TEAM Sette

THE LONDON COURT OF INTERNATIONAL ARBITRATION

VASIUKI LLC

(CLAIMANT)

v.

REPUBLIC OF BARANCASIA

(RESPONDENT)

SKELETON BRIEF FOR CLAIMANT

8 AUGUST 2015

I. Jurisdiction & Admissibility

A. *This Tribunal has jurisdiction over the dispute under Article 8 of the BIT*

1. **Claimant appropriately submitted the case for settlement to this Tribunal after the negotiations had collapsed.** Even if Claimant proposed to negotiate in writing, Respondent declined such suggestions. Since then the dispute has not been resolved for more than six months. Therefore, based on Article 8(2) of the BIT, Claimant is entitled to bring the case to this Tribunal.

B. *Respondent has not terminated the Agreement legitimately under Article 13 of the BIT*

2. **Termination of a treaty may take place by applying the provisions of the treaty at issue or the VCLT**. This implies that contracting parties that wish to terminate the treaty should abide by the termination provisions of the treaty in good faith. Thus, termination of the BIT should not be legally forced from other treaties, including TFEU (Article 42(2), VCLT).

3. **Respondent's notification on 29 June 2007 cannot terminate the BIT.** As the BIT entered into force on 1 August 2002, it shall be valid until 1 August 2012, according to Article 13(2) of the BIT. If one party makes a notification before the ten-year period, it would contradict Article 13(2) itself, weaken the enforceability of the BIT, and defeat the object and purpose of the Agreement.

C. *EU accession does not terminate the BIT by virtue of VCLT Article 59*

4. **The BIT and EU Regulations including TFEU do not relate to the same subject matter.** This further rules out the application of VCLT Article 30(3).

Article 59 of VCLT is restrictively applied to situations where successive treaties relate to the same subject matter (*Eureko v. Slovakia*, 2010, ¶239). Simply dealing with the same facts or having the same goal cannot satisfy the requirement of "the same subject matter" (*European American Investment Bank v. Slovakia*, 2012, ¶168). Also, *Eureko* and *Eastern Sugar* tribunal concluded that Intra-EU BITs and EU Law do not cover the same subject matter (*Ibid.*, 2012, ¶179-182).

5. **There is no evidence that Claimant and Respondent intended to replace the BIT with TFEU.** Under Article 59 of VCLT, in order to terminate BIT with the conclusion of TFEU, contracting parties should have subsequently intended that EU law should apply in full between them (*Eureko v. Slovakia*, 2010, ¶244). In this case, Respondent unilaterally notified its intention to terminate the BIT to which Claimant did not agree.

6. **Provisions of the BIT and EU legal order are compatible.** Two treaties are incompatible when compliance with one treaty inevitably leads to a breach of the other (*European American Investment Bank v. Slovakia*, 2012, ¶216). Mere differences between the treaties do not constitute incompatibility. In this case, the BIT and EU law are far from being so incompatible to be applied at the same time.

II. Merits

A. *Respondent has breached Fair and Equitable Treatment standard in Article 2 of the BIT*

7. **Fair and Equitable Treatment standard in the BIT should be understood in a broader sense.** Since BIT in the case does not specify the meaning of Fair and Equitable Treatment (hereinafter, FET), the interpretation of the provision should

be based on Article 31(1) of VCLT. Ordinary meaning, context, and object and purpose prescribed in the preamble of the BIT should be considered. Respondent's claim on the termination of the BIT and abrupt modification of the national law contravenes the primary object and purpose of the BIT of creating and maintaining favorable conditions for investors.

8. **In practice, tribunals take into account various elements when determining the breach of FET standard.** Tribunals have considered specific criteria such as protection of legitimate expectations, due process, transparency, etc. in a number of cases (UNCTAD, *ISDS and Impact on Investment Rulemaking*, p.46; *Tecmed v. Mexico*, 2003, ¶154; *MTD v. Chile*, 2004, ¶103-105; *Bayindir v. Pakistan*, 2009, ¶178).

9. **Respondent violated FET standard by implementing measures beyond Claimant's legitimate expectations.** Investors' expectations based upon legal order or promises in forms including contract, law, regulation, or governmental approval are regarded legitimate (*CMS v. Argentina*, 2005, ¶274-276). Vaisuki, at the time of investment, implemented Beta and twelve other projects, relying on the LRE which guaranteed the feed-in tariff for twelve years. Furthermore, the *Regulation* provides an exhaustive list of calculation factors and BEA officially announced 0.44EUR/kWh feed-in tariff. Therefore, Claimant has enough reasons for its legitimate expectations which should be protected.

