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International Arbitration Case Law

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Award Name and Date: Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica (ICSID Case No. ARB/13/2) – Decision on Jurisdiction – 15 December 2014

Case Report by: Nahila A. Cortes**, Editor Diego Luis Alonso Massa***

Summary: Claimants brought a claim against the Republic of Costa Rica pursuant to the Costa Rica-Switzerland Bilateral Investment Treaty (“BIT”) alleging that Costa Rica breached its obligations under the BIT, *inter alia*, protection and treatment, expropriation, and other commitments, in relation to its investment in a Costa Rica’s company that operated in the liquefied petroleum gas sector (“LPG”). The Parties agreed to bifurcate the proceeding. In the decision on jurisdiction, the Tribunal decided that it had jurisdiction *rationae temporis* and *rationae voluntatis*. However, the Tribunal concluded that it only had jurisdiction *rationae materiae* in relation to the violation of the fair and equitable treatment regarding the tariff proceeding and the canon applied by Costa Rica’s authority, and that it lacked jurisdiction on the others Claimants’ claims.

Main Issues: jurisdiction *rationae temporis*- State responsibility- jurisdiction *rationae voluntatis*- abuse of process – burden of proof – treaty shopping - jurisdiction *rationae materiae*- admissibility of the facts *pro tempore*.

Tribunal: Mr. Alexis Mourre (President), Mr. Ricardo Ramírez (Arbitrator) and Mr. Andrés Jana (Arbitrator)

Claimant's Counsel: Mr. Luis Grifé Alonso, Mr. Guillermo Ramírez Pérez, Sr. Ángel Espinosa García, Mr. Josafat Paredes Camarena (Mexico D.F., Mexico)

Respondent's Counsel: Ms. Marcela Chavarria, Ms. Adriana Gonzalez, Ms. Andrea Zumbado, Ms. Raquel Chanto, Ms. Karima Sauma (Ministry of Foreign Relations of Costa Rica) and Mr. Alejandro Escobar (Baker Botts LLP, London)

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Digest:

1. Relevant Facts

Cervin Investissements S.A. (“Cervin”) and Rhone Investissements S.A. (“Rhone” and together with Cervin, the “Claimants”) are two companies incorporated under the laws of Switzerland. Both companies are part of Grupo Zeta, a group of Mexican companies. Respondent is the Republic of Costa Rica (“Costa Rica” or “Respondent”) (¶¶ 1-12). The underlying dispute arose out of Claimants’ investment in Gas Nacional Zeta S.A. (“GNZ”), a company that resulted from the merger of GNZ and Tropigas de Costa Rica S.A. (“Tropigas”), which provides services of storage, packing, distribution, and commercialization of LPG.

In Costa Rica, the public and private entities interact in the LPG sector. On the one hand, RECOPE, a State-owned entity, oversees the production, acquisition, and sale of LPG to private companies. On the other hand, private companies store, distribute, and sell LPG to the final consumers (¶51). There are two authorities that have competence on the regulation of LPG: (i) the Regulatory Authority of Public Service (“ARESEP”), that sets the utilities prices and rates and supervises service providers from a financial and technical perspective, and (ii) the Ministry of Environment, Energy, and Transportation (“MINAE”), that defines the policies, the regulations, grants the concessions of public utilities and the permits for the packing and transportation of LPG in vehicles (¶¶61-62).

On 31 March 2010, Rhone and Cervin acquired by means of an assignment, all the shares of GNZ and Tropigas. Briand N.V., a company incorporated under the laws of the Netherlands, assigned all the shares of GNZ to Cervin, and Grenelle, a company incorporated under the laws of the Netherlands, assigned all the shares of Tropigas to Rhone. In October 2011, GNZ was merged by absorption into Tropigas, and the Claimants became the sole owners of GNZ (¶¶6-9). On 22 September 2006, Tropigas requested ARESEP an increase in the commercialization margin for the storage and distribution of LPG (¶96). After administrative filings, ARESEP granted the increase but fixed the margin lower than the one requested by Tropigas (¶97). On 30 November 2007, ARESEP revoked the authorization of Tropigas and GNZ to store and commercialize hydrocarbons derivatives due to a failure of Tropigas and GNZ to comply with their concession contracts as they had withheld gas cylinders belonging to their competitor (¶100).

