# TABLE OF CONTENTS

List of abbreviations and AUTHORITIES ...................................................... 3

Factual background ......................................................................................... 4

**Respondent to jurisdiction objection** .......................................................... 5

A. Termination of the BIT under Article 59 of the Vienna Convention ............... 5
B. Inapplicability of the BIT under VCLT Article 30 ....................................... 17
C. Inapplicability of the BIT under EU Law .................................................. 20

**THE SUBSTANTIVE CLAIMS** ...................................................................... 21

Breach of fair and equitable .............................................................................. 21
Failure to Accord Full Protection and Security ................................................ 24
Non-Transparency of the Legal System ............................................................ 24
Absence of Good Faith ...................................................................................... 25
Indirect Expropriation ...................................................................................... 25

**Prayers for Relief** ........................................................................................ 26
List of abbreviations and AUTHORITIES

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>¶ / ¶¶</td>
<td>paragraph / paragraphs</td>
</tr>
<tr>
<td>Art. / Arts.</td>
<td>article / articles</td>
</tr>
<tr>
<td>BIT / BITs</td>
<td>bilateral investment treaty / bilateral investment treaties</td>
</tr>
<tr>
<td>BIT COGITATIA and BARANCASIA</td>
<td>AGREEMENT BETWEEN THE REPUBLIC OF BARANCASIA AND THE FEDERAL REPUBLIC COGITATIA FOR THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS</td>
</tr>
<tr>
<td>CSFR</td>
<td>European Agreement Establishing an Association between the European Community on the one hand, and the CSFR, Hungary and Poland on the other, signed 16 December 1991</td>
</tr>
<tr>
<td>e.g.</td>
<td><em>exempli gratia</em> (for example)</td>
</tr>
<tr>
<td>ECJ</td>
<td>Court of Justice of the European Union</td>
</tr>
<tr>
<td>EU</td>
<td>The European Union</td>
</tr>
<tr>
<td>Extra-EU BIT Cases</td>
<td>ECJ decisions in cases brought against Austria, Sweden and Finland, relating to breaches of their obligations as EU Member States arising from the investment treaties that they had concluded with third (<em>i.e.</em>, non-EU) countries: Case C-205/06, <em>Commission v. Republic of Austria</em>, Judgment of 3 March 2009, [2009] ECR I-01303; Case C-249/06, <em>Commission v. Kingdom of Sweden</em>, Judgment of 3 March 2009, and Case C-118/07,</td>
</tr>
</tbody>
</table>
Factual background

1. Our company [Vasiuki], an LLC incorporated under the laws of Cogitatia in 2002, has been engaged in the development, construction and operation of renewable energy facilities in Cogitatia and elsewhere in the region, including Barancasia, since 2002.

2. Our operations have included investments in photovoltaic projects in Barancasia commencing from 2009 and operating under Barancasia’s 2010 Law on Renewable Energy (“LRE”).

3. We first launched an experimental solar project called “Alfa” in 2009, which was connected to the grid and operational as of 1 January 2010. Under the LRE and its implementing Regulation, the Barancasia Energy Authority (“BEA”) calculated a guaranteed feed-in tariff of EUR 0.44/kWh for renewable energy producers, such as Claimant. Article 4 of the LRE provided that the feed-in tariff announced by the BEA and applicable at the time of issuance of a license to the renewable power producer would apply for twelve years.

4. Based on this regime for renewable energy, we significantly expanded its photovoltaic investments in Barancasia. This included applying for a
license for its “Alfa” project, and then subsequently investing in its second photovoltaic project, Beta, and then 12 more photovoltaic projects using a new technology.

5. On 25 August 2010, Claimant’s application for a license for the Alfa project was rejected. However, on that same date, our application for a license for project Beta was approved. The Beta project became operational on 30 January 2011, while 12 remaining projects received their licenses on 1 July 2012, thereby permitting us to invest in necessary equipment and commence construction.

6. On 3 January 2013, Barancasia amended Article 4 LRE to provide for annual review of the feed-in tariff. Barancasia did so without adequate justification and consultations with concerned stakeholders. The BEA subsequently reviewed and adjusted the feed-in tariff, imposing a draconian reduction to the tariff of EUR 0.15/kWh, with retroactive effect from 1 January 2013.

Respondent to jurisdiction objection

7. Respondent puts forward its objections to jurisdiction under four broad headings:
   a. Termination of the BIT under Article 59 of the Vienna Convention on the Law of Treaties (‘VCLT’)
   b. Inapplicability of the BIT under VCLT Article 30
   c. Inapplicability of the BIT under EU law
In addition, Respondent has made submissions concerning the proper relationship between this Tribunal and the institutions of the EU. These arguments and submissions are considered in turn in the following paragraphs.

