LONDON COURT OF INTERNATIONAL ARBITRATION

Vasuiki LLC

v.

Republic of Barancasia

MEMORIAL FOR RESPONDENT
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STATEMENT OF FACTS

1. The Republic of Barancasia (“Barancasia” or “Respondent”) and the Federal Republic of Cogitatia (“Cogitatia”) are developing countries (collectively “Contracting Parties”). With the intention of developing inter-state economic cooperation, Barancasia and Cogitatia entered into an Agreement in 1998 for the Promotion and Reciprocal Protection of Investments (“BIT”). The BIT dealt, inter alia, with matters relating to foreign direct investment (FDI), a special treatment to investors as well as a dispute resolution mechanism. The BIT entered into force on 1 August 2002.

2. Subsequently on 1 May 2004, both Contracting Parties acceded to the European Union. Subsequently, the Parties came to be bound by the Treaty of Lisbon\(^1\), which entered into force on 1\(^{st}\) December 2009.

3. Pursuant to their accession to the EU, especially after the entry into force of the Lisbon Treaty, the Respondent made several attempts to bring about a mutual termination of the BIT since the treaty had no place in EU law. The Respondent adopted a resolution requiring its officials to work on the termination of BITs. On 29 June 2007, Barancasia notified Cogitatia of its intention to immediately terminate the BIT with effect from 29 June 2008. Subsequently on 28 September 2007, Cogitatia expressly acknowledged receipt of the Respondent’s communication stating the termination of the BIT.

4. In 2010, a Cogitatian company named Vasiuki LLC (the “Claimant”) connected the solar panels of its Alpha Project to the grid. The project was running at huge cost overruns and was an overall failure.

5. In order to meet EU obligations of renewable energy production, the Respondent enacted the Law on Renewable Energy\(^2\) (“LRE”) to incentivize sustainable production of renewable energy. It also adopted the Regulation on the Support of the Photovoltaic Sector (“PV Regulation”) to empower the BEA to calculate and announce a fixed feed-in-tariff (“FiT”).

\(^{1}\textit{Treaty of Lisbon.}\)
\(^{2}\textit{Annex No. 7.1, Record at p. 38.}\)
The LRE, which came into effect on 1 July 2010, provides that projects of certain specifications shall be entitled to be granted a license for receipt of a FiT for a period of 12 years. Subsequently, the BEA announced a FiT at the rate of EUR 0.44/kWh. The BEA received 7000 applications for such licenses. License holders could also make profits by selling energy to entities other than the State, outside the LRE scheme.³

6. On 25 August 2010, the BEA granted a license to the Claimant’s Project Beta and refused it to its Project Alpha. The BEA stated that the refusal of license to Project was due to inapplicability of the LRE to old projects and specifically due to Alpha’s poor performance. Subsequently on 1 July 2012, Claimant’s next 12 projects, viz. Chi, Delta, Digamma, Zeta, Epsilon, Eta, Fi, Gama, Epsilon, Jota, Kappa, Kopi, were granted a license each.

7. However, in 2011, a ground-breaking technology was developed. This technology drastically reduced the cost of manufacturing solar panels and consequently reduced the costs of development. While this dramatically increased the profitability of the investments made under the LRE, the calculation of FiT by the Barancasian Energy Authority became ineffective and null as the costs had been majorly altered in the negative.

8. While this increased profitability tempted many more investors to invest in Barancasia, the Government of Barancasia realized that the LRE was a mistake and had created a “solar bubble”. An approval of all 7000 new applications would cause a 15% of the GDP to be spent on incentivizing renewable energy production, which would have been more money than those allocated to education in Barancasia. Further, the continuance of the FiT scheme was required to meet the EU targets of renewable energy production. It was imperative for the Respondent to mitigate an impending economic crisis.

9. Therefore, the Respondent decided to bring about a change in the rate of the FiT by amending the LRE. The Respondent also arranged for a meeting with important and representative stakeholders in the industry while deliberating an amendment to the LRE.

³Procedural Order No. 3, at para. 10.
Those invited and present at the meeting were among those investors who have some of the largest projects, thereby covering for the representation of any other smaller entity.

10. Eventually, the Respondent amended the LRE in order to introduce an annual review to for the calculation of the FiT. It is noteworthy that the Respondent only provided for an exceptional situation under which the FiT would be annually revised. It did not revoke the FiT altogether. Subsequently, the BEA calculated the new FiT at the rate of EUR 0.15/kWh in light of the ground-breaking technology which was developed in 2011. The new FiT was made applicable from 1 January 2013, and would continue towards the end of the original 12 year period.

11. Aggrieved by the amendment to the LRE, the Claimant commenced arbitral proceedings before the LCIA on 2 November 2014 alleging inter alia a violation of the Standard of Treatment by Barancasia. In its Response to Request for Arbitration dated 21 November 2014, the Respondent has denied and dismissed each of the Claimant’s claims.
ARGUMENTS

I. THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE DISPUTE

1. Art. 8 of the BIT\(^4\) conferred jurisdiction upon the Tribunal to resolve disputes in connection with an investment from one Contracting state in the territory of the other state. The Tribunal lacks jurisdiction over the instant dispute because the governing BIT has been duly terminated.

2. The treaty has been terminated in two ways. First, the Contracting Parties have terminated the BIT by mutual consent in accordance with Art. 54 of the VCLT (Section A). Second, the BIT suffers from an automatic termination by virtue of Art. 59 of the VCLT after the Lisbon Treaty\(^5\) was effected into force (Section B). In *arguendo*, the Tribunal also lacks jurisdiction because there is a material inconsistency between the Dispute Resolution clause\(^6\) of the BIT and provisions of the TFEU\(^7\) (Section C).

A. THE BIT HAS BEEN TERMINATED THROUGH MUTUAL CONSENT OF THE CONTRACTING PARTIES

3. As of 29 June 2008, the BIT stands terminated by mutual consent in accordance with Article 54 of the VCLT, which is reproduced as hereunder:

   “[T]he termination of a treaty or the withdrawal of a party may take place:
   (a) in conformity with the provisions of the treaty; or
   (b) at any time by consent of all the parties after consultation with the other contracting states.”

4. The Respondent officially communicated to Cogitatia its intention to terminate the treaty on 29 June 2007\(^8\). Cogitatia acknowledged receipt of the said notification on 28 September 2007\(^9\), establishing the fact that Cogitatia was fully aware of the Respondent’s intention to

\(^{4}\) *Barancasia-Cogitatia BIT.*
\(^{5}\) *Treaty of Lisbon.*
\(^{6}\) *Barancasia-Cogitatia BIT, art. 8.*
\(^{7}\) *Treaty for the Functioning of the European Union, art. 267, 344.*
\(^{8}\) *Annex No. 7.1, Record at p. 38.*
\(^{9}\) *Annex No. 7.2, Record at p. 39.*
terminate the BIT. To that extent, Cogitatia’s silence and/or lack of protest amounts to *tacit consent* towards mutual termination of the BIT.

5. It is clear from the wording of Art. 13 that irrespective of the duration of the BIT or its lock-in period, the Contracting Parties are empowered to terminate the treaty at any point of time. This is because:

   “treaty parties are the masters of their own treaty and may *at any time*—contrary to any time-limit or other conditions stipulated by the treaty, and even if the treaty is silent—agree to its termination or *in maiore minus* the withdrawal of a particular state.”

Therefore, the termination of the BIT by mutual consent in the present case is not affected by Art. 13 of the BIT or any of the requirements contained therein.

6. Parties can express their consent in various ways. A treaty can be terminated in accordance with Article 54 by *tacit agreement*, e.g. whereby certain states parties to the treaty propose the termination of the treaty and the remaining states *acquiesce* thereto, and it appears from the circumstances that the other parties are assenting to the situation Cogitatia’s conduct of officially acknowledging receipt of the Respondent’s communication, without contesting the fact of termination itself, amounts to tacit agreement on its part to partake in the termination of the BIT.