On 25 January 2008, the representative of Zeta Internacional S.A. sent a letter to the Embassy of Mexico in Costa Rica requesting the intervention of the Mexican government to notify the Monitoring Commission of the Costa Rica-Mexico BIT about the violation to the investment treaty by Respondent (¶102). The letter referred to the revocation of the permits and a draft decree of Government of Costa Rica that modified the system to refill gas cylinders (the “Draft Decree”) (¶¶102-103). Under the proposed Draft Decree, companies had the obligation to refill the gas cylinders that were handed over by customers, even though if the gas cylinders concerned belonged to another company involved in the LPG business (“Universal Refill

System”) (¶65). This proposed system was different from the system of “segmented responsibilities” under which each company was the owner of their gas cylinders and the distributing companies could only refill their own gas cylinders and were forbidden to refill those of other companies (¶66).

From Claimants’ perspective, the Draft Decree authorized an illegal practice (¶ 102) and confiscated the companies gas cylinders (¶ 111).

On 9 March 2008, the representative of Tropigas and GNZ presented before the Ministry of Commerce of Costa Rica (“COMEX”) a notice of intent to file a claim under the Costa Rica-Mexico BIT (the “First Notice of Intent”) (¶106). This First Notice of Intent was based on the revocation of the permits and the existence of the Draft Decree (¶109). On 24 June 2008, the MINAE granted new concessions to Tropigas and GNZ for five years (¶115).

On 15 October 2008, a second notice of intent to file a claim under the Costa Rica-Mexico BIT was filed (the “Second Notice of Intent”) and it exclusively referred to the promulgation of the Draft Decree (¶¶117-118).

On 19 November 2008, the Secretary of Economy of Mexico sent to COMEX a communication making reference to the Second Notice of Intent and requested COMEX’s assistance to clarify and take care of the situation that the Grupo Zeta was undergoing in Costa Rica (¶121). On 12 February 2009, a representative of Mexican investors sent a communication to COMEX requesting their urgent intervention to prevent the promulgation of the Draft Decree (¶123).

On 13 March 2009, the Vice Minister of COMEX answered the letter by stating that COMEX was working in coordination with MINAE to have a final Draft Decree that would comply with the Costa Rica-Mexico BIT (¶124). On 19 November 2009, the representative of Tropigas and GNZ sent a notice to the Embassy of Mexico in Costa Rica stating that they would assert their rights under the mechanisms established in the Costa Rica-Mexico BIT and requested their assistance to initiate the necessary contacts with the governments of Mexican and Costa Rica under the Uruguay Round, GATT, and WTO (¶¶125-127). On 5 October 2010, the Ambassador of Mexico sent a letter to the Minister of Foreign Relations of Costa Rica requesting a hearing to discuss the Draft Decree (¶128).

In relation to the utility rate resolutions of 2010 and 2011, GNZ requested on March 16, 2010 an ordinary review of the commercialization margin (¶129). The authorities decided to increase the commercialization margin, however, the margin was set in a lower rate than the one requested by GNZ and imposed to all the packagers the obligation to comply with the Universal Refill System (the “Resolution of 2010”) (¶¶131-132).

On 17 March 2011, GNZ filed a new request to adjust the commercialization margin and the price of LPG since the current rates were directly affecting the financial situation of GNZ and forced it to subsidize the gas price in favor of consumers (¶133-134). The ARESEP decided to increase the margin, however, it recommended some calculations related to the user charges ((¶¶136-137) and imposed to the packagers the Universal Refill system (the “Resolution of 2011”) (¶¶138). GNZ appealed the Resolution of 2011.

On 19 February 2013, Claimants filed a request for arbitration before the ICSID. Claimants’ claim was based on Respondent’s failure to comply with the regulatory framework of LPG in

Costa Rica in relation to the utility rate decisions, arbitrary imposition of user charges, arbitrary application of the Universal Refill System, and violation of the direct client relationship (¶324).

On 30 September 2013, the authority resolved to partially annul the Resolution of 2011. However, up until the day of the hearing this issue had not been resolved (¶¶146-147). In addition, in 2012 and 2013 Claimants requested ARESEP to increase their margins but their petitions were rejected (¶147).

