Team: JESSUP

ARBITRATION PURSUANT TO THE RULES OF ARBITRATION OF THE LONDON COURT OF INTERNATIONAL ARBITRATION

IN THE PROCEEDING BETWEEN

VASIUKI LLC

(Claimant)

v.

REPUBLIC OF BARANCASIA

(Respondent)

SKELETON BRIEF FOR CLAIMANT

I. JURISDICTION

A. The Tribunal has jurisdiction

(1) **The BIT has not been terminated in conformity with its own provision (Art. 54, VCLT).** According to Art. 13 of the BIT, it shall be terminated only after 1 August 2012, which is 10 years from 1 August 2002, the date the BIT came into force. Barancasia's written notification of its intention to terminate the BIT was sent to Cogitatia on 29 June 2007, and therefore, was not in accordance with the BIT. Furthermore, termination notifications must be in writing (Art. 13, BIT). The informal contacts regarding termination of the BIT that were made by Respondent to Cogitatia as late as 3 November 2010 are not valid termination notifications, because not only did they take place prior to 1 August 2012 but also no proof exists that such contacts were in writing.

(2) **The BIT has not been terminated by the mutual consent of parties.** Consulting the other contracting party is a prerequisite when terminating a treaty based on mutual consent (Art. 54, VCLT). Respondent, on 29 June 2007, merely notified Cogitatia, without consultation, of its intention to terminate the BIT. While Cogitatia did respond on 28 September 2007, its reply, however, was merely confirmation of reception, and was insufficient to be construed as consultation or consent to termination.

(3) **The BIT has not been superseded by EU law**. The BIT is considered superseded only if (i) the later treaty covers the same subject matter to a degree that "the two treaties are not capable of being applied at the same time" or (ii) it appears from the later treaty that the parties intended that the matter be governed by that treaty (Art. 59, VCLT; Eureko BV v. Slovak Republic). However, (i) the posterior treaty – Treaty on the Functioning of the European Union ("TFEU") – does not cover the same subject matter as the BIT since TFEU, different from the BIT, does not guarantee investors a dispute settlement mechanism in case of host states' breach of the treaty. (ii) While a "common" intention of both parties is necessary to consider the BIT superseded by EU law, no proof of Claimant's such intention exists. Additionally, even if certain individual provisions of the BIT are incompatible, according to VCLT Art. 30(3), the BIT is applied to the extent that its provisions are compatible with those of TFEU.

(4) **EC's opinion is not legally binding on the tribunal**. The tribunal derives its jurisdiction from the BIT Art. 8 and LCIA Rules Art. 23.1. The tribunal is not bound by EC's opinion (Eastern Sugar v. Czech Republic).

II. MERITS

A. Respondent breached the FET standard.

(5) **The Tribunal should employ a broad interpretation of Art. 2 of the BIT.** Art. 2(2) does not mention customary international law ("CIL"). Thus, the FET standard is de-linked from CIL. The content of FET thus should be interpreted according to the "general notions of fairness and equitability" (UNCTAD, Fair and Equitable Treatment). In fact, "the concept of FET has emerged to make possible the consideration of inappropriate behavior, which while difficult to define, may still be regarded as unfair, inequitable, or unreasonable" (Merrill & Ringe v. Canada). This interpretation of FET sets a lower liability threshold than the minimum standard of treatment in CIL.

(6) **Respondent's amendment of Art.4 of Law on Renewable Energy ("LRE") frustrated Claimant's legitimate expectation.** Foreign investors expect the host state not to arbitrarily revoke any commitments that influenced their decision to invest (Tecmed v. Mexico). The LRE ensured 12 year duration of the license which created a legitimate expectation for Claimant and influenced its decision to expand investments in Beta and 12 new projects. Moreover, a drastic 66% cut of the feed-in-tariff ("FIT") was totally unanticipated as it is beyond the scope of a "reasonable regulatory action" (UNCTAD).

(7) **Respondent acted unreasonably and arbitrarily by denying license for project Alfa.** The notion of arbitrariness in international law is "willful disregard of due process of law" (United States v. Italy, ICJ, 1989). It is a measure that inflicts damage on the investor without serving any legitimate purpose and without a rational explanation (UNCTAD). The denial of a license to project Alfa due to the fact that it is not a new project has no legal basis in the LRE, and serves no legitimate purpose

as approval of Alfa is in accordance with the aim of the LRE: "to ensure sustainable development of the use of renewable energy sources" (LRE, Art. 1).

