London Court of International Arbitration

IN THE PROCEEDINGS BETWEEN

Vasiuki LLC

(Claimant)

V.

Republic of Barancasia

(Respondent)

CASE NO. 00/2014

MEMORIAL FOR CLAIMANT
CLAIMANT’S MEMORIAL

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STATEMENT OF FACTS

1. Vasiuki LLC (“Vasiuki”) is the Claimant in this dispute. It was incorporated in Cogitatia in 2002, and is a successful developer of electric projects spanning multiple modalities,. The Republic of Barancasia (“Barancasia”) is the Respondent.

2. Vasiuki has been engaged in the development, construction and operation of renewable energy facilities in Cogitatia and elsewhere in the region, including Barancasia, since 2002. Claimant’s operations have included investments in photovoltaic projects in Barancasia commencing from 2009 and operating under Barancasia’s 2010 Law on Renewable Energy ("LRE").

Claimant’s investments

3. Vasiuki has been monitoring the Barancasian legislation process on renewable energy incentives since 2007 when Barancasia declared its goals to fulfill its obligation to meet EU climate and energy targets. Being aware of such initiatives Vasiuki decided to launch its first photovoltaic solar (PV solar) energy project – Alfa in May 2009 - and purchased land plots for that purpose. Alfa was connected to the grid on 1 January 2010.

4. In August 2010 Vasiuki obtained a license for a new project – Beta, which guaranteed fixed feed-in tariff (“FIT”) rate for a period of 12 years.

5. In 2011 Vasiuki borrowed a substantial sum of money to acquire land plots suitable for the development of PV solar plants and equipment for 12 new projects. Licenses for all of them were granted on 1 July 2012 with an approved 0.44€/kWh FIT. After that solar panels were ordered.

EU Accession and termination of Intra-EU BITs

6. On 1 May 2004, Barancasia and Cogitatia joined the European Union (“EU”). After this, Barancasia officially asked its Minister of Foreign Affairs to reach an agreement on termination of its intra-EU BITs. The BIT between Barancasia and Cogitatia was listed in the relevant Resolution as one of the BITs for termination.

7. On 29 June 2007, Barancasia notified Cogitatia of its intention to terminate the Cogitatia-Barancasia BIT. Cogitatia’s Ministry of Foreign Affairs merely confirmed receiving the notification sent by Barancasia. In fact, Cogitatia has not initiated or officially acknowledged termination of any of its existing intra-EU BITs.

8. The press releases from Barancasian state officials show that Barancasia informally contacted the Ministry of Foreign Affairs of the Cogitatia several times, most recently
on 3 November 2010, in order to confirm the termination of the BIT, but received no official response from Cogitatia.

9. In an interview dated 5 May 2012, the Prime Minister of Barancasia discussed the government’s success in terminating intra-EU BITs. There is no record of any Cogitatian Government response or comment to the interview.

**Barancasian FIT scheme for renewable energy incentivization - the LRE**

10. In 2010 Barancasia adopted the LRE, which was followed by a Regulation on the Support of Photovoltaic Sector (“Photovoltaic Support Regulation”). This Regulation sets forth the criteria that a renewable energy provider must satisfy in order to be granted the FIT: existing or new photovoltaic capacity which does not exceed 30 kW.

11. On 1 July 2010 the rate of 0.44€/kWh which was supposed to return an average 8% to the PV solar investment, was announced.

12. Vasiuki applied for licenses for both of its projects Alfa and Beta only to find that its first application was denied for reasons not legally established. For its second project – Beta Vasiuki obtained the license for 12 years, but the promised tariff rate lasted only 2 years of that time due to the fact that on 3 January 2013 the Barancasian Parliament adopted an amendment to Article 4 of LRE which permits the Barancasia Energy Authority (“BEA”) review the FITs rate on an annual basis.

13. The new feed-in tariff rate was announced as 0,15€/kWh from 1 January 2013 which is about one third of the previously promised FIT rate.

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

14. In 2014, Vasiuki commenced arbitral proceedings before the London Court of International Arbitration ("LCIA") pursuant to Article 8 of the Barancasia-Cogitatia Bilateral Investment Treaty, which entered into force 1 August 2002 (“BIT”).
ARGUMENTS

I. The Tribunal has jurisdiction over the dispute and the claims asserted by Claimant are admissible

16. The Tribunal has jurisdiction over the dispute for two reasons: (A) the BIT remains in force despite EU accession and (B) the BIT was not terminated either in accordance with its provisions or by mutual consent of the parties. As such, the claims asserted by Claimant are admissible.

A. The BIT remains in force despite EU accession

17. The BIT is still in force after EU accession because (1) EU accession does not render the BIT obsolete and (2) Article 30 VCLT does not make the BIT inapplicable in the case at hand.

1. EU accession as a mere fact does not make the BIT obsolete

18. The BIT was not implicitly superseded by the *acquis communautaire* when Barancasia and Cogitatia acceded to the EU. It is not supported by the BIT or international law.

19. The Tribunal’s jurisdiction is dictated by the treaty that establishes it and within which consent originated, so it is the BIT Article 8.1 In the BIT, there is no provision expressly terminating the BIT between states after accession to the EU. EU law does not extinguish earlier treaties existing before accession to the EU. The Treaty on the Functioning of the European Union (“TFEU”) expressly states that rights and obligations arising from agreements concluded before accession to the EU shall not be affected by the provisions of the Treaties.2 The TFEU also states: ‘to the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established’ 3

20. Neither the TFEU nor any other provisions of the EU legal order deals expressly with the question of terminating earlier existing intra-EU BITs after accession to the EU.4 Thus, the mere fact of EU accession does not make earlier treaties in force between acceding states obsolete. In the absence of more specific legal provisions in the BIT or EU law, the effect of the accession to the EU must be judged according to

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1 Kadi & Barakaat, paras 280-291.
2 Article 351 (para 1) TFEU (ex Article 307 TEC).
3 Article 351 (para 2) TFEU (ex Article 307 TEC).
4 Oostergetel, para 80.
international law, in particular the Vienna Convention on the Law of Treaties ("VCLT"), of which Cogitatia and Barancasia are both parties.

21. As a matter of public international law, a treaty can only be ended in accordance with its own terms or the VCLT. VCLT Article 42 also sets forth that the validity of a treaty or of the consent of a state to be bound by a treaty may be impeached only through the application of the VCLT.

22. Accordingly, the Claimant asserts that the following requirements must be satisfied in order to fulfill the conditions for termination under VCLT Article 59: (a) both treaties must relate to the same subject matter; (b) the two states must have intended Vasiuki’s investment to be governed by the TFEU instead of the BIT; and (c) the provisions of the BIT must be so far incompatible with the provisions of the TFEU that the two treaties are not capable of being applied at the same time. Claimant submits that these conditions are not met.

a. The TFEU does not cover the same subject matter as that of the BIT

23. In other intra-EU BIT cases, tribunals have come to the conclusion that the relevant BIT and the TFEU do not cover the same subject matter. In these cases, tribunals have based their decisions on the following arguments.

24. The TFEU objectives differ from the objectives created under the BIT because the former is aimed to create a common market between all EU Member States while the latter provides for specific guarantees for the investor’s investment in the host state.

25. For example, the Tribunal in Eureko ruled that 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. The rights and duties central to the purpose of the BIT are the Fair and Equitable Treatment ("FET") standard, protection against expropriation and most importantly, the Investor-State Dispute Settlement ("ISDS") clause, which according to arbitral practice are not guaranteed by EU law.

26. The BIT in this case contains an article on protection against expropriation which is not as extensively covered by EU law. Article 17 of the EU Charter of Fundamental Rights protects property rights, but not as extensively as the BIT provision on

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5 Article 42(2) VCLT.
6 Article 42 (1) VCLT.
7 Eureko (Slovak Republic), para 239; Eastern Sugar, para 159; Oostergetel, para 74.
8 Oostergetel, para 75.
9 Eureko (Slovak Republic), para 245.
10 Ibid, para 262; Oostergetel, para 79.
expropriation. Furthermore, the BIT protects ‘assets’ and ‘investments’ rather than the arguably narrower concepts of ‘possessions’ and ‘property’ protected by the EU Charter of Fundamental Rights, which gives investors the possibility of wider protection under the BIT than under EU law.\textsuperscript{11}

b. Barancasia and Cogitatia did not intend for the TFEU or the EU legal order to supersede the BIT

27. The second component\textsuperscript{12} of the test in VCLT Article 59 is to determine whether the states’ intended for one treaty to supersede or terminate the other. Tribunals in intra-EU BIT cases have refused to support the Respondents submissions that states intended EU law to supersede BITs after accession.\textsuperscript{13} In the present dispute, the lack of intent by the parties to render the BIT obsolete after EU accession can be demonstrated according to the following two arguments:

28. Firstly, the VCLT requires states’ \textit{intention} to be considered prior to or in the process of entering new treaty obligations, but not after the successive treaty comes into force. In fact, Barancasia only declared its intention to terminate its intra-EU BITs after its accession to the EU\textsuperscript{14}, in order to align with EU legal order. This demonstrates that Barancasia did not consider the fact of EU accession as making the BIT obsolete.

29. Secondly, there is no evidence of Cogitatia’s and Barancasia’s common intention to give precedence to EU law and subordinate the BIT to it. Indeed, in the few instances where Barancasia has intended to give precedence over a BIT to a particular source of law, it has done so expressly.\textsuperscript{15} For example, the Tribunal in Eastern Sugar confirms this argument when it stated that: “The Arbitral Tribunal would find it odd if a matter as important as investment protection had been overlooked in the negotiations of the old EU countries with the Czech Republic and the other new EU countries”.\textsuperscript{16} Further, in Micula, the Tribunal underscored the fact that the European Commission expressly concluded that the BIT was neither superseded nor terminated by Romania’s accession to the EU pursuant to VCLT Article 59.\textsuperscript{17}

30. For the above stated, there was no intent to terminate the BIT after accession of Barancasia and Cogitatia to the EU.

