaining from cross-border conflict, illegal use of force, and aggression.\textsuperscript{169} In light of this, ‘international emergency’ exceptions found in other treaties, such as the Canada-Peru BIT\textsuperscript{170} and the GATT,\textsuperscript{171} have also been interpreted to be inapplicable to “emergencies with purely local effects.”\textsuperscript{172}

82. Thus, the scope of Article 11 should be confined to threats of an ‘international’ nature, as an expansive reading of the clause would defeat the very purpose of the BIT.\textsuperscript{173} It was observed by the tribunal in Enron that:

“[The] Tribunal must first note that the object and purpose of the Treaty is, as a general proposition, to apply in situations of economic difficulty and hardship that guarantee the protection of the international guaranteed rights of its beneficiaries. To this extent, any interpretation resulting in an escape route from the obligations defined cannot be easily reconciled with that object and purpose.”\textsuperscript{174}

83. Respondent’s derogations from the BIT cannot be not excused under Article 11 of the BIT as there was no armed conflict, political turmoil or social upheaval that threatened regional or international peace, or security. The fiscal situation faced by Respondent was limited to domestic budgetary constraints;\textsuperscript{175} and in the absence of an actual breach of borrowing limits by Respondent\textsuperscript{176} the economic situation was of little consequence even to other EU Member States. Further, the political protests

\textsuperscript{168} Enron v. Argentine Republic (Award), ¶ 330.
\textsuperscript{169} Simma, pp. 40–42.
\textsuperscript{170} Art. 10(4), Canada-Peru BIT (2006).
\textsuperscript{171} Art. XXI, GATT.
\textsuperscript{172} Newcombe and Paradell, p. 497.
\textsuperscript{173} Newcombe and Paradell, p. 485.
\textsuperscript{174} Enron v. Argentine Republic (Award), ¶ 331.
\textsuperscript{175} Uncontested Facts, ¶ 29.
\textsuperscript{176} Uncontested Facts, ¶ 30.
against the feed-in tariff were limited in scale, and entirely non-violent,\(^{177}\) with no international repercussions.

**B. ** **RESPONDENT’S ACTIONS ARE NOT EXEMPT UNDER THE CUSTOMARY DEFENCE OF NECESSITY**

84. Respondent’s breach of international obligations cannot be excused under the customary international defence of necessity. State practice and judicial decisions support the view that necessity may only be invoked upon meeting of strict conditions\(^{178}\) that must be cumulatively satisfied.\(^{179}\)

85. Article 25 of the ILC Articles, which are widely accepted as reflective of customary international law,\(^{180}\) enlist the following requirements: *first*, the act in question must have been the ‘only way’ for the State to safeguard an ‘essential interest’ against a ‘grave and imminent peril’; and *second*, the act in question should not have seriously impaired an essential interest of the State towards which the obligation exists’, and *third*, the State concerned should not have contributed to the situation of necessity.\(^{181}\) Thus, the defence of necessity, by definition, follows a restrictive approach.\(^{182}\)

86. Respondent cannot invoke this defence because its perceived possibility of a financial crisis did not pose a ‘grave and imminent’ peril (Section 1), its fiscal concerns did not constitute an ‘essential interest’ (Section 2), and the Amendment was not the ‘only way’ for Respondent to tackle the prevailing situation (Section 3). Moreover, the crisis was a result of Respondent’s own actions (Section 4).

1. **Respondent did not Face a ‘Grave and Imminent’ Peril**

87. The economic crisis faced by Respondent was neither grave nor imminent. The threshold for this element is exceedingly high,\(^ {183}\) which is evident from the

\(^{177}\) Uncontested Facts, ¶ 32, Procedural Order No. 2, ¶ 17.
\(^{178}\) Art. 25, ILC Commentary, ¶ 2 and 14; CMS v. Argentine Republic (Award), ¶ 317.
\(^{179}\) Gabčíkovo-Nagymaros, ¶ 51; Kent and Harrington, p. 249.
\(^{180}\) Gabčíkovo-Nagymaros, ¶ 32.
\(^{181}\) Art. 25, ILC Articles.
\(^{182}\) CMS v. Argentine Republic (Award), ¶ 317.
\(^{183}\) Kent and Harrington, p. 250; Sloane, p. 454.
negative wording employed in Article 25 of the ILC Articles. This threshold was not even met by the Argentine economic crisis of 1998-2002, which resulted in:

“[Significant] decrease of Gross Domestic Product, consumption and investment, [...] deflation and reduction in value of Argentine corporations, [...] widespread unemployment and poverty [and] dramatic consequences in health, malnutrition and social policies.”