A. Termination of the BIT under Article 59 of the Vienna Convention
8. On 31st of December 1998, the Finance Minister of the Claimant and Respondent Government signed BIT for the promotion and reciprocal protection of investments by investors of the other, within the territory of their respective countries. It will not bind those that have merely signed it, unless of course, signature is in the particular circumstances regarded as sufficient to express the consent of the state to be bound\(^1\). These officials are according to Clause (b) of Art.7 of the Vienna Convention (1969) the authorized persons representing their States and their signatures bind their respective countries.

9. Respondent has been a State Party to the VCLT since 28 May 1993; and the Cogitatia since 9 April 1985. Respondent has argued on the basis of the provisions of the VCLT, and has not suggested that the rules set out in the provisions which it discusses are not applicable to the BIT.

10. VCLT Article 59 provides for the termination of treaties. It is convenient to set it out in full at this point:

\[\text{Article 59. Termination or suspension of the operation of a treaty implied by conclusion of a later treaty}\]

\[\text{i. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and:}\]

\[\text{a. it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or}\]

\[\text{b. The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.}\]

\[\text{ii. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.}\]

11. We reject the submission that the BIT has been terminated in accordance with the rules set out in VCLT Article 59. There are three main reasons for this decision.

12. The first main reason is that the operation of VCLT Article 59 is subject to the provisions of VCLT Article 65 (“Procedure to be followed with

respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty”). VCLT Article 65(1) – (3) read as follows:

**Article 65. Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty**

i. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

ii. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

iii. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in article 33 of the Charter of the United Nations.

13. In our view, it is therefore clear from the text of the VCLT that the invalidity or termination of a treaty must be invoked, according to the Article 65 procedure. The VCLT\(^2\) does not provide for the automatic termination of treaties by operation of law (with the exception of treaties that conflict with rules of *jus cogens*).

14. VCLT Article 65(5) provides that:

Without prejudice to article 45,\(^3\) the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from

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\(^2\) This interpretation of the clear meaning of the text is supported by the terms of the ILC Commentary on the draft of VCLT article 65 (then numbered article 62): see: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf at pp. 261-3.

\(^3\) VCLT, art. 45 reads as follows: “Article 45. Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty. A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts: (a) it shall have expressly
making such notification in answer to another party claiming performance of the treaty or alleging its violation.

15. In the present case it is not “another party” to the treaty that is alleging its violation. Claimant is not a party to the BIT, which was concluded by the Federal Republic of Cogitatia and the Republic of Barancasia, now Respondent. It is, however, not necessary to consider whether VCLT Article 65(5) would permit Respondent to give a notification of invalidity in answer to a request for arbitration made by an investor under the BIT, because we consider that in any event the other conditions for the application (and hence the invocation under Article 65) of VCLT Article 59 are not met.

16. The second main reason for dismissing this objection to jurisdiction is that the application of VCLT Article 59 is expressly limited to situations where there are successive treaties “relating to the same subject-matter.” (See Article 59(1) cited above). The same phrase appears in VCLT Article 30 in a different context; but while the notion of “sameness” may be common to those two instances, the manner in which the overlap between the treaties is approached is manifestly not common. This is evident from the roles accorded by the VCLT to Articles 30 and 59.

17. Article 59 is concerned only with the termination of the entire treaty. Article 30, in contrast, is concerned with the priority between particular provisions of earlier and later treaties relating to the same subject-matter. While Article 30 is, therefore, focused on particular provisions, the question under Article 59 is whether the entire treaty should be terminated by reason of the adoption of a later treaty relating to the same subject-matter. The very fact that these situations are treated separately in the VCLT points to the need under Article 59 for a broader overlap between the earlier and later treaties than would be needed to trigger the application of Article 30.

18. This conclusion is borne out by a comparison of the terms of Article 30 and Article 59. Under Article 30 the test is whether the two successive treaty provisions are “compatible.” Under Article 59 the test is whether the provisions of the later treaty are “so far incompatible with those of the earlier one that the two treaties are not capable of being applied at agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or (b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.” Article 45 is not applicable in the present case.
the same time.” Article 30 may be triggered by the slightest incompatibility between the provisions of the earlier and later treaties. Article 59 clearly requires a broader incompatibility between the two treaties.

19. 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. In any event, it is also necessary, as Article 59 expressly stipulates, that either (a) it appears from the later treaty or is otherwise established that the parties intended the later treaty to govern the subject-matter or (b) the provisions of the treaties that relate to the subject-matter are so far incompatible as to preclude the concurrent application of the two treaties. One or other limb of that test must be satisfied if VCLT Article 59 is to operate.

20. We observe that while test (b) requires incompatibility between treaty provisions, test (a) does not. Test (a) would apply even in circumstances where successive treaties contain identical provisions. The result would be that it is the provisions in the later treaty that govern. That may be significant for questions of jurisdiction that turn upon the date of the governing instrument, for example.

