

International Law Moot Court Competition *Asia Cup 2021*

*Case Concerning the Treatment of "Eternal Zephyr"*

(The Kingdom of Algaria v. the State of Rosalia)

1. The State of Rosalia (hereinafter, Rosalia) is a temperate insular State. Its population is approximately 9,000,000, and its GDP per capita is around 17,000 USD. In the northern part of Mele Island, Rosalia's largest island, there is capital city Haoli, facing the Sea of Kalee. The majority of the population live in the areas in and around Haoli. Other areas in Mele Island are mostly mountainous and only sporadically resided. Until 1985, Rosalia was known as the Kingdom of Rosalia.
2. White-lapel diver (*Gavia piscatoris*) is a species of seasonal divers, also known as loons, seen in Rosalia roughly between late October and early May. According to the national myth, the Kingdom of Rosalia was founded in the 11<sup>th</sup> century. When the founding fathers were lost at sea, the tale tells, a flock of white-lapel divers appeared from the north and led them to Mele. Rosalian people have used white-lapel divers for traditional fishing. The white-lapel diver has also been treated as a symbol of Rosalia and its royal family.
3. The Kingdom of Algaria (hereinafter, Algaria) is an industrialized country in the northern part of the Osean continent. In 1813, as a western colonial power, it concluded a protectorate treaty with the then Rosalian King Lente I. Algaria built a large modern port near Haoli and used it for trading. In 1825, an Algarian naturalist discovered that the Rosalian white-lapel diver was the same species as the one they see in Algaria during the summer.
4. Rosalia restored independence peacefully in 1945 and concluded *the Treaty on Basic Relations and Friendship* with Algaria, which is reproduced at p. 7 below. Algaria, as a gesture of congratulations, offered to Rosalia a substantial amount of development assistance, and the then King Lente II of Rosalia promoted economic industrialization. He created a vast industrial estate neighboring the Haoli port and attracted many foreign, mainly Algarian manufacturers, which then built factories and created jobs. To cope with a power shortage, Lente II also made coal and water power plants. While he sometimes employed heavy-handed means against opponents, it is also well recorded that he never allowed a policy that would adversely affect white-lapel divers.
5. In 1983, Lente II got injured in a bicycle accident and withdrew from politics. Because his sole child, Princess Wiosenka, was only two years old, he decided to abdicate and transform the State's polity to the constitutional monarchy. Under the 1985 Constitution, which reflected this change, the monarch's power is limited to some symbolic and ceremonial acts. Until Queen Wiosenka became 25, her parents jointly conducted official duties. From 2000

until 2006, Queen Wiosenka studied at the Royal University of Algaria and gained a master's degree in environmental studies.

6. Both Algaria and Rosalia are parties to the United Nations Framework Convention on Climate Change and the Kyoto Protocol. Under Annex I of the Protocol, Algaria has an obligation to reduce greenhouse gas emissions by 7% in comparison to 1990. To meet the goal, Algaria increased investment in the renewable energy sector, raising the percentage of solar and wind energy sources in its energy mix from 2% in 1990 to 25% in 2018.
7. In January 2007, in her first annual speech before the parliament, Queen Wiosenka stated as follows. "As a queen of an insular State that has developed by burning hydrocarbons, I have come to feel a special responsibility for climate change. Even apart from treaty obligations, I think people should do what they can to change the world."
8. In April 2007, the Rosalian parliament passed *the Framework Act for Countering Climate Change (FACCC)*. It situates the reduction of GHG emissions among Rosalia's principal policy objectives and encourages all the actors to make their best efforts for this aim. In March 2008, two pieces of legislation were adopted to complement the FACCC. One is *the Act on Feed in Tariff (FIT Act)*. It obliges power companies in Rosalia to purchase the electricity produced from renewable energies at a price higher than the fossil fuel-generated energy, as fixed by the Government for a period of every three years.
9. The other, *the Act on the Wind Power Promotion (Wind Power Act or WPA)*, directs the Authority for the Management of Royal Properties (AMRP)<sup>1</sup> to issue long-term occupation permissions (LTOP) at the request from the Minister of Energy. LTOP consists of two permissions for occupation of an area designated by the Government and power generation in the area for 30 years. An applicant for this license must be a legal person established under the law of Rosalia and submit to the Ministry of Energy a development plan together with an environmental impact assessment (EIA) report.
10. WPA established Agency for the Selection of Areas (ASA), a body with an independent legal personality. Its members include former executives of power companies, and experts in engineering, oceanography, and biology. Its role is to collect and analyze scientific information, consult interested parties, and recommend areas suitable for designation under WPA to the Minister of Energy. ASA shall take into account: the profitability, namely the velocity of the wind, its consistency, and the estimated cost of building, the impacts on the environment, economic activities, and the local population. The Minister enjoys a discretion in deciding whether to give a designation to the recommended area. The Minister