\textsuperscript{11} Eureko (Slovak Republic), para 261.
\textsuperscript{12} Article 59(1)(a) VCLT.
\textsuperscript{13} Eureko (Slovak Republic), para 252; Eastern Sugar, para 167; Oostergetel, para 74.
\textsuperscript{14} Annex NO. 7.1, page 38.
\textsuperscript{15} Article 10(1) the BIT.
\textsuperscript{16} Eastern Sugar, para 143.
\textsuperscript{17} Micula (Final Award), para 293.
c. The BIT and TFEU are not incompatible, and they can be applied at the same time

31. VCLT Article 59(1)(b) requires a ‘gross incompatibility’ to such an extent that the parties must be considered to have intended to abrogate the earlier treaty. This conclusion is made by earlier tribunals on the comparison of the terms of VCLT Articles 30 and 59. While the test under VCLT Article 30 is whether the successive treaty provisions are ‘compatible’, the test under VCLT Article 59 requires that 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”.

32. The argument that the availability of arbitration for some but not all EU investors would amount to discrimination in violation of EU law, as expressed in TFEU article 18 was addressed in Eastern Sugar: “it will be for those other countries and investors to claim their equal rights; but the fact that these rights are unequal does not make them incompatible”. Following this, in Eureko, the Tribunal decided that “the answer to this argument is to extend rights and not to cancel them”.

33. Furthermore, some arbitral tribunals have concluded that the rights included in the BIT, in particular, the FET standard, full protection and security and protection against expropriation, “extend beyond the protection afforded by EU law”; therefore there is no reason to hold that those rights under the BIT should not be fulfilled and upheld in addition to the rights protected by EU law. The two legal orders are not incompatible. They can co-exist.

34. Tribunals dealing with the jurisdiction issues relating to the BIT termination have concluded that EU law does not automatically supersede BITs after accession. In similar circumstances, tribunals have recognized that BITs together with their arbitration clauses are still in force after EU accession. For these reasons, the accession of Barancasia to the EU does not automatically make the BIT signed between Cogitatia and Barancasia invalid or obsolete.

2. VCLT Article 30 is not a ground for the inapplicability of the BIT

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18 Eureko (Slovak Republic), para 241.
19 Eastern Sugar, para 170.
20 Eureko (Slovak Republic), para 274.
21 Ibid, para 263; Eastern Sugar, para 168; Oostergetel, para 74.
22 Eureko (Slovak Republic), para 265; Eastern Sugar, para 172; Oostergetel, para 94.
23 Eastern Sugar, para 172.
35. Unlike VCLT Article 59, Article 30 is concerned with situations of incompatibility between particular provisions in successive treaties, and not with the entire treaty.  

36. Firstly, in light of tribunals’ findings in the intra-EU BIT cases, TFEU and the BIT do not cover the same subject matter, so they cannot be considered successive treaties pursuant to Article 30.

37. Secondly, the incompatibility of BIT Article 8 (investor-state arbitration) with TFEU Article 18 (non-discrimination) is not problematic because there is no rule of EU law that prohibits investor-State arbitration.

38. 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 on the effect of EU law as part of the applicable law and, as such, a matter for the merits and not jurisdiction.

39. Thus, Tribunal should dismiss the argument that VCLT Article 30 makes provisions of the BIT inapplicable in this case.

B. The Tribunal has jurisdiction over the dispute as the BIT was not terminated either in accordance with its provisions or by mutual consent of the parties

40. VCLT Article 54 stipulates that a treaty may be terminated in accordance with provisions of that same treaty, or by consent of all the parties after consultation.

41. The Claimant argues that (1) the BIT was not terminated unilaterally according to the criteria set forth in BIT Article 13.2, and (ii) the Respondent has not mutually terminated the BIT.

1. Unilateral termination has no legal effect as Barancasia acted in breach of BIT Article 13

42. The Claimant submits that Barancasia breached the notification rule required under BIT Article 13(2), and therefore the termination has no legal effect.

43. BIT Article 13.2 requires notifying the other Contracting party in writing of its intention to terminate the Agreement. However, the textual interpretation of BIT Article 13.2 imposes that notification shall be given 10 years after the treaty entered into force. This period starts any time after 1 August 2012, and yet Barancasia

24 VCLT Commentaries, Article 59 (then Article 56), 252, para 4.
25 Oostergetel, para 104.
26 Eureko (Slovak Republic), para 274.
27 Ibid, para 272.
28 Procedural Order (“PO”) No 2, para 1.
notified Cogitatia of its intent to terminate the BIT on 29 June 2007, more than five years before the end of initial 10 year period.

44. A question that arises is precisely when a state can give notice to terminate a treaty following the expiration of the minimum period of application. However the BIT is clear on this point. BIT Article 13.2 states that:

“[T]his agreement shall remain in force for a period of ten years. Thereafter, it shall remain in force until the expiration of twelve month period from the date either Contracting party notifies the other in writing of its intention to terminate the Agreement”.

45. The ordinary meaning\(^\text{29}\) of the wording provided under BIT Article 13.2 requires that notice can only be given after the expiry of 10 years, which would mean that the minimum period of application is, including 12 month of notification period, actually 11 years. Accordingly, since the BIT entered into force on 1 August 2002\(^\text{30}\), the end of the minimum period of application period is 1 August 2013.

46. The minimum period of application\(^\text{31}\) of the BIT serves to give a degree of stability and security to investors who know that they can rely on the treaty for at least a minimum period of time. This mechanism therefore minimizes risk for investors during the initial operation of the BIT by establishing a temporary prohibition on the unilateral termination of the BIT.

47. Accordingly, by breaching the notification rule in BIT Article 13.2 Barancasia has not fulfilled its obligations with regard to proper termination.

48. Due to the fact that the treaty was improperly terminated, all of the Claimant’s projects fall within the jurisdictional scope of this Tribunal. In fact, on 1 January 2010, solar panels of the Alfa project were connected to the grid and became operational.\(^\text{32}\) The ‘Beta’ project became operational on 30 January 2011\(^\text{33}\), while Claimant’s 12 remaining projects having been applied for the licenses on 1 April 2012\(^\text{34}\), received their licenses on 1 July 2012.\(^\text{35}\) Apparently, all the investment made by Claimant on its photovoltaic projects falls within the 10 year period of the BIT existence, which would expire on 1 August 2012.\(^\text{36}\)

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\(^{29}\) Article 31 (a) VCLT.  
\(^{30}\) PO No 2, para 1.  
\(^{31}\) Harrison, 933.  
\(^{33}\) Ibid, para 23.  
\(^{34}\) PO No 2, para 9.  
\(^{35}\) Facts, para 33.  
\(^{36}\) Article 13.2, the BIT; PO No 2, para 1.
2. Respondent did not succeed in mutual termination of the BIT

49. The provisions of the BIT do not preclude the right to terminate the BIT by mutual consent. However, the parties must follow the established rules of VCLT Article 54 on mutual termination; however these rules have not been followed. Therefore the BIT has not been terminated by mutual consent.

a. The BIT was not terminated as the requirements of VCLT Article 54 were not met

50. In accordance with the international law of the treaties\textsuperscript{37}, the ordinary meaning of the VCLT Article 54(b) sets forth two requirements, namely, (i) the treaty shall be terminated ‘by consent of all the parties’ and (ii) it should take place ‘after consultation with other parties’. Claimant submits that none of these requirements have been fulfilled.

i. Cogitatia did not consent to the termination

51. Firstly, a note\textsuperscript{38} from the Cogitatia’s Ministry of Foreign Affairs about receiving the notification of termination sent by Barancasia does not constitute consent. Secondly, after confirming the receipt of the notification Cogitatia was reluctant to react and terminate the BIT officially, as stated by Barancasia state officials\textsuperscript{39}. Cogitatia has not initiated or officially acknowledged termination of any of its existing intra-EU BITs.\textsuperscript{40}

ii. There were no consultations with Cogitatia prior to the termination

52. Barancasia officially\textsuperscript{41} commenced the process of terminating its BITs by organizing meetings with respective parties of the of particular BITs regarding the termination of those treaties, preferably by reaching an agreement on termination. The Cogitatia-Barancasia BIT was listed as one of the BITs for termination.\textsuperscript{42} However, there was no consultation with Cogitatia. There is no evidence that parties to the BIT, Cogitatia or Barancasia held any meetings or consultations in order to terminate the BIT other than sending a notification to Barancasia on 29 June 2007\textsuperscript{43}.

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\textsuperscript{37} Article 31, VCLT.
\textsuperscript{38} Annex No. 7.2, page 39.
\textsuperscript{39} Facts, para 24.
\textsuperscript{40} PO No 2, para 3.
\textsuperscript{41} Annex NO. 6, page 36.
\textsuperscript{42} Annex NO. 6, page 37.
\textsuperscript{43} Annex NO. 7.1, page 38.
53. Neither the requirement to hold a consultation regarding the termination of the BIT nor requirement of obtaining consent from Cogitatia has been fulfilled by Barancasia. Hence, the BIT has not been terminated mutually.

b. Mutual termination is not valid since investors as third party beneficiaries should have been notified about the termination.

54. In the event that the Tribunal finds that the BIT has been terminated by mutual consent of the BIT party states, investors should have been notified about the termination of the treaty since they are third party beneficiaries.

