TEAM SCHWEBEL

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

Vasiuki LLC

(Claimant)

v

Republic of Barancasia

(Respondent)

Skeleton Brief for Claimant

8 August 2015

I. THE ARBITRAL TRIBUNAL HAS JURISDICTION OVER THE DISPUTE

1. The Tribunal has jurisdiction over the present dispute pursuant to Article 8 of the BIT, concluded between Cogitatia and Barancasia on 31 December 1998. Contrary to Respondent's allegation, (i) the BIT has not been terminated, (ii) nor has it become obsolete.

A. The BIT has not been terminated

i. Respondent did not follow appropriate procedure to terminate the BIT

2. According to Article 54 of the Vienna Convention on the Law of Treaties ("VCLT"), contracting parties can terminate a treaty by (i) following the provisions of the treaty, or (ii) by consent of all parties.

3. BIT Article 13(2) declares that after ten years of enforcement, either Contracting Party may notify the other in writing of its intention to terminate the Agreement. However, the notification of Barancasia to terminate the Agreement was submitted on 29 June 2007, before the completion of ten-year period promised in the BIT which is 1 August 2012.

4. Moreover, the Ministry of Foreign Affairs of Cogitatia only confirmed that it 'received' the notification from Barancasia. Therefore, one cannot argue that consent exists between all contracting parties of the BIT.

ii. The BIT is compatible with the European Union Legal Order

5. Respondent argues that the Tribunal lacks jurisdiction because the BIT has become obsolete due to its incompatibility with the Treaty on the Functioning of the European Union ("TFEU").

6. However, Article 59 of the VCLT provides that a treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to "the same subject-matter." On the contrary, the BIT and TFEU Article 207 do not regulate on the same-subject matter. The BIT addresses internal relationship between Cogitatia and Barancasia which are member states of the European Union

("EU"), whereas Article 207 of the TFEU regulates external relationship between EU and third countries. In short, since the BIT and the TFEU regulate on different subject matters, the former is compatible with the latter.

B. Even if the BIT has been terminated, this dispute is still subject to arbitration

7. The date of termination cannot be before 1 August 2012. Even if the BIT is considered as terminated on this date, it still does not affect the jurisdiction of the Tribunal.

8. Under Article 13(3) of the BIT, all investments made prior to the termination shall be subject to the provisions of the BIT for an additional ten years from the date of termination. All investments in this case have been made before 1 August 2012. The Tribunal has jurisdiction based on the BIT in that the investments of this case are subject to the provisions of the BIT.

C. This dispute should be submitted to an arbitral tribunal, not the ECJ

9. This case is a BIT dispute, not an EU law dispute, implying that the European Court of Justice ("ECJ") has no jurisdiction over this case. Therefore, this dispute must be submitted to an arbitral tribunal.

II. THE CLAIMS ASSERTED SHOULD NOT BE DISMISSED ON THE GROUNDS OF INADMISSIBILITY

10. Under the BIT, the Tribunal cannot derive any power to dismiss the asserted claims based on admissibility. "There is here no express power to dismiss a claim on the grounds of "inadmissibility," as invoked by the USA."[1]

11. Therefore, the Tribunal must proceed with the arbitration process and take the merits of this case

[1] *Methanex v. United States*

into consideration.

III. RESPONDENT VIOLATED FAIR AND EQUITABLE TREATMENT

A. Subsequent changes to the LRE is a violation of fair and equitable treatment

i. Frustration of Claimant's legitimate expectation

12. By reading of the law, it is legitimate for Claimant to expect to get the guaranteed feed-in tariff for twelve years. Article 4 of the LRE stated that the feed-in tariff "applicable at the time of issuance of a license," which is 0.44 EUR/kWh, would apply for twelve years. Moreover, there is no explicit provision in LRE stating that the Barancasia Energy Authority can re-calculate the feed-in tariff. Thus, the reduction of the guaranteed feed-in tariff frustrated Claimant's legitimate expectation.

ii. Respondent failed to meet its obligation to provide a "stable" legal framework

13. The stability of the legal and business framework in a state is an essential element in the standard of what is fair and equitable treatment.[2] However, Respondent's drastic reduction of the feed-in tariff by amendment of the law made Claimant's investment unstable.

iii. The need to protect Claimant's legitimate expectation outweighs Respondent's power to legislate.