Finally, the concessions of GNZ expired on 30 June 2013 (¶148), and during 2014 the authority granted new concessions for five years (¶149).

2. Procedural History

On 19 February 2013, Claimants filed a Request for Arbitration which was registered by ICSID on 11 March 2013 (¶¶ 24-25). The Tribunal was constituted on 14 August 2013 (¶ 26). The first session was held by means of a telephone conference on 11 September 2013 where the parties communicated their intention to bifurcate the proceeding. On 19 September 2013, the Tribunal communicated the First Procedural Order (¶27). It was recorded that the parties did not have any objection to the constitution of the Tribunal and agreed to appoint Mr. Bingen Amezaga as an Assistant of the President of the Tribunal (¶29). On 20 November 2013, Respondent filed the Memorial on Exceptions to the Jurisdiction (30). On 7 March 2014, Claimants filed a Counter Memorial on Exceptions to the Jurisdiction (¶31). On 25 April 2014, Respondent filed the Reply to the Exceptions to the Jurisdiction (¶32). On 6 June 2014, Claimants filed a Rejoinder to the Exceptions to the Jurisdiction (¶33).

On 12 June 2014, Respondent requested the Tribunal to admit the incorporation of a document that should have been included in Annex R-62 of the Reply to the Exceptions to the Jurisdiction that was accidentally omitted (¶34). On 13 June 2014, the parties and the Tribunal had a telephone conference where they discussed practical issues related to the hearing and Respondent's request to incorporate the document in Annex R-62. In addition, Respondent requested the Tribunal to incorporate as a legal authority an award that had been published after the filing of the Reply to the Exceptions to the Jurisdiction (¶35). Since Claimants did not have any objection to said request, the Tribunal admitted the incorporation of the award. On 17 June 2014, Claimant informed the Tribunal their acceptance to incorporate the document as Annex R-62bis (¶36).

On 1 July 2014, the hearing on jurisdiction was held in Washington D.C. On 24 July 2014, each party filed their respective costs submissions and none of the parties objected to the filing of the other party (¶43).

3. Positions of the Parties

3.1 Respondent's Position

Respondent submitted that ICSID and the Tribunal lacked jurisdiction since the dispute arose before the Claimants made the investment. Respondents argued that the investment was done in bad faith and with the sole purpose of submitting the claim under the BIT. In addition, Respondent stated that Claimants did not provide any evidence of a violation of the BIT (¶¶156-157).

3.1.1 The claim is an abusive intent of submitting a pre-existing or foreseeable dispute

3.1.1.1 The claims are a pre-existing or foreseeable dispute

Respondent argued that Grupo Zeta has always been the real controlling company of Tropigas and GNZ and that it continued to be so through the Claimants (¶158). Moreover, the claims submitted to arbitration are pre-existing claims between Grupo Zeta and Respondent which have been subject to international claims under the Costa Rica-Mexico BIT (¶159).

Respondent argued that in order to determine the date on which a controversy arose, it is necessary to determine which is the real cause of the claim in order to assess whether the facts or considerations that generated the original dispute are still playing a principal role in the current dispute (¶161). In addition, Respondent claimed that the criterion to determine whether the claim is a pre-existing one is the substantial identity between the claims, not the formal one (¶162).

According to Respondent, the origin or cause of the controversy brought up by Grupo Zeta in 2008 against Respondent was still the key aspect of the controversy submitted to this arbitration (¶163).

3.1.1.2 The apparent investment was exclusively done to file a claim and constitutes an abuse of process that is incompatible with good faith and international law

Respondent alleged that Grupo Zeta incorporated the Claimants under the laws of Switzerland and acquired the shares of GNZ and Tropigas solely to invoke the BIT and to have a more favorable dispute resolution mechanism before the ICSID, given that the Costa Rica-Mexico BIT did not foresee the possibility to file a claim for a pre-existing dispute (¶180).

In this sense, Respondent argued that the creation of a legal entity to avail itself of a BIT is not compatible with the duty of good faith. In general, an investment made in bad faith is not protected under bilateral investment treaties, and particularly, those investments would not comply with Section 2 of the BIT and Section 25 of ICSID Convention (¶182). According to Respondent, to determine whether the investment was made in bad or good faith, Tribunals must assess the substance of the transaction, the substance of the commercial operations, and the time or opportunity when the transaction was executed in comparison to the time when the controversy arose (¶184).