---

<sup>1</sup> Under the Constitution of Rosalia, any part of its territory owned by no one belongs to the monarch. The AMRP is a governmental division that manages the royal areas, especially by permitting the use of them to private actors.

may also suspend the designation or request the AMRP to suspend LTOP if he or she considers, on the advice from ASA, that one or more of the criteria are no longer present.

11. Between 2008 and 2010, ASA chose several sites and investigated such matters as the wind conditions, depths of the water, water current, ecological risks, presence of fishing activities, and the distance to residential areas. It also requested advice from outside researchers, interviewed the interested people, and collected public opinions. As a result, an area of approximately 80 square kilometers in the Sea of Kalee, located 14 nautical miles from the baseline, was selected as a candidate for area designation. Although there was concern about the impact on white-lapel divers, ASA's report, which was published at the website of the Ministry of Energy, concluded that the area was sufficiently distant from their regular feeding sites or migration route. The entire area is located within the exclusive economic zone (EEZ) of Rosalia. No maritime dispute exists over the area.
12. On 9 February 2010, the Minister of Energy formally gave the designation to the Kalee area. On the same day, the Minister told the media as follows:

“This is an ideal place for offshore wind farms. ASA's report shows that very impressively. The report is scientifically robust too. The area is now open to any investors, whether domestic or international, for 30 years, without any interruption, and with complete stability. Harness your wind!”
13. In March 2010, Queen Wiosenka visited the headquarters of Microcosmos Industry Ltd. (hereinafter, Microcosmos) in Algaria and observed its offshore wind power plant. The company, incorporated under the law of Algaria, is the largest producers of wind power generators in Algaria. It has commissioned three offshore wind farms in Algaria, amounting to 18,000 megawatts (MW). After being briefed by the Managing Director, Julia Oliveira, Queen strongly encouraged Oliveira to invest in Rosalia. She emphasized that “our law stabilizes the investment conditions at sea, so I assure you that your company is eligible for the benefit.”
14. In June 2010, Eternal Wind Inc. was established and registered under the law of Rosalia. 66% of its shares are owned by Microcosmos, and the rest by Earth Wind & Solar Company.<sup>2</sup> The purpose of Eternal Wind Inc. was to develop a wind power farm under the FIT Act and WPA.
15. Eternal Wind Inc. conducted two years' EIA from August 2010. The EIA covered the impacts on the water quality and marine animals caused by submarine drilling, cable laying, and tower construction. The species and number of flying animals were also assessed. The EIA

---

<sup>2</sup> Earth Wind & Solar Company is a limited company established on the basis of *the Act on the Promotion of Green Investment* and wholly owned by the Algaria Government. The Company financially supports the outward investment in renewable energy sectors by Algarian nationals.

indicated that the risk of collision with birds or bats would be low thanks to the distance from feeding spots. Several precautionary measures were installed nevertheless, including coloring the tip of white blades with black and ultraviolet ink, putting cameras and sound alarms, and embedding sensors that detect the physical shock caused by a collision.