7. As a result, the BIT stands terminated as on 30 June 2008, and the Tribunal holds no jurisdiction to hear the present dispute.

8. Claimant may argue that the Respondent did not participate in any consultation with Cogitatia as required under Article 54. It must be emphasized that “consultation” under Article 54 is akin to a *right* for the Contracting Parties to be heard, though not to participate in the decision. Therefore, it is for Cogitatia to exercise its right to be consulted as opposed to an obligation upon the Respondent to initiate consultation and discussion.

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10 *Villiger*, at p. 686.
11 *Villiger*, at p. 415.
12 *Villiger*, at p. 415.
B. THE BIT HAS BEEN AUTOMATICALLY TERMINATED AS PER ART. 59 OF THE VCLT

9. Both Contracting Parties to the BIT also being state parties to the VCLT, Article 59 of the latter is binding on them. Relevant portion of Article 59 is reproduced as hereunder:

“[1.] A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:
(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.”

10. Termination of a treaty by operation of Art. 59 is automatic. It does not require any further procedural conduct on part of the parties. Both Contracting Parties to the BIT have, on a later date, also become Contracting Parties to the TFEU, which is the later treaty in terms of Art. 59.

11. In order to qualify such an automatic termination, there are two more important requirements, both of which have been fulfilled in the present case. First, the BIT and the TFEU relate to the same subject matter (Section i). Second, the treaties are so far incompatible that they cannot be applied together simultaneously (Section ii).

i. The BIT and the TFEU relate to the same subject matter

12. The BIT and the TFEU relate to matters governing Foreign Direct Investment (FDI). On the one hand, the BIT binds both parties to provide for economic cooperation and reciprocal protection of foreign investment. On the other hand, Articles 3, 206 and 207 of the TFEU deal with the establishment of a Common Commercial Policy (CCP), liberalization of FDI policy as well as governance of all commercial aspects of FDI.

13. Art. 3\textsuperscript{13} provides that the EU shall have exclusive competence over the CCP. Subsequently, Art. 207\textsuperscript{14} has included FDI within the CCP after the entry into force of the Lisbon Treaty on 1 December 2009.

\textsuperscript{13} TFEU, art. 3.
\textsuperscript{14} TFEU, art. 207.
A plain reading of the said provisions evinces express inclusion of matters relating to FDI within the exclusive competence of the EU. The Contracting Parties were, moreover, fully aware of this change in competence.

14. A harmonious interpretation of Art. 59 in accordance with Art. 31 of the VCLT would reveal that the requirement of the *same subject matter* does not extend to being *identical*. It is sufficient for the application of Art. 59 that the treaties in question *relate* to the same subject matter.

15. While there has been a mixed interpretation of the scope of EU’s competence, the European Parliament has made it clear that FDI most certainly lies within the exclusive competence of the EU. The EP made it clear in its Resolution dated 6 April 2011\(^\text{15}\) that:

> “the Treaty of Lisbon brought Foreign Direct Investment (FDI) under exclusive EU competence, as enshrined in Articles 3 (1) (e), 206 and 207 of the Treaty on the Functioning of the European Union (TFEU)”.

The Resolution further clarifies that the specific subject of investor protection is also within the scope of its exclusive competence.

16. Exclusive competence over FDI was implicit before the entering into force of the Lisbon Treaty. After the Lisbon Treaty has been effected, this competence over FDI has become expressly exclusive. Not including investor protection [within the scope of EU’s exclusive competence] would have the effect of depriving the clauses including FDI under the CCP of any *effet utile* as nothing would change with the [pre-Lisbon Treaty] practice.\(^\text{16}\) Existing literature as well as the EC substantially clarify that competence on FDI matters includes investment protection.\(^\text{17}\)

\(^{15}\) European Parliament Resolution of 6 April 2011 on the future European International Investment Policy, (2010/2203 (INI))

\(^{16}\) *Woolcock*, at pp. 22-25.

\(^{17}\) *Moerenhout and Perez Aznar Facundo*, at p. 11.
ii. *The BIT and the TFEU cannot be applied together*

17. It is an accepted principle among member states that EU law has supremacy over any national or domestic legislation and that any inconsistency between such national and EU law will lead to the “disapplication” of the national law.\(^{18}\) It is the TFEU which is *lex specialis* in the present case in accordance with the intention of the Contracting Parties. Therefore at the time of joining the European Union and its new legal order in 2004, the Contracting Parties were fully aware of Van Gend Loos\(^ {19}\) and the superiority of EU law established since 1963.

18. Since the EU has exclusive competence towards investor protection, the member states are precluded from applying any inter-parties agreement towards the same. Therefore, simultaneous application of the BIT and the TFEU would lead to an irreconcilable conflict.

19. Therefore, the BIT stands automatically terminated as on 1 December 2009. The Claimant’s first complete investment was made in the Respondent’s territory on 1 January 2010. In any case, the earliest claim or its cause of action for any of the Claimant’s investments dates back to 25 August 2010, the date on which Project Alpha was refused a license. Since no investment of the Claimant was protected under the LRE on or before 1 December 2009, the Claimant has no *locus standi* before this Tribunal as the BIT was terminated before such time; the sunset clause cannot be effected towards the assets in dispute.

20. It is an accepted principle that “the termination of the earlier treaty occurs informally and is implied once the later treaty has been concluded. There is no express termination or modification of the earlier treaty”\(^ {20}\). The termination is by operation of international law; it is automatic. Therefore, neither of the parties to the BIT is required to further follow any procedure laid down in Article 65 of the VCLT to achieve termination. The fact that the Respondent tried to officially communicate such termination cannot invite any adverse inferences against the Respondent.

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\(^{19}\) *Villiger*, at p. 726.
\(^{20}\) *Villiger*, at p. 726.
C. The Dispute Resolution Clause of the BIT is Inapplicable

21. The Eastern Sugar\textsuperscript{21} Tribunal stated that an ISDS Tribunal will not have jurisdiction over a dispute arising from an intra-EU BIT only if the dispute resolution clause of the BIT was materially inconsistent with the TFEU within the meaning of Article 30 (3) of the VCLT.\textsuperscript{22} The relevant portion of Article 30(3) is reproduced below:

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

22. Article 8, which is the Dispute Resolution clause in the BIT, is materially inconsistent with the TFEU in two ways. First, it is in conflict with Article 344 of the TFEU and Article 19 of the TEU (Section i). Second, Article 8 is inconsistent with Article 267 of the TFEU (Section ii).

i. Article 8 of the BIT is in conflict with Article 344 of the TFEU and Article 19 of the TEU

23. Article 19 states that the CJEU has the responsibility to ensure that the TFEU is correctly interpreted.\textsuperscript{23} International agreements are likely to not be applied when they are “likely to adversely affect the allocation of responsibilities defined in the Treaties and the autonomy of the Community legal order, respect for which must be assured exclusively by the Court of Justice pursuant to Article 164 of the EEC Treaty (sc. Article 19 (1) TEU)”.\textsuperscript{24}

24. The ECJ further stated in its opinion that the objective of ensuring uniform interpretation of [EU law] enshrined in Article 19 must be kept intact, and that the Court’s function of reviewing the legality of the acts of the Community institutions and its members must be preserved.\textsuperscript{25} At the very least, the Tribunal will have to interpret the provisions of the TFEU to determine their applicability in the present case. To decide such questions [the

\begin{flushleft}
\textsuperscript{22}Ibid.
\textsuperscript{23}Ibid., summary, para 2.
\textsuperscript{24}Ibid., at para 35.
\textsuperscript{25}Ibid., at para. 11-12.
\end{flushleft}
Tribunal] would clearly “have to rule on the respective competences of the [Union] and the Member States as regards the matters governed by the provisions of the agreement.”