Respondent stated that Claimants' transaction was an internal reorganization of Grupo Zeta, and that the apparent investment was made when there was a pre-existing controversy between Grupo Zeta and Costa Rica, and a pending international claim under the Costa Rica-Mexico BIT (¶¶185-186). In addition, Respondents detailed that Grupo Zeta had secured the diplomatic intervention of the Mexican Government in relation to the controversies with Costa Rica, while at the same time it was incorporating the legal entities and transferring to the Claimants the shares of Tropigas and GNZ (¶189). According to Respondent, Grupo Zeta intended to neutralize the balance of the rights and duties under the ICSID system, and due to Section 27 of the ICSID Convention, Claimants incurred an abuse of the process (¶190).

3.1.2 Claimants have not alleged a plausible violation of the BIT

Respondent admitted that most of the alleged facts should be viewed *pro tem* as real and that Claimants had the burden to prove that their allegations were serious enough to proceed to the merits of the case (¶193). In this regard, Respondent stated that the facts alleged by Claimants could not constitute a violation of the BIT because they were excluded *rationae temporis*, since they were prior to the investment, and the subsequent facts that followed the apparent investment were excluded *rationae materiae* because they could not serve as a basis for a plausible violation of the BIT (¶194).

4. Claimants' position

Claimants' argued that (i) there was no abuse of right since there was not a pre-existing or reasonably foreseeable dispute, and there had not been a deliberately manipulation of the facts to invoke the BIT and the ICSID mechanism, and (ii) Claimants have sufficiently presented a case on a *prima facie* violation of the BIT (¶209).

4.1 There is neither an abuse of right nor a deliberately manipulation of facts

4.1.1 There is neither an abuse of rights nor a deliberate manipulation of facts

Claimants argued that there is not a pre-existing or reasonably foreseeable dispute, based on the following:

(i) The prior controversies did not constitute a formal international claim. The notice of intent under the Costa Rica-Mexico BIT operated as a notice to give the parties an opportunity to discuss and clarify their differences (¶213); GNZ and Tropigas were entities incorporated in Costa Rica and lacked standing to sue Costa Rica, and their shareholders did not express in writing their consent to arbitrate (¶214), and Section 27 of ICSID Convention applies where the investor has already consented to arbitration. In this case, only Cervin and Rhone consented to arbitrate and have never requested diplomatic protection from Switzerland (¶216). The informal diplomatic step that the Mexican Government took, are not prohibited under Section 27 of the ICSID Convention (¶217);

(ii) The claims under the BIT are based on different facts from the controversies that had arisen in 2008 and 2009. These controversies referred to the revocation of Tropigas and GNZ's concessions to provide consumers with LPG and the eventual approval of the Draft Decree that would implement the Universal Refill System (¶219). Finally, these disputes did not have any effect because in June 2008 Tropigas and GNZ were granted new concessions and the Draft Decree never came into force (¶220). Claimants argued that the current claim is based on the illegal, arbitrary, and unjustified failure of Costa Rica's authorities to comply with the regulatory framework of LPG (¶221).

(iii) The parties to this arbitration are not the same parties that participated in the aforementioned events and controversies. Claimants alleged that the arguments based on the theory of "unique economic entities" should not be admitted since this theory is exceptionally use in cases related to economic competence but have never been accepted in international arbitration (¶238).

(iii) The causes of action are different. Claimants argue that the facts that motivated the notices of intent under the Costa Rica-Mexico BIT are not the same to the current claims and do not play a significant role on the claims that were filed in this arbitration (¶240)

4.1.2 *There has not been a manipulation of facts to obtain protection under the BIT*

Claimants stated that they did not manipulate the corporate structure to exclusively obtain a benefit from the BIT because they already had the possibility to refer the controversy to an ICSID arbitration under other treaties (¶242). Between 2008 and 2010, Briand and Grenelle were the sole owners of Tropigas and GNZ and their investment was protected under the Costa Rica-Netherlands BIT (¶243), which contemplates the possibility to submit the dispute to an ICSID tribunal and to an *ad-hoc* tribunal under the UNICITRAL rules (¶¶243-244). In this regard, the acquisition of Rhone and Cervin did not bring about a dispute resolution mechanism that was not previously contemplated nor did it mean a procedural or substantial advantage (¶245).

