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**THE LONDON COURT OF  
INTERNATIONAL ARBITRATION**

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**LCIA ARBITRATION No. 00/2014**

**VASIUKI LLC**

*Claimant*

v.

**REPUBLIC OF BARANCASIA**

*Respondent*

**SKELETAL BRIEF FOR CLAIMANT**

## ARGUMENTS ON JURISDICTION AND ADMISSIBILITY

### **I. THE TRIBUNAL HAS JURISDICTION TO HEAR THE PRESENT DISPUTE, WHICH IS DERIVED FROM ARTICLE 8, BIT**

#### **A. The BIT has not been terminated by operation of law.**

1. Accession to the European Union does not terminate the BIT since the requirements under Article 59, VCLT have not been fulfilled.
2. Entry into force of the Lisbon Treaty does not terminate the BIT since the requirements under Article 59, VCLT have not been fulfilled. Further, the procedural requirements under Article 65, VCLT have not been complied with.

#### **B. The BIT has not been terminated of Claimant's volition.**

1. The procedure for unilateral termination under Article 13, BIT has not been complied with.
2. In any event, the survival clause under Article 13(3), BIT extends protection to Claimant's investments for 10 years beyond the date of termination.

#### **C. The application of Article 8, BIT is not excluded by Article 30, VCLT.**

1. The European Court of Justice does not have exclusive jurisdiction to hear disputes with respect to foreign direct investment. Hence, the requirements under Article 30, VCLT have not been fulfilled.

## ARGUMENTS ON MERITS

### **II. RESPONDENT IS LIABLE FOR BREACH OF OBLIGATIONS UNDER THE BIT**

#### **A. Respondent's regulatory and administrative measures breach Article 2(2), BIT.**

1. The standard of protection under Article 2(2) is Fair and Equitable Treatment ["FET"], which is broader than the Minimum Standard of Treatment ["MST"] under customary international law. Under FET, serious acts of maladministration are not required to constitute a breach.

2. The denial of license to Alfa violates the obligation of transparency under the FET standard. The LRE did not state that the feed-in tariff would be limited to new projects only. Such ambiguity, read in accordance with the *contra proferentem* rule, cannot be interpreted to disadvantage a foreign investor.
3. The Amendment violates the obligation to protect legitimate expectations of the investor under the FET standard.
  - 3.1 Claimant had a legitimate expectation regarding the stability of the legal regime concerning the feed-in tariffs. Claimant relied on this expectation in making the investment in Beta and 12 other projects.
  - 3.2 The retrospective application of the Amendment created instability in the existing legal environment and thus, violated Claimant's legitimate expectations.
  - 3.3 The Amendment was made for political reasons, in response to protests and strikes and therefore, it was not a legitimate regulatory measure.
4. The reduction in tariff, without having heard all interested parties, such as Claimant, violates the requirement of due process under the FET standard.

**B. Respondent's regulatory measures constitute a breach of Article 5, BIT.**

1. Article 5 prohibits both direct and indirect expropriation by prohibiting 'measures having effect equivalent to nationalization or expropriation'.
2. The Amendment resulted in an indirect expropriation of Claimant's investments.
  - 2.1 The sole effects doctrine, as applied in the *Metaclad* case, is applicable.
  - 2.2 Indirect expropriation results if the investor suffers 'substantial deprivation'. Since Claimant suffered 'permanent loss' of a significant part of the 'reasonably expected economic benefits' from the investment, the standard is met.
  - 2.3 Respondent's intent in having expropriated Claimant's investment is immaterial.

3. The expropriation of Claimant's investment was not for a legitimate public purpose. Further, it cannot be exempted under the 'police powers' doctrine.

3.1 The public policy exception is inapplicable as the Amendment was not a *bona fide* measure. It was politically motivated, enacted in response to strikes and protests.

3.2 The Amendment was contrary to the State's specific commitments under Article 4, LRE. This further excludes the application of the 'public policy' exception.

3.3 The police powers doctrine is limited to measures related to tax, criminal law and public order. It does not extend to measures taken for public welfare.