21. In the present case, we don't consider that either of the two tests is met. As far as an intention that the later treaty should “govern the matter” is concerned, it is plainly established that the Parties to the BIT – Respondent and Cogitatia subsequently intended that EU law should apply in full between them. There is, however, no evidence of any intention that the provisions of EU law should result in the termination of the entire BIT. Nothing in the text of the EU treaties produces that result; and the necessary intention is not established by extraneous evidence. Indeed, such evidence as there is indicates that there was no or, at least, no clear intention that the BIT should be terminated by any of the CSFR Association Agreement, the Association Agreement, the Accession Treaty or the Lisbon Treaty.

22. Moreover, the BIT establishes extensive legal rights and duties that are neither duplicated in EU law nor incompatible with EU law. The protections afforded to investors by the BIT are, at least potentially, broader than those available under EU law (or, indeed, under the laws of any EU Member State). Those rights and duties are central to the
purpose of the BIT. This, too, indicates that no intention that EU law should entirely displace the BIT can be inferred.

23. The claims in this case are made under Articles 2(2) (fair and equitable treatment; non-discrimination), Article 2(2) (full protection and security; non-discrimination), Article 6 (free transfer of profits and dividends), and Article 5 (expropriation), pursuant to Article 8 (investor-state arbitration) of the BIT.

24. The question of the relationship between free transfer of capital under a BIT and free movement of capital under EU law arose in the Extra-EU BIT cases. The European Court of Justice held in those cases that the BIT “free transfer” provisions might be a bar to limitations on free movement of capital imposed under EU law, which EU Member States would be obliged to implement, and that the compatibility of the BIT with EU law could not be ensured. The Court considered that there was no adequate mechanism under international law that would allow an EU Member State to derogate from its BIT obligations in respect of the free movement of capital in order to fulfil its obligations under EU law.

25. The situation in the present case is different. The situation would not be one in which the EU State sought to invoke its internal law (including EU law) against an investor from a non-EU State in order to derogate from its BIT obligations. In the present case, both the EU State and the investor from another EU State would be subject to the same provisions of EU law. It is, accordingly, at least arguable that there is no incompatibility between the BIT and EU law on this point. However, it is acceptable that it is at least arguable that there is a duplication of rights to free movement of capital, which exist both under the BIT and under EU law. Nonetheless, that fact cannot determine the question of jurisdiction here because we consider that the other material BIT provisions are not duplicated in EU law, quite apart from Article 8 of the BIT.

26. We cannot accept the submission that the protection afforded by the BIT provision on fair and equitable treatment is entirely covered by a prohibition on discrimination. Respondent does not allege that there is any principle of EU law that specifically forbids treatment that is not fair and equitable. We do not consider that any such principle, independent
of concepts of non-discrimination, proportionality, legitimate expectation and of procedural fairness, is yet established in EU law.\(^4\)

27. Treatment might be unfair and inequitable even if it is imposed on everyone regardless of nationality or, indeed, of any other distinguishing characteristic. A flat-rate corporation tax might be an example. Respondent accepted that such a measure might be prohibited by the BIT but permitted by EU law. That possibility precludes an \textit{a priori} determination that every claim of a violation of the fair and equitable treatment standard must fall within the scope of a prohibition on discrimination. Similar hypothetical examples can readily be imagined that relate to other principles of EU law.

28. It cannot, therefore, be assumed (as the first test in VCLT Article 59 requires) that EU law is so comprehensive and legally certain as to have been impliedly intended to govern this question. It cannot be assumed that the Parties intended that a right so central to the purpose of the BIT would be displaced by the narrower and more loosely defined rights accorded by EU law.

29. Respondent argues that this hypothetical situation, where an action that would violate the BIT is permitted by EU law, is a clear example of incompatibility between the BIT and EU law. Incompatibility is a matter to be considered under test (b) in VCLT Article 59. Respondent said that incompatibility occurs when one act is permissible under one law, but not permissible under the other. The Tribunal does not share that view.

30. Article 59 is concerned with situations where “provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.” That could only arise in the hypothetical situation if the Member State had either a legally-protected right under EU law or a legal duty under EU law to impose the flat-rate tax. It would not arise where, because no law forbade it, the State simply had the freedom to impose such a tax if it so chose. True, the BIT obligation would prevent the State from enjoying its freedom under EU law to impose a flat-rate tax: but all treaty obligations consist in the fettering of a State’s freedom to act.

31. Accordingly, in the view of our company the fair and equitable treatment provision in the BIT does not fall under either limb of the test set out in VCLT Article 59.

32. We have focused on the scope of the protections afforded by the BIT and by EU law, rather than on the question whether on the facts of this particular case the claim based on the fair and equitable treatment provision could be raised under EU law. There are several reasons for this focus.

33. As discussed further below, the question here is one of jurisdiction; and the extent to which either the BIT or EU law covers the claim cannot be answered until the merits of the case have been considered.

