IN THE ARBITRATION UNDER THE RULES OF THE LONDON COURT OF
INTERNATIONAL ARBITRATION

BETWEEN

VASIUKI LLC
CLAIMANT

v.

REPUBLIC OF BARANCASIA
RESPONDENT

MEMORIAL FOR RESPONDENT

2015
# TABLE OF CONTENTS

INDEX OF ABBREVIATIONS ........................................................................................................ iv
INDEX OF AUTHORITIES ......................................................................................................... v
INDEX OF CASES ..................................................................................................................... x
STATEMENT OF FACTS .............................................................................................................. 1
ARGUMENTS ............................................................................................................................... 3

I. THE PRESENT TRIBUNAL LACKS JURISDICTION TO HEAR THE DISPUTE BETWEEN THE PARTIES .............................................................................................................. 3
   A. The BIT has become obsolete due to the accession of both Cogitatia and Barancasia to the European Union ........................................................................................................ 3
      1. BIT is materially inconsistent with the Article 207 of Treaty on Functioning of the European Union .................................................................................................................. 3
      2. The BIT is in contradiction with principle of non-discrimination under European Union Law .......................................................................................................................... 5
      3. European Union Law overlaps protection granted under the BIT .................................. 7
      4. BIT shall be interpreted in light with EU Law ..................................................................... 8
   B. The BIT is terminated in accordance with its provisions and the applicable international law ................................................................................................................................. 8
      1. Arbitration Clause is no longer in force ............................................................................. 8
      2. Cogitatia has consented to terminate the BIT .................................................................... 9
      3. Barancasia terminated the treaty in the light of fundamentally changed circumstances ............................................................................................................................... 10
   C. Awarding compensation may not be enforced since it constitutes unlawful State aid 11

II. BARANCASIA DID NOT BREACH ITS OBLIGATIONS OF THE FAIR AND EQUITABLE TREATMENT ................................................................................................................. 12
   A. Respondent’s administrative measures, in respect to the ALFA project does not constitute or amount to a breach of the Fair and Equitable Treatment Standard .................................................................................................................. 13
      1. ALFA project does not constitute an investment accepted by the “host state” .............. 13
      2. Barancasia did not violate Claimant’s legitimate expectation ........................................... 15
   B. Respondent’s regulatory measures in respect of the LRE did not constitute or amount to a breach of the fair and equitable treatment standard ............................................................................................................................... 16
      1. LRE was not supposed to be unchangeable ........................................................................... 17
      2. Reasonability of the Legitimate Expectation ..................................................................... 18
   C. Balancing investor’s expectations and public interest .......................................................... 19
III. RESPONDENT SHOULD BE EXEMPT FROM THE LIABILITY ON THE BASIS THAT ITS ACTIONS WERE NECESSARY TO MEET ITS ECONOMIC OBJECTIVES AND TO ADHERE EU OBLIGATIONS

A. Respondent should be exempt from liability based on the principle of State of necessity

1. Essential interests of Barancasia

(a) Essential Economic and social Interest

(b) EU obligation as an essential interest

2. Respondent state’s measures were only way to avert economic and social crisis

3. Respondent state had not contributed to the occurrence of the state of necessity

IV. THE CLAIMANT’S REQUESTED REMEDY OF SPECIFIC PERFORMANCE IS INCONSISTENT WITH RESPONDENT’S SOVEREIGNTY AND BEYOND THE POWERS OF ANY TRIBUNAL

A. Order of Specific performance contradicts with principles and applicable rules of international law

1. Granting the specific performance would impinge on the state’s regulatory sovereignty

2. Granting the specific performance contradicts with Articles on State Responsibility

B. Granting the specific performance is not derived from traditional practice of awarding damages

V. IN ALTERNATIVE, CLAIMANT’S CALCULATIONS FOR DAMAGES ARE ILL-SUPPORTED AND SHALL NOT BE RELIED

A. Claimant failed to mitigate its losses

B. Claimant inadequately assessed the risks related to investment

C. The method used for calculation is not appropriate for the non-expropriation case

PRAYER FOR RELIEF

PRAYER FOR RELIEF
## INDEX OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>BEA</strong></td>
<td>Barancasia Energy Authority</td>
</tr>
<tr>
<td><strong>BIT/Cogitatia-Barancasia BIT</strong></td>
<td>Bilateral Investment Treaty concluded between Cogitatia and Barancasia on December 31, 1998</td>
</tr>
<tr>
<td><strong>CCP</strong></td>
<td>Common Commercial Policy</td>
</tr>
<tr>
<td><strong>CJEU</strong></td>
<td>The Court of Justice of European Union</td>
</tr>
<tr>
<td><strong>DCF</strong></td>
<td>Discounted Cash Flow</td>
</tr>
<tr>
<td><strong>EU</strong></td>
<td>European Union</td>
</tr>
<tr>
<td><strong>EU Commission</strong></td>
<td>The executive body of the European Union</td>
</tr>
<tr>
<td><strong>EU Law</strong></td>
<td>European Union Law</td>
</tr>
<tr>
<td><strong>EURO</strong></td>
<td>Official currency of the EU</td>
</tr>
<tr>
<td><strong>FDI</strong></td>
<td>Foreign Direct Investment</td>
</tr>
<tr>
<td><strong>FET</strong></td>
<td>Fair and Equitable Treatment</td>
</tr>
<tr>
<td><strong>ICJ</strong></td>
<td>International Court of Justice</td>
</tr>
<tr>
<td><strong>ICSID</strong></td>
<td>International Centre for Settlement of Investment Disputes</td>
</tr>
<tr>
<td><strong>ILC Articles</strong></td>
<td>Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001</td>
</tr>
<tr>
<td><strong>intra EU BITs</strong></td>
<td>BITs concluded between the member states of the European Union before their accession to the latter</td>
</tr>
<tr>
<td><strong>K/Wh</strong></td>
<td>Kilowatt-hour</td>
</tr>
<tr>
<td><strong>LCIA Rules</strong></td>
<td>The London Court of International Arbitration Rules</td>
</tr>
<tr>
<td><strong>LRE</strong></td>
<td>Law on Renewable Energy</td>
</tr>
<tr>
<td><strong>New York Convention</strong></td>
<td>Convention on the Recognition and Enforcement of Foreign Arbitral Awards, dated 10 June 1958</td>
</tr>
<tr>
<td><strong>Para.</strong></td>
<td>Paragraph</td>
</tr>
<tr>
<td><strong>PCIJ</strong></td>
<td>Permanent Court of International Justice</td>
</tr>
<tr>
<td><strong>TEEC</strong></td>
<td>Treaty Establishing the European Community</td>
</tr>
<tr>
<td><strong>TFEU</strong></td>
<td>Treaty on the Functioning of the European Union</td>
</tr>
<tr>
<td><strong>VCLT</strong></td>
<td>Vienna Convention on the Law of Treaties 1966</td>
</tr>
</tbody>
</table>
## INDEX OF AUTHORITIES

<table>
<thead>
<tr>
<th>Author</th>
<th>Reference</th>
</tr>
</thead>
<tbody>
<tr>
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<td></td>
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</tr>
<tr>
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</tr>
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</tr>
<tr>
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<table>
<thead>
<tr>
<th>Case Description</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alan Craig v. Ministry of Energy</td>
<td>Alan Craig v. Ministry of Energy of Iran, Iran-U.S. Claims Tribunal Reports, 1983</td>
<td>31</td>
</tr>
<tr>
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<td>27</td>
</tr>
<tr>
<td>Azurix Corp. v. The Argentine</td>
<td>Azurix Corp. v. The Argentine Republic, ICSID, Case No. ARB/01/12, 2006</td>
<td>32</td>
</tr>
<tr>
<td>CMC v. Argentina</td>
<td>CMS Gas Transmission Company v. The Republic of Argentina, ICSID, Case No. ARB/01, 2002</td>
<td>19, 30</td>
</tr>
<tr>
<td>CMS Gas Transmission Company v. Argentine</td>
<td>CMS Gas Transmission Company v. Argentine, ICSID, Case No. ARB/01/8, 2005</td>
<td>29</td>
</tr>
<tr>
<td>Commission v. Austria</td>
<td>Commission v. Austria, Court of Justice of European Union, Case C-205/06, ECR I-1301, 2009</td>
<td>4</td>
</tr>
<tr>
<td>Commission v. Finland</td>
<td>Commission v. Finland, Court of Justice of European Union, Case C-118/07, ECR I-10889</td>
<td>4</td>
</tr>
<tr>
<td>Commission v. Sweden</td>
<td>Commission v. Sweden, Court of Justice of European Union, Case C-249/06, ECR I-1335</td>
<td>4</td>
</tr>
<tr>
<td>Compañía de Aguas v. Argentina</td>
<td>Compañía de Aguas v. Argentina, ICSID, Case No. ARB/97/3, 2008</td>
<td>33</td>
</tr>
<tr>
<td>Decision N15 of the UNCC</td>
<td>Decision N15 of the UNCC Governing Council Compensation for Business Losses Resulting from Iraq’s Unlawful Invasion and Occupation of Kuwait</td>
<td>31</td>
</tr>
</tbody>
</table>
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*Eastern Sugar B.V. v. The Czech Republic*