25. In these circumstances, CJEU’s powers cannot be preserved if the Tribunal is allowed to make any interpretation of EU law.

26. It is accepted that the ECJ stated in Commission v Slovakia that it was not for the Court to interpret the provisions of the BIT. However, the ECJ did not only determine whether there was an “investment” according to the Investment Protection Agreement, but also proceeded to conclude from the absence of a denunciation clause that

“in so far as a termination of the contract at issue would have the consequence of depriving ATEL of the remuneration provided for by that contract in return for its financial contribution … such a measure would impact adversely on ATEL’s rights and would thus have the same effect as expropriation within the meaning of Article 6 of the Investment Protection Agreement.”

27. As Von Papp puts it:

“[t]he ECJ’s conclusion that there is an investment covered by the Investment Protection Agreement and that there would otherwise be a breach in form of an indirect expropriation can only be, and is in fact, based on an interpretation of typical notions of international investment law. Therefore, in short, even though the ECJ said that it was not interpreting the Investment Protection Agreement, this is in fact what it was doing.”

As a result, it cannot be argued that the CJEU does not have the jurisdiction or the power to hear disputes arising from BITs.

28. The Tribunal is further restrained from exercising jurisdiction over this dispute because both Contracting Parties are obligated under Article 344 to not submit this dispute before the Tribunal. Article 344 reads as follows:

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26Ibid., at para. 34.
27European Commission v Slovak Republic, at para 40.
30Von Papp, at p. 12; European Commission v Slovak Republic, at para 50.
“[M]ember States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.”

29. The ECJ categorically stated in MOX Plant\(^{31}\) that member states are restrained by virtue of the said provision to settle disputes through any other dispute settlement mechanism, including by arbitration.

30. A harmonious interpretation of Article 344 in accordance with Article 31 of the VCLT will support the proposition that Article 344 binds each member state in its individual capacity. This means that no member state must submit a dispute requiring interpretation of the Treaties to an Arbitral Tribunal regardless of the nature of parties to the dispute. It is true that the said judgment was in the context of an inter-state arbitration between the UK and Ireland. Subsequently, the Court has also stated in European and Community Patents Courts\(^{32}\) that Article 344 is not applicable to disputes between individuals.

31. However, the ECJ has at no point has stated that the application of Article 344 is exclusively limited to inter-state disputes. This proposition has been supported and aptly summarized by Konstanze Von Papp in the following way:

> “[W]hile there is conclusive authority for the suggestion that Article 344 TFEU applies to disputes between Member States there is as yet no certainty regarding the question of whether the reach of Article 344 TFEU is limited to disputes between Member States. In other words, Article 344 TFEU does not apply to disputes between individuals (in the fields of patents), but it may apply to investor-to state arbitration.”\(^{33}\)

32. Respondent is, therefore, precluded by Article 344 from submitting this dispute to the Tribunal as is required under Article 8. Since the TFEU is the later treaty, Article 8 must be adjudged as inapplicable to the present dispute.

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\(^{31}\)Commission v. Ireland.

\(^{32}\)CJEU opinion, at para 89.

\(^{33}\)Von Papp.
ii. Article 8 of the BIT is materially inconsistent with Art. 267 of the TFEU.

33. Article 8 of the BIT is in conflict with Article 267 of the TFEU because it takes away the power of National Courts to interpret, and subsequently to refer a question of interpretation to the CJEU. The relevant portion of Article 267 is reproduced below:

“[T]he Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;
....

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.”

34. Pursuant to the Nordsee case, the ECJ has held that Commercial Arbitration Tribunals are a form of private, and not state, dispute settlement and thus do not qualify as “tribunals” entitled to request preliminary rulings.

35. The ECJ delved on a similar question in its Opinion with regards to the setting up of uniform European and Community Patents Courts. While dismissing the argument under Article 344 for want of state parties in disputes, the Court held the Draft Agreement was incompatible with Article 267 because of the non-availability of the preliminary reference proceeding by the planned patent courts. The Court went on to hold that a separate EU Patent Court system will:

“[D]eprive courts of Member States of their powers [provided in Article 267] in relation to the interpretation and application of European Union law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts, and, consequently, would alter the essential character of the powers which the

34 Nordsee Deutsche Hochseefischerei, at 166.
35 Opinion 1/09, CJEU, at para 83.
36 Opinion 1/09, CJEU, at para 89.
Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law.”

It is averred that Art. 8 is inconsistent with Article 267 of the TFEU since it takes away the power of National Courts to decide over these matters.

36. While it is accepted that the Frankfurt Court dismissed the above argument in Eureko while stating that the member state Court was not bound to refer the question of interpretation to the ECJ, a Court of final instance, on the other hand, is under a general obligation to make such a reference for a preliminary ruling. This means that at least member state apex Courts are under an obligation to make a referral to the ECJ.

“Since the Eureko case could and, in fact, did go on appeal to the German Federal Court (Bundesgerichtshof), the OLG Frankfurt was correct in concluding that it was under no formal obligation to make a preliminary reference”.

37. Concurrently, Prof. Reinsch argues that as long as the envisaged dispute settlement system offers a possibility to allow preliminary references, it is compatible with the CJEU’s claim to have the final word on the interpretation of EU law.

38. However, the facts in the instant case are materially different from those in Eureko. In Eureko, the seat of arbitration was Germany. Therefore, the Frankfurt Court could afford to state that while the member Court was not obliged to make a referral to the ECJ, it recognized the fact that higher Courts in Germany will be able to do the same. In other words, referral to the ECJ was still possible because the investor-state dispute between Eureko and the Republic of Slovakia was eventually brought before a Court of a member state of the EU.

39. However, this analysis will not apply when the seat of arbitration between the Contracting Parties is set outside the EU. To quote Konstanze Von Papp’s illustration:

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37 Opinion 1/09, CJEU, at para 89.
38 Von Papp, at p. 9.
39 Slovak Republic v. Eureko, BGH Az. III ZB 37/12.
40 Von Papp, at p. 17.
41 August Reinisch, at 77.
"[I]n a scenario where the seat of arbitration is a Non-EU State, even if the court at the seat of the arbitration gets involved, this will not be an EU Member State court. To take again the Eureko case as an example: had either Eureko or the Slovak Republic insisted on a more neutral forum, detached from the EU and any related issues, they might have agreed on, for example, Switzerland as place of the arbitration. The challenge of the Partial Award would then not have reached the OLG Frankfurt nor indeed any other EU Member State court, thus excluding the possibility of reviewing and referring any questions of EU law to the ECJ."42

40. It is noteworthy that the seat of arbitration in the instant dispute is Dunedin, Caledonia. Caledonia is not bound by the TFEU because it is not an EU Member State. There exists no possibility that a question of interpretation of the TFEU will eventually fall within the scope of EU Member State Courts, much less of the ECJ. Consequently, Article 8 of the BIT has allowed the Contracting Parties to, and they have in fact, excluded the possibility of reviewing and referring any questions of EU law to the ECJ.43

41. To reiterate, Art. 8 of the BIT is directly in conflict with Article 267 of the TFEU to the extent that the application of the former will completely wipe out the possibility of the latter’s application. The dispute resolution clause of the BIT is therefore inapplicable to the present case; thereby depriving the Tribunal of its jurisdiction to hear the present matter.

