Stockholm Chamber of Commerce
SCC Arbitration V2016/183

In the Arbitration between

UAB Vilniaus Energija
Veolia Environnement S.A.

Claimants

and

SP AB Vilniaus Šilumos Tinklai
Vilnius City Municipality

Respondents

FINAL AWARD

Arbitral Tribunal

Dr. Wolfgang Peter, President
Mr. Henri Alvarez KC, Co-arbitrator
Prof. Hugo Barbier, Co-arbitrator

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I. THE PARTIES AND THEIR REPRESENTATIVES

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D. ADMINISTRATIVE SECRETARY

Ms. Nhu-Hoang Tran Thang (as from 3 February 2020)[2]

III. THE ARBITRATION AGREEMENT

103. The present arbitration concerns a dispute arising out of the15-year Lease Agreement entered into by Claimant, UAB Vilniaus Energija (or "**Vilnius Energy**"", and its then indirect parent company, Dalkia S.A.S. (now known as Veolia) with Respondents SP AB Vilniaus Šilumos Tinklai and the Vilnius City Municipality (the "**Lease Agreement**" or the "**Lease**").[3] Art. 38.4 of the Lease at dispute contains an arbitration agreement which reads as follows:

> *"Any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or invalidity thereof, that cannot be resolved in accordance with the dispute resolution procedures provided for in sub-article 38.3 above shall be settled by arbitration in accordance with the International Chamber of Commerce of Stockholm (ICC) Rules of Arbitration in effect at the time of such dispute. Arbitration under this Agreement shall be conducted by five (5) arbitrators, each Party, i.e. the Municipality, VŠT, Newco and the Guarantor, having the power to appoint one of the arbitrators. The fifth arbitrator shall be selected in accordance with the ICC Rules of Arbitration. The place of arbitration shall be Vilnius. The language to be used in the arbitration proceedings shall be English. The arbitration award shall be final and undisputed; the Parties will be required to implement it to the full extent within the reasonably shortest time. Should the reference of any dispute to arbitration be unenforceable due to the restrictions of the Code of Civil Procedure of the Republic of Lithuania,*

[1] Replacing Mr. Volker Triebel.

[2] Replacing Ms. Esra Ogut.

[3] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002.

the disputes shall be ultimately resolved in ordinary Lithuanian courts."

IV. THE APPLICABLE LAW

A. THE APPLICABLE PROCEDURAL LAW

104. As clarified in Procedural Order No. 1,[4] this arbitration is governed by the SCC Arbitration Rules in their 2010 version[5] and the "Specific Procedural Rules" annexed to Procedural Order No. 1 and forming integral part thereof. Furthermore, as the seat of the arbitration is Vilnius, Lithuania,[6] the Arbitral Tribunal and the Parties have agreed that the rules of Lithuanian law on international arbitration are applicable to this dispute.[7]

B. THE APPLICABLE SUBSTANTIVE LAW

105. Pursuant to Article 41 of the Lease Agreement,[8] the law applicable to the present dispute is the law of the Republic of Lithuania.

V. THE PLACE OF ARBITRATION

106. Pursuant to Article 38.4 of the Lease Agreement,[9] the place of arbitration is Vilnius.

VI. FACTUAL INTRODUCTION

107. The Arbitral Tribunal summarizes below key important facts underlying the Lease Project. However, given that the facts underlying specific Claims and Counterclaims

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[4] Procedural Order No. 1 dated 13 June 2017, paras. 12-13; see also para. 1.

[5] See also SCC Arbitration Rules (2010), preamble ("[u]*nder any arbitration agreement referring to the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the "Arbitration Rules") the parties shall be deemed to have agreed that the following rules, or such amended rules, in force on the date of the commencement of the arbitration", i.e. in the present case, 30 November 2016 which is the date of Claimants' Request for Arbitration. This preamble is unchanged in the latest 2017 version of the SCC Arbitration Rules*."

[6] C-001: Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Art. 38.4.

[7] Procedural Order No. 1 dated 13 June 2017, paras. 12.

[8] **C-001:** Lease Agreement, dated 01 February 2002, Art. 41.

[9] **C-001:** Lease Agreement, dated 01 February 2002, Art. 38.4.

are discussed extensively in the sections addressing them, the following factual introduction is limited, and the Arbitral Tribunal refers to his discussion of facts as part of its analysis in the legal discussion of this award. For the sake of clarity, the absence of any reference to a given argument or piece of evidence does not mean that said argument or piece of evidence was not considered by the Arbitral Tribunal in its decision-making.

108. On 26 July 2000, the Vilnius Municipality took the decision to organize a tender under Decision No. 58 of the Vilnius City Council,[10] with regard to the modernization of the centralized heating and hot water supply systems of the city of Vilnius. By that decision, the Vilnius City Council mandated the City Board to draw a tender that would reflect the basic criteria of the contract, *i.e.* 1) the project was to be implemented by "*attracting investments and not depriving of property associated with the main activity of* [VST]"; 2) the price of heat energy was not to be increased and 3) renovation of the heat substations were to be "*performed at the expense of the winning bidder*". The City Council further mandated the City Board to establish "*a nine-person Committee for implementation and supervision of the project of renovation of the project*", specifying the composition of that Committee, which was to include notably Mr. Arturas Zuokas.

109. On 13 September 2000, the first meeting of the Committee referred to by the City Council in its decision of July 2000 was held. Said Committee was formally named the "Commission for the Implementation and the Supervision of the Vilnius City District Heating and Hot Water Supply System Modernization and Investment Project" (the "**Project Implementation Commission**"). In that first meeting, Mr. Zuokas was elected as the Chairman of the Project Implementation Commission. Draft tender documents were also provided at the Meeting in relation to electing an advisor to oversee the selection process and for the provision of legal services for the project.[11]

[10] **R-045:** Decision No. 58 of the Vilnius City Council regarding the renovation of the centralized heating and hot water supply systems of Vilnius City, July 26, 2000, dated 26 July 2000.

[11] **R-131:** Minutes of meeting No. 1 of the Commission for the Implementation and the Supervision of Vilnius City District Heating and Hot Water Supply System Modernization and Investment Project, September 13, 2000, dated 13 September 2000.

110. From 2000 to 2007 and from 2011 to 2015, Mr. Zuokas held the position of the Mayor of Vilnius.[12]

111. On 1st October 2001, Veolia Environment SA (at the time, Dalkia S.A.S.) submitted its bid for the tender organized by the municipality of Vilnius[13].

112. On 22 October 2001, the Project Implementation Commission declared Veolia as the winner of the tender.[14] Following this, on 23 October 2001, Mr. Zuokas wrote a letter to the representatives of Veolia, including Mr. Jean-Pierre Denis, Mr. Andreas Greim and Mr. Andrius Janukonis, informing Veolia that it had won the tender and officially inviting it to "*commence negotiations".*[15]

113. On 30 October 2001, Mr. Janukonis, an owner of the Rubicon group, was assigned as the Local Representative of Dalkia to negotiate the lease agreement. This was agreed under the Annex to the Minutes of Negotiations on the Lease Agreement Between VST and the Winner of the Tender for the Lease and Management of the Property.[16]

114. On 1st February 2002, Claimant, Vilnius Energy ("**VE**"), and its parent company, Dalkia S.A.S., now Veolia, entered into a 15-year Lease with Respondents as per the Lease Agreement between Respondents, *i.e.* SP AB Vilniaus Šilumos Tinklai ("**VST**"), the Vilnius City Municipality, VE and Dalkia S.A.S (the "**Lease**").[17]

115. On 29 March 2002, Vilnius Energy took control of the Facilities. The List of Facilities and Statement on Transfer of Facilities to Use of the Lessee was concluded following the conclusion of the Lease Agreement by the parties on 1st February 2002 and contains the List of Facilities that were to be used by VE as the Lessee. [18]

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[12] **R-129:** Website of Mr. Artūras Zuokas, dated 17 July 2017, p. 25 of the PDF file.

[13] **R-029:** Dalkia's Proposal for Tender of Vilnius City Municipality for Assets, Lease and Operation of VŠT, dated 01 October 2001.

[14] **R-049:** Minutes of meeting No. 24 of the Commission for the Implementation and Oversight of the Project Regarding Lease of Heat and Hot Water Supply Facilities in Vilnius, dated 22 October 2001.

[15] **R-050:** Letter from A. Zuokas to J.-P. Denis, A. Greim, and A. Janukonis (Dalkia), dated 23 October 2001.

[16] **R-137:** Annex to Minutes of Negotiations on the Lease Agreement Between SPAB Vilniaus Šilumos Tinklai and the Winner of the Tender for Lease and Management of Property, dated 30 October 2001.

[17] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002.

[18] **R-359:** List of Facilities and Statement on Transfer of Facilities to Use of the Lessee, dated 29 March 2002.

116. Between 2002 and 2017 Vilnius Energy operated the Facilities.

117. In June 2016, the Parties started to discuss the appointment of an independent expert to inspect the Facilities before VE re-redelivered them to VST. The Parties were however unable to agree on the appointment of an expert, following which Claimants initiated this arbitration on 1st December 2016.[19]

VII. PROCEDURAL BACKGROUND

118. As seen above, at the end of the Lease the Parties failed to reach an agreement and jointly appoint an expert to inspect the Facilities that were to be re-delivered by VE to VST.

119. On 30 November 2016, Claimants submitted their Request for Arbitration to the SCC ("**RfA**").[20] In their RfA, Claimants proposed that the Parties agree to resolve their dispute before a panel of three arbitrators instead of five (as stipulated in Article 38.4 of the Lease). Accordingly, Claimants jointly appointed Mr. Joe Smouha QC as their arbitrator.

120. On 27 December 2016, Respondents filed their Answer to the Request for Arbitration in which they agreed to proceed with three arbitrators.[21]

121. On the same date, Respondents submitted an application to the SCC for the appointment of an emergency arbitrator.[22]

122. On 23 January 2017, GOPA was designated as the Expert by the Emergency Arbitrator.[23]

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[19] **SoD:** Statement of Defense and Counterclaim, dated 19 February 2018, para. 590.

[20] **RFA:** Claimants' Request for Arbitration, dated 30 November 2016.

[21] **Answer to RFA:** Respondents' Answer to the Request for Arbitration, dated 27 December 2016.

[22] **R-308:** Respondents' Application for appointment of emergency arbitrator and issuance of emergency order, dated 27 December 2016.

[23] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 591.

123. On 27 December 2016, Respondents filed their Answer to the Request for Arbitration in which they agreed to proceed with three arbitrators.[24]

124. On 3 February 2017, Respondents challenged Mr. Joe Smouha QC.

125. By letter dated 9 February 2017, Respondents appointed Dr. Volker Triebel as co-arbitrator.

126. On 16 February 2017, the SCC sustained the challenge of Mr. Joe Smouha QC following an opportunity given to the Parties and Mr. Smouha to comment on the challenge. Mr. Joe Smouha QC was released from the appointment. The SCC invited Claimants to appoint a new arbitrator by 26 February 2017.

127. Claimants, with their letter dated 20 February 2017, appointed Mr. Henri Alvarez KC as co-arbitrator.

128. On 10 March 2017, the SCC confirmed the appointment of Dr. Wolfgang Peter as Chairperson in the above arbitration.

129. On 22 March 2017, Claimants requested the Arbitral Tribunal to extend the deadline for the Parties' procedural comments on the Procedural Timetable until 28 April 2017.

130. On 23 March 2017, Respondents requested leave to present their brief comments to the Arbitral Tribunal on the Procedural Timetable. On the same day, the Arbitral Tribunal took note of the Parties' position with respect to the Procedural Timetable and requested Respondents to present their brief comments by 27 March 2017.

131. On 27 March 2017, Respondents disagreed with the extension of the deadline for the Parties' comments until 28 April 2017, and asked the Arbitral Tribunal to extend the deadline until 13 April 2017.

132. On 30 March 2017, the Arbitral Tribunal invited the Parties to submit their points of agreement on the Procedural Timetable by 18 April 2017.

[24] **Answer to RFA:** Respondents' Answer to the Request for Arbitration, dated 27 December 2016.

133. On 24 April 2017, the Parties were able to reach an agreement on most issues, except as to whether or not the Procedural Timetable should contain a document production phase.

134. On 12 May 2017, Claimants sent a letter to the Arbitral Tribunal stating the reasons why they considered that a document production phase was not appropriate in this proceeding.

135. On 15 May 2017, the Arbitral Tribunal invited Respondents to present their brief response to Claimants' proposal regarding the document production phase by 17 May 2017.

136. On 17 May 2017, Respondents submitted a letter providing the reasons why they considered that a document production phase would be essential and a fundamental due process tool in this arbitration.

137. By letter dated 23 May 2017, the Arbitral Tribunal proposed to hold a case management conference ("**CMC**") by telephone to discuss the remaining issues, *i.e.,* to finalize the draft Procedural Order No. 1 and to settle the issue whether there should be a document production phase provided for in the Procedural Timetable.

138. With its letter dated 24 May 2017, the Arbitral Tribunal confirmed to the Parties that the CMC would be held on 2 June 2017.

139. On 26 May 2017, Claimants submitted their revised Request for Arbitration which replaced Claimant's original Request for Arbitration dated 30 November 2016.[25]

140. On 13 June 2017, the Arbitral Tribunal rendered its Procedural Order No. 1 and decided that a separate document production phase should be added to the Procedural Timetable.

141. On 3 July 2017, Respondents submitted their Answer to the Revised Request for Arbitration and Preliminary Statement of Counterclaim.[26]

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[25] **Revised RFA:** Claimants' Revised RFA, dated 26 May 2017.

[26] **Answer to revised RFA and Preliminary CC:** Respondents' Answer to the Revised Request for Arbitration and Preliminary Statement of Counter-Claim, dated 03 July 2017.

142. On 16 October 2017, Claimants submitted their Statement of Claim ("**SoC**") together with 4 witness statements, 2 expert reports, 178 factual exhibits and 8 legal authorities.[27]

143. On 19 February 2018, Respondents filed their Statement of Defense and Counterclaim ("**SoD**"),[28] together with 2 witness statements, 2 expert reports, 40 factual exhibits and 73 legal authorities.

144. On 12 March 2018, the Parties simultaneously exchanged their Document Production Requests.

145. By letter dated 19 March 2018, Claimants accepted Respondents' proposal to use confidential documents from the ongoing parallel ICSID arbitration between the Parties in this arbitration. In their letter, Claimants did not object "*in substance to the sharing of documents between the two arbitrations*", however they proposed certain requirements with respect to the sharing of documentary evidence between the SCC and ICSID arbitrations.

146. On 29 March 2018, Respondents requested the dismissal of Claimants' proposed restrictions, referring to the close connection between the two proceedings and the need for transparency.

147. On 3 April 2018, the Parties simultaneously exchanged their Responses to the Document Production Requests.

148. On 5 April 2018, the Arbitral Tribunal acknowledged the Parties' general agreement on sharing documents which have already been filed in the SCC and ICSID arbitrations, without notifying the other Party in advance.

149. On 25 April 2018, the Parties simultaneously submitted to the Arbitral Tribunal their Replies to the other Party's objections to the other Party's Document Production Request.

[27] **SoC:** Claimants' Statement of Claim, dated 16 October 2017.

[28] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018.

150. On 1st June 2018, the Arbitral Tribunal rendered Procedural Order No. 2 on the Parties' Document Production Requests.

151. On 8 October 2018, Respondents submitted their submission supplementing the Statement of Defense and Counterclaim ("**SoD Suppl.**"),[29] together with 38 factual exhibits and 3 legal authorities.

152. On 6 December 2018, Respondents submitted an Application Regarding Claimants' Document Production, alleging that the latter failed to comply with Procedural Order No. 2 by withholding two broad categories of responsive documents, including documents relating to the procurement of goods and services by VE from the Rubicon Group and its affiliates as well as other third parties (Category I Documents) and documents containing legal advice on a range of issues related to the present dispute and provided to Claimants by their in-house legal advisors distinct from their external counsel (Category II Documents). The Parties exchanged two rounds of submissions on that application.

153. On 19 December 2018, Claimants submitted their Response to Respondents' Application Regarding Claimants' Document Production.

154. On 7 January 2019, Respondents submitted their Reply Regarding Claimants' Document Production.

155. On 23 January 2019, Claimants submitted their Reply and Statement of Defense to Counterclaims ("**Reply**"),[30] together with 9 witness statements, 7 expert reports, 501 factual exhibits and 80 legal authorities.

156. On 30 January 2019, Claimants submitted their Rejoinder on Respondents' Application Regarding Claimants' Document Production.

[29] **SoD Suppl.:** Respondents' Submission Supplementing the Statement of Defense and Counterclaim, dated 08 October 2018.

[30] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019.

157. On 8 February 2019, Claimants submitted their Application on Respondents' confidentiality breaches requesting the Arbitral Tribunal to order Respondents to take various actions to protect confidential information.

158. On 15 February 2019, Respondents submitted their Response to Claimants' Application on confidentiality, requesting the Arbitral Tribunal to reject Claimants' allegations and to dismiss their request.

159. On 22 February 2019, Claimants submitted their Reply to Respondents' Response of 15 February 2019 on confidentiality.

160. On 27 February 2019, Respondents filed their Rejoinder to Claimants' Reply on confidentiality, reiterating their request that the Arbitral Tribunal deny Claimants' requests.

161. On 5 March 2019, Claimants submitted another Application seeking the Tribunal's intervention in connection with further public statements of Respondents revealing confidential information regarding these proceedings.

162. On 8 March 2019, Respondents submitted their Response to Claimants' Application of 5 March 2019, objecting to Claimants' allegations and requesting the Arbitral Tribunal to reject in full Claimants' requests.

163. On 11 March 2019, Claimants filed their Reply to Respondents' Response of 8 March 2019, and upheld their confidentiality-related requests. On the same day, the Arbitral Tribunal invited the Parties to provide short answers to the Arbitral Tribunal's questions related to the Category I Documents and Category II Documents. Claimants were to provide an answer to questions 1 to 7 and Respondents to questions 2 to 6 by 25 March 2019.

164. On 13 March 2019, Respondents filed their Rejoinder in response to Claimants' Reply of 11 March 2019.

165. On 25 March 2019, The Parties provided their answers to the Arbitral Tribunal's questions in relation to the Category I Documents and Category II Documents.

166. On 2 April 2019, Claimants submitted their Comments on Respondents' Responses to the Arbitral Tribunal's Questions 2 to 6 and Respondents presented their Comments on Claimants' Responses to the Arbitral Tribunal's questions 1 to 7 on Document Production.

167. On 24 May 2019, the Arbitral Tribunal rendered Procedural Order No. 3 regarding Claimants' Application on confidentiality breaches, dismissing Claimants' Application and directing Respondents to abide by the legal confidentiality requirements in this arbitration.

168. On 31 May 2019, the Arbitral Tribunal rendered Procedural Order No. 4 regarding Respondents' Application on Claimants' Document Production dated 6 December 2018, granting Respondents' Application in relation to the Category I Documents and dismissing Respondents' Application related to the Category II Documents. Claimants were ordered to produce the documents for a fixed and small number of Respondents' designated representatives, counsel, and experts, forming a "clean team". The Arbitral Tribunal directed Claimants to obtain third parties' agreement to produce the Rubicon-Related Procurement Documents and granted Claimants' application for document sharing regarding scanned documents. It ordered Respondents to grant Claimants access to the scanned documents.

169. On 12 June 2019, Respondents submitted their Application seeking further instructions regarding Procedural Order No. 4 in light of the decision issued on 24 April 2019 by the tribunal constituted in the parallel ICSID arbitration and requested reconsideration of the Arbitral Tribunal's decision on the Category II Documents. This Application was followed by two rounds of written submissions from the Parties.

170. On 21 June 2019, Claimants submitted their Response to Respondents' Application objecting to the various comments and requests of Respondents.

171. On 24 June 2019, Respondents filed their Reply to Claimants' Response of 21 June 2019 providing certain clarifications. Claimants on their end filed their Rejoinder to Respondents' Reply, stating that there were no grounds for the Arbitral Tribunal to reopen and reverse its assessment.

172. On 23 July 2019, Respondents submitted their Application seeking a one-month extension for the filing of their Rejoinder and Reply on the Counterclaim.

173. On 25 July 2019, the Arbitral Tribunal rendered its Procedural Order No. 5 regarding Respondents' Application of 12 June 2019 for further instructions regarding the scope of documents to be produced. According to Respondents, they ultimately received "*the full set of Vilnius Energy's procurement documents on July 31, 2019, one month before the* [initial] *deadline for the filing of the Respondents' Rejoinder*."[31]

174. On 31 July 2019, Claimants submitted their response to Respondents' Application dated 23 July 2019, objecting to the various comments and requests of Respondents.

175. On 7 August 2019, Respondents submitted their Reply to Claimants' Response of 31 July 2019 with an updated proposal regarding the extension of the deadline for the filing of their Rejoinder and Reply on the Counterclaim and the rescheduling of the June 2020 hearing.

176. On 14 August 2019, Claimants filed their Rejoinder to Respondents' Reply, again rejecting Respondents' request to postpone the hearing dates.

177. On 23 August 2019, the Arbitral Tribunal rendered Procedural Order No. 6 regarding Respondents' Application of 23 July 2019 granting Respondents a one-month extension to file their Rejoinder and Reply on the Counterclaim. The Arbitral Tribunal maintained the hearing dates for a period of two-weeks instead of a three-week hearing with one week allocated to the Parties' hearing preparations.

178. On 2 September 2019, Respondents informed the Arbitral Tribunal that the Procedural Timetable revision as set out in Procedural Order No. 6 would cause serious detriment to their procedural rights and requested the Arbitral Tribunal to reserve alternative dates for the evidentiary hearing in order to safeguard their due process rights.

179. On 10 September 2019, Claimants replied to Respondents' letter of 2 September 2019 and requested the Arbitral Tribunal to confirm the Procedural Timetable set out in

[31] Respondents' Application dated 4 November 2020, para. 58; see also Respondents' reply dated 2 December 2020, p. 8.

Procedural Order No. 6 and to reject Respondents' request to schedule alternative hearing dates.

180. On 12 September 2019, Mr. Andrius Janukonis (an ex member of VE's Board of Directors) sent a letter to the Arbitral Tribunal raising serious illegalities related to the use in this arbitration of his personal data including information concerning his private life that was obtained more than 15 years ago and which were submitted to the Arbitral Tribunal by Respondents without his consent. Mr. Linas Samuolis (an ex-president of VE) also alerted the Arbitral Tribunal of the same issue on 19 September 2019.

181. On 20 September 2019, the Arbitral Tribunal invited the Parties to make any comments they had by 27 September 2019 regarding Mr. Andrius Janukonis' letter. In line with the instructions of the Arbitral Tribunal, the Parties sent their comments on 27 September 2019.

182. On 27 September 2019, the Arbitral Tribunal invited the Parties to make any comments that they had by 4 October 2019 regarding Mr. Linas Samouli's letter.

183. On 8 October 2019, the Arbitral Tribunal sent a letter to the SCC regarding Mr. Andrius Janukonis' letter dated 12 September 2019 and Mr. Linas Samuolis' letter dated 19 September 2019. The Arbitral Tribunal considered that requests made by persons who are not parties to the arbitral proceedings are inadmissible and should not be decided by this Tribunal.

184. On 14 October 2019, Respondents submitted their Rejoinder and Reply on the Counterclaim ("**Rejoinder**"),[32] together with 7 witness statements, 3 expert reports and 73 legal authorities.

185. On 13 November 2019, Respondents requested the Arbitral Tribunal to formally release the current June 2020 hearing dates and that new hearing dates be fixed for this arbitration in due time.

186. On 15 November 2019, the Arbitral Tribunal noted Respondent's communication and invited Claimants to respond by 18 November 2019.

[32] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019.

187. On 19 November 2019, Claimants maintained that none of Respondents' preceding developments constituted a basis for cancelling and rescheduling the June 2020 hearing.

188. On 20 November 2019, the Arbitral Tribunal acknowledged receipt of Respondents' communication of 19 November 2019 and granted leave for them to submit their response on the same day. Accordingly, Respondents confirmed their request to vacate the June 2020 hearing dates and to reserve new dates at the earliest feasible opportunity, taking into account the Respondents' due process rights.

189. On 23 November 2019, Claimants asked the Arbitral Tribunal to maintain the June 2020 hearing dates.

190. On 17 December 2019, The Arbitral Tribunal decided to maintain the June 2020 hearing dates and invited the parties to consider the logistical arrangements for the hearing.

191. On 27 December 2019, Respondents requested an urgent in-person case management conference in Geneva to formulate a fair and reasonable procedure for the remainder of the case. They proposed to hold the CMC as soon as possible after 17 January 2020, when Claimants were to file their Rejoinder in the parallel ICSID case.

192. On 7 January 2020, Claimants asked the Arbitral Tribunal to reject Respondents' application to hold an in-person case management and to also reject Respondents' renewed effort to change the current arbitration schedule.

193. On 8 January 2020, Respondents requested leave to respond to Claimants' letter by 9 January 2020, which was granted on the same day.

194. On 9 January 2020, Respondents maintained their request that the Arbitral Tribunal organizes a CMC to remedy the unfair position in which they had been put. Respondents submitted that the current calendar does not comport with the principles of equality of arms and due process, and would cause massive and irreversible prejudice to them if the issue was not resolved.

195. On 22 January 2020, the Arbitral Tribunal considered both Parties' positions on Respondents' request to hold an in-person CMC in Geneva and decided to hold a CMC by telephone. The Parties were invited to inform the Arbitral Tribunal of their

availabilities in February by 24 January 2020. Further, the Parties were ordered to submit a proposed agenda for the CMC with a list of participants by 31 January 2020.

196. On 23 January 2020, Claimants advised the Arbitral Tribunal of the dates that they were available to participate in the CMC in February. The Arbitral Tribunal took note of Claimants' availability on the dates proposed and decided to hold the CMC by telephone on 13 February 2020. Respondents were invited to submit their proposed agenda for the conference by 27 January 2020 and Claimants were to submit any comment that they had on the proposed agenda by 29 January 2020.

197. On 24 January 2020, Respondents confirmed their availability to hold the CMC on 13 February 2020 and requested the Arbitral Tribunal to move the deadlines forward by one day for them to submit a draft agenda by 28 January 2020, with Claimants providing their comments by 30 January 2020.

198. On 27 January 2020, the Arbitral Tribunal confirmed the CMC to be held by telephone on 13 February 2020 and granted Respondents their request to move the deadlines by one day.

199. On 30 January 2020, Claimants provided the Arbitral Tribunal with their comments on Respondents' proposed CMC agenda, together with Claimants' own proposal for the agenda. On the same day, given the scope of the disagreement between the Parties on the discussion of the agenda, including its content, sequency and timing, Respondents requested leave to briefly comment on Claimants' letter.

200. On 31 January 2020, the Arbitral Tribunal granted Respondents' request to briefly reply to Claimants' revised agenda for the CMC on the same day. Accordingly, Respondents replied with their comments and firmly objected to Claimants' suggested edits to the CMC agenda.

201. Having considered the Parties' positions, on 5 February 2020, the Arbitral Tribunal provided the Parties with an adapted agenda for the CMC reflecting its decisions on the disagreements of the Parties.

202. On 6 February 2020, Respondents requested the Arbitral Tribunal to amend the agenda for the CMC to include the discussion of the feasibility of a hearing starting five

weeks after Claimants were due to file their Rejoinder on Counterclaims, *i.e.* on 1st May 2020.

203. On 7 February 2020, with reference to Respondents' request, the Arbitral Tribunal invited Claimants to make any comments by 10 February 2020. Subsequently, Claimants replied that Respondents' request for reconsideration was inappropriate in terms of substance and constituted an abuse of power.

204. On 12 February 2020, after having reviewed the Parties' positions, the Arbitral Tribunal considered that the inclusion of the requested discussion in the agenda was reasonable since it was the principal reason for which Respondents requested to hold the CMC.

205. On 20 February 2020, following the CMC of 14 February 2020, the Arbitral Tribunal sent an email to the Parties deciding on the necessary duration, dates and venue of the hearing.

206. On 3 April 2020, Claimants brought to the Arbitral Tribunal's attention Respondents' conduct that they considered violated Respondents' confidentiality obligation and the Arbitral Tribunal's directions in Procedural Order No. 3. However, Respondents did not seek the Arbitral Tribunal's intervention. On 5 April 2020, Respondents requested leave to correct Claimants' alleged mischaracterizations.

207. On 7 April 2020, the Arbitral Tribunal granted Respondents leave to answer and explain whether they considered that there has been a violation of confidentiality by 10 April 2020.

208. On 8 April 2020, Claimants sent a letter to the Arbitral Tribunal regarding the schedule for the next steps in the proceedings, which they concluded required modification in light of the COVID-19 pandemic. Claimants requested a one-month extension to submit their Rejoinder on Counterclaims by 1 June 2020.

209. On 9 April 2020, the Arbitral Tribunal invited Respondents to submit any comments that they had in response to Claimants' letter by 15 April 2020.

210. On 10 April 2020, Respondents replied to Claimants' letter of 3 April 2020 and submitted that their public statements did not violate confidentiality.

211. On 15 April 2020, Respondents replied to Claimants' request of 8 April 2020 for a one-month extension of the deadline for their Rejoinder, and concluded that Claimants could be accorded an extension to file their Rejoinder as long as the hearing dates and Respondents' rights were protected. This could be achieved if Claimants were to file their Rejoinder in a bifurcated manner.

212. On 16 April 2020, the Arbitral Tribunal invited Claimants to respond to Respondents' letter by 17 April 2020.

213. On 17 April 2020, Claimants requested that the Arbitral Tribunal reject Respondents' proposal to split the Rejoinder and to set 1 June 2020 as the new deadline for Claimants' complete Rejoinder. On the same day, the Arbitral Tribunal invited Claimants to submit comments on Respondents' letter of 10 April 2020 by 20 April 2020.

214. On 20 April 2020, Claimants maintained their request that Respondents cease violating their confidentiality obligation and asked the Arbitral Tribunal to remind Respondents that they must abide by the confidentiality requirements of this arbitration.

215. On 21 April 2020, the Arbitral Tribunal granted Claimants' request for a one-month extension of the deadline to file their Rejoinder on Counterclaims by 29 May 2020 and invited Respondents to submit any further comments regarding confidentiality by 22 April 2020.

216. On 22 April 2020, Respondents replied that they had always complied with the applicable confidentiality regime, and that they would continue to do so.

217. On 27 April 2020, the Arbitral Tribunal reminded to all involved that Procedural Order No. 3 stands and that it provides for confidentiality of these proceedings, arising out of both the applicable law and the Parties' choice of arbitration. On the same day, Respondents requested the Arbitral Tribunal to postpone the pre-hearing conference scheduled for 11 June 2020 to allow them sufficient time to review Claimants' Rejoinder.

218. On 28 April 2020, Claimants agreed to reschedule the pre-hearing conference to a later date in June.

219. On 29 April 2020, the Arbitral Tribunal confirmed that the pre-hearing conference would take place on 25 June 2020.

220. On 30 May 2020, Claimants submitted their Rejoinder on Counterclaims ("**Rejoinder on CCs**"),[33] together with 9 witness statements, 9 expert reports, 516 factual exhibits and 217 legal authorities, including a newly introduced expert, AFRY[34]. AFRY's expert report answered Sweco's expert report produced by Respondents with their Rejoinder.[35]

221. On 17 June 2020, the Parties sent a joint letter to the Arbitral Tribunal whereby they informed the latter that, having conferred, they shared the view that in light of the COVID-19 circumstances, hearing preparation would be significantly impacted and that it was extremely unlikely that an in-person hearing could take place as scheduled. The Parties agreed "*that an in-person hearing is essential in this particular case, given its scale and complexity*." The Parties accordingly agreed that the hearing be cancelled and rescheduled, proposing the window of 13 September-8 October 2021.

222. On 29 June 2020, Claimants sent a letter to the Arbitral Tribunal informing it that they had filed four criminal complaints for public defamation with French judicial authorities concerning Respondents' allegations of corruption, manipulation, and inflation of heating tariffs, degradation of the heating facilities, secret agreements with the Rubicon group, illegal actions and actions in breach of the Vilniaus lease by Veolia and its Lithuanian subsidiaries.

223. On 3 July 2020, after consultation with the Parties, the Arbitral Tribunal sent an email to the Parties whereby it fixed the new hearing dates on 16 August-3 September 2021.

224. On 7 July 2020, the Arbitral Tribunal wrote to the SCC to request an extension of the time limit to render the Final Award (then fixed on 31 December 2020) in view of the hearing's postponement.

225. On 7 July 2020, Respondents wrote an email to the Arbitral Tribunal and Claimants in relation to Mr. Jean-March Fédida's automatic "out of office" email in reply all to the Arbitral Tribunal's email of the same date. Respondents questioned whether Mr. Fédida

[33] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (Revised), dated 30 May 2020.

[34] Expert Report of Jarno Kaskela, Matthias Laue, Sami Pastilla and Peter Postpischl (AFRY) dated 26 May 2020, CEX-12.

[35] Expert Report of Mikael Jönsson and Michael Morris (Sweco), REX-4.

is part of Claimants' counsel team and requested, for the sake of transparency, that Claimants disclose the capacity in which Mr. Fédida receives correspondence in this case. Claimants answered on 8 June 2020 that Mr. Fédida is a French attorney external counsel to Veolia, advising the company on, *inter alia*, the criminal complaints before French authorities for defamation. Respondents acknowledged receipt of that information on 10 July 2020.

226. On 9 July 2020, upon the SCC's invitation, the Arbitral Tribunal indicated that it estimated that it would be able to render the award by the end of 2022. That letter was communicated to the Parties by the SCC on 10 July 2020. On 17 July 2020, Respondents stated that they had no comment on the estimated time required by the Arbitral Tribunal to render its final award, whereas Claimants expressed concern as follows:

> "*Claimants are fully cognizant of the unusual scale of this case, which grew exponentially under the weight of Respondents' overbroad counterclaims, and they well appreciate the large task ahead of the Tribunal. Nevertheless, Claimants recall that this still is a commercial arbitration (despite Respondents' efforts to highjack it by asserting frivolous counterclaims). Claimants hope that the 15-month estimate will prove to be an overstatement, and they trust that the Tribunal will make every effort to issue its award as expeditiously as possible*."[36]

227. On 10 July 2020, Respondents wrote an email to the Arbitral Tribunal in relation to Claimants' letter of 29 June announcing the filing of four criminal complaints for defamation against Respondents before the French authorities. Respondents commented that these complaints lacked any basis, and that Veolia's actions could only be taken as attempts to scare and bully Respondents away from exercising their rights. Respondents advised that they were not aware of the content of the criminal complaints and thus unable to advise the Tribunal in this regard.