55. In the commentary VCLT Article 54, the International Law Commission (“ILC”) states that “whatever may be the provisions of a treaty regarding its own termination, it is always possible for all the parties to agree together to put an end to the treaty”\(^{44}\). However, BITs may be distinctive in this regard because they grant third party rights to foreign investors and therefore the mutual termination should be subject to some constraints in relation to third party rights.

56. VCLT Article 54 (b) must be read\(^{45}\) in light of VCLT Article 37(2) which provides for the requirement of consent the third state.

57. Although this text is drafted to apply to the rights of third states, it has been extended to other third parties covered by the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (“VCLT-IO”).\(^{46}\) The formulation of VCLT Article 37(2) was dictated by “logical considerations” rather than “state practice”, and therefore and it proves to represent a general principle that is applicable to all third party right holders.\(^{47}\)

58. The VCLT does not define revocation for the purposes of Article 37(2). The ordinary meaning of ‘revocation’ is ‘the action of revoking, rescinding, or annulling something’.\(^{48}\) In this case, rights that were previously held have been revoked. The situation clearly falls within ambit of the provision.

59. This interpretation is supported by the purpose of BITs, which would otherwise have been undermined. According to this view, the effect of BITs is to confer rights directly on investors.\(^{49}\) It is supported by the arguments that BITs give investors the ability to bring claims without the consent of their home states. Additionally, the calculation of

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\(^{44}\) VCLT Commentaries, 249.

\(^{45}\) Harrison, 943.

\(^{46}\) VCLT-IO, Article 37(2).

\(^{47}\) D’Argent, 944.

\(^{48}\) Oxford English Dictionary Online.

\(^{49}\) McLachlan et al, 61, para 3.54; p. 62, para 3.58; 63–5 paras 3.62–3.64.
compensation does not take account of the injury to the investor’s home State are rights that conferred on the investor directly from the treaties.  

60. This view is buttressed by some investor–state arbitral awards and by prominent scholars. The Court of Appeal of England and Wales in an Appeal of the Jurisdiction of the decision made by Occidental Tribunal which held that “The case concerns a Treaty intended by its signatories to give rise to rights in favour of private investors capable of enforcement, to an extent specified by the Treaty wording, in consensual arbitration against one or other of its signatory States”.

61. The language of the BIT also supports that parties intended to confer rights on investors that cannot be revoked without notice. Hence, the investors hold autonomous third party rights under the BIT. Accordingly these third party beneficiaries should have been notified about the BIT termination process.

c. The mutual termination of the BIT contradicts the provisions of the BIT as well as its object and purpose

62. A textual interpretation of the preamble, the ISDS clause and the termination clause of the BIT provides support for the proposition that the drafters of the BIT intended to establish a stable legal framework for investors that could not be peremptorily revoked through termination, either unilaterally or by mutual consent before the minimum period of application expires.

63. Once the treaty is concluded, the host state deliberately renounces an element of its sovereignty in return and the balancing of interests and aspirations contained in the treaty will no longer be subject to a unilateral decision that would alter the terms of the treaty.

64. Firstly, the BIT Preamble para 3 in connection with para 2 states that the Contracting Parties intended to create and maintain favourable conditions for investors which would be mutually beneficial for states from this protection [Emphasis added].

65. The objective of promoting “favourable conditions” in the BIT demonstrates the acknowledgement of states of the need for a certain degree of legal stability for investors. It also creates the expectation that protection will be in place at the international level. In contrast, allowing states to completely withdraw the rights of

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50 Douglas(I) 29–38; Paparinskis, 81–85.
51 Plama Consortium, para 141; Corn Products, para 173.
52 Dugard, para 112; Douglas(II), 33 para 65; McLachlan et al 61–2; Paulsson, 255–56; McNair, 532.
53 Occidental (EWCA), para 37.
54 McNair, 532.
55 Dolzer & Schreuer (2008), 23.
investors through mutual agreement, with little or no notice, would seriously undermine the object and purpose of investment treaties.

66. Secondly, the ILC, in its commentary to its Draft Convention on the Law of Treaties, stated that “the irrevocable character of the right would normally be established either from the terms or the nature of the treaty provision giving rise to the right or from an agreement or understanding arrived at between the parties and the third State”.

67. Looking at the nature and language of the BIT, there are certain features that are supporting the intention of drafters to limit the ability of states to revoke the rights of investors.

68. As clear from the text of Article 8 of the BIT, contracting parties’ intention was to grant the third party - investor with a right to bring the claim against them to international arbitration.

69. Also, the survival clause (Article 13(3) BIT) is drafted in a broad manner and such language may be considered to provide clear evidence that the parties to the BIT intended to set some limits to their ability to terminate the treaty even by mutual consent.

70. When investors’ third party rights are contested by the principle of the in dubio mitius, according to which a treaty should be interpreted in deference of state sovereignty, are not relevant to investment treaties and will not be successful in this case. Although it has been stated to be a “widely recognized” principle of international law by the WTO Appellate Body, the precise status of the in dubio mitius principle remains contested and some authors urge extreme caution in its application.

71. Indeed, investment tribunals have been wary of giving too much deference to state sovereignty because it conflicts with the object and purpose of BITs.

72. The idea of revoking investors’ rights by terminating the treaty by mutual consent contradicts the whole investment protection regime created by contracting states seriously undermining the object and purpose of investment treaties.

73. Furthermore, arguments stated above supports that the minimum period of application guaranteed by the BIT for investors, should restrict mutual termination. In this sense even if Barancas was intended to terminate the BIT in 29 June 2007, the BIT should be

56 VCLT Commentaries, 230; D’Argent, 947.
57 EC – Hormones, para 165.
58 Brownlie, 606; Douglas (I), 51.
59 Loewen, para 51; Aguas del Tunari, para 91.
60 Article 13.2 the BIT, Harrison, 933.
counted as terminated after expire of guaranteed 10 years period. Survival clause should have effect on Claimant’s investments as they all fall within this period.

74. Thus, Cogitatia and Barancasia cannot terminate the BIT by the mere noticing each other, as investors both from Cogitatia and Barancasia hold the rights of the third party beneficiary.
ARGUMENTS ON MERITS

II. RESPONDENT VIOLATED ITS OBLIGATION TO ENSURE FAIR AND EQUITABLE TREATMENT

75. The Respondent violated the FET standard provided in BIT Article 2. It did so by (A) frustrating Claimant’s legitimate expectations (B) arbitrarily reducing the subsidies through the amendment of the LRE (C) acting nontransparent and denying due process, and (D) acting in bad faith.

**A. Respondent frustrated Vasiuki’s legitimate expectations**

76. The Respondent frustrated the legitimate expectations protected under the BIT by revoking representations and commitments it made in the form of adopting a law which would guarantee FITs to investors for 12 years. Barancasia subsequently revoked these promises by modifying the FIT rates.

77. It is accepted by investment Tribunals, alike by scholars, that the protection of legitimate expectation is now firmly rooted in arbitral practice.61

78. The Tribunal establishing the breach of FET standard by undermining legitimate expectation must follow 3-tier test, which was considered as basis in Micula case with similar factual background.62 Based on the test it must be established (1) if Barancasia made a promise or assurance (2) if the Claimant relied on that promise or assurance as a matter of fact, and (3) if such reliance was reasonable.

79. In addition to the mentioned test one more factor must be addressed.63 So criterion four is if the Respondent making promise and assurance repudiated them subsequently.

**1. Barancasia made a specific assurance**

80. In this vein, Schreuer notes, “legitimate expectations are based on the host state’s legal framework and on any undertakings and representations made explicitly or implicitly by the host state.”64 Legitimate expectations can therefore arise from “rules that are not specifically addressed to a particular investor but which are put in place with a specific aim to induce foreign investments.”65

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61 Dolzer/Schreuer, 134; Micula (Final award), para 667.
62 Micula (Final award), para 668.
63 Continental Casualty, para 261.
64 Dolzer/Schreuer, 145.
65 UNCTAD FET, 71.
81. Since 2007, Barancasia has endeavoured to meet ambitious EU climate and energy targets. In 2010 Respondent made explicit undertakings and representations to promote the development of renewable energy sources by adopting the LRE. That has been the legal mechanism encouraging renewable energy providers by fixing general FITs which would be good incentive to invite more investors. The law guaranteed that the FITs would apply 12 years. On 1 July 2010 the BEA announced publicly the FITs in the amount of 0.44 EUR/kWh. Finally, Respondent succeeded in its plan of encouraging investors, the BEA received 7000 applications to develop new photovoltaic power plants.66

2. The reliance was reasonable

82. Tribunal in Micula subscribed to the view quoted in Duke Energy. It stated that “the assessment of the reasonableness or legitimacy must take into account all circumstances including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host state”67. Also the tribunal noted that “the element of reasonableness cannot be separated from the promise, assurance or representation, in particular if the promise is not stated explicitly or contained in the contract”. 68

83. The reasonableness of the Claimant’s reliance is based upon the fact that it had been monitoring Barancasian legislative process since 2007. The Claimant made its main investment after becoming aware of the forthcoming LRE.

3. Claimant relied on that assurance as a matter of fact

84. Whether the investor relied on the assurance and whether it created any legitimate expectations must be assessed on the factual basis considering all circumstances.69 The Claimant in this case made assessments and legitimately relied upon Respondent’s actions.

85. After 2007 being aware that Barancasia was making strides in promoting renewable energy sources, the Claimant began researching in Barancasia. In May 2009, it purchased land plots in Barancasia and decided to launch an experimental solar project, calling it “Alfa”. The Claimant continued its development work with “Alfa” project through early 2010 when it realized that subsidized tariff rates might permit the further development of the “Alfa” project.