16. On 9 November 2012, Eternal Wind Inc. applied for LTOP to build an offshore wind power farm named Eternal Zephyr. The farm was to be composed of 70 turbines with installed capacity of 500 megawatts (MW). Each tower is 110 meters high and has three blades of 70 meters lengths. The Minister of Energy reviewed the submission and, on 11 March 2013, requested the AMRP to issue a license. The LTOP was granted the same day and the company is the only LTOP-holder to date. Construction works began in August 2013, and the plant was finally commissioned on 20 July 2016 and started generating power.
17. In November 2016, some Rosalian fishers reported they saw fewer white-lapel divers than usual. The Wild Bird Society of Rosalia estimated that the number of white-lapel divers might have declined by 10 to 15 % compared to the record of November 2015. The Society cautioned that the decrease could have a severe impact on the reproduction of the species. To date, the population of white-lapel divers in Rosalia has not recovered to the level in 2015.
18. On 8 December 2016, an international NGO for bird conservation, Joint Social Initiative for Loons (JSIL), posted a video on several social networking platforms. It showed water birds, including white-lapel divers, flying around, or perching on Eternal Zephyr plants. A professor of biology at the Haoli University of Science, in a TV program, stated: "The wind towers may have become human-made fish banks and be attracting those birds. We must watch if there would be a bird strike."
19. On 28 February 2017, JSIL released a photo it claimed to have obtained from an anonymous fisher. It showed a corpse of a young white-lapel diver floating in the water, one of whose wings cut off and lost. The post, shared more than 50,000 times, wrote that "Wind power kills birds! TRUTH: Eternal Zephyr is Eternal THANATOS!!!" According to the post, the fisher told that he had found more dead birds during work, but the bodies tended to be lost in a short time. In a reply, the official account of Eternal Wind Inc. wrote that "Our system has recorded no collision; this shocking picture is believed to be unrelated to Eternal ZEPHYR. We keep paying the greatest care to birds."
20. On 15 March 2017, JSIL uploaded a short video of 22 seconds, apparently recorded at sea. The camera is first focused on a bird's corpse in the water for some 18 seconds and then quickly tilts up, showing a wind power turbine for several seconds. Although the bird's species cannot be identified, it is surely not a white-lapel diver. Despite the camera shake and blurriness, one can recognize a series of numbers on the surface of the tower, which is identical to the serial number printed on one of the Eternal Zephyr turbines.

21. The video was copied and spread to other platforms, causing massive condemnation against Eternal Wind Inc. and Microcosmos Industry Ltd. The Ministry of Energy also received abundant protests through phone calls and emails. Most of them demanded the suspension of the power plant, and some even contained defamation against Queen.
22. Eternal Wind Inc. and Microcosmos Industry Ltd. released a joint statement on 20 March 2017, which reads:

Similar to the previous cases, there is no physical shock detected and recorded by the system of Eternal Zephyr. It is true that the number shown in the movie corresponds to the ID we allocated, but there is no evidence that our plant killed the bird. We even do not exclude the possibility that the video itself is a fake, fabricated by using some sophisticated technology.

This statement, however, only amplified the brouhaha.
23. On 1 April 2017, the Ministry of Energy arranged a meeting with Eternal Wind Inc. A governmental official explained that “given the spreading social concerns, we are considering suspending the operation of your plant.” The company contested and emphasized that the plant was operating in absolute consistency with the result of the EIA. The official replied that, “even if that might be the case, some members of ASA told us that the science in this regard was novel and obscure. The current social situation demands a precautionary approach.” On 6 April 2017, the Minister of Energy requested the AMRP to suspend the power generation permission issued to Eternal Wind Inc. pending another request from the Minister. The suspension was effected the same day. The decision was then notified to Eternal Wind. Inc., and Eternal Zephyr stopped operation.
24. Eternal Wind Inc. filed a lawsuit against the Ministry of Energy and the AMRP before the Haoli Regional Court, claiming that the revocation was an abuse of power based on political motivation and should be annulled and that the company was entitled to compensation. However, the claims were dismissed, and appeals to the Haoli High Court and the Rosalian Supreme Court was also unsuccessful, the final judgment having been given on 10 October 2019. The Minister of Energy has not granted new LTOP requested by the company with revised EIA reports.
25. Following the judgment, the Minister of Foreign Affairs of Algaria stated to the press that “not only our nationals but also the Government itself are interested in the project. It is the Government’s position that the sudden and unreasonable change of *status quo* gives rise to Rosalia’s international responsibility.” He also revealed that a formal request for consultation on the issue had already been sent to the Rosalian Government.
26. On 23 October 2019, the Rosalian Minister of Foreign Affairs confirmed in a regular press conference that there were talks with the Algerian Government. She stated that “this is a

purely domestic matter between a domestic company and the Republic, on which the Algerian Government has no say. In any event, our decision was made in the best interest of the whole community. From the outset, the 1945 Treaty does not protect such an offshore facility.”