228. On 21 July 2020, upon the SCC's further inquiry, the Arbitral Tribunal informed it about the work still to be done to complete a final award.

[36] Claimants' email to the Arbitral Tribunal dated 10 July 2020.

229. On 23 July 2020, the SCC communicated its decision to extend the deadline to render the award until 31 May 2022.

230. On 24 July 2020, Respondents requested the Arbitral Tribunal to exclude ARFY's expert report submitted by Claimants with their Rejoinder on Counterclaims[37] due to an alleged conflict of interest, Respondents allegedly having exchanged extensively with ÅF AB and Pöyry PLC (with ÅF AB having acquired Pöyry PLC to create expert firm AFRY) on issues opined in ARFY's report. Respondents therefore requested the exclusion of the author of the expert report.

231. On 5 August 2020, Respondents clarified that they withdrew their counterclaims from the parallel ICSID arbitration to bring them before the Lithuanian courts in accordance with the post-Achmea EU member States' agreement of 5 May 2020 to terminate the intra-EU BITs.

232. On 7 August 2020, upon the Arbitral Tribunal's invitation, Claimants answered Respondents' request to exclude AFRY's expert report from the record.

233. On 21 August 2020, Respondents replied to Claimants' letter of 7 August 2020 regarding Respondents' request to exclude AFRY's expert report from the record.

234. On 28 August 2020, Claimants submitted their final comments on the issue of AFRY's expert report, in response to Respondents' letter of 21 August 2020.

235. On 27 October 2020, the Arbitral Tribunal rendered Procedural Order No. 7 rejecting Respondent's application to exclude the AFRY's expert report from the record. In reaching its decision, the Tribunal gave weight to the argument that the individuals consulted by Respondents and the individuals having authored the expert report are different. Furthermore, the Arbitral Tribunal noted that there is nothing in the ARFY report that suggests that its authors would have had access to confidential information received from Respondents, as ARFY relied mostly on exhibits submitted by Claimants.

236. On 28 October 2020, Claimants requested leave to submit additional documents to the record.

[37] **CEX-012:** AFRY Expert Report, dated 26 May 2020.

237. On 4 November 2020, Respondents requested the Arbitral Tribunal's leave to add documents to the record.

238. On 6 November 2020, upon the Arbitral Tribunal's invitation, Respondents commented that they did not object to the admission of the documents Claimants sought to introduce on 28 October 2020. They made comments on said documents. The Claimants' application was consequently granted on 11 November 2020, and Claimants' submitted Exhibits C-1272 and C-1273 on 17 November 2020 pursuant to that decision.

239. On 25 November 2020, Claimants responded to Respondents' application for leave to add documents to the record dated 4 November 2020.

240. On 2 December 2020, upon the Arbitral Tribunal's leave granted on 30 November 2020, Respondents replied to Claimants' comments dated 25 November 2020.

241. On 9 December 2020, Claimants commented on Respondents' reply of 2 December 2020 regarding the new documents Respondents sought to introduce to the record.

242. On 24 December 2020, Claimants sent a letter to the Arbitral Tribunal whereby they requested leave to add to the record newly available documents allegedly "highly material to the outcome of this case".

243. On 22 January 2021, the Arbitral Tribunal sent a letter requesting an increase in the advance on costs for its advance on fees to be at minimum EUR 2 million, to account for the considerable dimension of the case and consequent work for the Tribunal.

244. On 10 February 2021, Dr. Volker Triebel sent a letter to the Board of the SCC offering his resignation as arbitrator. It was communicated by the SCC to the Parties on the same date.

245. On 11 February 2021, the SCC sent a letter to the Parties whereby it informed them that the SCC had released Dr. Triebel of his appointment as arbitrator, fixed his fees at EUR 162,000 and rejected the Arbitral Tribunal's request for an increase in the advance on costs of 22 January 2021. The SCC afforded Respondents an opportunity to appoint a new arbitrator until 25 February 2021.

246. On 20 February 2020, the Arbitral Tribunal, after having read and heard the Parties extensively, decided that the hearing would take place from 17 August to 4 September 2020 in London.

247. On 25 February 2021, Respondents appointed Prof. Hugo Barbier as co-arbitrator, confirming his availability on the scheduled dates of Hearing. This appointment made Prof. Barbier's mandate effective and thus marked the re-constitution of the Arbitral Tribunal.[38]

248. On 1 March 2021, the SCC sent Prof. Barbier's confirmation of acceptance to the Parties and two standing members of the Arbitral Tribunal.

249. On 19 March 2021, the Arbitral Tribunal rendered Procedural Order No. 8, whereby it granted Respondents' leave to add certain additional evidence to the record further to their application of 4 November 2020. The Arbitral Tribunal further granted Claimants' 60 days from the submission of the new evidence by Respondents to comment on such new evidence. Finally, the Arbitral Tribunal acknowledged Respondents' lack of objection to Claimants' application dated 24 December 2020 and invited Claimants to add the new evidence discussed in that application.

250. On 9 April 2021, Respondents wrote to the Arbitral Tribunal to inform it of the passing away of counsel for Respondents, Professor Emmanuel Gaillard.

251. On 11 April 2021, the Parties wrote to the Arbitral Tribunal to seek clarification of Procedural Order No. 8, Annex A, item 5.

252. On 11 April 2021, the Parties jointly requested the Arbitral Tribunal to adjust certain deadlines preceding the hearing.

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[38] Ragnwaldh, Andersson and Salinas Quero, A Guide to the SCC Arbitration Rules (2019), p. 55 ("[a]s soon as a party informs the SCC of the identity of the arbitrator it has chosen to appoint, the appointment is effective and is not subject to further confirmation by the SCC. Upon receipt of such information, the Secretariat will contact the party-appointed arbitrator and request that the arbitrator complete a statement of acceptance, availability, independence and impartiality").

253. On 23 April 2021, Respondents submitted 65 new factual exhibits (R-1779 to R-1844) and 22 legal authorities (RL-310 to RL-332) pursuant to the leave granted by the Arbitral Tribunal in Procedural Order No. 8 of 19 March 2021.

254. On 23 April 2021, Claimants submitted 5 new factual exhibits (C-1274 to C-1278) pursuant to the leave granted by the Arbitral Tribunal in Procedural Order No. 8 of 19 March 2021.

255. On 17 May 2021, the Parties wrote to the Arbitral Tribunal to inform it that they had agreed that holding a virtual hearing would be the most practical solution in light of the uncertainties associated with the COVID-19 pandemic.

256. On 11 June 2021, Claimants submitted their comments on Respondents' exhibits filed pursuant to Procedural Order No. 8 of 19 March 2021. Claimants' comments were filed primarily in the form of a table[39], accompanied by 33 new factual exhibits (C-305bis, C-965bis and C-1279 to C-1312) and 5 legal authorities (CLA-332 to CLA-337).

257. On 17 June 2021, the Arbitral Tribunal and the Parties held a pre-hearing telephone conference-call, during which a draft hearing protocol and issues related to the hearing were discussed.

258. On 18 June 2021, Claimants circulated revised versions of Dr. Hesmondhalgh's Third Expert Report[40] and of its Rejoinder on Counterclaim. The revisions were indicated as dated from 21 May 2021. These updates reflected the revisions of the AFRY's expert report pursuant to Procedural Order No. 8.

259. On 21 June 2021, the Arbitral Tribunal issued its decisions on certain outstanding hearing-related matters, and the Parties circulated a finalized hearing protocol on this basis on 10 August 2021, after having exchanged their list of witnesses and experts to be cross-examined and after the Tribunal decided several further issues in relation to the allocation of working time at the hearing.

[39] Annex A to Claimants' letter to the Tribunal dated 11 June 2021.

[40] **CEX-010:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 29 May 2020.

260. On 14 August 2021, FTI and Sweco submitted *addenda* to their expert reports.[41]

261. On 15 August 2021, at around 9:30 pm Vilniaus time (8:30 pm Geneva time), counsel for Claimants Sidley Austin LLP wrote a letter to the Arbitral Tribunal to inform it of its withdrawal, with immediate effect, from the present proceedings. Sidley Austin LLP explained that such withdrawal was due to the termination of its engagement on the same date, following issues in its financial relationship with Claimants.

262. Shortly thereafter, Mr. Eric Haza, Group Chief Legal Officer of Veolia Environment, sent an email to the Arbitral Tribunal whereby Claimants submitted "*that the hearing must be immediately cancelled and the proceedings suspended*" due to the fact that Claimants lost their "*lead law firm*."[42] The Arbitral Tribunal wrote an email to the Parties on the same evening indicating that Claimants' request for cancellation of the hearing and suspension of the proceedings would be discussed with the Parties at the agreed time of the Hearing on 16 August 2021.

263. On 16 August 2021, the Arbitral Tribunal and the Parties joined the virtual Hearing originally scheduled to last three weeks at the agreed time (3:00 pm Vilniaus time / 2:00 pm Geneva time).

264. After hearing the Parties at the Hearing on 16 August 2021, the Arbitral Tribunal took the following decisions. These were confirmed in Procedural Order No. 9 regarding the postponement of the Hearing and related issues issues:

> *"8.1 The three-week hearing is rescheduled and will take place from 18 to 29 April 2022 (two weeks) and from 16 to 20 May 2022 (one further week). The Arbitral Tribunal does not intend to further modify these hearing dates and it is up to Claimants to identify, appoint and instruct a new counsel team capable to assist them on these hearing dates. Claimants are invited to inform the Arbitral Tribunal about the appointment of its new counsel team as soon as it will have been appointed.*
>
> *8.2 The Parties are invited to make the necessary logistical arrangements for an in-person hearing to take place on the above dates, if circumstances*

[41] **REX-003 Add:** Addendum to the Second FTI Expert Report, dated 14 August 2021; **REX-004 Add:** Addendum to Sweco Expert Report, dated 14 August 2021.

[42] Mr. Eric Haza's email to the Tribunal dated 15 August 2021.

allow. This includes the reservation of a hearing room and break-out rooms at the International Dispute Resolution Centre (IDRC) in London, and of court reporter(s).

8.4 Respondents may formulate a request to the Arbitral Tribunal regarding costs immediately incurred as a result of the hearing's postponement.

8.5 The Parties are invited to keep the Arbitral Tribunal informed about the status of the parallel ICSID arbitration.

8.6 Respondents' application of 14 August 2021 for leave to submit the addenda to the Sweco expert report dated 13 October 2019 and to the second FTI expert report dated 13 October 2019 attached to their application is granted; Claimants may apply for leave to comment on this addenda in writing."[43]

265. On 18 August 2021, the Arbitral Tribunal requested a substantial advance payment its fees, in view notably of the work accomplished so far and of Mr Triebel's resignation and the payment of his fees.

266. On 1st September 2021, Claimants informed the Arbitral Tribunal of the issuance of Procedural Order No. 9 of 20 August 2021 in the parallel ICSID proceeding, whereby the ICSID tribunal decided not to suspend the ICSID proceeding following the withdrawal of Sidley Austin LLP from the ICSID case. The ICSID tribunal instead instructed Claimants to retain new counsel as expeditiously as possible (in principle within four weeks) and asked the Parties to liaise immediately thereafter to agree on the calendar for the correction of the ICSID hearing transcript, the post-hearing briefs and the statements of costs.

267. On 3 September 2021, the SCC sent a letter to the members of the Arbitral Tribunal to inform them of the payment of 50% of their preliminary fees.

268. On 20 September 2021, Mr. Dany Khayat of Mayer Brown in Paris sent a letter to the Arbitral Tribunal on behalf of Claimants to inform the Arbitral Tribunal that it represented

[43] Procedural Order No. 9, para. 8.

Claimants from thereon along with Dr. Stanimir Alexandrov. The Arbitral Tribunal acknowledged receipt on the same date, reminding the Parties of paragraph 8.2 of Procedural Order No. 9 inviting the Parties to make the necessary logistical arrangements for the hearing of April/May 2022.

269. On 28 September 2021, newly introduced counsel for Claimants sent an email to the Arbitral Tribunal to confirm that the Parties were discussing the logistical arrangements of the hearing of April/May 2022. Claimants further confirmed that the law firm Cobalt continued to represent Claimants along with Mayer Brown and Dr. Stanimir Alexandrov.

270. On 3 November 2021, Respondents submitted an Application for Wasted Costs pursuant to paragraph 8.4 of Procedural Order No. 9. Upon the Arbitral Tribunal's invitation, Claimants responded to this application on 12 November 2021. Respondents requested and obtained leave to reply by 19 November 2021, after which Claimants submitted rejoinder comments on 26 November 2021.

271. On 13 December 2021, the Arbitral Tribunal sent a letter to the Parties inviting Claimants to pay the amount of GBP 12,079.37 (corresponding to the invoices of the IDRC and Opus 2 for the hearing of August-September 2021) to Respondents within ten (10) days from the receipt of that letter, failing which the Tribunal would prepare and issue a partial award ordering the same, at Claimants' costs.

272. Claimants informed the Arbitral Tribunal on 21 December 2021 that they stood ready to make the payment to Respondents, and were awaiting their bank details to make the transfer.

273. On 26 November 2021, Claimants requested leave to introduce additional evidence to the record. Upon the Tribunal's invitation, Respondents commented on that request on 3 December 2021, stating that they were not opposed to its admission into the record but disagreed on the translation. On 8 December 2021, the Parties communicated to the Tribunal an agreed translation of that decision which was added to the record as exhibit C-1313.

274. On 2 February 2022, Claimants confirmed the payment, on the same date, of the sum of GBP 12,079.37 to Respondents *as per* the Arbitral Tribunal's decision dated 13 December 2021.

275. From 18 to 29 April 2022 and 16 to 20 May 2022, the Arbitral Tribunal and the Parties held three weeks of hearing, during which Claimants' witnesses (Ms. Lešinskienė, Mr. Janušauskas, Ms. Mikšytė, Mr. Akelis, Mr. Husty, Mr. Veršulis, Mr. Sacreste, Mr. Keserauskas, Mr. Bernotas, Mr. Greim), Claimants' experts (Mr. Stuggins and Accuracy, Prof. Pieth, Prof. Nekrošius, Prof. Merkevičius, Prof. Birštonas, Fichtner, AFRY), Respondents' witnesses (Mr. Masiulis, Mr. Jasaitis, Mr. Skučas, Mr. Benkunskas, Ms. Vilyte, Mr. Burokas, Mr. Imbrasas), and Respondents' experts (Dr. Smaliukas and SWECO) were heard. A transcript of that hearing was established and thereafter jointly corrected by the Parties.

276. In between the two periods of hearing, on 2 May 2022, the SCC sent a letter to the Arbitral Tribunal and the Parties reminding the deadlines for the rendering of the Final Award on 31 May 2022. On 3 May 2022, the Tribunal wrote to the SCC to draw their attention to the fact that the hearing was not completed yet.

277. On 5 May 2022, the Tribunal followed-up with a formal indication to the SCC that the Tribunal did not expect to be in a position to render the Final Award before the end of the year and that it would be in further contact once the hearing would be concluded, and the post-hearing schedule would be set. The Tribunal consequently formally requested an extension of the time limit to render the Final Award.

278. On 10 May 2022, the SCC invited the Parties to comment on the Tribunal's request for extension of the time limit for rendering the Final Award dated 5 May 2022.

279. On 19 May 2022, the SCC sent a letter to the Arbitral Tribunal informing the latter that the time-limit to render the Final Award had been extended until 31 December 2022.

280. On 24 May 2022, the Arbitral Tribunal sent an email to the Parties to summarize the procedural decisions covering the next steps of the procedure including:

- a further day of hearing to hear the Parties' *quantum* experts, whom the Parties had not had the time to cross-examine during the above-mentioned three weeks of hearing, which was scheduled to take place on 8 June 2022, by video-conference;

- Post-Hearing Briefs of maximum 350 pages by 14 October 2022;

- Reply Post-Hearing Briefs of maximum 100 pages by 2 December 2022;

- a further day of hearing to hear closing arguments and answers to the Arbitral Tribunal's questions from the Parties, at a date to be determined.

281. On 30 May 2022, the Parties reverted to the Arbitral Tribunal with an agreed agenda for the hearing of quantum experts on 8 June 2022.

282. On 3 June 2022, Respondents wrote to the Tribunal to inform the latter that the Parties had not been able to agree on a date for the Closing Hearing. Respondents requested that the Closing Hearing take place in the weeks of 12 or 19 December 2022 (during which Claimants indicated they were not available). Should the Tribunal decide that the Closing Hearing could only take place in 2023, Respondents indicated that they would forego their request for a Closing Hearing. Claimants confirmed their unavailability in December 2022 and their position that no Closing Hearing should take place on the same date.

283. On 8 June 2022, the Arbitral Tribunal and the Parties held a 16th day of hearing to hear Ms. Hesmondhalgh (Brattle) and Mr. Roques (FTI), the Parties' respective quantum experts. At the end of the hearing, the Tribunal communicated its decision not to hold a Closing Hearing in view of the Parties' submissions on the same. A transcript of that Hearing was established and thereafter jointly corrected by the Parties. At the quantum Hearing, the Parties jointly requested the Arbitral Tribunal to be authorized to produce the transcript of the Hearing in the ICSID proceedings. By email dated 10 June 2022, the Arbitral Tribunal accepted the Parties' joint request subject to the reciprocal production of the entire transcript of the ICSID hearing in this SCC arbitration.

284. On 10 June 2022, the Arbitral Tribunal accepted the Parties' joint request to produce the transcripts of the Hearing in the present arbitration to the ICSID Arbitral Tribunal in the parallel proceedings, subject to the reciprocal production of the entire transcript of the ICSID hearing in this SCC arbitration. On 4 July 2022, the Parties produced Volumes 1, 2 and 17 of the transcripts of the ICSID hearing, indicating that the production of Volume 9 corresponding to the first part of Mr. Zuokas' examination was subject to the ICSID Tribunal's express authorization and that, as things stood, Parties were prevented to disclose it in the SCC arbitration. The Arbitral Tribunal notes that the

Parties accidentally produced the second part of Mr. Zuokas' cross-examination in Volume 10 when they replaced exhibits with the final ICSID hearing transcript.

285. On 27 June 2022, the Arbitral Tribunal communicated a short list of questions to be answered in the Post-Hearing Briefs to the Parties.

286. On 29 September 2022, the Parties sent the corrected version of the transcript of the Hearing to the Tribunal.

287. On 13 October 2022, the Parties communicated their agreement to postpone the filing of their Post-Hearing Briefs until 18 October 2022.

288. On 18 October 2022, the Parties submitted their respective Post-Hearing Briefs ("**CPHB**" and "**RPHB**").[44]

289. On 31 October 2022, the Parties submitted their respective positions in respect of the deadline for and format for their costs submissions.

290. On 2 November 2022, Claimants further commented on the deadline for the costs submissions.

291. On 4 November 2022, the Arbitral Tribunal sent an email to the Parties whereby it 1) decided on the deadline and format for costs submissions, and 2) invited the Parties to support the Tribunal's request for extension of the time-limit for the rendering of the Final Award.

292. On 9 and 11 November 2022, the Parties sent emails to the Arbitral Tribunal confirming their support of the upcoming Arbitral Tribunal's request to the SCC for an extension of the time limit to render the Final Award.

293. On 18 November 2022, Respondents submitted procedural requests to the Arbitral Tribunal concerning the format of Post-Hearing Briefs, which were answered by Claimants on 22 November 2022 and decided on 29 November 2022.

[44] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022; **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022.

294. On 29 November 2022, the Arbitral Tribunal sent a request for extension of the time limit to render the Final Award to the SCC.

295. On 30 November 2022, the SCC sent a letter informing the Arbitral Tribunal and the Parties that the deadline to render the Final Award had been extended by the SCC until 30 June 2023.

296. On 6 December 2022, the Parties submitted their respective Reply Post-Hearing Briefs ("**CRPHB**" and "**RRPHB**").[45]

297. On 27 January 2023, Claimants sent a letter to Prof. Barbier requesting clarifications on his relationship with Counsel for Respondents. On 30 January 2023, Respondents sent unsolicited comments on that request. On 31 January 2023, Prof. Barbier answered Claimants' request and confirmed his continuing independence and impartiality in the present case.

298. On 31 January 2023, the Parties submitted their respective cost submission.[46] Respondents separately filed an updated application for wasted costs.[47]

299. On 8 February 2023, Respondents sent an email to the Arbitral Tribunal commenting on Veolia's requests for costs related to Sidley Austin's alleged fees.

300. On 24 February 2023, upon the Arbitral Tribunal's leave, Claimants responded to Respondents' email of 8 February 2023 criticizing their claim for Sidley's alleged fees, commented on further aspects of Respondents' cost submission of 31 January 2023, and submitted their response to Respondents' updated application for costs of the same date. Respondents briefly replied on these submissions in an email dated 2 March 2023.[48]

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[45] **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 06 December 2022; **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 06 December 2022.

[46] **CSOC:** Claimants' Statement of Costs, dated 31 January 2023; **RSOC:** Respondents' Costs Submission, dated 31 January 2023.

[47] **Wasted Costs Application:** Respondents' Wasted Costs Application, dated 31 January 2023.

[48] **Claimants' Comments on Wasted Costs Application:** Cs' Response to Rs' Revised Wasted Costs Application, dated 24 February 2023.

301. On 6 June 2023, the Arbitral Tribunal sent a request for extension of the time limit to render the Final Award to the SCC.

302. On 9 June 2023, the SCC sent a letter a letter to the Arbitral Tribunal and the Parties informing them that the deadline to render the Final Award had been extended until 31 October 2023.

303. On 16 October 2023, the Arbitral Tribunal sent an email to the Parties whereby it informed them that it required a one-month extension to finalize the drafting of this Award. On the same date, the SCC sent a letter to the Parties to invite them to provide comments on the Arbitral Tribunal's request for extension.

304. On 17 October 2023, the Parties confirmed their agreement with the one-month extension sought by the Tribunal to finalize this Award. On the same date, the SCC formally extended the deadline to render the Final Award until 30 November 2023.

VIII. PRAYERS FOR RELIEF

A. CLAIMANTS

"*1335. For all the reasons set out above and in its prior submissions, Veolia respectfully requests the Tribunal to:*

(a) ***AWARD*** *to Veolia:*

(iii) EUR 20,619,000 for the Disputed Assets (plus pre and post-Award interest);

(iv) EUR 103,000 for the Software Modifications (plus pre and post-Award interest);

(v) EUR 624,184 for the losses incurred due to the Respondents' actions that prevented the Pricing Commission from increasing Vilnius Energy's heating tariffs to account for the approved 2015-2017 Investments (plus pre and post-Award interest);

(vi) EUR 251,764 for the Lease Fee for VE-3 for the period after 1 January 2016, that Vilnius Energy paid under protest (plus pre and post-Award interest); and

(vii) its costs and fees for this Arbitration.

(b) ***DECLARE****:*

(i) that Veolia duly returned the VE-3 plant to VŠT on 1 January 2016, and that Veolia had no obligation to pay Lease Fee for VE-3 after that date;

(ii) that Veolia's interpretation of Complete State under the Lease is correct, including that the Complete State requirement did not require Vilnius Energy to repair or replace assets that:

- *have been replaced by new, modernized assets;*
- *have been decommissioned and put into conservation;*
- *are no longer needed due to, for example, age or changes to the way that heating and electricity services are provided; or*
- *show pre-existing defects or defects that do not affect the utility of the Facilities.*

(iii) or, if the Tribunal determines that any such asset would not be classified as being in a Complete State:

- *that Veolia is not liable for any defect that it could have corrected before the handover if the Respondents had acted appropriately in appointing the expert;*

(iv) or, if neither declaration (ii) nor declaration (iii) is granted:

- *that Veolia, or its designees, shall be given access to the Facilities to correct any defects; or, if for any reason that is not possible, to declare that the Respondents may only claim against Veolia upon a showing that the repairs have in fact been performed (at a reasonable cost); and*

(v) that the value of the assets Veolia returned to VŠT satisfies the obligation to return assets equal in value to the Facilities it received at the beginning of the Lease term.

*(c) **DISMISS** all of the Respondents' Counterclaims in their entirety.*

*(d) **AWARD** any relief the Tribunal deems just and equitable.*"[49]

"***305. IN ADDITION**, and given the Respondents' request for an additional declaratory relief in respect of the 2016 EAs, Veolia respectfully requests the Tribunal to **DECLARE** that, if the Tribunal determines that Veolia was not entitled to return the VE-3 plant prior to the end of the Lease, the 2016 EAs related to VE-3 consequently belong to Veolia and should be released to it.*

[49] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1335.

306. For the avoidance of doubt, Veolia's additional request for relief is submitted in addition to the prayer for relief included in its PHB."[50]

B. RESPONDENTS

"***XIII. REQUEST FOR RELIEF***

1138. For the reasons stated above, the Respondents respectfully request the Tribunal to:

On the Claimants' claims:

(a) dismiss the entirety of the Claimants' claims;

On the Respondents' counterclaims:

(b) as regards the Respondents' counterclaims:

(c) find and declare that

(i) the Claimants have breached their obligations under the Lease Agreement and Lithuanian law;

(ii) the Claimants are jointly and severally liable for those breaches; and

(iii) the Claimants must fully indemnify the Respondents for the consequences of those breaches, including, without limitation, by paying to the Respondents all damages and losses associated with those breaches, whether calculated by way of disgorgement of net dividends and management fees VE paid to Veolia, overpayments on investments procured by Rubicon, and other benefits received by Rubicon via other contractual arrangements including VPAA, or otherwise;

(d) in addition, order the Claimants jointly and severally to pay to the Respondents the following amounts:

[50] **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 06 December 2022, paras. 305-306.

*(i) as regards the bad faith and illegal manner in which the Claimants obtained and set out to perform, including through corruption, the Lease Agreement (**Counterclaim 1**):*

1. *EUR 238,494,598 corresponding to the benefits of the Claimants' unlawful actions;*[2000]
2. *annual interest of 6% calculated from the date(s) on which the corresponding benefits were received until full payment of the amount awarded;*

*(ii) as regards the Claimants' overcharges for heat supplied in Vilnius (**Counterclaim 2**):*

1. *EUR 9,319,680;*[2001]
2. *annual interest of 6% calculated from 30 March 2017 until full payment of the amount awarded;*

*(iii) as regards the Claimants' misuse and misappropriation of proceeds from sales of emission allowances (**Counterclaim 3**):*

1. *Between EUR 52,287,088 and EUR 53,865,188,*[2002] *corresponding to harm incurred as at 30 March 2017;*
2. *EUR 5,660,735, corresponding to harm incurred between 2018 and 2019;*[2003]
3. *annual interest of 6% calculated from 30 March 2017 until full payment of the amount awarded;*
4. *Declare that all title, right and interest over the emissions allowances in account number EU-100-5006040-0-2 lie with and are vested in VŠT;*
5. *Order UAB Vilniaus energija to submit in writing a request to the Environmental Projects Agency of the Lithuanian Ministry of Environment (in its capacity as register management body) to lift the suspension over account number EU-100-5006040-0-2 so that all emissions allowances in this account be transferred to VŠT;*
6. *Order UAB Vilniaus energija to transfer the emissions allowances in account number EU-100-5006040-0-2 to VŠT within ten (10) days of the account suspension being lifted;*

*(iv) as regards the Claimants' failure to modernize and maintain operational the VE-3 plant (**Counterclaim 4**):*

1. *EUR 260,634,765;*[2004]
2. *annual interest of 6% calculated from 30 March 2017 until full payment of the amount awarded;*

*(v) as regards the Claimants' failure to invest in the Facilities (**Counterclaim 5**):*

1. *EUR 40,385,793;*[2005]
2. *annual interest of 6% calculated from 30 March 2017 until full payment of the amount awarded;*

*(vi) as regards the Claimants' failure to return Facilities in Complete State (**Counterclaim 6**):*

1. *EUR 988,911.25;*[2006]
2. *annual interest of 6% calculated from the date(s) on which the relevant costs/losses were incurred until full payment of the amount awarded;*

*(vii) as regards the Collective Agreement the Claimants imposed on VŠT (**Counterclaim 7**):*

1. *EUR 1,111,091.46;*[2007]
2. *annual interest of 6% calculated from 30 March 2017 until full payment of the amount awarded;*

*(viii) as regards the Disputed Assets (**Counterclaim 8**), declare and order that:*

1. *no payment should be made by the Respondents to the Claimants in respect of the Disputed Assets;*
2. *the Economizer, Steam Turbine No. 5 and the associated Network Pump No. 19, and the Cars are VŠT's property (the Hot Water Meters and Inventory having already been transferred into VŠT's ownership);*[2008]

3. *the price of all Disputed Assets and all the Units is equal to the outstanding amount of Lease Fee No. 4 at the end of the Term of the Lease Agreement;*

*(ix) as regards the Claimants' failure to transfer the IT Systems to VŠT (**Counterclaim 9**):*

1. *EUR 1,458,567;*[2009]
2. *annual interest of 6% calculated from the date(s) on which the relevant losses/costs were incurred until full payment of the amount awarded;*

*(x) as regards the Claimants' failure to timely transfer the 2015-2017 investments to VŠT (**Counterclaim 10**):*

1. *declare that the Claimants breached their obligations to duly report and sell the 2015-2017 investments to VŠT;*
2. *Should the Tribunal find for the Claimants on Claim 1 (Disputed Assets), Claim 2 (Software Modifications), or Claim 3 (2015-2017 Investments), set-off the amount of damages awarded to the Claimants by EUR 421,601.62;*[2010]

*(xi) as regards the Claimants' failure to timely pay Lease Fee concerning VE-3 (**Counterclaim 11**):*

1. *EUR 12,741;*[2011]
2. *daily interest of 0.08% calculated from 15 March 2017 until full payment of the amount awarded;*

*(xii) as regards the Claimants' failure to return assets at the end of the Lease of the same or higher value as the assets they received at the beginning of the Lease (**Counterclaim 12**):*

1. *EUR 20,278,013 (if VE-3 was returned on 1 January 2016) or EUR 21,578,013 (if VE-3 was returned at the end of the Lease);*[2012]

2. *annual interest of 6% calculated from 30 March 2017 until full payment of the amount awarded;*

*(xiii) As regards the Claimants' unlawful de facto joint venture with Rubicon (**Counterclaim 13**):*

1. *EUR 238,494,598 corresponding to the benefits of the Claimants' unlawful actions;*[2013]
2. *annual interest of 6% calculated from the date(s) on which the relevant losses/costs were incurred until full payment of the amount awarded;*

Other Requests:

(i) order the Claimants jointly and severally to pay the full costs of this arbitration, including, without limitation, arbitrators' fees and expenses, the administrative costs of the SCC Arbitration Institute, the costs and fees of counsel and experts, expenses, and any other costs associated with this arbitration, such as third-party funding costs;

(ii) order the Claimants jointly and severally to pay post-award interest of 6% on the amounts awarded by the Tribunal until full payment; and,

(iii) to the extent not captured by the previous requests for relief (above), order the Claimants jointly and severally to pay any tax that the Respondents are liable to pay on any damages awarded to the Respondents, including any VAT.

(iv) order any such further relief to the Respondents as the Arbitral Tribunal may deem appropriate."[51]

[51] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para- 1138.

IX. DISCUSSION

A. INTRODUCTION

305. As summarized in the procedural and factual backgrounds above, the present arbitration arises out of the performance of the Lease by Claimants. It was initiated in the context of the return by Claimants of the Respondents' facilities/assets to Respondents at the end of the Lease period. Claimants seek declarations and compensation in that respect: Claim 1 (Disputed Assets), Claim 2 (IT Systems), Claim 4 (VE-3 Lease Fee), Claim 5 (Complete State). They also seek compensation for a loss in tariff profits they attribute to Respondents' actions: Claim 3 (2015-2017 Investments).

306. Respondents have formulated 13 Counterclaims in total. Each of the 6 claims submitted by Claimants corresponds to a counterclaim of Respondents.[52] The latter acknowledged in their latest prayers for relief and elsewhere[53] that these counterclaims *"may overlap and intersect in some respects" and that* "[a]*warding some counterclaims may affect both the merits and the quantum of other counterclaims*".[54] Respondents explain that "[t]*o the extent the Tribunal finds that there is overlap between the heads of loss addressed by the disgorgement claims and the specific damages claims, the Tribunal must assess the extent of that overlap and has a discretion to determine the appropriate level of compensation provided that the Respondents are fully compensated for the losses they have suffered*".[55]

307. They nevertheless insist on the importance of full compensation in this case, "*including in respect of non-quantifiable losses.*"[56] Respondents counterclaim for their "*non-quantifiable losses*" by way of two fully overlapping (and thus alternative) claims for disgorgement of Veolia's profits during the relevant period,[57] a remedy which Respondents allege is appropriate to compensate damages the amount of which is

[52] See List of Claims and Counterclaims [Annex to Award].

[53] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 1116-1137, **REX-001:** Expert report of FTI Consulting, dated 19 February 2018, paras. 6.5, 6.13-6.14.

[54] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1139.

[55] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1118.

[56] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 6.

[57] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 842, 1109-1113; **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 230.

difficult to prove.[58] The disgorgement of profits counterclaimed by Respondents under either Counterclaim 1 (corruption) and/or Counterclaim 13 (illegal transfer of the Lease to Rubicon) is valued by Respondents' expert at EUR 238,494,598 for each counterclaim.[59]

308. In addition, Respondents counterclaim for their "*specific damages*", which they contend are "*cumulative because they compensate different losses*"[60]. These specific damages correspond to the rest of Respondents' 13 counterclaims, which are Counterclaim 2 (Tariff Overcharge), Counterclaim 3 (Emissions Allowances), Counterclaim 4 (VE-3 Conversion), Counterclaim 5 (Investment Obligation), Counterclaim 6 (Complete State), Counterclaim 7 (Collective Agreement), Counterclaim 8 (Disputed Assets), Counterclaim 9 (IT Systems), Counterclaim 10 (2015-2017 Investments), Counterclaim 11 (VE-3 Lease Fees) and Counterclaim 12 (Total Aggregate Value).

