TEAM NERVO

THE LONDON COURT OF INTERNATIONAL ARBITRATION

UNDER THE LCIA RULES

LCIA ARBITRATION NO. 00/2014

VASIUKI LLC … **CLAIMANT**

V.

REPUBLIC OF BARANCASIA … **RESPONDENT**

SKELETAL BRIEF ON BEHALF OF THE RESPONDENT

ARGUMENTS ON JURISDICTION AND ADMISSIBILITY

I. THE TRIBUNAL IS NOT VESTED WITH JURISDICTION OVER THE CLAIMS SUBMITTED BY THE CLAIMANT.

A. The Barancasia-Cogitatia Bilateral Investment Treat ("BIT") has become obsolete due to the accession of both Barancasia and Cogitatia ("Contracting Parties") to the European Union ("EU").

1. As on the date the two countries of Barancasia and Cogitatia joined the EU, the Barancasia-Cogitatia BIT stands terminated in accordance with Article 59 of the Vienna Convention of Law of Treaties ("**VCLT**"). There is an inherent conflict as both the BIT and the Treaty on the Functioning of the European Union ("**TFEU**") have separate redressal fora and the intent of the parties is clearly to replace the former with the latter.
2. The BIT consists of and addresses the same subject matter as the TFEU. The purpose of Article 59 of the VCLT is to prohibit parties from undertaking the same obligations twice, as well as to negate the scope of inconsistencies. Thus, the definition of the phrase 'relate to the same subject matter' must be construed in the wider sense rather than favouring a narrower interpretation. The wider interpretation restricts the repetition of agreements and promotes agreements to be beneficial for both Contracting Parties.
3. By becoming signatories to the TFEU, the intention of the two Contracting Parties must be ascertained to be one wherein they clearly wished to replace the BIT with the TFEU. The ultimate goal of the European Union is to provide for a customs-free union for the countries in the region. Therefore, by acceding to the EU, the Contracting Parties accepted to abide by the provisions of the TFEU, and even though the BIT mentions termination it does not explicitly prohibit replacement. Hence, it must be ascertained that the parties had intended to replace the obligations under the BIT with those under the TFEU.

B. Article 10 of the BIT is directly applicable to the present dispute.

1. When a matter is governed by both the BIT, as well as another international agreement to which both the Contracting Parties are parties (such as the TFEU),

Article 10(1) of the BIT authorises a Contracting Party to take advantage of whichever rules are more favourable to its case.

2. Therefore, Article 10(1) is directly applicable to the present dispute, and the Respondent is entitled to proceed under the provisions of the TFEU, as they are more favourable to its case.

C. The present dispute must be referred to the European Court of Justice ("ECJ").

1. The arbitration clause provided in Article 8 of the BIT is incompatible with the TFEU because it violates the 'competence' of the ECJ to interpret the EU law.
2. Further, the TFEU does not promote arbitration for investors and members as it may create discrimination.
3. If the Tribunal lacks jurisdiction over a dispute but the Claimant still claims that the dispute persists, then as per the approach taken in *Ireland v. United Kingdom* the proceedings may be recommended to be undertaken at the ECJ.
4. Therefore, the Tribunal may refer the present dispute to the ECJ and stay the current proceedings.

D. In Arguendo, Article 8 of the BIT is inapplicable to the present dispute as per Article 30 of the VCLT.

1. Even if Article 59 of the VCLT does not operate to terminate the BIT, the Tribunal has no jurisdiction to decide this case because the arbitration clause in the BIT is not "compatible" with the TFEU within the meaning of Article 30 of the VCLT.
2. Article 30 states that the provisions of the later treaty shall prevail when the earlier treaty is incompatible with the latter. Unlike Article 59, Article 30 requires no proof of the Contracting Parties' intentions and does not deal with the incompatibility of the treaties as a whole, but rather the incompatibility of individual provisions of the treaties. The BIT's clause of dispute resolution (Article 8) is thus replaced with the TFEU's dispute resolution mechanism.

E. In Arguendo, the BIT has been terminated according to Article 13 of the BIT.

1. The Respondent notified the Claimant's home country of its intention to terminate the BIT, on 29 June 2007.

2. Therefore, the BIT stands terminated as the conditions required under Article 13(2) of the BIT, for termination of the BIT, have been fulfilled by the Respondent.

