TEAM AJIBOLA

LONDON COURT OF INTERNATIONAL ARBITRATION

VASIUKI LLC

(Claimant)

v.

REPUBLIC OF BARANCASIA

(Respondent)

ARBITRATION NO: 00/2014

SKELETON BRIEF FOR RESPONDENT

PART I: JURISDICTION AND ADMISSIBILITY

I. THE TRIBUNAL HAS NO JURISDICTION OVER THE DISPUTE.

A. The Barancasia-Cogitatia BIT ("BIT") is validly terminated.

1. The guaranteed operation period of 10 years under *Article 13(2),* BIT has been observed by the respondent except for the period of one month which is inconsequential and insignificant.
2. Beyond this period, unilateral termination is permissible after a twelve month notice which has been given by respondent.

B. The BIT is not revived by any survival clauses.

1. Investments in photovoltaic projects were made four years after termination of BIT.
2. Thus, claimant cannot get benefit of survival clause under *Article 13(3),* BIT.

C. EU law precedes over BIT.

1. According to *Article 59,* VCLT, in case of any inconsistency the latter treaty prevails over the earlier treaty *(Eureko v. Slovakia, ¶269).*
2. In accordance with *Article 258,* TFEU, the CJEU will have exclusive and compulsory jurisdiction over any member state dispute *(Commission v. Ireland, ¶184).*
3. EU law precedes over BIT *(AES Summit v. Hungary, ¶193).*
4. Further, principle of non-discrimination requires that there is no discrimination among EU members as prescribed under *Article 18,* TFEU.
5. Intra-EU BITs are discouraged so that two member states entering into BIT do not any enjoy undue advantage as compared to their other member states of EU.
6. The concern of EU is that arbitration takes place without relevant questions of EU law being submitted to the qualified court, which is the CJEU.

PART II: MERITS

II. THE RESPONDENT'S MEASURES DID NOT AMOUNT TO A BREACH OF THE BIT.

A. No act of expropriation or measure having equivalent effect has occured

1. Not all government regulatory activity, change in the law or its applicability that makes it difficult or uneconomical for an investor to carry out business, is an expropriation *(Robert Azinian v. Mexico, ¶83; Feldman v. Mexico, ¶112).*
2. Expropriation occurs if the interference is substantial and deprives the investor of all or most of the benefits of the investment.

B. The acts of respondent are not violative of the fair and equitable treatment ("FET") standards.

1. FET standards are infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety *(Waste Management v. Mexico II, ¶98).*
2. When the alleged 'legitimate expectation' is one of regulatory stability, absent an assurance to the contrary, a state cannot be expected to freeze its laws and regulations *(Micula v. Romania, ¶673; EDF v. Romania, ¶217).*
3. Where the investor chose to invest in a country in transition as a candidate for European Union membership, the investor cannot claim damages as it took the business risk to be faced with changes of law even detrimental to its investment *(Parkerings-Compagniet v. Lithuania, ¶335,336).*
4. Laws are inherently liable to change, even when the original legislative intent was to create a permanent regime or a regime for a given period *(Continental Casualty v. Argentina, ¶258).*

C. Acts attributed to respondent are reasonable.

1. A policy is rational when the state adopts it with the aim of addressing a public interest matter *(AES v. Hungary, ¶10.3.9).*
2. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host state's legitimate right to subsequently

regulate domestic matters in the public interest must be taken into consideration *(Saluka v. Czech Republic, ¶305; S.D. Myers v. Canada, ¶263).*

III. THE ACTIONS OF THE RESPONDENT ARE EXEMPTED ON GROUNDS OF NECESSITY.

A. The respondent's actions were necessitated by the crisis.

1. Economic interests qualify as essential security interests under *Article 11*, BIT *(Oil-Platform's case, ¶73; CMS v. Argentina, ¶359-360).*
2. The respondent's actions were necessitated on account of the existential crisis it faced due to the burden on its financial resources in order to meet EU's policy of debt ceilings and the increased expenditure on social sector reforms.
3. The respondent's interests are also harmed when it is unable to provide basic minimum functions as a state to its population *(LG&E v. Argentina, ¶234).*