309. In their Post-Hearing Brief, Respondents modified their prayers for relief with an offer to 1) waive Counterclaims 6, 7, 9, 10 and 11, and 2) reduce the amount of their Counterclaim 4, on the condition that the Tribunal grants their Counterclaim 4.[61] Counterclaims 6, 9, 10 and 11 correspond to Claims 5, 2, 3 and 4, respectively. Claimants have made clear in their Reply Post-Hearing Brief that "*Veolia maintains its request that the Tribunal decide on the merits of its own Claims*".[62] Claimants further criticize Respondents' conditional waiver as hollow, alleging that "*the quantum of the waived Counterclaims is in fact already included in their remaining Counterclaims*".[63] It bears noting that Respondents have only addressed part of the interactions concerning their conditionally waived claims, offering their assistance to the Tribunal in the case

[58] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 1109 and 1117; ref. to **RL-044:** Civil Code of the Republic of Lithuania (including amendments of April 12, 2011), Art. 6.249(2) and **RL-312:** Ruling of the Court of Appeal of Lithuania, Civil Case No. e2A- 248-790/2020, dated 30 March 2020.

[59] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 10 and 1138, where Respondents quantify both their Counterclaim 1 and alternative Counterclaim 13 at EUR 238,494,598 for "*the benefits of the Claimants' unlawful actions*".

[60] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 1113, 1116.

[61] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 1139-1140; see also paras. 12-14.

[62] **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 13.

[63] **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 13.

where further briefings would be required.[64] Respondents' proposals have little relevance in view of the Arbitral Tribunal's decisions set out in this Award.

310. As part of the decision roadmap they propose to the Tribunal, Respondents emphasize that "*Counterclaim 1 has to be decided on any analysis*" and that "*Counterclaim 13 also must be considered because of the nature of the facts, their centrality to the case*".[65] Indeed, while this arbitration was initiated in the context of the return of VST's assets and facilities to Respondents at the end of the Lease, it has since become centered around the Respondents' allegations of corruption and collusion by Veolia and Rubicon during the negotiation and performance of the Lease. The Arbitral Tribunal will therefore start its analysis by Counterclaim 1 (Illegality) (see below **B**) and Counterclaim 13 (Illegal Transfer of the Lease to Rubicon/*De Facto* Joint Venture with Rubicon) (see below **C**), which cover facts relevant to most if not all other claims and counterclaims to be decided.

311. Having reviewed Respondents' proposed roadmap for decisions but also analysed itself the interactions and overlaps between claims and counterclaims before it, as well as given weight to the respective amounts claimed, the Arbitral Tribunal considers it appropriate to adopt the following structure for its analysis:

- Counterclaim 4: VE-3 Conversion (**D**);
- Claim 5/Counterclaim 6: Complete State (**E**);
- Claim 1/Counterclaim 8: Disputed Assets (**F**)
- Counterclaim 3: Emissions Allowances (**G**);
- Counterclaim 2: Tariff Overcharge (**H**);
- Claim 4/Counterclaim 11: VE-3 Lease Fee (**I**);
- Claim 2/Counterclaim 9: IT Systems (**J**);

[64] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1137.
[65] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 1110-1111.

- Counterclaim 7: Collective Agreement (**K**);
- Claim 3/Counterclaim 10: 2015-2017 Investments (**L**);
- Counterclaim 5: Investment Obligation (**M**);
- Claim 6/Counterclaim 12: Total Aggregate Value (**N**);
- Allocation of costs and Respondents' Application for Wasted Costs (**O**).

B. COUNTERCLAIM 1: CORRUPTION

1. Introduction

312. In their Post-Hearing Brief dated 18 October 2022, Respondents request the Arbitral Tribunal to "*find and declare that (i) the Claimants have breached their obligations under the Lease Agreement and Lithuanian Law; (ii) the Claimants are jointly and severally liable for those breaches; and (iii) the Claimants must fully indemnify the Respondents for the consequences of those breaches, including, without limitation, by paying to the Respondents all damages and losses associated with those breaches, whether calculated by way of disgorgement of net dividends and management fees VE paid to Veolia, overpayments on investments procured by Rubicon, and other benefits received by Rubicon via other contractual arrangements including VPAA, or otherwise*"[66].

313. Following their request for a declaration, Respondents further request the Tribunal to order the disgorgement of profits deriving from Claimants' alleged unlawful actions, *i.e.* to "*order the Claimants jointly and severally to pay to the Respondents the following amounts*:

[66] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1138, confirmed in **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 307.

*i. as regards the bad faith and illegal manner in which the Claimants obtained and set out to perform, including through corruption, the Lease Agreement (**Counterclaim 1**),*

1. EUR 238,494,598 corresponding to the benefits of the Claimants' unlawful actions;

2. annual interest of 6% calculated from the date(s) on which the corresponding benefits were received until full payment of the amount awarded."[67]

314. As recalled above, the present arbitration was initiated in the context of the return of the Facilities leased by Respondents to Claimants.[68] The number and dimension of Respondents' Counterclaims, which question the regularity of both the procurement and performance of the Lease in their entirety, have however changed the main object of the dispute. In particular, Respondents' allegations of corruption have become a central point of debate in these proceedings. Respondents argue that Veolia's operations were associated with significant structural risks of corruption and that "*Veolia chose to secure the Vilnius Lease through representatives who engaged in bribery systematically and reflexively*". [69] Respondents rely on the Accounting Documents and Wiretaps Transcripts as direct evidence of corruption and on the manner in which the Lease was procured and performed as circumstantial evidence of the same. According to Respondents, Veolia both provided the means for the corruption and failed to implement basic compliance controls to conduct meaningful investigations.[70]

315. Respondents insist that "*this case presents a high-profile opportunity for the Tribunal to prove that international arbitration dispenses justice in both directions and that public interests can be upheld in a private process*."[71] The Arbitral Tribunal agrees that it is its duty to fully address all of Respondents' counterclaims. In approaching this first

[67] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1138, confirmed in **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 307.

[68] See above Section VII.

[69] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 76.

[70] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 76-306.

[71] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 5.

Counterclaim, the Arbitral Tribunal is however mindful of the several threshold issues arising in the context of the examination of allegations of corruption by international arbitral tribunals. It therefore considers it appropriate to first examine whether it is in a position to decide on Respondents' allegations of corruption, before proceeding, as the case may be, to examine the evidence on which Respondents rely in support of their allegations.

316. Claimants deny Respondents' allegations of corruption on their merits, but also submit several threshold procedural defenses relating to the evidence on which Respondents' allegations are based.[72] Notably, Claimants allege that Respondents' allegations of corruption should be dismissed because they rest on unreliable and inadmissible evidence.[73]

317. Respondents' case of corruption is that "[t]*he manner by which the Vilnius Lease was procured and performed provides compelling circumstantial evidence of corruption* […]*, which is put beyond doubt by the direct evidence of corruption reflected in the Black Accounting Documents […] and the wiretaps*". [74] Respondents' allegations of corruption thus rely on "*a mixture of direct and indirect evidence*",[75] the direct evidence consisting of the Accounting Documents and Wiretaps Transcripts allegedly establishing bribery of "*numerous Lithuanian officials in connection with the Vilnius Lease Agreement*" by Veolia.[76]

318. Claimants consider that the direct evidence relied on by Respondents is inadmissible. The preliminary question to the admissibility or inadmissibility of the Accounting Documents and Wiretaps Transcripts is therefore whether their exclusion from the record would make Respondents unable to meet their burden of proof, in other terms whether corruption can be proven solely based on circumstantial evidence in an international commercial arbitration (**2**). Should the answer be negative, the question

[72] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 766.
[73] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 808-838.
[74] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 76 (emphasis added).
[75] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 73.
[76] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 57.

of the admissibility of the direct evidence of corruption submitted in support of Respondents' first Counterclaim would become decisive (**3**).

2. The means of proof

2.1. The Parties' Positions

5.7.1 Respondents' Position

319. Respondents submit that "*it is now firmly established in international arbitration that corruption may be proven through direct or indirect evidence or a combination of both*".[77] Respondents remind that reliance on circumstantial evidence and inferences is a well-established civil law methodology routinely applied by arbitrators and European judges reviewing arbitral awards concerned with corruption issues.[78] Respondents consequently ask the Arbitral Tribunal to use "*red flags, indicators, circumstantial evidence*" as means of proof of corruption in this case.[79]

5.7.2 Claimants' Position

320. Claimants rely on Prof. Pieth's evidence to argue that, while the method of red flags can bring indicia of corruption, red flags can only be the starting point of an investigation.[80]

321. Claimants (and Prof. Pieth) further insist on "*a key distinctive feature of this Arbitration*" which "*is that such investigations were already thoroughly conducted by Lithuanian prosecutors, who closed them for lack of evidence once 'all procedural possibilities were exhausted during the pre-trial investigation in collecting the information'".*[81] According to Claimants, this unique feature is very important to the evidentiary

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[77] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 64 (emphasis added), see also Respondents' Opening Statement, Part, II Slide 9 ("*The evidentiary threshold can be satisfied by direct or indirect evidence (or both)* […] *Precise, serious and converging indirect evidence suffices to establish corruption*").

[78] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 74.

[79] Transcript, Day 1, 118/10-12; see also **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 478.

[80] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 769; 841-843.

[81] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 843, with ref to **R-1232:** Prosecutor General's Office, Decision to Terminate Pre-Trial Investigation, December 3, 2009, dated 03 December 2009.

approach to be taken by the Arbitral Tribunal, who would have to explain why it would close its eyes to six years of investigations by the Lithuanian authorities into the same allegations if it were to disregard their conclusions.[82]

322. Claimants further point to the vagueness of Respondents' case on corruption: Respondents bring the evidentiary level to "*an impossibly low level*" and fail to present a legal standard. Rather, Respondents advocate for a nebulous legal/moral duty of the Arbitral Tribunal to address corruption and so uphold the values of the international community.[83]

2.2. The Arbitral Tribunal's Analysis

323. The Arbitral Tribunal first notes the wide discretion with which it is empowered insofar as admissibility of evidence is concerned according to the procedural rules applicable to these proceedings.[84] Art. 26 of the SCC Arbitration Rules (2010) provides that "[t]*he admissibility, relevance, materiality and weight of evidence shall be for the Arbitral Tribunal to determine*".[85] Art. 33(7) of the Lithuanian Law on Commercial Arbitration of 1996 provides for its part that "[t]*he arbitral tribunal shall have the right to establish the admissibility, sufficiency and relevance of any evidence to the case*."[86]

324. As to the question of whether indirect or circumstantial evidence can be the sole basis of a finding of corruption in an international arbitration, the Arbitral Tribunal has carefully reviewed and fully considered the relevant legal authorities produced by both Parties, as well as their legal experts' testimonies.

325. In the Arbitral Tribunal's view, they leave no doubt as to the fact that it is indeed possible to rely on circumstantial evidence to find corruption in international arbitration when direct evidence is not unavailable. The Basel Institute on Governance's "Toolkit for

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[82] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 844-845.

[83] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 845.

[84] Procedural Order No. 1, dated 13 June 2017, Article 12 provides that "[t]*hese proceedings shall be conducted in accordance with the SCC Rules and the "Specific Procedural Rules" to be issued by the Arbitral Tribunal* […] *in addition* […], *the mandatory provisions of the seat of arbitration apply to these proceedings.*"

[85] **RL-290:** SCC Arbitration Rules (2010), dated 01 January 2010, Article 26, p. 15 (emphasis added).

[86] **CLA-002:** Republic of Lithuania Law on Commercial Arbitration, dated 02 April 1996, Article 33(7) (emphasis added).

Arbitrators" with respect to corruption and money-laundering in international arbitration ("**Toolkit**") is clear on that issue.

> "***Tool 5.3***
>
> ***No need for direct evidence***
>
> *In international arbitration, there will hardly ever be direct evidence for corruption and tribunals have no coercive powers. It is well established though that bribery can be proven by circumstantial evidence ("faisceau d'indices"), including […] red flags (Tool 1).*"[87]

326. As mentioned in the Toolkit, circumstantial evidence is relied on as part of a "*faisceau d'indices*" or so-called red flags, not in isolation to one another.[88]

327. Red flags should however only be the starting point of further scrutiny into allegations of corruption by arbitral tribunals. The Toolkit is also clear that "proof by way of red flags" is not yet an established mean of proof:

> "*Red flags are not in themselves proof of corruption (yet). However, they are indicators of corruption that should alert arbitrators that further scrutiny must be applied to the facts of the case. Red flags are part of circumstantial evidence, which can then give rise to proof of corruption. Tribunals may make a firm finding of corruption based on the circumstantial evidence available to them*."[89]

328. The Arbitral Tribunal appreciates that a leap may have to be made to find corruption in the absence of direct evidence, and that it ought not to "close its eyes" to circumstantial

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[87] **R-1334:** Basel Institute on Governance, "Corruption and Money Laundering in International Arbitration: A Toolkit for Arbitrators", 2019, dated 29 April 2019, p. 13.

[88] See **RL-333:** Emmanuel Gaillard, 'The emergence of transnational responses to corruption in international arbitration' (Arbitration International, 2019, 35, 1-19), dated 01 January 2019, pp.7-10, **RL-180:** Metal-Tech Ltd. v. The Republic of Uzbekistan (ICSID Case No. ARB/10/3), Award, October 4, 2013, dated 04 October 2013, para. 293, **RL-192:** Spentex Netherlands, B.V. v. Republic of Uzbekistan (ICSID Case No. ARB/13/26), public reporting by IA Reporter, June 22, 2017, dated 22 June 2017, p. 6.

[89] **R-1334:** Basel Institute on Governance, "Corruption and Money Laundering in International Arbitration: A Toolkit for Arbitrators", 2019, dated 29 April 2019, p. 13, see also **CLA-249:** *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, dated 22 August 2017, paras. 514-517, **CLA-250:** *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, dated 31 August 2018, paras. 7.113-7.114.

evidence, as bribery, in particular, will almost never be clearly evidenced without the courts or arbitral tribunals "connecting the dots" and making inferences.

329. However, in the present case, accounting for Prof. Pieth's admonition that arbitral tribunals must link evidence to the given elements of the corruption crime (here, bribery),[90] this Arbitral Tribunal is missing the basis for a finding of corruption, as the indirect evidence (notably the circumstances of the Lease procurement) cannot establish bribery without any evidence of payments.

330. The Accounting Documents, even if they were to be admissible, would be insufficient to establish these payments without being confirmed through other evidence, such as the Wiretaps Transcripts.[91] Tellingly, the proof of payments to Arturas Zuokas or "Abonentas" hinge on the elucidation of the codes used in the Accounting Documents, which in turn is to be found in the Wiretaps Transcripts.[92]

331. The Arbitral Tribunal has considered Respondents' reference to 6 ICC awards dating from 1982 to 2008 in which corruption was found through the methodology of red flags, excluding direct evidence such as evidence of payments.[93] These cases (as others relied on by Respondents)[94] are however not completely apposite here, as they all concerned disputes under intermediary agreements in which the true object of these agreements was core to the allegations of corruption.

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[90] **CEX-007:** Expert Opinion of Dr. Mark Pieth, dated 17 January 2019, paras. 18-19, see also Prof. Pieth's oral presentation, Transcript, Day 11, 7/3-24 and Prof. Pieth cross-examination by Ms. Banifatemi, Transcript, Day 11, 58/25-59/4 and 132/24-133/3.

[91] See **CEX-014:** Expert Report of Accuracy, dated 26 May 2020, paras. 6.109-6.111, Accuracy's Direct Presentation, slides 26-38, Transcript, Day 9, 83/8-19 ("*The accounting evidence to corroborate these entries is fairly limited […] we have six bank statements, some of which indicate payments that are then reimbursed, and then we have a number of bank statements that pertain to movement of funds between Rubicon-related companies. And then, as I just mentioned, as direct evidence of payments made to Lithuanian officials, we have three bank statements from BNA Grupé to Mr Zuokas in the summer of 2003 that add up to less than €10,000, which is why, in our view,* […] *the accounting evidence submitted falls short of supporting respondents' allegations*."); see also Accuracy's cross-examination in which the corroboration through the Wiretaps Transcripts was a key point of discussion, Transcript, Day 9, pp. 132 ff.

[92] **R-154:** Letter from Vilnius Board of the Special Investigation Service to the Public Prosecutor, dated 29 September 2005, pp. 32 ff, see also Respondents' Opening Presentation, Part II, slides 74-79 and corresponding oral presentation in Transcript, Day 1, 93/24-97/8, **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2023, para. 206.

[93] **RL-333:** Emmanuel Gaillard, 'The emergence of transnational responses to corruption in international arbitration' (Arbitration International, 2019, 35, 1-19), dated 01 January 2019, pp. 5-7.

[94] See **RL-180:** Metal-Tech Ltd. v. The Republic of Uzbekistan (ICSID Case No. ARB/10/3), Award, October 4, 2013, dated 04 October 2013.

332. In any event, Respondents themselves confirm that the indirect evidence is only reliable to corroborate the direct evidence of bribery allegedly found in the Accounting Documents and the Wiretaps Transcripts. Respondents' position is that "[t]*he manner by which the Vilnius Lease was procured and performed provides compelling circumstantial evidence of corruption (**c**), which is put beyond doubt by the direct evidence of corruption reflected in the Black Accounting Documents […] and the wiretaps*".[95] Respondents further qualify the Accounting Documents and Wiretaps Transcripts as "core" to their case on corruption.[96] As mentioned, the Accounting Documents do not prove anything without the code elucidation found in the Wiretaps Transcripts, making the latter essential to Respondent's case on corruption. Without references to these payments, Respondents' case that Claimants bribed municipality officials is bound to fail as insufficiently proven.

333. The Arbitral Tribunal agrees that it must not "close its eyes" to alleged evidence of corruption. However, it cannot close its eyes to previous investigations made into the same evidence either. The present case is indeed particular insofar as further scrutiny has been conducted by the better equipped Lithuanian Authorities. The decisions cited by Respondents in support of their request that this Arbitral Tribunal "dispenses justice" in this arbitration do not correspond to situations in which the evidence considered by the Arbitral Tribunal had already been scrutinized by local authorities and rejected by these authorities as insufficient proof of corruption.

334. In the present case, the Arbitral Tribunal is asked to take the decision to entirely disregard the investigation conducted by the local authorities on the same facts and allegations. The existence of this previous investigation also goes to Claimants' separate, stand-alone defense to Counterclaim 1 based on the preclusive effect of the decisions of the Lithuanian's authorities.[97] The Arbitral Tribunal does not consider it necessary to delve into that specific issue. The general impact of the Lithuanian

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[95] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 76 (emphasis added).

[96] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 512; see also para. 579: "*it is puzzling to read Veolia's contention that, even if reliable, the wiretaps are irrelevant. In addition to directly corroborating the payments in the Black Accounting Documents, they (i) describe the modus operandi of the corruption scheme; (ii) include conversations in which corruption is openly discussed with both the Mayor and the CEO of VŠT; and (iii) provide an extraordinary insight into the unlawful activities of Veolia's top executives. Far from being irrelevant, the wiretapped conversations are a probative gem*."

[97] See **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, paras. 182-183.

Authorities' prior investigation of the same facts and evidence is to be considered by this Arbitral Tribunal, regardless of whether the decisions which have resulted from that prior investigation preclude or not the Arbitral Tribunal from re-examining the same facts and evidence, or more generally bear a *res judicata* effect.

335. Claimants' expert Prof. Pieth has testified that red flags cannot serve as a basis for a finding of corruption in view of the thorough investigation by Lithuanian authorities having led to a conclusion that the same evidence proffered in this arbitration was unreliable and insufficient:

> "*Where domestic law enforcement has acted and investigated the "red flags" in question, a tribunal should appropriately take account of those investigations and should not proceed to a de nova review of its own* […]
>
> *Given that the national authorities of Respondents decided not to press charges and that neither Claimants nor their employees (nor any alleged intermediaries) were ever tried or convicted, it is for Respondents to explain (i) how they can use the same evidence the prosecutors had considered insufficient now in arbitration proceedings and (ii) why they could expect the Tribunal to re-do the work of Respondents' domestic authorities and reach different conclusions on the same evidence*."[98]
>
> *"Even if Respondents were able to identify certain red flags (which I note is in dispute), Claimants have provided explanations and Lithuanian authorities investigated the matter for years (and, again, determined there to be insufficient evidence). Red flags are not sufficient to find corruption in light of these facts. Respondents' focus on the alleged existence of red flags, even though the evidence giving rise to those red flags has already been investigated and determined insufficient, is misplaced. "*[99]
>
> *"Frequently, the question of how to treat "red flags" (if they are established) in an arbitration is challenging because countries refrain from following up on such evidence. This is not the case here. In fact, I am informed that law enforcement has spent several years on the 505 Investigation and has collected 118 files on evidence. Nevertheless, the case seems to have been closed for lack of evidence. Obviously, the Tribunal must*

[98] **CEX-007:** Expert Opinion of Dr. Mark Pieth, dated 17 January 2019, paras. 57-60, see also para. 71 and **CEX-019:** Second Expert Opinion of Prof. Dr. Mark Pieth, dated 24 May 2020, paras. 13-15.

[99] **CEX-019:** Second Expert Opinion of Prof. Dr. Mark Pieth, dated 24 May 2020, para. 15, see also paras. 22-23, Prof. Pieth's Direct Presentation, slide 5.

ask itself why, over 16 years after the alleged facts, it is in a better position than the domestic judiciary to deal with the case".[100]

"Now, the peculiarity of our case is that domestic law enforcement has, in fact, opened an investigation. They haven't just opened it; they spent, if I understand well, close to six years on that investigation, with over 100 files. They've used measures of constraint. And they've ultimately decided to discontinue the case for lack of evidence, to put it shortly […] *I find it problematic in this case here that respondent is actually attempting, 20 years after the facts, to ask an arbitral tribunal, not disposing of these means of constraint, to re-open a case largely based on the same evidence, hoping that the standard of proof applied would be lower than what domestic law enforcement needed to formulate an indictment."*[101]

336. Upon review, the decision of the Lithuanian Prosecutor to close the 505 Investigation based on a lack of reliable evidence is indeed difficult to ignore. It makes it clear that the Prosecutor's Office conducted an in-depth investigation on facts and persons object of the investigation and of the evidence collected during the same.

It should be stated that the duration of the pre-trial investigation in the case under consideration was fairly long and that numerous procedural actions were performed both in the Republic of Lithuania and other world countries, including the USA, France, Estonia and Latvia. During the investigation, a very great amount of material was collected and many long-term enquiries were assigned. The pre-trial investigation checked different areas of activity of the group of Rubikon companies, such as work with the offshore companies, the economic and financial activities in Lithuania, assistance, etc […]

On analyzing the progress of the pre-trial investigation in accordance with the statutory requirements for the procedure of a pre-trial investigation, and having regard to the provisions of Art. 6 of the 1950 European Convention for the Protection of Human Rights and Freedoms, it should be concluded that there is no possibility to serve the notice of suspicion or complete the pre-trial investigation in an indictment as no sufficient information has been collected which supports the fact of the performance of the criminal act or the guilt of any of the persons for committing a crime. It should be stated that all procedural possibilities were exhausted during the pre-trial

[100] **CEX-019:** Second Expert Opinion of Prof. Dr. Mark Pieth, dated 24 May 2020, para. 23.
[101] Transcript, Day 11, 9/11-17, 10/8-14.

> *investigation in collecting the information which would allow supporting the suspicion, but no such information was obtained* […]
>
> […] *The data recorded on the optical medium of the laptop computer seized from UAB Rubikon* […] *during the search should be evaluated critically as the abbreviations contained in them are not clear either and they do not allow making any categorical statements that the money had been meant for the suspects in particular, and as no information was obtained during the pre-trial investigation regarding the transfer of the funds to and their receipt by the suspects* […]
>
> *In view of the circumstances identified in this case and the fact that all the doubts after all the procedural possibilities have been exhausted are for the benefit of the perpetrator, the pre-trial investigation concerning* [several other offences and] *bribery* […] *should be terminated due to failure to collect sufficient information on the fact of committing an act with elements of a crime or a criminal offence*."[102]

337. The Lithuanian Authorities have found the direct evidence to be insufficient, and in this arbitration the Arbitral Tribunal would not even consider the direct evidence if the Wiretaps Transcripts were to be found inadmissible. This is an element that ought to be considered seriously by the Arbitral Tribunal. The investigation is described in the Prosecutor's decision to close it as having been exhaustive and there is no clear reason advanced by Respondents why the Arbitral Tribunal should ignore it.

338. Respondents do not contend in this arbitration that the investigation was truncated for political reasons. Rather, they rely on the testimony of Mr. Jasaitis, Respondents' witness, a prosecutor at the Prosecutor General's Office and a Professor of Lithuanian criminal procedure,[103] who affirms that, in his opinion, the investigations "*were not transferred to court principally because nobody was caught red-handed in the act of bribery* [as] […] *the PGO's understanding at the time was that the Lithuanian courts apply a very high threshold in bribery cases, requiring a person to be caught red-handed*".[104] Respondents do not ask this Arbitral Tribunal to disregard the 505 Investigation because it was wrongly conducted or instrumentalized for political

[102] **R-1232:** Prosecutor General's Office, Decision to Terminate Pre-Trial Investigation, December 3, 2009, dated 03 December 2009, pp. 9 ff. (emphasis added).

[103] **RWS-006:** Witness Statement of Mr. Gintaras Jasaitis, dated 10 October 2019; see **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 598-601.

[104] **RWS-006:** Witness Statement of Mr. Gintaras Jasaitis, dated 10 October 2019, para. 50 (emphasis added).

reasons, "*but because the prosecutors considered they needed in flagrante evidence*".[105]. The Arbitral Tribunal would in any event not be competent and also ill-equipped to draw any conclusion as to whether the political situation may have put into question or not the conclusions of the Lithuanian Authorities following the Investigation 505.

339. There is therefore no reason why the Arbitral Tribunal would not follow the conclusion reached by the Lithuanian Authorities, which reinforces the Arbitral Tribunal's conclusion that, in the present case, the indirect evidence adduced by Respondents would not suffice to establish bribery as it is not linked to the evidence of payments.

340. In view of such conclusion, the admissibility of the documents allegedly establishing the payments (Accounting Documents read together with the information from the Wiretaps Transcripts) becomes decisive.

3. The admissibility of the evidence of corruption relied on by Respondents

3.1. The Parties' Positions

3.1.1. Claimants' Position

341. Claimants' position starts from the premise that, under Lithuanian arbitration law, the Arbitral Tribunal should apply the domestic evidentiary rules.[106]

342. Under this applicable framework of Lithuanian law, Claimants contend that materials collected from a criminal investigation are inadmissible in this arbitration, as is confirmed by their experts Professors Nekrošius and Merkevičius.[107] They rely on the following arguments. First, the Lithuanian Law on Criminal Intelligence prohibits the use

[105] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 596.

[106] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 143.

[107] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 557, see also **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 133-162. Claimants add that this exclusion would not apply to the Prosecutor's letter closing the 505 Investigation "*because that document was not collected pursuant to the Lithuanian Law on Criminal Intelligence*", with ref. to **C-383:** Letter from Prosecutor of the Department of Investigation of Organized Crime and Corruption of the Prosecutor General's Office, December 3, 2009, dated 03 December 2009.

of materials collected during a criminal investigation in a civil or arbitral proceeding.[108] Information gathered under the Lithuanian Law on Criminal Intelligence may only be used for the purpose which is directly and unequivocally specified by law and permitted uses for information gathered under that law and do not include use in a civil or arbitral proceeding.[109]

343. Second, the use of information collected during a criminal investigation in this proceeding would violate the principle of equality of arms insofar as Claimants have not been granted an unrestricted access to the file.[110] As Respondents rely on evidence of a criminal proceeding in which Claimants were not involved, Claimants do not have access to core evidence that may disprove Respondents' allegations.[111]

> "*Reliance on this cherry-picked evidence would violate the principle of equality of arms and infringe Lithuanian public policy and could prevent the arbitration award to be recognized in Lithuania*."[112]

344. In particular, the equality of arms is said to be breached insofar as Claimants (and the Arbitral Tribunal) have not had access to the audio and video recordings corresponding to the Wiretaps Transcripts, which "*have not made their way into this Arbitration, including due to the Prosecutor's exercise of its own discretionary powers when it decided to withhold crucial evidence that would likely exculpate Veolia*".[113] The Wiretaps Transcripts are in any event unreliable evidence, as the Prosecutor General's Office confirmed the existence of inconsistencies between certain extracts of the audio recordings to which Mr. Andriukaitis could listen and the corresponding transcripts.[114]

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[108] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 134-149.

[109] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 135-136.

[110] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 150-153, with ref. to Art. 6(1) of the European Convention on Human Rights; Arts. 12 and 17 of the Lithuanian Code of Civil Procedure (CLA-006bis), see also **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 824-838.

[111] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 152.

[112] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 153; see also **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 764.

[113] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 764, see more generally on the inadmissibility of the Wiretaps Transcripts: paras. 824-838.

[114] See **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 816-817.

"*In that context, the Prosecutor General's Office's arbitrary and unexplained refusal to release the source recordings so that they can be compared with the transcripts is suspicious*".[115] "[T]*he fact that Veolia was never allowed to access the original audio recording prevents it from showing that the transcripts were tampered with and thus breaches the Parties' equality of arms*."[116] "Whether the Respondents were also denied access to the source material is irrelevant."[117]

345. Finally, the use of information collected during a criminal investigation in this proceeding would violate the European Union and Lithuanian data privacy rules.[118]

346. While the applicability of the above instruments was discussed by Claimants with Respondents' expert Dr. Smaliukas at the Hearing,[119] Claimants do not insist on them in their Post-Hearing Brief. They rather emphasize the general recognition of "*the principle of due process, which is enshrined, inter alia, in the Constitution of Lithuania, the Law on Commercial Arbitration and the UNCITRAL Rules*"[120] and the violation of which is a ground for annulment under Lithuanian arbitration law.[121]

3.1.2. Respondents' Position

347. Respondents object to Claimants' attempt to remove what they state is "*core evidence*" of Claimants' illegal conduct.[122]. They argue that Veolia's prior position regarding these materials show that Veolia's inadmissibility argument is made in bad faith.[123] Veolia did not raise the inadmissibility of the Accounting Documents upon Respondents' filing of a limited number of them with their Statement of Defense.[124] In fact, during the document production phase, Veolia requested the production of the complete case files

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[115] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 180; see also **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 311-312.

[116] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 823.

[117] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 838.

[118] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 154-162.

[119] Transcript, Day 13, 36/7-38/19.

[120] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 828.

[121] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 828.

[122] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 512.

[123] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 513; see also **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, paras. 80(ii) and (iv).

[124] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 514 - 515.

for any criminal investigation regarding the Lease tender process or negotiations.[125] By that request "*Veolia sought to obtain the very Black Accounting investigation file that it now seeks to exclude*"[126]. Veolia also admitted in the process that "*the rule of non-disclosure of pre-trial investigation data is not absolute*" and that prosecutors can allow the use of such materials in arbitration proceedings.[127] Veolia did not consider then that the prosecutors could not provide the Accounting Documents to Veolia or that their production in this arbitration would be contrary to Lithuanian law.[128] Claimants only argued the inadmissibility of the pre-trial investigation file after having received them pursuant to an order of the Tribunal[129], so demonstrating their bad faith[130].

348. Further, the pre-trial investigation file is plainly admissible[131] since, as explained by Respondents' expert Dr. Smaliukas, the domestic rules of evidence and procedure relied on by Claimants do not apply to international arbitration proceedings.[132] Further, even if domestic evidentiary rules were of any relevance in this arbitration, the Accounting Documents would still be admissible as a civil dispute is concerned.[133]

349. Respondents note that under Lithuanian law, the public prosecutors are the custodians of the pre-trial investigation materials and have a broad discretionary power to regulate access to, and disclosure of, pre-trial investigation information.[134]

350. Finally, Respondents emphasize that excluding evidence of corruption from the record would contravene Lithuanian international public policy.[135]

351. Regarding the Wiretaps Transcripts and Claimants' criticism that they were not granted access to the audio recordings that would have allowed them to verify the veracity of

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[125] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 515.
[126] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 515.
[127] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 516.
[128] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 517.
[129] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 521-530.
[130] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 523.
[131] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 526.
[132] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 527-528, with ref. to **REX-005:** Expert Opinion of Dr. Andrius Smaliukas, dated 12 October 2019, para. 19.
[133] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 531-532, with ref. to **REX-005:** Expert Opinion of Dr. Andrius Smaliukas, dated 12 October 2019, paras. 45-53.
[134] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 533.
[135] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 534.

said Transcripts, Respondents rely on the Lithuanian Regional and Supreme Courts' decisions in the *Drėma* case to argue that "*the wiretaps were not only reliable, but were extremely informative evidence*".[136] Respondents further refer to the fact that Mr Andriukaitis' initial complaint that the transcripts contained inaccuracies was remedied through a process whereby Mr. Andriukaitis could listen to the recordings. "*That process confirmed that the inaccuracies identified by Mr. Andriukaitis were 'technical errors' that 'did not actually distort the essence of the content of the conversations captured in the audio records'*".[137]

352. Respondents insist that the Parties were on an equal footing in the present case and that "*Veolia's complaint turns on the exercise of the prosecutors' discretion not to provide either side with the original audio and video recordings from the 505 Investigation case file*."[138]

353. They conclude that "*the admissibility of the evidence in this arbitration does not turn one way or the other on whether the exercise of that discretion was correct or not as a matter of Lithuanian law*"[139] because 1) the materials were originally gathered legally under Lithuanian law;[140] 2) Veolia's objection is in bad faith and Veolia is so estopped from objecting; 3) Veolia has not made any real effort to appeal or follow-up in any way on the prosecutor's decision; 4) "[i]*n the event that the Tribunal considered there was a real issue, public policy would require the Tribunal to take steps to remedy the issue rather than closing its eyes to compelling evidence of high-level corruption*",[141] and 5) "*it is not remotely credible for Veolia to suggest that it is unfair to expect Veolia to access evidence from Rubicon-affiliated individuals and from the Rubicon Group* [and] *it is not at all plausible given the nature and scope of the relationship that Veolia could not acquire documents for its defense had it wished to do so*."[142]

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[136] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 404.
[137] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 407.
[138] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 79.
[139] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 06 December 2022, para. 80.
[140] See **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 574-575.
[141] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 80(v).
[142] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 83.