42 Von Papp, at p. 16.
43 Von Papp, at p. 16.
II. ARGUMENTS ON MERITS

42. It is denied that the Respondent has committed any substantive breach of the BIT. Art. 2 of the BIT has been invoked by the Claimant in order to allege breach of the *Fair and Equitable Treatment* standard, as well as violation of the *Umbrella* clause as provided in Art. 2 (3) of the Treaty. Claimant’s averments with respect to the FET standard are dealt with in subsequent paragraphs in Section A, while the alleged breach of the *Umbrella* clause is dealt with in Section B. Exemption from all liability is invoked by the Respondent also on the grounds of “Essential Interests” and the defence of “Necessity”, which are respectively dealt with in Section C.

A. RESPONDENT HAS ACTED FAIRLY AND EQUITABLY

43. The FET clause of the Cogitatia-Barancasia BIT provides that:

> Investments of investors of either Contracting Party shall at all times be accorded fair equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.\(^{44}\)

44. The tribunal may rule out, at the outset, any possibility of breach of the ‘Full Protection and Security’ (FPS) obligation. An overwhelming majority of tribunals and scholars agree that the FPS clause is not meant to cover just any kind of impairment of an investor’s investment, ‘but to protect more specifically the physical integrity of an investment against interference by use of force.’\(^ {45}\) The facts of the present case disclose no possibility of any such violation and may be ruled out at the outset.

45. In its discussion of the threshold to constitute a breach of the FET standard, the *S D Myers* tribunal concluded that:

> “…only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.”\(^ {46}\)

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\(^{44}\)Annex I, BIT, art. 2 (2).


\(^{46}\)S.D. Myers, Inc. v. Canada, at para 408.
46. A breach of the FET standard must be determined in light of all facts and circumstances relevant to each case. A key circumstantial consideration in every case, regardless of the FET standard applicable, is the deference that must be made to a host state’s sovereign right to legislate and regulate in the broader public interest. The difference between an autonomous treaty standard and the customary minimum standard is, therefore, rendered more apparent than real.

47. In any case, regardless of whether an autonomous standard or the international minimum standard is applied, Respondent has not violated the substantive protections of the BIT. Specifically, Respondent’s acts (i) did not violate Claimant’s legitimate expectations, (ii) were not arbitrary, and (iii) did not lack transparency.

i. **Respondent did not violate Claimant’s legitimate expectations**

48. Certain basic expectations of the investor find a measure of qualified protection under the FET standard. The *Saluka* tribunal, in analyzing the entrails of legitimate expectations, stated that:

‘the scope of the Treaty’s protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors’ subjective motivations and considerations. Their expectations, in order for them to be protected under the FET standard, ‘must rise to the level of legitimacy and reasonableness in light of the circumstances.’

It is averred that the expectations of the Claimant fall far short of the above threshold.

(a) **Claimant’s expectations were neither reasonable nor legitimate**

49. The expectations on which Claimant purports to base its claim for breach of the FET standard are –

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47 *F. A. Mann*, at para 244.
48 *Saluka Investments BV (The Netherlands) v The Czech Republic*, at para 291.
50 *Saluka Investments BV (The Netherlands) v The Czech Republic*, at para 304.
That the LRE would remain unaltered despite a drastic change in circumstances; 
(ii) That the tariff under the LRE would, under no circumstances, be revised responsibly in light of changing technology.

Such expectations are neither legitimate nor reasonable; they fail to qualify the protection under the BIT.

50. An expectation is legitimate if the investor received an explicit promise or guarantee from the host-state, or if implicitly, the host-state made assurances or representations that the investor relied on in making the investment.\(^{51}\) The only condition under which an expectation - that the LRE would remain unaltered notwithstanding surrounding circumstances- would legitimately arise, would be if a representation had been made in the form of a stabilization clause.\(^{52}\)

51. Potesta argues that in the absence of a stabilization clause, ‘to imply, without qualifications, a requirement of stability within fair and equitable treatment would place obligations on host states which would be ‘inappropriate and unrealistic’.\(^{53}\)

52. The BIT contains no stabilization clause, or any other provision to the tune thereof. It is a settled position that an FET clause by itself does not act as a stabilization clause. In such light, any expectation of a regulatory chill is not legitimate.\(^{54}\)

53. Furthermore, the licenses granted tethered to the RSPS which spoke of a ‘general’ fixed FiT and which, following the amendment of Art. 4 of the LRE, was subject to an annual review. Therefore, the license only guaranteed ‘a fixed feed-in tariff’, not a feed-in tariff of a specific value.

54. In examining the reasonableness of expectations, tribunals should consider whether the investor has been diligent and prudent and has taken into account all circumstances

\(^{51}\text{Parkerings-Compagniet AS v. Lithuania, at para 331.}\)
\(^{52}\text{Saluka Investments BV (The Netherlands) v The Czech Republic, at para 304.}\)
\(^{53}\text{Michele Potestà, at para 30.}\)
\(^{54}\text{EDF (Services) Limited v Romania, at para 218-219.}\)
surrounding the investment. Barancasia, like the Claimant’s home state, has had a pattern of developing rapidly and implementing a wide range of social and economic reforms. The expectation of a frozen legal regime cannot be held as a reasonable one.

55. Additionally, the policy of an 8% rate of return from the feed-in-tariff was made public and the expectations of the investor must be informed by all such public information which would be gathered in the course of due diligence. The central element in the formation of expectations on the part of investors would be the rate of return on investments, not an absolute number, notwithstanding the context, such as €0.44/kWh.

(b) **Respondent has exercised its regulatory powers fairly and equitably**

56. Weighing the investor’s expectations against the state’s inherent power to legislate and regulate, several tribunals have held that, in the absence of a stabilization clause, the investor may legitimately expect that the state would act fairly, equitable and reasonably in the exercise of its legislative power.

57. Further, the Tribunal in *Toto v. Lebanon*, stated that in the absence of a stabilization clause, changes in the regulatory framework would be found to breach the FET standard only if it is drastic or discriminatory.

58. It is noteworthy that the ground-breaking technology in 2011 caused an unforeseeable number of applicants for license under the LRE as well as a significant increase in the profit margin for PV investors under the LRE. In order to address the financial repercussions of such a situation, the state amended Art. 4 of the LRE to provide that:

“The feed-in tariffs set by the Barancasia Energy Authority may be reviewed annually for adjustment taking into account the costs of the best available technology”.

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55 *MutisTéllez*, at para 30.
56 Parkerings-Compagniet AS v. Lithuania, ICSID Case No. ARB/05/8, Award (11 September 2007), 333
58 *Toto ConstruzioniGeneraliS.p.A. v. Lebanon*, at para 244.
59. This amendment is not drastic because it does not alter the basic feature of the licensing regime which was the fixed feed-in tariff. It is not discriminatory in any manner because the ‘general tariff’ would apply uniformly to all licensed projects. The amendment is reasonable because it provides no room for arbitrariness or even wide discretion; it provides a singular and objective criterion for such review.

60. The BEA, likewise, acted fairly and non-arbitrarily in implementing the annual review. The new tariff would still allow energy companies to obtain an annual average return rate on their investment that was at least 8%, which was the originally intended return. The AES tribunal found that it was a perfectly valid and rational policy objective for a government to address the issue of windfall or luxury profits.59

61. For the above reasons, there has been no breach of legitimate expectations of the Claimant.

   (c) Respondent did not violate fair procedure

62. The Thunderbird tribunal held that administrative irregularities ‘must be grave enough to shock a sense of judicial propriety’. The tribunal also stated that such a claim should be tested against the standards of due process and procedural fairness applicable to administrative officials because ‘administrative due process requirement is lower than that of a judicial process’.60

   ii. Respondent’s acts were not arbitrary

63. The FET obligation has been held to protect against arbitrariness that is ‘manifest’ and ‘severe’.61 There must be a ‘complete lack of transparency in an administrative process’.62 Such a guarantee is violated by measures that cause damage to the investor, involve a wilful

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59AES v. Hungary, at para 10.3.31, 10.3.34.
60International Thunderbird Gaming Corporation v Mexico, at para 200.
62Waste Management v. Mexico, at para 98.
disregard for due process or are found to have been made purely on the basis of prejudice or bias without a legitimate purpose or rational explanation.\textsuperscript{63}

64. Rational explanations underlie both, (i) the denial of a license to project Alpha as well as (ii) the process of consultation of stakeholders while amending the LRE. Respondent’s acts, therefore, are not arbitrary.