Eastern Sugar B.V. v. The Czech Republic


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*Elettronica Sicula Case*


*Energy v. Ecuador*


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<table>
<thead>
<tr>
<th>Case</th>
<th>Description</th>
<th>Year(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Gabčikovo-Nagymaros Project Case</em></td>
<td>Gabčikovo-Nagymaros Project, Hungary v. Slovakia, International Court of Justice, GL No 92, 1997</td>
<td>10, 22, 26</td>
</tr>
<tr>
<td><em>Gold v. USA</em></td>
<td>Glamis Gold, Ltd. v. The United States of America, UNCITRAL, 1976</td>
<td>19</td>
</tr>
<tr>
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<td>The International Association of Independent Tanker Owners and Others, High Court of Justice, Case C-308/06, ECR I-04057, 2008</td>
<td>8</td>
</tr>
<tr>
<td><em>Karpa v. Mexico</em></td>
<td>Marvin Roy Feldman Karpa v. United Mexican States, ICSID, Case No. Arb(Af)/99/1, 2002</td>
<td>18</td>
</tr>
<tr>
<td><em>Lemire v. Ukraine</em></td>
<td>Joseph C. Lemire v. Ukraine, ICSID, Case No. ARB/06/18, 2010</td>
<td>20</td>
</tr>
<tr>
<td></td>
<td>Vol. 20, No. 1, 1981</td>
<td></td>
</tr>
<tr>
<td><em>Metalclad v. Mexico</em></td>
<td>Metalclad Corporation v. The United Mexican States, ICSID, Case No. ARB (AF)/97/1, 2000</td>
<td>18</td>
</tr>
<tr>
<td>Case Name</td>
<td>Claimant/Plaintiff</td>
<td>Respondent/Defendant</td>
</tr>
<tr>
<td>---------------------------------</td>
<td>------------------------------------------------------------------------------------</td>
<td>------------------------------------------</td>
</tr>
<tr>
<td>Middle East Cement v. Egypt</td>
<td>Middle East Cement Shipping and Handling Co. S.A.</td>
<td>v. Arab Republic of Egypt, ICSID, Case No. ARB/99/6, 2002</td>
</tr>
<tr>
<td>Mondev v. USA</td>
<td>Mondev International Ltd. v. United States of America</td>
<td>ILM, 2003</td>
</tr>
<tr>
<td>MTD Equity Case</td>
<td>MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile</td>
<td>ICSID, Case No. ARB/01/7, 2004</td>
</tr>
<tr>
<td>Occidental Petroleum Corp. v.</td>
<td>Occidental Petroleum Corp. v. Republic of Ecuador</td>
<td>ICSID, Case No. ARB/06/11, 2007</td>
</tr>
<tr>
<td>Republic of Ecuador</td>
<td></td>
<td></td>
</tr>
<tr>
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<td>Parkerings-Compagniet As v. Republic Of Lithuania</td>
<td>ICSID, Case No. Arb/05/8, 2008</td>
</tr>
<tr>
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<td>PSEG Global Inc. v. Turkey, ICSID, Case No. ARB/02/5, 2007</td>
<td></td>
</tr>
<tr>
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</tr>
<tr>
<td>Case</td>
<td>Iran-U.S. Claims Tribunal Reports, 1993</td>
<td></td>
</tr>
<tr>
<td>Tecmed v. Mexico</td>
<td>Tecnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID, Case No.</td>
<td>ARB (AF)/00/2, 2003</td>
</tr>
<tr>
<td><strong>WBC Claim</strong></td>
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<td></td>
</tr>
<tr>
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<td>Zhinvali Development Ltd. v. Republic of Georgia, ICSID, case No. ARB/00/1, 2003</td>
<td></td>
</tr>
</tbody>
</table>
STATEMENT OF FACTS

1. Vasiuki LLC (hereinafter – Claimant/Vasiuki), incorporated under the law of Cogitatia, has been engaged in the development of small scale fossil fuel and wind turbine generation facilities in Cogitatia and elsewhere in the region, including Barancasia (hereinafter - Respondent).


3. On 1 May 2004, Barancasia and Cogitatia joined the European Union. Thus, reviewed its policy related to the bilateral investment treaties and on 15 November 2006, its intention to terminate Intra-European BITs has been announced.

4. On 11 December 2006, the Government of Barancasia formally resolved to terminate all its Intra-EU BITs. Respondent has notified the Federal Republic of Cogitatia of its intention to immediately terminate the Cogitatia-Barancasia BIT on 29 June 2007. The Minister of Foreign Affairs of Cogitatia replied to the notice with regard to the termination of BIT via formal notification, dated 28 September 2007 acknowledging the intent of the counter party to annul the agreement.

5. On 28 November 2008, considering the BIT obsolete, Barancasia, removed the BIT with Cogitatia from its Ministry of Finance website, in particular, the section of the website listing valid and binding international agreements.

6. In May 2009, Vasiuki purchased land plots in Barancasia and decided to launch an experimental solar project, calling it “Alfa”. On 1 January 2010, solar panels of the Alfa project were connected to the grid and became operational, but the project was operating at a heavy loss due to defects in the installation, delays and huge budget overruns. There appeared to be no future for the Alfa project.

7. In May 2010, Barancasia adopted the LRE, which aimed at encouraging the development of renewable energy technology, improving security and diversification of energy supply taking into account the principles of consumer protection and legitimate interests.

8. The LRE provided that the production of energy from renewable sources will be encouraged by state measures until the share of electricity generated from renewable sources amounts to no less than 20 percent as compared with the country’s gross consumption of energy and as an
Article 2 of LRE provided assessment shall be made each year as of December 31st to determine the percentage of electricity generated from renewable sources.

9. During 2011, a ground-breaking technology was developed making solar panels substantially cheaper to manufacture and dramatically reducing the costs of development and thus, Barancasian public officials admitted that guaranteed profits for 12 years amounted to unfair windfall and that the whole renewable energy support scheme was unsustainable; moreover Barancasia could not borrow the necessary amounts for the maintenance of the existing renewable energy support system, because that would require it to exceed its EU-mandated borrowing limits for the relevant years.

10. The renewable energy support system has been financed from the state budget. If all applications for feed-in tariff were approved, up to 15% of state revenues would be diverted to finance solar feed-in tariffs, a higher share than public financial allocations to Barancasia’s educational system; moreover in June 2012, outraged teachers of Barancasia organized national strikes demanding an increase of salaries and educational funding. Along with national unrest, the local media regularly highlighted the excessive profits of the solar developers and abundant possibilities for the abuse of the green subsidies scheme.

11. In light of existing circumstances, the Government of Barancasia was compelled to amend the LRE.
ARGUMENTS

I. THE PRESENT TRIBUNAL LACKS JURISDICTION TO HEAR THE DISPUTE BETWEEN THE PARTIES

1. The Respondent submits that the present Tribunal lacks jurisdiction to hear the dispute arising out of from the Barancasia – Cogitatia Bilateral Investment Treaty dated 31 December 1998 (hereinafter - BIT) since the BIT has become obsolete due to the accession of both Cogitatia and Barancasia to the European Union (A) or in alternative the BIT is terminated in accordance with its provisions and the applicable international law (B); in any event awarding compensation may not be enforced since it constitutes unlawful State aid (C).

A. The BIT has become obsolete due to the accession of both Cogitatia and Barancasia to the European Union

2. As of the date of the Barancasia’s and Cogitatia’s accession to the European Union (1 May 2004), the Treaty Establishing the European Community (hereinafter - TEEC) has governed the relationship between the respective two States.

3. Respondent contends that these treaties cannot be applied simultaneously or in parallel and that the application of the BIT is therefore excluded on the following grounds: the BIT is materially inconsistent with the Article 207 of Treaty on Functioning of the European Union (hereinafter - TFEU) (1); the BIT is in contradiction with principle of non-discrimination under the European Union Law (2); European Union Law (hereinafter – EU Law) overlaps protection granted under the BIT (3).

1. BIT is materially inconsistent with the Article 207 of Treaty on Functioning of the European Union

4. The Respondent submits that with the entry into force of the Lisbon Treaty on 1 December 2009, the importance of investment law is reflected in the EU’s exclusive competence for foreign direct investments.¹

5. In the case at hand, the BIT concluded between the parties established the legal and economic framework between two member states of the European Union ignoring the common regulations and principles provided under the EU Law. Even the preamble of the BIT between

¹ Maydell, p. 73; Eilmansberger, p. 393
the parties supports the above mentioned statement; according to this treaty, parties intended
to create and maintain favorable conditions for investments of investors of one contracting
party in the territory of the other contracting party, through development of economic co-
operation to the mutual benefits.\(^2\) While the Article 207 TFEU incorporates foreign direct
investment into the exclusive Common Commercial Policy (hereinafter - CCP) competence of
the European Union. The paragraph 1 of Article 207 establishes that the CCP shall be based on
uniform principles, per se excluding any possibility of granting the different treatment between
EU member states or creating the different framework based on obsolete BITs, concluded
between the member states of the European Union before their accession to the latter
(hereinafter – intra EU BITs).