3.2 The Arbitral Tribunal's Analysis

354. The Arbitral Tribunal has concluded that Respondent's case of corruption would fail without the support of the direct evidence of corruption reflected in the Black Accounting Documents and the Wiretaps Transcripts. It now turns to determine whether this direct evidence relied on by Respondents is admissible in this arbitration.

355. As mentioned above, the Arbitral Tribunal has wide discretion to determine the admissibility of the evidence adduced under the applicable procedural rules, notably the SCC Arbitration Rules and Lithuanian arbitration law.[143] Such discretion as to the admissibility of evidence in an international arbitration proceeding is also enshrined in Art. 9.1 of the IBA Rules on the Taking of Evidence in International Arbitration (2010).[144] Notwithstanding his position on Lithuanian criminal procedural law, even Claimants' expert Prof. Nekrošius accepted at the Hearing that this Arbitral Tribunal can assess the admissibility of the evidence Claimants seek to exclude.[145]

356. As reflected in the summary of the Parties' positions above, they and their respective legal experts[146] have debated at length over the question whether an international arbitral tribunal can or cannot consider information from the files of a discontinued criminal investigation that was collected pursuant to Lithuanian (and European) criminal and data protection laws, as well as from the perspective of Lithuanian arbitration law. Respondents and their expert Dr. Smaliukas have taken the position that "[u]*nder Lithuanian arbitration law, rules on evidence that apply in domestic civil or criminal proceedings before the Lithuanian courts do not apply to arbitrations with a seat in Lithuania*".[147]

357. The Arbitral Tribunal does not consider it necessary to decide the debated question of whether domestic procedural rules apply in this arbitration insofar as the Parties agree

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[143] With regard to Lithuanian arbitration law, see also **RL-301:** Decision of the Supreme Court of Lithuania, May 22, 2015, Case No. 3K-3-320-611/2015, dated 22 May 2015, p. 11.

[144] **CLA-019:** IBA Rules on the Taking of Evidence in International Arbitration, dated 29 May 2010.

[145] Transcript, Day 12, 73/18-22.

[146] **CEX-006:** Expert Opinion of Drs. Vytautas Nekrošius and Remigijus Merkevičius, dated 21 January 2019; **CEX-017:** Expert Report on Civil Procedure and Arbitration of Prof. Doctor Habilitatus Vytautas Nekrosius, dated 25 May 2020, see also Transcript, Day 11, pp. 263/22-272/14, **REX-005:** Expert Opinion of Dr. Andrius Smaliukas, dated 12 October 2019, see also Transcript, Day 12, 188/12-227/7.

[147] **REX-005:** Expert Opinion of Dr. Andrius Smaliukas, dated 12 October 2019, para. 12, see also para 24.

that the Arbitral Tribunal is bound by fundamental principles such as equality of the Parties, the general principle according to which evidence can only be relied upon when its authenticity is sufficiently established and the adversarial principle, as well as the right of defense. Dr. Smaliukas confirms in his expert report that *"*[i]*nsofar as the issue of admissibility is raised before an arbitral tribunal, that tribunal has wide discretion and may resolve the matter by applying the fundamental principles of evidence and due process applicable to international arbitration."*[148]

358. The requirements of due process, equality of arms and the adversarial principle are enshrined in Lithuanian arbitration law, in Arts. 8(4) and 8(6) which provide that "[t]*he parties to arbitration shall have equal procedural* rights" and that "[t]*he arbitration procedure shall take place in compliance with the principle of autonomy of the parties, adversarial principle, principles of economy, cooperation and expedition"*. [149] The principle of equal treatment of the Parties is also found in the Constitution of the Republic of Lithuania[150] and in the UNCITRAL Model Law on International Commercial Arbitration, 2006.[151]

359. More specifically, Art. 9 of the IBA Rules on the Taking of Evidence in International Arbitration, (2010), which are referred to in Procedural Order No. 1 at para. 6.2, state that *"*[t]*he Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons:* [...] *(g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling."*[152] The Arbitral Tribunal further refers to the many legal authorities produced by the Parties which confirm that equal treatment and the adversarial principle are fundamental principles of international arbitration. For instance, in *Wena Hotels v Egypt*, the annulment committee decided that the parties*'* equal right (including

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[148] **REX-005:** Expert Opinion of Dr. Andrius Smaliukas, dated 12 October 2019, para. 23 (emphasis added), see also para. 37; See also **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 824-836, **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 06 December 2022, paras. 75-84, Transcript, Day 13, 60/22-61/8.

[149] **CLA-002:** Republic of Lithuania Law on Commercial Arbitration, dated 02 April 1996, Art. 8 (emphasis added).

[150] **RL-046:** Constitution of the Republic of Lithuania, 1992, dated 25 October 1992, Art. 29.

[151] **RL-280:** United Nation Commission on International Trade Law, Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, dated 01 January 2006, Art. 18.

[152] **CLA-019:** IBA Rules on the Taking of Evidence in International Arbitration, dated 29 May 2010, Art. 9(2)(g) (emphasis added).

the adversarial principle) to present their case means not only the right *"to produce all arguments and evidence in support of* [their claims]*"*, but also that this must be done *"in a way that allows each party to respond adequately to the arguments and evidence presented by the other."*[153] This necessarily involves a right of the responding party to access the documents on which the other party relies, as put by the tribunal in *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*.[154]

360. Respondents' expert himself made it clear in his answers to the Arbitral Tribunal that the latter 1) has the discretion to consider and align with the Lithuanian authorities' review of the same evidence in the criminal investigation or not, and 2) in any event, is under a duty to ensure equality of arms:

> "*THE CHAIRMAN:* […] *the evidence which is here in case and which admissibility is disputed, that has been collected during a criminal investigation for the purpose of finding if there had been illegal or criminal acts.*
>
> *And now we have here a Commercial Arbitration between legal entities in a commercial dispute; and the counterclaimants, in order to pursue their counterclaims, have had access to the information collected during the criminal investigation. And there has been* […] *a dispute over this. And the issue had been decided by the Lithuanian courts.*
>
> *Now, under the principles of fairness and the various other criteria which were discussed, and the principle that the arbitral tribunal may have freedom to determine this, we are not bound by the decisions of the courts saying that this evidence can be handed over to the two counterclaimants. Do you agree with that? We are not bound by that?* […] *But, we, of course, might endorse it. We might see (indecipherable) similarly or we might, relying on these principles, come to the consideration that we consider that this evidence may not be admissible; yes? That's our freedom* […] *Is this the reference framework which I'm looking at? Or is there anything I'm missing?*
>
> *A. Mr President, you are, in principle, absolutely correct. Just maybe with one additional point: that those two decisions in question from -- from Lithuania criminal*

[153] **CLA-374:** Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Decision on annulment, dated 05 February 2002, para. 57.

[154] **CLA-352:** Standard Chartered Bank (Hong Kong) Limited v. Tanzanian Electric Supply Company Limited, ICSID Case No. ARB/10/20, PO 6, dated 06 July 2012, para. 13.

investigation judge definitely don't bind […] *you* […] *They have res judicata effect on the parties concerned, but for you these are just authorities* […] *Other than that, you're absolutely correct. This is indeed how Lithuanian law, codified in Article 33 of Commercial Arbitration, operates. You have the discretion to decide on the admissibility of any evidence* […].

MR ALVAREZ: Can I just follow up on that: I take it, though, when you refer to the UNCITRAL Model Law, this Tribunal is subject to any general requirements of the law. That is to say: we have an overriding obligation to treat the parties equally and fairly; is that correct?

A. That is absolutely correct.

MR ALVAREZ: Okay. So the discretion -- the wide discretion that you say we have is still subject to some limits?

A. That is absolutely correct, yes."[155]

361. The issue at stake is therefore whether the admission in this arbitration of the Wiretaps Transcripts would violate due process, regardless of any consideration of applicable criminal or data privacy laws.

362. Dr. Smaliukas accepted that a breach of due process or a breach of one right's to privacy would endanger the validity of the Arbitral Tribunal's award.[156] Further, when he was asked about the alleged breach of equality of arms between the Parties insofar as the Parties have not been granted access to the audio and video recordings corresponding to the Wiretaps Transcripts, Dr. Smaliukas first suggested that Claimants should have resorted to "*procedural remedies*" to gain such access.[157] However, when pressed on this issue further, he admitted that if Claimants were indeed denied access to the source material backing the Wiretaps Transcripts, that would certainly create due process issues.[158] In their Reply Post-Hearing Brief, Respondents

[155] Transcript, Day 13, 15/14-18/12.
[156] Transcript, Day 13, 31/21-32/2; 34/2-7.
[157] Transcript, Day 13, 61/9-64/18.
[158] Transcript, Day 13, 60/22-61/8; 67/8-68/10.

addressed Dr. Smaliukas' testimony with respect to equal treatment of the Parties as follows:

> "*Respondents respectfully submit that Dr. Smaliukas' commentary on that point is of little relevance given that: (i) the question is one of international arbitration law and procedure and is not specific to Lithuanian law – the Tribunal (and indeed most counsel) would see no need to defer to Lithuanian law experts on such issues; (ii) Dr. Smaliukas necessary lacks familiarity with the procedure in this case given that this was never part of his scope; and, (iii) to the extent that Dr. Smaliukas' comment could be construed as an attempt to answer the question that arises for this Tribunal, his answer would have been wrong for the simple reason that both sides have been on an entirely equal footing throughout the proceeding with respect to their access to evidence from the 505 Investigation case file*".[159]

363. Respondents' position is indeed that there can be no breach of the Parties' equality before this Arbitral Tribunal since neither Claimants nor Respondents were granted access to the original audio and video recordings of the 505 Investigation.[160] That refusal was communicated in letters from the Prosecutor General's Office to Respondents' Counsel in June 2018, and was justified by the facts that 1) it contained information on the private life of individuals, and 2) the information was obtained using methods and means of criminal intelligence information gathering.[161]

364. Claimants state that "[t]*his raises a crucial question: if the Prosecutor General's Office could not communicate the audio recordings because they contain information involving the privacy of individuals, then why could the Prosecutor General's Office give transcripts that allegedly contain the same identical information?*"[162] Claimants rely on the testimony of Mr. Jasaitis, Respondents' witness, a prosecutor at the Prosecutor General's Office and a Professor of Lithuanian criminal procedure, who was asked this question during his cross-examination and conceded that there was indeed no reason

[159] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 78 (emphasis added).

[160] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 79.

[161] **C-1336:** Letters from the Prosecutor General's Office to Respondent's Counsel TGS Baltic, dated 29 June 2018, p. 4.

[162] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 819.

for the Prosecutor's Office to withhold the video and audio recordings if they matched the Wiretaps Transcripts:

> "*MR ALEXANDROV: Thank you, Mr President. Mr Jasaitis, if the information or the data in the video and audio recordings is exactly the same as the information contained in the transcripts, there is no reason to provide the transcripts but to refuse to provide the audio and video recordings; isn't that correct?* […]
>
> *A. Yes, that is correct. Yes."*[163]

365. Mr. Jasaitis also made clear that the Prosecutor could have, but did not provide access to the source material of the Wiretaps Transcripts:

> "MR ALVAREZ: […] *You say the prosecutor has the discretion to release the materials* […] *And just to confirm, this discretion would include, if requested, not only a transcript, but the full original material; is that correct?*
>
> *A. Yes, absolutely correct , but in this case the prosecutor would be deciding whether, in the defence of public interest , it is enough to submit a copy, or whether the original should be handed over. It's up to the prosecutor to decide."*[164]

366. Respondents are free to waive their right to access the source materials underlying the core evidence of their case of corruption. However, Claimants have not waived such right, and due process evidently requires that the veracity of these transcripts be verifiable by the party against which they are proffered.

367. In the present case, the Arbitral Tribunal itself would be incapable to decide whether corruption took place based *inter alia* on Wiretaps Transcripts if it cannot verify the accuracy of the transcription.

368. This is all the more so in a situation where Claimants have raised allegations of tampering of the evidence found in the Wiretaps Transcripts. Claimants rely notably on a magazine interview of Mr. Andriukaitis,[165] a former Lithuanian Seimas member and eventual European Commissioner, who was investigated for taking bribes but acquitted

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[163] Transcript, Day 7, 11/16-12/8; see also 12/16-22.

[164] Transcript, Day 7, 58/1-24.

[165] **C-1239:** Inga Liutkevicienė, "Vytenis Povilas Andriukaitis — The Life's Interview", dated 01 January 2002.

(in a case which Claimants allege has no link to them or their Lease and business activities in Vilnius). Mr. Andriukaitis stated, in short, that transcripts of his wiretapped conversations during the investigation he was the object of were heavily tampered with, in a biased way "*as if willing to enforce the version of the investigators*".[166] In that regard Respondents respond that Mr. Andriukaitis' initial complaint that the transcripts contained inaccuracies was remedied through a process whereby Mr. Andriukaitis could listen to the recordings. "*That process confirmed that the inaccuracies identified by Mr. Andriukaitis were "technical errors" that 'did not actually distort the essence of the content of the conversations captured in the audio records'*".[167]

369. The fact is that, in the present case, Claimants (and the Arbitral Tribunal) have no means to remedy the process and verify the accuracy of the Wiretaps Transcripts. This fact is compelling. To find corruption based on the circumstantial evidence adduced by Respondents as confirmed by the Wiretaps Transcripts, the Arbitral Tribunal would have, without access to the source material of the Wiretaps Transcripts, to assume that they correspond to the original content of the examinations, with such Wiretaps Transcripts being the core, direct evidence confirming red flags of corruption. In other words, the Arbitral Tribunal would need to blindly follow Respondents' assurance that the edition of the Wiretaps Transcripts was limited to "private life material".[168] The Arbitral Tribunal would so fail to account for Claimants' objections as to the veracity of the Wiretaps Transcripts, and the whole procedure would be tainted by a breach of the Parties' equality of arms. The Arbitral Tribunal would be deprived of evidence the authenticity of which is sufficiently established and Claimants' ability to exercise their right of defense would be affected.

370. Other tribunals have excluded transcripts of wiretapped conversations in the absence of a certitude that these matched the original conversations. In *Libananco v. Turkey*,[169] Turkey submitted transcripts of telephone conversations between the owner of the claimant company and members of his family, which were recorded during a criminal

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[166] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 625, **C-1239:** Inga Liutkevicienė, "Vytenis Povilas Andriukaitis — The Life's Interview", dated 01 January 2002, p. 16.

[167] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 407, with ref to **C-1000:** Resolution of the Prosecutor's Office Refusing to Start Pre-Trial Investigation, dated 12 May 2005, pp. 6-7.

[168] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 77.

[169] **Exhibit CLA-353**: *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award dated 2 September 2011, paras. 374 ff (pp. 136 ff).

investigation.[170] After the claimant disputed their reliability, the *Libananco* tribunal observed that these transcripts "*appeared, on their face, to be an incomplete account of the conversations they purported to transcribe and further that they were transcribed by the Respondent's agents*" and according to the respondent's own witnesses "*included only portions of the conversations relevant to the investigations being carried out*."[171] The claimant relied *inter alia* on the violation of "*the common law rule of completeness with respect to evidence*" and on its witnesses' evidence that the transcripts were not authentic.[172] The *Libananco* tribunal decided that it may only admit the transcripts into the proceedings "*if the Tribunal* [were] *satisfied that they were accurate transcriptions of actual telephone recordings*."[173] It then went on to analyse in detail the findings of the parties' experts on audio recordings, which had submitted a joint report on which the *Libananco* tribunal relied to conclude that "[n]*either of the Parties' experts was able to confirm that the audio recordings in question were authentic, since the original recordings* […] *were not available for forensic examination. In that regard, the Respondent's experts were able to say no more than that the audio recordings in question were 'highly likely* … [to be] *unaltered recordings of contemporaneous events*".[174] Given the "*prejudicial nature of the contents*" the tribunal concluded that "*it would be unsafe to admit those exhibits as evidence*".[175]

371. A similar approach was adopted by the tribunal in *EDF v Romania*.[176] Like the *Libananco* tribunal, it declared incomplete and possibly partially edited transcripts in the absence of the audio recordings for verification to be inadmissible. The *EDF v Romania* tribunal observed that the debate between the parties' respective "audio science" experts was of no value without access to the audio recordings to verify the

[170] **Exhibit CLA-353**: *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award dated 2 September 2011, para. 374.

[171] **Exhibit CLA-353**: *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award dated 2 September 2011, para. 375.

[172] **Exhibit CLA-353**: *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award dated 2 September 2011, para. 375.

[173] **Exhibit CLA-353**: *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award dated 2 September 2011, para. 376.

[174] **Exhibit CLA-353**: *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award dated 2 September 2011, para. 383.1.

[175] **Exhibit CLA-353**: *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award dated 2 September 2011, para. 384.

[176] **CLA-344:** EDF (Services) Limited v. Republic of Romania, ICSID Case No. ARB/05/13, Procedural Order No. 3, dated 29 August 2008, paras. 28 ff.

authenticity of the transcripts. It further emphasized the burden of the party having submitted the transcripts to submit the corresponding audio recording:

> "*The lack of authenticity of the [audio tape, transcript and recording of a conversation regarding an allegedly corrupt payment] constitutes by itself sufficient ground for rejecting Claimant's request.*
>
> *Considering that today's sophisticated technology may permit easy manipulation of audio recordings, proven authenticity is in fact an essential condition for the admissibility of this kind of evidence. As mentioned* […] *Respondent's expert in conducting forensic examination of audio and video media to authenticate recordings, "[r]ecordings cannot be authenticated without the original medium and sometimes the original recorder"* […]
>
> *The Tribunal has carefully reviewed and fully considered both Parties experts' analysis and conclusions.* […] *The dialogue among the experts in this case was very full and might continue without their differences of opinions being narrowed. It is this divergence of views on essential technical questions that makes the further confrontation among forensic experts of both sides, as requested by Claimant, of no avail in the absence of the original audio recording. Only the original would in fact permit the Tribunal to establish with confidence the authenticity of the recording and the absence of digital edits.*
>
> *Even leaving aside the many questions left open by the experts' debate, it is undisputed that both the beginning and the end of the recording have been removed, making the same incomplete […] more than two-thirds of the conversation has either not been recorded or, if recorded, has been removed from the proffered audio recording* […]
>
> *The absence in the recording of a substantial part of the conversation […] and the possibility that the recorded part was manipulated make the audio file unreliable in the absence of its authentication through the original recording.*
>
> *An obvious condition for the admissibility of evidence is its reliability and authenticity. It would be a waste of time and money to admit evidence that is not and cannot be authenticated.*

> […] *Claimant had the burden of satisfying Respondent's legitimate request for the production of the original audio recording. Having failed to do so, it must bear the consequences*."[177]

372. The Tribunal concurs with the findings of the tribunals in *Libananco* and *EDF v Romania* that evidence can only be relied on by a tribunal if its authenticity is established with sufficient certainty (with the burden of proof falling on the Party who relies on it).

373. Similarly to *Libananco* and *EDF v Romania*, the Tribunal in the present case is unable to verify the authenticity of the Wiretaps Transcripts, as audio or video recordings serving the basis of the transcripts were not submitted in this arbitration, and therefore, by admitting the Wiretaps Transcripts, the Tribunal would rely on evidence, the authenticity of which cannot be sufficiently established.

374. In addition, the Arbitral Tribunal finds further comfort that its decision is the only way to preserve equality of the Parties. In the decision of the Paris Court of Appeal in the so-called *Belokon*,[178] the Paris Court of Appeal relied on *"the principles of loyalty of proceedings and the equality of arms"* to exclude evidence obtained against Mr. Belokon during a criminal investigation:

> "*Whereas Mr BELOKON requests that the exhibits obtained in the course of the criminal investigation conducted in Kyrgyzstan and/or by means of the unlawful expropriation noted in the Award be excluded* […].
>
> *Whereas, first, for the principles of loyalty of proceedings and the equality of arms to be respected, the asymmetry resulting from the implementation by a State of its investigative powers within the framework of an investigation procedure should be corrected by granting the accused access to the entire criminal file in order to ensure that the documents produced in a parallel civil proceeding are not truncated or tendentiously selected and that [the accused] could obtain documents useful to its defense;*

[177] **CLA-344:** EDF (Services) Limited v. Republic of Romania, ICSID Case No. ARB/05/13, Procedural Order No. 3, dated 29 August 2008, paras. 29-35 (emphasis added).

[178] **RL-163:** Paris Court of Appeal, Republic of Kyrgyzstan v. Mr. Valeriy Belokon, Case No. 15/01650, Judgment, February 21, 2017, dated 21 February 2017.

> *Whereas Mr BELOKON's allegation that this right of access was denied to him is not contested by the other party*;
>
> *Whereas, second, the documents at issue (forms for opening accounts, bank statements, certificates of incorporation) have been produced without any indication as to their origin and the conditions under which they were obtained;*
>
> *Considering that it follows from the foregoing that it is appropriate to grant in full Mr BELOKON's request that exhibits listed on page 38 of his pleadings be excluded."*[179]

375. In the present case, the way in which the problematic documents were obtained is known. This however does not remove any force from the Court's holding that the right of the responding party to access the (source) materials of a criminal investigation which are referred to against it is core to the parties' equal treatment and Claimants' right to defend themselves. This is so in an international arbitration as it would be before any court of justice. Reference is made in particular to the case law of the European Court of Human Rights (**ECHR**) which confirms that the use of information collected during a criminal investigation in this proceeding would violate the principle of equality of arms insofar as Claimants have not been granted an unrestricted access to the file.[180]

376. In conclusion, Claimants' (and the Tribunal's) lack of access to the audio or video recordings corresponding to the Wiretaps Transcripts to verify their accuracy make the Wiretaps Transcripts inadmissible in this arbitration, as their inclusion into the record would violate Claimants' right to be heard, including Claimants' right to challenge the content of the evidence produced, *i. e.* of the Wiretap Transcripts. Furthermore, Claimants would be deprived of their right to contradict an essential line of argument from Respondents (which would breach the adversarial principle) and, thus, would be deprived of a core means of defense (which would result in the infringement of the right of defense).

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[179] **RL-163:** Paris Court of Appeal, Republic of Kyrgyzstan v. Mr. Valeriy Belokon, Case No. 15/01650, Judgment, February 21, 2017, dated 21 February 2017, p. 10 (emphasis added).

[180] **CLA-242:** *Dombo Beheer B.V. v. Netherlands*, ECHR Application No. 14448/88, Judgment, dated 27 October 1993, para. 1; **CLA-244:** *Rook. v. Germany*, ECHR Application No.1586/15, Judgment, dated 25 July 2019, paras. 74-75; **CLA-245:** *Beraru v. Romania*, Judgment, ECHR Application No. 40107/04, Judgment, dated 18 March 2014,paras. 83-84; **CLA-246:** *Matanović v. Croatia*, ECHR Application No. 2742/12, Judgment, dated 04 April 2017, para. 4.

377. As to the Black Accounting Documents,[181] regardless of their admissibility their content is not sufficiently clear and convincing. The Arbitral Tribunal sees no good reason to depart from the analysis of the Prosecutor General's Office made in its decision to terminate the investigation:

> […] *The data recorded on the optical medium of the laptop computer seized from UAB Rubikon* […] *during the search should be evaluated critically as the abbreviations contained in them are not clear either and they do not allow making any categorical statements that the money had been meant for the suspects in particular, and as no information was obtained during the pre-trial investigation regarding the transfer of the funds to and their receipt by the suspects* […][182]

378. Without the help of the Wiretaps Transcipts (found inadmissible by the Tribunal), the Black Accounting Documents are even more difficult to understand and clarify. Being unclear and equivocal in themselves, they cannot not be relied upon to substantiate legal determination on the existence of corruption.

379. In view of the conclusion of the Arbitral Tribunal on the necessary means of proof required to prove Respondents' allegations, and of the exclusion of the Wiretaps Transcripts from the record to preserve due process, the equality of arms, the adversarial principle and Claimants' right to defend themselves, as well as the general principle according to which evidence can only be relied upon when its authenticity is sufficiently established, the corruption (bribery) alleged by Respondents remains unproven and Counterclaim 1 must therefore be dismissed.

4. The insufficiency of the indirect evidence of corruption relied on by Respondents

380. While the Arbitral Tribunal rejects Counterclaim 1 primarily as a consequence of 1) its decision that the Wiretaps Transcripts are inadmissible and 2) its consideration of the

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[181] **R-150:** Magneto-Optical Drive Inspection Protocol, dated 03 March 2004; **R-151:** Protocol of Computer Inspection, dated 17 March 2004.

[182] **R-1232:** Prosecutor General's Office, Decision to Terminate Pre-Trial Investigation, dated 03 December 2009, p. 16 of the PDF.

prosecutor's findings issued in 2009, it finds it appropriate to briefly address, for the sake of argument, why Respondents' Counterclaim 1 based on indirect evidence alone would have in any event failed to establish corruption. In other words, even if the Arbitral Tribunal had not considered that indirect evidence does not suffice to establish corruption and that the direct evidence on record is inadmissible, the Arbitral Tribunal would have still reached the same decision on Counterclaim 1.

381. Indeed, even if the Arbitral Tribunal would have found on the legal and/or procedural plane that in this case indirect evidence alone could establish corruption, the indirect evidence relied on by Respondents in the present case would not have allowed their claim to prosper.

382. Respondents contended, amongst others, that: 1) Veolia's entry into the Lithuanian market came with structural risks of corruption,[183] 2) Veolia's representatives practiced corruption systematically,[184] 3) Veolia's leases were obtained and performed in an irregular manner,[185] 4) Veolia provided the means for the alleged corruption,[186] and 4) Veolia allegedly failed to implement anti-corruption measures.[187]

383. Regarding structural risks of corruption, Respondents essentially describe the general context of Veolia's investment into Lithuania in the early 2000s. They highlight that, prior to the Lease, Veolia (through the intermediary of Rubicon) persuaded other Lithuanian municipalities, to which district heating assets were transferred back from the former monopoly of *Lietuvos Energija* in 1997-1998, to enter into long-term leases before the municipalities even issued tenders for the same. Respondents further submit that Veolia's lease proposals gave rise to inherent risks of corruption.[188]

384. Respondents' allegations based on indirect evidence serve to create an overall atmosphere, at best. They are speculative, and sometimes inconclusive. Respondents make amalgams on which it would be unreasonable and inappropriate for the Arbitral Tribunal to rely in its decision-making. For example, Respondents point to the young

[183] See **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 77-92.
[184] See **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 93-114.
[185] See **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 115-192.
[186] See **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 230-292.
[187] See **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 293-306.
[188] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 80-88.

age of Rubicon employees engaged by Veolia, to the general economic dimension of profits associated with the lease of district heating assets, or to the generally low salary of municipal staff to infer that Veolia must have instructed, performed or at the very least closed an eye to bribery:

> "*In summary, Veolia entered the Lithuanian market by retaining a group of 20-somethings to create and obtain lease contracts over very large public assets on the expectation that they would receive hundreds of millions of Euros worth of business if they succeeded and in circumstances where the municipalities they were negotiating with were fertile ground for corruption and were staffed by low paid municipal officials.*"[189]

385. This is however far from sufficient to prove corruption, regardless of the direct or indirect nature of the evidence relied on. In the present case, the Arbitral Tribunal in any event finds that Respondents have pointed to "red flags" but failed to "connect the dots". An accumulation of suggestions inferred from allegedly suspicious circumstances that are supposed to outline facts rather prove them specifically does not fulfil the evidentiary test for a finding of corruption, even under a less stringent balance of probabilities test. In this regard, Claimants' comments on the cumulative aspect of Respondents' allegations are on point:

> "[T]*he vocabulary used throughout the Respondents' corruption claim is very telling: words such as "likely", "seems", "appear", "interpret", etc.* […] *Even under the less stringent balance of probabilities test, a fact is established if, on the basis of the evidence before it, the Tribunal considers that there is more than a 50% chance that the allegation is true (i.e., at least 51%). However, <u>when several events need to be proven cumulatively, as is the case with the Respondents' "red flags", and the probability of each event happening is 51%, then the probability of them happening cumulatively is much less than 51%</u>.*
>
> […]
>
> *With every added assumption (and there is a uncountable number of them in this case), the probability of each specific assumption needs to increase (closing in on 100%) for*

[189] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 92.

> *the probability of them happening cumulatively to be likely (i.e., above 51%). Otherwise, the likelihood of all of the assumptions to have occurred is close to nil.*"[190]

386. The lack of relevance of accumulated, isolated circumstances not directly connected to the precise project at stake in the present dispute is well reflected in Respondents' reference to the alleged overall structural risk of corruption associated with doing district heating business with Lithuanian municipalities in the early 2000s. The Arbitral Tribunal agrees with Claimants' conclusion in this regard:

> "[E]*ven assuming that the Respondents' allegation was correct – i.e., that the municipalities were a fertile ground for corruption (quod non), this would not mean that this particular Lease was procured through, or marred by, corruption. Operating in an environment with proven corrupt practices could show, at best, that the market under consideration was propitious to corruption, but would still require evidence of the specific purported corrupt act in relation to a specific project or investment.*"[191]

387. Respondents further argue that the fact that Veolia interfaced with Lithuanian public officials through its Rubicon partners is problematic. Respondents state that this interposition of Rubicon constitutes a red flag of corruption insofar as several of the Rubicon owners involved in Veolia's business, in particular Mr. Janukonis, grew up in the same small town as Mr. Zuokas.[192]

388. The fact that Veolia (through its Lithuanian subsidiary Litesko) contracted with Rubicon as from the early 2000s to enter into the business of district heating in Lithuania is established in the Lease Procurement Contracts concluded by the two entities.[193] It is also uncontested by Claimants. Mr. Greim, who set up Veolia's (then Dalkia's) business in Lithuania with the help of Mr. Janukonis, testified at the Hearing as follows:

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[190] **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 165 (emphasis added).

[191] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 853 (emphasis added).

[192] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 85-88.

[193] **R-595:** Litesko, Decision to Amend the Articles of Association, November 24, 1999, dated 24 November 1999, **R-596:** Contract between Litesko and Rubikon Apskaitos Sistemos, dated 15 January 2000, **R-597:** Agreement No. 000115/1 between Litesko and Rubikon Apskaitos Sistemos, dated 15 January 2000, **R-598:** Agreement No. 000115/2 between Litesko and Rubikon Apskaitos Sistemos, dated 15 January 2000, **R-599:** Agreement No. 000115/3 between Litesko and Rubikon Apskaitos Sistemos, dated 15 January 2000, **R-600:** Agreement No. 000115/4 between Litesko and Rubikon Apskaitos Sistemos, dated 15 January 2000, **R-601:** Agreement No. 000225/1 between Litesko and Rubikon Apskaitos Sistemos, dated 25 February 2000, **R-602:** Agreement No. 000428/1 between Litesko and Rubikon Apskaitos Sistemos, dated 28 April 2000, **R-604:** General Management Agreement between Litesko and Rubikon Apskaitos Sistemos, dated 19 June 2000.

> "*Rubicon was, at least at this moment, the only company I knew that installed individual substations and had some knowledge."*[194]
>
> "[…] *one of the criteria why we have chosen Rubicon was exactly -- not only that they already applied ESCO* [Energy Service Company] *scheme as such, but by doing so, they installed metering facilities, they installed the individual substations which allow to regulate the heat, and they installed insulations in the pipes. So they did exactly the kind of work what we needed in order to go ahead. So when we met with them, it was clear for me that this partner will have to do to work with us because we cannot work as Dalkia from France to do such kind of work."*[195]

389. Mr. Sacreste, former CEO of VE, also testified as to Rubicon's role in helping Veolia enter the district heating business in Lithuania, explaining that the Lease Procurement Contracts served "*to secure local assistance in: (i) explaining to Lithuanian stakeholders the benefits of the ESCO model (whereby municipalities partner with private operators who pay for improvements to municipal infrastructure) and encouraging municipalities to issue tenders to lease their district heating systems under the ESCO model; and (ii) assisting Veolia in collecting information, performing due diligence, and preparing its bids for projects once the municipalities issued tenders.*"[196] Mr. Sacreste further described why Rubicon was qualified perfectly for the job:

> "*Rubicon was an ideal partner for this, because Rubicon already had in-depth knowledge of the activity and the market. It must be noted that, independently from Veolia, Rubicon implemented the ESCO model in the heating sector for facilities like schools in Vilnius, and it was therefore familiar with the structure and benefits of the model, as well as the relevant regulations, administrative agencies, pricing, etc. This expertise was valuable to Veolia as it entered the Lithuanian market for the first time.*
>
> *Veolia entered into these agreements prior to my management of Vilnius Energy. I did, however, oversee the execution of two such Lease Procurement Contracts for the Litesko branches in Birzai and Druskininkai in 2003, and can confirm that Rubicon provided valuable and entirely legitimate services under those agreements.*

[194] Transcript, Day 6, 170/20-24.
[195] Transcript, Day 6, 171/7-17.
[196] **CWS-007:** Second Witness Statement of Jean Pierre Henri Sacreste, dated 18 January 2019, para. 20.

Furthermore, I can confirm that entering into these kinds of agreements when entering a new market was, and still is, a common business practice in the industry.

In addition to the Lease Procurement Contracts, the Lithuanian Subsidiaries also entered into Advisory Consultancy Agreements with VPAA, a Rubicon company. Under these agreements, which remained in force during the various municipal leases, VPAA advised the companies on local business matters such as marketing and supplier relationships, as well as public relations and media strategy. It was very important for Veolia as a foreign-headquartered company to have domestic consultants to keep us informed about local issues."[197]

390. This is all in line with the fact that Respondents themselves resorted to Rubicon before and after the Lease. Before the Lease was signed, VST hired Rubicon to install substations in Vilnius in 1999.[198] Later and up to today, Respondents continued to do business with Rubicon despite the previous convictions of Rubicon representatives. For example, in June 2002, Rubicon won a public tender announced by the Municipality for the maintenance of heat and hot water supply systems in schools and kindergartens in Vilnius.[199] In 2017 and 2018, VST hired Rubicon-owned companies through public tenders for electrical equipment maintenance services[200] and reconstruction work on a water heating boiler.[201] Most recently, in 2019, Rubicon won a tender organized by the Municipality to build and operate the Municipality's National Stadium.[202]

391. In any event, the evidence of corruption required in this case concerns the Lease for Vilnius, not leases entered into by Veolia with other municipalities in Lithuania, with or without the help of Rubicon. Mr. Greim testified as to Rubicon's role in the obtention of the Lease for Vilnius, as follows:

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[197] **CWS-007:** Second Witness Statement of Jean Pierre Henri Sacreste, dated 18 January 2019, paras. 20-22.

