London Court of International Arbitration

Vasiuki LLC

[Claimant]

v.

The Republic of Barancasia

[Respondent]

Skeleton Argument for Respondent

1. Termination of the BIT between Barancasia and Cogitatia ("BIT") by mutual consent

1.1. The BIT has been effectively terminated by mutual consent under Article 54(b) Vienna Convention on the Law of Treaties **("VCLT")** upon Barancasia's notification[1] and Cogitatia's reply[2] without objection in 2007. Any investment made after termination shall not be protected by the BIT.

2. Incompatibilities between VCLT and BIT

2.1. Even if the BIT was not terminated by mutual consent, under Article 30(3) VCLT, Intra-EU BITs would apply only to the extent that individual provisions are compatible with those of EU Treaties. Therefore, particular provisions of the BIT would be inapplicable subsequent to both parties' accession to the EU.[3] Such incompatibilities have rendered (1) the Tribunal lacking jurisdiction, and (2) the claims inadmissible.

3. The Tribunal lacks jurisdiction over the current dispute

3.1. Firstly, Article 8 BIT is incompatible with Article 344 Treaty on the Functioning of the European Union **("TFEU")** which prohibits outsourcing settlements of disputes concerning EU law whose jurisdiction belongs to the EU Court.[4]

3.2. Secondly, Article 8 also conflicts Article 18 TFEU on non-discrimination on grounds of nationality. The availability of choice of dispute resolution procedures gives investors from signatory countries advantages over others.[5]

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[1] Annex 7.1.
[2] Annex 7.2.
[3] *Eureko B.V. v. The Slovak Republic*, PCA Case No. 2008-13, ¶ 188.
[4] *MOX Plant,* ECJ Case C-459/03, ¶¶ 123, 177.
[5] *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, ¶¶ 119, 126.

3.3. As such, there is no valid offer to arbitrate and the Tribunal, among most tribunals which are not as competent in EU law and international investment law,[6] shall decline jurisdiction over this dispute.

4. Claims are inadmissible due to EU's exclusive competence

4.1. Foreign direct investment **("FDI")** matters are now under EU's exclusive competence as regards Articles 2(1), 3(1)(3) and 207 TFEU. Accordingly, claims based on incompatible BIT provisions such as Article 3 and 6 are inadmissible.[7]

5. No breach of Fair and Equitable Treatment ("FET") standard in denying the licence to Alpha Project

5.1. The denial of license is not arbitrary. Given that fixing the general feed-in tariff is to encourage development of renewable energy resources, it is reasonable that incentives would not be given to existing projects with no proposal on further development.

5.2. A plain reading of the Law on Renewable Energy **("LRE")** also suggests that in the absence of further development, any expectation that licenses would be given to existing projects is unreasonable.[8]

[6] *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19.
[7] *Commission v. Austria* ECJ, Case No. C‑205/06.
[8] LRE Art 5.

6. Reduction of tariff does not constitute FET violation

6.1. Claimant is not entitled to expect that the regulatory regime would remain stable in the absence of stabilisation clauses. Legislative provisions fixing the tariff regime do not qualify as stabilisation clauses.[9]

6.2. Representations made by the host state are enforceable and justify investor's reliance only when they are specifically addressed to a particular investor.[10]

6.3. In addition, investors cannot expect the state will never modify the legal framework in time of crisis, unless modifications are unreasonable or are made specifically to prejudice Claimant's investment.[11] The modification in the present case is reasonable, given the advancement of technology substantially lowers the operational costs of Claimant. Moreover, the reduction of tariff applies to all investors, hence there is no element of discrimination.

6.4. Regarding the 12 projects following the Beta Project, no legitimate expectation that the feed-in tariff would remain in force for 12 years existed. Claimant knew in June 2012, when the teachers were on strikes, that Respondent promised to review the LRE, and the license together with the feed-in tariff was only granted to Claimant on 1 July 2012.[12] In addition, there would not be reliance on the part of Claimant, as they only ordered solar panels from the producers and started the construction of photovoltaic power plants based on the new technology.

6.5. In any event, even if the expectation that the feed-in tariff rate of 0.44kW would remain in force for 12 years is legitimate, adopting the reasoning in *Perenco v*

[9] *Total SA v Argentina*, ICSID Case No ARB/04/1, IIC 484 (2010), 21 December 2010, ¶ 101.
[10] *Ibid* ¶ 119.
[11] *Impregilo SpA v Argentina*, ICSID Case No ARB/07/17, IIC 498 (2011),21 June 2011, ¶ 291.
[12] Statement of Uncontested Facts, ¶¶ 32-33.