6. The above mentioned changes to EU Law and the following concerns lead the relevant
stakeholders to treat such BITs as obsolete agreements and ensure that EU obligations in force
be met: the investment tribunals are not bound to respect EU Law, even if they decide on
subject matters covered by the TFEU and regulated by EU Law. In addition, even if arbitral
tribunals were to apply EU law, they could not request a preliminary ruling from the Court of
Justice of the European Union under Article 267 TFEU. The recent case law of European Court
of Justice (hereinafter - CJEU) illustrates that even in the case of “hypothetical
incompatibilities” between the BITs and Community law, the BITs must be either brought into
line with Community law or, if that proves impossible, be denounced.\(^3\) This very approach
underlines the desire of the CJEU to ensure that no international court or arbitral tribunal gets
into the position of interpreting or applying Community law, thereby undermining the
exclusive jurisdiction of the CJEU.\(^4\)

7. The European Commission’s position is clear in this regard:

\[
\text{“EU Law prevails in a Community context as of accession... the BIT is not applicable to matters falling under Community competence... The intra-EU BITs should be terminated in so far as the matters under the agreements fall under Community competence”}.\(^5\)
\]

\(^2\) BIT, Preamble
\(^3\) Commission v. Austria, ¶43; Commission v. Sweden, ¶2; Commission v. Finland ¶43; Denza pp. 263-274; Koutrakos, pp. 2059-276
\(^4\) Lavranos EFAR, pp. 265-282
\(^5\) Eastern Sugar B.V. v. The Czech Republic ¶126
The same position was reiterated by the European Commission on November 2006, when it was expressed:

“there appears no need for agreements of this kind [intra EU BITs] in the single market and their legal character after accession is not entirely clear.”

8. Barancasia’s government acting in line with recent recommendations from relevant institutions of European Union and Article 4 TFEU, which states that the Member States shall take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the treaties or resulting from the acts of the institutions of the Union, since 1 May 2004, after Barancasia’s and Cogitatia’s accession to the European Union, Barancasia’s Government announced its BITs as obsolete treaties; resolved to terminate intra EU BITs due to the obligation to bring its foreign investment policy in line with EU Law.

9. Accordingly, the BIT between the Barancasia and Cogitatia has been terminated legally, pursuant to the legal order, subject of which are parties to the agreement.

2. The BIT is in contradiction with principle of non-discrimination under European Union Law

10. The general principle of non-discrimination is a rule of the European internal market. Article 18 TFEU ensures every national of a member state of the European Union to participate on the internal market without any discrimination on the basis of its nationality. Regardless above, the contents of intra EU BITs and EU Law frequently differ from each other, validity of the former entails the risk that certain rights and privileges apply only to some and not all citizens of European Union. Accordingly, the significant problems are raised with regard to their compatibility with EU Law.

11. Intra EU BITs confer rights on a bilateral basis to investors from some member states only: both EU Law, and Member States’ BITs contain dispute resolution systems. In the European Union legal order, there is established the exclusive jurisdiction of the Court of Justice of the European Union regarding the interpretation and application of EU Law, whereas under a Bilateral Investment Treaty, the parties consent on jurisdiction of international arbitral
tribunal; accordingly on the other hand, investors seeking to claim an infringement of their rights under EU Law have the only choice to refer to remedies under EU Law, thus deprived the benefits of alternative dispute resolution. In other words, some investors are granted within the provisions of the Bilateral Investment Treaty the opportunity to seek investor-State arbitration for the resolution of their claim, while others are not given that possibility. In accordance with consistent case law from the CJEU, such discrimination based on nationality is incompatible with EU law. For all these reasons, the Commission has decided to request five Member States (Austria, the Netherlands, Romania, Slovakia and Sweden) to bring the intra-EU BITs between them to an end.

12. Differing standards and limited personal scope of application of intra-EU BITs discriminate against EU nationals and companies and thus violate EU fundamental freedoms. Further, fair and equitable treatment and umbrella clauses in intra EU BITs are in a potential conflict with EU law as they might strike a different balance between substantive legality and the protection of legitimate expectations of an investor.

13. The European Commission repeatedly argues that bilateral investment treaties between EU Member States are in conflict with EU Law, are incompatible with the EU single market and, therefore, should be phased out. The European Commission has maintained that intra-EU BITs discriminate between EU investors from different Member States because it grants some and not others the right to sue Member States at international tribunals. Furthermore, the EU Commission is concerned that investor-to-state arbitration is binding and is not subject to review by the CJEU.

14. The above mentioned approach of European Commission on this issue was also heard when, in 2008, it presented an amicus curiae in the case of AES v Hungary at ICSID and in 2010, it presented written observations in the case Eureko v. Slovakia. In the Slovakia case brief, the European Commission stated: “Intra-EU BITs amount to an anomaly within the EU internal market”... “Eventually, all intra-EU BITs will have to be terminated”.

15. The treaty from which the present dispute has been aroused contains number of clauses in contradiction with EU Law, most importantly the right to refer the dispute to arbitration.

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11 Burgstaller, Hindelang, Pernice
12 Press Release on Micula Case; Peterson, p. 24; Krause, p. 145
13 Kleinheisterkamp, p. 5; Communication of the Commission p. 3
14 Burgstaller, Hindelang, Pernice p. 54
15 Staff Working Document p. 2
16 Eureko B.V. v. The Slovak Republic, amicus curiae
17 Article 8
which makes it discriminative towards the other member states, thus incompatible with EU Law, legal framework prevailing the agreements between its member states.\textsuperscript{18}

16. In light with all above mentioned, the Respondent submits that, should the present tribunal consider the determination of investment policy within the national jurisdiction of the member states, the BIT between Barancasai and Cogitatio is still invalid and shall not be applied to the dispute due to its incompatibility with the fundamental principle of European legal order – prohibition of discrimination.

3. \textit{European Union Law overlaps protection granted under the BIT}

17. The Respondent submits that by acceding to the European Union, Barancasia became a part of a specific system of law which creates more complex and elaborate framework of investment protection and human rights than that provided by the BIT.

18. Articles of the Treaty on the Functioning of the European Union guarantee to market participants a set of basic freedoms; as a consequence the internal market comprises “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties” (Article 26 TFEU). Accordingly, investors may physically move and reside freely within the territory of the member states (Article 21 TFEU); they can move their capital freely within the internal market (Article 63, 65 TFEU); they have the freedom to establish the companies they wish to use for their investments in any member state (Articles 49, 52 TFEU); their companies can provide their services across borders (Article 56, 62, 52 TFEU) and their national employees can equally move freely (Article 45 TFEU); moreover, any European investor enjoys the protection of fundamental rights, which were previously elaborated in the case law of the CJEU in the light of the European Convention of Human Rights, and which are now laid down in the Charter of Fundamental Rights (the “CFR”) as directly applicable law.\textsuperscript{19} This includes the guarantee of personal liberty and security (Article 6 CFR); the freedom to pursue a freely chosen occupation (Article 15 CFR) and to conduct business (Article 16 CFR); the right to property, including the right to fair compensation in good time (Article 17 CFR); access to services of general economic interest (Article 36 CFR); the right to good administration (Article 41 CFR) as well as access to effective justice and due process (Article 47 CFR).

\textsuperscript{18} Article 4, TFEU
\textsuperscript{19} Article 6(1) TEU.
19. In light with all above mentioned, by terminating the BIT concluded with Cogitatia, the Claimant in the present dispute has not been deprived any of its rights; accordingly the dispute over the protections granted by the legal instruments of European Union shall be heard by the relevant forums in this jurisdiction.

4. BIT shall be interpreted in light with EU Law

20. Since obligations under EU Law and the BIT is impossible to reconcile, any conflict ought to be resolved in favor of EU law. In case Intertanko and Others it has been established that “Member States cannot in principle invoke agreements concluded after accession as against Community law”;20 moreover the CJEU has ruled that EU law takes precedence over all pre-accession bilateral treaties concluded between Member States (Exh. RL-197 to RL-200).

21. Accordingly it is submitted that since the investment tribunals lack the competence to address the issues regulated under the EU Law, the present tribunal shall find the lack of jurisdiction and refuse the Claimant to address the dispute.

B. The BIT is terminated in accordance with its provisions and the applicable international law

22. The Respondent submits that BIT has been terminated in light with rules and regulations under the public international law, in particular arbitration clause is no longer in force (1); Cogitatia has consented to terminate the BIT (2); or in alternative the Respondent invokes the exception from pacta sunt servanda principle, namely the fundamental change of circumstances (3).

1. Arbitration Clause is no longer in force

23. Under the Article 30 of Vienna Convention on the Law of the Treaties 1966 (hereinafter - VCLT), since Barancasia’s accession to the European Union the arbitration clause in the BIT can no longer be considered applicable.

24. According to Article 30(3) of the VCLT, when all the States Parties to an anterior treaty are also States Parties to a posterior treaty, and the earlier treaty is not terminated or suspended by operation of Article 59 of the VCLT, the “earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.”

25. Under Article 30(3) of the VCLT, even if the BIT has not been terminated by application of Article 59 of the VCLT, at least Article 8 of the BIT must be deemed inapplicable as it is

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20 Intertanko and Others, ¶77
incompatible with EU Law. The basis for such finding of incompatibility is to be found in Article 334 of the TFEU.

26. Article 334 prevents the submission of disputes between Member States to any method of settlement other than those provided for therein.

27. Under Article 334 of the TEEC which confers exclusive jurisdiction on the CJEU to deal with disputes among Member States on the application of EU Law in the following terms: Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein.\(^{21}\)

28. It is stated by the highly qualified scholars of international law, that treaties may be considered as terminated through implied agreement by the parties if all the parties conclude a later treaty which is intended to supplant the earlier treaty or if latter treaty is incompatible with its provisions.\(^{22}\)

29. The Respondent submits that since Barancasia and Cogitatia later from the conclusion of BIT acceded to TFEU, establishing the different forum for dispute settlement, the arbitration clause under the earlier treaty shall be considered invalid, thus the present tribunal shall refrain itself from hearing the dispute.

2. **Cogitatia has consented to terminate the BIT**

30. Article 54 of VCLT provides that the operation of the treaty or of some of its provisions may be suspended at any time by consent of all the parties.