34. We also consider that the question of overlap and incompatibility must, under VCLT Article 59, relate to the same legal relationship. Thus, a treaty provision guaranteeing non-discrimination does not have, even indirectly, the “same subject-matter” as a treaty provision guaranteeing fair and equitable treatment, even if on the facts of a particular case a claim might be raised under either provision and the claimant might be able to recover compensation for the entire loss under either provision. In this respect the notion of the same “subject-matter” has certain common features with the notions of “identity” that operate in the context of the doctrine of res judicata.

35. Our idea in relation to the fair and equitable treatment provision in the BIT alone is sufficient to dismiss Respondent’s submission that all BIT claims are covered by provisions of EU law. It is enough that one such claim made by us does not necessarily lie within the scope of the protections afforded by EU law to conclude that the BIT offers protections wider than those afforded by EU law. The fair and equitable treatment claim, however, is not the only claim that is not wholly covered by EU law.

36. In the view of our company the BIT right to “full protection and security” is not exhausted by the rights flowing from the freedom of establishment under EU law. The right to full protection and security subsists for as long as the investment remains in place, no matter how long after it has been established and no matter whether or not the treatment complained of is discriminatory. While the freedom of establishment under EU law entails various ancillary rights, we do not consider that those rights cover the entire ground that the right to full protection and security might be said to cover.5

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37. Similarly, the protection in Article 5 of the BIT against expropriation is by no means covered by the EU freedom of establishment. While it certainly overlaps with the right to property secured by Article 17 of the EU Charter of Fundamental Rights (and the First Protocol to the ECHR, as applied under EU law), the BIT provision on expropriation is not obviously co-extensive with it. Both the considerable body of jurisprudence on indirect takings that has emerged in the context of BITs, and also the fact that the BIT protects “assets” and “investments” rather than the arguably narrower concepts of “possessions” and “property” protected by the EU Charter on Fundamental Rights, give rise to the possibility of wider protection under the BIT than is enjoyed under EU law.

38. Thus, EU law does not provide substantive rights for investors that extend as far as those provided by the BIT. There are rights that may be asserted under the BIT that are not secured by EU law. Consequently, it cannot be said that it is implicit in the text of the EC Treaties that Respondent and the Cogitatia intended that it should supplant the BIT.

39. Nor can it be said that the provisions of the BIT are incompatible with EU law. The rights to fair and equitable treatment, to full protection and security, and to protection against expropriation at least, extend beyond the protections afforded by EU law; and there is no reason why those rights should not be fulfilled and upheld in addition to the rights protected by EU law.

40. The third main reason for rejecting the jurisdictional challenge based on VCLT Article 59 may be stated simply. An essential characteristic of an investor’s rights under the BIT is the right to initiate London Court of International Arbitration proceedings against a State party (as the host State) under Article 8 of the BIT. Such a consensual arbitration under well-established arbitration in a neutral place and with a neutral appointing authority, cannot be equated simply with the legal right to bring legal proceedings before the national courts of the host state; and, moreover, the locus standi of an investor under the BIT, with its broad definition of “indirect” investments under Article 1, is unlikely to be replicated under the court procedures of an EU Member State.

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41. Accordingly, we strongly dismisses Respondent’s submission that the BIT provisions have been displaced by EU law as a result of the principle set out in Article 59 of the Vienna Convention on the Law of Treaties.

42. The consequence is that in any particular case investors protected by the BIT may have wider rights than those given under the substantive provisions of EU law to investors of (other) EU Member States. Affording such wider protection to those investors while not affording it to investors of other EU States may violate EU law prohibitions on discrimination. But that is not a reason for cancelling our wider rights under the BIT. More significantly, it is still less a reason for treating the Parties’ consent to these arbitration proceedings as invalid or otherwise ineffective, particularly where the first stage of such consent pre-dated the relevant EU Treaties, the second stage pre-dated the Lisbon Treaty, and Claimant is an EU investor.

43. There is moreover no reason, legal or practical, why an EU Member State should not accord to investors of all other EU Member States rights equivalent to those which the State has bound itself to accord to investors of its EU bilateral investment treaty partners – or, indeed, to investors from States that are not members of the EU. Certainly, it is not for an arbitral tribunal to cancel rights created by a valid treaty in order to safeguard a State party against the possibility that it might one day decide to apply the treaty in a way that could violate its obligations under one or more other later treaties.

