TEAM SPENDER

IN THE

LONDON COURT OF INTERNATIONAL ARBITRATION

UNDER LCIA RULES

VASIUKI LLC
(CLAIMANT)

Versus

THE REPUBLIC OF BARANCASIA
(RESPONDENT)

SKELETON MEMORIAL FOR THE CLAIMANT

PART-I

JURISDICTION

I. THE TRIBUNAL HAS JURISDICTION OVER THE MATTER

1. The BIT is not terminated under Article 59 of the VCLT

(a) The treaties do not contain the same subject matter.

(i) The objective of the European Treaties is to achieve economic integration.

(ii) The European Treaties are not specifically aimed at investment protection.

(iii) There are only relative and no absolute standards of protection under EU law.

(iv) The BIT is *lex specialis*, mostly concerned with providing a set of guarantees for protection of a long-term investment in the host state.

(b) The BIT provisions are not materially incompatible with the European Legal Order

(i) Article 207 of TFEU does not include intra EU investment.

- Exclusive competence of EU over Foreign Direct Investment only concerns Extra EU BIT.
- The Commission's proposal of Common European Investment Policy expressly excludes intra EU BIT.
- Lack of legislative initiative for harmonizing investment protection in the internal market confirms non-inclusion of Intra EU investment under Article 207.

(ii) The BIT and Article 18 TFEU are not in conflict

- Article 18 is a MFN clause guaranteeing every internal market participant the same material rights.

- Article 18 and the BIT should be harmoniously interpreted so as to minimize the harm to the investor.
- The fact of inequality of rights among citizens doesn't make such rights incompatible.
- Broader protection should be extended to all EU citizens instead of withdrawing it.

(iii) Article 8 of the BIT does not undermine the EU legal Order

- Art 344 TFEU is directed to Member States, rather than to individuals.
- The resulting award will not be outside the purview of EU legal order as it will be reviewed by national courts during enforcement.
- Requisite measures may be undertaken under Article 259 or Article 260, if the award does not comply with EU law.

(c) Additionally, for the abovementioned reasons, article 8 of the BIT will not be derogated under Article 30(3), either.

(d) The BIT has not been validly terminated

(i) The binding period of ten years under Article 13 of the BIT was not complied with by the Respondent.

(ii) Procedure for termination under Article 65 VCLT was not followed.

(iii) Treaty cannot be terminated on a mere unilateral assertion as the parties never agreed on the facts constituting a justified reason for terminating the treaty.

PART-II

LIABILITY

II. THE RESPONDENT'S ADMINISTRATIVE AND REGULATORY MEASURES VIOLATE ITS OBLIGATIONS UNDER ARTICLE 2 OF THE BARANCASIA-COGITATIA BIT

1. The Respondent's actions lead to violation of its obligation to accord fair and equitable treatment

(a) The Amendment of Article 4 of the LRE and alteration of Feed in tariff violate the *legitimate expectations* of the claimant

(i) The feed in tariffs fixed under Law on Renewable energy for twelve years, were introduced to induce long term investment in the photovoltaic sector. The stability of the same was relied upon by the investor.

(ii) There was no indication in the legislation regarding any regulatory changes in future.

(iii) Such change in the legal regime was made without any representation or notification to the investors which frustrated the legitimate expectations of the Claimant.

(b) The Respondent's administrative measures lack *Transparency, Consistency and Due process*

(i) Inspite of a provision in LRE for licenses for existing capacity, license was denied by BEA to Alfa

(ii) The amendment of LRE was preceded by 'private' hearings. No notification of such hearings as well as no alternative opportunity was given to the claimant to make a representation during such proceedings.

(c) The application of revised feed in tariff on Beta was *disproportionate and unreasonable*

(i) The revision in tariff was made taking into consideration the new and cheaper technology. However, it was arbitrarily applied on pre-2011 projects which were developed using older technology and higher costs.