Cervin and Rhone's real motivations to acquire GNZ and Tropigas were the economic, financial, and tax opportunities that Switzerland offered (¶246). Moreover, Claimants argued that Respondent had the burden of proof of the existence of abuse of process, however, Respondent did not provide any evidence on this regard (¶247).

4.2 *There is a prima facie violation of the BIT*

Claimants argued that all their claims were based upon behaviors, acts, and specific omissions on the part of the regulatory authorities of the LPG sector in Costa Rica that arbitrary and without any justification failed to comply with the regulatory framework and undermined Claimants' investments (¶252). Claimants' claims are related to the Universal Refill System, the direct client's system, the utility rate review, and the ARESEP user charges (¶254). The facts alleged cause Costa Rica to not comply with its obligations under the BIT, particularly with Section 4 of the BIT, protection and treatment; Section 5, expropriation; and Section 11, other commitments (¶255).

According to Claimants, the Tribunal must assume that the facts presented before it are true unless they are manifestly frivolous, degrading, or developed in bad faith, and that those facts must be provisionally accepted since they will be examined and rebutted in the merit phase (¶257).

5. Tribunal's analysis

The Tribunal concluded that it had jurisdiction *rationae temporis* and *rationae voluntatis*. However, the Tribunal found that it only had jurisdiction *rationae materiae* in relation to the violation of the fair and equitable treatment regarding the utility rate proceeding and the user charge applied by Costa Rica's authorities, and that it lacked jurisdiction on the rest of Claimants' claims.

5.1. *Jurisdiction rationae temporis*

The Tribunal stated that in order to determine whether a dispute is prior or subsequent to the investment, the analysis should start from the moment the alleged facts caused the State to incur responsibility (¶278). The Tribunal considered that Claimants identified facts that were

subsequent to the investment and that caused the State to incur the alleged responsibility, and did not invoke State's conduct prior to the investment (¶284). The Tribunal considered that the sole existence of a prior controversy cannot block the Tribunal's jurisdiction. Also, the Tribunal jurisdiction cannot be affected by the sole fact that, in the absence of bad faith, a controversy could have been foreseen at the moment the investment was made (¶285).

5.2 Jurisdiction *ratianae voluntatis*

Respondent argued that the sole purpose of investment made through the Swiss entities was to enable Grupo Zeta, which is the most relevant controlling entity of the investment, to artificially benefit from the BIT. Therefore, Claimants acted in bad faith to get a procedural advantage which they did not have before (¶288).

The Tribunal decided that it had jurisdiction *ratianae voluntatis* based on the following:

(i) Respondent had the burden to provide evidence that the investment was restructured to manipulate the ICSID jurisdiction (¶295), but Respondent did not offer such evidence. In addition, if Cervin and Rhone had not acquired Tropigas and GNZ's shares, the Netherlands entities controlled by Grupo Zeta, would have been able to sue Respondent under the Costa Rica-Netherlands BIT. The Tribunal concluded that since there was not a procedural advantage, there must have been other financial, fiscal, or corporate reasons to justify said reorganization (¶298).

(ii) Claimants did not immediately file a claim after the reorganization of the companies (¶300).

(iii) Respondent's conduct to renew the concessions in 2014 would be incompatible with Respondent's allegations of abuse of right (¶302).

(iv) Respondent argued that Briand and Grenelle lost their right to invoke the Costa Rica-Netherlands BIT after Grupo Zeta sent their notices of intent under the Costa Rica-Mexico BIT (¶303). Respondent alleged that Grupo Zeta, acting on behalf of GNZ and Tropigas, manifested its consent to arbitration under the Costa Rica-Mexico BIT and section 13-22(1) of that treaty excluded the possibility to have access to other dispute resolution mechanism (¶303). The Tribunal considered that the fact that Grupo Zeta and GNZ may have renounced to other dispute resolution mechanisms does not imply that said renunciation is extended to Grenelle and Briand, nor to Cervin and Rhone (¶306). In addition, there is no provision in the Costa Rica-Netherlands BIT nor in the BIT that states that the benefits of the treaty should be denied when the controlling investor previously invokes, directly or indirectly, the benefit of another treaty (¶306). Furthermore, Respondent's argument does not contemplate that the notices of intent and the communications made reference to different facts that are not currently at issue, and that Grupo Zeta did not initiate an arbitration under the Costa Rica-Mexico BIT (¶307).