3.4 Under Article 5, BIT, which constitutes *lex specialis*, an expropriation must be accompanied by compensation even if it is for a public purpose. Respondent has failed to meet this requirement.

**III. RESPONDENT IS LIABLE TO COMPENSATE CLAIMANT FOR BREACH OF ITS INTERNATIONAL OBLIGATIONS.**

**A. Respondent is bound by its obligations under Article 2(2) and Article 5(1), BIT.**

1. Requirements under Article 30, VCLT are not met as Article 2(2) and Article 5, BIT do not conflict with Article 107 of the TFEU.
2. According to *Kleinheisterkamp*, a mere possibility of incompatibility in the future cannot lead to presumption of conflict in the present. The European Commission has not notified Respondent of any such conflict.

**B. Respondent's regulatory measures are not exempted under Article 11, BIT.**

1. Article 11, BIT operates as *lex specialis*, thus excluding the customary international law defence of 'necessity'.
2. Article 11, BIT cannot be invoked.
  - 2.1 Article 11 defines 'essential security interests' extremely narrowly. There was no threat to 'international' security interests. An emergency with purely local

effects, such as minor political protests and concerns regarding budgetary allocation, does not meet this requirement.

2.2 Article 11 does not set a self-judging standard. Thus, Respondent did not possess unilateral capacity to evade its international obligations.

**C. Respondent's measures are not precluded from wrongfulness under the customary international law defence of 'Necessity'.**

1. The Amendment was not the 'only way' for Respondent to tackle the budgetary imbalance. The fiscal requirement could have been met through diversion of funds from other sectors, increase in taxes, or increase in end-price of electricity for consumers.
2. Respondent did not face a 'grave and imminent threat', which requires existence of the highest degree of public disorder. A mere public policy concern does not meet the required standard.
3. The defence of necessity is not applicable when the State has contributed to the situation of necessity. In this case, Respondent cannot be allowed to take advantage of its own failure to account for its fiscal constraints.

**D. In any case, as per Article 27 of the ILC Articles, Respondent must compensate Claimant for the 'material loss' caused to it due to the Amendment.**

**ARGUMENTS ON REMEDIES**

**IV. CLAIMANT IS ENTITLED TO A REMEDY OF SPECIFIC PERFORMANCE**

**A. Specific performance is a remedy under international law as per the ILC Articles.**

**B. Specific performance can be granted as a remedy in the instant case.**

1. Arbitral tribunals have the power to award specific performance against States in investor-state disputes, as was held in the *Enron v Argentina* case.

2. Specific performance is not materially impossible in the instant case. Mere legal or financial difficulties, which Respondent may face, do not amount to material impossibility under the ILC Articles.
3. Specific performance will not impose a disproportionate financial burden upon Respondent. In any case, since disproportionality is uncertain, as injured party, Claimant's request for relief should be favoured.

**V. IN ANY CASE, CLAIMANT IS ENTITLED TO CLAIM DAMAGES FROM RESPONDENT**

**A. The standard for compensation is 'full reparation', as held in the *Factory at Chorzów* case.**

**B. Claimant is entitled to damages amounting to approximately €2.1 million for loss caused by the reduction in feed-in tariff.**

1. The rate of discount applicable is the cost of equity, under the direct equity method of calculating Net Present Value.
2. Claimant's estimation of damages for denial of license to Alfa is not speculative. In any case, uncertainty of the quantum of damages cannot entirely excuse Respondent from paying damages.
3. Claimant is entitled to recover the lost profits from the 12 new projects. Given the success of Beta, the estimated damages for loss caused to these projects is not speculative.
4. Claimant is entitled to damages for the lost profits from future projects. Loss resulting from a lost opportunity to make probable future profits must be compensated for by the responsible State. Given Claimant's plans to install new projects under the LRE, it is entitled to receive damages for such loss of opportunity.

**C. Claimant is entitled to the same rate of interest on damages as the rate of discount on cash flows, in order to avoid an Invalid Round Trip.**