2. The Amendment of the Law on Renewable Energy also violates Respondent's obligation under the umbrella clause of the Cogitatia Barancasia BIT

(a) The respondent has assumed legal obligation towards a specific investment of the Claimant through a license.

(b) Such obligation was not of a general character.

III. THE RESPONDENT'S ACTIONS ARE NOT EXEMPTED ON THE BASIS THAT THEY WERE NECESSARY IN ORDER TO MEET ITS ECONOMIC AND RENEWABLE ENERGY OBJECTIVES AND TO ADHERE TO ITS EU OBLIGATIONS

1. The burden of proof for requirements of necessity rests on the respondent.
2. The applicable standard for assessment is that of customary international law for state responsibility
   (a) *Essential security interests* as per the BIT under Article 11 only embody international peace or security as obligations in the event of which alternative measures may be taken.
   (b) Since *the Lex specialis* being the special treaty regime is silent on a state's own essential security interests or public policy measures, recourse to the general law may be allowed.
   (c) Such a full fall-back application on customary international law is in consonance with Article 32 of VCLT.

3. Art. 25 of the ILC Articles on State Responsibility codifies the requirements for a plea of necessity which have not been met :

   (a) The domestic hardships of the respondent do not qualify as grave and imminent peril :

      (i) The respondent had merely reached the threshold for its EU mandated borrowing limits.

(ii) EU renewable energy obligations once introduced in national laws become part of the domestic legal order. The respondent cannot invoke its domestic law as an excuse for alleged breaches of its international obligations.

4. Alternatively, in the event of state of necessity being proven, the respondents are liable to pay compensation to the claimants under Article 4 of the BIT.

IV. THE RESPONDENT CAN BE ORDERED TO RESCIND THE LRE AMENDED ART 4 OR TO CONTINUE PAYING THE PRE-2013 TARIFF TO THE CLAIMANT

1. In accordance with Article 34 of Draft Article of State Responsibility, restitution is the first of the forms of reparation as ruled by PCIJ in *Chorzow factory* case
   (a) The respondent should be ordered to rescind the amended LRE as it fulfills the criteria laid down under Article 35:
      (i) Such a relief is not materially impossible for the respondent because:
         - the situation at hand is not irreversible,
         - the Feed-in tariffs which are the subject matter of dispute are still in place,
         - a mere political or administrative obstacle in the way of reparation cannot be regarded as material impossibility
      (ii) It does not amount to imposing an obligation out of all proportion as opposed to compensation.
2. Alternatively, the respondent may be asked pay the pre-2013 tariff to the claimant
   (a) The tribunal is vested with the power to order specific performance

(b) In case restitution is discarded, the respondent should be called to honor its contractual obligations specifically.

(c) In modern investment-arbitration jurisprudence, investors have sought such a remedy and the same has been awarded.

V THE CLAIMANT'S BASIS FOR CLAIMING AND QUANTIFYING COMPENSATION IS APPROPRIATE

1. The claimant was denied a license to project Alfa, which caused it to operate on a tariff lower than that of other solar providers
    (a) Such a denial amounted to a violation of Fair and Equitable Treatment standard under Article 2.
    (b) The reliance on the license tariff was not to combat difficulties
        (i)The cost overruns were only a challenge upon startup and the same had been resolved.
        (ii) Alfa's capacity improved significantly which would soon help it to run on the projected capacity.
2. The discounting cash flow method used for calculating losses for project Beta and as an alternative for 12 other projects is correct
    (a) The cash flows to firm have been discounted at WACC and not the cash flows to equity. Refer Kovic Annex 4, p.2 wherein the value loans and interest on loans has been duly considered.
3. The expenditure on land and other equipment is of no utility if the tariff is reduced
    (a) Claimant's ownership of property was effectively sterilized because the property could not, thereafter be used for the development purposes for which it was originally acquired

(b) Additionally, it did not possess any significant resale value as held in the case of Santa Elena.

4. Lastly, damages are claimed for additional development of plants which thy sought to bring every 2 years which may suffer due to decreased tariff.