

**THE 2015 FOREIGN DIRECT INVESTMENT  
INTERNATIONAL ARBITRATION MOOT**

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

IN THE PROCEEDING BETWEEN

**VASIUKI LLC**  
(Claimant)

v.

**THE REPUBLIC OF BARANCASIA**  
(Respondent)

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**SKELETON BRIEF FOR RESPONDENT**

**8 AUGUST 2015**

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## **I. JURISDICTION AND ADMISSIBILITY**

1. The LCIA Tribunal lacks jurisdiction over this case as [A] it does not qualify as an investment dispute and [B] the CB-BIT was invalidated following Respondent's accession to EU and termination. Further, [C] Claimant's claims are inadmissible.

### **A. The Present Case Does Not Constitute an Investment Dispute**

2. **The present dispute falls outside the scope of Article 8 CB-BIT as the Arbitration Clause conferring jurisdiction.** Claimant's alleged right to benefit from Respondent's LRE in the form of the feed-in tariff applicable for twelve years falls beyond the scope of Article 1(1)(e) CB-BIT as it constitutes a return, not an 'investment'.

### **B. The CB-BIT Became Invalid Following Respondent's Accession to EU and Termination of the CB-BIT**

3. Moreover, the Tribunal may only have jurisdiction if the legal instrument governing Claimant's claims was valid when Respondent's alleged violations took place (Douglas, *The International Law of Investment Claims*, p.329). The CB-BIT was invalidated by [1] Respondent's accession to EU and [2] its termination.

#### ***1. Respondent's accession to EU rendered the CB-BIT and its provisions obsolete***

4. **EU law cannot apply simultaneously with the CB-BIT.** Under Article 59 VCLT two treaties relating to the same subject matter can only apply simultaneously if compliance with one treaty does not violate the other (*Eureko*, 2010, ¶241). Following Respondent's accession to EU, compliance with the CB-BIT would be incompatible with the EU principle of non-discrimination as the CB-BIT only regulates legal relationship exclusively between Cogitatia and Barancasia (*Eastern Sugar*, 2007, ¶266).

## ***2. The CB-BIT was properly terminated***

5. **Termination is not limited to the conditions under Article 13(2) CB-BIT and may be conducted at any time when done mutually.** Respondent has the inherent right to terminate the CB-BIT *at any time* upon mutual consent from consultations (Article 54(b) VCLT). Respondent's notice thus served to terminate the CB-BIT prior to the lapse of its original ten years period, effective in June 2008. The absence of Cogitatia's objection within three months (Article 65 VCLT) signified its consent to terminate the CB-BIT (*Free Zones*, 1929, p.18).
  
6. **Respondent's notification to terminate the CB-BIT fulfilled all procedural rules under VCLT.** Respondent's notification was written, signed by an authorized official and referred to Respondent's Resolution that provided the accession to the EU as the reason for the termination (Articles 65-68 VCLT). Alternatively, failure to meet procedural rules does not invalidate the termination.

### **C. Claimant's Claims Are Inadmissible**

7. **EU law prevails over the CB-BIT by virtue of the principle of EU law supremacy.**
  
8. **The CJEU has the competence to give a preliminary ruling as the present case concerns the interpretation and application of EU law (*Eureka*, 2010, ¶274).**

## **II. MERITS**

9. Consistent with Respondent's legitimate sovereign right to regulate its laws, the denial of Claimant's license for Alfa and the reduction of the feed-in tariff complied with [A] FET standard of Article 2(2) CB-BIT, [B] umbrella clause of Article 2(3) CB-BIT, and [C] did not constitute expropriation violating Article 5 CB-BIT. Alternatively, such measures are exempted pursuant to [D] Article 11 CB-BIT or in any event, [E] the proportionality principle.

### **A. Respondent Complied With FET Standard**

10. **Respondent did not breach Claimant's legitimate expectations.** An investor's expectation is legitimate only when the investor has reasonably relied on representations made by a host State (*Waste Management*, 2004, ¶98). Claimant's expectation was illegitimate as it unreasonably expected that the 0.44EUR/kWh tariff would remain unchanged for twelve years despite the unprecedented groundbreaking technology in 2011, thus disregarding the business risks of regulatory changes inherent in every investment making decision.
11. **Respondent's actions were not arbitrary.** An act is arbitrary when it is founded on prejudice or preference rather than on reason or fact (*Lauder*, 2001, ¶221). Respondent did not act in an arbitrary manner since (i) Alfa was a defective operation not to be further developed and (ii) the tariff reduction for reducing excessive profits earned by investors was a perfectly valid and rational policy objective (*AES*, 2010, ¶10.3.34).
12. **Respondent complied with due process of law when reducing the tariff.** The host State only breaches the due process of law when it fails to provide investors an opportunity to be heard (UNCTAD, *FET*, p.80). Conversely, Respondent has provided an opportunity for representatives of the industry to be heard in the private hearings held prior to the Amendment.