(v) Respondent argued that Claimants violated Section 27 of the ICSID Convention. Furthermore, Respondent alleged that Claimants could not have access to the ICSID jurisdiction after having requested diplomatic protection from the Mexican Government (¶311). The Tribunal considered that the purpose of Section 27 is to forbid resorting to diplomatic protection once the parties have already consented or have already resorted to arbitration (¶313). In addition, the letter sent by the Mexican Ambassador to the Minister of Foreign Affairs of Costa Rica did not imply that diplomatic protection was granted, in the sense

of Section 27(1), since that letter was an informal diplomatic measure whose purpose was to facilitate the resolution of the controversy (¶315).

5.3 *Jurisdiction rationae materiae*

Both parties agreed that at the jurisdictional phase the Tribunal must admit that the facts presented by Claimants are true unless they are frivolous, offensive, or developed in bad faith, and the Tribunal must be persuaded that Claimants' alleged facts, if proved, could set the basis for a violation of the treaty (¶318). The Tribunal found that, although in the jurisdictional phase the facts are admitted *pro tem*, those allegations must be sufficiently precise to enable the Tribunal to verify whether there has been a possible violation of the BIT (¶322). At this phase, it is not sufficient to argue that the State violated international law, since Claimants must (i) explain which are the facts that, if true, constitute the basis of the State responsibility, and once those facts are identified (ii) demonstrate that those facts could violate the treaty concerned (¶322).

Claimants argued that the facts constitute, jointly or separately, a violation of the BIT, i.e. direct or indirect expropriation, fair and equitable treatment, full protection and security, national non-discriminatory treatment, and others (¶325). Although the parties did not develop which are the standards that applied to determine whether there has been a violation of the BIT, the Tribunal considered that in the jurisdictional phase it is not necessary to determine in a precise and final manner which is the content of the rules involved in each violation, but it suffices to determine whether the alleged facts could amount to a violation of the treaty (¶326).

The Tribunal analyzed each of Claimants' claims to determine whether the alleged facts could reasonably constitute a violation of Respondent's international obligations (¶327):

5.3.1 *Utility rates*

Claimants particularly argued that the ARESEP failed to comply with the regulatory framework related to the setting of the utility rates. Claimants claimed that (i) there has not been a due process in the utility rates' administrative review process; (ii) in their utility rates request, the authorities demanded GNZ to comply with additional requirements that had not been required from other companies, in violation of the national and non-discriminatory treatment; and (iii) the authorities rejected Claimants' request concerning the margin and price adjustment of GNZ in violation of the prohibition to expropriate without due process, and without a prompt, adequate, and effective compensation (¶329).

The Tribunal decided that the alleged violation of the regulatory framework did not constitute the basis for a claim on expropriation. It considered that although it is not defined in the BIT, an expropriation is a temporary or definite deprivation of the use and enjoyment of the investment. In this sense, Claimants did not argue that they had been totally or partially deprived of the use and enjoyment of their shares in Tropigas or GNZ nor of their assets or concessions (¶331). Also, Claimants did not provide evidence, even *prima facie*, that the authorities' resolutions interfered with the viability of the company (¶333). The Tribunal concluded that a diminution of the economic performance of the companies' incomes or profits does not constitute an expropriation (¶333).

Claimants have not explained why the protection and security obligation and the national and non-discriminatory treatment obligations set out in the BIT had been violated. Therefore, the Tribunal concluded that it did not have jurisdiction on those matters (¶¶335-336).

In relation to the violation of the fair and equitable treatment, Tribunal considered that in the jurisdictional phase it is not necessary to determine whether the BIT refers to the minimum standard of treatment or to a different standard (¶337). At this stage, the Tribunal considered that in order to find a violation of the fair and equitable treatment it is necessary that the State's conduct is arbitrary, manifestly unfair, and idiosyncratic, or that it involves an omission of the due process (¶337). The Tribunal considered that a deliberate disregard of the principles on which the regulatory framework is based and ARESEP's manifest absence of good faith in the utility rate proceeding, could, if proved, constitute a violation of the fair and equitable treatment despite the fact that this is the applicable standard. Likewise, the arbitrary rejection of the utility rate increases and the lack of transparency, if proved, may constitute a violation of the fair and equitable treatment (¶339). Therefore, the Tribunal concluded that it had jurisdiction in relation to the fair and equitable treatment of the utility rate proceeding (¶340).