10. **The denial of Alfa project was arbitrary and discriminatory**. Arbitrariness is not so much something opposed to rule of law; rather, it is a willful disregard of due process of law, an act which shocks or surprises a sense of juridical propriety (*Case Concerning Elettronica Sicula (ELSI)*, 1989, ¶128). Respondent entitled a license with 0.44EUR/kWh tariff only for new projects of Vasiuki, although

nothing in LRE and Regulations mentioned this limitation. This arbitrary measure contradicts legitimate expectations of Vasiuki and discriminates Alfa project against other photovoltaic projects. Moreover, by adopting vague terms such as "best available technology", the amended Article 4 of LRE opens room for further arbitrary measures.

11. **Respondent's measures lack due process and transparency.** The principle of due process and transparency which guarantees access to justice, notice of proceedings or opportunity to be heard is a fundamental element of FET standard. Its application is not confined to judicial process. Denial of opportunity to attend the Municipal's meeting was also considered a breach of due process (*Metalclad v. Mexico,* 2000, ¶91). Likewise, Vasiuki has not been provided with due process in terms of administrative or legislative process: limited accessibility to the private hearing and law amendment procedure.

12. **Respondent has not provided Claimant with Full Protection and Security.** When the term "protection and security" is qualified by "full" and no other explanation, its ordinary meaning is not limited to physical interferences but extends to legal stability and domestic judicial procedure in general (Azurix Corp. v. Argentina, 2006, ¶407-408; Vivendi v. Argentina, 2007, ¶13-17). A tribunal in *Occidental* case even concluded that a treatment which is not fair and equitable automatically entails an absence of full protection and security (*Occidental Exploration and Production Company v. Ecuador*, 2005, ¶187).

B. *Respondent's actions cannot be exempted on the basis of necessity under customary international law*

13. **Respondent cannot invoke the BIT Article 11 for its domestic affairs**. The current situation in the Respondent state has little to do with its obligations for the maintenance of international peace or security.

14. **The situation in Respondent does not fall within the scope of "essential security interest.** In order to argue that essential security interest is at imminent peril, the situation should reach such profoundly serious conditions as total breakdown of economy or disruption of society (*CMS v. Argentina, ¶354-356*). The fact that Respondent is on the verge of exceeding borrowing limit and that national strikes occurred is not severe enough to be equated with economic or social collapse.

15. **Respondent failed to satisfy the "only way" element of the necessity defense**. A state may invoke necessity when it is the only way for the State to reserve its essential interest against a grave and imminent peril (*ILC Draft Articles, 2001*, Art.25(1)(a)). However, Respondent did not attempt to find other alternative ways to meet EU obligations.

16. **Respondent has contributed to the situation of necessity**. Invoking necessity defense requires that Respondent has not contributed to the situation which is in peril (*Draft Articles, 2001*, Art.25(2)(b)). As Respondent's public officials admitted, it has contributed to the situation of necessity by setting inappropriate tariff rate and thus leading to financial difficulty. Therefore, Respondent may not be exempted from its responsibility even if exogenous factors fueled additional difficulties (*AWG v. Argentina,* 2010, ¶264).

III.Remedy

A. *Claimant is entitled to restitution as specific performance*

17. **Respondent shall rescind LRE amended Art 4 or continue to pay the pre-2013 feed-in tariff to Claimant.** International tribunals have power to order measures such as orders of specific performance (Enron v. Argentina, 2004, ¶81). On the basis of Article 4 of the BIT which regulates restitution as available remedy, Respondent shall repeal the amendment of LRE or to continue to pay Claimant the €0.44 feed-in tariff for 12 years.

B. *Claimant shall be accorded just and adequate compensation for its loss*

18. **Claimant reasonably calculated compensation for its loss.** Denial of the €0.44/kWh tariff on Alfa project and arbitrary slash of the tariff on Beta project caused loss of Vasiuki, each amounts to €120,621 and €123,261. Claimant also deserves payment to its second head of damage of €690,056 of wasted investment, or €1,427,500 which would occur by accepting forced €0.15/kWh tariff until the Project completes. Lastly, the future projects will suffer reduced revenues of €765,835 due to the change in tariff. After adjustment of WACC, Claimant is entitled to approximately €2.1 million.