67 Micula(Final Award), para 670.
68 Ibid, para 669.
69 Ibid.
86. Investment to Beta and 12 other projects was made after adoption of the LRE, which was explicit assurance for providers of renewable PV solar energy. It made considerable investments of its own and borrowed money into the 12 new solar power plant projects: bought land plots, obtained construction permits, hired personnel and paid considerable advances for equipment, which was shipped to Vasiuki on 31 January 2013.\(^{70}\)

4. **Subsequent repudiation of the main representation**

87. Respondent reversed its specific assurance of ‘green power’ subsidies guaranteed to investors in the LRE by an arbitrary amendment, it did so without communicating or obtaining a consent of the investors who has interests in guaranteed incentivized tariffs.

88. The Tribunal in *Occidental* confirmed that the unilateral change of the legal and contractual framework would frustrate the investor’s legitimate expectations and thereby violate the FET standard.\(^{71}\) The Tribunal in *Suez* said that a sudden change in state laws has breached the requirement of fair and equitable treatment.\(^{72}\) Indeed, had the legal order been different, the decision to invest might have been different.

89. Review of the components indicates that Vasiuki’s expectations were infringed by Respondent’s failure to maintain a series of warranties. This amounts to a violation of Vasiuki’s legitimate expectations created at the time of its investment, causing damages in huge amount. For the aforementioned reasons, the Tribunal must declare Respondent’s measures in violation of Article 2 of the BIT.

B. **Respondent’s treatment towards investors was arbitrary**

90. Vasiuki submits that Respondent violated the BIT’s FET standard by arbitrarily reducing the subsidies through the amendment of the LRE without any adequate justification and consultation with concerned stakeholders.\(^{73}\) Moreover, this measure was adopted with retroactive effect.\(^{74}\)

91. The Tribunal in *CMS* stated that an arbitrary measure in itself contravenes the basic principle of FET.\(^{75}\)

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\(^{70}\) Facts, para 36.
\(^{71}\) *Occidental Exploration*, para 191.
\(^{72}\) *Suez*, para 226.
\(^{73}\) Request for Arbitration.
\(^{74}\) Request for Arbitration; Facts, para 34-35.
\(^{75}\) *CMS(II)*, para 290.
92. Defining the meaning of ‘arbitrariness’ Tribunals referred to the ordinary *Black’s Law Dictionary* meaning of the word “arbitrary” and concluded that it means, “depending on individual discretion; founded on prejudice or preference rather than on reason of fact”. Moreover, even the confusion and lack of clarity with regard to the measure taken could be characterized as arbitrary.  

93. Furthermore, in *Tecmed*, the Tribunal required that the host state respect the basic expectations of the investor at the time of the investment and act without revoking any decisions, in an arbitrary manner upon which the investor had relied in planning its investment.  

94. In the current dispute, the Respondent amended LRE Article 4 by providing for annual review of the FIT. This change significantly frustrated the expectations of the Claimant which were based on the tariff rate of EUR 0.44/kWh. As a result, the Claimant has suffered significant losses. Respondent modified incentivizing mechanism without any prior negotiation or clear justification. Imposing new reduced tariff rates with retroactive effect was illegitimate.  

95. As stated in *Occidental Exploration*, it is not necessary for the Respondent to have intent to act in a prejudicial or preferential manner, to deem the measure arbitrary. Hence, the Claimant does not carry the burden of establishing Respondent’s intent. The effects of the measure and its unfair and unjust result on the Claimant’s investment are sufficient to amount the breach the FET standard.

C. **Respondent’s administrative and legal decision-making process was non-transparent and it did not provide due process**  

96. Respondent failed to (1) act transparently and (2) ensure sufficient due process in its subsequent changes of the regulatory and administrative measures.

1. **The amendment to the LRE was made in a non-transparent manner**

97. Transparency is one of the central elements in administrative decision-making of the state. The Tribunal in *Metal clad* opined that ‘all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or

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76 Black’s Law Dictionary, 100.  
77 Lauder, para 221; CMS(II), para 291.  
78 Occidental Exploration, para 163.  
79 Tecmed, para 154.  
80 PO No. 2, para 19.  
81 Occidental Exploration, para 163.
intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. 82

98. In the Tecmed case the tribunal linked the requirement of transparency with a breach of the FET standard in the BIT. 83 The Tribunal explained that “the Claimant was entitled to expect that the government’s actions would be free from any ambiguity that might affect the early assessment made by the foreign investor”. 84

99. The changes to the LRE which caused damage to the Claimant were made in the non-transparent manner. Private hearings before the Barancasian Parliamentary Energy Committee, in which only invited representatives of industry and certain stakeholders groups were present, resulted in amendment to LRE Article 4. The Claimant was neither invited, nor informed of the meeting. The Claimant applied for a license for the Alfa project, but the BEA denied this request, stating that a fixed FIT would only be available for new projects, not for existing ones. However, nothing in the LRE stated such a limitation. Based on a textual reading of the LRE and the Regulation, the Claimant should have been entitled to the fixed FIT for the “Alfa” project. 85 According to the Regulation, both existing and new photovoltaic projects are entitled to the FITs. 86 The BEA refused to disclose the criteria for granting a license according to its “confidentiality obligation”. 87 Therefore, the Respondent failed to act transparently in its subsequent changes of the regulatory (LRE amendment) and administrative measures (granting licenses).

D. Respondent did not accord the Claimant due process

101. The requirement of due process is one of the basic components of the FET standard. 88 In Metalclad, the Tribunal noted: “the permit was denied at a meeting of the Municipal Town Council of which Metalclad received no notice, to which it received no invitation, and at which it was given no opportunity to appear”. 89 In Thunderbird the tribunal also agreed that due process is relevant for administrative proceedings. 90 Indeed, the majority of modern-day FET claims relate to measures

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82 Metalclad, para 76.
83 Tecmed, para 167.
84 Facts, para 34; PO No 2, para 15.
85 Facts, para 22.
86 Annex No 3, Art. 3.
87 PO No 2, para 16.
88 Dolzer/Schreuer, 154; Dolzer, 29.
89 Metalclad, para 91.
90 Thunderbird, paras 197-200.
taken by the executive, and sometimes legislative, branches of a government.\textsuperscript{91} States retain the right to regulate in the public interest but they must do so without violating the due process of law.

102. Tribunals in \textit{Genin}\textsuperscript{92} and \textit{Waste Management}\textsuperscript{93} assured that the right to be heard and faire procedure are the elements of the FET. Procedural deficiencies of non-fundamental and abusive nature contributes to a finding a violation.\textsuperscript{94}

103. It is agreed upon that the Claimant was not present at the public hearing and did not receive any notice or invitation about it. This denial of right to be heard and deprivation of due process contributes to the violation of the FET standard.

E. \textbf{Respondent acted in bad faith.}

104. Respondent breached the principle of legitimate expectation, acted arbitrarily and non-transparently without providing due process. This amounts to acting in bad faith.

105. Arbitral tribunals have expressed that the principle of good faith “permeates the whole approach”\textsuperscript{95} to investor protection and, more particularly, that is “at the heart of the concept of fair and equitable treatment”\textsuperscript{96}.

106. The Claimant properly expected that the Respondent would implement its policies in good faith. Professor Wälde expressed that the principle of legitimate expectations is a manifestation of the good faith principle, which is a general principle of law.\textsuperscript{97} In \textit{El Paso} the Tribunal stated that the legitimate and reasonable expectations of investors, which is considered as the touchstone of the FET standard, indeed derives from the obligation of good faith.\textsuperscript{98} Thus, by violating the legitimate expectation principle of the FET Respondent acted in bad faith.

107. Another application of the notion of good faith is the duty to act for cause, and not for purely arbitrary reasons of domestic politics.\textsuperscript{99} Adopting the LRE the Respondent declared the development of renewable energy sources for electricity production as the strategic goals of its state energy policy.\textsuperscript{100} The Respondent

\textsuperscript{91} UNCTAD FET, 81.
\textsuperscript{92} Genin, para 358.
\textsuperscript{93} Waste Management, para 98.
\textsuperscript{94} UNCTAD FET, 81.
\textsuperscript{95} Sempra, para 299.
\textsuperscript{96} Sempra, para 298.
\textsuperscript{97} Wälde, Separate Opinion.
\textsuperscript{98} El Paso, para 348.
\textsuperscript{99} Eureko(Poland), para 233.
\textsuperscript{100} LRE, art. 1(3).
arbitrarily modified the previously established mechanism without any clear justification.

108. Moreover, the manner of Respondent’s actions in the adoption of the LRE amendment was not transparent. The Claimant was not heard or provided relevant due process for it to challenge legal or administrative decisions made by Respondent. These actions also identify that Respondent acted in bad faith.

109. Thus, the Tribunal must declare that the Respondent was acting in bad faith and violated FET standard.
III. The Respondent cannot invoke necessity and/or its EU obligations as excuses from responsibility

110. The Claimant disagrees that the Respondent’s actions are exempted from responsibility on the basis that they were necessary in order to meet its economic and renewable energy objectives and that rendering award would somehow violate Barancasian obligations under European Union law.

A. The Respondent’s wrongful acts cannot be justified by the state of necessity

111. The Respondent’s violation of its treaty obligations under the BIT cannot be excused from responsibility by means of (1) the Essential Security Interest clause or (2) customary international defence of necessity.

