

Team SHI

**IN THE LONDON COURT OF INTERNATIONAL ARBITRATION FOR
ARBITRATION
UNDER LCIA RULES**

LCIA ARBITRATION No. 00/2014

VASIUKI LLC

Investor (Claimant)

v

REPUBLIC OF BARANCASIA

Host State (Respondent)

SKELETON MEMORIAL FOR THE CLAIMANT

JURISDICTION

I. The Tribunal has jurisdiction over the dispute under the Bilateral Investment Treaty (BIT)

A. The BIT has not been terminated as per Article 13

1. The Claimant submits that the BIT is valid and has not been terminated, since Article 13 of the BIT provides that the BIT shall remain in force for a period of at least ten years. The BIT can be unilaterally terminated by giving a notice of termination only upon the completion of the ten year period.
2. Further, Article 13 requires the termination of the BIT to be effective for a period of twelve months from the date of notice for termination given by the parties.
3. Barancasia's notice for the termination of the BIT is thus prima facie invalid because it states the effective date of termination to be June 30, 2008, which is *before* the completion of the minimum term of the BIT, as the BIT came into force on August 1, 2002. Thus the Tribunal has jurisdiction over the dispute concerning the Claimant's photovoltaic projects under the BIT.

B. Accession into the European Union (EU) does not automatically terminate the BIT

4. The automatic termination of the BIT following the accession of both countries into the EU has been previously rejected by arbitral tribunals in the cases of *Eastern Sugar BV (Netherlands) v Czech Republic* and *Eureko BV v The Slovakia Republic* respectively.
5. Article 59 of the Vienna Convention on the Law of Treaties (VCLT) has no application to the present case as the European Community Treaty (EC Treaty) and the BIT do not relate to the same subject matter. The EC Treaty provides for free movement of capital and freedom to establish undertakings; it does not require the member states to afford fair and equitable treatment or dispute resolution through arbitration as under the BIT.
6. The protection accorded to the investors under the BIT is more detailed and therefore makes the subsequent EC Treaty materially different from the BIT. Even if the EC Treaty provides some protection of investments, the EC Treaty deals with the initiation of investments, while the primary aim of the BIT is the protection of investors.

7. The Claimant thus submits that even after the accession of the countries into the EU, the EU law does not automatically supersede the BIT and the BIT remains in force inclusive of its arbitration clause and thus the Tribunal has complete jurisdiction in the present dispute.

MERITS

II. There has been a violation of the obligation of Fair and Equitable Treatment (FET) under the BIT

A. The applicable standard of protection is that of FET and not Minimum Standard of Protection

1. Article 2(2) of the BIT is silent on the reference to international law or customary international law and thus accords for following the FET standard and not the Minimum Standard of Protection under international law.

B. The Respondent has breached its obligations due under Article 2 of the BIT flowing from the principles enshrined under FET

2. Denial of license to project Alfa in violation of Article 3 and Article 5 of the Law on Renewable Energy is arbitrary and grossly unfair. *Tecmed, SA v United Mexican States* has established that the legitimate expectations of Claimant of a stable legal framework were frustrated due to Barancasia's retrospective reduction of the feed-in tariff from 0.44 EUR/kWh to 0.15 EUR/kWh for licensed renewable energy providers.
3. The Claimant's legitimate expectation of a stable legal framework was further frustrated due to the introduction of an annual review whereas the law guaranteed fixed feed in tariffs for twelve years.

C. Denial of license to project Alfa and the retrospective reduction of tariffs results in the indirect expropriation of the investments made by the Claimant

4. Interference with the property which deprives the owner in whole or in significant part of the use or reasonably to be expected economic benefit of property amounts to indirect expropriation.
5. Actions of the Barancasian government resulted in indirect expropriation, and thus violation of the FET standard as:

5.1. Denial of license to project Alfa resulted in depriving the Claimant from fully utilising the investments made with regard to project Alfa.

5.2. Retrospective reduction of tariffs makes the investment on land and equipment for the twelve new solar power plant projects much less valuable and results in huge losses to the Claimant.

III. There is no exemption of Respondent's actions for breaching the BIT

A. The Respondent's actions cannot be said to be taken to protect its essential security interests under Article 11 of the BIT

1. There was no threat to the breach of international peace and security. As the non precluded measures clause is not being satisfied the Respondent cannot be exempted from liability for having breached the BIT.
2. Alternatively, even if the terms of the BIT are interpreted in accordance with the rules established in the VCLT in light of its ordinary meaning, object and purpose and the defense of necessity under Article 25 of the ILC draft Articles on State Responsibility is read into the NPM clause of the BIT, even then the respondent is not exempted from liability.

B. The Only Means Requirement

3. The plea of necessity would be excluded if there are other (otherwise lawful) means available, even if they may be difficult, more costly or less convenient as was stated in *Enron Corporation v. Argentine Republic*. Barancasia continuing with its renewable energy support system would have merely caused certain economic difficulties and inconveniences and an alternative measure would have still existed.
4. Therefore as was established in *Sempra Energy Int'l v. Argentine Republic*, this situation did not threaten its essential interests even though there were demonstrations and strikes demanding increase in salaries of teachers, as this would not be sufficient to prove an imminent peril to the State's existence or its essential security interests.

REMEDIES

IV. The Tribunal has the power to grant the relief of specific performance

A. There is no limitation in the LCIA Rules

1. The powers of the tribunal provided under the LCIA rules are not limited to granting pecuniary damages. These powers may either be restricted by the regulations of the arbitration institution as under the *ICSID Convention* or the prior intention of the parties as provided in the BIT.
2. However, in absence of the aforementioned exceptions, the general presumption lies in favour of an arbitrator's discretion to provide an appropriate remedy. Thus, the Claimant submits that the power to grant a remedy of specific performance can be exercised by the tribunal as was exercised in *Texaco v. Libya*.

B. State has to be made responsible for their wrong actions

3. The tribunals in the past have recognized their power to order measures in the nature of performance or injunction of certain acts. It is also an established principle that such a power does not affect the sovereign rights of the states.
4. The authority to issue an order results from the inherent power of a competent tribunal which is faced with the continuous breach of an international obligation. These obligations are often established with a harmonious balance of sovereignty.

V. The amount of compensation to be awarded

A. Projection of improvement in working of project Alfa cannot be ignored

1. The report of Mr. Kovic clearly suggests that after a successful run with project Beta, Vasuiki LLC was able to correct the errors in its existing project Alfa. With an increase of 2.2% every year, the working hours of project Alfa have accordingly been fixed.
2. It would not be equitable to consider the performance of the project as stagnant and award compensation as has suggested by Ms. Primeo.

B. Both debt and equity shall be considered for Discounting of Cash Flows

3. A business model is often run on a combined valuation of equity and debt, as the annual returns on equity is often used to negate the annual liability incurred due to debt. The expected compensation must be calculated on the basis of both equity and debt, otherwise the real picture of the cost being incurred would not be reflected.

4. Therefore the method of calculation for the same has been used as the Weighted Average Cost of Capital Method which has also been recognized as the most relevant discounting method in investment arbitration in cases like *ADC Management Limited v. The Republic of Hungary*.

C. No Valuation has been provided in the report of Ms. Primeo

5. The compensation demanded under the breach of the BIT can also be shown to be mitigated by external factors. However, a mere assertion would not be sufficient to determine the scope of the claim. Any unsubstantiated argument shall stand not be maintainable and shall stand rejected as was evidenced in the case of *Generation Ukraine, Inc. v. Ukraine*.