[198] See **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 860; **C-987:** Agreements between Rubicon Group Companies and Vilnius Municipality, dated 01 January 2004.

[199] See **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 961; see also **R-074:** Public Offering Prospectus, City Service, May 14, 2007, dated 14 May 2007.

[200] See **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 961; see also **C-1265:** Procurement Procedures Report, VŠT-Axis Industries, February 2017, dated 21 February 2017; **CEX-003:** Rebuttal Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 23 January 2019, para. 300.

[201] **C-1266:** List of Axis Industries Contracts, 2017, *available at*: http://www.freedata.lt/vpt/bysup/165707056/year:2017, dated 01 January 2017.

[202] **C-1009:** "Vilnius greenlights national stadium construction," *LRT televizija*, December 18, 2019, dated 18 December 2019.

"*They acquired for us information about the Vilnius project upfront so that we were aware that this project will come and that we could prepare ourselves to organise ourselves because, I don't know if you know, but such kind of tenders are very huge -- huge projects. You had to make a tender team, technical, financial and legal people to come together and to be ready to participate in the tender.*"[203]

"[…] *they helped us in the understanding and they helped us a lot during the tender elaboration, because a lot of things we had to do with support, getting information, analysis and others, what was local, even to logistics, everything was assured by our partner on this*."[204]

392. Mr. Greim testified to the specificity of the Lease requirements, as follows:

"[T]*he kind of work that was done by Rubicon in the framework of the Vilnius tender was by far different from what happened in the securing of the concessions we had before. When we worked with the municipalities in '98 and '99, these municipalities just took over the municipality heating and they were completely overcharged, overdebted, and they were very different solutions. They had no idea how to -- sorry, how to solve this, and we proposed them a solution which was completely new for them with the concession scheme, transferring the responsibility of operating and the financial results to an operator. This is the concession scheme. This -- so we had to teach them, we had to explain them, we have to gather figures.*

[…]

Vilnius was different, because Vilnius, they developed the scheme on their own with the help of local consultants, it was approved by World Bank, so there was another work, there was nothing to teach to Vilnius, because Vilnius Municipality was developed and had a clear vision what they wanted to do. So the work of -- I just want to mention that the kind of work that was provided by Rubicon was different because it was let's say upfront information to give us a background what would and could happen in the Vilnius project." [205]

"*The expectation was the understanding that when we will take over Vilnius, which was a 200 million business, we had to do a lot of works very quickly, and the*

[203] Transcript, Day 6, 201/11-18.
[204] Transcript, Day 6, 205/24-206/4.
[205] Transcript, Day 6, 187/9-188/10 (emphasis added).

understanding was that Rubicon, as we know how they were, will help us very quickly to solve a lot of questions we had by staffing people, by supervising the works, by helping in the tenders in the evaluation. So a lot of works should be done, and we asked them to help us for that, and they understood this was business and this was a remuneration for what they did for us."[206]

393. Mr. Sacreste, for his part, explains that the involvement of the World Bank reinforced the regularity of the tender for the Lease:

"[…] *in 2002 – 2003, the World Bank and the Global Environment Facility ("GEF") (an intergovernmental organization affiliated with the World Bank, various UN bodies, and others) collaborated with Vilnius Energy on a project to individualize heating and billing in individual apartments in buildings in Vilnius. That project was going to involve significant procurement activities for the equipment and services to individualize the buildings. I recall that representatives of the World Bank* […] *conducted a survey of the project and of our organization, in particular to check our procurement procedures and specifically our procedures with respect to individual substations, which were related to the project. In 2003, Vilnius Energy signed an agreement with GEF to execute the project* […]

We carried out procurement for the project through a tender and contract with a Rubicon company (City Service), which the World Bank specifically reviewed and approved. We then provided monthly financial reports on the implementation of the project to the World Bank. The Vilnius Municipality eventually cancelled the project around 2008 because it was no longer able to manage it. Nevertheless, given the World Bank's known focus on monitoring its projects, I consider the World Bank/GEF's involvement in this project as independent confirmation that Vilnius Energy's procurement procedures were efficient and reasonable."[207]

394. Mr. Stuggins confirmed Mr. Sacreste's views as follows:

"[…] *one of the fundamental premises for the World Bank involvement in some of these things is to make sure that there isn't corruption. In fact, I mentioned in my expert witness case that if the World Bank is going to get involved -- and it was still open*

[206] Transcript, Day 6, 188/20-189/4 (emphasis added).

[207] **CWS-007:** Second Witness Statement of Jean Pierre Henri Sacreste, dated 18 January 2019, para. 33 (emphasis added).

whether or not we were going to be able to give them a loan to Dalkia -- that if this was -- if there was any sign corruption, then we would have been backing off right away. So it was important to make sure. And that's a fundamental component of the World Bank process, so that's why we were involved."[208]

"[…] *an important part of what the World Bank is doing is it's making sure -- if we're going to get involved, we're going to be making a loan, we want to make sure that there's going to be a credible -- well, any time that we do an appraisal, we appraise the company that's going to be doing this, and we were appraising the District Heating Company. Now, if this was going to be a privatisation, there's going to be someone else in there, we have to make sure afterwards that this is going to be a decent company, they're going to be able to do the job properly and to make sure that this was done on the up and up*."[209]

"So what we want to make sure is that whoever they have selected, we agree also that if we were in their shoes that we would do the same thing, and that's -- to us, it's -- that would have been one of the red flags. If we came to a different conclusion than they did that would have made life very difficult and that's something -- we try to make sure it's going to be fair and open and make sure that we're analysing on a consistent basis to make sure that it's going to be -- we're going to come to a fair conclusion. So our primary focus there is to make sure that it is going to be fair there."[210]

"*And there, what we looked at was the lease agreement and it looked to be fair. It was even-handed, Dalkia would win some, the Municipality would win some, so it was -- it looked like it was a balanced lease*."[211]

[208] Transcript, Day 10, 29/4-15.
[209] Transcript, Day 10, 42/15-43/1.
[210] Transcript, Day 10, 45/4-14.
[211] Transcript, Day 10, 46/20-22.

395. Mr. Bernotas as well confirmed that "*the tender process was professional and thorough*".[212] Furthermore, the World Bank did not observe any red flags in relation to the Lease tender.[213]

396. With respect to concerns raised by Respondents' concerning the duration of the tender and the negotiation process, the exclusion of Fortum and the comments of the Lithuanian institutions, the Arbitral Tribunal considers that Respondents' concern remain unsubstantiated for the following reasons.

397. The duration of the tender and negotiation process leading to the conclusion of the Lease is not suggestive of corruption. Even though Mr. Stuggins noted in the World Bank's Project Appraisal that "*"[t]ypically, it takes two to three years to complete a concession"*[214]*,* he confirmed in his expert report and later at the Hearing that the duration of the tender was not "*overly concerning*" or "*indicative of foul play or corruption*":

> *"I understand that Respondents have characterized the Vilnius tender process as unusually fast. I agree that this tender process was shorter than many cases. I disagree, however, that this is indicative of foul play or corruption. In fact, in my experience, if tender processes are slow, there is more concern that "side" negotiations are taking place that should not, by enabling a bidder to upgrade their proposal. Such extended negotiations raise red flags, for fear that irregularities in the process might arise."*[215]

[212] **CWS-009:** Witness Statement of Egidijus Bernotas, dated 08 January 2019, para. 16; see also **CWS-022:** Second Witness Statement of Egidijus Bernotas, dated 29 May 2020, para. 10. In light of the above, the Arbitral Tribunal considers that the evidence presented by Respondents in support of their allegation that the Lithuanian municipalities were a fertile ground for corruption in the early 200s is inconclusive of the fact that Veolia procured the Lease through corruption.

[213] See **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 908; see also **R-1857:** Veolia Environnement and others v. Republic of Lithuania, ICSID Case No. ARB/16/3, Hearing on Jurisdiction and Merits, Transcript, June 15, 2021, dated 15 June 2021, Day 13, 3170/4-8.

[214] See **R-1252:** World Bank, "Project appraisal document on a proposed loan in the amount of US$ 17,100,000.00 to the Republic of Lithuania for the Vilnius District Heating Project", March 27, 2001, dated 27 March 2001, p. 44.

[215] See **CEX-009:** Expert Report of Gary Stuggins, dated 14 January 2019, para. 19.

> *"I do not dispute that the process experienced for the VDHC was probably faster than average. However, the speed of the Vilnius process was not overly concerning to us."*[216]
>
> *"*[A] *period for bidders to prepare bids and perform due diligence was too short." It was short, but too short? No. You know, there was a lot of things that they did in a time period that we independently did in less time than they did. So "too short"? Mm, I'm not too sure that I would go that far*".[217]

398. Regarding the circumstances that must be considered when examining the satisfactory length of the privatization/tender process, Mr. Stuggins noted in his expert report that as there were only a limited number of companies with the necessary experience, regardless of the time schedule for the tender, only a limited numbers of candidates could have bid.[218] Accordingly, the time frame provided to submit the bids proved to be sufficient as five firms had expressed their interests to bid (even if later only two firms submitted their bid).[219] Finally, even though the Municipality was fast in evaluating the bids, this could be attributed to the Vilnius' district heating system's financial situation and the state of its assets which urgently needed new funding.[220]

399. Concerning the denial of the extension request submitted by Dalkia's competitor Fortum, Mr. Stuggins' investigation revealed that Fortum was not seriously interested in the project and likely would not have submitted a bid even if additional time would have been granted.[221]

400. Finally, regarding the concerns expressed by the World Bank, the Swedish International Development Agency ("**SIDA**"), and the Luthuanian National Audit Office ("**NAO**"), the Arbitral Tribunal considers that these concerns are not indicative of corruption either. The recommendations expressed by the World Bank were mere

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[216] **CEX-018:** Expert Report of Gary Stuggins, dated 27 May 2020, para. 10; see also Transcript, Day 10, 45/4-14.

[216] **CEX-018:** Expert Report of Gary Stuggins, dated 27 May 2020, para. 10; see also Transcript, Day 10, 45/4-14.

[217] Transcript, Day 10, 87/21-88/2.

[218] **CEX-018 :** Expert Report of Gary Stuggins, dated 27 May 2020, para. 11.

[219] **CEX-018:** Expert Report of Gary Stuggins, dated 27 May 2020, para. 11.

[220] See **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 910; see also **CEX-018:** Expert Report of Gary Stuggins, dated 27 May 2020, para. 12, Transcript, Day 10, 94/17-95/1.

[221] **CEX-018:** Expert Report of Gary Stuggins, dated 27 May 2020, para. 14.

suggestions in case any of the bidders complained about the time schedule or the evaluation criteria of the tender, and it is important to note that this did not occur.[222]

401. As for the report produced by the SIDA, which questions the choice of Veolia as being in the best interest of the Vilnius Municipality, it bears noting that the SIDA was not involved in the tender process.[223] According to Mr. Stuggins, the review of the SIDA "*was not an unbiased review*" in view of the SIDA's endorsement of Swedish competitor Skydraft.[224] Finally, the NAO's comments regarding the draft Lease were mostly of a technical nature and were duly considered by the Municipality.[225]

402. Therefore, Respondents' concerns regarding the irregularity of the tender and negotiation process are not convincingly substantiated.

403. For the sake of exhaustiveness, the Arbitral Tribunal considers that the fact that the project evolved from a World Bank backed project to a private investment is not *per se* indicative of corruption. The World Bank's Project Appraisal, relied on by Respondents, noted that "*private sector participation in the provision of heat has become increasingly adopted. Furthermore, there are other examples of increasing private sector participation in similar sectors (water supply, for example). Therefore, the Municipality is considering a range of options that would increase private sector participation including* […] *concession or leasing arrangements*."[226] The Municipality's decision was consistent with the trends at the time in the relevant (and other essential public) sector(s),[227] and well thought of, in consideration of the following elements: 1) the World Bank's Project Appraisal itself noted in the description of the project that the Municipality was considering options other than a loan to increase private sector participation, 2) the Municipality's shift to a private funded project pre-dated the election

[222] Transcript, Day 10, 96/1-97/7 and 102/16-20.

[223] See **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 920; **CWS-018:** Third Witness Statement of Andreas Greim, dated 28 May 2020, para. 20, **CWS-022:** Second Witness Statement of Egidijus Bernotas, dated 29 May 2020, para. 11.

[224] Transcript, Day 10, 86/18 and 88/14-20.

[225] See **R-141:** National Audit Office of the Republic of Lithuania, Interim Certificate Regarding Legal Assessment of the Draft Lease Agreement of SP AB Vilniaus Šilumos Tinklai, dated 08 January 2002; **C-009:** Letter from Vilniaus Šilumos Tinklai to Vilnius Energy, dated 21 March 2016, paras. 21-22.

[226] See **R-1252:** World Bank, "Project appraisal document on a proposed loan in the amount of US$ 17,100,000.00 to the Republic of Lithuania for the Vilnius District Heating Project", March 27, 2001, dated 27 March 2001, p. 34.

[227] See **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 905.

of Mayor Zuokas, 3) there is in any event no evidence that Claimants would have influenced such shift, 4) the Municipality lacked the funds required to back up a World Bank loan which would have not exceeded USD 17 million (vs. the EUR 167 million investment pledge of Veolia), 5) Lithuania's 1999 National Energy Strategy supported the continued privatization of the energy facilities, 6) in the view of the World Bank itself and of Mr. Stuggins, private-sector participation was, in any case, necessary.[228]

404. As to the performance by Veolia of the Lease, and leaving aside allegations linked to excluded direct evidence, the Arbitral Tribunal notes that the payments made under the Lease Procurement Contracts are, as Claimants correctly state, not directly relevant to the present dispute insofar as none of the parties to the Lease Procurement Contracts are parties to this dispute and that these contracts do not relate to the subject matter of the dispute:

> "[…] *neither of the parties to the Lease Procurement Contracts are parties to this dispute, and these contracts do not relate to Vilnius, Vilnius Energy, or the tender process for the Vilnius district heating project. Instead, these are contracts for services that Rubicon provided to Litesko in relation to Lithuanian municipalities other than Vilnius".*[229]

405. As for the Consultancy Contracts with VPAA, Claimants have demonstrated that the services rendered under those contracts were real and of value, that contracting a local company is reasonable and widely accepted, and that payments made under the Consultancy Contracts were not grossly disproportionate compared to the services rendered.[230] Claimants note that according to Respondents' own statements, the range of earnings of three other Lithuanian public relations firms between 2001 and 2003 was EUR 289,000 to 1.07 million,[231] while VPAA earned an average yearly amount of EUR

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[228] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 905; see also **R-1252:** World Bank, "Project appraisal document on a proposed loan in the amount of US$ 17,100,000.00 to the Republic of Lithuania for the Vilnius District Heating Project", March 27, 2001, dated 27 March 2001.

[229] See **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 928.

[230] See **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022**,** paras. 934 and 944-956; see also **R-618:** Agreement between Verslo Plėtros ir Administravimo Agentūra and Stonell LLC, August 5, 2002 (Black Accounting Case File, Volume 49), dated 05 August 2002.

[231] See **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022**,** para. 934; with reference to **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 307; **R-1339:** Verslo Žinios, Rankings of Public Relations Companies by Income from Public Relations Services for 2001, last accessed on July 4, 2019 (available athttp://www.mediabv.lt/resursai/reitingai/Viesuju_bendroviu_reitingai_2001.pdf), dated 04 July 2019.

800,000.[232] Therefore, according to Claimants, VPAA's revenues fell squarely within the range provided. Furthermore, Claimants contend that given that VPAA provided Veolia both public relations and business intelligence services over 15 years, a total amount of EUR 13 million in payment for these services is reasonable.[233] Claimants rely on the testimony of Mr. Akelis to corroborate their statement, who stated that he would not be surprised to hear that Veolia transferred less than a million a year.[234]

406. Regarding the services rendered under the Consultancy Contracts, VPAA provided primarily public relations and advisory services.[235] Specifically, concerning the public relations services, VPAA monitored Vilnius Energy's and Litesko's media, responded to press requests, conducted press conferences and other media events, handled crisis communication, held media relations training sessions and internal communication projects, worked with journalists to generate media coverage and reported of its activities. Concerning the advisory services, VPAA and Rubicon regularly advised Veolia of the local market conditions due to their expertise in the Lithuanian market and the heating sector.[236] This is in line with the role intended for Rubicon in the description of Mr. Greim discussed above.

407. As noted above, Claimants have shown that taking into account the public relations and advisory services over 15 years, a total amount of EUR 13 million payments made for these services under the Consultancy Contracts were reasonable.[237] In order to show collusion, Respondents would have been required to establish with concrete evidence that the Consultancy Contracts were overpriced. In any event, Respondents' claims

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[232] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022**,** para. 934; **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, Annex 4.

[233] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022**,** para. 934.

[234] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022**,** para. 934; Examination of Akelis, Day 3, 131/25-132/7

[235] See **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 944; see also **CWS-007:** Second Witness Statement of Jean Pierre Henri Sacreste, dated 18 January 2019, para. 23; **R-1849:**, dated 12 April 2021, ICSID Hearing, Examination of Greim, Day 5, 1008/10-17; see also **R-618:** Agreement between Verslo Plėtros ir Administravimo Agentūra and Stonell LLC, August 5, 2002 (Black Accounting Case File, Volume 49), dated 05 August 2002.

[236] See **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 947-951.

[237] See **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 934; see also **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 307; **R-1339:** Verslo Žinios, Rankings of Public Relations Companies by Income from Public Relations Services for 2001, last accessed on July 4, 2019 (available athttp://www.mediabv.lt/resursai/reitingai/Viesuju_bendroviu_reitingai_2001.pdf), dated 04 July 2019.

remain unsubstantiated as Claimants showed the reality and value of the services provided and the reasonableness of the payments made compared to those services. Among others, Claimants demonstrated that VAA handled VE's media monitoring, responded to press requests, conducted press conferences and other media event, handled crisis communications, conducted media relations and communications trainings for Veolia's staff and worked with journalists to generate media coverage of VE's work, and in addition, VPAA provided business intelligence and strategic services to VE.[238]

408. The Arbitral Tribunal furthermore considers it reasonable that Veolia was seeking the assistance of local companies, especially because they were required to make large investments at an early stage of the project in order to be profitable as soon as possible, notably by charging increased tariffs for an improved network early on in the duration of the Lease. For this, Veolia could reasonably have required local assistance, which they obtained from Rubicon and VCAA.

409. Regarding the offshore contracts and payments referred to by Respondents, specifically the two payments made by Dalkia to Chine and Timber, the Arbitral Tribunal recalls that the direct evidence referred to by Respondents has been excluded by the Arbitral Tribunal. The Arbitral Tribunal cannot therefore conclude that these two payments were made to pay bribes to local officials to illegitimately obtain the Lease. Nevertheless, even taking into account other circumstances, the Arbitral Tribunal considers that Veolia was not a party to the Rubicon-U.S. Contracts,[239] and that therefore the VPAA Consultancy Contracts are not proven to be related to the offshore contracts referred to by Respondents.

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[238] See **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 207-211; see also **C-710:** VPAA Press Releases, February 2-3, 2011, dated 03 February 2011; **C-692:** Vilnius Energy Press Release, "Most powerful biofuel boiler will begin operating in Vilnius," October 2006, dated 01 October 2006; **C-691:** Vilnius Energy Press Release, "Cold did not disrupt the functioning of heat supply systems in Vilnius," February 22, 2007, dated 22 February 2007; **CWS-005:** Second Witness Statement of Andreas Greim, dated 14 January 2019, paras. 39 *et seq.* and 42 *et seq*; see also **R-618:** Agreement between Verslo Plėtros ir Administravimo Agentūra and Stonell LLC, August 5, 2002 (Black Accounting Case File, Volume 49), dated 05 August 2002, Article 4.

[239] See **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 965; **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 317; see also **R-618:** Agreement between Verslo Plėtros ir Administravimo Agentūra and Stonell LLC, August 5, 2002 (Black Accounting Case File, Volume 49), dated 05 August 2002; **R-620:** Agreement between Stonell LLC and Alma Ind. LLC, August 14, 2002 (Black Accounting Case File, Volume 48), dated 14 August 2002.

410. Furthermore, the Arbitral Tribunal notes that the Lithuanian authorities reviewed and analysed the factual elements of these offshore contracts and did not initiate proceedings regarding those contracts and the payments made in relation thereto.[240] The Lithuanian Prosecutors, among others, examined VPAA's contract with Stonell, LLC, but terminated the investigation due to insufficient data substantiating that criminal offense was committed."[241]

411. Finally, the testimony of Mr. Sacreste, Mr. Greim and Mr. Veršulis during the ICSID Hearing also confirms the absence of a link between Veolia and these Rubicon-U.S. Contracts.[242] For the above reasons, the Arbitral Tribunal considers that Respondents' evidence in support of the alleged channeling of funds through Rubicon by way of offshore contracts was inconclusive.

412. As to Respondents' reference to proceedings involving Veolia's representatives in relation to other projects, the Arbitral Tribunal considers that they are not directly relevant insofar as Veolia was not involved in the *Drėma* case invoked by Respondents and because it is not related to acts of corruption alleged in the present case.[243] This was confirmed by Respondents themselves during their opening statement at the ICSID Hearing:

> "*And one example of those discussions is the discussion between Janukonis and Zuokas concocting the bribery of Drėma. So, what happened then is that the findings of the Vilnius Regional Courts were upheld by the Lithuanian Supreme Court, simply--and they take that ad hoc, but it makes no difference--the Supreme Court simply took issue with the characterization of the crime as an attempted bribery, and requalified it as a fully consummated crime of bribery. So, it doesn't matter if it's an attempted bribery or a consummated bribery. There is an actual final criminal finding which*

[240] See **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 967; see **C-383:** Letter from Prosecutor of the Department of Investigation of Organized Crime and Corruption of the Prosecutor General's Office, December 3, 2009, dated 03 December 2009, p. 17 of the PDF.

[241] **C-383:** Letter from Prosecutor of the Department of Investigation of Organized Crime and Corruption of the Prosecutor General's Office, December 3, 2009, dated 03 December 2009, p. 17 of the PDF.

[242] **R-1850:** Veolia Environnement and others v. Republic of Lithuania, ICSID Case No. ARB/16/3, Hearing on Jurisdiction and Merits, Transcript, April 13, 2021, dated 13 April 2021, Day 6, P1453:L19-P1454:L3; **R-1849:** Veolia Environnement and others v. Republic of Lithuania, ICSIDCase No. ARB/16/3, Hearing on Jurisdiction and Merits, Transcript, April 12, 2021, dated 12 April 2021, Day 5, 1067/4-16 and 1069/20- 1070/18; **R-1849:** Veolia Environnement and others v. Republic of Lithuania, ICSIDCase No. ARB/16/3, Hearing on Jurisdiction and Merits, Transcript, April 12, 2021, dated 12 April 2021, Day 5, 1143/14-1144/12.

[243] See **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 856.

> *concerns all of these characters. So, my point here is--and the other side says, "Well, it has nothing to do with me." That's true. But the point here is, it's not beneath the dignity of this cast of characters to engage into corruption. That's all we are saying. We are not saying that Veolia was involved in this particular action. We are saying that Janukonis and Zuokas, it is not beneath their dignity to engage in corruption activity.*"[244]

413. As noted by Claimants, Respondents conceded that "*the Drema case was unrelated to Veolia and therefore could only serve as an indication of context and characters.*"[245]

414. The extrapolation made by Respondents based on unrelated criminal proceedings concerning municipal bribery to influence municipal elections,[246] a subject-matter far from the sort of more economic stakes involved here, is not sufficient to affect the Arbitral Tribunal's conclusion. It is an open-ended statement which alleges facts without linking them to a precise request or allegation of corruption. To assert that "*it is not beneath the dignity* [of the persons involved in the present dispute] *to engage into corruption*" does not provide a basis for a finding of corruption to the Arbitral Tribunal, even in the form of a "red flag", which would in any event lack sufficient connection to other established "red flags".

415. In addition to the above, Respondents' argument that Veolia relied on convicted criminals to negotiate the Lease[247] stands corrected as the timeline of the *Drėma* case does not coincide with the tender and negotiation phase of the Lease. The tender and the negotiation of the Lease unfolded in July to October 2001 and February 2002, more than a year prior to the events leading to the convictions in the *Drėma* case, *i. e.* the 2003 mayoral elections, which occurred in April to June 2003.[248] Therefore, while Respondents try to connect the convictions of Mr. Janukonis and Mr. Zuokas with the negotiation of the Lease and present it as a red flag, in reality none of these individuals were involved in the *Drėma* case at the time of the negotiation of the Lease.

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[244] **C-1398:** Veolia Environnement and others v. Republic of Lithuania, ICS1D Case No. ARB/16/3, Hearing on Jurisdiction and Merits, Transcript, March 30, 2021, dated 30 March 2021, Day 2, 462/9-22 to 463/1-5 (emphasis added).

[245] See **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 856.

[246] See **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2023, paras. 244-284.

[247] See **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 424-426; see also Transcript, Day 1, 125/2-128/7.

[248] See **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 858.

Consequently, the convictions could not have served as a "red flag" at the time of the negotiation of the Lease. As noted by Claimants:

> "*Respondents cannot argue that Veolia relied on "convicted bribers" to negotiate the Lease, without abusively misrepresenting facts by giving retroactive effect to this one conviction."*[249]

416. The Arbitral Tribunal notes that Respondents themselves pointed out that the facts underlying the *Drėma* case occurred after obtaining the Lease:

> *"That case shows that, barely a year after Veolia obtained the Vilnius lease, the Veolia officer and member of Veolia's two Lithuanian Management Boards was following daily instructions from the person holding the highest public office in Vilnius to commit crimes for the purposes of his re-election."*[250]

417. In light of the above, Respondents' argument that Veolia "*ratif*[ied] *the bribery relationship between Mr. Janukonis and Mr. Zuokas by refusing to investigate the matter and leaving Mr. Janukonis in place*"[251] is unconvincing, especially when considering that Respondents maintained business relationship with Rubicon and Mr. Janukonis, as pointed out by Claimants:

> *"If Mr Janukonis had engaged in the kind of serial corruption that the Respondents now claim, and his conviction would irremediably stain any deal he may have been involved in, one would expect the Respondents to cut off ties with Rubicon immediately. However, they continue to do business with Rubicon in relation to high-profile projects, and even in the district heating sector itself. Facts, not empty words and pettifog allegations raised for the sole purpose of this Arbitration, are what matters, and hard facts show that the Respondents do not believe their own allegations. In reality, despite Mr Janukonis' conviction in the 501 Investigation (the Drema case) and despite the 505 Investigation which led to no convictions (none of these Investigations being related to the Lease), Rubicon continues to be the Respondents' business partner, including in several important and high visibility projects."*[252]

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[249] See **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 858.

[250] See **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 96 (emphasis added), see also **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 581.

[251] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 98.

[252] See **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 863 (emphasis added).

418. The Arbitral Tribunal notes that Claimants refer to projects such as the maintenance of heat and hot water supply systems in schools and kindergartens in Vilnius in 2002,[253] the public tenders won by Rubicon-owned companies in 2017 and 2018 for electrical equipment maintenance services[254] and reconstruction work on a water heating boiler.[255] In 2019, Rubicon won a tender organized by the Municipality to build and operate the Municipality's National Stadium.[256]

419. As mentioned above, Respondents for the rest rely on atmospheric arguments concerning the close friendship of Mr. Janukonis and Mr. Zuokas which are inconclusive and fail to establish that the Lease was obtained and negotiated through corruption.[257]

420. Consequently, the Arbitral Tribunal does not concur with Respondents' argument that Rubicon employees at Veolia negotiating the Lease, *i. e.* Mr. Janukonis and Mr. Zuokas were convicted criminals at the time of the negotiation of the Lease or that their conviction could serve as a "red flag" in this case.

421. Finally, Respondents' allegation that Veolia failed to implement anti-corruption measures[258] is equally unconvincing. Claimants have demonstrated that Veolia formalised and enforced its anti-corruption policies in Lithuania. In his witness statement and at the Hearing, Mr. Husty explained that he received extensive training from Veolia, and that he had regular and substantial oversight of Vilnius Energy's activities, including dealings with its largest suppliers, such as Rubicon companies:

> *"Veolia has provided me with extensive training. For example I participated in the Sharing Eastern European Potentials ("SHERPA") program, which was an intensive*

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[253] See **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 961; see also **R-074:** Public Offering Prospectus, City Service, May 14, 2007, dated 14 May 2007, p. 26 of the PDF.

[254] See **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 961; see also **C-1265:** Procurement Procedures Report, VŠT-Axis Industries, February 2017, dated 21 February 2017; **CEX-003:** Rebuttal Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 23 January 2019, para. 300.

[255] **C-1266:** List of Axis Industries Contracts, 2017, *available at*: http://www.freedata.lt/vpt/bysup/165707056/year:2017, dated 01 January 2017.

[256] See **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 862; **C-1009:** "Vilnius greenlights national stadium construction," *LRT televizija*, December 18, 2019, dated 18 December 2019.

[257] See **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 420-426 and para. 581.

[258] See **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 293-306.

four-week executive management course provided to Veolia group managers across multiple cities in Europe where the Veolia group operates. I also participated in a training program on reinforcing controls in 2012, which covered topics such as strengthening internal controls by understanding fraud risks, and using fraud prevention tools, among other issues. I have also regularly attended conferences organized by Veolia in Paris on topics relating to efficient management practices, finance, fraud prevention, and issues relating to internal controls.

[…]

Veolia established the Veolia Ethics Committee to monitor compliance with the Code of Ethics and provide a confidential channel for employees to report potential ethical concerns. Vilnius Energy is also obligated to comply with Veolia's Compliance Policy to Prevent Criminal Risk and Corruption (the "Anti- Corruption Policy"). The Anti-Corruption Policy mandates that Veolia group companies provide training regarding corruption, embezzlement, the use of intermediaries, and conflicts of interest, among other topics, include anti-corruption clauses in contracts with all of Vilnius Energy's counterparts. Vilnius Energy explained the anti-corruption clause of each contract to the other party during negotiations. Vilnius Energy is also subject to Veolia policies governing commercial intermediaries and sponsorship and patronage activities. Veolia makes it very clear to its contracting partners that Veolia will not abide illegal behavior.

Veolia would monitor Vilnius Energy's activities by performing internal audits (including forensic audits) and sending external experts to audit the Company. Veolia also monitored the Company through its Control Assessment Process (CAP) assessments of Vilnius Energy's internal controls.

Each year the Lithuanian business unit was required to complete CAP reporting questionnaires formulates by Veolia's Internal Control department. CAP reporting involved extensive testing of Vilnius Energy's internal controls. At the conclusion of Vilnius Energy's annual CAP assessment, Vilnius Energy's Vice Finance Director or CFO and President were required to sign "Synthesis" letters submitted to Veolia: (1) certifying the adequacy of specific internal controls; (2) noting positive or negative trends in the effectiveness of the internal control; and (3) commenting on identified weaknesses. I personally signed the Synthesis letters for Vilnius Energy for fiscal

years 2009-2015 and organized Synthesis letters for the Lithuanian Business Unit for fiscal years 2016-2017"[259]

422. This was confirmed by the witness statement of Mr. Veršulis, who repeated that Veolia had guidelines and held trainings to avoid conflict of interest:

"*Q. You did not receive any training, did not receive any guidance, as to how to prevent conflicts of interest?*

A. Of course I received training during SHERPA programme and others, but it's -- this procedure is fully governed by the public procurement law and this law is fully sufficient for members.

Q. Please, again, I ask of you. Sometimes a question is just "yes" or "no". So my question is: did Veolia give you guidance, as head of procurement, as to how to prevent situations of conflict of interest?

A. Yes.

Q. You received this guidance?

A. Yes.

Q. And you followed this guidance?

A. Yes.

Q. Because you told me earlier that one of the goals of the process that you have set up was to conform with Veolia's guidelines where they do not conflict with the public procurement law, correct?

A. Yes, exactly.

Q. So you would have followed Veolia's guidance on conflict of interest where they do not conflict with public procurement law, correct?

[259] **CWS-011:** Witness Statement of Alexander Husty, dated 10 January 2019, para. 7 and paras. 14-16; see also Transcript, Day 4, 3/22-4/24.

A. Yes."[260]

423. The same was also affirmed by Mr. Sacreste at the ICSID Hearing:

> *A. Okay. I will rephrase if you want to eliminate what I--what you did not understand. I wanted to say that we installed sort of guidelines, or we had guidelines, avoiding conflict of interest. That means, knowing the fact Mr. Samuolis was only Shareholder and not manager in Rubicon and fully manager in Vilnius Energy and Litesko, and as I was not in charge of procurement in the beginning and was under the limits of the public procurement rules after, I don't see any possibility or any element proving any such dealing. That is my position."*[261]

424. In view of the above, the Arbitral Tribunal does not see any reason to doubt the implementation of these guidelines which seem in line with the international standard practice.

425. To conclude, even if the Arbitral Tribunal considered that indirect means of proof suffice to prove corruption in international arbitration, the indirect evidence relied on by Respondents would not have been sufficient to convince the Arbitral Tribunal that corruption took place in relation to the conclusion and/or performance of the Lease.

5. Conclusion

426. The dismissal of Counterclaim 1 renders several issues in dispute moot:

a. The preclusive effect, if any, of the Lithuanian authorities' decisions,[262] does not need to be decided insofar as the Arbitral Tribunal does not find any corruption based on the evidence adduced before it. As mentioned above, the fact that the Lithuanian Authorities have evaluated essentially the same evidence [263] has

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[260] Transcript, Day 4, 117/5-118/4.

[261] **R-1850:** Veolia Environnement and others v. Republic of Lithuania, ICSID Case No. ARB/16/3, Hearing on Jurisdiction and Merits, Transcript, April 13, 2021, dated 13 April 2021, ICSID Hearing, Examination of Sacreste, Day 6, 1350/15-1352/21.

[262] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 763-765; see also para. 794, **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 251-259.