44. Also the Respondent Government has several times referred to this BIT as an effective BIT making it effective impliedly. For instance the fact that the BIT has been uploaded on official website of Ministry of Finance shows that the Respondent Government has fulfilled all the required formalities to bring the BIT into effect and has considered it as effective. Further, on 15th November 2006, Respondent’s Minister in response to the question asked by the Barancasia Times reporter has referred to this BIT as an effective BIT by pointing out that its considering to terminate all the effective Intra-European BITs (p.35) which is included in the list of BITs for termination (p.37) as one of the BITs concluded and effective to be terminated by the Government of Barancasia. This in fact on the basis of principle of “Estoppel”, prevents the Respondent to deny what it has already affirmed i.e., effectiveness
of the BIT. This was held in land and Maritime Boundary between Cameroon and Nigeria which says that "an estoppel would only arise if by its acts or declarations Cameroon had consistently made it fully clear that it had agreed to settle the boundary dispute submitted to the Court by bilateral avenues alone"6. The doctrine of separability of Arbitration clause is shorthand for regarding an arbitration clause as constituting a separate and autonomous Clause. It means that the validity of the arbitration clause does not depend on the validity of the contract as a whole and by surviving the termination of the main contract, the clause constitutes the necessary agreement of the parties that any disputes between them (even concerning the validity or termination of the contract in which it is contained) should be refereed to arbitration. In this way it provides a legal basis for the appointment of an arbitral tribunal7.

45. Moreover, the statements made by the Respondent are self-contradictory which is against the principle of Venire contra factum proprium6. On one hand it talks about the termination of the effective BIT and on another hand it refers to it as “Obsolete”. Literary speaking, an agreement should be in existence in the first place to be able to attract the adjective obsolete for any reason. When the respondent challenges the validity of the BIT, at first stage should illustrate the circumstances of obsoleteness and in second stage explain that why this is not binding.

46. Speaking of the termination of the BIT, it is worth of being mentioned that according to Art.54 of the Vienna Convention, termination of a Treaty shall take place according to the provisions of the Treaty. The contentions of the Respondent saying that it has terminated the BIT is groundless since the notice that they are referring to has not been issued correctly, is not valid. Article.13 of the BIT in its Clause (b) provides that this BIT shall be effective for 10 years and in case of no notice of termination by either of the parties, shall remain in force for another 12 months from the date either of the Contracting Party notifies the other in writing of its intention to terminate the Agreement. In Clause (c) it is provided that in respect of the claims which arise before the date of its termination, this BIT shall apply for another 10 years from the date of its termination. (p.30) The Respondent’s Parliament passed a resolution

on 11th of December 2006 regarding the procedure for the proposal for approval of the procedure of the Republic of Barancasia concerning the termination of bilateral investment treaties concluded by the Republic of Barancasia with members of the European Union. (Annex.6, p.36). Later on 29th of June, 2007, the government of Barancasia served a notice on Claimant’s government stating that it has adopted Resolution No. 1800, based on which it terminates the Agreement for the Promotion and Reciprocal Protection of Investments concluded between the Republic of Barancasia and the Federal Republic of Cogitatia on December 31, 1998, effective as of June 30, 2008. (Annex No.7.1, p.38). Clearly the Respondent Government failed to serve a valid written notice in order to terminate the BIT, therefore this BIT has never been terminated.

47. The Respondent’s government’s assumption which says the BIT is obsolete is ill explained by them and wrongly supported. They refer to Art.207 of TFEU which reads as follow .1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action. 2. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy. 3. Where agreements with one or more third countries or international organizations need to be negotiated and concluded, Article 2188 shall apply, subject to the special provisions of this Article. The Commission shall make recommendations to the Council, which shall authorize it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules. The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as
the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations. 4. For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority. 48. For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules. The Council shall also act unanimously for the negotiation and conclusion of agreements: (a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity; (b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organization of such services and prejudicing the responsibility of Member States to deliver them. 5. The negotiation and conclusion of international agreements in the field of transport shall be subject to Title VI of Part Three and to Article 218. 6. The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonization of legislative or regulatory provisions of the Member States in so far as the treaties exclude such harmonization.”

B- Inapplicability of the BIT under VCLT Article 30

1. Respondent’s argument that the provisions of the BIT are inapplicable because of the operation of the rules set out in VCLT Article 30 can be dealt with briefly.

2. VCLT Article 30 is concerned with situations of incompatibility between particular provisions in successive treaties. In so far as it is relevant, it reads as follows:

Article 30. Application of successive treaties relating to the same subject-matter

i. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

ii. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

iii. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.”

3. Article 30(1) refers to the provision of Article 103 of the UN Charter which gives obligations arising under the Charter priority over other treaty obligations. It is not relevant in this case. Article 30(2) deals with situations where there is an express provision governing relations between successive treaties. There is no such provision in this case. Article 30(3) is the material provision for the present case.

4. It has already been explained that in the view of the Tribunal there is no incompatibility in circumstances where an obligation under the BIT can be fulfilled by Respondent without violating EU law. That conclusion is not affected by the principles of supremacy, direct effect or direct application of EU law.

5. More importantly, it is difficult to see how Article 30 could deprive the Tribunal of jurisdiction based upon the Parties’ consent derived from Article 8 of the BIT (whether operating the first stage, second stage or both), even if there may be circumstances in which a true incompatibility between the BIT and EU law arises. Any such incompatibility would be a question of the effect of EU law as part of the applicable law and, as such, a matter for the merits and not jurisdiction.