The tribunals in CMS, Enron and Sempra found that, even though the crisis was of “catastrophic proportions”, it did not result in a “total economic and social collapse.” Therefore, it was not sufficiently grave to meet the threshold of Article 25.

88. Further, a peril is only considered to be ‘imminent’ if it has been “objectively established” at the relevant point in time, and is not a mere ‘apprehension’ or ‘possibility’. Imminence requires that the threat be ‘proximate’ or ‘immediate,’ as was recognized by the ICJ in the Nicaragua case.

89. The fiscal problems contented by Respondent were a mere contingency, based on the presumption that ‘all applications’ for the feed-in tariff would receive approval. In fact, all applicants were not granted a license, and were not eligible for the feed-in tariff. Further, it was only after obtaining the license that the applicants could have commenced the ‘development’ of the photovoltaic projects. This gave Respondent sufficient time to address its infrastructural and fiscal problems, making the crisis a distant possibility. Since the crisis was not “actually out of control or had become unmanageable,” the requirement of its being ‘grave and imminent’ is not met.

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184 Art. 25, ILC Commentary, ¶ 14; Gabcikovo-Nagymaros, ¶ 51.
185 Newcombe and Paradell, p. 518.
186 Enron v. Argentine Republic (Award), ¶ 289.
187 CMS v. Argentine Republic (Award), ¶ 320.
188 Newcombe and Paradell, p. 518.
189 CMS v. Argentine Republic (Award), ¶ 320 and 355.
190 Gabcikovo ¶ 54; LG&E v. Argentine Republic (Award), ¶ 253.
191 Gabcikovo-Nagymaros ¶ 54.
193 Uncontested Facts, ¶ 29.
195 Art. 5, LRE.
196 Enron v. Argentine Republic (Award) ¶ 307; Sempra v. Argentine Republic (Award) ¶ 349.
2. **Respondent’s Essential Interests were not Seriously Impaired**

90. The defence of necessity cannot be allowed unless the circumstances pleaded by the responsible State impaired its essential interests. As described by Robert Ago, essential interests are “those interests which are of exceptional importance to the State seeking to assert it.”\(^{197}\) Such interests must be as essential as preservation of the existence of State,\(^ {198}\) ensuring the survival of a sector of its population or preservation of territory.\(^ {199}\) Tribunals have accorded a similar meaning to this requirement in context of the Argentine economic crisis,\(^ {200}\) observing:

> “[There] was a severe crisis [and in such a context] it was unlikely that business could have continued as usual. Yet, the argument that such a situation compromised the very existence of the State and its independence, and thereby qualified as one involving an essential State interest, is not convincing.”\(^ {201}\)

91. The economic situation faced by Respondent was in the nature of a mere budgetary misallocation, caused due to its own reluctance to divert funds from other sectors of the economy.\(^ {202}\) Further, the risk of breaching borrowing limits, and the fear of being unable to provide infrastructural support to the suppliers of photovoltaic energy was merely speculative.\(^ {203}\) It did not seriously threaten the polity or economy of the Respondent State.

3. **The Amendment was not the Only Way for Respondent to Address its Financial Situation**

92. Necessity cannot be pleaded as Respondent could have taken alternative measures to address its fiscal problems. The Commentary to the ILC Articles emphasizes that in order for a State’s conduct to be justified by the defence of necessity, its measures must be the “sole means” available to remedy the situation.\(^ {204}\) If there exist alternative measures, albeit “more costly or less convenient,”\(^ {205}\) that

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\(^{197}\) Ago, p. 19.