[263] See **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 774, see also para. 779, Claimants' Opening Presentation, slides 75-76.

nevertheless played a role in this Arbitral Tribunal's decision to consider that evidence of bribery was insufficient in this arbitration as well.

b. The alleged acts of corruption do not appear to be established under either the standard of clear and convincing evidence or the standard of balance of probabilities, as the means of proof offered in this arbitration were in themselves insufficient.

c. The Claimants' objections 1) that this arbitration is the inappropriate venue for Counterclaim 1 or that this Arbitral Tribunal lacks competence over it;[264] 2) that Counterclaim 1 was time-barred;[265] 3) that the requirements for a finding of civil liability were not met under Lithuanian law; [266] or 4) that the acts of corruption could not be attributed to Claimants[267] are moot.

d. So is the question of the legal consequences of any corruption on the validity *ab initio* of the Lease, which was answered by the Parties in their Post-Hearing Briefs upon the Arbitral Tribunal's inquiry.[268]

C. COUNTERCLAIM 13: ILLEGAL TRANSFER OF THE LEASE TO RUBICON/DE FACTO JOINT VENTURE WITH RUBICON

1. Introduction

427. The above finding that an important portion of Respondents' evidence of alleged corruption is inadmissible has led the Arbitral Tribunal to dismiss Counterclaim 1, but it

[264] See **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, pp. 330 ff.; **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 85 ff , see also **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, paras. 540 ff.

[265] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, pp. 330 ff, paras. 760, 1302, **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 163-164, 172.

[266] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 1304-1316.

[267] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, paras. 552-553.

[268] Arbitral Tribunal's email to the Parties dated 27 July 2022, in which the Tribunal invited the Parties to address the following question in their Post-Hearing Briefs: "[i]*n view of Respondents' allegation that Claimants induced the Lease Agreement through corruption, is the Tribunal required to examine sua sponte a possible nullity ab initio of the Lease Agreement? If so, how would the Parties' respective claims for damages be affected?*"

does not preclude it from examining whether Respondents otherwise breached the Lease Agreement.

428. As recalled above, Respondents request first and foremost to be fully compensated, including with respect to their non-quantifiable losses which they claim by way of Counterclaim 1 or Counterclaim 13, alternatively. Both these counterclaims seek the disgorgement of Veolia's profits under the Lease, but they do not have the same nature.

2. Time limitation

2.1. The Parties' Positions

2.1.1 Claimants' Position

429. Claimants object that Respondents' Counterclaim 13 is time-barred and thus inadmissible. According to Claimants, Respondents should have known the facts underlying Counterclaim 13 since at least 2009, when the 505 Investigation was closed.[269]

430. Claimants explain that "[u]*nder Lithuanian law, the general limitation period on the right to make a claim is ten years, but a shorter three-year period applies to claims for damages*."[270]

431. Since "*most of the Respondents' Counterclaims relate to events dating back to the early 2000s and therefore significantly exceed this time period*",[271] Counterclaim 13 is time-barred.

2.1.2 Respondents' Position

432. Respondents submit that, because of the Claimants' stonewalling, they did not have a full picture of Veolia's collusion with Rubicon and of its consequences prior to the two

[269] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 1024, 1302.

[270] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1302; see also **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, paras. 530, 959 and 1446.

[271] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1302.

arbitrations.[272] According to them, at the relevant time no one had full access to the contracts between VE and the Rubicon companies. Consequently, until the arbitrations Respondents ignored *e.g.* that Rubicon had been awarded two-thirds of VE's planned investments.[273]

433. Importantly, Respondents lacked access to VE's procurement documents in view of the alleged confidentiality of these documents. Once these documents were obtained in the arbitrations, Sweco's analysis of the same required months of work and machines processing assistance to provide a full picture.[274]

434. The fact that Respondents had one single representative of VST in some (not all) of the procurement commissions is irrelevant, as it would have been nearly impossible to detect any irregularities just by sitting in these commissions.[275] Finally, Respondents allege that VE was manipulating the technical specifications and requirements for the tenders before they took place. Institutions like the NCCPE do not have the power to seize documents at companies, and Respondents therefore remained unaware of these manipulations until the arbitrations.[276]

2.2. The Arbitral Tribunal's Analysis

435. In support of their time-bar objection, Claimants rely on Art. 1.125.8 of the Civil Code of the Republic of Lithuania, which provides that an "[a]*bridged three-year prescription shall be applied with respect to claims for the compensation of damage, including claims for the compensation of damage caused by defective production*."[277] There is no dispute between the Parties that the statute of limitations starts running on "*the day on*

[272] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 827, 838 and 840; see also paras. 745 ff; **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 234; **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1132 ff; **SoD Supplement:** Respondents' Submission Supplementing the Statement of Defense and Counterclaim, dated 08 October 2018, para. 1.

[273] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 828 and 830.

[274] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 832.

[275] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 833-834.

[276] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 835 and 839.

[277] **RL-044:** Civil Code of the Republic of Lithuania (including amendments of April 12, 2011), p. 322 of the pdf.

which a person becomes aware or should have become aware of the violation of his right".[278]

436. Respondents' defense to Claimants' objection has rather focused on Respondents' unawareness of the relevant facts until this and the ICSID arbitration.[279]

437. As pointed out by Respondents,[280] it is not explicit why Claimants submit in their Post-Hearing Brief that the termination of the 505 Investigation is the event that triggers the three-year statute of limitation they rely on. Claimants have limited this new position to a reference to the Prosecutor General Office's decision to close the investigation, and the calculation that Counterclaim 13 became time-barred three years thereafter, *i.e.* on 3 December 2012, whereas Respondents introduced Counterclaim 13 in the arbitration on 8 October 2018 with their Submission Supplementing the Statement of Defense and Counterlaim.[281]

438. Before their Post-Hearing Brief, Claimants had submitted a different position that, under any interpretation, Respondents cannot be considered to have discovered the factual predicates of their Counterclaim 13 after October 8, 2015, which is three years before the introduction of Respondents' Counterclaim 13 in its Submission Supplementing the Statement of Defense and Counterclaim.[282]

439. Claimants advance that Respondents ought to have been aware of the facts underlying their Counterclaim 13 throughout the term of the Lease through "*the reporting, approval*

[278] **RL-044:** Civil Code of the Republic of Lithuania (including amendments of April 12, 2011), Art. 1.127 (1), p. 323 of the pdf.

[279] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 827, 838 and 840; see also paras. 745 ff; **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 234; **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1132 ff; **SoD Supplement:** Respondents' Submission Supplementing the Statement of Defense and Counterclaim, dated 08 October 2018, para. 1.

[280] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 234.

[281] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 1024, 1302, with ref. to **R-1232:** Prosecutor General's Office, Decision to Terminate Pre-Trial Investigation, December 3, 2009, dated 03 December 2009.

[282] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 1446.

and transfer processes under the Lease" [283] as well as the announcement in newspapers of tenders which Rubicon handled for VE.[284]

440. Respondents however contest that they were aware of the collusion they now claim compensation for:

> "*The result of the institutional capture and stonewalling was that, prior to the two arbitrations, no one (including the Respondents) ever had a complete overview of Veolia's collusion with Rubicon, including as to its extensiveness, its consequences, and the elements of the "understanding" between them. Information that was available to the Respondents was piecemeal and insufficient to determine the true extent of such collusion, as confirmed at the hearings. Indeed, the two arbitrations are the first time that access was obtained in the same forum to all of the following: (i) documents from the 505 Investigation, (ii) Veolia's contracts with Rubicon, (iii) Veolia's procurement documents, (iv) Veolia's internal documents, such as emails, presentations, drafts, (v) testimonies by Veolia and Rubicon employees, and (vi) the findings of multiple Lithuanian institutions*."[285]

441. Respondents contend, on the merits, that the secretive *de facto* joint venture between Veolia and Rubicon caused harm to both Respondents and the citizens of Vilniaus. According to Respondents, Veolia and VE consciously concealed that secretive joint venture or collusion with Rubicon from them, and such concealment is part of the breach Respondents seek compensation for.[286] Respondents further argue that VE's obfuscation of any meaningful supervision by them is another breach of the Lease.[287]

442. It is clear from the formulation of Respondents' Counterclaim 13 that their alleged unawareness of the so-called Veolia-Rubicon *de facto* joint venture is in dispute, and at the core of the Counterclaim's merits. In a way, Respondents' allegations that Claimants concealed the *de facto* joint venture and obfuscated supervision by

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[283] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 1447; see also **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1024.

[284] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 1448.

[285] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 828 (emphasis added).

[286] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, section IV.C.4 (paras. 744-753).

[287] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, section IV.C.5.c (paras. 824-826).

Respondents support both 1) Respondents' defense to Claimant's time-bar objection and 2) Respondent's Counterclaim 13 itself.

443. The Arbitral Tribunal can therefore not determine the timeliness of Counterclaim 13 without examining its merits.

3. Respondents' standing

3.1 The Parties' Positions

3.1.1 Claimants' Position

444. Claimants further object that Respondents have no standing to advance Counterclaim 13 since the customers, not Respondents, would have suffered the alleged damages.[288]

445. This objection is, somehow, an extrapolation of the claims Claimants make in relation to Counterclaim 2 (Tariff Overcharge). Claimants have explained in their Post-Hearing Brief that the issue of Respondents' standing also "*arises in respect of Counterclaim 13. To recall, in Counterclaim 13, the Respondents assert inter alia that the contracts which Vilnius Energy concluded with Rubicon allegedly increased tariffs for consumers* […] *the Respondents lack standing to make this Counterclaim*."[289]

446. Claimants rely on the same arguments as the ones developed in relation to Respondents' Counterclaim 2.[290] They contend that Respondents do not have an interest of their own to pursue (Counterclaim 2 or) Counterclaim 13, as they have failed to prove that they have suffered any damage to VE's alleged overcharging consumers in Vilniaus.[291] Claimants refer to Lithuanian courts' case law, which confirms that

[288] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 760, 1024 and 1300; **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, paras 2 and 151.

[289] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1300 (emphasis added).

[290] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 1280-1300; see also **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, paras. 885-898 and **Rejoinder on CC :** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 477 ff.

[291] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1282.

"*Lithuanian law does not allow a party to bring a claim when it fails to demonstrate the specific harm it has suffered*."[292]

447. Further, "*Respondents do not represent Vilnius' consumers and cannot seek damages on the consumers' behalf.*"[293] While municipal institutions and the State can bring claims to protect the public interest under Lithuanian law, they may do so only when this is provided by the applicable law. In the present circumstances, no legal provision enables Respondents to represent the Vilnius consumers or to defend the public interest, as has been confirmed by the Lithuanian courts.[294]

448. Finally, "*Respondents are wrong to claim that the Parties concluded the Lease for the benefit of consumers*."[295] According to Claimants, the Lease does not contain any stipulation for their benefit and Respondents' "*high-level assessment of the policy goal and ultimate economic beneficiaries of the Lease is irrelevant to establish the existence of a contractual stipulation in favour of the consumers: the Respondents identified none*."[296] Claimants underline that Vilnius' consumers' relations with VE arose from private contracts separate from the Lease. "*Any obligations that [VE] had under the Lease that may have benefitted the consumers do not equate to the Lease – or these obligations – being legally concluded with the consumers*."[297]

3.1.2 Respondents' Position

449. Respondents point to the belated nature of Claimants' objection which was raised in their Post-Hearing Brief for the first time: "*After dedicating five pages to its argument that the Respondents have no standing to claim damages under Counterclaim 2*

[292] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1287.

[293] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1288; **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 151.

[294] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 1289-1297.

[295] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1298; **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 151.

[296] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1298; **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 152.

[297] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1299; **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 152.

because damages were suffered by the Lithuanian consumers (which is wrong), Veolia writes a mere three sentences to extend the reasoning to Counterclaim 13".[298]

450. They first respond that Claimants' contention that Counterclaim 13 concerns the impact of Veolia's collusion with Rubicon on the tariffs paid for by consumers in Vilnius does withstand scrutiny. First, Veolia recognizes itself by the formulation "*inter alia*" that damages incurred by consumers in Vilnius would in any event only constitute part of Counterclaim 13, "*which also includes damages to the Respondents themselves*".[299]

451. Second, Respondents have under any analysis standing to bring Counterclaim 13, as *"(i) Veolia had an obligation to the Respondents not to charge tariffs above the level permitted by the NCCPE; and, (ii) in any event, the Lease was a contract for the benefit of third parties (i.e., consumers).*" Respondents refer to Veolia's own statements in its Post-Hearing Brief that the citizens of Vilnius were stakeholders of the Lease.[300]

452. In relation to Counterclaim 2, Respondents have advanced a varying interpretation of Lithuanian law as to whether they are entitled under it to claim compensation for losses incurred by the consumers of Vilniaus.[301] They have further affirmed with respect to Counterclaim 2 that Veolia's overcharge will be returned to consumers through reductions to future heat bills.[302] The Arbitral Tribunal considers that it is safe to assume that the same would go for any portion of the compensation granted under Counterclaim 13 that would correspond to the damages incurred by the consumers as opposed to Respondents.

3.2 The Arbitral Tribunal's Analysis

453. Respondents are correct that Claimants are belated in their objection to Counterclaim 13 on the ground of standing. Further, this objection is an extension of Claimants' standing objection to Counterclaim 2 rather than an argument specific to Counterclaim 13. This objection will be discussed in relation to Counterclaim 2 and has no

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[298] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 233.

[299] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 233.

[300] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 233.

[301] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 855-857; see also **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2023, paras. 931 ff and **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1255 ff.

[302] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 858.

consequence on the Tribunal's findings on the merits of Counterclaim 13. Therefore, Claimants objection to Respondents' standing in respect of this counterclaim is dismissed.

4. Liability

4.1 The Parties' Positions

4.1.1 Respondents' Position

454. According to Respondents, and leaving aside their allegations of corruption that have been dismissed, the Veola-Rubicon partnership or "*de facto joint venture*" breached Claimants' obligations to Respondents primarily through "(*ii) anti-competitive conduct (i.e., the guarantee that Rubicon would be Veolia's main supplier in Lithuania), and (iii) rampant conflict of interest (i.e., Rubicon staffing Vilnius Energy and Litesko)*."[303] Such conduct allegedly included "*the manipulation of tender rules, the extensive contracting with Rubicon at an overprice, and the stonewalling that was put in place to prevent any attempts at external supervision* […] [which] *prevented the Respondents from protecting their contractual rights over time*."[304]

455. Respondents allege that Veolia and Rubicon, who previously partnered in the form of a joint venture (Litesko, of which Rubicon held 19% of the shares), continued such joint venture in a concealed way after its dissolution in 2000. According to Respondents, this was a concoction meant to circumvent the prohibition of having Rubicon as a member of the consortium to be created to undertake the Lease, *i.e.* Vilnius Energy. "[B]*y receiving contracts from Vilnius Energy and overcharging for its services, Rubicon was able to indirectly share with Veolia the revenue of the Lease, despite never appearing as a shareholder of Vilnius Energy* […] *Overpricing of goods, works and services supplied by Rubicon to Vilnius Energy was the perfect avenue to conceal this transfer of wealth*."[305]

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[303] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 443 (emphasis added).

[304] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 445 (emphasis added), see also **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 118.

[305] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 455 (emphasis added).

456. Respondents submit that the very structure of the Rubicon-Veolia *de facto* joint venture breaches the Lease and the rules applicable to the Lease tender procedure[306] and that, regardless of the manner in which the Lease was obtained, Veolia breached its obligations regarding the implementation of the Lease. These breaches include placing Rubicon's shareholders at key positions in VE, and thus creating and entertaining a situation of conflict of interest in breach of Veolia's own policies.[307] "*The creation of such a widespread conflict of interest constitutes a breach of the Lease*."[308]

457. Respondents point in particular to the role played by 1) Mr. Samuolis, one of Vilnius Energy's top managers in 2002-2008 and its head in 2009-2017 and 2) Mr. Janukonis, an active Board Member of VE,[309] notably in the manipulation of Vilnius Energy's procurements in favor of Rubicon. Respondents highlight that key positions at VE with an influence on its procurements were held by "*the closest collaborators and employees of Messrs. Samuolis and Janukonis*" [310] and that "[t]*hese positions complemented the management roles of Messrs. Samuolis and Janukonis at Vilnius Energy*."[311] According to Respondents, this allowed Veolia to funnel most of VE's contracts to Rubicon companies on unreasonable, non-market terms,[312] notably through the manipulation of VE's tenders.[313] Such manipulation of the tender rules was confirmed by the Lithuanian Public Procurement Office and established by Respondents' experts, Sweco, through the latter's analysis of VE's tenders against *inter alia* best international practices. Respondents highlight the lack of similar analysis by Claimants' experts of AFRY.[314]

458. Respondents contend that Claimants and Rubicon's manipulation of tenders in turn led to massive overpricing of purchases by VE from Rubicon companies, as shown by

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[306] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 562-594.

[307] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 595-629.

[308] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 663.

[309] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 457-470.

[310] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 471-482; **SoD Supplement:** Respondents' Submission Supplementing the Statement of Defense and Counterclaim, dated 08 October 2018, paras. 218-230.

[311] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 482.

[312] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 483-515, see also see also **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, paras. 121, 128-143.

[313] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 669-701, see also **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, paras. 119-127, 128-143.

[314] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 669-694.

Sweco's benchmarking and contrary to AFRY's conclusions.[315] Sweco's analysis demonstrates in particular the overpricing for individual substations, the Rubisafe devices, the heat meters, hot water meters, pipes and the Economizer.[316]

459. In addition to this overpricing in contracts awarded to Rubicon, the benefits that Claimants funneled to Rubicon included "*other unjustified arrangements with Rubicon, namely, payments made to VPAA, and the profits made by Dalkia Lietuva and Rubicon's IHPs* [Independent Heat Producers]".[317] Respondents criticize in particular Veolia's resort to the Management Agreements, concluded without a tender and under which VE granted Rubicon an exclusive right to supply and install all of VE's pipes and individual substations. Such supplies and services corresponded to 64% of VE's minimum Investment Obligation under the Lease.[318]

460. All these breaches were unknown to Respondents in view of Claimants' stonewalling. Contrary to Claimants' assertions, no meaningful supervision was possible.[319] In particular, Veolia's invitations to Respondents to review documents related to the Lease operations at the premises of VE were not effective, as Respondents were precluded from making copies of documents, which would have been necessary to conduct a proper analysis such as the one conducted by Sweco.[320]

461. In response to the Arbitral Tribunal's questions and to Claimants' contention that it would have been uneconomical for VE to overspend on its purchases, Respondents have answered that 1) this was the price for Rubicon's support to obtain the Lease;[321] and that 2) under such arrangement, Veolia was still able to "*profit from Rubicon's piece of the pie*" as it "*was able to pass through via the tariff a large share of Rubicon's compensation, under both the Lease tariff and regulated tariff*."[322] Respondents add that the overpricing of purchases from Rubicon also served to artificially reduce its

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[315] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 702 ff.

[316] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 713-741.

[317] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 437.

[318] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 484.

[319] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 805-823.

[320] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, paras. 207-208.

[321] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 515-525.

[322] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 526, Respondents' presentation of 29 April answering the Tribunal's questions, slides 34-35, see also **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 115.

investment obligations under the Lease and increase the value of Facilities returned to Respondents.[323] A further explanation provided by Respondents' expert on *quantum* is that overpricing allowed Veolia to reduce its apparent profitability and so avoid applicable caps on profits in a regulated sector.[324]

462. Overall, the *de facto* joint venture and more broadly, the collusion between Veolia and Rubicon, breached the Lease which "*was entrusted to a gang of local, inexperienced individuals who had an extremely strong incentive to manipulate public procurements, inflate the prices of investments, foreclose the various markets of suppliers in the district heating sector, and even cannibalize VŠT's market share, rather than by a good faith international operator as the Respondents expected*."[325]

463. This had dire consequences on Vilnius citizens, who suffered from the increase in price of heating in the city, which went from the lowest in Lithuania before Veolia and became the highest in Lithuania thereafter.[326] Further, Veolia's anti-competitive practices resulted in market foreclosure and prevented non-Rubicon companies from fairly expanding. "*The harm to the Vilnius citizens is unquantifiable*."[327]

464. Similarly, the harm done by Veolia through its collusion with Rubicon cannot be quantified, as would require accounting for the fact that "[r]*ather than the performance of an international and skilled operator, the Respondents received the performance of Rubicon: an inexperienced, conflicted and dishonest local company*".[328] Such quantification exercise would require the reconstruction of the decisions that a reasonable and prudent operator would have made over the course of 15 years, leading to an inherently complex and dynamic counter-factual. For this reason, Respondents claim the disgorgement of Claimants' benefits.[329]

4.1.2 Claimants' Position

[323] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 538.
[324] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 540 see also **FTI Slides:** Hearing Presentation of FTI (Dr. Fabien Roques), dated 08 June 2022, slides 12 ff.
[325] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 843.
[326] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 845.
[327] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 845.
[328] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 846.
[329] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 848.

465. Claimants reply that "*Veolia did not put Rubicon at the helm of* [VE]*, nor did it funnel it most of its contracts*".[330] Further, Counterclaim 13 can only be explained through the lens of corruption. Since no corruption took place, including in relation to the obtention of the Lease, Veolia had no reason to collude with Rubicon and any collusion would only have had a negative impact on its profits under the Lease.[331]

466. According to Claimants, Respondents conflate subcontracting with transfer or assignment of their obligations under the Lease.[332] "[N]*o transfer or assignment occurred. Veolia never transferred nor assigned its contractual responsibility for fulfilment of the Lease to Rubicon and remained contractually entitled to the benefits thereunder. Put differently, throughout the performance of the Lease, Veolia remained contractually bound to fulfil its terms.[1575] To the Respondents, Veolia was liable, and so remained for the entire duration of the Lease. This is what matters*."[333] Outsourcing part of the Lease's performance was lawful under both the Lease and general Lithuanian contract law.[334]

467. They recall that Veolia had made it clear from the outset that it would conduct the project relying on experienced and reliable domestic partners with local expertise.[335] Veolia was at liberty to choose the strategy for managing its obligations under the Lease.[336] "*Given the magnitude of investments that Veolia had to perform within a short period of time, Veolia elected to resort to the PMAs, a form of technical management agreements commonly used in the energy sector, as explained by AFRY during the Hearing*".[337] While Rubicon managed VE's specific investments into the district heating network and individual substations,[338] Veolia remained fully responsible for all critical strategic decisions regarding the implementation of these investments.[339]

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[330] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1025-1026.

[331] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 256.

[332] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 1025, 1029-1030, 1045-1049.

[333] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1050.

[334] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 1044-1055, see also **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, paras. 233-236.

[335] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1031.

[336] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 1036, 1040.

[337] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para .1036.

[338] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para .1037.

[339] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para .1039.

468. Claimants point to Respondents' contradictory theories. "*Until now, the Respondents have argued that Veolia essentially transferred and/or assigned the performance of the Lease to Rubicon by subcontracting and employing certain individuals with connection to Rubicon. Now, the Respondents contend that, in fact, Veolia remained in control, but concealed the joint venture it formed from the outset with Rubicon, without informing the relevant authorities*."[340] Veolia did not hide anything but rather voluntarily adopted a new and transparent approach for the Vilnius project, justified by the dimension of the same.[341] This is even more so when considering that Rubicon had previously rendered services to VST and the Municipality, and that it was the Municipality itself which introduced Rubicon to Veolia.[342] Notwithstanding this collaboration, "[a]*t no point did Veolia intend to share the Lease's responsibility with Rubicon*."[343]

469. Claimants further deny Respondents' allegation that it manipulated procurement rules in favour of Rubicon which would have benefitted from extremely advantageous terms.[344]

470. Claimants "*always closely oversaw and retained control over* [VE]*, implemented adequate management practices to prevent and detect wrongdoing, and followed Public Procurement Law*."[345] They point to the fact that Claimants were acting in a very regulated and supervised sector, rendering Respondents' allegations incredible,[346] which was reinforced by the broad visibility that Respondents had into VE's operations through multiple oversight mechanisms.[347]

471. Contrary to Respondents' allegations, the individuals with links to Rubicon who worked for VE, in particular Messrs. Janukonis and Samuolis, did not control VE's decision-

[340] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para .1058.

[341] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 1059-1061, see also para. 1068.

[342] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para .1061, see also **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, paras. 237, 239.

[343] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para .1060.

[344] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 1026, 1062.

[345] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1026; see also paras. 1063-1091, see also **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, paras. 267-273.

[346] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1021, see also paras. 1170, 1167 (c).

[347] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1024, see also paras. 1063-1091, 1169-1173.

making, as was confirmed by multiple witnesses at the Hearing.[348] VE was supervised by Veolia at all times, in many ways including "*(i) internal checks and controls, and (ii) regular reporting requirements, auditing, supervision, training and management from the Veolia headquarters in Paris. Vilnius Energy's structure and oversight mechanisms would have protected the company from conflicts even if Rubicon's shareholders individually sought to pursue their own interests over Vilnius Energy's*".[349] Importantly, Veolia's policies complied with Lithuanian law which does not prohibit officers of a company from owning shares in other companies.[350] As a result of Veolia's control, any potential conflict of interest that could have resulted from the roles of Messrs Janukonis and Samuolis were neutralized.[351] In particular, Veolia made sure to retain control over VE's procurements which were outsourced to City Service.[352] According to Claimants, "*none of the individuals the Respondents identify (and notably not Mr Janukonis and Mr Samuolis), had <u>any</u> hand in the execution of the tenders.*"[353]

472. Claimants further affirm that they always followed public procurement law and implemented best international practices with respect to VE's procurements.[354] In that regard, Claimants recall that the Lithuanian Public Procurement Law (**PPL**) only applied to VE from 2003, for international tenders only, and from 2009, more broadly for all tenders above a specific threshold.[355]

473. In any event, Respondents' allegations that Rubicon companies were favored in the tenders are unsubstantiated. Claimants recall that while VE entered into contracts with Rubicon companies, it also concluded many procurement contracts with companies other than Rubicon.[356] Further, Respondents' statistical analysis only considers data from 2008 and treats all subcontracts awarded to third parties under the PMAs as Rubicon subcontracts, even if around 90% of these were awarded to third party

[348] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1062, see also paras. 1063, 1074-1079.
[349] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1062, see also paras. 1065-1071, 1084.
[350] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1071.
[351] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1076.
[352] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 1083, 1094.
[353] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1085, see also paras. 1086-1090.
[354] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1062; see also paras. 1092-1119.
[355] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1093.
[356] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 1324; **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 1101, 1119.

suppliers.[357] Sweco's hand-picked selection of the procurements it analyzed makes it unreliable.[358] Therefore, any generalization from an example of overpricing to the entire procurement practice of VE would be inappropriate as "*Sweco cherry-picked the contested procurements, enabling them to pick an extreme sample that is unrepresentative of Vilnius Energy's procurements in a manner that furthers their goals*."[359]

474. Even more importantly, "[t]*he fact remains that, through the use of the PMAs at an earlier stage, and later through public procurements under the PPL, Veolia achieved at- or below-market prices for the goods, works and services it procured*."[360]

475. VE conducted thousands of procurements over 20 years, all in compliance with the applicable PPL. Of these, Respondents only take issue with 17 of them, "*despite the fact that the relevant Lithuanian authorities had already approved the tenders and, where appropriate, addressed any concerns*".[361] In only one case out of 17 did the Lithuanian courts agree with the Lithuanian Public Procurement Office ("**PPO**") that a contract should be cancelled, and VE complied.[362] Importantly, "[t]*he PPO and the Lithuanian courts – not Respondents – were responsible for Vilnius Energy's compliance with the PPL*."[363] Any concern of the PPO was addressed through the appropriate regulatory dispute mechanisms and settled by Lithuanian courts. Respondents thus "*ask the Tribunal to second-guess the PPO's actions and the courts' conclusions and to award Respondents damages to which they would have never been entitled under Lithuanian law*."[364] The Tribunal cannot review the regularity of the

[357] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1096.

[358] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 1122 (a), 1167 (b).

[359] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 1167 (b), 1168.

[360] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1098.

[361] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1102, see also **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 2037.

[362] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 2038; see also **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 1103 and 1107.

[363] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 2038; see also **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1102.

[364] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 2038.

tenders de novo and find issues not previously identified by the Lithuanian authorities. "*The Tribunal lacks the necessary jurisdiction to do so.*"[365]

476. Respondents cannot criticize the procurements as illegal, and therefore rely on "*a standard that is part their own non-authoritative interpretation and retroactive application of the PPL, part subjective characterization of industry practices*." [366] Respondents in particular fail to consider the evolution of public procurement rules over time, and the fact that retroactive application of public procurement rules is not accepted by either the EU or Lithuanian law.[367] Further, Respondents' expert Sweco lacks expertise in procurement law.[368] Sweco's *ex-post facto* comparisons of the value of VE's tenders with non-comparable contracts in different countries also contradict fundamentals of public procurement law.[369] In fact, Respondents and Sweco's having to present tenders made in other countries, in different time periods and pertaining to difference scopes "*goes to further demonstrate that the prices the Respondents allege were available to Vilnius Energy were not necessarily known to it at the time it was making investment decisions.*"[370]

477. According to Claimants, Respondents' allegations of "overpricing" of the services and supplies purchased from Rubicon (or the "overspending" of VE on these purchases) are in any event false.[371] Claimants point to the fact that Respondents' positions on price benchmarking are all based on the analysis of Sweco, which should be accorded no weight in view of the deficiencies in its data-analysis practices and case-knowledge.[372] To the contrary, "*AFRY has demonstrated that the alleged Rubicon premium is inexistent*".[373]

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[365] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1102.

[366] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 2042, see also **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1104.

[367] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 2042, see also **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1104.

[368] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1104.

[369] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 2042-2043.

[370] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1167.

[371] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 2044 ff.

[372] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 1121-1122.

[373] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1214.

478. Further, at no point were Respondents prevented from exercising their supervision role.[374] Several contractual mechanisms ensured oversight of Claimants' operations by the Municipality and VST,[375] and VE was further subject to the oversight of at least 13 different entities including the Pricing Commission, the Competition Council and the PPO. According to Claimants, the Lithuanian's Government's "*animus towards Veolia*" turned regulatory oversight into "*politicised and targeted scrutiny undertaken with the sole mission of finding problems*". Nonetheless, "*those proceedings and investigations seldom resulted in findings of wrongdoing (and even when they did, the faults were minor or curable and Veolia acted immediately)*".[376]

4.2 The Arbitral Tribunal's Analysis

479. The Arbitral Tribunal has noted Claimants' objection that Respondents somehow switched theories in support of their Counterclaim 13, from that of an illegal transfer or assignment of the Lease by Veolia to Rubicon, to that of an illegal *de facto* joint venture between the latter.[377]

480. The Arbitral Tribunal does not consider that the change of theories has caused prejudice to Claimants. Notably, the Arbitral Tribunal has received extraordinarily extensive submissions from both Parties and their experts on the multifaceted Counterclaim 13.[378] At this stage of the reasoning, the issues that appear determinant for the Arbitral Tribunal's decision on Counterclaim 13 are essentially factual or technical. In any event, the Arbitral Tribunal agrees with Respondents that the variation between their lines of arguments with respect to Counterclaim 13 does not imply any contradiction as the facts underlying the two theories are the same: "*Respondents have*

[374] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1062; see also paras. 1174-1193.

[375] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1180.

[376] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1180.

[377] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1029.

[378] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 1021 ff., **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 443 ff., **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 1736 ff., **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 668 ff., see also **CEX-003:** Rebuttal Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 23 January 2019, **REX-004:** Sweco Expert Report, dated 13 October 2019.

always stated that, despite signing the Lease, Veolia placed Rubicon shareholders and employees in charge of Vilnius Energy's operations and procurements."[379]

481. As regards the determination of Claimants' liability, Respondents state that the "*main question*" with respect to the alleged *de facto* joint venture between Veolia and Rubicon is "*why did Veolia set up a structure where Rubicon's shareholders and employees occupied high managing positions at Vilnius Energy, while Vilnius Energy awarded the vast majority of its contracts to Rubicon at a premium?*"[380]

482. The question calls for multiple factual determinations, but some of these may well be irrelevant if the Arbitral Tribunal does not ultimately find that the "*de facto* joint venture", "*illegal partnership*" or other "*collusion between*", or "*illegal assignment of the Lease from Veolia to Rubicon*" led to overspending by VE on overpriced goods and services from Rubicon affiliated companies.

483. Respondents submit that the hidden partnership between Veolia and Rubicon breached, "*by virtue of its own structure*", the Lease and the rules applicable to the Lease tender. They further contend that the so-called Veolia-Rubicon "joint venture" breached core provisions of the Law on Energy and of the Law on the Heat Sector.[381] However, it remains that Counterclaim 13 must be linked to a damage incurred by Respondents. In other words, if the partnership Respondents submit is illegal did not cause any damage to Respondents, by virtue of its own structure or otherwise, Counterclaim 13 fails as missing a constituting element of civil liability under Lithuanian law.[382] Similarly, the Claimants' "stonewalling" or Claimants' concealment of its partnership with Rubicon cannot constitute compensable breaches of the Lease if these conducts did not lead to damages to Respondents.

484. Respondents further contend that the hidden Veolia-Rubicon partnership breached Veolia's obligations under the Lease as it entertained conflicts of interests at VE, which in turn allowed Rubicon employees at managerial positions in VE to manipulate tenders and purchase supplies and services from Rubicon companies at an overprice. However,

[379] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 117.
[380] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 113 (emphasis in the original).
[381] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 743.
[382] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 1305 ff.

the question of whether the positions held by Messrs. Janukonis and Samuolis granted them sufficient control as for them to manipulate VE's procurements in favour of Rubicon can only be relevant insofar as, if established, such control led to VE's overspending, which in turn caused damage to Respondents.

485. Similarly, the Management Agreements which allegedly deviated from industry or best practices cannot have caused harm to Respondents if they only led to market or below prices for VE's procurements. Indeed, as recalled by Claimants, "*the remedy of disgorgement does not relieve a claimant from the burden of proving the existence of a damage; only of quantifying it*."[383] In the present case, the existence of a damage must be demonstrated by significant overpricing of VE's procurements from Rubicon companies. The Arbitral Tribunal considers that significant overpricing may be established in case of systematic overpricing practice or in case of an isolated but particularly manifest abuse.

486. The Arbitral Tribunal has carefully reviewed the entirety of the Parties' positions on the multiple elements constituting, according to Respondents, breaches of the Lease on which Counterclaim 13 is based. In view of the above and for the sake of efficiency, it however finds it appropriate to start its analysis by determining whether systemic overpricing of Rubicon supplies and services purchased by VE is established. Although Respondents allege that the existence of conflicts of interests, the alleged manipulation of tenders or the resistance to supervision by Respondents constitute violations of the Lease in themselves, the Arbitral Tribunal could in any event not grant damages in compensation for such breaches if no damage, *i.e.* no overpricing has taken place. The existence of a significant overprice in the purchases of VE from Rubicon companies must therefore be assessed first.