1. The Respondent’s breach of treaty obligations cannot be justified under Article 11 of the BIT

112. The Claimant rejects the Respondent’s assertions that its wrongful acts fall under the scope of the BIT Article 11 for two reasons: (a) Article 11 is not self-judging; and (b) it has a limited scope of application.

a. BIT Article 11 is not self-judging

113. Should the Tribunal conclude that the treaty provisions are self-judging, each party has a right to decide independently the existence of situation envisaged by Article 11 and take appropriate measures. This will limit tribunals’ examination of such measures to a good faith review.

114. However in the series of arbitrations considering provisions similar to Article 11, the tribunals decided that the self-judging element must be manifestly expressed. For example, the tribunal in CMS held that when states intend to reserve the right to determine unilaterally the legitimacy of their measures, they do so expressly.

115. In comparison with other international treaties, for instance, with Article XXI of the GATT 1994 which explicitly provides the Contracting Party with right to determine what “it considers necessary”, the absence of such provision in the text of Article 11 means that parties did not intent it to be self-judging. At the same time

101 Article 11 of the BIT.
102 Enron, para 324.
103 Enron, paras 335-336.
104 CMS, para 370.
“judicial review” of such an unambiguous provision as Article XXI of the GATT 1994 must be conducted, otherwise it would open doors to abuse without redress.105 Anyway the self-judging provision would be contrary to object and purpose of the treaty106, and good faith review would not differ significantly from the substantive analysis.107 Therefore BIT Article 11 is not self-judging and the Tribunal shall conduct its own analysis of whether the measures taken by Respondent fall under its scope.

b. Article 11 has a limited scope of application

116. The Respondent cannot rely on the Essential Security Interests clause because it has a limited scope, as it applies only to international peace and security, and not to situations of national economic emergency, as the Respondent claims.

117. Non-precluded measure (“NPM”) clauses have been included in some BIT texts.108

118. BIT Article 11 encompasses only one regulatory objective – the maintenance of international peace and security. This differs from international practice. In comparison, the NPM clause in the USA-Argentina BIT defines three separate objectives: (1) the maintenance of public order, (2) the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, (3) the protection of its own essential security interests. In Continental Casualty the tribunal noticed that Parties clarified that they understand “obligations with respect to the maintenance or restoration of international peace or security” in accordance with obligations under the UN Charter. Therefore the tribunal excluded this item as irrelevant in the context of the arbitration.109

119. Another relevant example, GATT Article XXI sets out the necessity exception with two objectives: (1) the protection of essential security interests; (2) obligations under the UN Charter.

120. UN Charter Article 1110 names the maintenance of international peace and security among purposes of the UN. According to the Commentary to the UN Charter, the term “international peace and security” addresses different but interrelated

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105 Van den Bossche/Zdouc, 596.
106 Sempra, para 374.
107 LG&E, para 214.
108 Moon, 482; Jung/Han, 399.
109 Continental Casualty, para. 163, footnote 234.
110 UN Charter.
concepts. “Peace” refers to the state of international relations which lead to the diminution of likelihood of war, and therefore “bring about a stabilization of international relations.” “International security” means such a state of international relations when “peace will not be broken or at least any breach will be limited.”

121. Thus the ordinary meaning of international peace and security is not identical to the meaning of State’s essential security interests and do not cover situations of the economic emergency. Otherwise there would be no sense to separate them into two different concepts. Consequently the understanding of Article 11 should be limited to the international peace and security in its ordinary meaning and encompasses only military or defence concerns.

122. Hence the international peace and security should be interpreted to mean the obligations under the UN Charter and therefore the economic emergencies are not covered by the scope of BIT Article 11. The Respondent’s contention that the breach of the BIT was necessary due to the maintenance of international peace and security is mistaken.

2. The Respondent’s breach of the BIT cannot be exempted under the customary international law defense of necessity

123. According to customary international law, every internationally wrongful act of a State entails international responsibility. Only under certain circumstances the actions of the state can be exempted from it.

124. The Respondent defends its unlawful actions on the ground of necessity, however, it can only be invoked under strictly defined criteria which must be cumulatively satisfied. Barancasia cannot rely on necessity as justification of its wrongful acts because (a) its essential interests were not threatened; (b) there was not grave and imminent peril; (c) the reduction of FIT was not the only way to address the problem; (d) the Respondent has contributed to the state of necessity.

a. Barancasian essential interests were not threatened
125. In order to rely on necessity defence the Respondent first needs to prove that its essential interests were at stake when it breached the BIT. At the same time its essential interests must outweigh “some other international obligation of lesser weight or urgency”. 118

126. The extent to which a given interest is essential depends on all the circumstances, and cannot be prejudged. 119 According to one prominent legal scholar, examples of essential interests are “the existence of the State itself, its political or economic survival, the continued functioning of its essential services, the maintenance of internal peace, etc.”. 120

127. Thus the essential interests should involve certain concerns related with the normal functioning of a state. The implementation of the FIT contained in the first version of the LRE did not cause any detrimental effect to the essential interests of Barancasia. Respondent shows that share of state revenues which would be diverted to finance the FIT scheme is higher than public financial allocations to the education system 121, which caused national teachers strikes. But even put all together, it was not enough to damage Barancasian essential interests. Arbitral tribunals in a number of cases were reluctant to make a finding of necessity under Article 25 of ILC Articles as it requires a very high threshold. For instance, even such a severe economic crisis as the Argentinian crisis of 2001-2002 did not convince the Tribunal in Sempra that it put at risk “the existence of the State and its independence” so much so that it could be qualified as “one involving an essential State interest” 122. The CMS tribunal found, that the crisis was severe but it “did not result in total economic and social collapse” 123. On the other hand, in LG&E, the Tribunal did find that the conditions for the invocation of necessity were met by analyzing the effects of the economic crisis which led among other things to price deflation, civil and political unrest, culminating in deadly riots and etc. 124 Nothing mentioned in these cases occurred in Barancasia.

b. The effects of the FIT scheme did not constitute a grave and imminent peril

128. According to the ICJ’s interpretation in Gabčikovo-Nagymaros , a “peril” evokes the idea of risk; at the same time it has to be “grave” and “imminent”. The

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118 Ibid, 80.
119 Ibid, 83.
120 Ago, 14.
121 Facts, para 29.
122 Sempra, para 348.
123 CMS, para 355.
124 LG&E, para 235-236.
latter is synonymous with immediacy or proximity, therefore “peril” must have been a threat to the interest at the actual time.\textsuperscript{125} The possibility of peril does not satisfy the necessity test: “it has to be objectively established and not merely apprehended as possible”.\textsuperscript{126}

129. There is no serious evidence that the effect of the FIT constituted such a threat to be recognized as “a grave and imminent peril”. First of all, the main consequence of the LRE was financial – facts say that up to 15\% of Barancasian revenues would diverted to finance the photovoltaic projects.\textsuperscript{127} However, nothing is said about the overall effect, and the Respondent has not provided any evidence that it would cause serious financial breakdown or lead to irrecoverable damage to the state. Collateral effects of the LRE were national teachers strikes which did not involve any act of violence:\textsuperscript{128} such events do not support the idea of a grave peril which would threaten the essential interests of Barancasia.

130. Besides that, all effects of the FITs are economic in nature and can be foreseeable and assessed in advance, as was done in early 2012;\textsuperscript{129} therefore they cannot be claimed as unmanageable or out of control\textsuperscript{130}. Furthermore, the peril cannot be considered “real”. Even if the part of state revenues intended to finance the renewable energy sector according to the FITs would constitute a high share of state budget does not necessarily prove that Barancasia would be in state of danger. So, the facts presented by the Respondent do not suffice criterion of a grave and imminent peril.

\textbf{c. The reduction of the FIT was not the only way to address the situation}

131. One of the elements of the necessity test requires that the measures taken out of necessity shall be the only lawful available option, even if they are “costly or less convenient”.\textsuperscript{131}

132. Respondent has not shown that adoption of the LRE’s amendment was the only means to deal with the difficulties it faced. In fact, there are plenty of lawful alternatives available. It has been argued that the contemporary state has “the panoply

\textsuperscript{125} Gabčíkovo-Nagymaros Project, para 54.
\textsuperscript{126} ARSIWA Commentaries, 83.
\textsuperscript{127} Facts, para 29.
\textsuperscript{128} PO No 2, para 18.
\textsuperscript{129} Facts, para 28.
\textsuperscript{130} Sempra, para 349.
\textsuperscript{131} ARSIWA Commentaries, 83.
of political and economic instruments” to deal with situations of crisis. Barancasia possibly could adopt the LRE in different version which would not interfere with the rights and interests of those who already made investments in the photovoltaic sector. Thus Respondent needs to prove why it could not choose other lawful measures available at the moment of adoption of the LRE’s amendment.

d. The Respondent contributed to the current situation

133. The Tribunal in LG&E found that the state, which has contributed to the emergency, cannot invoke the state of necessity, because there is “the causal relationship between the State’s act and the damage”.133

134. The Claimant argues that the whole situation might take place only because of a short-sighted policy chosen by Barancasia to develop its renewable energy sector. It should have been foreseeable, at the time of adoption of the FIT, that there could be more other companies willing to invest in photovoltaic projects. In fact, Barancasian actions encouraged foreign companies to enter the market, the Respondent should be held fully responsible for its mistakes, which undermined the Claimant’s legitimate expectations.

135. Thus, necessity, as one of the circumstances precluding wrongfulness, has an exceptional nature and can be guaranteed only under fulfillment of strictly defined criteria, the Respondent’s actions do not satisfied these conditions, therefore, it cannot rely on the customary defence of necessity.