\(^{198}\) Art. 25, ILC Commentary, ¶ 4-16; Kent and Harrington, p. 249.

\(^{199}\) Ago, p. 14.

\(^{200}\) Continental Casualty v. Argentine Republic (Award), ¶ 166; LG&E v. Argentine Republic (Award), ¶ 251.


\(^{202}\) Uncontested Facts, ¶ 29.

\(^{203}\) Uncontested Facts, ¶¶ 29-30.

\(^{204}\) Art. 25, ILC Articles.

\(^{205}\) Art. 25, ILC Commentary, ¶ 17.
would result in lesser injury to Claimant, the State’s responsibility cannot be excused. This requirement has been recognized to be sufficient for precluding the defence of necessity.

93. The fiscal difficulties faced by Respondent due to the feed-in tariff were similar to those faced by various other EU Member States. A comparison of the policies adopted by other governments, which is a legitimate means of establishing the existence of policy alternatives, indicates that the Amendment was not the only step available to Respondent. Like Spain and Portugal, Respondent could have securitized the tariff deficit instead of funding it through the State budget. It could also have transferred the cost of the tariff to the consumers, like Britain, or Germany. In any case, Respondent could have resorted to a proportional diversion of funds from other sectors of the economy to the photovoltaic energy sector. An analysis of the merits of these alternatives is immaterial for determining whether a state of necessity existed.

4. Respondent Contributed to its Financial Crisis

94. Respondent’s actions are not justifiable as it contributed substantially to its situation of necessity. Allowing a State to create a state of necessity and then “take advantage of its own fault” by excusing any resulting breaches of international obligations would violate all notions of fairness and justice. Such exemption can only be granted where the state of necessity results “entirely” from exogenous factors. Where government policies and their shortcomings have significantly contributed to the crisis, the existence of exogenous factors does not preclude the wrongfulness of State measures.

95. The fiscal problems faced by Respondent were a result of its own policy to borrow heavily, its own decision of guaranteeing high feed-in tariffs and its own

206 Kent and Harrington, p. 252.
207 Legal Consequences of the Construction of a Wall (Advisory Opinion), ¶ 140; Sornarajah, p. 462.
208 Enron v. Argentine Republic (Award), ¶ 308; Kent and Harrington 252.
210 Uncontested Facts, ¶ 30.
211 Sempra v. Argentine Republic (Award), ¶ 351; Ago, p. 20.
212 Art. 25, ILC Commentary, ¶ 20; Enron v. Argentine Republic (Award), ¶¶ 311-312.
213 CMS v. Argentine Republic (Award), ¶ 353.
214 Enron v. Argentine Republic (Award), ¶ 312.
215 CMS v. Argentine Republic (Award), ¶ 328; Sempra v. Argentine Republic (Award), ¶ 354.
216 Uncontested Facts, ¶ 30.
failure at upgrading its infrastructure,\textsuperscript{218} in spite of such upgradation being prescribed by the EC.\textsuperscript{219} That the feed-in tariff would result in increased public expenditure was a consequence that could have been foreseen by Respondent.\textsuperscript{220} Since Respondent “helped, by act or omission” in bringing about the situation of alleged necessity,\textsuperscript{221} it cannot use it as a shield to preclude liability for subsequent actions.

96. Thus, Respondent’s actions can neither be precluded from wrongfulness under Article 11 of the BIT, nor can they be excused under the customary defence of necessity. Consequently, Respondent must compensate Claimant for its losses.

V. \textbf{RESPONDENT CAN BE ORDERED TO PERFORM ITS OBLIGATIONS THROUGH AN AWARD OF RESTITUTION}

97. The remedy for a breach of obligations under the BIT may be derived from customary law on state responsibility, as codified in the ILC Articles.\textsuperscript{222} Article 35 of these Articles provides that the responsible State has an obligation to make restitution for the injury caused, in that it must “re-establish the situation which existed before the wrongful act was committed.”\textsuperscript{223} Both, juridical restitution and specific performance of primary obligations are forms of restitution provided for under the Articles.\textsuperscript{224}

98. The Claimant must be granted restitution in the present case. To that end, Respondent must either repeal the Amendment to the LRE, or alternatively, it must continue paying the pre-Amendment rate of tariff to Claimant.\textsuperscript{225} \textit{First}, the Tribunal has competence to grant such restitution (Section A); \textit{second}, this award should be granted because restitution is the primary remedy for a breach of international obligations by a State (Section B); and \textit{third}, the conditions precluding restitution under Article 35 of the ILC Articles have not been met (Section C).

