THE LONDON COURT OF INTERNATIONAL ARBITRATION

LCIA ARBITRATION NO: 00/2014

VASIUKI LLC (CLAIMANT)

V.

THE REPUBLIC OF BARANCASIA (RESPONDENT)

SKELETON BRIEF FOR RESPONDENT

8TH AUGUST 2015

JURISDICTION

A. THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER THIS DISPUTE AND THE CLAIMS ASSERTED BY VASIUKI LLC ARE INADMISSIBLE

I. The BIT has been terminated prior to the investment made by the Claimant (*rationae temporis*).

1. The termination of the BIT on June 30th 2008 is valid.
2. The termination by way of written notice is a usual practice or mode of termination in many bilateral agreements [Aust (2007) ***Modern Treaty Law and Practice***].
3. For bilateral agreements, withdrawal by either party results in the termination of the treaty for both parties [Helfer (2012) ***Terminating Treaties***].
4. This practice has been consistently accepted by contracting States [termination of South Africa-Netherland BIT].

II. The BIT has become obsolete due to Barancasia and Cogitatia's accession to the European Union.

1. The BIT has been terminated according to Art.59-VCLT.
2. The BIT and the TFEU relate to the same subject matter. Art.207-TFEU gives the EU exclusive competence to deal with foreign direct investment.
3. Both States have intended that the TFEU should supersede the BIT. The conduct of the State can be considered to determine the common intention of the States to terminate the BIT [***European American Investment Bank*** (2012) ¶112].

III. Even if the BIT as a whole has not been terminated, the arbitration clause under Art.8-BIT became inoperative by virtue of Art.30-VCLT.

1. Art.8-BIT is incompatible with the investor-state dispute settlement mechanism provided by the EU.

2. EU have recently implemented a Regulation setting out a new set of rules to manage investor-to-state disputes under the EU's investment agreements with its trading partners [***Regulation (EU) No 912/2014*** of 23 July 2014].
3. The set-up of the Tribunal is clearly against the power cohered to EU in regards to foreign direct investment.

MERITS

A. BARANCASIA HAS NOT BREACHED THE FAIR AND EQUITABLE TREATMENT STANDARD IN ART.8-BIT

I. Amendment to Art.4-LRE does not frustrated Vasiuki's legitimate expectations.

1. There should not be a claim based on breach of legitimate expectations by Vasiuki which is derived from the LRE with respect to Alpha, as LRE was not implemented yet in May 2009.
2. The legal regime in place at the time of the investment was made is the starting point where the Tribunal will assess whether investment protection provisions of a treaty is violated [***Duke Energy*** (2008) ¶365].
3. The legitimate expectations by an investor need to be balanced with Barancasia's sovereign right to regulate domestic matters in the public interest [***Saluka*** (2006) ¶305].
4. Vasiuki cannot claim to have a legitimate expectation that no restructuring of the industry would take place.
5. No investor can reasonably expect that the regulatory framework which they face at the time of their first investment will not be substantially altered with the passage of time and the evolution of events [***Paushok*** (2011) ¶370].
6. No prudent business entity assumes a constant tax system in a state and plans on the belief that there will not be changes. [***El Paso*** (2011) ¶374].
7. Without a stabilization agreement, Vasiuki cannot establish a legitimate expectation that Barancasia will refrain from modifying its feed-in tariff [***Paushok*** (2011) ¶305].

II. The amendment of the LRE was neither arbitrary nor unreasonable.

1. The amendment of the LRE is a bona fide general regulation made to protect public interest [***AES v. Republic of Hungary*** (2010) ¶9.2.4].
2. Such amendment is done in a transparent manner. Absence of consultation with the industry does not constitute a lack of transparency [***Paushok*** (2011) ¶304].

III. The Claimant must consider the conditions of the State in establishing a legitimate expectation.

1. An investor must take the conditions of the host State as it finds them.
2. The conditions in the host State upon its accession to the European Union affects the legitimacy of the investor's expectations [***Parkerings*** (2007) ¶335].

IV. Barancasia should not be made responsible for the loss suffered by the Claimant, as the State is not an insurer to the investor.

1. The obligation of fair and equitable treatment does not provide a guarantee that no damage will be suffered by an investor [***AAPL v Sri Lanka*** (1990) ¶546].