5.3.2 User charge

According to Claimants, RECOPE imposed on the companies that purchased LPG the obligation to pay a user charge, the value of which must be added to the utility rate that the concessionaries charge to the final customers (¶341). However, Claimants stated that the ARESEP had not been adding the value of the user charge to the final utility rates, although the Office of the Comptroller General of the Republic of Costa Rica had imposed such an obligation. Therefore, Claimants alleged that there has been a violation of Section 4(1) of BIT and that Respondent's conduct constituted an expropriation (Section 5 of the BIT) (¶342).

The Tribunal found that Claimants did explain the reasons why the payment of the user charge by Tropigas and GNZ could have implied a deprivation of their investment, a loss of control or significant loss of their value (¶344). Therefore, the Tribunal determined that it did not have jurisdiction on that claim (¶345). Regarding the arguments related to the obligation of treatment, the Tribunal considered that the controversy related to the user charge was intrinsically linked to the utility rates claim. Thus, the Tribunal found it had jurisdiction on this issue (¶¶346-347).

5.3.3 Universal Refill System

Claimants contended that ARESEP imposed in an arbitrary way the Universal Refill System when it issued the 2010 and 2011 Resolutions (¶350). They alleged that Respondent's actions violated the fair and equitable treatment and protection and security obligations and that expropriated their investments without a due process and a prompt, adequate, and effective compensation (¶352).

The Tribunal determined that it did not have jurisdiction regarding the fair and equitable treatment allegation. The Tribunal concluded that, without a persuasive explanation, Claimants limited their claim to affirm that Respondent's allowed the Universal Refill System's practice, notwithstanding Respondent's allegations that it never authorized those practices (¶358). The Tribunal concluded that in the jurisdictional phase, Claimants must have put forward arguments of facts and law that could have allowed the Tribunal to understand the reason why those resolutions could be in themselves unreasonable or discriminatory measures (¶358).

Although the facts should be admitted *pro tem*, the claims should be sufficiently precise to enable the Tribunal to determine whether they may justify a violation of the treaty (¶361). In addition, the apparent lack of clarity of a utility rate resolution, in absence of bad faith, cannot constitute by itself an arbitrary or unfair conduct (¶362).

Claimants argued that there has been an expropriation and failure to provide full security since the competitors refilled GNZ's gas cylinders and did not return them (¶363). The Tribunal determined that Claimants did not make a precise argument on this regard, as they did not identify the responsible operators of such conduct (¶365), and furthermore, Claimants did not explain why those acts were attributable to the State (¶366).

Finally, Claimants claimed that Respondent failed to provide them with full protection and security (¶367). The Tribunal stated that considering that private operators committed the illegal acts, the failure to grant protection and security implies that the victim should have requested the intervention of the State to prosecute and sanction the illicit conduct of the competitors and to obtain the illegally withheld gas cylinders. However, Claimants did not assert in a precise way that they requested the intervention of the competent authorities and did not provide proof evidencing that the authorities dismissed or rejected those claims (¶367).

5.3.4 Direct Clients

Claimants contended that RECOPE, the State-owned entity, had apparently been applying preferential prices to GNC's competitors, notwithstanding that those preferential prices were reserved for large consumers and gas stations. Claimants stated that Respondent discriminated against GNZ and violated the national treatment obligation (¶369).

The Tribunal stated that Claimants made general allegations in relation to this issue and that the only factual allegation made was that RECOPE improperly applied preferential prices in favour of Blue Flame. However, Claimants did not provide any evidence regarding the date on which those sales were made, the quantity of LPG sold, and the prices that benefited Blue Flame (¶371).