65. Art. 5 of the LRE sets out the criteria for renewable energy projects eligible for a license in the following words:

“Issuance of Licenses for the Development of Capacity of Electricity Production from Photovoltaic Power Plants:

\textit{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.”

66. Alpha was an existing project when the Claimant applied for a license under the LRE; the only way it could be eligible was if its capacity was to be developed.\textsuperscript{64} However, the feed-in tariff scheme was only available for projects that did not exceed 30KW.\textsuperscript{65} Alpha was already at 30KW capacity.\textsuperscript{66} As a result, it would either meet the condition of developing its capacity, or the condition of not exceeding 30KW, but never both. Since the two criteria must be cumulatively fulfilled, and not disjunctively so, Alpha was denied a license.

67. To argue that Alpha’s operational capacity was being developed at the rate of 2.2\% per year would be incorrect. A perusal of Art. 3 of the RSPS makes it clear that ‘capacity’ means ‘photovoltaic capacity’, and not an operational parameter. Therefore, the denial of a license to Alpha was in accordance with the letter of the law which was readily apparent and not arbitrary.

\textsuperscript{63}UNCTAD, FET, at 16.
\textsuperscript{64}Annex 2, LRE, art. 5.
\textsuperscript{65}Annex 3, Record, art.1.
\textsuperscript{66}Expert Opinion of Kovic, Annex 1 – A, Record.
67. Further, the amendment to Art. 4 of the LRE was brought about after due consultation with stakeholders from the concerned industry. No investor may be asked to be consulted as a matter of right, nor is a state obligated to consult during the process of law making. Barancasian law grants the National Parliament broad discretion in consulting the public during the course of legislative procedures. Barancasian Parliamentary Committees are not bound by any rules regarding their choice of stakeholders to invite to take part in the consultation.68

68. Claimant’s share in Barancasia’s renewable energy market is very small.69 Out of the 6000 licenses that had been issued under the LRE to Barancasian and foreign investors, most relate to projects of much greater scale and operated by large international companies with extensive experience in solar energy.70 In the consultative hearings on amendments to the LRE, the Energy Committee invited both national entrepreneurs and foreign investors having in total a significant share of the local market of renewable energy.71 Therefore, even if the due process requirement extends to legislative procedure, Respondent’s acts were not without a rational explanation.

iii. **Respondent’s acts were transparent**

70. Once an act is proven to be non-arbitrary and held as not in breach of legitimate expectations, there is no independent requirement of transparency under the FET. Tribunals and scholars alike have held that possible elements of FET, such as transparency, may not be said to have materialized into the content of FET with a sufficient degree of support.72 Transparency has been held not to be ‘an end in itself’, and therefore not an independent standard.73 While transparent conduct and consultation with the investor is a good practice, an ‘inflexible and unrealistic approach to these issues’ would in effect transfer the risk of operating in a developing country environment from an investor to the host State.74

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67 Uncontested facts 34  
68 Procedural Order No. 3, No. 5.  
69 Procedural Order No. 3, No. 18.  
70 Procedural Order No. 3, No. 13.  
71 Procedural Order No. 3, No. 5.  
72 UNCTAD, art.63  
73 UNCTAD, art 72.  
74 Newcombe and Lluis Paradell, at 237-238.
71. Further, no claim for violation of due process, on grounds of arbitrariness or non-transparency, may be entertained when the investor has not even reasonably engaged in the provided process. Ruling on a similar alleged breach of the FET standard, the tribunal in Vivendi concluded that:

“…..Vivendi should first have challenged the actions of the authorities in its administrative courts, any claim against the Argentine Republic could arise only if Claimants were denied access to the courts of Tucumán, denied procedural justice or denied of substantive justice.”

Since Vivendi failed to seek relief from the Tucumán administrative courts and since there was no evidence before the Tribunal that these courts would have denied Vivendi procedural or substantive justice, the Tribunal found that there was no basis on this ground to hold the Argentine Republic liable under the BIT.

72. Claimant’s license was denied on 25 Aug 2010 and the present claim only instituted in 2014. Foreigners are eligible to file claims in Barancasia’s administrative courts, which have jurisdiction to resolve disputes involving a state entity or government agency. However, the Claimant did not file any such claim. Nor has any evidence been adduced that such courts would have denied Claimant substantive or procedural justice. Therefore, it is averred that there has been no breach of the FET standard by denying a license to Alpha.

B. RESPONDENT DID NOT VIOLATE THE UMBRELLA CLAUSE IN ART. 2(3) OF THE BIT

73. Art. 2 (3) of the BIT provides that:

Each Contracting Party shall observe any other obligation it may have with regard to a specific investment of an investor of the other Contracting Party.

It is averred that the Respondent did not violate any obligation it had with regard to a specific investment of Claimant’s.

75 CompanieGénérale des Eaux (Vivendi) (France) v. Argentine Republic.
76 CompanieGénérale des Eaux (Vivendi) (France) v. Argentine Republic.
77 Procedural Order No. 2, No. 23
74. Umbrella clauses primarily and generally state that certain contractual breaches by the state would also trigger claims for a treaty breach. The clause only covers certain types of obligations, and only protects against certain kinds of breaches of those obligations.

75. With respect to the obligations that an umbrella clause takes within its sweep, it has been held that only obligations of a specific character are covered in its scope; the SGS v. Philippines tribunal, interpreting a clause identical to Art. 2 (3) of the BIT, observed that while the phrase ‘any obligation’ seems broad at first, it was qualified by a reference to ‘a specific investment’. The tribunal concluded that only specific obligations towards specific investments would be covered, and not obligations of a general nature, such as those under legislative or regulatory regimes.

76. Scholars are critical of the proposition that a state’s municipal law can be referred to as an ‘obligation’ or ‘commitment’. Prof. Reinisch has opined that such this construction could have the consequence of depriving a number of protections under the BIT of their importance. In line with this view, no tribunal has so far accepted that obligations under municipal law are covered under an umbrella clause.

77. Furthermore, even if the Tribunal were to find that the provisions of the LRE are indeed obligations’, they do not qualify as ‘specific obligations’. Since Art. 4 of the LRE is not an ‘obligation’ covered under the umbrella clause, its amendment does not breach Art. 2 (3) of the BIT.

78. The Tribunal in Micula, reiterating the Philippines view, stated that an umbrella clause does not ‘change the proper law of the obligation to international law’ and that the question of

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78 Schreuer, at 295.
81 SGS Société Générale de Surveillance SA v Philippines, at para 121.
82 August Reinisch, at 25.
83 August Reinisch, at 25.
whether an obligation has arisen depends on the law governing that obligation.\textsuperscript{84} In the words of the Tribunal:

\ldots that in order to be afforded the protection of the BIT, the obligation must qualify as such under its governing law. It is the Claimants’ burden to prove that Romania’s undertaking amounts to an obligation under Romanian law, and that the content of that obligation is such that Romania’s actions have breached it.\textsuperscript{85}

79. In this case, the governing law is Barancasian law, and the burden is on the Claimant to adduce evidence demonstrating that the licenses granted to the projects under the LRE amounted to an ‘obligation’ under Barancasian law, and that Respondent’s actions have breached it, consequently constituting a breach of the umbrella clause.