B. The LRE was adopted to pursue EU renewable energy objectives and did not violate substantive law of the EU

136. The Respondent’s breach of its BIT obligations cannot be justified by the laws of the EU because: (1) the LRE’s support scheme was exempted from the general prohibition of state aid; (2) it is not the task of an investor to ensure the proper implementation of EU law in Barancasia.

1. The FIT was an exception from the general rule prohibiting state aid

137. The general rule under TFEU Article 107 (1) prohibits state aid. However some exceptions are provided, including certain types of state aid that are considered to be compatible with the internal market. For example, if the state aid facilitates the development of certain economic activities. It does not mean that such type of aid is

132 Vicuna, 746.
133 LG&E, para 256.
automatically exempted, but it may be recognized compatible with the common market under the European Commission’s (Commission) discretion and if it is justified by the necessity to give an incentive effect\textsuperscript{134}. The Commission declared necessity as a general compatibility criterion and would authorize the aid if it leads to additional activities that would have not been achieved by market forces alone\textsuperscript{135}.

138. The LRE falls within a framework of the Renewable Energy Directive\textsuperscript{136} which established an ambitious plan to reduce the electricity consumption sourced from non-renewables tied to mandatory national targets for each Member State.\textsuperscript{137} Barancasia has not yet achieved its target of the 20\% share of renewable energy\textsuperscript{138}.

139. In EU law, a “directive” is binding only to the result to be achieved; in other words, the choice of forms and methods is left to national authorities.\textsuperscript{139} According to, the Renewable Energy Directive, Member States may apply support schemes through any instruments that promote the use of energy from renewable sources, including the FIT.

140. Due to the great importance of the reduction of greenhouse gases emissions in the EU, the CJEU did not find that the renewable energy support schemes were incompatible with EU legislation.\textsuperscript{140}

141. In addition each Member State had to adopt a national renewable energy action plan, covering inter alia the measures to promote the use of energy from renewable resources in electricity and notify the Commission by 30 June 2010\textsuperscript{141}. The Commission is aware of all Member States support schemes through their regular monitoring and assessing\textsuperscript{142}. Therefore even if the Commission was not properly notified according to the rules of state aid, it still had to be informed about the incentives applied by Member States. But any proceedings against Barancasia in connection with the FIT have not been instituted\textsuperscript{143}.

142. Thus, the FIT is not illegal; it is recognized as one of the lawful means to promote the renewable energy sector. Neither award of damages should be considered

\textsuperscript{134} Nicolaides et al, 45
\textsuperscript{136} Directive 2009/28/EC.
\textsuperscript{137} Directive, Article 1.
\textsuperscript{138} PO No 2, para 10.
\textsuperscript{139} Hartley, 108.
\textsuperscript{140} PreussenElektra, para 73-74, 81
\textsuperscript{141} Directive 2009/28/EC.
\textsuperscript{142} Directive 2009/28/EC, Articles 13, 14, 22, 23.
\textsuperscript{143} PO No 2, para 18.
as impermissible state aid. Furthermore, the Tribunal in *Micula* \(^ {144}\) held that all the consequences relating to the state aid requirements are beyond the tribunal’s considerations. Therefore it is inappropriate to base on matters of EU law that may come to apply after the Award has been rendered.

2. **The investor is not responsible to ensure that the host state laws are in accordance with EU law**

143. Should the Tribunal find that the €0.44/kWh FIT was inconsistent with EU law, the Claimant contends that it is not a task of the investor to provide that the law of the host state correctly implements the EU’s state aid rules. \(^ {145}\) Barancasias is fully responsible for the due implementation of EU rules in relation to the LRE. Accordingly, the Tribunal in *Tecmed* held that the host state is expected “to act in a consistent manner, free from ambiguity and totally transparent”, so that the investor may know any rules regulating its investments in advance. \(^ {146}\) Likewise, the Tribunal in *Micula* concluded that: “it was reasonable... to believe that the incentives were compatible with EU law”. \(^ {147}\)

144. Therefore Respondent must be held responsible for violation of the FET standard in the case the Tribunal finds the FIT incompatible with the EU state aid rules.

IV. **The Responent has to award a license to Alfa and repeal the amendment to Article 4 of the LRE or continue to pay the € 0.44 FIT for 12 years**

145. The Claimant is entitled to restitution because: (A) the Tribunal’s power to award restitution is derived from its jurisdiction to decide a case; (B) it is the preferable form of reparation for the internationally wrongful act; (C) restitution is materially possible and does not involve a disproportionate burden.

A. **The Tribunal has the power to award restitution**

146. The power of arbitral tribunals to award restitution derives from their jurisdiction to decide a case. \(^ {148}\) Consequently the limitation of its powers should be found in the respective treaty provision that grants state consent to arbitration. If the parties to the BIT decide to limit the tribunal’s power to award only certain kinds of relief, they insert a relevant provision into text of the agreement. For example, Article

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\(^ {144}\) *Micula* (Final Award), para 340  
\(^ {145}\) Reuter, 37  
\(^ {146}\) *Tecmed*, para 154  
\(^ {147}\) *Micula* (Final Award), para 691  
\(^ {148}\) Sabahi, 63.
1135 of the NAFTA\textsuperscript{149} restricts the form of relief in final awards to monetary damages, interest and restitution of property. Article 9 of the BIT between Bulgaria and China\textsuperscript{150} narrows the scope of arbitral cases by stating that only cases concerning the amount of compensation for expropriation may be submitted to \textit{ad hoc} arbitral tribunals.

147. BIT Article 8 does not contain any restriction on the Tribunal’s power to award restitution, only that the arbitral award shall be final, binding and enforceable. Moreover BIT Article 4 recognizes the right of the investor to restitution in a limited number of situations involving a state of emergency, revolt, insurrection, riot and etc., but it is silent in regard of restitution as a remedy for an unlawful act. It thus may be concluded that under the BIT, restitution, \textit{i.e.} remedy which re-establishes “the legal situation that existed before the commission of the wrongful act”, is permissible.

148. The power of tribunals to award non-pecuniary remedies has been considered in a number of arbitrations. The Tribunal in \textit{Enron} held that it had the power “to order measures concerning performance or injunction… no doubt about the fact that these powers are indeed available”.\textsuperscript{151} Furthermore, the Tribunal in \textit{Micula} held that under the ICSID Convention it had the power to order pecuniary or non-pecuniary remedies, including restitution.\textsuperscript{152} The Tribunal elaborated that the fact that restitution is a rarely ordered remedy is not relevant at the stage of proceeding, and remedies and enforcement are two distinct concepts. It found no limitations of its power to order restitution in the BIT.\textsuperscript{153}

149. According to the well-accepted view of prominent scholars, there is no inherent limitation upon tribunals to award restitution but it depends on the particular circumstances of each case\textsuperscript{154}, rather than investors themselves framing their claims in terms of monetary damages.\textsuperscript{155} Thus, nothing precludes the tribunal from ordering restitution.

\textbf{B. Restitution is the primary remedy for an internationally wrongful act}

150. BIT Article 4 (2) spells out an obligation of the Contracting Party to accord restitution or just and adequate compensation to the investor suffered losses resulting

\begin{footnotesize}
\begin{enumerate}
\item[149] NAFTA
\item[150] Bulgaria–China BIT.
\item[151] Enron (Decision on Jurisdiction), para 79.
\item[152] Micula, para 166.
\item[153] Ibid, para 168.
\item[154] Dolzer/Schreuer (2008), 271.
\item[155] Schreuer, 329.
\end{enumerate}
\end{footnotesize}
from a state of necessity. If the Tribunal finds that Barancasia acted out of necessity, the Claimant is still entitled to restitution according to the treaty provision.

151. If the Tribunal finds that Barancasia has not acted out of a state of necessity, it is a general rule of customary international law that a responsible state is under the obligation to make full reparation of injury caused by the internationally wrongful act.\textsuperscript{156} The purpose of full reparation was explained in often cited ruling of the PCIJ in the \textit{Chorzów Factory} case: “must, as far as possible, wipe out all the consequences of the illegal act”.\textsuperscript{157} Among other possible forms of reparation, namely compensation and satisfaction, restitution has been recognized as the first form available to a state injured by an internationally wrongful act\textsuperscript{158}, as it requires re-establishment of the legal situation that existed before the commission of the wrongful act.\textsuperscript{159}

152. Restitution has been frequently invoked by the ICJ\textsuperscript{160} and by other international tribunals\textsuperscript{161} in a number of cases. Recently, the Tribunal in \textit{Goetz}\textsuperscript{162} asked the government to consider re-issue the license or agree on compensation; subsequently Burundi re-issued the license and paid some compensation.

153. Thus, according to customary international law and subsequent arbitral practice, restitution is an available remedy under the BIT.

\textbf{C. Restitution in form of issuing a license to the Alfa project and rescinding the amendment to the LRE is materially possible and does not involve a disproportionate burden on the state}

154. In accordance with customary international law, the Claimant submits that award of restitution will not: (1) be materially impossible; (2) involve a burden out of proportion.

155. Restitution is materially possible in this case. Barancasia has the power to modify its own laws. When Barancasia concluded the BIT it exercised sovereign powers, and guaranteed to accord the fair and equitable treatment to investments of investors from Cogitatia. Nevertheless the Claimant has suffered losses when “Alfa” was denied the FIT and the amendment of the LRE substantially reduced the economic value of its investments. Hence even if the Tribunal will finds that the

\textsuperscript{156} ILC Articles, Article 31
\textsuperscript{157} Chorzów Factory, 47.
\textsuperscript{158} ILC Articles, Article 35.
\textsuperscript{159} Ibid.
\textsuperscript{160} Temple, 37; the Arrest Warrant, 34
\textsuperscript{161} the Rainbow Warrior, para 114
\textsuperscript{162} Goetz, para 133
amendment of a law is for the state alone to determine, Barancasia still has to comply with its international obligations.