(8) **Respondent failed to guarantee due process.** Claimant was not invited to the hearing before the Barcansian Parliamentary Energy Committee, which discussed the amendment. Furthermore, the amended articles of the LRE applied immediately to the Claimant, even with retroactive effect. Non-invitation to the session and the immediate effectuation of a state measure without a chance to challenge it constitute procedural violations of the FET standard even if they conform to domestic law (Genin v. Estonia).

B. Respondent's measures are not exempted from the FET breach as they fail to meet the necessity requirement.

(9) **Respondent cannot escape its treaty obligation by invoking Art. 11 of the BIT.** Respondent may contend that the BIT's "necessity" standard is lower and independent from the CIL reflected in the ILC articles which equate "necessity" to "indispensable". However, a "restrictive interpretation" is "mandatory" for provisions that are escape routes from treaty obligation (Enron v. Argentina). The most recent standard of such restrictive interpretation is whether the host state had "reasonably available alternatives, less in conflict or more compliant with its international obligations" when invoking a necessity clause (Continental v. Argentina).

(10) **Respondent had reasonably available alternatives to fulfil its EU obligations.** Respondent may contend that it was under the obligation to meet EU deficit standards. However, the EU deficit standard can be achieved via various different ways including tax hikes or spending cuts. These are the common courses of action states take when they anticipate a fiscal deficit. Amending the LRE was necessary to soothe public outrage against Respondent, not to meet EU obligations.

(11) **CIL is of no help to Respondent.** Necessity defense under the CIL may only be invoked if the wrongful act was the "only way" to save Respondent's interest (ILC

Art. 25(1)(a)). As mentioned above, measures taken by Respondent does not meet this requirement. Even if the court finds otherwise, Respondent has contributed to the situation of necessity by legislating the LRE in the first place, nullifying its necessity defense (ILC Art. 25(2)(b)).

III. REMEDIES

A. The Tribunal has the power to order rescission of the LRE amended Art. 4

(12) The tribunal may order the rescission of the LRE amended Art. 4 as a form of restitution. ILC Draft Art. 35 stipulates restitution as a form of reparation. The BIT, furthermore, contains no clause that limits tribunal's power to order the restitution. On the contrary, the BIT suggests the possibility of restitution in Art. 4.

(13) The tribunal may order the rescission as a form of specific performance – actual performance of duties. LCIA Rules Art. 22.1(vii) endows the tribunal the power to order specific performance based on any legal obligation or agreement. Respondent, by issuing a license to Claimant for Beta project, not only entered into an agreement with Claimant but is also under a legal obligation, to guarantee €0.44/kWh FIT for twelve years according to the pre-amended LRE, Art. 4. Other tribunals' affirmation of their power to order specific performance when rules are silent on this issue further support this tribunal's power to order rescission of the LRE (SD Myers v. Canada, Enron v. Argentina).

B. Claimant's basis for claiming and quantifying compensation is appropriate

(14) Claimant is a "going concern" business with certain future cash flows. Claimant has demonstrated over 10 years of track record in the energy sector. Even if the tribunal finds Claimant's short experience in solar energy an impediment to using the discounted cash flow ("DCF") method, Claimant's quantification of damage is based on the LRE. Claimant's project drives its primary value from the FIT which is "certain" in the highest degree Furthermore, even the Respondent's expert has

acknowledged that the 21% capacity assumption is legitimate, and the operating cost of photovoltaic installations are nominal and fixed. This provides certainty on secondary factors influencing future cash flows.

(15) The discount rate used for Net Present Value calculation should be WACC (=8%). Future cash flows, the difference between the projected revenue under the current and past FITs, must be discounted by Weighted Average Cost of Capital ("WACC"), not the cost of equity alone. Respondent may contend that the debt to equity ratio is not constant throughout the valuation schedule. However, these discount rates, including the cost of equity Respondent uses, rarely remain constant in any valuation. Present WACC is the fair and authoritative representation of future cost of capital.