80. Failure to meet such a burden must result in a dismissal of the claim relating to breach of the umbrella clause under Art. 2 (3).\textsuperscript{86}

\textbf{C. Respondent’s actions are exempt under both the Essential Security Provision of the BIT as well as the Customary International Law defense of Necessity}

81. Even in the event that the Tribunal considers that the Respondent has breached the FET standard under Article 2 of the BIT, it is averred that its actions are protected under the BIT as well as under principles of customary international law. To reiterate, the quantum of FiT provided by the Respondent under the LRE became unsustainable for its economy after the development of a ground-breaking cost-effective technology. The actions of the Respondent became necessary and are, therefore, exempt for two reasons. First, the Respondent’s actions are exempt under the Essential Security clause under Article 11 of the BIT (Section i). Second, the Respondents actions are exempt under the customary international law defence of necessity (Section ii).

\textsuperscript{84} Micula and Ors v Romania, at 417.
\textsuperscript{85} Micula and Ors v Romania, at 449.
\textsuperscript{86} Micula and Ors v Romania, at 459.
i. The Respondent’s Actions are exempt under Article 11 of the BIT

82. Art. 11 of the BIT was incorporated in the BIT to allow the parties to derogate from the BIT when their essential security interests were at risk. Art. 11 provides:

“[N]othing in this Agreement shall be construed to prevent either Contracting Party from taking measures to fulfil its obligations with respect to the maintenance of international peace or security.”

83. In the present set of facts, the Respondent is entitled to take the benefit of this provision for two reasons. First, the Respondent’s economic crisis qualifies as an essential security interest within the meaning of the BIT (Section a). Second, the Respondent is entitled to interpret Article 11 of the BIT because it is self-judging in nature (Section b).

(a) An ‘Economic Crisis’ qualifies as an Essential Security Interest

84. Tribunals have previously held that an economic crisis falls within the scope of “essential security”. It is averred that, in the same light, Barancasia’s economic crisis qualifies as an essential security interest. Furthermore, Respondent’s compliance with the 2020 EU Economic and Renewable Energy obligations by protecting its electricity supply qualifies as one falling under the purview of “international security”.

85. Respondent’s measures were undertaken to fulfil its obligations with respect to the maintenance of international fiscal security. EU members are legally obligated to implement a fiscal policy that sets limits on government deficit and debt according to the Stability and Growth Pact and Articles 121 and 126 of the TFEU. The Respondent had no other alternative, but to reduce the amount of FiT in order to adhere with the EU mandated borrowing limits. Therefore, the Respondent cannot be liable for measures which were in line with its obligations of maintaining EU fiscal security.

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87 BIT, Art. 11, at p. 29.
88 See, Oil Platforms, ¶ 73; CMS Gas Transmission Company, ¶359-360; LG&E Energy Corp, ¶ 217
(b) **Article 11 is self-judging**

86. A provision is *self-judging*, when the Contracting Parties are at a liberty to determine whether a particular situation qualifies as an essential security. Article 11 of the BIT, it is averred, is a self-judging provision. The BIT does not define what constitutes as “necessary” for the purpose of application of Article 11. Furthermore, the absence of the phrase ‘necessary for’ signifies the parties’ intention to allow them subjective appraisal of what measures they consider appropriate. Thus, Respondent’s impugned measures are not subject to judicial scrutiny.

   ii. **Respondent’s actions are exempt under the customary international law defense of necessity.**

87. Respondent’s actions in the then prevailing circumstances meet the requirements of the customary international defence of necessity. This principle and its requirements have been codified by International Law Commission in Article 25 of its Draft Articles on State Responsibility (“ILC Draft Articles”). The following requirements under Article 25 have been acknowledged as binding under customary international law:

   (i) The measures were the only way to avoid a grave and imminent peril; and,
   (ii) The measures don’t impair other states’ or international community’s essential interests. The measures were not exempt if:

      (a) The obligation excludes the possibility of invoking the necessity defence; or,
      (b) If the state contributed to the situation of necessity.

In order to successfully claim the necessity defense, the Respondent is obligated to satisfy the requirements under Article 25 of the ILC Draft Articles. It is averred that the Respondent has successfully satisfied all the four requirements.

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90 UNCTAD, *The Protection of National Security in International Investment Agreements*, at p. 94.
91 See e.g., Case Concerning Gabčíkovo-Nagymaros Project, ¶ 32.
(a) The Respondent did not contribute to the Economic Crisis

88. The Respondent can successfully employ the necessity defence because it has not contributed to its economic and political crisis. States cannot be said to have been contributed to their crises if there was a struggle in separating exogenous and endogenous factors, which acted together in causing the crisis.94 The ground-breaking technology, which led to tremendous cost cuts for PV Plant owners, was completely an exogenous factor. The Respondent could neither have foreseen the advent of the ground-breaking technology and nor could it have had any control over it.

(b) Reduction in the Fixed Feed in Tariff was the only way for the Respondent to avoid a “Grave and Imminent Peril.

89. A reduction of the amount of the FiT was the only way for the Respondent to mitigate the prevailing economic crisis. After the advent of the ground-breaking technology in 2011, the costs of manufacturing solar panels were drastically reduced. Consequently, the profitability of investments made under the 0.44 EUR/kWh tariff increased dramatically.95 Barancasian public officials admitted that guaranteed profits for 12 years amounted to unfair windfall and that the whole renewable energy support scheme was unsustainable.96

90. The main objective of the LRE is to ensure “sustainable development” of the use of renewable energy sources and to encourage its production and development of related technologies.97 The renewable energy scheme under LRE with the pre-2013 feed-in tariff was not sustainable as it led to disproportionate manner of development. Therefore, it was necessary for the Respondent to alter the specific FiT in accordance with the LRE to preserve its object.

91. Reduction in the rate of the FiT was necessary to allow sustainable development of the use of renewable energy within the viability of Barancasia’s economic capacity, where Barancasia

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94 CMS Gas Transmission Company, ¶¶ 235-236.
95 Facts, ¶ 25 at p. 22.
96 Facts, ¶ 28-30, at p. 22.
97 LRE, Art. 1, at p. 31.
would need to achieve at least 20% share of renewable energy by 2020. The requirement of establishing the cause and effect relationship has been duly satisfied as the effect on the Respondent’s finances and EU commitments is a direct result of the grant of the old rate of FiT, i.e. EUR 0.44/kWh.

92. The term “only way” refers to overall actions rather than specific measures, and as long as they are held to be necessary and legitimate, this requirement is satisfied. Furthermore, the course of action taken by the State of Barancasia in order to protect its essential interest was the only available means for resolving the peril.

(c) The Respondent has not harmed any other parties’ Essential Interests

93. The Respondent has not harmed the essential interests of any other state, and/or the international community as a whole. There is no evidence to adduce the same.

94. As far as investors may be concerned, the Respondent has taken all possible steps to satisfy all stakeholders. For instance, the BEA calculated a new FiT keeping in mind the earlier rate of return on investment (ROI) at 8%. Consequently, the newly announced FiT still allows energy companies an ROI of at 8%.

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99 SAUR International S.A., ¶315.
100 Continental Casualty Company, ¶¶ 227-230.
101 Israeli Wall Advisory Opinion.
102 Procedural Order No. 2, Clarification No. 27, Record at p. 59.
III. Remedies

A. Claimant’s Prayer for Specific Performance Should Not Be Granted

95. The Claimant has prayed before the tribunal to direct Respondent to:

   a. Repeal the amendment to Article 4 of the LRE; or
   b. To continue to pay Vasiuki the €0.44 feed-in tariff for 12 years

Claimant’s prayer should be rejected by the tribunal on the ground that such remedies run contrary to the text of the BIT, EU Law, settled principles of arbitral jurisprudence as well as the principles of customary international law.

i. Restitution is not an envisaged remedy for the present claims under the BIT

96. The tribunal draws its powers, including those to decide on remedies, from what has been conferred upon it by the contracting States. The contracting parties did not intend for restitution to be awarded as a remedy for breach of the FET standard.