\textsuperscript{217} Uncontested Facts, ¶¶ 14-21.
\textsuperscript{218} Uncontested Facts, ¶ 129.
\textsuperscript{219} Renewable Energy Directive, ¶ 60-61.
\textsuperscript{220} Kent and Harrington, p. 260.
\textsuperscript{221} Gabicicikovo-Nagymaros (Hungary v. Slovakia), ¶ 57.
\textsuperscript{222} Hobér, p. 550; Noble Ventures v. Romania (Award), ¶ 69.
\textsuperscript{223} Art. 35, ILC Article.
\textsuperscript{224} Art. 35, ILC Commentary, ¶ 3 and 5.
\textsuperscript{225} Procedural Order No. 1, ¶ 4.
A. THE TRIBUNAL HAS COMPETENCE TO GRANT RESTITUTION

99. Commentators and arbitral tribunals have affirmed the inherent authority of tribunals to grant restitution in investment disputes. Treaties such as the ICSID Convention and the ECT also implicitly allow for such non-pecuniary remedies. For instance, Article 54(1) of the ICSID Convention states that:

“Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that Stat[e].”

[emphasis supplied]

100. Thus, this provision implicitly recognizes the competence of ICSID tribunals to grant non-pecuniary remedies such as restitution, though only pecuniary remedies are made enforceable under the Convention. In fact, a proposal to allow for only pecuniary remedies was explicitly rejected by the Drafting Committee, thereby indicating the intention to provide for non-pecuniary remedies in investment disputes under the Convention.

101. Similarly, Article 26(8) of the ECT provides that:

“[the] awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a sub-national government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy [granted]

[emphasis supplied]

102. Thus, while the responsible State may choose to pay monetary damages in certain circumstances, it is evident that tribunals have competence to grant non-pecuniary remedies under the ECT. The provision for restitution under such multilateral treaties provides evidence of its availability in the jurisprudence of investment arbitration.

226 Schreuer, p. 1138; Enron v. Argentina (Jurisdiction), ¶ 79; Nykomb v. Latvia (Award), p. 39.
227 Sabahi, p. 570.
228 Art. 54(1), ICSID Convention.
229 Sabahi, p. 570.
230 Art. 26(8), ECT.
103. It is only when the investment agreement has a specific provision to the contrary, such as in case of the model BITs of USA and Canada, that the authority to grant restitution may be excluded.\textsuperscript{231} However, the Barancasia-Cogitatio BIT does not place any such restriction on the powers of this Tribunal. In fact, Article 4(2) of the BIT explicitly provides for restitution to be granted for losses caused by war, internal conflict and national emergencies.\textsuperscript{232} This is an implicit recognition of the competence of this Tribunal to award restitution. Furthermore, Article 22.1(vii) of the LCIA Arbitration Rules allows this Tribunal to “order compliance with any legal obligation […] and specific performance of any agreement.”\textsuperscript{233}

104. Additionally, the principle of ‘sovereignty of States’ does not preclude the authority of the Tribunal to grant restitution. In the present case, Respondent consciously submitted to arbitration under the BIT, and enacted and amended the LRE with complete knowledge of its obligations under the BIT. These were sovereign actions undertaken by Respondent. Therefore, it cannot escape the obligations arising out of these acts now by citing the same principal of sovereignty.\textsuperscript{234}

105. This is further supported by the decision in \textit{ATA v. Jordan}, where the tribunal ordered the annulment of a decision of the Jordanian Court of Cassation to reinstate the claimant’s right to arbitration under a BIT.\textsuperscript{235} Similarly, in \textit{Nykomb v. Latvia}, an award of specific performance was granted, wherein Latvia was ordered to continue to pay the promised tariff to the claimant for the remaining period, as had been guaranteed under its laws.\textsuperscript{236}