31. The Respondent argues that Cogitatia impliedly consented to terminate the BIT by not objecting Barancasia’s persistent intention to terminate the BIT.

32. James Crawford in his latest publication states that the termination of the treaty may take place by consent of all parties and such consent may be implied.\(^{23}\) The same approach is developed in Commentaries of Vienna Convention on the Law of Treaties, which provides the criteria for implied consent to be considered valid ground for treaty termination, the consent shall be derived by the parties and may be expressed by conclusion of later agreement incompatible with the previous one.\(^{24}\)

33. In the case at hand, as it was discussed above the both parties of the BIT have acceded to the treaty which grants the jurisdiction over the matters regulated by the BIT to different dispute

\(^{21}\) CJEU Opinion, p. 3
\(^{22}\) VCLT Art 54, ILC Final Report on Article 56; Plender, pp. 153-7.
\(^{23}\) Crawford p. 391
\(^{24}\) VCLT Commentary, pp. 1011-1020
resolution forum other than the one chosen by the earlier instrument. What is more, the facts of the case supports Respondents conclusion since Barancasia has repeatedly announced its intention to terminate BIT from 15 November, 2016; in addition to public announcements, on 29 June 2007 by written notification, Barancasia has notified the Cogitatia the termination of the treaty; Cogitatia has responded on the notification and confirmed its delivery without objecting the intention stipulated therein.

34. Considering the all above mentioned, Barancasia treats the BIT in question as terminated agreement as of 30 June 2008 and considers Claimant’s relief unsupported.

3. Barancasia terminated the treaty in the light of fundamentally changed circumstances

35. VCLT Article 61 strictly defines the cumulative conditions under which a change of circumstances may be invoked:

   a) it must affect circumstances existing at the time of the conclusion of the treaty which have not been foreseen by the parties at the moment of conclusion;

   b) The change must be ‘fundamental’ and the effect of the change must radically transform the extent of the obligations to be performed;

   c) the circumstances’ existence must have constituted “an essential basis of the parties consent to be bound by the treaty”.

36. Changes in the legal situation outside of the treaty can give rise to the application of Art 62. The ICJ recognized in the Fisheries Jurisdiction case that “changes in the law may under certain conditions constitute valid grounds for invoking a change of circumstances affecting the duration of a treaty”. The ICJ has observed in Fisheries Jurisdiction Case that International law admits that a fundamental change in the circumstances which determined the parties to accept a treaty, if it has resulted in a radical transformation of the extent of the obligations imposed by it, may, under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty.

37. With this respect Respondent submits that termination of BIT has been led by the accession to European Union, which has objectively not foreseen by Barancasia at the time of conclusion.

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25 Problem, Uncontested Facts, ¶6
26 Annex 7.1.
27 Annex 7.2
28 Gabčíkovó-Nagymaros Project Case, ¶104
29 Fisheries Jurisdiction ¶32
30 Fisheries Jurisdiction ¶36
of BIT back in 1998; and indeed it was the new legal order under European Union radically transforming both parties’ obligations under new EU investment policy which led for further denunciation of obsolete BITs.

38. With regard to third criteria, Permanent Court of International Justice has suggested that a particular matter could only be a "circumstance" for this purpose if it was "in view of and because of the existence of a particular state of facts that the treaty was originally concluded".31

39. It is submitted that the essential basis of conclusion of BIT has been enshrined in its preamble, in particular, creation of framework for their economic relationship in the field of investments. Since the parties of BIT no longer lack the common framework for their investment relationships to be regulated, we submit that state of facts due to which the parties concluded the BIT no longer exist.

40. In sum, all of the requirements for the existence of fundamental change of circumstances are present in the case at hand and as a consequence, BIT is lawfully terminated by Barancasia.

C. Awarding compensation may not be enforced since it constitutes unlawful State aid

41. Alternatively to the above stipulated arguments, the Respondent submits that awarding compensation may not be enforced since it contradicts with EU Law (state aid) and enforcement may be denied on public policy grounds.

42. Claimant requests the tribunal to order the Respondent the amendment of its national regulation in favor of the Claimant or payment of €0.44 feed-in tariff for 12 years or compensation of damages calculated on estimation basis.32

43. The Respondent considers the claims presented impossible to be satisfied and enforced from the perspective of EU Law.

44. Under its Letter dated 01.10.2014 the Commission with regard to Award on Micula Case, concluded that the Commission considers that “execution, in part or in full, of the Award of 11 December 2013 would amount to granting of State aid”.33 During the proceedings of this very dispute, the Commission provided the tribunal with its written Submission, according to which it was argued that an award of damages would constitute impermissible state aid, for such new state aid to be granted, Romania must first seek and obtain prior approval from the

31 France v. Switzerland, p. 156.
32 Arbitration Request, p. 5
33 EU Commission Report, ¶50
Commission pursuant to Article 108 TFEU, which in the opinion of the expert would most likely be denied. The Commission further submitted that "[i]f the Tribunal rendered an award that is contrary to obligations binding on Romania as an EU Member State, such award could not be implemented in Romania by virtue of the supremacy of EU Law, and in particular State aid rules" (Commission’s Written Submission, ¶ 125(4)).

45. In the Eco Swiss case, the CJEU held that the competition rules of the TFEU are part of the public order which national courts must take into account when they review the legality of arbitral awards under the public policy exception recognized by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In case of Micula v. Romania, the Commission in its written submission stated that Article 54(1) of the ICSID Convention provides that each Contracting State shall automatically recognize and enforce an ICSID award within its territory as if it were a final judgment of a court in that State. However, if a national court in the EU were asked to enforce an ICSID award that is contrary to EU law and EU state aid policy rules, the proceedings would have to be stayed under the conditions of Article 234 of the EC Treaty so that the CJEU may decide on the applicability of Article 54 of the ICSID Convention, as transposed into the national law of the referring judge.

46. Faced with the dilemma of having to breach either its country’s obligations under international law or those under European Law (in the case of an ICSID arbitration: Articles 53 and 54 of the ICSID Convention, which obliges every contracting state to recognize and enforce ICSID awards without allowing any objections; otherwise the public policy exception of Article V(2)(b) of the New York Convention would be of avail), a European judge is obliged to privilege the latter under the principle of the supremacy of the European Treaties; accordingly we believe the award on the present dispute in favor of the Claimant is in advance ill-fated with regard to enforcement.

II. BARANCASIA DID NOT BREACH ITS OBLIGATIONS OF THE FAIR AND EQUITABLE TREATMENT

47. Barancasia submits that it did not breach Fair and Equitable Treatment. On the contrary, Respondent contends that change in Renewable Energy Law was necessary to safeguard

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34 Micula v. Romania, ¶334
35 Eco Swiss China Time Ltd. v. Benetton International Nv, ¶38
36 Micula v. Romania, Commission’s Written Submission, ¶¶122-124
Barancasia’s in order to meet its economic and renewable energy objectives and to adhere its EU obligations. Thus, alleged violations of the Cogitatia-Barancasia BIT were exempt on the above mention basis.

48. In order to establish that Barancasia did not violate Fair and Equitable Treatment, Respondent submits that (A) its administrative measures in respect of the ALFA project did not violate Fair and Equitable Treatment Standard. Furthermore (1) Respondent argues that ALFA project in fact never been accepted as an investment in Barancasia and thus, (2) Legitimate Expectation even if it was reasonable are not protected in terms of ALFA project.

49. In terms of BETA and other twelve projects, it [Respondent] further submits that (B) Barancasia’s regulatory measures in respect of the LRE did not amount to a breach of the Fair and Equitable Treatment standard in fact they [measures] were reasonable. Because, (1) LRE was not supposed to be permanently unchanged and thus, (2) the Claimant’s Legitimate Expectation were not reasonable.

50. Respondent also argues that Fair and Equitable Treatment Standard obligation does not precludes state to (C) act in public interest and thus change or modify its laws.

A. Respondent’s administrative measures, in respect to the ALFA project does not constitute or amount to a breach of the Fair and Equitable Treatment Standard

51. Respondent denies that its measures, either administrative or regulatory, in respect of the LRE amounted to a breach of the Cogitatia-Barancasia BIT, in particular, the fair and equitable treatment standard("FET" or “FET Standard”). It contends that Claimant’s assertions do not meet any of the requirements necessary for establishing violation of the FET Standard. Article 3 of the BIT explicitly indicates that FET standard only applies to those investments that have already been admitted in its territory of a Contracting State; ALFA project have been neither licensed nor otherwise accepted by the Barancasia Energy Authority("the BEA") therefore it cannot be treated as an investment protected by the FET standard; Moreover, the government of the Barancasia has never given any assurance or promise that could have created a legitimate expectation that ALFA Project would be licensed.

1. ALFA project does not constitute an investment accepted by the “host state”

52. Article 3 of the Cogitatia-Barancasia BIT reads as follows: “Once a Contracting Party has admitted an investment in its territory, in accordance with its laws and regulations, it shall accord to investments and returns of investors of the other Contracting Party treatment which
is fair and equitable.”\textsuperscript{37} The question as to whether or not ALFA project was an investment “admitted” by the contracting state within the meaning of Article 3 of the BIT is a crucial one in case at hand, since FET Standard is applicable only if a contracting Party accepts investment in its territory.