97. The text of the BIT makes it clear that restitution is envisaged as the appropriate remedy only under extreme circumstances, such as those outlined in Art. 4 of the BIT:

   “[1] Where investments of investors of either Contracting Party suffer losses owing to war, armed conflict, a state of national emergency, revolt, insurrection, riot or other similar events attributable to authorities in the territory of the other Contracting Party, such investors shall be accorded by the latter Contracting Party treatment as regards restitution, indemnification, compensation or other settlement…”

Facts of the instant case disclose no instance even remotely suggesting losses owing to use of force imputable to the state authorities as envisaged above.

98. While paragraph [2] of Art. 4 does enlist restitution as a possible remedy for losses during ‘the state of necessity’, the reference is qualified by the words ‘in any of the events referred to in’ paragraph [1], thereby limiting the application of Art. 4 to only grave instances of use of force attributable to the state authorities.
ii. *Infringement of Respondent’s sovereignty*

a. Ordering specific performance, in investor-State disputes, is a greater infringement of State sovereignty than an award granting compensation. Furthermore, restitution which presupposes the cancellation of the legislative measures is a particularly drastic intrusion on the sovereignty of the States.\(^{103}\) Such a remedy is rare and when made, is always optional.\(^{104}\)

b. Art. 8 of the BIT requires that the award shall be enforceable in accordance with the domestic legislation. It has been held, however, that an award ordering an amendment of a piece of legislation is not compatible with this provision, since such an award would not be ‘enforceable in accordance with the domestic legislation.’\(^{105}\)

c. While Claimant may argue that the submission of a dispute to arbitration amounts to a waiver of sovereignty, such a waiver is limited to the powers conferred upon the tribunal which in this case does not include restitution for breach of FET. Besides, a restrictive approach to sovereign immunity only applies to commercial transactions but not in cases of an act of state.\(^{106}\).

d. For these reasons, scholars and tribunals alike, support the view that compensation is a more appropriate remedy than restitution for a breach of FET in light of state sovereignty.\(^{107}\)

iii. *No case for restitution under customary international law*

103. The law precludes restitution if it causes disproportionate burden to the state. It must also be balanced on the reasonableness of the circumstances.\(^{108}\)

104. If the pre-amendment law is reinstated, then the State will be spending 15% of its Annual budget on subsidizing PV investments under the LRE, which would cause it to exceed its

\(^{103}\) *Libyan American Oil Company v Libya*, at 140.

\(^{104}\) *Antoine Goetz et consorts v. République du Burundi*.

\(^{105}\) *BP Exploration Company (Libya) Limited v. Libya* at p. 351.

\(^{106}\) *Victory Transport, Inc. v. Comisaria General*, at 934.

\(^{107}\) *Felipe Mutis Téllez* at 434; *Elizabeth Snodgrass*, at 51.

\(^{108}\) *Yearbook of the International Law Commission*, at pp. 96-98.
borrowing limits under EU law and sink into debt. The economic standing of Barancasia should be considered.\textsuperscript{109}

105. Moreover, according to customary international law, juridical restitution is not required if the liability can also be atoned by a pecuniary remedy.\textsuperscript{110}

\textbf{iv. \textit{Contravention of EU Law}}

106. Art. 107 of the TFEU prohibits member states from providing any aid that:

i) Is imputable to the state;

ii) Selectively favours certain undertakings; and

iii) May disrupt competition in the internal market.

A selective grant of a higher tariff to only the Claimant would fall squarely in this description.

107. Tribunal awards in recent times have been declared illegal state aid and are facing enforcement problems.\textsuperscript{111} Therefore such a remedy must not be granted when pecuniary alternatives are available.

\textbf{v. \textit{Arbitral Jurisprudence weighs against grant of specific performance}}

109. Tribunals have found that restitution was the appropriate remedy only in cases involving:

(i) A breach of a State contract with a stabilization clause. No such clause is present in the present case.\textsuperscript{112}

(ii) In cases of unlawful taking.\textsuperscript{113}

110. A multitude of decisions have held that compensation has been the most usual remedy sought by investors and awarded by international investment arbitration tribunals as remedy for the breach of the FET standard.

\begin{footnotesize}
\textsuperscript{109}Himpurna California, ¶ 318.
\textsuperscript{110}J. H. W. Verzijl at 744.
\textsuperscript{111}Implementation of Arbitral award Micula v Romania
\textsuperscript{112}The Government of the State of Kuwait v The American Independent Oil Company.
\textsuperscript{113}Phillips Petroleum Co. Iran v. Iran et al., at 79.
\end{footnotesize}
111. In any event, the wrongful State is entitled to refuse specific performance and to opt for compensation instead.\textsuperscript{114}

\textbf{B. INCORRECT CLAIM OF DAMAGES}

112. Causation is a requisite element to assess damages.\textsuperscript{115} There needs to be a causal relationship between a wrongful act and any harm caused. Tribunals have ruled in the negative where such causal relationships were found absent or too remote.

113. Uncertainty of future incomes requires appropriate risk assessment and the discount rate applied should be commensurate to the risk. If compensation is permitted at a low discount rate for a high risk project, the claimant is essentially allowed to swap a high risk high return investment for a low risk high return investment, a form of double recovery that would be unfair to the compensator.

\textit{i. Investment Projects without extensive performance}

114. Thomas Walde in the chapter on Compensation, Damages and Valuation notes that projects that are either due to start or at a nascent operative stage with very limited performance record, tend to use very optimistic projections in its ‘business plans’. Therefore as a general rule, projects with limited operative history much be typically valued based on book value as opposed to using financial projections. To be compensated as a ‘going-concern’ with at least a co-application of Net Present Value/Discount Cash Flow (NPV/DCF) method, there has to be ‘sufficiently long time to establish a performance record’.\textsuperscript{116}

\textit{ii. Duties of Investors}

115. One of the duties of an investor is to be fully aware of the investment risks prior to making an investment and to have realistic expectations regarding profitability of such investments. Any loss out of inaccurate assessment of risks is to be borne by the investor.

\textsuperscript{114}Mr. Franck Charles Arif v. Republic of Moldova, at para.571
\textsuperscript{115}B Cheng, at 122.
\textsuperscript{116}Thomas Walde and Borzu Sabahi, 26.
International Investment Agreements (IIAs) “are not insurance policies against bad business judgment”.\textsuperscript{117}

116. The other is the duty to conduct an investment in a reasonable manner. Where it can be shown that the loss incurred by the investor has been caused by their bad management of the investment rather than by any regulatory action on the part of the host country, a claim for breach of FET would not lie for that element of loss, which could be attributed to the conduct of the investor.\textsuperscript{118}

iii. \textit{Project Alfa}

117. With regards to Alfa, as highlighted earlier, there has been no arbitrariness involved in not granting a license. The development of a capacity that is already at the maximum of 30kW is not feasible and to that end the decision of the BEA has been perfectly justified. Moreover, a period of 5 years has lapsed since the rejection of the license application for Alfa and yet the matter of non-granting of license for Project Alfa was raised for the first time in November 2014 under the BIT. Although there is no requirement for the exhaustion of local remedies, the failure to agitate the matter using readily available redressal mechanisms should very much be part of the consideration when it comes to compensation calculations.

118. The following are some relevant observations pertaining to Alfa:

   a) The project pre-dates the LRE regime and was not undertaken pertaining to any promises under the LRE. The project was pursuant to earlier licensing regime at a tariff of €0.1989/kWh.

   b) The estimated cost of Alfa projected by Vasiuki LLC was at a rate of €4100/kW resulting in a total of €123,000. However the actual cost turned out to be 52% higher than the estimate at €187,550.