106. Thus, it follows that this Tribunal has the authority to grant an award of restitution in the present case.

**B. RESTITUTION IS THE PRIMARY REMEDY UNDER THE ILC ARTICLES ON STATE RESPONSIBILITY**

107. The primacy of restitution is derived from the standard of “full reparation” laid down in Article 31 of the ILC Articles.\textsuperscript{237} Furthermore, Article 36 of the ILC

\begin{itemize}
  \item \textsuperscript{231} Bonnitcha, p. 59.
  \item \textsuperscript{232} Art. 4(2), BIT.
  \item \textsuperscript{233} Art. 22.1(vii), LCIA Rules.
  \item \textsuperscript{234} cf. Texaco v. Libya, p. 182.
  \item \textsuperscript{235} ATA v. Jordan (Award), ¶ 131.
  \item \textsuperscript{236} Nykomb v. Latvia (Award), p. 41.
  \item \textsuperscript{237} Art. 31, ILC Articles.
\end{itemize}
Articles provides for compensation as a remedy for the damage caused by the responsible State only “insofar as such damage is not made good by restitution.”

This principle has been affirmed by the PCIJ in the landmark Factory at Chorzów case, as well as by various tribunals in investment disputes.

108. Similarly, in the present case, restitution is the only way to achieve the standard of ‘full reparation’ because it is best aligned with Claimant’s expectations from its investments. Claimant is a commercial entity, which decided to undertake long-term investments in the Respondent State in light of reforms in its energy sector. Reinstating the pre-Amendment rate of tariff would allow Claimant to execute these investments plan most effectively and undertake similar investments in the future, which a mere award of damages would not. This would also be consistent with the objective of the BIT to “create and maintain favourable conditions for investment” in Barancasia. Therefore, it is submitted that restitution must be the primary remedy in the instant case.

C. THE CONDITIONS PRECLUDING RESTITUTION UNDER ARTICLE 35 OF THE ILC ARTICLES HAVE NOT BEEN MET

109. Article 35 of the ILC Articles lays down two conditions under which restitution should not be granted: first, when such restitution would be materially impossible (Section 1); and second, when it would impose a disproportionate burden upon the responsible State as compared to compensation (Section 2). Neither of those conditions is met in the present case.

1. Restitution is not Materially Impossible

110. According to the standard laid down in Article 35 of the ILC Articles, mere administrative, political or economic hurdles do not constitute a material impossibility, even though the responsible State may have to undertake special efforts to overcome these.
111. In the present case, repealing the Amendment would only require Respondent to make certain budgetary reallocations, or raise funds from other sources.\textsuperscript{243} In the alternative, if Respondent were to continue paying the pre-Amendment rate of tariff to Claimant \textit{alone}, its burden of expenditure under the post-Amendment tariff regime would only increase marginally. Further, since the on-going strikes in Barancasia were limited in scale, and entirely non-violent,\textsuperscript{244} neither the economic nor political situation of Respondent constituted a material impossibility.

112. The threshold for material impossibility, as demonstrated in decisions like \textit{Petrobart v. Kyrgyz Republic} and the \textit{Forests of Central Rhodope} case, is much higher. In \textit{Petrobart v. Kyrgyz Republic}, specific performance of a contract for the supply of gas was considered impossible because the investor was no longer operating in Respondent State, and had terminated its contracts with its own suppliers.\textsuperscript{245} Similarly in the \textit{Forests of Central Rhodope} case, restitution was denied because the forests in question had been cut down, and third parties had acquired rights over them.\textsuperscript{246}

113. In the present case no such difficulties would arise in implementation of an award of restitution. Thus, the condition of material impossibility has not been satisfied.