53. It is noteworthy that according to Article 1 of the BIT, “investment” shall comprise every kind of asset invested in connection with economic activities by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter.” \textsuperscript{38} Thus, Article 1 of the BIT indicates that investment has to be made in accordance with the laws of the contracting party. In this case, investment would have been made in accordance with the law of the contracting state if Barancasia Energy Authority had issued a license for the development of the existing capacity of the electricity. Barancasia Renewable Energy Law, in particular, Article 5 explicitly indicates and requires that “Existing capacity of electricity production from renewable energy sources may be developed or new capacity of electricity production from renewable energy sources at a new facility may be installed only upon obtaining a license from the BEA”\textsuperscript{39}. Thus, it is clear that investment with regards to the ALFA project would have been legally made only if Claimant had obtained the license under the Renewable Energy Law.

54. It is an established fact uncontested by Claimant that ALFA project has never been licensed by the BEA, in other words investment has never been made by the Vasiuki in accordance with the host state law as required by the BIT. Thus, Respondent believes that the project has never moved beyond the drawing board and Vasiukis’ endeavors did not mature into a legal investment.\textsuperscript{40} Respondent further argues that the situation in case at issue is analogous to that in \textit{Mihaly v. Sri Lanka}, where a number of steps undertaken by the Claimant were ruled not to constitute an investment as it has never been admitted as an investment by the host state [in that case Sri Lanka],\textsuperscript{41} this also has been echoed by the tribunal in \textit{Zhinvali v. Georgia}.\textsuperscript{42} Similar to the present circumstances where certain efforts by the Claimant has never been admitted as an investment by the host state by way of the refusal to issue license.

\textsuperscript{37} Annex No.1 p.25
\textsuperscript{38} Ibid. p. 24
\textsuperscript{39} Annex No.2, p. 32
\textsuperscript{40} Dolzer and Schreuer, p. 65
\textsuperscript{41} Mihaly v. Sri Lanka, p. 155
\textsuperscript{42} Zhinvali v. Georgia, p. 74
55. In the light of the above, there is no investment\textsuperscript{43} in terms of the ALFA project as it was not admitted by the host state\textsuperscript{44} and therefore it falls out of the protection of FET Standard of the Barancasia – Cogitatia BIT.

2. Barancasia did not violate Claimant’s legitimate expectation

56. Claimant contends that the law of Barancasia on Renewable Energy created legitimate expectations which were subsequently violated by the Respondent. Respondent argues that it has never breached any legitimate expectation of the Claimant. On the contrary Respondent contends that the Claimant have not met any of the threshold requirements essential for establishing legitimate expectation because the Claimant did not receive any promise that license would be issued for the Alfa project.

57. Respondent submits that the legitimate expectation is only violated when state itself creates expectation through its promises\textsuperscript{45}, which have been made or existed in time when the investment was made by the investor. In other words, the principle of legitimate expectation is breached only if the host state acts in consistent with the previous promises, which has been made in time when the investment was made by the investor. Since, there is no evidence in record that would suggest that Barancasia ever promised Vasiuki that license would be issued for ALFA project, at the time when the investor decided to invest\textsuperscript{46} Respondent concludes that, FET standard, in particular legitimate expectation has not been violated.

58. Moreover, Respondent contends that legitimate expectation is violated only if claimant shows that host state changes that law, which was reason why investor invested in the host state at the time of the investment, investment must be “based on the conditions offered by the host State at the time of the investment; they must exist and be enforceable by law.”\textsuperscript{47} Moreover, investor’s “Legitimate expectations cannot be solely the subjective expectations of the investor. They must be examined as the expectations at the time the investment is made, as they may be deduced from all the circumstances of the case, due regard being paid to the host State’s power to regulate its economic life in the public interest.”\textsuperscript{48} More importantly, “[w]here an investor claims that it was induced by a particular regulatory measure, it must demonstrate that the existing regulatory framework was the crucial factor in determining

\textsuperscript{43} OECD I, p. 56
\textsuperscript{44} Nagel v. The Czech Republic, p. 89
\textsuperscript{45} Gami v. Mexican States, p. 115
\textsuperscript{46} Vandevelde p. 66
\textsuperscript{47} LG&E v. Argentina, ¶130
\textsuperscript{48} EDF v. Romania para.219
whether or not to invest in the host state and that, absent that measure, the investor would not have made the investment”.

59. Claimant’s argument that legitimate expectations were violated is unfounded. Firstly, there is no evidence in the record that would suggest that Barancasia ever promised Vasiuki that license would be issued for ALFA project, at the time when the investor decided to invest.\(^{49}\) Secondly, Barancasia never made any action by which it has induced investor to invest. Thus, the creation of the Alfa project was not induced by the host state. Therefore, FET standard, in particular legitimate expectation has not been violated.

60. In conclusion, Respondent argues that, the provisions of the FET standard cannot be applied because BEA never issued license for the ALFA project, which means ALFA project has never been admitted as investment in the context of FET standard and therefore is not entitled to the protection under Article 3 of the BIT\(^{50}\). Nevertheless, if this tribunal were to establish that ALFA project falls within the protection of Article 3, Respondent has demonstrated above that it did not violated the Claimant’s legitimate expectations.

\[\text{B. Respondent’s regulatory measures in respect of the LRE did not constitute or amount to a breach of the fair and equitable treatment standard}\]

61. Claimant contends that when Barancasia changed its Renewable Energy Law\(^{51}\) it disregarded the legitimate expectation of the investor and thus, it violated protections that Claimant was entitled to under the BIT\(^{52}\). According to the article 2(2) of the Cogitatia-Barancasia BIT:

\[\text{Investments of investors of either contracting party shall all time be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.}^{53}\]

62. However, Respondent argues that it did not violate Claimant’s legitimate expectations with respect to BETA and twelve other projects because (1) Claimant received no assurance that could have created a legitimate expectation that the LRE would remain unchangeable for 12 years; (2) Even if Claimant relied on the LRE, any such reliance cannot be considered objectively reasonable.

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\(^{49}\) Ibid, Vandeveld, p. 66
\(^{50}\) Annex No.1 p. 21
\(^{51}\) Uncontested Facts, p. 23, ¶35
\(^{52}\) Summary of the Dispute p. 4
\(^{53}\) Annex No.1 p. 25
64. The issue of violation of FET standard is a difficult one and will much depend on the facts of the particular case. Many tribunals tried to give a specific meaning to the FET standard by formulating general definitions and descriptions.

65. An examination of the above mentioned practice of the tribunals demonstrates that several principles can be identified, which are embraced by the standard of FET. One of the main tenets of the FET standard is Investors Legitimate Expectations, which deemed and subsequently claimed by the Claimant/Vasiuki to be the threshold aspect of the violation of the FET standard in case at issue.

I. LRE was not supposed to be unchangeable

66. Protection of investors’ legitimate expectations has been repeatedly identified by arbitral tribunals as a key element of the FET standard. The investor’s legitimate expectations has to be based on the legal framework of the host state and it has to be grounded, *inter alia*, in the legal order of the host state as it stands at the time when the investor acquires the investment. Based on the practice of arbitral tribunals, Respondent contends that for a legitimate expectation of regulatory stability to be protected, the following requirements must be met: there must be a contract, or at least a promise or specific representation that the law will remain unchanged and thus legitimate expectation may only be frustrated where the state made “specific commitments” that particular laws or regulations remain in place and these commitments must be valid under the domestic law.

67. Respondent submits that in the present case it was the Renewable Energy Law (LRE) in particular Article 4 of LRE, which subsequently has been changed by the Government of Barancasia. Claims relating to the breach of legitimate expectations, may arise when a host State’s conduct causes adverse effects to an investment. In other words, the reversal of the assurances/Laws by the host state that have led to the legitimate expectations might amount to the violation of the FET. Respondent also indicates that any claim based on the frustration

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54 Mondev v. USA, ¶118
55 AWG Group v. Argentina, p. 145
56 Dolzer, pp.553-589
57 *CMS v. Argentina*, ¶¶127-166; *Tecmed v. Mexico*, ¶154; *Metalclad v. Mexico*, ¶87; *Karpa v. Mexico*, ¶111
58 *Micula v. Romania*, ¶603
59 Vandeveld, p. 76.
60 Annex No. 2
61 UNCTAD, Series, p. 64
62 Vasciannie, pp.146 -147
of the legitimate expectation requires that claimant prove that the state created or reinforced the expectations through its own affirmative acts.\textsuperscript{63}

68. According to the original wording of Article 4 of the LRE “The feed-in tariff announced by the Barancasia Energy Authority (“BEA”) and applicable at the time of issuance of a license will apply for twelve years.”\textsuperscript{64} Article 2 of that same law indicates that “The production of energy from renewable sources shall be incentivized by the state measures until the share of electricity generated from renewable sources amounts to no less than 20 percent.”\textsuperscript{65} According to the interpretation and factual understanding of these clauses it is clear that legitimate expectation that Article 4 was unamendable and unchangeable is frustrated by the wording of the law itself that provided already that time the room for future regulatory changes in this field of operation. Moreover, in Article 4 it is also explicitly emphasized that assessment whether or not renewable energy reached its minimum amount shall be made annually as of December 31.\textsuperscript{66}

69. In the light of the above, Respondent contends that Barancasia Energy legislation in particular LRE did not create any assurances that its provisions be unamendable for 12 years, therefore claimant’s expectations that Article 4 of the LRE would be in place for the entire 12 years was inaccurate and therefore Respondent’s actions in terms of LRE cannot be perceived as a violation of Article 2(2) of Cogitatia-Barancasia BIT.