\textsuperscript{117}Maffezini vs. Spain, at para 64.

\textsuperscript{118}Peter Muchlinski, at 542-548.
119. A causal link between a wrongful act and the damages incurred needs to be established for it to be compensable. In the instant case, even if it is assumed for argument’s sake that there has been a breach of the BIT with regards to non-granting of license to Alfa, the above observations clearly show that such a causal link simply does not exist. Alfa was a problematic project with severe cost over-runs and poor performance record and the rejection of license is not the reason for the losses incurred by it. Moreover, by continuing to run the project, the claimants failed to mitigate any damage. Lastly, the projection by Mr. Kovic of a ‘annual capacity increase’ of 2.2% is unrealistic without any sound basis for such an assumption.

120. Therefore Alfa is not a compensable project and the Mr. Kovic’s projections are untenable.

iv. Project Beta

121. Barancasia rejects the claimant’s allegation of a FET breach with regards to Project Beta. The amendment was pursuant to taking a balanced approach towards the needs of the investor and sustainable economic development of the State. However if the tribunal finds in favour of the claimant, the following needs to be considered in computation of damages.

122. Below is a table with the restatement of Vasiuki LLC’s historic P&L with data on Wind Electricity segment sales and profits. EBIT (Earnings Before Interest and Tax) also known as Operating Profit is the standard measure of profits. Given that the claimants seek ‘lost profits’ as a compensation with respect to Beta, the Net Present Value (NPV) of the Average

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Operating Profits is the appropriate measure as opposed to the NPV of Revenue Loss sought by Mr. Kovic.

<table>
<thead>
<tr>
<th>EUR</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
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<tr>
<td>Electricity Sales</td>
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<td>320,750</td>
<td>426,173</td>
<td>431,585</td>
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<tr>
<td>Opex. of Owned Plants</td>
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<td>44,164</td>
<td>63,445</td>
<td>63,445</td>
<td>71,494</td>
</tr>
<tr>
<td>EBITDA</td>
<td>211,947</td>
<td>276,586</td>
<td>362,728</td>
<td>368,140</td>
<td>390,046</td>
</tr>
<tr>
<td>Depreciation</td>
<td>79,715</td>
<td>100,372</td>
<td>144,193</td>
<td>144,193</td>
<td>162,486</td>
</tr>
<tr>
<td>EBIT</td>
<td>132,232</td>
<td>176,214</td>
<td>218,535</td>
<td>223,948</td>
<td>227,560</td>
</tr>
</tbody>
</table>

**EBIT Margin**

|        | 54%     | 55%     | 51%     | 52%     | 49%     |

**Note:** Restated segment data of Vasiuki LLC’s Historic P&L (Vasiuki LLC Dataset)

123. Vasiuki LLC primarily a turnkey plant provider began its Wind Energy production business in 2006 and the average operating profit margin of this segment during the five-year period between 2007-2011 is 52%. This is comparable to the Solar Electricity production business and hence the calculation of damages for Beta can be computed at this rate (i.e. 52% of the calculated revenue loss). Moreover, the compensation calculation is at the project level and not at the firm level that is reflective of the total capital structure. Hence the appropriate discount rate to be used is the Expected Return of Equity (RoE) of 12% and not the WACC rate.

124. If the tribunal contends that Project Beta is compensable, the maximum damages awarded should not exceed €54,289 (Annual Revenue loss of €16,614 at 52% EBIT Margin discounted at 12%).

v. **Follow-on Projects (12 Projects)**

125. Barancasia rejects the claimant’s allegation of a FET breach with regards to the 12 Follow-on projects (“12 Projects”). The amendment of the LRE was to avoid providing “excessive profits”, in light of the new advanced technology that had significantly reduced the costs of projects. The 12 Projects were all based on the new technology.\(^{120}\)

126. The relationship entered into by a Foreign Investor and a Host State for the exploitation of its natural resources, presupposes that the Foreign Investor is entitled to profits for its risky

\(^{120}\)Procedural Order No.1, No. 33 at p. 24.
venture within the terms of the economic development. However the profits outside the normal risk related expectations are not part of the legitimate expectations of both parties to the relationship. Any excess profits not part of such legitimate expectations may be reclaimed by the Host State.\(^\text{121}\)

127. In the instant case, the new technology that has dramatically reduced costs for project developers leading to excessive profits for investors was not part of the investor’s legitimate expectation to begin with. Moreover the policy criterion of Barancasia to permit PV Projects was on the basis of target minimum return of 8% for the investors. Hence the legitimate expectation of the investor was limited to a guaranteed assured return of at least 8%. The 12 projects were assured to earn a return of at least 8% even after the amendment of the LRE and therefore there has been no breach of any of the standards of the BIT.\(^\text{122}\)

128. Since there is no breach, the question of damages does not arise. But if the tribunal were to find there has been a breach with respect to the 12 Projects, then the following facts need to be considered prior to deciding on the issue of damages.

129. Mr. Kovic has provided alternative heads of damages for the 12 Projects, one based on ‘wasted expenditures’ while the other being on the basis of ‘loss of profits’. Given the 12 Projects are not even operational, the loss of profits or DCF method is not an appropriate valuation methodology.\(^\text{123}\)

130. With regards to the ‘wasted expenditures’ method, the observation by our expert Ms. Priemo, that the potential to mitigate damages pertaining to the land and equipment costs not having been explored is a pertinent one. Land if sold at the current market value would recover €330,000 (i.e. 10% higher than acquisition costs of €300,000). PV Panels worth €301,950 delivered to date can be resold to other players at a reasonable discount of 10% thus recovering at least €271,755. The 50% deposit on remaining panels can be retrieved entirely without taking any delivery and thereby recover another €52,006. Total

\(^{121}\) Carasco, Emily, at. 39.

\(^{122}\) Procedural Order No. 3, No. 23.

\(^{123}\) Annexes to Mr. Kovic’s Report, Annex 2 & 3, Record.
money payable on recovery of the above amounts would be €295. This along with €36,100 operating expenditure incurred by the claimants as per Mr. Kovic’s Annex 2, would entail a maximum pay-out of €36,295. However since the claimants have decided to continue with the project even after the amendment of the LRE, the need for any compensation is completely negated.\textsuperscript{124}

**ADDITIONAL PROJECTS**

131. Mr. Kovic has assumed that several additional installations would be undertaken by Claimant, resulting in an additional €765,835 of damages. Our expert Ms. Priemo has not found any documentation that would support Claimant’s alleged plans for such expansion. There is nothing in the business plan section of the Vasiuki LLC Dataset, nor is there any evidence that any additional land had been acquired, that any feasibility studies had been performed, that equipment had been sourced and ordered, etc. The statement by a local manager without any other supporting evidence makes Mr. Kovic’s calculation a mere speculation that warrants no serious consideration.

132. 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 does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

\textsuperscript{124}Procedural Order No.2, Pg. 60, No. 26.
PRAYER FOR RELIEF

Respondent Barancasia requests that the Tribunal:

1. Find that it has no jurisdiction and/or that the claims asserted by the Claimant are not admissible.

2. In the event that the Tribunal does not grant Barancasia’s first prayer for relief, find that Barancasia has not violated the protections of the BIT.

3. In the event that the Tribunal does not grant Barancasia’s first or second prayer for relief, deny Claimant’s request for specific performance.

4. In the event that the Tribunal does not grant Barancasia’s first or second prayer for relief, find that Claimant’s calculations for damages are ill-supported and based on false and incorrect legal and factual assumptions.

5. Find that Barancasia is entitled to restitution by Claimant of all costs related to these proceedings.

(On behalf of Respondent)

Team Koroma

26 September 2015