Team: Donoghue

ARBITRATION INSTITUTE

OF THE LONDON CHAMBER OF COMMERCE

IN THE PROCEEDING BETWEEN

VAUSISKI LLC

(CLAIMANT)

v.

THE FEDERAL REPUBLIC OF BARANTATIA

(RESPONDENT)

SKELTON BRIEF FOR RESPONDENT

8 AUGUST 2015

I. **Jurisdiction and Admissibility**

1. The Tribunal has no jurisdiction over the present dispute because Claimant acquired obligation to obtain the access to arbitration under the current BIT, but (A) the BIT has become obsolete due to the accession of both Cogitatia and Barancasia to the European Union. It is, therefore, materially inconsistent with the Lisbon Treaty and TFEU Article 207. Also, (B) the BIT has been terminated according to the BIT Article 13(2); VCLT Article 54(b) and the VCLT Article 59(1)(a); Article 65.

A. The BIT has become obsolete due to the accession of both to the EU and its inconsistent with the Lisbon Treaty and TFEU Article 207(1).

2. **TFEU Article 207(1) is that the EU common commercial policy shall be based on uniform principles and shall be conducted in the context of the principles and objectives of the EU's external action.** The latest press release by the EC which was asked Member States to terminate the BIT on 18 June 2015. Moreover, there are some judgments in arbitration that "the provisions of the treaties that relate to the subject-matter are so far incompatible as to preclude the concurrent application of the two treaties"(Eureko B.V. v. Slovak Republic 2010 ¶242). The BIT was terminated (Commission v. Austria 2005 ¶36; Commission v. Sweden 2009 ¶37).

3. ECJ has exclusive jurisdiction over disputes between EU Member States by Article 344 TFEU and the principle of loyalty (Commission v. Ireland 2006 ¶123).

4. Barancasia and Cogitatia concluded the BIT on 31 December 1998, then, they both joined the EU in 2004. The EC has repeatedly expressed the view that arbitration clauses

in BIT between EU Member States are in conflict with the Lisbon Treaty and EU law (in particular Article 207 TFEU) and therefore inoperative. Hence, the claimant do not have jurisdiction without the BIT.

B. The BIT has been terminated.

5. The BIT Article 13(2), Contracting Party notifies the other in writing of its intention to terminate the agreement.

6. Moreover, according to Article 54(b), it provides that at any time by consent of all the parties after consultation to terminate a treaty. VCLT has direct effect to terminate BIT.

7. Under Article 59(1)(a) the intention of the Contracting Parties was to replace the former treaty with the later one. And Article 65 requires a state to notify its counterparty of its claim and the reasons therefor. Article 59(1)(a) is subject to Article 65 (Eureko B.V. v. Slovak Republic 2010 ¶235-238).

8. Barancasia notified Cogitatia to terminate the BIT (Annex No.7.1). Afterwards, Cogitatia confirmed to receive that notification on 10, July 2007 (Annex No.7.2) without raising any objections. On 28, November 2008, Barancasia removed the BIT with Cogitatia from its Ministry Finance website which the section of the website listing valid and binding international agreement. Afterwards, Cogitatia also did not raise any objections to the termination of the BIT. Hence, Cogitatia consented to terminate the BIT.

II. Merits

A. Respondent accordingly complied with the Fair and Equitable Treatment, as stated by Article 2 of the BIT.

9. **The FET clause states the minimum standard of treatment.** Article 2(2) meets the minimum standard of treatment and it shall be interpreted according to it (*Total v. Argentina*, 2010, ¶145)(*Glamis v. US*, 2009, 619-622; 800-801). The international minimum standard is widely recognized by many Tribunals, whose interpretation consists on "no treatment in addition to or beyond that which is required by the international minimum standards" (*MTD v. Chile*, 2004, ¶110). Hence, "a broad and widely-accepted standard encompassing such fundamental standards as good faith, due process, nondiscrimination(*sic*), and proportionality"(*MTD v. Chile*, 2004, ¶109).