2. \textbf{Restitution will not Impose a Disproportionate Burden upon Respondent}

114. Restitution may not be granted when the burden imposed upon the responsible State by such an award is disproportionately greater than the burden imposed by an award of compensation.\textsuperscript{247}

115. In the present case, a repeal of the LRE would not impose a disproportionate burden on Respondent in light of the alternate means of financing available to it.\textsuperscript{248}

116. Alternatively, a payment of the pre-Amendment rate of tariff to Claimant \textit{alone} will not impose a disproportionate burden on Respondent. In that event, the

\begin{itemize}
\setlength\itemsep{0em}
\item \textsuperscript{243} Uncontested Facts, ¶¶ 29, 30 and 32; See Part IV(B)(3) of this Memorandum.
\item \textsuperscript{244} Procedural Order No. 2, ¶ 17.
\item \textsuperscript{245} Petrobart v. Kyrgyz Republic (Award), p. 78.
\item \textsuperscript{246} Forests of Central Rhodope Case, p. 1432.
\item \textsuperscript{247} Art. 35(b), ILC Articles.
\item \textsuperscript{248} See Part IV(B)(3) of this Memorandum.
\end{itemize}
additional expenditure incurred by it would be determined by the difference between
the tariff rates applicable before and after the Amendment. If Respondent were to pay
compensation instead of restitution, the amount of such compensation would be
calculated on the same basis. Therefore, the extra expenditure to be incurred by
Respondent will be comparable in both cases.

117. Further, payment of a higher tariff to Claimant alone will not violate the State
Aid provisions under the TFEU, and will not impose a disproportionate burden upon
Respondent. In the case of AES Summit v. Hungary, the tribunal held that damages
paid to an investor was “fundamentally different” from State Aid under EU law. The
State was obligated to pay damages by an external authority, and therefore such
payment did not constitute State Aid. This rationale also applies to an award of
restitution, and therefore such an award would not amount to State Aid under the
TFEU.

118. In any event, restitution should not be denied to Claimant merely on grounds
of such conjecture. Any uncertainty with regard to the burden imposed must be
settled in favour of the injured party, which is Claimant in this case. Thus,
restitution as requested by Claimant must be granted in the present case.

VI. ALTERNATIVELY, DAMAGES WORTH €2.1 MILLION MUST BE GRANTED

119. In the event that this Tribunal deems restitution inappropriate, full reparation
through payment of compensation must be granted as the alternate remedy, as
provided under Article 36 of the ILC Articles.

120. The quantum of damages as calculated by Claimant’s Expert, Prof. Kovič, is
€2.1 million. The objections raised by Respondent’s Expert, Prof. Priemo against this
estimate are incorrect. The estimates arrived at by Prof. Kovič with respect to the rate
discount (Section A), damages for project Alfa (Section B), damages for the
Barancasia Solar Installation Projects ["New Projects"] (Section C), damages for the
Follow-on Solar Installation Projects ["Follow-on Projects"] (Section D), and the
interest rate applicable (Section E) should be relied upon.

249 Claimant’s Expert’s Report, ¶ 7.
250 Art. 107, TFEU.
251 AES Summit v. Hungary (Expert Opinion), ¶ 121.
252 Micula v. Romania (Jurisdiction), ¶ 340.
253 Art. 35, ILC Commentary, ¶ 11.
A. **Projected Cash Flows for Project Beta and the New Projects Must Be Discounted at the Rate of 8%**

121. Prof. Kovič has used the Discounted Cash Flow method to calculate the net present value of Project Beta and the New Projects, with the discount rate being equal to the Weighted Average Cost of Capital ["WACC"] of the Claimant company.\(^{254}\) Prof. Priemo has alleged that the use of this rate is flawed because the WACC includes cost of *both, debt and equity*, but it has been applied to discount the *cash flows to only equity*.\(^{255}\) It is conceded that this method, if used, would lead to an inaccurate, inflated estimation of damages.

122. However, both, Annex 1(B) and Annex 3 to Prof. Kovič’s Report indicate that the *total* revenue lost due to the Amendment has been discounted by the WACC.\(^{256}\) This revenue would have accrued to the firm as a whole, and thus represents projected cash flows to the firm. In order to arrive at the cash flows to equity, debt payments such as interest payments on loans would have to be subtracted from this amount.\(^{257}\) This has not been done in the present case. Thus, Prof. Kovič has applied the WACC correctly to discount the cash flows to the firm *as a whole*, and not the cash flows to equity.