B. <u>THE ACTS OF BARANCASIA WERE NECESSARY TO PROTECT ITS ESSENTIAL SECURITY INTERESTS.</u>

I. Art.11-BIT allows Barancasia's actions to be exempted from its obligation under the BIT.

1. Art.11-BIT must be read in light of Art.31-VCLT.
2. The "essential security interest" extends to element encompasses economic and political interests as well [***LG & E Energy Corp*** (2007) ¶217].
3. The present situation in Barancasia threatens its essential security interest: (i) The foreseeable danger towards Barancasia's economic and renewable energy objectives (ii) the consequences following the breach of Barancasia's obligation to adhere to EU law

II. The protection afforded by Art.11 is in line with the defence of necessity as reflected in Art.25-ILC.

1. The Tribunal may depart from the strict interpretation of Art.25-ILC under customary international law and employ other jurisprudence [***Continental Casualty*** (2008) ¶192].
2. The present situation in Barancasia fulfils the requirements under Art.25.
   (i) There was a grave and imminent peril against an essential interest of the State.
   (ii) No essential interest of any other state was harmed.
   (iii) These were the only means which the Barancasia could have adopted.
   (iv) There was no substantial contribution to the state of necessity by the Respondent State.

REMEDIES

A. THE AWARD OF SPECIFIC PERFORMANCE SHOULD NOT BE GRANTED

I. The award, if granted, is against public policy.

1. The award of specific performance may be refused on the grounds of public policy pursuant to Art.V(2)(b) of the New York Convention .
2. Rules made for the interests of the state falls under public policy. [***Art.1(d) of the International Law Commissions Resolution on Public Policy 2002***, ***C Turpin; International Encyclopedia of Comparative Law*** vol. VII Ch. 4 27p]
3. Restitution is only available for unlawful takings [***Phillips Petroleum*** (1989)¶110].

II. The order of restitution will cause disproportionate burden to Barancasia.

1. Art.35-ILC precludes restitution if it causes disproportionate burden to the state. It must also be balanced on the reasonableness of the circumstances [***(2010) Yearbook of the International Law Commission*** vol. II, Part Two 96-98pp***, Greek Telephone Company*** cited in Wetter and Schwebel (1964) "Some Little Known Cases on Concessions" 221p].

2. The economic standing of Barancasia should be considered. [***Himpurna California*** (1999) ¶ 318***,CME*** (2006) Separate Opinion**,** Brownlie(2003)"***Principles of Public International Law" 6th ed.*** 513p].

III. Barancasia is still entitled to sovereign immunity

1. Restrictive approach to sovereign immunity only applies to commercial transactions but not in cases of an act of state [***Victory Transport*** (1965) 934p].
2. Immunity to jurisdiction may still be invoked in commercial transactions done for the purpose of the state [***Borri Loca*** (2006) ¶5].
3. Enforcement of an award can be precluded on the grounds of sovereignty [***Occidental Petroleum*** (2004) ¶84***, LG&E*** (2007) ¶87***, LIAMCO***(1977) 196p].

B. CLAIMANT'S BASIS FOR COMPENSATION IS INACCURATE

I. Damages for Project Alfa and future installations should be wiped out.

1. Legitimate expectation can only exist at the time of investment [***AES*** (2010) ¶9.3.7, ***Duke Energy*** (2008) ¶340, ***Tecmed*** (2003) ¶154].
2. Projects that are inoperative cannot claim for lost profit [***Metalcalad*** (2000) ¶121]

II. The DCF method should not be adopted, as there is no going concern and a lack of profitability.

1. Future profits or going concerns cannot be used to determine the fair market value of an investment which lacks profitability and has no going concern [***Vivendi*** (2007) ¶8.3.4***, CBS*** (1990) ¶52***, American International Group*** (1983) 108p***, Southern Pacific Properties***(1995) ¶188***, Wena Hotels*** (2002) ¶123] even if it has already concluded future contracts [***Benvenuti & Bonfant*** (1993) ¶4.78].
2. The book value method is the most appropriate for recent investments [***Siemens***(2007) ¶355]

III. Alternatively, there have been miscalculations in the financial report for damages.

1. If the tribunal finds that the DCF method should be adopted, it is still subject to challenges in calculations [***Enron*** (2007) ¶¶408-419***, Sempra*** (2007) ¶¶418-80].
2. Claim for lost profits may be denied if a certain project can still achieve its objectives [***Pope & Talbot*** (2005) ¶84].
3. Alternatively, in cases of indirect expropriation, the fair market value can only be determined by the amount of the actual investment made [***Metalclad*** (2000) ¶122].
4. Lawful takings as an economic measure to promote social justice calls for less than full compensation **[*Scordino*** (2006) ¶97***, LIAMCO*** (1977) ¶206***).***
5. Vasiuki has a duty to mitigate its loss [***CME*** (2003) ¶303***, Endo Labarotories*** (1987) ¶ 50***, Economy Forms*** ¶ (1983) 53p].
6. The principle of equity should be applied in cases where compensation is hard to be determined [***Aminoil***(1982) ¶78***,Tecmed*** (2003) ¶190***, American International*** (1983)109p].

Respectfully submitted,

On behalf of respondent:

The Republic of Barancasia

Team Bedjaoui