156. The state has a right to regulate, but before making a decision to develop photovoltaic projects the Claimant relied on the provisions of LRE Article 4 which guaranteed the duration of support measures for 12 years. Barancasia undermined the legitimate expectations of the Claimant by altering LRE Article 4; hence in order to wipe out all the consequences of this wrongful act, the Respondent should repeal the amendment of the LRE and issue a license to Alfa.

157. However the restoration of status quo ante is not sufficiently enough to satisfy the standard of full reparation without paying the compensation for damages that the “Alfa” and “Beta” projects have already suffered. Accordingly the Respondent must compensate for losses incurred from the day that the license to “Alfa” was denied (25 August 2010) to the date of award; and for “Beta” from 1 January 2013 until the date of award.

158. Therefore, the Claimant submits that restitution is possible by the way of awarding a license to “Alfa” and rescinding the amendment to LRE Article 4.

V. The Claimant is entitled to reparation of damages in the amount that wipes out all of the financial consequences of Barancasia’s breach of its BIT obligations

159. If the Tribunal finds that restitution is not available, the Claimant submits that, according to customary international law, the Respondent is still under an obligation to compensate for the damage caused by its illegal acts, insofar as such damage is not made good by restitution.163

160. Furthermore if the Tribunal finds that the Respondent’s breach of its BIT obligations occurred due to the state of necessity, Claimant is still entitled to compensation according to BIT Article 4 which provides payment of just and adequate compensation when the investor suffers losses from inter alia the state of necessity.

161. The BIT stipulates the payment of compensation in case of lawful expropriation, but it does not define a standard for compensation and damages for other wrongful conduct of a state such as a violation of its international obligation to treat investors fairly and equitably. In similar situations of absence of an applicable provision within the Treaty itself as lex specialis, arbitral tribunals must appeal to customary international law to find the applicable standard.164

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163 ARSIWA Commentaries, 99.
164 BCB, para 288
In accordance with the well-established rule\(^{165}\), the standard of compensation for illegal acts committed by a state differs from the one established for lawful expropriation, and must, as far as possible, wipe out all the consequences of the wrongful act. Therefore the calculation of damages caused by the Respondent’s illicit acts should be done on the ground of customary international law as restoring the situation that would happen in their absence and as closely as possible to restitution.

Prof. Kovič, who holds a Ph.D. degree from the University of Cogitatia is a respectable academic experienced in conducting economic research on macroeconomics and the economics of utility regulation. He divided and computed damages suffered by the Claimant according to three categories: (A) damages to Alfa and Beta; (B) wasted investments in land, photovoltaic panels and related equipment; and (C) lost profits.

**A. The Claimant is entitled to recover damages to “Alfa” and “Beta” Projects**

164. The Claimant’s request on reparation of damages is based on two grounds: (1) the Respondent’s breach of the BIT detrimentally affected the Claimant’s “Alfa” and “Beta” projects; (2) Prof. Kovič’s calculation of damages is correct.

1. The Respondent’s unlawful acts detrimentally affected the Alfa Project and Beta Project

165. The unfair and unequitable treatment of the Claimant resulted in substantial damages in the form of deprivation of its earnings which have a far-reaching impact on the overall value of its investments. If the Claimant had known beforehand that the Respondent could change tariff rates arbitrarily, it might have reconsidered its decision to invest in the first place.

166. According to well-established arbitral practice\(^{166}\), compensation for the violation of a BIT provision will only be due if there is a sufficient causal link between the breach of the BIT and the loss sustained by the investor and such a link should not be too remote or indirect.\(^{167}\)

167. The “Alfa” project was connected to the grid and became operational on 1 January 2010.\(^{168}\) Even though “Alfa” had some difficulties at the beginning that resulted from cost overruns on the construction and operational challenges, those problems, however, have been resolved, according to Prof. Kovič: “Vasiuki has seen

\(^{165}\) ILC Articles; Chorzow Factory; ADC; Vivendi; Siemens.

\(^{166}\) Biwater Gauff, para 779-780; S.D. Myers, para 140 (316); UPS, para 38; Feldman, para 194.

\(^{167}\) Biwater Gauff, para 785.

\(^{168}\) Facts, para 13.
Alfa’s capacity improve at a rate of 2.2% per year, which I project will result in it meeting its design operating capacity of 21% by 2013”. But the Claimant was discriminatory denied the FIT rate for “Alfa” and had to accept a rate of €0.1989/kWh which is less than half that of other solar providers.

168. The “Beta” came online on 1 January 2011 and enjoyed the €0.44/kWh tariff for the first two years instead of 12; and after an amendment to the LRE was adopted, the FIT was reduced to €0.15/kWh.

169. The Claimant contends that that “Alfa” and “Beta” projects both meet the requirements set out in the LRE. However the Claimant has been deprived of its cash flows. Consequently, such a deprivation has impacted its ability to pay dividends and repay debts. The operational costs of “Alfa” and “Beta” have not decreased, but the revenues to cover those costs have been severely impacted. The BEA based the calculation of the initial rate of FITs on “the premise that the average annual return on investment for licensed renewable projects should be 8%”.

170. According to financial theory, the value of business reflects the present worth of future cash flows. The improper conduct of Barancasia seriously impaired the economic performance of the Claimant, causing a reduction in the fair market value (“FMV”) of the Claimant’s business in the renewable energy sector inasmuch as the level of profitability of its projects was affected and decreased.

171. Damages for the Claimant’s “Alfa” and “Beta” projects were caused directly from the Respondent’s unlawful actions and this amounts to the difference between the FMV in “but for” and “as for” scenarios.

2. Calculation of damages the Claimant’s “Alfa” and “Beta” projects

172. In order to determine concrete losses suffered by Claimant, Prof. Kovič properly used a discounted cash flow method of valuation (“DCF valuation”) which establishes overall present worth of the business based on its profitability and

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169 ER of Marko Kovic, para 6.
170 PO No 3, para 20
171 Facts, para 21.
172 Ibid, para 25.
173 Ripinsky/Williams, 195.
174 Söderlund, 283.
anticipated earnings\textsuperscript{175} for both the “as is” scenario and the “but for” scenario. DCF valuation has been recognized by arbitral tribunals as a “sound tool used internationally”\textsuperscript{176} and is universally adopted as an appropriate method\textsuperscript{177}. It has been found to be the most useful method for arriving at the valuation of a business that had been operating as a going concern by the Tribunal in Tidewater.\textsuperscript{178}

173. DCF valuation is the most appropriate method of valuation in a given case. This is particularly the case where there is sufficient information to determine the hypothetical financial position of the Claimant which would exist if Barancasia had complied with its treaty obligations to accord the FET to the Claimant.

174. DCF valuation comprises several steps, including: (1) the projection of the most likely revenues from the valuation date; and (2) discounting the projected net cash flow to the “present value” by applying a discount rate.\textsuperscript{179}

175. It seems like there is no disagreement in the projection of net cash flows for the 12 years of existence of the €0.44/kWh FIT made by Prof. Kovič.

176. To convert future cash flows into a present value Prof. Kovič used in his calculation the Weighted Average Cost of Capital (“WACC”) which is one of the approaches regularly employed by tribunals in order to calculate risks.\textsuperscript{180} WACC consists of two elements: (1) the determination of the cost of equity, and (2) the cost of debts.\textsuperscript{181} The cost of debt is an important part of WACC because borrowing money increases the riskiness of the stock.\textsuperscript{182} Prof. Kovič used a 8% WACC in discounting future amounts.

177. It is undisputed that there are two ways of computing the value of the business in the practice of investment arbitrations: (1) indirect equity value (total invested capital), and (2) direct equity value. The former approach is the most commonly used.\textsuperscript{183} WACC is one of its elements, and prof. Kovič relied on it in his calculations. However, even though the cost of equity replaces WACC in the computation of the direct investment value, it does not mean that the cost of debt is absolutely irrelevant, as expert Priemo argues\textsuperscript{184}.

\textsuperscript{175} Crawford et al, 607.
\textsuperscript{176} Enron, para 385
\textsuperscript{177} CMS, para 416; ADC, para 502; Sempra, para 416
\textsuperscript{178} Tidewater, para 157.
\textsuperscript{179} Kantor, 131.
\textsuperscript{180} Marboe, 246.
\textsuperscript{181} Knull et al, 281-283.
\textsuperscript{182} Ibid, 283.
\textsuperscript{183} Kantor, 173
\textsuperscript{184} ER of Juanita Priemo, para 9
178. The Tribunal in CMS describes the calculation of the direct equity value as follows: first, the computation of the cash flows to equity (cash flows from operations, minus interest and debt repayments); second, discount them at the cost of equity ("COE"); third, add the discounted cash flows to equity to establish the value of equity ("the direct equity value"); and four, add the value of debt to establish the value of the firm”.\textsuperscript{185}

179. Properly applied, both approaches of calculation should “result in the same value”.\textsuperscript{186} The Claimant asserts that the Respondent’s expert Priemo made a mistake in her computation of damages assuming that the cash flows to equity is the same as the FMV of the Claimant’s business and not including the cost of debts.

180. Thus, Prof. Kovič was correct in his calculation of damages to the Claimant. Accordingly, the “Alfa” net present value of damages estimates as €120,621.\textsuperscript{187} For the “Beta” the net present value is €123,261.\textsuperscript{188}

B. The Claimant is entitled to the compensation of wasted investments in land and equipment

181. The Claimant requires reparation of damages related with wasted investments for two reasons: (1) the Respondent’s breach of the BIT has resulted in diminution of the FMV of the Claimant’s investments; (2) calculation of damages made by Prof. Kovič is correct.