6. The one exception would be if Article 8 of the BIT, which provides for arbitration between the investor and the State, were by itself incompatible with EU law. It could not be incompatible when the BIT was made; but it might be argued that it is incompatible with the CSFR
Association Agreement, the Association Agreement, the Accession Treaty or the Lisbon Treaty. If that were so, that would, at least arguably, deprive the Tribunal of jurisdiction.

7. There is, however, no rule of EU law that prohibits investor-State arbitration. Far from it: transnational arbitration is a commonplace throughout the EU, including arbitrations between legal persons and States; and the European Court of Justice has given several indications of how questions of EU law should be handled in the course of arbitrations, including important questions of public policy. It cannot be asserted that all arbitrations that involve any question of EU law are conducted in violation of EU law. The argument that the availability of arbitration for some but not all EU investors would amount to discrimination in violation of EU law was addressed above, where it was decided that the answer is to extend rights and not to cancel them. The fact that there might be remedies available to the Claimant in national courts through Francovich procedures does not alter the position. One of the central purposes of arbitration is to provide the disputing parties, by their consent, with an alternative to proceedings in national courts. Moreover, an arbitration clause in a BIT is specifically included to address the substantive protections afforded to investors under the BIT.

8. Reference was made to the ruling of the ECJ in the MOX Plant case that by virtue of Article 344 TFEU (ex Article 292 TEC) and the principle of loyalty the ECJ had exclusive jurisdiction over disputes between two Member States. Whatever the implications of that ruling might be for Article 10 of the BIT, which is concerned with disputes between the BIT Contracting Parties, the ruling is not applicable to disputes under Article 8, which are not disputes between Contracting Parties but investor-State disputes. There is no suggestion here that every dispute that arises between a Member State and an individual must be put before the ECJ; nor would the ECJ have the jurisdiction (let alone the capacity) to decide all such cases.

9. The argument that Article 8 of the BIT is incompatible with EU law is therefore unsustainable. Accordingly, we disagree Respondent’s submission that the Tribunal lacks jurisdiction because the BIT provisions have been displaced by EU law as a result of the principle set out in Article 30 of the Vienna Convention on the Law of Treaties.

9 For example, Eco Swiss.
C. Inapplicability of the BIT under EU Law

10. Respondent’s third line of argument is that the Tribunal lacks jurisdiction because, as a matter of EU law, EU law has direct effect and prevails over both national law and international treaties, and because only the European Court of Justice can interpret EU law.

11. We do not accept this argument. EU law may have a bearing upon the scope of rights and obligations under the BIT in the present case, by virtue of its role as part of the applicable law under BIT Article 10. But that is a question for the merits stage, not a question that goes to jurisdiction.

12. The only basis – beyond the arguments already discussed in relation to VCLT Articles 30 and 59 – on which the Tribunal might arguably be deprived of jurisdiction on the basis of the status of EU law is that the Tribunal needs to consider and apply EU law in order to decide the present case and yet is entirely precluded from considering and applying any such EU law by the Parties’ consent derived from Article 8 of the BIT.

13. Even assuming, for the sake of argument, that the questions that the Tribunal will need to address might be identified accurately prior to the merits stage, and that they include questions of EU law, that proposition is unsustainable. Far from being precluded from considering and applying EU law the Tribunal is bound to apply it to the extent that it is part of the applicable law(s), whether under BIT Article 10.

14. The argument that the ECJ has an “interpretative monopoly” and that the Tribunal therefore cannot consider and apply EU law, is incorrect. The ECJ has no such monopoly. Courts and arbitration tribunals throughout the EU interpret and apply EU law daily. What the ECJ has is a monopoly on the final and authoritative interpretation of EU law: but that is quite different. Moreover, even final courts are not obliged to refer questions of the interpretation of EU law to the ECJ in all cases. The acte clair doctrine is well-established in EU law.\textsuperscript{10}

15. The fact that, at the merits stage, the Tribunal might have to consider and apply provisions of EU law does not deprive the Tribunal of jurisdiction. The Tribunal can consider and apply EU law, if required.

16. Accordingly, this jurisdictional objection can be reject.

THE SUBSTANTIVE CLAIMS

Breach of fair and equitable

17. Unlike portfolio investments, foreigner enters the Host State with express consent of the Host State which is in international law a reason why the concept of State responsibility arises. No country is forced to admit an investor to enter into his territory for any investment. However, since Vasiuki has officially entered Barancasia through formal channels and with putting heavy expenditure has started a huge project like Alfa in 2009 which was necessary for the economic development of Barancasia, taking into consideration a reasonable level of risk, as an investor entitled to a non-discriminatory and favorable condition, fair and equitable treatment with full protection and security for investors by the Host state. The Respondent failed to accord either of the above “Minimum Standard Treatment” by inter alia, not granting license to Alfa project. The Arbitral Tribunal in Sempra v. Argentina believes that it is a wrong perception to say that fair and equitable treatment is one of the secondary and collateral conditions, but we have to even in situations where there are no sufficient proof of expropriation consider this condition as a criteria for achieving justice and compensating the investor.