The Tribunal concluded that the allegations made against Blue Flame cannot constitute a violation of the BIT. First, Claimants did not provide any evidence that, even *prima facie*, it was a State's conduct and that it could have been attributable to the State (¶374). Second, even if the conduct were attributable to the State, the Tribunal decided that the alleged sales to Blue Flame were not sufficient to establish, even in a *prima facie* analysis, a violation to the BIT (¶375).

Regarding the treatment obligation claim, the Tribunal concluded that only an arbitrary, manifestly unfair, idiosyncratic conduct or the absence of due process, may constitute a violation of the treatment obligation. The Tribunal found that facts of this case cannot be reasonably considered as such (¶376).

Regarding the full protection and security claim, the Tribunal decided that the sales to Blue Flame cannot constitute a violation. Based on the documents presented in the case, the Tribunal considered that the accusation filed by GNZ was examined by ARESEP, who collected relevant information and challenged RECOPE and Blue Flame, and decided that Blue Flame did not have the right to a preferential treatment (¶377).

Regarding the discriminatory treatment claim, the Tribunal concluded that Claimants did not provide any evidence, even *prima facie*, that the sales were carried out to favor Blue Flame due to its nationality or any other reason. The Tribunal stated that what happened with Blue Flame was an isolated irregularity that was promptly investigated and resolved by the authorities. In the hearing, Claimants were not able to provide any evidence that there were other irregular sales in favour of other entities (¶378).

5.3.5 Violations to the concessions

Claimants argued that Respondent violated section 11(2) of the BIT since it did not observe the obligations that arose out of the concessions (¶380). That Section of the BIT establishes that “*each contracting party shall observe any obligation assumed in relation to the investments of investors of the other contracting party executed in their territory*” (¶381).

The Tribunal decided that Claimants did not develop nor explained which contractual obligations have been violated. Therefore, the Tribunal concluded that it lacked jurisdiction on this issue (¶383).

6. Costs

The Tribunal decided that the decision of legal costs and expenses would be decided in the Decision on the Merits (¶ 226).

7. Separate Opinion of Ricardo Ramirez

Co-Arbitrator Ricardo Ramirez agreed with the majority’s decision on the objections *rationae temporis* and *rationae voluntaris*, however, he disagreed with the majority’s position on the objection to the *rationae materiae*. While he agreed with the majority’s position on the fair and equitable treatment obligation regarding the utility rates and the user charge, and the non-existence of an expropriation, he disagreed with the non-existence of a justifiable violation of the BIT in relation to the other claims.

Mr. Ramirez agreed with the parties and the majority’s position on the criteria the Tribunal must follow to analyze the jurisdictional objections, i.e. the Tribunal must admit the facts presented before them *pro tem* (unless they are manifestly frivolous, degrading, or developed in bad faith) and if proved, the Tribunal must determine whether they could constitute a violation of the BIT (¶1). However, Mr. Ramirez opined that although the majority admitted the factual allegations *pro tem*, they added an additional requirement, that the facts must be “sufficiently precise” to enable the Tribunal to verify whether there is a plausible violation of the BIT (¶2).

The Co-arbitrator did not agree with this position since the majority did not define or explain which elements must be taken into consideration to analyze this additional requirement (i.e. sufficiently precise); he did not find that the rules of arbitration supported this position, nor the consuetudinary norms of international public law, and similar criterion have been rejected by other arbitral tribunals.

Moreover, Mr. Ramirez considered that the majority confused the applicable standards to analyze whether there has been a “*plausible*” or “*prima facie*” violation of the BIT (¶8). Both standards are different. One applies to the jurisdictional objection and seeks to prevent the

filing of frivolous or bad faith claims that do not have any possibility of success. The other one applies to the merits of the case and requires that the investor prove in a reliable way that there has been a violation of the State (¶8). The majority seems to understand that although there is a *prima facie* case regarding the facts, those facts do not represent a violation of the BIT (¶8).

Mr. Ramirez opined that on this jurisdictional phase it was not suitable to request Claimants to present their case in a complete way as if it were the merits phase (¶8). The Co-arbitrator considered that the criteria of “plausible violation” is very strict, it must be analyzed in a very restrictive way, and he did not find elements in this case to apply said criteria on the jurisdictional phase (¶57). Considering the standard that should have been applied, there were sufficient elements to conclude that in the jurisdictional phase, there was a reasonable presumption of the existence of violations to the BIT (¶57).