2. Reasonability of the Legitimate Expectation

70. Respondent submits that if claimant believed that provision of LRE in particular Article 4 of it was unchanged, such an idea was unreasonable. Thus, Respondent contends that any expectation that LRE in particular Article 4 of it would remain unchanged for 10 years is unreasonable.

71. It is widespread understanding that all expectations are not supposed to be protected by the FET Standard. In several decision tribunals indicate that investor’s expectation must have been objectively reasonable, in particular, the investor must anticipate that the law may change.\textsuperscript{67} As it was stated in Duke Energy v. Ecuador:

\textsuperscript{63} Ibid, Micula v. Romania, ¶166
\textsuperscript{64} Annex No. 2, p. 31
\textsuperscript{65} Ibid
\textsuperscript{66} ANNEX No. 2, p. 32
\textsuperscript{67} Gold v. USA, ¶767
72. “The Tribunal acknowledges that expectations are an important element of fair and equitable treatment. At the same time, it is mindful of their limitations. To be protected, the investor’s expectations must be legitimate and reasonable at the time when the investor makes the investment.” In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest.\(^{68}\) In other words such reliance must be reasonable.\(^{69}\)

73. Respondent submits that there was no evidence that Respondent ever assured the Claimant that Article 4 of the LRE would remain unchanged, more importantly Respondent argues that the fact that LRE itself contained in its Article 2 that state measures would be in force until the share of electricity generated from renewable sources amounts to no less than 20 percent indicates that LRE was not supposed by the legislators of the Barancasia as an static and unamendable.

74. Respondent submits that Claimant’s reliance was not reasonable and due to the facts of the case, because LRE itself indicating explicitly about its changing nature at any time before the 12 year. Thus, taking into consideration the regulatory structure of the LRE, Respondent contends that Claimant’s legitimate expectation was unreasonable.

C. Balancing investor’s expectations and public interest

75. Respondent submits that it is a very common perception in international investment law that FET obligation does not prevent host States from acting in public interest, or does not restrict state not to change or modify the legislation of its own discretion,\(^{70}\) even if such acts adversely affect investments.\(^{71}\)

76. In *Saluka v. Czech Republic* case, the tribunal analyzed the balancing interests of the investor and the state and indicate: “[Legitimate] expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances. […] No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor’s expectations was justified and reasonable, the host State’s legitimate right subsequently to regulate domestic matters in the public interest must be taken into

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\(^{68}\) Energy v. Ecuador, ¶340.

\(^{69}\) Vandevelde, p. 69

\(^{70}\) Parkerings v. Lithuania, ¶ 333.

\(^{71}\) Ibid. UNCTAD, p. 73
consideration as well.\footnote{Electronica Sicula Case, ¶15.} Thus, investor cannot have a legitimate expectation of legislative statists, and any general entitlement to regulatory stability does not preclude legislative changes.”\footnote{Erömü Kft v. Hungary, ¶345}

77. Thus, in Saluka tribunal recognized the host State’s right to enact or amend legislation to serve legitimate public interests, even if the changes negatively affect a foreign investor\footnote{Lemire v. Ukraine, ¶452}. Similarly, \textit{Parkerings-Compagniet v. Lithuanua}\footnote{IBID Parkerings, p. 74}, the tribunal held that,\footnote{Ibid} it is each State’s undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion.” Moreover, in EDF v. Romania, tribunal noted that FET does not mean the total and absolute freezing of the host state law “… Except where specific promises or representations are made by the State to the investor.

78. Respondent submits that in present circumstances acting in the public interest was the one of the predominant drawing forces that make government of Barancasia to change its energy law, in particular by reducing expenditure on energy and assist teachers. It is noteworthy that, in June 2012 national strikes were organized by the outraged teachers, demanding an increase of the salaries and that teachers deserve better treatment than solar panels.\footnote{Uncontested Facts, p.23, ¶32} Furthermore, Barancasia were not able to borrow necessary amount of money for teachers’ salaries because that would require to exceed its EU-mandated borrowing limits for the relevant years.\footnote{Ibid, Facts p.22, ¶30}

79. In sum, considering all the circumstances, Respondent submits that, firstly it never promised Vasiuki or any other energy operator that in the following 12 years the legislature would remain totally frozen, Moreover, the law itself made it clear from the very beginning that the applicable regime might have been subjected to future changes\footnote{Annex No. 2, p.31} and secondly Respondent was compelled to change its energy attitudes due to the social situation in the country, public interest lead Respondent to amend the LRE. To conclude, as demonstrated above, Respondent has not violated the BIT between Barancasia and Cogitatia in particular FET standard.
III. RESPONDENT SHOULD BE EXEMPT FROM THE LIABILITY ON THE BASIS THAT ITS ACTIONS WERE NECESSARY TO MEET ITS ECONOMIC OBJECTIVES AND TO ADHERE EU OBLIGATIONS

80. Even if the tribunal finds that the Respondent’s measures were not complied with the Fair and Equitable Treatment Standard under BIT, they still do not constitute wrongful acts. Respondent submits that measures adopted by Respondent were necessary to meet the essential economic objectives and thus are justifiable. Moreover, Respondent further submits that its actions were necessary to adhere to its EU obligations. Finally, Respondent argues that it shall not be held liable to pay any compensation.

A. Respondent should be exempt from liability based on the principle of State of necessity

81. Article 25 of ILC Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter – ILC Articles) provides basis for precluding the wrongfulness of the act contrary to international law on in the situation of the state of necessity.

82. According to Article 25, there are particular requirements and preconditions that have to be satisfied in order for a state to be able to invoke the defense of the state of necessity. Respondent recognizes that the defense of the state of necessity can only be invoked according to certain strictly defined circumstances. Thus, the measures undertaken by the state shall serve for the essential interest and that interest has to be threatened by the grave and imminent peril. As Professor Crawford stated what is “essential interest” for the purposes of the clause also must depend on the specific facts of each case. In addition, the measures adopted shall constitute the only means available to the state to protect its “essential” interests. Finally, the state must not have contributed to the situation of the state of necessity.

83. In the light of the essential elements of Article 25, Respondent submits that subsequent changes of the Law of the Renewable Energy, in particular, Article 4 was (1) necessary on the one hand for (a) the economic stability and maintaining the operation of essential services and (b) on the other for the fulfillment of its obligations in EU. Moreover, Respondent states that (2) its actions and measures were only way to protect the above-mentioned essential economic, social and public interests and (3) Respondent state had not contributed to the occurrence of the state of necessity.

80 GabcKovo-Nagymaros Project Case, ¶¶51 - 52
81 Crawford, pp. 65 - 67
1. Essential interests of Barancasia

(a) Essential Economic and social Interest

84. Respondent contends that a closer examination of the arbitral tribunals’ practice demonstrates that “what qualifies as an “essential” interest is not limited to those interests referring to the State’s existence,”\(^{82}\) but rather “economic, financial or those interests related to the protection of the State against any danger seriously compromising its internal or external situation, are also considered essential interests.”\(^{83}\) In LG&E v. Argentina tribunal excused State of Argentina on the basis that “it faced an extremely serious threat to its existence, its political and economic survival, to the possibility of maintaining its essential services in operation, and to the preservation of its internal peace.”\(^{84}\) Likewise, in the case at hand, Barancasia was facing serious economic and financial problems that could have threatened the operation of essential services in the country such as a system of education as well as it threatened the preservation of internal peace.

85. LRE, which was adopted by the State of Barancasia with the aim of encouraging the development of the renewable energy technology as well as ensuring consumer protection and legitimate interests of the state and its citizens, has created serious economic problems that posed threat to the financial and social stability of the country. Feed-in tariff established by LRE has caused unjustifiable economic problems: the support scheme under RLE was not financially sustainable; Respondent was not able to borrow the necessary amount of money to maintain the existing feed-in support system because it would exceed its EU-mandated borrowing limits for the relevant years;\(^{85}\) the extensive financing of the support system would also create shortage in the budget and required higher budget than Barancasia’s educational system.\(^{86}\) Thus, the threat to the operation and financing of education system in the country also gave rise to a major public upheaval that threatened public order and inner peace. In particular, the existing situation caused outraged teachers to organize national strikes with demand to increase salaries and funding in the education system.\(^{87}\) What was more striking is that these events were taking place on the background of the local media campaign which

\(^{82}\) LG&E v. Argentine, ¶251
\(^{83}\) Ibid
\(^{84}\) LG&E v. Argentine para. 257.
\(^{85}\) Ibid, ¶30.
\(^{86}\) Ibid, ¶29.
\(^{87}\) Ibid, ¶32.
regularly highlighted the shortcomings of the system and the possible abuses of the green subsides scheme.\(^{88}\)

86. Thus, LRE frustrated basic tenets of the LRE itself to ensure and safeguard public interest. Therefore, Respondent submits that, LRE created circumstances that threatened both economic stability, the operation of essential services, public order and future development of the country. Respondent further submits that administrative and regulatory measures in respect of the LRE were necessary for safeguarding its “essential interests” from “grave and imminent peril” and therefore, it shall be exempt from the liability for such measures to the extent they were contrary to its international law obligations under the BIT.

\((b)\) \textit{EU obligation as an essential interest} \\

87. In addition to the essential interests described above, Barankasia had to take measures to meet its obligations within EU. Not doing so, would seriously impair its external interests and policies within EU and undermine the entire legal and political system inside the country that rested on those very obligations with the EU system.