18. The undertaking of the host country to provide fair and equitable treatment to the investors of the other party and their investments is a standard feature in BITs, although the exact language of such undertakings is not uniform. The generality of the fair and equitable treatment standard distinguishes it from specific obligations undertaken by the parties to a BIT in respect of typical aspects of foreign investment operations such as those concerning monetary transfers, visas, etc. At the same time, the fair and equitable treatment standard can be

distinguished from other general standards included in BITs, namely the national and the most favored nation treatment standards, which guarantee a variable protection that is contingent upon the treatment given by the host State to its own nationals or to the nationals of the best treated third state.

19. We turn now to the more specific concept, which we assert forms part of the fair and equitable treatment standard, of the protection of “legitimate expectations” on the part of an investor concerning the stability of the legal framework under which it has made its investment.

20. Legitimate expectations with respect to the stability of the legal framework under which a foreign company makes an investment may derive not only from contractual undertakings, but also from legislation and regulation that was precisely meant to attract foreign investment.

**LAW ON RENEWABLE ENERGY** 1 May 2010 No. XI-1375 framework was devised and enacted in order to attract long term private foreign investments in utilities, which were badly in need of modernization through massive investment.

21. The expectation of the investor is undoubtedly “legitimate”, and hence subject to protection under the fair and equitable treatment clause, if the host State has explicitly assumed a specific legal obligation for the future, such as by contracts, concessions or stabilization clauses on which the investor is therefore entitled to rely as a matter of law.

22. In other words, an investor’s legitimate expectations may be based “on any undertaking and representations made explicitly or implicitly by the host State. A reversal of assurances by the host State which have led to legitimate expectations will violate the principle of fair and equitable treatment. At the same time, it is clear that this principle is not absolute and does not amount to a requirement for the host State to freeze its legal system for the investor’s benefit. A general stabilization requirement would go beyond what the investor can legitimately expect.”

23. The balance between these competing requirements and hence the limits of the proper invocation of “legitimate expectations” in the face of legislative or regulatory changes (assuming that they are not contrary to a contractual, bilateral or similar undertaking, binding in its own right) has been based on a weighing of various elements pointing in opposite directions. On the one hand, the form and specific content of the

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undertaking of stability invoked are crucial. No less relevant is the clarity with which the authorities have expressed their intention to bind themselves for the future. Similarly, the more specific the declaration to the addressee(s), the more credible the claim that such an addressee (the foreign investor concerned) was entitled to rely on it for the future in a context of reciprocal trust and good faith. Hence, this accounts for the emphasis in many awards on the government having given ‘assurances’, made ‘promises’, undertaken ‘commitments’, offered specific conditions, to a foreign investor, to the point of having solicited or induced that investor to make a given investment. We surely describe the acts of THE REPUBLIC OF BARANCASIA on which we rely in this way. As a result of such conduct by the host authorities, the expectation of the foreign investor may “rise to the level of legitimacy and reasonableness in light of the circumstances.”14 When those features are not present, a cautious approach is warranted based on a case specific contextual analysis of all relevant facts.

24. Indeed, the most difficult case is (as in part in the present dispute) when the basis of an investor’s invocation of entitlement to stability under a fair and equitable treatment clause relies on legislation or regulation of a unilateral and general character. In such instances, investor’s expectations are rooted in regulation of a normative and administrative nature that is not specifically addressed to the relevant investor. This type of regulation is not shielded from subsequent changes under the applicable law. This notwithstanding, a claim to stability can be based on the inherently prospective nature of the regulation at issue aimed at providing a defined framework for future operations. This is the case for regimes, which are applicable to long-term investments and operations, and/or providing for “fall backs” or contingent rights in case the relevant framework would be changed in unforeseen circumstances or in case certain listed events materialize. In such cases, reference to commonly recognized and applied financial and economic principles to be followed for the regular operation of investments of that type (be they domestic or foreign) may provide a yardstick. This is the case for capital intensive and long term investments and operation of utilities under a license, natural resources exploration and exploitation, project financing or Build Operate and Transfer schemes. The concept of “regulatory

14 See Saluka Investments BV v. The Czech Republic, supra note 103, para. 304.
“fairness” or “regulatory certainty” has been used in this respect. In the light of these criteria when a State is empowered to fix the tariffs of a public utility it must do so in such a way that the concessionaire is able to recover its operations costs, amortize its investments and make a reasonable return over time.

25. Now we should declare that through Barancasia arbitrary denial of a license to our Alpha project and subsequent changes to Barancasia’s renewable energy laws which harmed our other projects, violates the protections that we are entitled to under the BIT. In particular, Barancasia’s treatment is neither fair nor equitable. It disregards the legitimate expectations that Barancasia established for investors such as our company (and other photovoltaic investors).