487. This approach is without prejudice to the Arbitral Tribunal's references to aspects of Counterclaim 13 other than overpricing in its reasoning and does not mean that the Arbitral Tribunal has not considered all aspects of Counterclaim 13. The Arbitral Tribunal's focus on determining whether systematic overpricing occurred or not however reflects the fact that, without such systemic overpricing, the importance of other issues is largely reduced insofar as these other issues serve the allegation of

[383] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1202.

overpricing. For example, Respondents' allegation that VE entertained conflicts of interest lacks any relevance if it does not lead to overpriced purchases by VE because of the alleged conflicts of interests. The key issue is whether any conflict of interests gave rise to an inflated price and caused harm. The Arbitral Tribunal also notes that these allegations have already been discussed in relation to Counterclaim 1, and refers to such discussion.[384]

5. Overpricing

5.1 Introduction

488. At the outset of the analysis, it should be emphasized that it is not for the Arbitral Tribunal to second-guess from a financial standpoint the main features of a tender nor the choice finally made by the organizer of a tender by fully reviewing the financial terms of the offers. Any organizer benefits from a financial margin of appreciation within the framework of current industrial and commercial practices at the time of the call for tender, provided that the rules and guidelines of the applicable law are followed. In other words, a difference exists between the legal assessment of a tender and the financial assessment of a tender. It is only insofar as the financial outcome of a tender demonstrates a wrongful act of the organizer that it is of interest to the Arbitral Tribunal. Considering that Vilnius Energy's procurements were subject to the Lithuanian Law on Public Procurement and other public procurement governing orders and regulations[385], the Lithuanian law applies to the review of the tender at hand and of the final decision reached by the organizer.

489. Such an assessment must also be made in consideration of the commitments and representations made by VE at the time of the formation of the lease, in addition to the guidelines provided by Lithuanian law. In particular, VE promised in its tender proposal of 1 October 2001, that, by virtue of its "*experience in designing, installing and*

[384] See above paras. 380 ff.

[385] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 947; **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 1323; **CWS-013:** Witness Statement of Mantvydas Veršulis, dated 10 January 2019, paras. 37-40 and para. 108; **C-607:** National Commission for Energy Control and Prices, Evaluation and Coordination Procedure of Energy Company Investments, No. O3-252, dated 17 April 2015.

managing district networks", it "*can develop innovative solutions that help ensure installation reliability and environmental protection at the lowest cost for customers*"[386]. In addition, the guidelines provided by the 2009 Heat Price Methodology (the ones in force at the time of the tender at hand) are also enlightening: "*the components of heat prices shall be based on the supplier's necessary expenses (rationed by the state) (…)*"[387]. Pricing is designed to, *inter alia*: "*ensure long-term, reliable and good quality heat supply at the lowest possible cost*" [388]. These representations and requirements formed the legitimate expectations of the other party to the lease agreement.

490. Given the above representations and requirements, the Arbitral Tribunal considers that the said "*lowest possible cost*" to the customers must in each case be put into balance with installation reliability and environmental protection. This implies that the best offer that should be identified by the organizer of a tender is not necessarily the lowest offer but the one that shows the best ratio between low price and other requirements such as reliability or environmental protection.

491. For the reasons stated above, the Arbitral Tribunal finds it necessary and a priority to assess whether Respondents' allegations that Claimants' misconduct led to purchases of goods and services by VE at prices far above the market are established.

492. The Arbitral Tribunal will analyze the specific allegations of overpricing relied on by Respondents which are addressed in their Post-Hearing Brief.

493. This task is, however, difficult. The crux of the matter crystallizes in a debate of the Parties' technical experts who proceeded by way of comparisons without relying on the same data, information and, of course, instructions. The respective experts' positions are therefore wide apart, and the decision of the Arbitral Tribunal will ultimately be an assessment of whether one of the Parties or its expert's position was more convincing

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[386] **R-029:** Dalkia's Proposal for Tender of Vilnius City Municipality for Assets, Lease and Operation of VST, dated 01 October 2001, p. 69 (of the pdf), (Emphasis added.); see also **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1335.

[387] **C-183:** National Commission for Energy Control and Prices, Resolution Regarding Methodology for Setting Heat Prices, No. O3-96, dated 08 July 2009, para. 64; **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 11246.

[388] **C-183:** National Commission for Energy Control and Prices, Resolution Regarding Methodology for Setting Heat Prices, No. O3-96, dated 08 July 2009, para. 3.2; **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1246.

or less far-fetched in the Arbitral Tribunal's appreciation. If the Arbitral Tribunal remains undecided after in-depth scrutiny of the evidence with respect to a given item of overpricing, it must conclude that overpricing, the burden of proof of which lie with Respondents, is not established.

5.2 The Individual Heat Substations

494. Respondents submit that VE manipulated its tender for the supply of Independent Heat Substations ("**IHS**") No. 107756 of 23 February 2011[389] such that Rubicon, and more specifically its subsidiary Axis Industries ("**Axis**"), would win the tender, which, in turn, led to overpricing. This claim should not be confused with the Respondents' allegation that VE manipulated the tender for the maintenance of IHS, VE's tender of 5 January 2011, Tender No. 99126.[390] As discussed below, Respondents base their claim for overpricing of all IHS purchases by VE by extrapolating the results of their analysis of the tender for the supply of IHS No. 107756.

495. Claimants deny all of Respondents' claims. The Arbitral Tribunal addresses here only their response to this specific part of the Counterclaim relating to the IHS.

496. The Parties' submissions over the course of the pleadings, hearing and post hearing briefs are complex and, at times, not entirely clear. In the end, the Parties' primary focus in their post-hearing submissions was the debate between their respective experts regarding the appropriate benchmark for determining whether Tender No. 107756 was awarded at a price that was too high and in breach of Lithuanian Procurement Law, described below. The Arbitral Tribunal, however, summarizes the Parties' respective positions over the course of their pleadings.

5.2.1 The Parties' Positions

a. Respondents' Position

[389] **R-969:** Vilnius Energy, Technical Specifications, Procurement No. 107756, dated 23 February 2011.

[390] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1033 ff., **C-425:** Letter No. 4S-1272 from the Public Procurement Office regarding Evaluation of the Procurement Procedure No. 99126, April 11, 2011, dated 11 April 2011.

497. Respondents initially alleged breaches relating to maintenance services for the IHS.[391] Respondents' complaint regarding Tender No. 107756 arose from documents disclosed during document production, which followed the exchange of the Parties' initial pleadings. In their Submission Supplementing the Statement of Defense and Counterclaim, Respondents presented Counterclaim 13. As part of this Counterclaim, Respondents alleged that, by way of the Management Agreements (which the Respondents later refer to as the "DHN [District Heating Network] Transfer Agreement" or "DHN GMA" and the "Substation Transfer Agreement" or "IHS GMA"), Claimants transferred in 2002 all of the DHN and IHS work to Rubicon at an overprice which they knowingly passed on to Respondents and Vilnius consumers.[392] This allegation seems to cover all of VE's tenders for IHS supply and installation under the IHS General Management Agreement which, it appears, applied until about 2009. They maintain that due to this history, the overpricing continued after the expiry of the IHS General Management Agreement until the end of the Lease.

498. The specific issue addressed here was developed in Respondents' Rejoinder and Reply to Counterclaim [393] where they distinguish between the majority of all procurements for IHS under the IHS General Management Agreement and this later separate procurement by way of Tender No. 107756 of 23 February 2011 for the installation of 210 IHS (120 new IHS and 90 replacements for ones previously installed). The tender was awarded to Axis in the amount of USD 2,027,0000.

499. Respondents allege that the procurement of Tender No. 107756 was manipulated by way of a combination of stringent technical requirements which excluded bidders other than Axis Industries.[394]

500. In addition to Counterclaim 13, Respondents also allege overpricing of IHS as part of their Counterclaim 5 for failure to invest the amounts required under the Lease. There

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[391] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2023, para. 326.

[392] **SoD Suppl.:** Respondents' Submission Supplementing the Statement of Defense and Counterclaim, dated 08 October 2018, paras. 154-163:**Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 320 ff and paras. 871 ff, **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 183, paras. 191-192, p. 64, Sweco's Direct Presentation, slides 40-44.

[393] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 978-979.

[394] See **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 979-989, paras. 1966-1972.

is an overlap between Counterclaim 13 and Counterclaim 5.[395] Respondents clarify that the overpricing calculated by Sweco in respect of Tender 107756 should apply to all of VE's tenders for all IHS over the course of the Lease on the basis that all IHS were supplied by Rubicon and that Sweco's benchmarking was based on the great majority of tenders which occurred in 2003/2004 and the prices paid for IHS increased over time.[396] In their view, this demonstrates that deducting the 50% overpricing from the total sum spent by VE for IHS is reasonable and conservative. In addition, Respondents submit that the 10% premium for the cost of works paid by VE to Rubicon under the IHS General Management Agreement must also be deducted from Claimants' total investment under the Lease for the purpose of Counterclaim 5. Respondents' *quantum* experts, FTI, calculated that the total overpricing of all of the IHS installed by VE amounts to EUR 8.7 million.[397]

501. In their rejoinder, Respondents assert that the following technical requirements for Tender No. 107756 were designed to ensure that only a Rubicon company could win the tender. In particular, VE's Technical Specifications:

    a. required that all components of the IHS be produced by the same supplier;

    b. mandated compliance with technical drawings which also required potential suppliers to use Rubisafe devices (a data collection device produced exclusively by Axis Industries) in the IHS;

    c. included a provision that the substations be equipped with a heat meter. Annex 3 of VE's Technical Specifications listed the acceptable type of heat meter and referenced the "Technical Description" of the meters found on the Axis Industries' website.[398]

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[395] See **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 979-989 and paras. 1966-1972.

[396] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1968-1971.

[397] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1968-1971.[397]

[398] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 982-985. Annex 3 of the Technical Description of the meters provided as follows: "Note: design companies, in preparation of working designs for the thermal energy metering units for objects of UAB Vilnaus Energija, are to select from meters types indicated in this table. The Technical Description of heat meters and flow sensors is presented on

502. According to Respondents, the direction to use the Rubicon Rubisafe device and the Axis heat meters led inevitably to Axis Industries' successful bid.[399]

503. Respondents also posit that VE's original 14-day deadline, later extended to one month, for suppliers to prepare their bids was too short a period for a turn-key contract. Respondents note that on top of the short deadline to submit bids, the tender documents were only available in Lithuanian. Time and language barriers made it particularly difficult for potential international suppliers to bid.[400]

504. Respondents submit that, according to their expert, Sweco, the manipulations of Tender No. 107756 and Axis Industries' successful bid led to an overpricing of IHS by 50%. [401] Respondents explain that they base their calculation on Sweco's benchmarking of prices paid by VE to install IHS in 2003 and 2004 ("**IHS 2003-2004 Period**"). Moreover, they note that during the IHS 2003-2004 Period, all IHS were installed by Rubicon Apskaitos.[402]

505. In their analysis, Sweco compared the IHS installed by VE with comparable IHS installed in Kyiv between 2000-2003. According to Sweco, the IHS installed in Kyiv were comparable in terms of technical specifications, age and region to those installed by Rubicon companies for VE. Sweco's benchmarking for costs of equipment, including Rubisafe devices, excluded installation works because they lacked comparable data.

506. According to Respondents, the 50% overpricing identified by Sweco is reasonable and conservative since all IHS were supplied by Rubicon during the Lease period and prices paid by VE increased over time. Moreover, Respondents say that the 10% premium paid under the GMAs should be also deducted on account of the installation works. In essence, Respondents argue that the full amount represented by the 50% overpricing of the equipment supplied and the 10% premium on installation works should be

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the website of UAB Axis Industries at https://www.axis.it." (emphasis added by the Respondents). See **R-969:** Vilnius Energy, Technical Specifications, Procurement No. 107756, dated 23 February 2011, Annex 3.

[399] [reference]

[400] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 987.

[401] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 988, para. 1967. In other words, VE spent 1.5 times what the Respondents say a prudent supplier should pay. **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 256-327.

[402] According to the Respondents, from 2002-2010, Rubicon Companies installed 3493 IHS for VE. In 2011, Axis Industries installed an additional 230 IHS.

deducted from VE's alleged investment when analyzing VE's investment obligation (EUR 167.7 million) under Counterclaim 5.[403]

507. In their Post Hearing Brief, Respondents maintain their claim that VE purchased equipment and services from Rubicon at an overprice.[404] Relying on Sweco's analysis, they argue that, due to overpricing, the IHS were overpriced by between 46-63% which, they say, was conservatively calculated at 50% by Sweco.[405] Respondents explain that Sweco properly benchmarked the price of VE's IHS from the IHS 2003-2004 Period since the installation of the majority of the IHS supplied and installed by Rubicon entities took place in those years. Moreover, they submit that Sweco accurately compared the IHS 2003-2004 Period installations to IHS installations in Ukraine in 2003 for which Sweco had access to relevant tender documents. According to Respondents, Claimants' experts, AFRY, confirmed Sweco's analysis, admitted that Sweco's timeframes made sense, and agreed that the cost of IHS with comparable functionality were likely similar between Lithuania and Ukraine.[406]

508. Respondents also submitted that Sweco correctly removed the costs of works when benchmarking IHS, noting that Sweco had access to the cost of installation of IHS by VE in Lithuania and the comparable installation of IHS in Ukraine. They explain that removal of these costs is appropriate because the cost of labour varies greatly between countries as opposed to the cost of equipment and technology. They say AFRY accepted this in cross-examination.[407]

509. Respondents went on to submit that AFRY's benchmarking analysis was unreliable since it benchmarked VE's IHS against tenders held in Serbia in 2007 and Finland in 2019 and did not take into account the different costs of labour. Further, they affirm that the Serbian benchmark used by AFRY included items unrelated to the IHS.

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[403] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 167-172. Respondents submitted that Sweco's analysis was confirmed by the NCCPE's findings that VE's substations were 59% more expensive than other comparable substations, without including the cost of Rubisafe devices, and 93% more expensive if Rubisafe devices were included. See **C-532:** Letter from the Pricing Commission to Vilnius Energy, February 10, 2010, dated 10 February 2010, p. 22.

[404] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 702-712.

[405] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 715-717.

[406] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 715. Claimants deny this [reference for Claimants to be found].

[407] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 716.

Respondents also criticize AFRY's use of the Lithuanian Sistela 1 database which, according to them, uses retail prices normally 20-30% higher than market prices.[408] Further, AFRY's benchmarking included unnecessary "additional functionalities."

510. According to Respondents, by reducing the Sistela comparator by 30% and by removing the additional functionalities, the overpricing in VE's IHS results in 59%, which confirms the reasonableness of Sweco's conclusion of overpricing by 50%.[409]

511. Finally, Respondents noted that VE's estimate of the costs of installation for its IHS included in the tender at LTL 3000 per unit was significantly inaccurate since it purchased the installation works from Rubicon for LTL 5400.[410]

512. In their Reply Post Hearing Brief, Respondents maintained that Sweco's reliance on benchmarks from Ukraine in 2003 was appropriate. Moreover, they explain that Sweco's exclusion of a 2001 procurement contract in Ukraine was appropriate since it occurred prior to the signature of the Lease. They submit that the data from the 2001 procurement was unreliable since, unlike VE, the contract was made by an immature purchasing entity making an early test in the market. Respondents note that the price per IHS in the 2001 procurement, which Claimants' experts, AFRY, refer to was €8000 whereas, in the later contracts (2003), the price per IHS ranged between €3300-€5000. Therefore, according to Respondents, the 2001 Ukraine procurement was not relevant and was properly excluded by Sweco.[411]

513. On the other hand, Respondents maintain that Sweco's reliance on two contracts from Ukraine in 2000 to identify IHS installation costs is justified since these contracts confirmed its other benchmark with respect to labour costs from 2003. Therefore, they contend that VE's complaint that the installation costs identified by Sweco were disproportionate due to the small size of the contracts from 2000 is unfounded since

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[408] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 717. See also **C-843:** Sistela website, "Relevant Comments," *available at*: http://www.sistela.lt/Aktualus/komentarai, dated 01 January 2020 and **R-1896:** National Audit Office Report, Procurements of Construction Works by the State Enterprise Lithuanian Road Administration, No. VA-P2-20-11-26, dated 23 December 2009, p. 2;

[409] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 717, Sweco's Direct Presentation, slide 60.

[410] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para.718. Respondents also repeated their earlier submission that the NCCPE found VE's IHS to be overpriced by between 59-95%.

[411] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 155.

Sweco also took into account the 2003 contract, which was substantial. Further, Respondents submit that the installation costs in the 2003 contract were the same as those in the 2000 Ukraine tenders.[412]

b. Claimants' Position

514. Claimants deny any breach of the Lease as alleged in Counterclaim 13. They respond that they did not transfer the performance of the Lease or improperly partner with Rubicon. Rather, they closely supervised and managed the operations of VE. They affirm that they employed standard and efficient business strategies, which included the use of the General Management Agreements, which, for an investor in Lithuania at the time, were necessary and efficient and were also consistent with industry practice.[413] Claimants also state that VE voluntarily disclosed any related party transaction flowing from the role played by Shareholders of Rubicon in its management and appropriately managed any conflicts of interests. In this regard, Claimants state that neither the Lease nor Lithuanian Law addressed conflicts of interests nor prohibited Rubicon Companies from participating in tenders].[414]

515. With respect to procurement, Claimants submit that VE conducted its procurement and tendering in accordance with Lithuanian Law and denies that it manipulated any tenders, including Tender No. 107756 of 23 February 2011 for the installation of 230 IHS.

516. With respect to Respondents' claim that VE manipulated Tender No. 107756 to ensure that Axis Industries would be the successful bidder and receive a premium price, Claimants respond that VE complied with Public Procurement Law, encouraged

[412] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 156, Transcript, Day 15, Cross-examination of Sweco by Mr. Ortiz, 19/5-24, **REX-004:** Sweco Expert Report, dated 13 October 2019, Annex 7, Worksheet "Ukraine_DB".

[413] Rejoinder **on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 18-22.

[414] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1801-1820, 1865-1876. Claimants also maintain that even if conflicts of interest were present, Respondents have not demonstrated that any such conflicts permitted Rubicon Companies to overcharge for works and materials. See **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1865.

competition, and obtained a fair price.[415] In response to Respondents' specific allegations, Claimants make the following arguments:

a. In response to Respondents' criticism that the tender required the same supplier for all IHS components, Claimants answer that Respondents misunderstood the technical specification of the tender. Claimants explain that the IHS are comprised of various components which are combined into one modular substation unit. They submit that the tender required that the different individual components across all the IHS be produced by the same supplier. In other words, if a component of an IHS was produced by a specific supplier, then the same supplier had to produce the same component for all other IHS. However, this did not preclude other suppliers from producing other components within the IHS. Claimants explain that the tender specification was intended to facilitate maintenance of the equipment by reducing the number of different supplier parts for regular maintenance or repairs.[416]

b. The Requirement to include a Rubisafe device in the IHS did not restrict competition since any bidder could purchase and distribute Rubisafe devices and could have supplied them as part of this tender.[417]

c. The tender did not require the inclusion of a Rubicon-produced heat meter. VE did not procure any heat meters as part of this tender for modular IHS, which consist of the assembled equipment required for the operation of the substation and did not contain heat meters. Annex 3 of the Technical Specifications listed acceptable heat meters to provide guidance for companies preparing designs for the IHS and referred to a technical description of heat meters on Axis Industries' website. The list of heat meters in question did not restrict competition among

[415] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 2116-2122.

[416] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 2117, **R-969:** Vilnius Energy, Technical Specifications, Procurement No. 107756, dated 23 February 2011, **CWS-016:** Third Witness Statement of Tadas Janušaukas, dated 29 May 2020, para. 90.

[417] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 2118, **CWS-016:** Third Witness Statement of Tadas Janušaukas, dated 29 May 2020, para. 91.

potential bidders since no heat meters were acquired through the tender and bidders could have used any of these meters in their IHS designs.[418]

d. With respect to the time limit for submitting tenders, Claimants clarify that VE initially provided a term of 14 days which was twice the minimum term required under the Public Procurement Law. Subsequently, the deadline was extended to provide for 31 calendar days.[419]

e. Claimants state that VE complied with Lithuanian Law and prepared tender documents in Lithuanian; they were not required to provide tender documents in other languages.[420]

517. Claimants contend that the tender was in compliance with the Public Procurement Law and that VE obtained a market price for this tender. Claimants rely on AFRY's analysis, which is based on VE's IHS procurement during 2003 and 2004, and demonstrates that VE's average IHS costs were in line with Lithuanian benchmark prices and below the price-level of comparable IHS installed in Serbia and Finland.[421]

518. Claimants rely on the evidence of their experts, AFRY, which compared the costs of VE's IHS in 2003 and 2004 to both the Sistela1 cost database and comparable international projects. Claimants' witness Mr. Versulis explained that Sistela is a company that publishes costs guidelines which "*reflect estimates of the current market costs of construction work design, realization, project management, and other costs*".[422]§Claimants state that these were appropriate comparables and note that Sweco, contrary to its benchmark analysis of the District Heating Network, did not use the Sistela database to create its benchmark. Claimants submit that by using the

[418] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 2119; **CWS-016:** Third Witness Statement of Tadas Janušaukas, dated 29 May 2020, para. 92. The Claimants say that VE received no complaints related to the Technical Requirements.

[419] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 2120.

[420] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 2121; **CLA-154:** Republic of Lithuania, Law on Public Procurement, dated 06 November 2011, Art. 24.9. According to AFRY, providing the tender documents only in Lithuanian was consistent with common practice among district heating companies.

[421] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 2022; **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 603, para. 618-620.

[422] **CWS-013:** Witness Statement of Mantvydas Veršulis, dated 10 January 2019, para. 93.

Sistela1 database, AFRY found that VE's actual costs per IHS on a like-for-like basis were 0.15% lower than the Lithuanian benchmark. When it compared the cost of VE's IHS with international benchmarks of IHS in Serbia and Finland, AFRY concluded that VE's actual average IHS prices were 17.6% lower than the price of comparable IHS in Serbia and 33% lower than the price of comparable IHS in Finland.[423] Claimants also point out that AFRY's comparison with the Ukrainian IHS used by Sweco indicates that Sweco excluded data which affected the average prices of the IHS procured.

519. In this regard, Sweco compared VE's IHS costs from 2003 and 2004 to IHS projects in Kiev between 2000-2003, but only assessed data for 317 IHS installed in 2003, and excluded over 50% of the installations during the period in question, in particular 330 substations installed in Kyiv in 2001. Correcting for this alleged error, Claimants explain that VE's actual prices for IHS were between 4% and 9% lower than the benchmark of IHS prices in the Kiev projects.[424]

520. With respect to Respondents' reliance on a 2010 NCCPE Report that concluded that, in comparison to Sistela prices, VE's IHS were overpriced by 59%, Claimants answer that the Report does not support this conclusion. In particular, Claimants raise the following points:

a. The NCCPE compared VE's planned investment in IHS, and not the actual costs, with the Sistela benchmark.

b. The NCCPE acknowledged that it compared VE's costs against Sistela data that excluded much of the works necessary for the installation or reconstruction of the IHS in question.

c. The Sistela data does not include the cost of remote control and data transmission elements of the IHS provided by the Rubisafe devices. In its

[423] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1062.

[424] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1063; **CEX-012 :** AFRY Expert Report , dated 26 May 2020, para. 616, Table 6. The Claimants note that AFRY went on to conclude VE installed the IHS at reasonable prices.

comparison, the NCCPE relied on VE's complete IHS costs which included materials, and a variety of works necessary for the installation of the IHS.

d. The NCCPE's comparison did not account for individual types of IHS but, instead relied on an aggregate investment total. According to Claimants, the price of an IHS may vary significantly depending on the load and power of the IHS itself which the NCCPE did not consider. The NCCPE should have compared VE's actual costs per substation to the Sistela price for a comparable IHS.

e. The NCCPE's analysis did not consider the costs of technologies that were excluded in the Sistela IHS price, such as pressure difference regulators to adjust for the pressure of water which is affected by the size and terrain of Vilnius. According to Claimants, these technologies increase the price of IHS.

521. As a result, Claimants conclude that the NCCPE's comparison does not establish that VE's IHS were overpriced.[425]

522. Claimants also note that prior to the commencement of the Lease, VST installed IHS that cost more than those installed by VE. In addition, the IHS installed by VST did not include Rubisafe devices, or any comparable devices with remote data collection or remote-control functions. Claimants assert that, in nominal terms, the average price of the IHS that VST installed between 1995 and 2001 was higher than the average cost of IHS which included the Rubisafe devices that Vilnius installed between 2002-2009[426].

[425] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1068.

[426] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1069; **CEX-003:** Rebuttal Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 23 January 2019, para. 58. The Claimants note that due to an amendment in 2011 to the Law on the Heat Sector, IHS were no longer leased assets and suppliers were prohibited from providing maintenance services on them. As a result, various functions of the Rubisafe devices could no longer be used and VE decided to install simple remote meter reading and data transmission devices which were less expensive than the Rubisafe devices and whose pricing does not appear to be in dispute between the Parties. The Claimants say that but for the amendment of the Law, VE would have continued to install Rubisafe devices and use its various useful functions. See; **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 1078- 1081.

In addition, Claimants point out that VE achieved lower costs for its IHS than the World Bank estimated in a 2001 proposal to finance the installation of IHS for VST[427].

523. In their Post Hearing Brief, Claimants repeated their submissions that VE's investments, which Respondents claim were overpriced, were thoroughly reviewed and approved by Respondents who accepted ownership of the assets in question. They emphasize that the Investment Plan and its subsequent amendments, the Quarterly Reports and the Asset Sale List and accompanying documents provided details of when and how VE's investments were made, the details of the investments and VE's actual costs as well as each of the contractors and suppliers involved. On this basis, Claimants submit that Respondents were fully aware of who executed the investments and the prices VE paid. Therefore, they state that it is too late for Respondents to re-evaluate all of VE's procurements and investments at this stage. In any event, Claimants submit that VE's procurements and the procurement related to IHS are below expected market prices.[428]

524. Claimants criticized Sweco's analysis on the basis that:

a. It selected data in order to ensure that its Ukrainian benchmark was as low as possible;

b. Relied on an improper Ukrainian benchmark when a reliable Lithuanian benchmark, Sistela1, was available;

c. Did not benchmark VE's IHS against those with equivalent functionality; and

d. Only benchmarked equipment that did not consider total cost.[429]

525. In particular, Claimants allege that while Sweco relies on three precedent procurements from Ukraine (Kyiv) in 2003, it excludes an IHS procurement from Kyiv that took place in 2001 on the basis that it was too distant from VE's procurement period. However, Claimants underline that Sweco frequently referred to procurements more than two

[427] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1069; **CEX-003:** Rebuttal Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 23 January 2019, para. 58, Table III.E.2.2.

[428] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 714-715.

[429] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1133 and the sources cited there referring to AFRY ER1.

years removed from relevant dates. In this regard, Claimants refer to Sweco's use of two tenders which took place in 2000 to calculate the cost of installation which it deducted from the overall installed cost in order to determine its equipment-only IHS benchmark. As a result, Claimants submit that there was no legitimate reason to ignore the 2001 procurement. Adding the relevant data from 2001, Claimants state that Sweco's calculation of alleged overpricing reduces substantially from 63% to 11%. This figure reduces to only 1% if Sweco's assumption that IHS units were independent is factored in by increasing Sweco's updated Kyiv project IHS weighted average by 10%. [430] Therefore, once the appropriate corrections are made, Sweco's benchmarking does not yield any overpricing.[431]

526. Claimants also submit that Sweco's analysis standardizes its precedent transactions on an equipment-only basis, since it alleges that the cost of labour and, therefore, installation costs would be difficult to compare between Lithuania and Ukraine. According to Claimants, Sweco did this by subtracting an installation cost of €2500 per IHS from the total procurement cost on the basis of its two installation-only related benchmarks from 2000. Claimants state this amount is significantly higher than VE's actual installation cost of €1439. Further, Sweco's referenced tenders are said to be small, installation-only tenders, as opposed to the larger, installation and supply procurement benchmarks. According to Claimants' experts, AFRY, large procurements and bundling can result in lower prices. Therefore, they submit that the tenders upon which Sweco based its installation cost estimate are not valid. Correcting for these inaccuracies, Claimants conclude that VE paid substantially less than Sweco's benchmark for IHS units. Claimants affirm that using AFRY's analysis, constructed on the basis of the Sistela1 benchmark, or adjusting for Sweco's improper benchmarks, the result is that no overpricing occurred.[432]

527. In their Reply Post Hearing Brief, Claimants respond to Respondents' position that the Sistela database is inappropriate for benchmarking the IHS procurement since it reflects retail prices which are above market. In Claimants' view, this is irrelevant. The documents Respondents rely on clearly provide that the Sistela database provides

[430] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1033(a) and footnote 1723.
[431] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1133(a).
[432] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1133(b), para. 1134.

benchmark prices for retail. The Sistela database is a respected Lithuanian benchmark used by entities including the Lithuanian Government, the NCCPE and Respondents themselves. Claimants submit that, in fact, the NCCPE, evaluated the fair price of IHS by reference to Sistela without making any reductions to account for the existence of any Sistela "overpricing."[433] Since the Arbitral Tribunal is being asked to assume the role of the NCCPE and assess VE's investments under the Lease, the Arbitral Tribunal should utilize the same methodology employed by the NCCPE, which was employed by AFRY in its benchmarking.[434]

528. However, if the Arbitral Tribunal adopts Sweco's analysis based on Ukrainian benchmarks, the benchmark must be adjusted to properly account for the 2001 data that Sweco excluded in its calculation of equipment costs and to account for the non-comparable 2000 data that Sweco used to calculate the installation costs. Claimants submit that once the benchmarks are adjusted, Sweco's model shows that VE's procurement achieved better than benchmark prices.435

5.2.2 The Experts' Evidence

a. Sweco's Evidence

529. In support of their Counterclaim 13, Respondents relied on the expert evidence of Sweco Energy AB ("**Sweco**") which forms part of the Sweco Group, a large Swedish Architecture and Engineering Consultancy firm with international operations. Sweco's expert report was authored by Mikael Jönsson and Michael Morris, who were examined at the Hearing.

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[433] **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 276; Letter from the Pricing Commission to Vilnius Energy, 10 February 2010, **C-532:** Letter from the Pricing Commission to Vilnius Energy, February 10, 2010, dated 10 February 2010, p. 22, see also **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022**,** para. 1129.

[434] **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 276; **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1129.

[435] **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 277. The Claimants also note that the installation cost of LTL 5400 which the Respondents refer to and compare to a very small subset of the IHS installed, representing only 19 IHS which represented approximately 1.6% of the total costs (excluding VAT) of the 230 IHS installed as part of Procurement No. 107756. See **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 278 and the sources cited there.

530. As part of their evidence, Sweco assessed VE's procurements.[436] In their analysis, Sweco identified what it considers an important conflict of interests with regard to VE's top officials, Messrs. Samuolis and Janukonis who were also owners of Rubicon. Sweco also reviewed and commented on two agreements for the general management of Claimants' investments: Agreement No. 02-05-01-759 of 16 May 2002 covering the "Construction, Reconstruction and Repair of Heating Roots" ("**DHN Agreement**"); Agreement No. 02-07-01-819 of 4 July 2002, covering the "Construction, Reconstruction and Renovation Works of the Heat Blocks" ("**IHS Agreement**").[437] Sweco's analysis concluded that the DHN Agreement and the IHS Agreement (collectively, the "**GMAs**" or "**PMAs**") form part of what they consider a blatant conflict of interest.[438] As described elsewhere, Sweco determined that the GMAs, which appear to have remained in force until 2009, created a dependency of VE on Rubicon Apskaitos Sistemos (the Rubicon Company party named in the GMAs) noting, in particular, the duration of the GMAs and the exclusivity given to Rubicon to supply any works or services under the GMAs.[439] Sweco identified what it considers to be conflicts of interests created by the GMAs and described examples of how these conflicts of interest affected the implementation of the Agreements.[440] Sweco was also of the opinion that Rubicon's performance under the GMAs and VE's in-house information it acquired during that time, provided Rubicon with a significant advantage over other bidders with respect to other procurements falling outside the scope of the GMAs and after their expiry.[441]

531. Sweco conducted a statistical analysis of VE's tenders and concluded that of a total contract value of VE's procurements of €429.7 million, as much as 65%, €281 million (including VAT), were procured from Rubicon. Sweco contrasts this with Rubicon's much lower success rate with other district heating companies unrelated to Rubicon. Further, according to Sweco, 65% of the contracts were awarded by VE to Rubicon without competition since it was the only bidder. Based on contract values, Sweco

[436] **REX-004:** Sweco Expert Report, dated 13 October 2019; **REX-004 Add:** Addendum to Sweco Expert Report, dated 14 August 2021. The authors of the Reports are Mikael Jönsson and Michael Morris.

[437] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 167-223.

[438] The Claimants referred to these agreements as Project Management Agreements (PMAs).

[439] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 169-176.

[440] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 176-217.

[441] **REX-004:** Sweco Expert Report, dated 13 October 2019, para.219.

concluded that where it presented a bid, Rubicon's success rate with VE was 97%. In Sweco's view, Rubicon's extraordinary success rate was not surprising given the conflict of interests created by VE's relationship with Rubicon.[442]

532. Sweco also conducted a detailed assessment of several large contracts between VE and Rubicon in which Rubicon was the successful bidder. According to Sweco, their findings were consistent with their analysis of the GMAs and their statistical analysis of all procurements.[443] Among those procurements, Sweco constructed price benchmarks for comparison. The first of these was the procurement relating to IHS.

533. Sweco describes IHS as standardized, usually prefabricated units installed to separate the district heating distribution system from the building heating system in order to control the indoor temperature and domestic hot water temperature of the connected building. Dependent IHS permit water from the district heating system to enter the building heating system, whereas independent IHS contain a heat exchanger which keeps the water from the district heating system separate from the water in the building heating system. According to Sweco, the independent IHS are the technically preferred option for a number of reasons.