88. Respondent further submits that the ILC Committee of experts on State Responsibility in particular Chairman Roberto Ago, stated that the “essential state interest” must be vital interest such as\(^ {89}\) “political, social or economic survival,\(^ {90}\) the continued functioning of its essential services, the maintenance of internal peace and the survival of a sector of its population.”\(^ {91}\) Respondent argues that EU member states are bound to adhere legal order of the European Union and they also have to modify their legislation in the manner that complies with the EU obligations.

89. Respondent further submits that from 1 May of 2004 Barancasia joined the European Union.\(^ {92}\) Upon the accession into the EU Barancasia get obligations that has to be fulfilled as a member state. Member state should fulfill its obligation under the Treaty on the Functioning of the European Union. According to that treaty in particular Article 107(1) which defines “Aids Granted by the State” states that: “aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between

\(^{88}\) Ibid, ¶29  
\(^{89}\) Ibid OECD II, p. 100  
\(^{90}\) Bjorklund, p. 480  
\(^{91}\) UN Yearbook, p. 45  
\(^{92}\) Ibid, ¶5
Member States, be incompatible with the internal market.” It also noteworthy that on the basis of this very Article 107(1) European Commission itself contended in *US Steel Global Holdings v Slovak Republic* case that “the exemptions from the payment of certain charges … to support the production of renewable energy amounted to a form of state aid that violated Article 107(1) of the Treaty on the Functioning of the European Union.”

90. Thus, Respondent submits that LRE created legal order which did not suffice the requirement of the EU law in particular Treaty on the Functioning of the European Union, thus it threatened not only social and political stability but future development of the country because Barancasia’s future economic, social and political development was largely based on the EU membership, for which country was strived painstakingly over the years.

91. Therefore, Respondent contends that adherence of the EU obligations was one of the predominate thresholds upon which Respondent state’s future security and stability was based on. Thus, states actions has to be exempt from the liability under the ILC Article of the internationally wrongful acts in particular Article 25(1) as a necessary against grave and imminent peril.

2. Respondent state’s measures were only way to avert economic and social crisis

92. Under Article 25 of the ILC Articles the states actions can only be exempt from liability for those exceptional cases where measures adopted by the host state were the only way to safeguard essential interest. 96

93. Respondent submits that amendment of the LRE was the only possible way to protect its economic stability and internal peace, as it is fact uncontested by Claimant, that if LRE would not be changed firstly, economic stability and public order would be tarnished, because the feed-in tariff was the only source of the threats posed to Barancasia’s essential interests as described in part (1), (a) and (b) above. Besides, the amendment of law was a legitimate measure that was within the sovereign powers of the state. Likewise, in LG&E v. Argentina, the tribunal rejected the argument that the measures adopted were not the only way and has established that “Argentina’s enactment of the Emergency Law was a necessary and legitimate measure on the part of the Argentine Government.” 97

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93 *U.S. Steel Global Holdings B.V. v. Slovak Republic*, ¶145
94 Germiny and Radjai, p. 3
95 OECD I, p. 100
96 ILC Commentaries, p.80
97 LG&E v. Argentina, ¶239-240.
that “Although there may have been a number of ways to draft the economic recovery plan,” the measures taken were necessary and relevant in the given situation of the case.\textsuperscript{98} Moreover, Barancasia was not able to borrow necessary amount of the money for the maintenance of the existing renewable energy support system because it exceed its EU mandated borrowing limits for the relevant years,\textsuperscript{99} thus LRE created political and social instability and state of Barancasia would not be able to resolve the essential financial and social problems if it did not amend LRE.

94. Respondent further contends that to change of LRE in particular feed-in tariff was only way to adhere its EU obligations, because the EU Commission several times indicated that “feed-in tariffs” for the solar energy developer violated Treaty on the Functioning of the European Union in particular Article 107(1) and thus it constituted unlawful state aid.\textsuperscript{100}

95. Thus, Respondent submits that if the LRE would not be changed economic and social crisis was inevitable, and thus it had no alternative other than to change LER in particular feed-in tariff to safeguard its essential interest against grave and imminent threat.

3. 
**Respondent state had not contributed to the occurrence of the state of necessity**

96. Finally, Respondent contends that the state of Barancasia has not itself contributed to the creation of the situation of necessity. Respondent recognizes that “the State which is the author of that act must not have “contributed to the occurrence of the state of necessity”. 101

97. Thus, Respondent, submits that it does not contribute to the occurrence of the state of the necessity, predominantly, the economic, financial and social difficulties faced by Respondent. The aim of the LRE was to encourage the development of renewable energy technology,\textsuperscript{102} and thus to promote investment and financial force in the country. It never amid and could not have foreseen the financial and economic difficulties that developed as a result of the operation of new renewable energy system. Thus, neither did Respondent facilitate to the social protests and media criticism that threatened the operation of essential state services and the peace and the security inside the State of Barancasia. Besides, Barancasia was not able to borrow necessary money for the maintenance of the existing renewable support system due to the EU-mandated borrowing limits.\textsuperscript{103}

\textsuperscript{98} LG&E v. Argentine, ¶257
\textsuperscript{99} Ibid, ¶30.
\textsuperscript{100} Germiny and Radjia, p.3
\textsuperscript{101} GabčKovo-Nagymaros Project Case, ¶¶51–52.
\textsuperscript{102} Ibid, ¶14.
\textsuperscript{103} Ibid, ¶30.
98. Moreover, as it was already mentioned, EU commission has indicated several times that feed-in tariffs violated Treaty on the Functioning of the European Union, in particular Article 107(1). Thus, Respondent had no alternative other than to comply with and fulfill its EU obligations.

99. In the light of all the above-mentioned circumstances, Respondent submits that it should be exempt from the liability on the basis that its actions were necessary to meet its economic objectives and to comply with its EU obligations.

IV. **THE CLAIMANT’S REQUESTED REMEDY OF SPECIFIC PERFORMANCE IS INCONSISTENT WITH RESPONDENT’S SOVEREIGNTY AND BEYOND THE POWERS OF ANY TRIBUNAL**

100. The Respondent submits that requested remedy of specific performance contradicts with principles and applicable rules of international law (A) and it is inconsistent with traditional practice of awarding damages (B).

   A. **Order of Specific performance contradicts with principles and applicable rules of international law**

101. The Respondent submits that the restitution remedy is unavailable to Claimants as a matter of international law, and Claimants’ prayer for relief must be confined to monetary damages based on the following grounds: granting the specific performance would violate the sovereignty principle (1) and this very remedy contradicts with Articles on State Responsibility (2).

   1. **Granting the specific performance would impinge on the state’s regulatory sovereignty**

102. It is submitted that under the well-established approach of tribunals, the reliefs related to specific performance is refused based on sovereignty concerns. The tribunals are reluctant to provide the award ordering the specific performance. The latter view is based, in part, on the traditional assumption that non-pecuniary relief constitutes a greater intrusion on state sovereignty than a damages award.

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104. Occidental Petroleum Corp. v. Republic of Ecuador, ¶¶78-85
105. LG&E v. Argentine, ¶¶86-87; Enron Corp. v. Argentine Republic, ¶78-81; Endicott, pp. 524-29
106. Occidental Petroleum Corp. v. Republic of Ecuador, ¶78, 84; Amco Asia Corp. v. Republic of Indonesia, ¶202; McLachlan, p. 341
103. In the case of LIAMCO v. Libya, the arbitrator cited V.S. Friedman’s 1953 treatise entitled Expropriation in International Law: “[I]t is impossible to compel a State to make restitution, this would constitute in fact an intolerable interference in the internal sovereignty of States.” \(^{107}\)

In the BP v. Libya case, the arbitral tribunal concluded the same and stated “when by the exercise of sovereign power a State has committed a fundamental breach of a concession agreement by repudiating it through a nationalization of the enterprise and its assets in a manner which implies finality, the concessionaire is not entitled to call for specific performance by the Government of the agreement and reinstatement of his contractual rights, but his sole remedy is an action for damages.”\(^{108}\)

104. In the more recent ICSID case of CMS Gas Transmission v. Argentine, while the Tribunal recognized that “[r]estitution is by far the most reliable choice to make the injured party whole as it aims at the reestablishment of the situation existing prior to the wrongful act”, concerning the issues related with sovereignty principle it concluded that “it would be utterly unrealistic for the Tribunal to order to turn back to the regulatory framework existing before the emergency measures were adopted”\(^{109}\).

105. In the case at hand the Claimant request the tribunal to order the sovereign State annulment of its legislation. The Respondent contends that it has never consented neither by signing the BIT nor under London Court of Arbitration Rules to be the subject of such remedy.

106. We believe satisfying such relief constitutes encroachment on State sovereignty, is not supported by the authorization of tribunal and shall not be allowed.

2. Granting the specific performance contradicts with Articles on State Responsibility

107. Respondent notes that it would be absurd and unjust for Barancasia to reinstate an old regulatory regime that would likely result in breach of the obligations under EU Law. That makes restitution essentially impossible, which rules it out as an available remedy.

108. Specific performance, even if possible, will nevertheless be refused if it imposes too heavy burden on the party against whom it is directed. Article 35 of the International Law Commission Articles on State Responsibility is worthy of mention in this regard:

\(^{107}\) Libya American Oil Company v. Libyan Arab Republic, p. 63.

\(^{108}\) BP Exploration Company Limited v. Libyan Arab Republic, p. 354

\(^{109}\) CMS v. Argentina, ¶406
“A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation, which existed before the wrongful act was committed, provided and to the extent that restitution: (a) Is not materially impossible; (b) Does not involve a burden out of proportion to the benefits deriving from restitution instead of compensation.”