**Failure to Accord Full Protection and Security**

26. Further, it is worth of notice that irrespective of the validity of a BIT, as a principle of international law, a country when it accepts an investor is expected to accord fair and equitable treatment to it, included in the main concept of fair and equitable treatment is the full protection which In the recent arbitrations it has been witnessed that the area of application for the full protection and security has increased to include not only the physical protection of the investment by police, security and judicial system but also to protect the investment from actions that infringes the legal system that is applicable to the investment or that which disturbs such system’s stability.

**Non-Transparency of the Legal System**

27. Also principle of fair and equitable treatment consists of prohibition of the discriminatory treatment, complying with contractual obligations. Although, the laws on grant of a license to be entitled to receive feed-in tariffs was not transparent which itself is a ground for a treatment to be not fair and equitable, but considering the circumstances in which the Alfa project entered into Barancasia made Vasiuki to expect legitimately that it is accepted as an investor to be entitled to enjoy the protections provided for by international law and the BIT because it was receiving a feed-in tariff of €0.1989 kwh since January 2010 for Barancasia with

16 Noble ventures, Inc v. Romania, ICSID Case No. ARB/01/11.
no extra legal or otherwise requirement to receive license, etc. As is concluded in *Azurix v. Argentina* Legitimate expectation necessarily does not exist on the basis of an agreement but it is also framed on the ground of express and implied guarantees or the indications that are seen in the Host State and the investor considers them in his investments. However later the approach of the Respondent Government changed towards Alfa by not granting license to it and depriving it of the incentives. Having such contrary and non-transparent laws is against the nature of fair and equitable treatment.

**Absence of Good Faith**

28. Also good faith is one of the vast principles of international law that in particular is an integral part of international investment law. International Arbitral Tribunals consider good faith as a natural part of the fair and equitable treatment. In *Genin v. Estonia* the Tribunal held that any action that infringes the principle of fair and equitable treatment is considered as contrary to the principle of good faith. The Claimant’s Treatment being against fair and equitable treatment has failed to act in good faith.

**Indirect Expropriation**

29. Art. 5 of the BIT 1998 protects the investor against the expropriation by the Host Government of the investment of the investor. When Beta project received license as was promised by Barancasia the guaranteed feed-in tariff was €44 kwh which was repealed by it suddenly due to unreasonable grounds and reduced to 0.15. Foreign direct investment is not a simple process; it involves heavy and complicated cost and planning. Any unexpected change in policy causes deep damages to the benefit of the investor and makes the investment meaningless. As the Tribunal in *Feldman v. Mexico* decided: actions like confiscation, taxation, prevention from access to raw material and implication of unreasonable balancing mechanisms, etc. are considered as

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18 *SPP v. Egypt*, Award, 20 May 1992, 3 ICSID Report 189, para 82.82
19 In *MTD v. Chile* the Tribunal held that considering the international law, treatment of the government of Chile saying that it invited investment and now it alleges that such investment is against its laws is infringement of principle of fair and equitable treatment.
expropriation. In Revere Copper v. OPIC it is alleged that although the Claimant is in ownership of all his assets and rights, the place of the project and its facilities, the rent agreement for the Mine is still valid, and like in past is continuing its activities, these issues may seem officially correct, but we cannot consider RGA control in use and commissioning of its properties the same as before the government’s affecting actions on its contractual rights". The expropriation done by the Respondent Government is unlawful and should be subject to an adequate compensation because: 1. It is not actually for public good, 2. Not with due process of law. 3 is discriminatory 4. not accompanied by an adequate compensation.

**Prayers for Relief**

30. Finally we request the Tribunal:

1. Declare that Respondent is liable for violations of the BIT, including failure to accord Vasiuki fair equitable treatment.
2. Order Respondent a) to repeal the amendment to Article 4 of the LRE or b) to continue to pay Vasiuki the €0.44 feed-in tariff for 12 years.
3. In the alternative to its second claim, order Respondent to pay damages to Vasiuki for its losses, which Vasiuki calculates would equal approximately €2.1 million [see the Report of Claimant’s Expert, Prof. Marko Kovič] over the 12 years during which the tariff should have remained unchanged.
4. To find that Claimant is entitled to restitution by Respondent of all costs related to these proceedings.

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20 ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary. see also Starrett Housing v. Islamic Republic of Iran, 4IUSCTR, p.154, 1984: the Tribunal stated that though the Government of Iran did not enact any law or pass any ordinance by which to confiscate the Shahgeli project, it is accepted in international law that though Government may not have deprived the investor of his rights but any act by Government, however unintentional, which affects the ownership rights of an investor amounts to expropriation.

21 Revere Copper v. OPIC, Award, 24 August 1978, 56 ILR, 1980 para 258.