14. The state may always change its legislation, being aware and thus taking into consideration that an investor's legitimate expectations must be protected.[3] If the balance is lost, it is nothing more than abuse of sovereign power.

15. Claimant's legitimate expectation has to be prioritized because: (i) investment in the energy sector has a tendency to be on the long-term basis and heavily influenced by regulatory changes; and (ii)

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[2] *LG&E v Argentine Republic*

[3] *Micula v Romania*

twelve-year guarantee of the feed-in tariff laid the foundation for Claimant's investments.

iv. Respondent's amendment process of the LRE was arbitrary.

16. The LRE has drastically changed in less than three years after its adoption; and the amendment was adopted only two months after the private hearings with certain stakeholders. Moreover, Claimant was never invited to the private hearings even though it was a concerned stakeholder.

B. Denial of a license to Alfa project is a violation of fair and equitable treatment

17. Denial of a license to Alfa frustrated Claimant's legitimate expectation since no provision in the LRE and the Regulation states limitation for the approval of a license.

18. Moreover, all relevant legal requirements for the purpose of investing should be capable of being readily known to all investors.[4] However, Respondent's action lacks transparency because it declined to disclose any criteria that has been applied in the approval procedure.

IV. RESPONDENT'S ACTIONS SHOULD NOT BE EXEMPTED ON THE BASIS OF NECESSITY

19. Respondent's action does not satisfy the requirements of customary international law defense of necessity.

A. Respondent was not in a grave and imminent peril

20. Respondent's situation does not amount to a grave and imminent peril because (i) mere speculation cannot be an objectively established evidence of a grave economic peril; and (ii) political peril caused by strikes with no violence is not imminent.

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[4] *Metalclad v The United Mexican States*

B. Even if there was a grave and imminent peril, Respondent contributed to the situation of necessity

21. Respondent failed to predict the market response and issued 6,000 licenses recklessly in order to boost investment on solar energy industry without thoroughly considering budget constraints.

V. PRE-2013 FEED-IN TARIFF MUST BE GUARANTEED

A. Restitution as the principle remedy

22. Article 35 and 36 of the Responsibility of States for Internationally Wrongful Acts state that a State responsible for an internationally wrongful act is under an obligation to make restitution to the extent that it is not materially impossible, and where damages are not made good by restitution, then the state is under an obligation to compensate.

23. Restitution in this case would be rescinding the amended LRE. However, if it is materially impossible, an alternative restitution would be guaranteeing the pre-2013 feed-in tariff.

B. Guaranteeing pre-2013 feed-in tariff is materially possible to Respondent

24. Respondent can continue to pay 0.44 EUR/kWh feed-in tariff. Even if the tribunal renders such award, it is obliged to grant pre-2013 feed-in tariff only to Claimant, not to all six thousand investors. It will not exceed the EU borrowing limit.

VI. THE CALCULATION ON DAMAGES PROPOSED BY CLAIMANT IS APPROPRIATE AND RELIABLE

29. Claimant's losses, which equal approximately €2.1 million, are comprised of the following elements.

A. Project Alfa

30. Alfa is eligible to benefit from Article 5 of the LRE since it does not exclude the existing project to be licensed. Its future revenue calculation is also reasonable because its capacity increased 2.2% per year.

B. Project Beta

32. WACC should be used as the discount rate. Since this analysis is to estimate the damage suffered by Vasiuki, WACC is preferred to calculate the company-wide effect this project would have.

C. 12 Additional Projects

35. WACC should be used for 12 additional projects as well, in that they constitute Vasiuki's present core business.

36. There is little possibility that the proceedings of further projects will be obstructed, thanks to the know-how in photovoltaic project development and advanced technology. Vasiuki’s expected profitability is established with sufficient certainty via reliable installation and operation of Project Beta.

37. Wasted expenditure should be indemnified because: (i) it is unlikely that other solar venture would make further investments in land and equipment due to the steep decline of the feed-in tariff; and (ii) Vasiuki would also struggle in using the land due to the adverse effect of the amended LRE.