

TEAM BADAWI

LONDON COURT OF INTERNATIONAL ARBITRATION

VASIUKI LLC

Claimant

v.

REPUBLIC OF BARANCASIA

Respondent

ARBITRATION No. 00/2014

SKELETON BRIEF FOR RESPONDENT

ISSUES RELATING TO JURISDICTION

THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE CLAIMS ADVANCED BY VASIUKI LLC ('CLAIMANT') AS THE COGITATIA-BARANCASIA BILATERAL INVESTMENT TREATY ('BIT') IS NO LONGER IN FORCE

I. THE REQUIREMENTS OF TERMINATION UNDER ART. 13 OF THE BIT HAVE BEEN MET

- i. The Respondent sent a notice of termination to the Claimant as required by Art. 13 of the BIT
- ii. The notice of termination was received and acknowledged by the Claimant, and was not met with any objection or denial whatsoever
- iii. Art. 13 does not require acceptance, in writing or otherwise, of the notice of termination
- iv. Art. 13 does not contain a prohibition against sending a notice of termination during the initial ten-year validity period of the BIT

II. THE LAW OF THE EUROPEAN UNION ('EU') IS APPLICABLE IN THE EVENT OF A CONFLICT BETWEEN THE BIT AND THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION ('TFEU'), DUE TO ITS INTERNATIONAL LAW CHARACTER ¹

- i. The BIT is in conflict with the provisions of EU law ²
- ii. Under EU law, the TFEU will have primacy over the BIT in case of such a conflict ³
- iii. The Tribunal is not entitled to decide if, or to what extent, EU law and the BIT are to be applied in case of a conflict ⁴

¹ *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, Part IV- Page 39, ¶ 4.126.

² Case C-205/06, *Commission v. Austria* [2009] ECR I-1301; Case C-249/06, *Commission v. Sweden* [2009] ECR I-1335; Case C-118/07, *Commission v. Finland* [2009] ECR I-10889.

³ European Commission's Observations in *Eureko B.V. v. Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, pp. 50-51, ¶ 177-180.

⁴ Friedl Weiss and Silke Steiner, 'The Investment Regime under Art. 207 of the TFEU – A Legal Conundrum: the scope of 'foreign direct investment' and the future of intra-EU BITs', in 'INVESTMENT LAW WITHIN INTERNATIONAL LAW', Freya Baetens ed., pp. 355-374, p. 368.

III. ADDITIONALLY, THE TFEU PREVAILS OVER THE BIT IN ACCORDANCE WITH THE VIENNA CONVENTION ON THE LAW OF TREATIES ('VCLT')

- i. The requirements of termination under Art. 59 of the VCLT have been met
 - a. The BIT and the TFEU relate to the 'same subject-matter'⁵
 - b. Both *Cogitatia* and *Barancasia* had a common intention that EU law would apply to the matters previously governed by the BIT
 - c. The BIT is so far incompatible with the TFEU that they cannot be applied simultaneously⁶

- ii. The requirements of primacy under Art. 30 of the VCLT have been met
 - a. The BIT and the TFEU relate to the 'same subject-matter'
 - b. Art. 13 of the BIT, which confers jurisdiction on the Tribunal, is incompatible with the provisions of the TFEU and is therefore inapplicable

⁵ 'Report of the Study Group of the International law Commission on Fragmentation of International Law', 13 April 2006, ¶ 253, 254, available at: <http://legal.un.org/docs/?symbol=A/CN.4/L.682>.

⁶ Case C-205/06, *Commission v. Austria* [2009] ECR I-1301; Case C-249/06, *Commission v. Sweden* [2009] ECR I-1335; Case C-118/07, *Commission v. Finland* [2009] ECR I-10889.

ISSUES RELATING TO THE MERITS OF THE CLAIMS

THE REPUBLIC OF BARANCASIA DENIES ALL CLAIMS ADVANCED BY THE CLAIMANT

I. THE RESPONDENT HAS ACCORDED CLAIMANT’S INVESTMENTS FAIR AND EQUITABLE TREATMENT

- i. Claimant has the burden of proving that the FET has been violated ⁷
- ii. Respondent did not violate Claimant’s legitimate expectations
 - a. The Claimant received no assurance that the law will remain unchanged, that could have created a legitimate expectation ⁸
 - b. Absent a specific representation to the Claimant, such as a stabilization clause, any expectation of regulatory stability would have been unreasonable ⁹
 - c. The Claimant has not proven that the existing regulatory framework of Barancasia was the crucial factor in its determination to make the investment ¹⁰
 - d. Respondent has regulated its renewable energy sector responsibly and fairly ¹¹
- iii. Respondent has not acted in an unreasonable, or arbitrary manner ¹²
- iv. Respondent has accorded Claimant due process of law ¹³

II. IN ANY EVENT, THE RESPONDENT’S ACTIONS ARE EXEMPTED ON THE BASIS THAT THEY WERE NECESSARY FOR RESPONDENT TO MEET ITS ECONOMIC AND RENEWABLE ENERGY OBJECTIVES AND TO ADHERE TO ITS EU OBLIGATIONS

⁷ Ioana Tudor, *The Fair and Equitable Treatment Standard in the Law of Foreign Investment* (2008).