This point was well exposed in the CMS case, where the tribunal stated the following:

“Restitution is the standard used to reestablish the situation which existed before the wrongful act was committed, provided this is not materially impossible and does not result in a burden out of proportion as compared to compensation.”

109. We invite the Tribunal to consider both parties’ rights in order to decide whether specific performance is possible. We argue that in the current case at hand “there are reasons of a material and social character that make it ‘impossible’ or ‘impracticable’ for the Respondent State to restore the situation to its prior state”.

110. Specific Performance requested by the party will definitely have the erga omnes effect, would go beyond providing a remedy to Claimant and eligible other investors in the field relevant incentives abolished deliberately by the Respondent State due to social and economic conditions at present.

111. Accordingly, the Respondent requests the Tribunal to confine the Claimant’s requested remedy to monetary damages should it finds the claims well supported.

**B. Granting the specific performance is not derived from traditional practice of awarding damages**

112. The dominant remedy in both international commercial and investor-state arbitration is compensation, typically in the form of money damages. It is noted by the various highly qualified scholars in the field that non-pecuniary relief — including orders for specific performance, contractual reformation, and pure declaratory relief — is far less common in commercial/investment arbitration.

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110 CMS Gas Transmission Company v. Argentine, ¶400
111 Schachter, p. 190.
112 Problem p. 23
113 Schneider and Knoll, p. 295
114 Endicott, p. 520;
113. Examples of non-pecuniary relief are particularly rare in investor-state arbitration. In the vast majority of cases, investors request damages, as opposed to non-pecuniary relief. Authoritative scholars state in this regards that, this preference for damages often reflects practical considerations, such as the enforcement difficulties. The State’s court system may be unwilling or unable to enforce an award of specific performance or restitution against its own government.\(^{115}\) What is more, by the well-established practice it has been already affirmed that traditional assumption that non-pecuniary relief constitutes a greater intrusion on state sovereignty than a damages award;\(^{116}\) this later assumption has lead the development of practice with regard to awarding damages and it is submitted that the present Tribunal shall rule pursuant to this well-established line of usage of remedies.

V. IN ALTERNATIVE, CLAIMANT’S CALCULATIONS FOR DAMAGES ARE ILL-SUPPORTED AND SHALL NOT BE RELIED

114. Vasiuki claims that it incurred the damages in the amount of EURO 120,621 due to the Respondent’s alleged arbitrary rejection of granting license to Alfa project and EURO 123,261 for the Beta project that was allowed the feed-in tariff for only two years instead of the promised twelve years. Respondent contends that claim calculation by Vasiuki is ill-supported and inappropriate since calculations ignore that Claimant failed to mitigate its losses (A), inadequately assessed the risks related to investment (B) and the method used for calculation is not appropriate for the non-expropriation case (C).

A. Claimant failed to mitigate its losses

115. Even if the Tribunal finds Claimant is entitled to damages, the damages should be almost entirely reduced because Claimant failed to mitigate its losses.

116. It is the general principle of law that the loss shall be mitigated.\(^{117}\) It has been stated in the Middle East Cement v. Egypt case that regardless of stipulation of obligation to mitigate in BIT, this duty could be considered the part of the general principles of Law.\(^{118}\) By the World Farmers Trading Case, the arbitral tribunal specifically referred to a "legal obligation" on the

\(^{115}\) Schneider and Knoll, p. 295

\(^{116}\) Occidental Petroleum Corp. v. Republic of Ecuador, ¶¶78, 84; Amco Asia Corp. v. Republic of Indonesia, ¶ 202; McLachlan, p. 341

\(^{117}\) WBC Claim, ¶54

\(^{118}\) Middle East Cement v. Egypt, ¶167
part of the claimant to mitigate its damage and established that the claimant was required to adduce evidence of the steps taken to mitigate.119

117. The practice of the UN Compensation Commission establishes the mitigation doctrine, which can limit the recovery of lost profits. Under the suggested doctrine, the claimant may not claim lost profits projected into an indefinite or a long-term period subsequent to the award and can be presumed to mitigate his loss by investing the awarded amount of compensation (calculated up to the date of the award or a limited period beyond that date) and earning profits elsewhere.120

118. In Alan Craig v. Ministry of Energy of Iran, the tribunal stated that the claimant was entitled to damages amounting to a sum due under the contract "less an amount attributable to steps that were taken or that should have been taken by the Craig to mitigate his loss."121

119. Respondent contends that the calculation of claims are way exaggerated since Claimant has ignored the potential mitigation; in particular Claimant requests the costs related to land purchase price and its development, while the facts of the case suggests that the price of the land plot is increased by 10% since its acquisition.122 Accordingly, Claimant may transfer the title over the land plots to someone who wishes to carry out further investment as it is suggested by Expert Report of Juanita Priemo.123

120. Accordingly, we believe the claim is overstated and shall be recalculated pursuant to Annex to Expert Report of Juanita Priemo.

B. Claimant inadequately assessed the risks related to investment

121. Respondent contends that the loss claimed by Vasiuki is caused by Claimant’s bad business judgment and inadequate assessment of risks, accordingly Respondent shall be held only for the relevant part of the loss.

122. In MTD v. Chile, the tribunal reduced the compensation by 50 per cent on account of the Claimant’s failure to undertake adequate due diligence of the risks involved.124 In Azurix v. Argentina, the tribunal decided that the claimant had made an irrational business judgment by

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119 Ram International Industries Case, ¶228
120 Decision N15 of the UNCC, ¶7
121 Alan Craig v. Ministry of Energy, ¶¶280, 289
122 Procedural Order No 2 and 3
123 Expert Report of Juanita Priemo, ¶11
124 MTD v. Chile, ¶¶242 -43
grossly overlapping for the concession and thus attributed the greater part of the loss to this bad judgment rather than to the governmental conduct.\textsuperscript{125}

123. As it is established from Vasiuki Dataset, ALFA project was operating at a heavy loss due to defects in the installation, delays and huge budget overruns.\textsuperscript{126} However, based new amendments to relevant legislative acts and over-optimistic expectations towards sustainable economy and development of energy sector in Baracasia,\textsuperscript{127} Vasiuki undertook substantial financial obligations, reimbursement of which is currently requested by Claimant. What is more, since project ALFA has never been undertaken in response to the incentives proposed by the amendments to Energy Law, we believe the part of the claim related to it shall be considered as ill-supported.

124. In light of above, Respondent submits that inadequate assessment of investment risk constitutes contributory fault to the claims requested by Claimant,\textsuperscript{128} accordingly Respondent shall not be held liable for total amount of compensation requested.

\textbf{C. The method used for calculation is not appropriate for the non-expropriation case}

125. Damages incurred to Alfa and Beta projects are calculated by income based approach, which is known as DCF method in international investment arbitration practice.\textsuperscript{129}

126. The Respondent contends that fair market value is not the appropriate standard of compensation in a non-expropriation case.\textsuperscript{130}

127. Tribunals has rejected the DCF method in Metalclad Corp. v. Mexico, ICSID Case No. ARB(AF)/97/1, Award, (Aug. 30, 2000), Wena Hotels Ltd. v. Egypt, ICSID Case No. ARB/98/4, Decision on Annulment Application, (Feb. 5, 2002), Tecnicas Medioambientales Tecmed, S.A. v. Mexico, ICSID Case No. ARB(AF)/00/2, Award, (May 29, 2003), S. Pac. Props. (Middle East) Ltd. v. Egypt, ICSID Case No. ARB/84/3, Award, (May 20, 1992), and Amoco Int’l Fin. Corp. v. Iran, Partial Award, 15 Iran-U.S. Cl. Trib. Rep. 189 (1987).

\textsuperscript{125} Azurix v. Argentina, ¶¶426-29
\textsuperscript{126} The Uncontested Facts of the Problem, ¶13, Vasiuki LLC Dataset, Annex No. 9, p. 5, 6
\textsuperscript{127} The Uncontested Facts of the Problem, ¶27
\textsuperscript{128} Ripinsky and Williams, section 8.1.
\textsuperscript{129} Simmons, p. 38
\textsuperscript{130} LG&E v. Argentina, ¶¶35-39; PSEG Global Inc. v. Turkey, ¶309; Simmons, p. 226

129. In Compañía de Aguas v. Argentina the Tribunal rejected the calculation based on DCF method stating “the net present value provided by a DCF analysis is not always appropriate and becomes less so as the assumptions and projections become increasingly speculative.”

130. The ILC Articles on State Responsibility disparage the DCF method as relying on “a wide range of inherently speculative elements, some of which have a significant impact upon the outcome (for example discount rates, currency fluctuations, inflation figures, commodity prices, interest rates and other commercial risks).”

131. Considering the above development of practice of arbitration in investment disputes, Respondent requests the present Tribunal to dismiss the calculation based on DCF method since the present case is not related to expropriation and calculation based on this very method cannot be precise.

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131 Compañía de Aguas v. Argentina, ¶8.8.3
132 ILC Articles on State Responsibility, Article 36
PRAYER FOR RELIEF

In light of the above, Respondent respectfully requests Tribunal to declare that:

— Tribunal lacks jurisdiction to hear the dispute;
— Respondent’s action did not amount to a breach of Fear and Equitable Treatment;
— Respondent’s actions are exempt from the liability on the basis of the state of necessity;
— Claimant’s requested remedy is beyond the powers of any tribunal;
— Claimant’s calculations for damages are ill supported.

Respectfully submitted on 26 September 2015

TEAM KEITH

On behalf of Respondent