27. On 6 April 2021, the Algerian Ambassador to the Netherlands submitted an Application against Rosalia to the International Court of Justice. In the Application, Algeria invoked *The Treaty on Basic Relations and Friendship* of 1945 as the basis of jurisdiction and claims. Rosalia disputed the admissibility of Algeria’s claims, but the parties agreed to deal with the issue together with the merits. Both parties are Members of the United Nations, and parties to the Vienna Convention on the Law of Treaties and the United Nations Convention on the Law of the Sea.
28. Prayers for relief of each party are as follows:
  - a. The Kingdom of Algeria respectfully requests the Court to adjudge and declare that:
    - i. The Kingdom of Algeria is entitled to invoke the Treaty on Basic Relations and Friendship between the Kingdom of Algeria and the Kingdom of Rosalia of 2 May 1945 on behalf of Microcosmos Industry Ltd. and Earth Wind & Solar Company in relation to the treatment of Eternal Zephyr.
    - ii. The State of Rosalia is internationally responsible for the economic loss caused to Microcosmos Industry Ltd. and Earth Wind & Solar Company and, accordingly, shall allow Eternal Zephyr to resume operation and pay full compensation for the losses.
  - b. The State of Rosalia respectfully requests the Court to adjudge and declare that:
    - i. The Kingdom of Algeria is not entitled to invoke the Treaty on Basic Relations and Friendship between the Kingdom of Algeria and the Kingdom of Rosalia of 2 May 1945 on behalf of Microcosmos Industry Ltd. and Earth Wind & Solar Company in relation to the treatment of Eternal Zephyr.
    - ii. In any event, the State of Rosalia has not violated international law and owes no obligation to allow Eternal Zephyr to resume operation or to pay compensation.

Treaty on Basic Relations and Friendship between the Kingdom of Algaria and the Kingdom of Rosalia, signed on 31 October 1945 at Haoli and entered into force on 23 December 1945

The Kingdom of Algaria and the Kingdom of Rosalia, hereinafter collectively referred to as the High Contracting Parties, *reaffirming* the principle of sovereign independence and equality in their relations, *desiring to* establish peaceful, friendly, and mutually prosperous relations between them, and *hoping* to this end to encourage more trade and investment and other economic activities between their peoples, as well as to establish regular consular relations, *have agreed* to conclude the Treaty on Basic Relations and Friendship.

Article I                      Recognition of independence

The Kingdom of Algaria recognises and congratulates the independence of the Kingdom of Rosalia as a sovereign State.

Article II                     Peaceful relationship

There shall be perpetual peace and friendship between the High Contracting Parties. To this end, each Party shall refrain in their mutual relations from the threat or use of force against the territorial integrity or political independence of the other Party, or any other manner inconsistent with the Purposes of the United Nations.

Article III                  Economic relations

1. Nationals of each High Contracting Party shall be recognized the right to enter the territory of the other High Contracting Party under the conditions no less favourable than those applied to the nationals of any third State. They shall have the right to engage in economic activities, including establishing corporations under the law of the other High Contracting Party.

2. Property of nationals and companies of each High Contracting Party established within the territory of the other High Contracting Party shall at any time enjoy full protection and security and treatment required under international law, including fair and just treatment. Such property shall not be nationalized or expropriated except for a public purpose. Any such nationalization or expropriation shall not be discriminatory and shall be followed by the prompt payment of adequate and effective compensation.

[...]

Article XI                  Dispute settlement

1. Any dispute that may arise between the High Contracting Parties with regard to the

interpretation or application of this Treaty shall, as far as possible, be settled amicably.

2. If such a dispute cannot be settled in accordance with paragraph 1 of this Article, the dispute shall be submitted to the International Court of Justice at the request of either Party. The High Contracting Parties shall recognize any judgment given by the Court in accordance with this paragraph as binding and final.

Article XII           Text of the Treaty

The Algerian, Rosalian, and English texts of this Treaty shall be equally authentic. In case of discrepancy or inconsistency among the authentic texts, the English text shall prevail.

[...]