⁸ *Gami Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL, Final Award, 15 November 2004, ¶¶ 90-110.

⁹ *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2011, ¶ 332; *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, ¶¶ 9.3.17-9.3.34.

¹⁰ *CMS v. Argentina* (Award), ¶¶ 275.

¹¹ *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL/PCA, Partial Award (17 March 2006).

¹² *Elettronica Sicula S.p.A. (ELSI)* (United States of America v. Italy), International Court of Justice, Judgment (20 July 1989).

¹³ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award (6 November 2008).

- i. The BIT must be interpreted consistently with EU law ¹⁴
- ii. In any event, any conflict ought to be resolved in favour of EU law ¹⁵
- iii. EU law is relevant to the determination of wrongfulness ¹⁶
- iv. Under EU law, the actions were necessary for the Respondent to meet its economic and renewable energy objectives and to adhere to its EU obligations ¹⁷

III. THE REMEDY OF SPECIFIC PERFORMANCE IS WHOLLY INCONSISTENT WITH THE RESPONDENT'S SOVEREIGNTY AND BEYOND THE POWERS OF THE ARBITRAL TRIBUNAL

- i. Customary International Law does not grant the power to an arbitral tribunal to award specific performance because of the principle of Duality ¹⁸
- ii. The inherent limitation over arbitral tribunals' authority to award non-pecuniary remedies is the legal implication of the multi-faceted general principle of State sovereignty ¹⁹
- iii. To order the Respondent to rescind the LRE amended Art 4 would constitute a reparation disproportional to its interference with the sovereignty of Barancasia ²⁰
- iv. No justification exists for the plea to order the Respondent to continue to pay the pre-2013 feed-in tariff to the Claimant ²¹

IV. THE CLAIMANT'S BASIS FOR CLAIMING AND QUANTIFYING COMPENSATION IS INAPPROPRIATE

- i. Damages for the Alfa Project and the Beta Project

¹⁴ *Asian Agricultural Products Limited v. Republic of Sri Lanka* (ICSID Case No. ARB/87/3), Award, 27 June 1990

¹⁵ ECJ Case 26/62, *Van Gend en Loos* [1963], ECR 3

¹⁶ *Ioan Micula and Ors. v. Romania* (ICSID Case No. ARB/05/20), Award, 11 December 2013, ¶ 328.

¹⁷ DIRECTIVE 2009/28/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 April 2009, Official Journal of the European Union, L 140/16

¹⁸ Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice*, OUP Oxford, 2011.

¹⁹ Viñuales, "Sovereignty in Foreign Investment Law", in Douglas, Pauwelyn and Viñuales (eds.), *The Foundations of International Investment Law*, Oxford, 2014.

²⁰ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador*, Decision on Jurisdiction, ICSID Case No. ARB/06/11; IIC 337 (2008)

²¹ *AGIP Spa v. Congo*, ICSID Award, 30 November 1979, ¶¶ 86-88; and *Amoco International Corporation v. Islamic Republic of Iran, National Iranian Oil Company*, Partial Award, July 1987, 1988, ¶ 178.

- a. Absence of causal link ²² between the Respondent State's measure and the measure for harm for Alfa
- b. No established record of profitability ²³ – indeterminate damage cannot be awarded²⁴
- c. The cash flows to equity of the Claimant should be discounted at the cost of equity and not at the WACC ²⁵
- ii. Damages for the alleged wasted expenditure in land and equipment
 - a. Fair market value cannot be determined due to insufficient record of performance ²⁶
 - b. Lost profits cannot be awarded for a beginning industry or unperformed work ²⁷
 - c. *Alternatively*, the future cash flows to equity of the Claimant should be discounted at the cost of equity and not at the WACC ²⁸
- iii. Damages for the Follow-on Barancasia Solar Projects
 - a. No supporting evidence of any plans of further installations ²⁹
 - b. Claim is merely speculation, damages too remote to be awarded ³⁰

²² *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID ARB/05/22, Award, 24 July 2008.

²³ Article 36, International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001).

²⁴ *Occidental Exploration and Production Company v. Ecuador*, LCIA Case No. UN3467, Final Award, July 1, 2004, at ¶. 210 .

²⁵ *CMS v. Argentina* (Award), ¶ 430.

²⁶ *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), ¶¶ 119–122.

²⁷ *Autopista Concesionada de Venezuela CA (Aucoven) v. Venezuela*, Award, ICSID Case No ARB/00/5, IIC 20 (2003), ¶ 360; S.P.P. (Middle East) Limited.

²⁸ *CMS v. Argentina* (Award), ¶ 430.

²⁹ *Ioan Micula and Ors. v. Romania* (ICSID Case No. ARB/05/20), Award, 11 December 2013, ¶ 328.

³⁰ *Lemire v. Ukraine*, Award, ICSID Case No ARB/06/18, IIC 485 (2011); *S.D. Myers Inc. v. Government of Canada*, UNCITRAL, Parital Award (13 November 2000); *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V (064/2008), ¶ 95.