4 The legal basis for the claims against the Republic

[...]

4.3 Violations of Treaty obligations

[...]

ARTICLE 13 EXPROPRIATION

(1) "Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is:

(a) for a purpose which is in the public interest;
(b) not discriminatory;
(c) carried out under due process of law; and
(d) accompanied by the payment of prompt, adequate and effective compensation.

Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the "Valuation Date")."

[...]

4.3.1 Expropriation

[...]

[...] The Arbitral Tribunal has considered the expert legal opinions and arbitral awards rendered under similar treaties presented in this case by the parties. The Tribunal finds that "regulatory takings" may under the circumstances amount to expropriation or the equivalent of an expropriation. The decisive factor for drawing the border line towards expropriation must primarily be the degree of possession taking or control over the enterprise the disputed measures entail. In the present case, there is no possession taking of Windau or its assets, no interference with the shareholder’s rights or with the management’s control over and running of the enterprise - apart from ordinary regulatory provisions laid down in the production licence, the off-take agreement, etc.

The Tribunal therefore concludes that the withholding of payment at the double tariff does not qualify as an expropriation or the equivalent of an expropriation under the Treaty

[...]
5 Assessment of losses or damages

5.1 Legal principles of assessment

[...]

[...]The Arbitral Tribunal holds, and it seems to be agreed between the parties, that the question of remedies to compensate for losses or damages caused by the Respondent's violation of its obligations under Article 10 of the Treaty must primarily find its solution in accordance with established principles of customary international law. Such principles have authoritatively been restated in The International Law Commission's Draft Articles on State Responsibility adopted in November 2001 (hereinafter referred to as the "Articles ILC").

According to Articles 34 and 35 ILC restitution is considered to be the primary remedy for reparation. Article 35 states:

"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 all proportion to the benefit deriving from restitution instead of compensation."

Restitution in the present case is conceivable, either through a juridical restitution of provisions of Latvian law ensuring Windau's right to the double tariff as it was ensured under the Entrepreneurial Law, or through a monetary restitution to Windau of the missing payments of the difference between the contractually established double tariff and 0.75 of the tariff actually paid. But even if damage or losses to an investment may be inflicted indirectly through loss-creating actions towards a subsidiary in the country of a Contracting State, restitution must primarily be seen as an appropriate remedy in a Situation where the Contracting State has instituted actions directly against the investor. An award obliging the Republic to make payments to Windau in accordance with the Contract would also in effect be equivalent to ordering payment under Contract No. 16/07 in the present Treaty arbitration. The Arbitral Tribunal therefore finds the appropriate approach, for the time up to the time of this award, to be an assessment of compensation for the losses or damages inflicted on the Claimant's investments. For the time after this award see section 5.2, last paragraph, below.

Referring Principles:

 XI.1 - Compensation for expropriation