123. Furthermore, since Claimant’s projects are financed by both debt and equity, the WACC is the more appropriate value for the rate of discount than the cost of equity.\(^{258}\)

B. **Claimant is Entitled to Damages Worth €120,621 for the Denial of License to Alfa**

124. Prof. Priemo’s objections with regard to damages for project Alfa are incorrect because *first*, Claimant is entitled to damages for Alfa (Section 1); and *second*, the quantum of damages calculated by Prof. Kovič is correct (Section 2).

1. **Claimant is Entitled to Damages for Alfa**

125. Claimant was denied a license for project Alfa in 2010 in violation of Respondent’s transparency obligations under Article 2 of the BIT.\(^{259}\) Under the old

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\(^{256}\) Annex 1(B), Claimant’s Expert’s Report; Annex 3, Claimant’s Expert’s Report.

\(^{257}\) CMS v. Argentina (Award), ¶ 432.

\(^{258}\) EDF v. Argentina (Award), ¶ 1285.
license, Alfa continued receiving a feed-in tariff equal to €0.1989/kWh, which was less than half the tariff being paid to its competitors under the LRE. This placed Alfa at a significant competitive disadvantage. Therefore, Claimant must be paid damages for the denial of license to Alfa.

2. Prof. Kovič’s Calculation of Damages for Alfa is Correct

126. Prof. Priemo’s second objection with regard to Alfa is that the damages estimated by Prof. Kovič are too speculative given Alfa’s poor performance in the past. For calculating damages, the profitability of a project must be established with reasonable, not absolute certainty. In the present instance, Alfa’s profitability has been reasonably established.

127. Alfa had faced some budgeting and scheduling problems at the time of installation, and had been performing at a suboptimal capacity in the early phase of its operation. However, these problems were subsequently resolved. By Prof. Kovič’s estimation, Alfa’s capacity was expected to increase at a rate of 2.2% annually, and reach the optimal level of 21% by 2013. Such internal forecasts can be relied upon by the Tribunal for estimating the profitability of a project. Furthermore, the experience and know-how gained from project Alfa were extensively applied by Claimant to project Beta. Beta’s resounding success offers reliable evidence that Alfa will continue to operate smoothly in the future. Therefore, the estimation of €120,621 as damages is not too speculative.

C. Claimant is Entitled to Recover Lost Profits Equal to €1,427,500 for the New Projects

128. In his Report, Prof. Kovič had proposed two alternate methods for the calculation of damages for the New Projects. The first method measured damages in the form of reliance expenditure incurred by Claimant for the Projects in the event that the Projects were cancelled. This included payments for acquiring land,
equipment and personnel.\textsuperscript{267} However, this method is no longer relevant because Claimant has decided to complete these Projects.\textsuperscript{268}

129. The other alternative proposed by Prof. Kovič was to quantify the loss of profits from the New Projects by applying the Discounted Cash Flow Method. Prof. Priemo had objected to this estimation on the grounds that the New Projects had no proven history of profitability and therefore, the estimated damages were not certain.\textsuperscript{269}

130. However, lost profits can be reasonably established even for a new investment where there is “sufficient evidence of its expertise” and “proven record of profitability” from other investments”.\textsuperscript{270} In light of project Beta’s success, and project Alfa’s recovery, Claimant has a reliable history of profitability from other investments. It also has extensive experience with operating large-scale ‘cluster-farm’ projects in the wind energy sector since 2006.\textsuperscript{271} The New Projects sought to replicate this model.\textsuperscript{272} Further, the fact that Claimant has been able to secure loans for the New Projects indicates that they meet the high standards of feasibility and profitability usually required by banks.\textsuperscript{273}

131. Therefore, the damages for the loss of profits to the Projects are not speculative.

**D. CLAIMANT IS ENTITLED TO DAMAGES FOR THE LOSS OF OPPORTUNITY TO ESTABLISH THE FOLLOW-ON PROJECTS**

132. It is well established that an investor must be compensated for the loss of opportunity to undertake planned investments.\textsuperscript{274} Prof. Irmgard Marboe, in her commentary on the calculation of damages in international investment law, has opined that “the chance of possible profits in the future must also be compensated, if it was sufficiently probable that such profits would have been made.”\textsuperscript{275} This principle