Ecuador[13], the departure from it is justified, as the expected return of the investors upon a reduction of the feed-in tariff rate would remain unchanged.

7. Defences of EU law and necessity

7.1. EU law is applicable in determining obligations under the BIT, in light of the provisions in Article 31(3)(c) VCLT, Article 10 BIT and the Tribunal's award in *Eureko v Slovakia*.[14] Alternatively, following *Micula v Romania*,[15] EU law is nonetheless relevant as part of the factual background in determining whether the FET standard is breached, in particular whether the expectation is legitimate and the respondent state's actions are reasonable. The relevant EU law obligation in question is contained in the Stability and Growth Pact under Articles 121, 126 and Protocol 12 of TFEU, which stipulate the borrowing limit for member states.

7.2. Hence, Respondent's obligation to provide FET is only to the extent that it would not necessitate excessive state borrowing. Alternatively, Claimant's expectation that the original level of tariffs would be maintained was illegitimate, as that necessitated contravention of EU law. Furthermore, following *AES v. Hungary*,[16] the FET standard was not violated as Respondent's actions were reasonable. The change in tariffs pursued the rational policy of complying with EU law, and there was appropriate correlation between the objective and the measure adopted.

7.3. Moreover, Respondent was under a state of necessity, which is a defence to state responsibility in customary international law.[17] Following *LG&E v Argentina*,[18]

[13] ICSID Case No. ARB/08/6, 12 September 2014.
[14] See *supra* n3.
[15] ICSID Case No. ARB/05/20, 11 December 2013.
[16] ICSID Case No. ARB/07/22, 23 September 2010.
[17] Article 25, International Law Commission Draft Articles on the Responsibility of States for Internationally Wrongful Acts.
[18] *LG&E Energy Corps v Argentina*, Award, ICSID Case No. ARB/02/1, IIC 295 (2007), 25 July 2007.

Respondent satisfies the relevant elements and shall be excused from compensation for damages during the period of necessity.

8. Restitution should not be ordered

8.1. Restitution, in the form of repeal of amendment or continuation of tariff payment at €0.44 for 12 years, is materially impossible where Respondent is compelled to modify its law.[19] The tribunal held in *LG&E v Argentina* that it did not have jurisdiction to compel Argentina to do so without any undue interference with its sovereignty. In the instant case, an order for restitution would similarly imply the modification of the current legal situation by annulling the amended Article 4 LRE.

8.2. Restitution is also barred where there is grave disproportionality between the burden and benefit, which is based on considerations of equity and reasonableness and is essentially a balancing exercise.[20] In the current case, if all applications for the feed-in tariff were approved, up to 15% of state revenues would be diverted to finance solar feed-in tariffs, a higher share than public financial allocations to Respondent's educational system.[21] Respondent is also unable to borrow the necessary amounts for the maintenance of the existing renewable energy support system and the guaranteed feed-in tariffs without exceeding its EU-mandated borrowing limits for the relevant years.[22]

[19] Endicott, Martin. *Remedies in Investor-State Arbitration: Restitution, Specific Performance and Declaratory Awards, in New Aspects of International Investment Law*, 540–41.
[20] See *supra* note 18.
[21] Statement of Uncontested Facts, at ¶¶29, 30.
[22] *Ibid*, at ¶30.

9. Damages

9.1. In the event that the Tribunal finds that Respondent has violated the protections of BIT, Claimant's calculations for damages are ill-supported and based on false and incorrect legal and factual assumptions. Respondent bases its defence on the Expert Report of Ms Juanita Priemo.

9.2. As regards Project Alpha, there is no evidence to support Claimant's projection of 21% operation capacity.

9.3. As regards Project Beta, it is wrong to adopt a weighted average cost of capital **("WACC")** in discounting the future income, given that WACC applies to cash flows going to both equity holders and lenders, yet there is no evidence that Project Beta was financed by debts.[23]

9.4. As regards the remaining 12 projects, Claimant failed to mitigate its loss as regards the "wasted investment". As held by *Middle East Cement v Egypt*, the duty to mitigate is a general principle of law.[24] It is apparent that land and equipment could have been resold.

9.5. As regards Claimant's future development of solar arrays, it is submitted that there has been no such evidence in support of the proposal.

[23] *Walter Bau AG v Thailand*, IIC 429 (2009), 1 July 2009, at ¶¶14.34 - 14.35.

[24] ICSID Case No. ARB/99/6, 12th April 2002.

Respectfully submitted on 08 August 2015 by

Team FITZMAURICE

On behalf of Respondent,
The Republic of Barancasia