II. THE CLAIMS ASSERTED BY THE CLAIMANT ARE INADMISSIBLE.

The claims asserted by the Claimant are inadmissible because the preconditions for the admissibility of any claim, such as (i) *rationae materiae*, (ii) *rationae personae*, and (iii) *rationae temporis*, have not been fulfilled by the Claimant in the instant case.

ARGUMENTS ON MERIT

III. THE RESPONDENT HAS UPHELD ITS TREATY OBLIGATIONS UNDER THE BIT AND HAS ADHERED TO THE FAIR AND EQUITABLE TREATMENT ("FET") STANDARD ENSHRINED IN THE BIT.

A. The Respondent's administrative and regulatory measures are neither unreasonable nor discriminatory.

1. The 2013 amendment of Article 4 of Law on Renewable Energy ("**LRE**") was a reasonable policy change in furtherance of a rational policy.
2. The actions of the Respondent, in the form of the LRE Amendment, apply uniformly to all the players in the market; the Claimant has not been arbitrarily singled out by the Respondent.

B. There is no breach of the Claimant's legitimate expectations.

1. The Claimant's expectations were not legitimate.
2. There was no representation or warranty made by the Respondent to the Claimant, which was in any way contrary to the actions taken by the Respondent.

IV. IN ARGUENDO, THE RESPONDENT'S ACTIONS ARE EXEMPTED ON THE BASIS THAT THEY WERE NECESSARY FOR BARANCASIA IN ORDER TO MEET ITS ECONOMIC AND RENEWABLE ENERGY OBJECTIVES AND TO ADHERE TO ITS EU OBLIGATIONS.

A. Article 11 of the BIT is applicable in cases of essential security interests.

1. The Respondent has certain economic objectives which are essential for maintaining national security.
2. The actions of the Respondent were necessary to maintain national security, and therefore, they fall under the definition of essential security interests.
3. The conditions necessary for the application of Article 11 to the present dispute have been satisfied by the situation that developed in the Respondent State, and the actions taken by the Respondent in response to such a situation.

B. The Respondent is obliged to meet certain climate and energy targets by virtue of being a part of the EU.

1. The Respondent is bound by various directives and policies as a result of its membership of the European Union.
2. Therefore, the Respondent is obliged to meet the economic, climate and energy targets as set forth by the EU.

V. THE RESPONDENT CANNOT BE ORDERED BY THE TRIBUNAL TO RESCIND THE AMENDED ARTICLE 4 OF THE LRE OR TO CONTINUE TO PAY THE PRE-2013 FEED-IN TARIFF TO THE CLAIMANT.

A. The arbitral tribunal has no power to order specific performance in the instant case.

1. The tribunal does not have the power to pass any award ordering specific performance; it can only pass awards ordering pecuniary relief.
2. This position has been upheld by multiple arbitral tribunals and international courts.

B. Any award by the arbitral tribunal ordering specific performance would be in direct violation of the Respondent's sovereignty.

1. The Respondent state has only waived its sovereignty to the extent of being bound by awards of arbitral tribunals ordering pecuniary relief.
2. The arbitral tribunal does not have the power to order specific performance or an injunction of any kind; as such an award would directly violate the sovereignty of the Respondent.

VI. THE CLAIMANT'S BASIS FOR CLAIMING AND QUANTIFYING DAMAGES IS MISPLACED AND ERRONEOUS.

A. The tribunal should accept the valuation report of the Respondent's expert, while rejecting the valuation report of the Claimant's expert, since the Claimant's valuation of the damages is fundamentally flawed.

1. Claims relating to damages for Project Alfa are erroneous and liable to be dismissed because Project Alfa was not undertaken in response to the LRE, and therefore, the Claimant cannot claim any benefit accruing towards Project Alfa from the LRE.
2. The Claimant's expert has made a fundamental error in calculating the damages relating to Projects Beta to Kopa by discounting cash flow at the Weighted Average Cost of Capital ("**WACC**") of 8% which includes both debt and equity, instead of discounting cash flow at the rate of 12% which is the cost of equity for the Claimant.
3. Finally, in the absence of any explicit documentation or any other proof evidencing the Claimant's alleged plans for additional expansion of its projects in the future, the Claimant is not entitled to claim damages on the basis of such future expansion. Such a conclusion is in accordance with the professional standards of accountancy across the world.