10. **Respondent did not fail to fulfil the Claimant`s legitimate expectation.** Expectations are qualified as "reasonable and justifiable" (*Enron v. Argentina*, 2007, ¶260) and "by definition require a promise of the administration on which the Claimants rely to assert a right that needs to be observed"(PSEG Global v. Turkey, 2007, ¶241). Promise which is not stipulated in the BIT. Accordingly, "no investor may reasonably expect that the circumstances remain (…) totally unchanged. (…) whether frustration of the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well (*Saluka v. Czech Republic*, 2006, ¶305).

11. **The Respondent did not fail to protect the Legal Stability.** Fair and equitable treatment cannot be interpreted as a "stabilization clause". Not even stabilization

requirements can be interpreted as "freezing of the legal system or the disappearance of the regulatory power of the State"(*Enron v. Argentina*, 2007, ¶261). The mere expectation that regulations will remain unmodified as in the time of the investment disregarding circumstances is illegitimate and it would attempt against the "high measure deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders"(*Saluka v. Czech Republic*, 2006, ¶305).

12. **Respondent never acted arbitrarily towards the Claimant.** Arbitrariness is defined as an unreasonable action, namely, "a measure that inflicts damage on the investor without serving any apparent legitimate purpose"(EDF v. Romania, 2009, ¶303). In the present case, the Respondent`s actions could not have been different. The Respondent`s acted as a response to the "unfolding crisis"(Enron v. Argentina, 2007, ¶281). After the "Solar Bubble" (2011) and its consequences, widespread information and Government`s announcement about the impossibility of the maintenance of the renewable energy support - as "unsustainable"- due to the crisis it had led the Respondent to, an imperative change of the LRE to protect public interest was mandatory.

13. **The Respondent never failed to act transparently towards the Claimant.** A violation to transparency amounts to "any procedural irregularity (…) consisted in bad faith, a wilful disregard of due process of law or an extreme insufficiency of action" (*Genia v. Estonia*, 2001, ¶371). In this sense, good faith means "absence of deceit and artifice during the negotiation and execution of instruments that gave rise to the

investment, as well as loyalty, truth and intent to maintain the equilibrium between the reciprocal performance of the parties"(Inceysa Vallisoletana S.L v. El Salvador, 2006, ¶ 231).

B. The Claimant is not liable to receive any compensation

14. **Project Alfa is subject to any compensation.** First, project Alfa was never granted a license to receive any support benefit. Second, the Claimant was unable to accurately foresee the Project Alfa performance. As well as it could be evidenced from the Respondent's own documents that it could not control the construction costs, the operating performance (operating at only 12.1% of its capacity, out of 21% projection). In other words, Professor Kovic's calculation are ill-supported and consequently, unreliable.

15. **The Claimant`s calculation for compensation on Project Beta is doubtful.** The calculation offered by the Claimants are ill-supported and misleading due to the unreasonable discount on the cash flows in order to equalize them to the "WACC" (Weighted Average Cost of Capital). The correct calculation shows a cost of equity of "12%", not "8%".

16. **The Claimant is not a subject to the compensation neither on cost of land and equipment.** The land purchased by the Respondent remains to have value in the future. Furthermore, the land price is now 10% higher than when it was bought. Also, the land may be used for other projects (According to Clarifications 29). The equipment, as well, can be used for another solar venture or sold to another company or venture.

17. **The Claimant is not a subject for the request on the lost profit of €1，427，500.** The correct calculation based on the change of the feed-in tariff is of 1.238.697, assuming the Claimant would have continued the Project build on schedule, and that the units would operate through the year 2023 at a capacity of 21%.

18. **The Claimant is not a subject to its request of additional damages of €765，835.** There is no evidence offered by the Claimant to such plans for expansion. The only evidence is merely based on speculation from a local manager that asserted that "thus was a long term goal that the company had always aspired to achieve, step by step.

III．<u>Conclusion</u>

A. The tribunal has no jurisdiction over the present dispute, and this case is inadmissible.

B. In any case the Barancasia's measures were lawful under Art.2, not subject the compensation.

Respectfully submitted,

On behalf of Respondent:

The republic of Barancatia

Team Donoghue