B. The respondent fulfils the essentials of necessity under international law.

1. The action of the respondent was the only way to mitigate the situation and was arrived at after detailed deliberations and discussions.
2. As per the cause and effect relationship *(SAUR v. Argentina, ¶315),* the effect on the respondent's finances and EU commitments is a direct result of the subsidy.
3. The current crisis was not a direct result of any action on part of the respondent but was caused by the rapid change in the solar energy market and LRE, which was framed in adherence of the EU's renewable energy directive for 2020 exceeding its targeted objective in a short time.

PART III: REMEDY

IV. RESPONDENT CANNOT BE ORDERED TO RESCIND THE LAW ON RENEWABLE ENERGY ("LRE") AMENDMENT OR CONTINUE TO PAY THE PRE-2013 FEED-IN-TARIFF.

A. Respondent cannot be ordered to rescind the amendment to LRE.

1. Restitution cannot be awarded if it impinges on the respondent's regulatory sovereignty. It is each state's undeniable right and privilege to exercise its sovereign legislative power *(Parkerings-Compagniet v. Lithuania, ¶332).*
2. Restitution is barred where there is a disproportionality between the burden and the benefit in the case and pecuniary indemnification is sufficient.

B. Respondent cannot be ordered to continue to pay the pre-2013 feed-in-tariff.

1. Respondent has not undertaken any obligation to maintain a specific regulatory regime. BIT does not require the contracting states to tailor their laws and regulations to the preference of foreign investors, nor does it establish liability for every regulatory change that has a negative impact on the foreign investors' businesses.
2. Investor cannot rely on the BIT as an insurance policy against the risk of changes in the State's legal and economic framework *(EDF v. Romania, ¶217).*
3. Ordering restitution or specific performance would go beyond providing a remedy to Claimant as it would entitle all other investors to the same feed-in tariff causing huge burden.
4. Damages are the only viable remedy available to the investor as the relationship between the parties had effectively broken down.
5. Specific performance is available for breach of contract only where damages are inadequate.

V. CLAIMANT'S CALCULATIONS FOR DAMAGES ARE ILL-SUPPORTED AND BASED ON FALSE AND INCORRECT LEGAL AND FACTUAL ASSUMPTIONS.

A. No damages can be claimed for Alfa as it predates the LRE and damages claimed for Beta are erroneously inflated.

1. 'Legitimate expectation' can only lead to compensation if there was 'detrimental reliance,' which is a link between the expectation and investment made (*Int'l Thunderbird Gaming v. Mexico, ¶119).*
2. Alfa project became operational on 1 January 2010 and it was only in May 2010, when the respondent adopted the LRE, which was to be applicable to new projects.
3. With regard to Beta, having computed the cash flows to equity, the claimant needed to only discount them at the cost of equity to obtain the present value *(CMS v. Argentina, ¶431)* and not a rate that includes both debt and equity.

B. Valuation of the loss in investment made (*damnum emergens)* ignores potential mitigation and the alternate claim of lost profits (*lucrum cessans)* are erroneously inflated.

1. Though injured party must take reasonable steps to mitigate its losses *(CME v. Czech Republic, ¶303),* the claimant presupposes that the land and equipment purchased will be worthless. However, the price of the land is now 10% higher than when it was bought and is suitable to be used for other purposes as well.
2. The alternate claim of lost profits is erroneously inflated as the cash flows to equity should be discounted only at the cost of equity.
3. Further, the fact that Beta performed better than Alfa and is running at projected capacity is no basis for assuming that all of the 12 new projects will also attain their project capacity of 21%.

C. No lost profits can be claimed for future similar developments.

1. No reparation for speculative or uncertain damage can be awarded *(Amoco International v. Iran, ¶238).*
2. Where the enterprise has not operated for a sufficiently long time to establish a performance record, future profits cannot be used to determine going concern or fair market value *(Metalclad Award, ¶120).*

3. Requirement of proof of expenses is essential and report is not supported by any documents or conduct.