### **B. Respondent Did Not Violate Umbrella Clause**

13. **Respondent did not owe any specific obligation to Claimant.** Respondent's commitment to pay licensed investors, including Claimant, the 0.44EUR/kWh tariff for twelve years does not constitute a specific binding obligation to likewise freeze the amount and period of its entitlement, which would be protected under the umbrella clause (*Micula*, 2013, ¶457).

### **C. Respondent's Measures Fell Short of Unlawful Indirect Expropriation**

14. **Respondent did not expropriate Claimant's investments.** Expropriation requires the deprivation of investors' control of their economic (*Feldman*, 2002, ¶59). Alternatively, the mere reduction of investors' profits due to the host State's regulatory action does not radically deprive investors of the value of their investment (*Pope & Talbot*, 2000, ¶99). Respondent did not expropriate Claimant's investments as (i) Claimant retains control of its operations and (ii) Claimant's investments remain profitable.

### **D. Respondent's Actions Are Exempted Pursuant to Article 11 CB-BIT**

15. **Respondent's energy security qualifies as an essential security issue.** Absent definition of "the maintenance of international peace or security" under Article 11 CB-BIT, the Tribunal should interpret it based on its ordinary meaning (Article 31(1) VCLT). Respondent's compliance with the 2020 EU economic and renewable energy obligations by protecting its electricity supply qualifies as one falling under the purview of "international security" (UNCTAD, *The Protection of National Security in International Investment Agreements*, p.15).
16. **Alternatively, Article 11 CB-BIT is self-judging.** Absence of the phrase 'necessary for' signifies the Parties' intention to allow them subjective appraisal of what measures they consider appropriate (UNCTAD, *The Protection of National Security in International Investment Agreements*, p.94). Thus, the Respondent's measures are not subject to judicial scrutiny.

### **E. In Any Event, Respondent's Actions Are Exempted According to the Proportionality Principle**

17. **Respondent's tariff reduction was proportionate to amend the unsustainable renewable energy support scheme.** The general principle of proportionality requires the acts' (i) suitability to achieve the objective, (ii) necessity, and (iii) proportionality *stricto sensu*.

18. The tariff reduction is suitable because the reduction relates to the purpose to adjust the unsustainable renewable energy support scheme. It was necessary because it was the least restrictive means to adjust the price to the substantial falling cost. The reduction was proportionate with the damage Claimant suffered to sustain the continuing profitable scheme.

### **III. REMEDIES**

19. In any event, [A] the Tribunal cannot order Respondent to perform restitution and [B] Claimant's basis for claiming and quantifying damages is inappropriate.

#### **A. The Tribunal Cannot Order Respondent to Perform Restitution**

20. **CB-BIT limits the performance of restitution in the event of war or other similar events (Article 4 CB-BIT).** Therefore, Claimant has no ground for restitution under *lex specialis* CB-BIT.
21. **Past tribunals have been reluctant to order restitution and their statements regarding their power to order restitution were strictly an *obiter dictum* (Douglas, *The International Law of Investment Claims*, p.100).**
22. **In any case, Respondent reserves the option to choose between restitution and compensation (Goetz, 1999, ¶¶134-137).**

#### **B. In Any Event, Claimant's Basis for Claiming and Quantifying Damages is Inappropriate**

23. **There was no causal link between Respondent' tariff reduction and Claimant's alleged future losses.** Causal link for future losses occurs only when the lost future income is not too remote, *i.e.* (i) the investor "had engaged or would have engaged in a profit-making activity" and (ii) the activity's profitability was "probable", *but for* the Respondent's unlawful act (*Micula*, 2013, ¶1009).

24. There is no “contemporaneous evidence” that Claimant would have embarked in further solar PV development. Claimant’s profitability is also not probable since its operations do not have an adequate performance record. Claimant’s Beta has only been operational for two years; worse, the twelve projects are not even operational yet (*Metalclad*, 2000, ¶120).
  
25. **Claimant failed to mitigate damages as it continued the construction of the twelve projects, thus accruing more damages.** The duty to mitigate damage is a general principle of law (Marboe, *Calculation of Compensation and Damages in International Investment Law*, p.3.240).
  
26. **Claimant’s COE instead of WACC is the more appropriate discount rate since Claimant acted only as equity holder and not debt holder.** WACC accounts for the financing through debt whereas the COE does not.