\textsuperscript{267} Claimant’s Expert’s Report, ¶¶ 9 and 10.
\textsuperscript{268} Procedural Order No. 2, ¶ 26.
\textsuperscript{269} Respondent’s Expert’s Report, ¶ 12.
\textsuperscript{270} Vivendi v. Argentina (Award), ¶ 8.3.4.
\textsuperscript{271} Uncontested Facts, ¶¶ 4 and 27.
\textsuperscript{272} Uncontested Facts, ¶ 27.
\textsuperscript{273} Uncontested Facts, ¶ 27.
\textsuperscript{274} Art. 7.4.3(2), PICC; Sapphire International Petroleums v. NIOC (Award), ¶ 15.
\textsuperscript{275} Marboe, ¶ 3.219.
has been applied by tribunals across jurisdictions,\textsuperscript{276} and has also been recognized under the UNIDROIT Principles on International Commercial Contracts.\textsuperscript{277}

133. Prof. Priemo has objected to the claim of damages for Claimant’s Follow-on Projects on the grounds that these have not been established yet.\textsuperscript{278} However, the witness statement by Claimant’s employee clearly indicates that Claimant had long-term business plans to establish these projects in Barancasia.\textsuperscript{279} This is consistent with Claimant’s pattern of investments in the wind energy sector where it established multiple cluster-farm projects to take advantage of green subsidies.\textsuperscript{280}

134. Prior to the Amendment, the feed-in tariff regime was to continue for a period of at least 12 years.\textsuperscript{281} It is only reasonable that a commercial entity such as Claimant would seek to maximise its profits from such an incentive-structure by undertaking multiple investments over this period.\textsuperscript{282} As was held in Karaha Bodas Company v. Perusahaan, in light of the guaranteed payment of feed-in tariffs by Respondent, the profitability of these investments can be reasonably established.\textsuperscript{283}

135. Since the establishment of these projects was ‘sufficiently probable’, Claimant must be compensated for the loss of opportunity to undertake these planned investments.\textsuperscript{284}

E. The Rate of Interest on Damages Must Be Equal to the Discount Rate, i.e., 8%

136. The purpose of both interest and discount rates is to take into account the change in the time value of money.\textsuperscript{285} The pre-award interest determines the increase in time value of money between the date of occurrence of damages and the date of the final award.\textsuperscript{286} Similarly, the discount rate determines the decrease in the time value

\begin{itemize}
\item \textsuperscript{276} Marboe, ¶ 3.219.
\item \textsuperscript{277} Lemire v. Ukraine (Lemire II Award), ¶ 251.
\item \textsuperscript{278} Respondent’s Expert’s Report, ¶ 14.
\item \textsuperscript{279} Procedural Order No. 2, ¶ 28.
\item \textsuperscript{280} Uncontested Facts, ¶ 4.
\item \textsuperscript{281} Art. 4, LRE.
\item \textsuperscript{282} Uncontested Facts, ¶ 27.
\item \textsuperscript{283} Karaha Bodas Company v. Perusahaan (Award), ¶¶ 125 and 126.
\item \textsuperscript{284} Sapphire International Petroleums v. NIOC (Award), ¶ 15.
\item \textsuperscript{285} Marboe, ¶ 5.193; McCollough v. Ministry of Post (Award), ¶ 98.
\item \textsuperscript{286} Marboe, ¶ 6.177.
\end{itemize}
of money as calculated on the date of the award to the date of occurrence of damages. This represents the round trip of the value of damages between the two dates.\footnote{Abdala, p. 10.} To avoid an “invalid round trip” and thereby ensure the correct valuation of the damages payable, the interest rate must be equal to the rate of discount applied.\footnote{Abdala, p. 10.} In the present case therefore, the interest rate must be equal to the WACC which is 8\%.\footnote{See Part VI(A) of this Memorandum.} Thus, damages amounting to €2.1 million as calculated by Prof. Kovič must be granted.