1. Wasted investments in land and equipment

182. The production of electrical power from renewable sources, as in this case solar energy, is more expensive than conventional power production.\textsuperscript{189} In order to develop its solar power plants, the Claimant invested on its own and borrowed substantial sum of money to acquire land, photovoltaic panels, related equipment and hire personnel with legitimate expectations to supply its energy on the basis of a FIT rate of 0,44€/kWh as guaranteed by the LRE and the BEA’s announcements. However in breach of its obligation to treat the Claimants’ investments fairly and equitably, Barancasia amended the LRE, which caused substantial damages to the Claimant.

183. The Claimant enjoyed the €0.44/kWh for the three completed installations for only 6 months which is not enough to reimburse for the overall related expenses. After

\textsuperscript{185} CMS, para 430.  
\textsuperscript{186} Kantor, 176  
\textsuperscript{187} Annex 1(A) of ER of Marko Kovič  
\textsuperscript{188} Annex 1(B) of ER of Marko Kovič  
\textsuperscript{189} Reuter, 2.
1 January 2013 – the day when the BEA announced the new reduced tariff – prices on land decreased.\textsuperscript{190} Therefore, it can be assumed that the investment’s value was diminished as a proximate cause of the Respondent’s actions.\textsuperscript{191} Moreover, as the logical consequence of revocation of incentives in the renewable energy sector in Barancasia, new investments in this sector have become less attractive, which make it more difficult for the Claimant to resell the acquired PV panels and equipment.

184. Besides that, the amendment of the LRE impacted the FMV of investments in the Claimant’s other projects in the same way as it impacted the “Alfa” and the “Beta”.

185. Thus, the Claimant requires that the compensation of damages related to 12 solar projects must also be based on the FMV of investments in order to satisfy the full reparation standard.

2. Calculation of compensation for investments in land, photovoltaic panels and related equipment acquired for the Project

186. In a number of arbitrations, tribunals relied on “sunk investment” or “wasted costs” approach as a method for calculation of compensation\textsuperscript{192}. The award of “sunk investment costs” places the investor back in the same position as if the lost investment had never made\textsuperscript{193}.

187. The calculation of the FMV on the basis of actual investments is popular in arbitral practice\textsuperscript{194}. For instance, in Metalclad, the Tribunal computed losses to the investor by reference to the actual investment.\textsuperscript{195} The same was concluded by the Tribunal in Wena Hotels which based its calculation of the FMV on the actual investment in the hotels\textsuperscript{196}.

188. According to the quantifications made by Prof. Kovič, damages incurred by the Claimant as wasted investment amount to €690,056\textsuperscript{197}.

189. Alternatively, if the Claimant decides to continue its projects, Prof. Kovič invokes the situation when the Claimant completes unfinished projects, but is forced to accept a new €0,15/kWh tariff. In that case, the net present value of the damage should be calculated on the basis of the DCF method with WACC as a discount rate

\textsuperscript{190} ER of Marko Kovic; Kontor, para 5.
\textsuperscript{191} Biwater Gauff, para 787.
\textsuperscript{192} Biloune, para 229; Metalclad, para 125.
\textsuperscript{193} Kantor, 56.
\textsuperscript{194} Ripinsky/Williams, 227.
\textsuperscript{195} Metalclad, para 122.
\textsuperscript{196} Wena Hotels, para 125.
\textsuperscript{197} Annex 2 of ER of Marko Kovic
and amounts to €1,427,500. Here the application of “as is” and “but for” scenarios is relevant as Vasiuki would be deprived its future cash flows.

190. Therefore Claimant is entitled to compensation either of the FMV calculated on the basis of Vasiuki’s actual investment or the difference in the FMV as the result of its diminution due to the revocation of the FIT.

C. Vasiuki is entitled to compensation of lost profits from the future projects.

191. The Claimant requests compensation of lost profits because: (1) the Respondent’s unlawful acts deprived the Claimants of the opportunity to generate profits by establishing new projects; (2) computation of lost profits made by Prof. Kovič is correct.

1. The Respondent’s unlawful acts caused lost profits to the Claimant

192. According to customary international law, the full reparation of damages suffered by the investor should include loss of profits, therefore the Claimant submits that it is entitled to compensation of the lost profit it would have earned but for the international wrongful acts of the Respondent.

193. The Tribunal in Nykomb clarifies that in order to claim lost profits the Claimant needs to prove that: (a) it was engaged in a profit-making activity or at least it would have been engaged in a profit-making activity but for the revocation of the incentives; (b) that activity would have indeed been profitable.

194. A number of tribunals have included sums for lost profit or loss of opportunities in the calculation of damages when an illegal act resulted in the deprivation of income.

195. The Claimant expected to bring additional developments of a comparable size to the project on line approximately every two years during the 12 year duration of the FIT tariff period under the LRE. The Claimant has worked successfully in the renewable energy sector for a number of years, and has had successful PV projects since 2010. With sufficient certainty, the Claimant would have launched new projects relying on the previously guaranteed LRE incentives. It cannot be disputed that the revocation of the higher rate of the FITs had not impacted on Claimant’s earnings.

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198 Annex 3 of ER of Marko Kovic
199 Article 36(2) of ILC Articles
200 Micula(Final Award), para 1009.
201 Sapphire International v NIOC, para 189
202 ER of Marko Kovic, para 11
Thus the change in Barancasian RE policy deprived the Claimant of the opportunity to generate profits by establishing new projects. Therefore it is justifiable for the Claimant to be compensated for lost profits.

2. Calculation of lost profits

197. Once it is found that the Claimant indeed suffered losses from unlawful state conduct, the assessment of the amount of damages should be prudent. For example, the tribunal in Lemire held that: “once causation has been established… less certainty is required in proof of the actual amount of damages” and the Claimant only needs to provide a basis for its determination.

198. The Claimant expected to develop additional projects every two year if the FIT rate had not been changed. In his Expert Report (“ER”) Prof. Kovič compared two future scenarios to determine the impact of the change to the tariff structure of the LRE on the Claimant’s future development of solar projects. For the calculation of those future profits Prof. Kovič used the “but for” approach on the basis of the DCF valuation method. The “but for” comparison is appropriate if the unlawful act of a State destroys or impairs long-term investments. According to Prof. Kovič computations, lost profit amounts to €765,835.

D. Compensation must include pre- and post-award interest

199. It is a well-accepted rule that in order to ensure full reparation, interest must be included in the calculation of damages. Therefore the Claimant requests pre- and post-award interest.

200. In order to avoid the “Invalid Round Trip” Prof. Kovič suggests the Claimant’s WACC as a proper rate of pre-judgment interest, which must be augmented to the past cash flows. In economic literature the term “Invalid Round Trip” refers to situations when the pre-judgement interest rates substantially differ from “the rate at which expected future losses are discounted to the valuation date”. Any other rate potentially leads to either under-compensation, which is contrary to the customary international law standard of full reparation, or over-compensation; for example, if the chosen rate is the Respondent’s short-term borrowing rate and it is greater than the damaged business’ cost of capital. Moreover, the Respondent’s borrowing rate is

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203 Marboe, 116.
204 Lemire, para 246
205 Marboe, 238; MTD, para 251
206 Annex 4 of ER of Marko Kovic
207 LG&E, para 55
208 Abdala et al, 4.
insufficient, especially when the Claimant is a closed corporation. In that case it may not fully compensate the Claimant because: (1) it cannot eliminate unsystematic risks, and (2) it prevents the Claimant from making investments. Thus the Claimant’s WACC is argued to be the proper interest rate.

201. Prejudgment interest runs from the date of harm until the date a decision is rendered. So it should be calculated from different starting dates depending on the head of damages and runs until the date of the award.

202. Furthermore, the Claimant requests post-award interest at the highest available rate which runs from the original award until it is paid and penalizes Respondent for not paying damages. In a number of arbitrations, the tribunals adopted a “reasonable” or “fair” rate. The Claimant contends that the fair interest rate is 8% inasmuch as it was the expected return of its investments.

203. Compound interest is the generally accepted standard in investment arbitrations. The Tribunal in Micula awarded compound interest, clarifying that it is “the overwhelming trend among investment tribunals”. The Tribunal in Santa Elena awarded compound interest to avoid unjust enrichment.

204. Thus, the proper way to calculate the pre- and post-award interest is to use the compound interest formulation. The Claimant seeks the 8% pre- and post-award interest compounded semi-annually.

209 Knoll, 346
210 Colón/Knoll, 22
211 Colón/Knoll, 3
212 Knoll, 359
213 Coe/Rubins, 631.
214 Ripinsky/Williams, 372.
215 Santa Elena, para 106; Maffezini, para 97; Wena Hotels, para 129
216 Micula(Final Award), para 1266.
217 Santa Elena, para 100-106.
PRAYER FOR RELIEF

The Claimant respectfully asks the Tribunal to issue an Award:

1. Finding that the Respondent has breached the FET standard under the BIT.

2. Ordering the Respondent a) to repeal the amendment to Article 4 of the LRE or b) to continue to pay the Claimant the €0.44 feed-in tariff for 12 years and c) to award license for “Alfa” project.

3. In the alternative, ordering the Respondent to pay damages to the Claimant for its losses, in the amount of €2,437,217 or €1,699,773 depending on calculation which the Tribunal finds appropriate.

4. Ordering the Respondent to pay pre- and post-award interest on the above amount at a 8% WACC rate compounded semi-annually until full payment has been made.

5. Ordering to the Respondent to pay all costs related to these proceedings.