534. 88% of the IHS installed by VE and VST are of the independent type and the remaining 12% are of the dependent type. The IHS installed by VE included a Rubisafe device, developed by Axis Industries, a member of the Rubicon Group, which serves as a remote data transmission device and controller. The IHS also included a Rubisafe Information System ("**RIS**") which is a metering and control system also developed by Axis Industries. In addition to the Rubisafe devices, the RIS provides a communication system which permits data collected by the Rubisafe devices to be stored and transferred to billing and other IT systems. Starting in 2003, VE engaged Rubicon Apskaitos to supply remote data collection services. As of 2010, VE procured these services by way of three tenders which Respondents state were manipulated to ensure that they were awarded to Axis.[444]

[442] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 224-254.
[443] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 256, para. 264, Table 7.
[444] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 266-272, paras. 286-288; paras. 428-493.

535. Sweco was instructed that the installation of Rubisafe devices and RIS information systems produced by Axis Industries was agreed to between Claimants and Rubicon before the Lease was signed.[445] In addition, Sweco was instructed that the Rubisafe equipment was experimental at the time it was installed. In Sweco's view, a prudent strategy is to install proven equipment which is not experimental in nature. Further, in its view, VE's agreement to use certain equipment supplied by Rubicon before the signature of the Lease is contrary to best practices. In Sweco's view, expensive information and communication systems should be selected after a thorough analysis of the needs of the district heating facilities and available products on the market. In addition, Sweco says the procurement process for acquiring these systems should be by way of tenders which permit domestic and international competition to ensure the best price and performance of the systems acquired. According to Sweco, VE did not follow best practices when it selected and installed Rubisafe devices in the IHS in the Vilnius heating network.

536. Further, Sweco was instructed that when VE and Rubicon signed the first contract for remote data collection services in February 2003, this was done without a prior procurement and without competition.

537. In addition, Sweco was also instructed that the communication and data exchanges between the RIS and the Rubisafe devices, meters and other system components could only be carried out with the assistance of Axis Industries. Further, the Rubisafe communication protocols and components of the RIS systems may not have been made available to VE and are not currently available to VST. In Sweco's view, this would have prevented suppliers other than Axis Industries from providing compatible devices to manage data collection and other services. As a result, by installing Rubisafe devices in all IHS from 2002 onwards, VE became dependent on the Rubisafe solutions for all of the data handling systems both during and after the termination of the Lease.

538. In its Report, Sweco analyzed in detail Procurement No. 107756 which was commenced by way of an Invitation to Tender, dated 1 July 2011. The procurement covered the supply and installation of 210 IHS, of which 120 were new and 90 were

[445] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 289; **R-612:** Minutes of Meeting of Extended Board, dated 21 January 2002, p. 3 of the PDF; **R-608:** Dalkia, PROJECT Heatman, CRI002, dated 02 August 2001, p. 18 of the PDF.

replacements of existing IHS. The contract works included design, production and installation of the IHS.[446] The deadline for presenting offers was originally set for 14 days, expiring on 14 July 2011 and then extended to 1 August 2011. The tender documents were published in Lithuanian, only. The only offer presented was by Axis Industries.

539. In Sweco's view, a number of elements of the tendering process indicate that it was designed to ensure that only Axis Industries could participate. In this regard, Sweco says that the reference to heat meters from Axis Industries in the Technical Specifications would have led potential bidders to believe that only heat meters produced by Axis Industries would be compliant with the Technical Specifications. In addition, potential bidders could have expected that Axis Industries would have an advantage in the procurement process, which would limit interest in competing in the tender. The relevant portion in the Technical Specifications provided as follows:

> "*Note: Design companies, in preparing of working design for thermal energy metering units for objects of UAB Vilniaus energija, are to select from the heat meters of types indicated in this table. The technical description of heat meters and flow sensors is presented on the website of UAB Axis Industries at http://www.axis.lt.*"[447]

540. In addition, Sweco refers to the Rubisafe remote data transmission and control system which was included in the drawings in the Technical Specifications. According to Sweco, the inclusion of Rubisafe devices in the drawings would have led potential suppliers to believe that only Rubisafe controllers would be compliant with the Technical Specifications, again deterring competition.[448]

541. In Sweco's view, reference to both Axis Industries' heat meters and Rubisafe devices strongly limited competition. Since the Technical Specifications prohibited the successful supplier from using different brands of equipment in the IHS, if either Axis Industries' heat meters or Rubisafe devices were installed no supplier other than Axis Industries could supply the substations except by purchasing Axis Industries' equipment. In addition, Sweco considers that the short period for the submission of

[446] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 293-327.
[447] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 304-305.
[448] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 306-307.

tenders and the publication of the tender documents in Lithuanian only created additional difficulties for bidders other than Axis Industries, particularly for international contractors. Although in normal tender conditions other suppliers would have been expected to participate in this tender, Sweco is of the opinion that in light of the way in which the procurement was designed, it is not surprising that only Axis Industries participated in the tender and was the successful bidder.[449]

542. Sweco also refers to the fact that Rubicon had provided assistance to VE in preparing Technical Specifications and had supplied IHS for VE since 2002 under the IHS GMA Agreement.

543. Sweco undertook a benchmarking analysis to compare the prices paid by VE for IHS equipment (excluding installation costs) with what it considers to be comparable market prices.[450] Sweco's analysis covered 3125 IHS supplied by VE and which are now in the ownership of VST. The majority of these IHS (61%) were installed in 2002-2004. Although Procurement No. 107756 was carried out in 2011, Sweco's price benchmarking focussed on the years 2003-2004 when most of the IHS were installed. As a result, the analysis covers most of the IHS installed by VE during the Lease. Sweco notes that the price of an IHS will depend on its capacity such that a larger IHS is more expensive than a smaller one. Capacities depend on the properties of the buildings they serve and can vary greatly. Further, prices can also depend on the composition of an IHS and how they are connected to the district heating network. Sweco takes into account the fact that independent IHS are approximately 10% more expensive than dependent IHS.

544. Sweco used as a comparator one contract awarded in 2003 on a project in Kyiv, Ukraine which consisted of the installation of approximately 1300 IHS in public buildings. Sweco reviewed the winning bid for one of the procurements on the project, for the installation of 85 IHS. Sweco determined that the equipment-only cost of the IHS procured in this tender consisted of equipment comparable to that used in VE's IHS. Further, according to Sweco, the capacities of the IHS in the two procurements were

[449] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 309-311.

[450] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 312-317. Sweco determined that the portion of installation works in the total IHS paid by VE was 17.3%. It deducted this share from the IHS Book Value to estimate the IHS equipment price paid by VE.

similar, as was the connection scheme (dependent or independent IHS). Further, the year in which the procurements were conducted were similar: 2003-2004 for the majority of the VE IHS and 2003 in the case of the Kyiv procurement in question. In addition, the geographic area was similar.[451]

545. Sweco's comparison led it to conclude that for equipment only, VE paid 51% more for the dependent IHS compared to the dependent supplied to Kyiv. Since the vast majority of the IHS installed by VE were independent, Sweco adjusted the price of the IHS installed in Kyiv by 10%. From this, Sweco concluded that VE paid 46% more for independent IHS than would have been the price if such independent IHS had been supplied in Kyiv.[452]

546. Sweco also analyzed three other contracts for the supply and installation of IHS in Kyiv. These contracts were signed in the years 2000-2003 for the installation of a total of 317 IHS. However, for these Sweco only had available general details of the contracts, including the total number of IHS, the type of contract, the supplier and the total contract value. As Sweco did not have available a detailed list of IHS elements for each of the contracts and the related capabilities of the IHS installed, its analysis was performed on an average basis, dividing the total number of contracts per number of IHS that were installed under the scope of each contract. In respect of these contracts, Sweco calculated a weighted average price for the IHS supplied and installed in Kyiv of €4243 and for the IHS supplied and installed by VE of €6,902.[453]

547. Sweco opted not to compare total installed prices in Lithuania and Ukraine since doing so would be difficult due to the different costs of labour. In order to compare the prices of equipment only under these contracts, Sweco deducted what it determined were the applicable installation costs. In the case of the contracts in Kyiv Sweco decucted the installation price of €2500 per IHS. For the VE IHS, Sweco deducted what it calculated was the share of the installation costs incurred by VE on a percentage basis (17.3% of the actual installed cost of the HIS) which amounts to € 1,439. On this basis, Sweco

[451] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 318-319.

[452] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 320-321, table 11. These results were calculated on the basis of a weighted average.

[453] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 322. In Sweco's opinion, the calculation of this weighted average is adequate for the purposes of its analysis because of the large number of IHS included in its review.

determined that VE paid 63% more per IHS than those supplied in Kyiv. However, to be conservative, Sweco increased the Kyiv IHS prices by 10% (since it is possible that Kyiv used a dependant IHS connection scheme which is less expensive than the independent IHS installed in Vilnius). In the end, Sweco found that VE's IHS were 48% more expensive than Kyiv's IHS.[454]

548. According to Sweco, since the vast majority of the large number of IHS purchased by VE was in 2003-2004, Axis Industries supplied all of the IHS throughout the Lease and the overpricing of Procurement No. 10775 was calculated as a percentage, its results can be extrapolated to all of the IHS supplied and installed by VE[455]. Based on its comparisons, Sweco concluded that VE paid, on average, 50% more for all of the IHS equipment it procured, as compared to similar IHS prices available on the market. Sweco also concluded that, in light of Rubicon's position as the exclusive supplier of IHS for over nine years prior to Procurement No. 107756 and the flawed procurement process in favour of Axis Industries, Procurement No. 107756 was a tender in name, only and was never intended for competition.[456]

c. AFRY's Evidence

549. AFRY is a Swedish-Finish international Engineering, Design and Advisory Company. Two divisions of AFRY contributed to their expert report and evidence, the Management Consulting and Energy Divisions. Its primary authors were: Jarno Kaskela, Matthias Laue, Sami Pastila and Peter Postpischl. Mr. Kaskela had overall responsibility for the Report. Together with Mr. Laue, he presented AFRY's Report and was subject to examination at the Hearing.

550. In response to Sweco's evidence, AFRY expressed the view that: VE's overall district heating system cost level was not exceptional and was within the range of comparable district heating operators; VE's Project Management Agreements ("PMAs" or, as referred to by Respondents, GMAs) were reasonable and justifiable; VE's procurement and tendering procedures were appropriate and did not require unreasonable functionality, unusual technical requirements or provide too little time to present tender

[454] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 323.
[455] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 224.
[456] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 325-327.

bids; and VE's actual spending measured against appropriate benchmarks were at market level.[457]

551. AFRY conducted an analysis of VE's overall district heating system costs and concluded that VE's costs were in line with those of what it considers to be VE's peer group, including the second and third largest district heating operators in Lithuania as well as select district heating providers in neighbouring European countries.[458]

552. AFRY's analysis compared VE's overall heat supply costs in relation to heat sold and to the network length with the overall costs of the selected comparators on the same bases. It also compared VE's depreciation and amortization expenses on the basis of heat produced in its own facilities in relation to the network length with the same expenses of the comparators. AFRY's conclusion was that VE's overall district heating costs and its depreciation and amortization expenses were in line with those of its peers in the comparison group.[459]

553. According to AFRY, the results of its analysis of overall district heating system costs indicate that Sweco's assertion that VE engaged in significant overspending by reason of procuring equipment and services from Rubicon companies are not plausible. If Sweco's allegations of significant overspending were true, AFRY says that this would be reflected in VE's overall district heating system costs. AFRY explains that VE's costs were in line with those of its peers in the comparator group. Therefore, Sweco's allegations of overspending by VE cannot be correct.[460]

554. AFRY also analyzed the district heating network tenders that Sweco examined to reach its conclusion of overspending. AFRY referred to its review as a "bottom-up" analysis of VE's tenders. AFRY maintains that its bottom-up analysis confirms that VE did not overspend in awarding contracts to Rubicon companies at inflated prices, thereby overpricing its supply of heat under the terms of the Lease.

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[457] **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 483-488.
[458] **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 489-508.
[459] **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 497-507.
[460] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 507.

555. In response to Sweco`s criticisms of VE`s tendering procedure and individual procurements, AFRY was of the opinion that VE did not create barriers to competition and favour Rubicon companies by way of technical specifications and other requirements. In this regard, AFRY says that VE`s technical specifications issued for the various procurements were reasonable, the bid preparation times exceeded the minimum requirements, and VE`s publication of tender documents in the local language, Lithuanian, was in line with common practice.[461]

556. With respect to VE's PMAs, AFRY is of the view that they were reasonable and justifiable from a technical perspective.[462] In response to Sweco`s criticisms of the PMAs, AFRY`s position is as follows:

a. the PMAs are similar to an Engineering, Procurement, Construction and Management contract model ("EPCM") or an Applied Engineering Procurement Construction contract model ("Applied EPC") which are a common contract model in the energy sector. According to AFRY, EPCM contract models are not intended for contractor "turnkey" deliveries, but rather for the management of deliveries provided by various contractors. In this model, various contractors work on a project without being subordinated to a leading contractor, although their work in relation to each other is coordinated by the EPCM Consultant. AFRY says that VE`s PMAs correspond in many ways to the concept of the EPCM model and that Rubicon, as Project Manager, performed many of the tasks that would normally be performed by an EPCM Consultant. An EPCM Consultant can also act as a contractor, which is not unusual in the energy sector.[463]

b. outsourcing project management in the form of PMAs made business sense, particularly at the start of the Lease, which required extensive planning and tendering supervision for the large investments required under the Lease. In AFRY`s view, building up internal staff to meet this early peak in investment and activity would not have been commercially sensible. According to AFRY, the

[461] **CEX-012:** AFRY Expert Report, dated 26 May 2020, §3.9, paras. 833-854.

[462] **CEX-012:** AFRY Expert Report, dated 26 May 2020, §3.10, paras. 855-890.

[463] **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 864-867. AFRY does not address Sweco`s view that Rubicon`s role under the PMAs created a conflict of interest. As an Engineering and Consulting Company, AFRY was of the view that the determination of whether a conflict of interest was beyond the scope of its work: **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 486.

standard business practice in these circumstances is to engage an EPCM Consultant, or in this case, a manager under the PMAs. Further, the use of a local project manager provides better expertise.[464] With respect to the exclusivity granted to Rubicon under the PMAs, it is common industry practice that EPCM Consultants and other engineering and professional service providers seek some form of volume commitment in return for dedicating resources to a client. In AFRY`s view, the exclusivity could be seen as a form of commitment by VE to Rubicon; the exclusivity arrangements under the PMAs did not cause harm to VE since the cost of the services and equipment provided under the PMAs was reasonable and/or provided at or below appropriate benchmark levels. The 10% fee provided for under the PMAs should be seen as a fee to compensate Rubicon as the Project Manager for the expenditures required to manage the procurement process. Further, in AFRY's view, it is appropriate to base a management fee on the project volume and a percentage of the total project volume and is a common arrangement.[465] Payment of the 10% fee did not increase VE's costs above what AFRY says were the appropriate benchmarks.[466]

c. In response to Sweco's criticism that a management fee based on a percentage of the investment budget could have led to a conflict of interest, AFRY says that there was no overspending in the equipment and services covered by the PMAs since VE was at or slightly below market level under the IHS-PMA investments and below the costs under Lithuanian standards for the investments under the DHN-PMA.[467]

557. With respect to individual substations, AFRY disagrees with Sweco's assessment that VE overspent by approximately 50% more than market prices for the procurement of the IHS it supplied. Rather, it says that VE's cost compared to the appropriate Sistela1

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[464] **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 868-873.

[465] **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 875-880.

[466] According to the Claimants, the PMAs contain provisions which gave VE control over the execution of works by the Project Manager by requiring approval by VE: DHN PMA, **R-613:** Agreement No. 02-05-01-759 between Vilnius Energy and Rubikon Apskaitos Sistemos, dated 16 May 2002, Clauses 3.3.1, 3.3.2; IHS PMA, **R-617:** Agreement No. 02-07-01-819 between Vilnius Energy and Rubikon Apskaitos Sistemos, dated 04 July 2002, Clause 3.3.1, 3.3.2. See, **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras.1854-1856.

[467] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 883.

benchmark was lower than that benchmark by 0.15%. AFRY also compared VE's IHS cost with international benchmarks of substations in Serbia, Finland and Ukraine and concluded that VE's average cost for individual substations were 17.6% lower than the price of comparable substations in Serbia and 33% lower than the price of comparable substations in Finland. Moreover, from its comparison of VE's prices to what it considers the appropriate Ukrainian benchmark, AFRY concluded that VE's IHS costs were between 4 and 9% lower.

558. AFRY first compared VE's IHS costs to the Lithuanian Sistela databases which are widely used in Lithuania for the assessment of investment costs for infrastructure construction, including energy infrastructure, and recommended by the Lithuanian Construction Production Certification Centre, an independent state-owned company established by the Ministry of Construction and Urban Development.[468] AFRY disagrees with Sweco's use of data extracted from a procurement conducted by the City of Kyiv in 2003 as a comparator for a number of reasons. According to AFRY, Sweco's comparison to one tender in the procurement for the Kyiv project conducted between 2000-2003 omits prices from other relevant parts of the procurement. Further, Sweco's comparison to the procurement conducted in Kyiv does not account for the additional functionalities of VE's IHS provided by the integration of a Rubisafe system into the IHS, which permitted the remote operation of various functions of the IHS and extensive remote collection of data. This additional functionality is not included in typical IHS, nor was it included in the IHS used in the Kyiv procurement.[469]

559. AFRY maintains that the appropriate benchmark for the IHS installed by VE is derived from the Sistela database. It notes that Sweco did use the Sistela database in its analysis of VE's District Heating Network costs, but not with respect to its assessment of IHS costs. In its comparison to the data in the Sistela1 database (which is entitled "Approximated Construction Price Calculations," and contains cost data on IHS installed in Lithuania), AFRY made adjustments to the Sistela prices to account for differences between VE's IHS and the Sistela1 reference prices. These adjustments consisted of the addition of the cost of water meters which are included in the VE IHS

[468] See **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 546-552.

[469] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 568, paras. 573-577; AFRY's Direct Presentation, slide 34.

but not in the Sistela1 reference price. AFRY also accounted for the additional functionality provided by the Rubisafe devices in the VE IHS by adding the additional cost of the Rubisafe devices, less the cost of the basic cost of functionality included in a typical IHS, to the Sistela reference price. In addition, AFRY added the typical technical project surcharge, including detail design of the works, from the Sistela2 database, which is not included in the Sistela1 reference prices.[470] AFRY's calculations yield a Lithuanian benchmark based on the Sistela1 database, and the adjustments described, of €8168.[471] AFRY calculated VE's IHS costs for the year 2003-2004, when the vast majority of IHS were installed, as €8155.[472] A comparison of the two costs indicates that VE's IHS cost is approximately 0.15% lower than AFRY's Lithuanian benchmark.[473]

560. AFRY also compared VE's IHS prices to cost data for procurements in Serbia and Finland[474] and calculated a Ukrainian benchmark correcting what AFRY says were errors in Sweco's analysis of the Kyiv procurement of IHS in a project over the course of 2001-2003.[475]

561. AFRY's Serbian benchmark was based on price data from a World Bank Finance Rehabilitation Clinical Centre in 2007 applying a similar approach to that used for its Lithuanian benchmark. AFRY calculated a Serbian benchmark of €9897 per IHS. When compared to VE's benchmark of €8155, VE's IHS cost is 17.6% lower.

562. AFRY also constructed a benchmark based on IHS purchases from one of its clients in Finland in 2019. On the basis of a similar analysis as for the Serbian project, AFRY calculated a benchmark value of €12176, reducing prices to reflect the 2003 EU inflation rate. AFRY's comparison of VE's IHS cost to those from the Servian project indicates that VE's cost was 33% lower.

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[470] **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 550-584, para. 595.

[471] **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 578-599; AFRY's Direct Presentation, slides 34 and 35.

[472] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 585.

[473] **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 596-598.

[474] **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 600-604.

[475] **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 604-616.

563. In AFRY's view, Sweco's Ukrainian benchmark is inappropriate for a number of reasons. AFRY notes that Sweco's benchmark was based on equipment costs only and required adjustments to remove installation costs for the works. AFRY notes that Sweco used inconsistent approaches to deduct installation costs. More specifically, AFRY says that Sweco deducted a percentage of VE's purchase contracts from 2004-2008 and calculated a portion of 17.3% (an average of € 1,439) which it attributed to works and subtracted this from VE's IHS installation costs in 2003 and 2004. On the other hand, AFRY asserts that Sweco used a fixed cost for installation works (€2500)[476] which it then deducted from the 317 IHS installations in the 2003 Kyiv procurement it analyzed, in order to calculate the cost attributable to equipment only. According to AFRY, Sweco's inconsistent calculation methods led to a significantly greater deduction from Sweco's Ukrainian benchmark than from VE's installed IHS cost. For that reason, AFRY says that using the total IHS purchase price, including equipment and installation, is preferable.[477]

564. Adopting Sweco's Ukrainian benchmark, using what AFRY considers to be the appropriate data, AFRY concludes that VE's IHS prices on an equipment-only basis is lower than the benchmark. In this regard, AFRY says that Sweco excluded more than 50% of IHS installations in the Kyiv project between 2001-2003. The procurement in question consisted of 330 IHS procured in 2001 and had an equipment and installation price of € 10,605. AFRY explains that, by deducting the installation price of € 2,500, the equipment-only cost of these IHS was € 8,097. Sweco's average estimated equipment-only cost for the two procurements in 2003 was € 4,243.[478] AFRY says that the 2001 data is relevant and should be taken into account. It notes that Sweco uses data from previous years elsewhere, including data from the same project in 2000 to calculate installation costs.[479] According to AFRY, incorporating the data from 2001 yields a weighted average equipment-only cost per IHS of € 8,713.[480] AFRY calculated an average equipment-only total cost of VE's IHS for 2003 and 2004 at € 8,155 per IHS.

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[476] It appears that this figure was derived from two installation-only benchmarks from the year 2000. See **REX-004:** Sweco Expert Report, dated 13 October 2019, Annex 7; **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1133(b) and fn 1725.

[477] **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 607-613.

[478] **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 606 and 614.

[479] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 47, paras. 605-606; **REX-004:** Sweco Expert Report, dated 13 October 2019, Annex 7, "Kyiv Project" tab.

[480] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 614.

On the other hand, Sweco calculated the cost of VE's equipment-only IHS as € 6,902 per IHS. According to AFRY, this is equivalent to a total cost, including installation, of € 8,341 per IHS. In either case, AFRY's calculations show that VE's IHS cost was lower than Sweco's corrected Ukrainian benchmark.[481]

565. AFRY concludes that VE's IHS costs were slightly below its preferred Lithuanian reference prices on a like-for-like basis. Using international benchmarks from Serbia and Finland, AFRY concludes that VE's IHS costs were 18% and 33% lower. Finally, VE's IHS costs were 6% below Sweco's corrected Ukrainian benchmark for equipment-only prices.[482]

5.2.3 The Arbitral Tribunal's Analysis

566. The Arbitral Tribunal notes that the Parties' and their experts' submissions on the price of the IHS are lengthy and complex. The debate however crystallized around the appropriate benchmark for determining whether Tender No. 107756 was awarded at a price that was too high and in breach of Lithuanian Procurement Law.

567. The claim of overpricing overlaps with the same claim in Counterclaim 5. It is also dependent on or inseparably linked to another claim in respect of another item alleged to have been overpriced, the Rubisafe devices which were included in the IHS.

568. The Arbitral Tribunal notes that the claim addressed under the separate heading of the Rubisafe devices relates to only a sub-category of all Rubisafe devices purchased and installed by VE: those were purchased separately and not together with the IHS and amount to EUR 1.3 million. The larger part of the overpricing is included in the IHS claim for EUR 8.7 million. The question of the need for a piece of equipment with the functionalities of the Rubisafe devices relates to both claims.

569. In the Arbitral Tribunal's view, Respondents have not met the burden of proof to demonstrate the overpricing of IHS. The Arbitral Tribunal is convinced by AFRY's

[481] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 616. AFRY's calculations indicate that VE's IHS costs were between 4-9% lower than the corrected Kyiv benchmark.

[482] **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 618-620.

evidence on the appropriate benchmark, whether based on the Sistela1 database or the adjusted Kyiv comparator.

570. As a result, the pricing of the IHS does not support the allegation that Claimants transferred the Lease and its performance to Rubicon. Further, the Arbitral Tribunal is not persuaded that the tender in question was inappropriately manipulated to exclude bidders other than Rubicon.

571. The Arbitral Tribunal is also not convinced that the IHS installed by VE, in particular the Rubisafe devices, were unnecessarily advanced or provided functionalities that were useless or unjustified. Respondents' argument that VE might have purchased at an overprice simply in order to improperly increase its investment and benefit Rubicon fails to convince the Tribunal. It seems more plausible that VE would invest in equipment that would enhance efficiency in its operation of the heating network and billing in order to maximize profits.

5.3 The Hot Water Meters

572. In order for the Arbitral Tribunal to have a clear view of the factual background, it should be recalled that, in addition to district heating, VE also delivered hot water to its customers. "*Hot water meters are needed to measure the consumption volume of VE's hot water customers so that VE can bill the delivery to its customers. The invoice issued to the household heat consumer (payment notice) must contain an accurate, clear and detailed information on the basis of which the heat provider has calculated the amount of the consumer charge for the amount of heat consumed for space heating and hot water and hot water maintenance, which must be sufficient to enable the consumer to verify that the charges have been calculated correctly. According to Lithuanian law hot water is billed monthly on the basis of each consumer's effective consumption. The remote reading of the hot water meters facilitates this process*".[483]

5.3.1 The Parties' Positions

a. Respondents' Position

[483] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 686.

573. In their Defense and Counterclaim, Respondents claim that Vilnius Energy ("VE") paid an inflated price for Axis Industries hot water meters purchased in 2010[484]. Comparing the price of their own purchases to the prices of hot water meters sold in 2010 by a Czech company, Metra Šumperk s.r.o., Respondents assert that hot water meters were offered by this company for around EUR 32 for one unit[485]. According to Respondents, Vilnius Energy thus paid EUR 49 (LTL 170), *i.e*. 64% more for the same type of device.

574. The argument is further made in Respondents' Rejoinder[486]. According to Respondents, the price per hot water meter paid by Vilnius Energy was LTL 262 (*i.e*. EUR 75.9), comprising LTL 170 (EUR 49.2) for the device and LTL 92 (EUR 26.6) for its installation[487]. While Respondents initially compared the price paid by them with the one paid by the above-mentioned Czech company, Sweco chose to compare Respondents' transactions with a Polish company that sold hot water meters in Ukraine for EUR 22.40 and EUR 27.70 per meter at the time of Respondents' own purchases.

575. In order to counter Claimants' argument according to which the Czech and the Polish meters cannot be compared to the Axis's meters since they are composed of two parts while the Axis's meters are integrated devices[488], Respondents, relying on Sweco's analysis, explain that both the Polish and the Czech meters are comparable to those purchased by Vilnius Energy in that they have the capability of metering hot water consumption and have modules to transmit metered data remotely, so that they can be connected to a remote data collection system[489].

576. In addition to the comparison conducted with the Czech and the Polish offers, Respondents also relies upon Sweco's analysis of the cost of hot water meters taken from six different public procurements conducted in Lithuania between 2010 and

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[484] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 376.

[485] **R-198:** Metra Šumperk s.r.o., Price list, 2010, dated 01 March 2010, p. 6 (Water meter GSD8-RF / E-RM 30 including radio module, short antenna [EUR] 31,42).

[486] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1989-1996.

[487] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para.1989.

[488] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 232; **CWS-006:** Second Witness Statement of Tadas Janušaukas, dated 15 January 2019, paras. 69-72.

[489] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1990; **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 418-419.

2013[490]. In three of these procurements, Axis Industries made an offer that was substantially lower than the price paid by Vilnius Energy. According to the three procurements produced by Respondents, rather than EUR 49 per device, Axis Industries offered EUR 10, 10, and 15[491].

577. In conclusion, based on Sweco's comparison of Axis Industries' hot water meters purchased by Vilnius Energy showing an overprice of 252%, Respondents rely upon FTI expert report which calculated that removing a 252% overpricing from the cost of the hot water meters purchased by Vilnius Energy reduces the investment value by EUR 9.5 million[492].

578. In their PHB, Respondents address the main criticism made by Claimants relying on AFRY's report and Janusauskas's witness statement which emphasizes the higher risk of manipulation of the meters' data attached to a two-part device in comparison to an integrated device. Respondents deny any relevance to this argument in light of the fact that the two-part meters were used on the market, which shows that they were sufficiently reliable and efficient[493]. Respondents therefore maintain that unreasonably advanced/unnecessary features that drove up the prices of goods purchased by Vilnius Energy were contrary to the obligations to keep tariffs at a minimum level under Article 3 of the Lease.

579. Respondents also recall that in both of its bids, Axis Industries proposed an installation price of EUR 27 (VAT excluded), as opposed to the EUR 10 (VAT excluded) offered by IRTC (the bidder who was excluded by Vilnius Energy) in the same tender[494]. AFRY held that IRTC's bid was too low[495]. Nevertheless, Respondents maintain their position by

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[490] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1991; **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 421.

[491] See **R-963:** AB Kauno Energija, Procurement Report, Procurement No. 107518, 2011, dated 10 August 2011; **R-964:** AB Šiaulių Energija, Procurement Report, Procurement No. 104913, 2011, dated 30 June 2011; **R-983:** AB Šiaulių Energija, Procurement Report, Procurement No. 118805, 2012, dated 07 June 2012.

[492] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1991; **REX-003:** Second FTI Expert Report, dated 13 October 2019, 14.3.

[493] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 731.

[494] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 733.

[495] **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 718-720.

observing that data compiled by AFRY from a tender in Kaunas shows that the winner offered EUR 10 (VAT included) for installation[496].

580. In their Reply PHB, Respondents rely on Sweco's analysis set out in its Addendum[497]. Sweco, in view of Claimants' criticism stressing the fact that the catalogue price of other meters suppliers should have been used, adopted a conservative approach and recalculated the difference of price between Axis and other local or foreign suppliers in 2010. Sweco identified a 39% overpricing for the hot water meters purchased by Vilnius Energy from Rubicon based on three comparators, namely Czech meters, Polish meters and Lithuanian meters. Based on the Czech and Polish meters, Sweco identified an overpricing of 56% and 50% respectively[498]. On the basis of the Lithuanian comparator alone, Sweco identified a 39% overpricing for the meters purchased by Vilnius Energy from Rubicon[499].

581. In response to Veolia's criticising Sweco's use of the Lithuanian comparator on the basis that not all of the hot water meters procured under Part 4 of the relevant tender had remote data reading capabilities, Respondents indicate that technical specifications of the tender explicitly requested that all of the hot water meters under Part 4 of the tender have remote reading capabilities[500]. Respondents point out that AFRY itself, in their report, took the same position, stating that "Part 4 [of the comparator's tender] applies to 4,500 meters with communication module"[501].

b. Claimants' Position

582. The first set of Claimants' arguments relate to the need to distinguish between the products purchased by Vilnius Energy.

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[496] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 733; **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 708, Table 33.

[497] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 166.

[498] **REX-004 Add:** Addendum to Sweco Expert Report, dated 14 August 2021, paras. 6-7.

[499] **REX-004 Add:** Addendum to Sweco Expert Report, dated 14 August 2021, paras. 8-9.

[500] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 166; **R-932:** UAB Trakų Energija, Technical Specification, Procurement No. 85301, 2010, dated 01 January 2010, para. 16 (translated by the Respondents: "Meter radio modules must periodically record meter readings and automatically transmit them to stationary antennas installed in the house (data concentrator).").

[501] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 166; **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 709(a).

583. Relying upon Mr Janušauskas's witness statement, Claimants emphasize that Axis Industries' meters are integrated devices while Metra's meters (the Czech company's meters) are not[502]. According to Mr. Janusauskas, this difference makes Axis Industries' meters more reliable and thus more valuable[503] . Claimants illustrate their argument with the following example. Due to the lack of integration of their parts and functions, Metra meters may be manipulated by accident or intentional customer tampering. This risk is prevented by the Axis meters thanks to their integrated system[504]. Claimants draw the conclusion that, when purchasing the Hot Water Meters, Vilnius Energy made a justifiable business decision[505].

584. Developing this argument in their Rejoinder on Counterclaim, Claimants refer to AFRY's report, which also disagrees with Sweco's price benchmarking analysis, including Sweco's alleged failure to use "all-in-one" hot water meters in its benchmarking, and Sweco's use of misleading equipment comparisons and different service levels, such as not including "a qualified person to configure the installed hot water meter to function properly with the data collection system."[506]. Claimants also refer to Mr. Janusauskas's witness statement, which states that hot water meters faced serious problems due to high rates of manipulation of the mechanical meters, and the possibility for discrepancies between the actual water usage measured by the mechanical meters and the water usage readings that are transmitted by the data transmission module of the meter. According to Mr. Janusauskas, Vilnius Energy purchased the integrated meters to significantly decrease these risks[507]. Claimants then rely upon AFRY's concordant report, according to which it was reasonable for Vilnius Energy to choose the all-in-one electronic hot water meters considering that the two

[502] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 232; **CWS-006:** Second Witness Statement of Tadas Janušaukas, dated 15 January 2019, paras. 69-72.

[503] **CWS-006:** Second Witness Statement of Tadas Janušaukas, dated 15 January 2019, para. 72.

[504] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 232.

[505] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 232.

[506] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1511; **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 66.

[507] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1512; **CWS-006:** Second Witness Statement of Tadas Janušaukas, dated 15 January 2019, paras. 83-86; **CWS-016:** Third Witness Statement of Tadas Janušaukas, dated 29 May 2020, paras. 97-100.

other options on the market "had severe shortcomings, especially regarding accurate and reliable measurements, and they were vulnerable to manipulation."[508]

585. Claimants draw the conclusion that Sweco's benchmark analysis is unreliable and should not be taken into account[509].

586. The second set of Claimants' arguments relates to the way difference of price should be should have been calculated. Claimants refer to Dr. Hesmondhalgh's analysis alleging a mistake on Respondents' part in asserting the 160% figure while Respondents' expert report indicates only a 64% alleged higher price for the Meters[510]. Further, also according to Dr. Hesmondhalgh's report, another miscalculation has been made by Respondents: the difference between the two prices quoted by VST – EUR 32 and EUR 49 – is, in fact, 53% and not 64%[511].

587. In their PHB, Claimants contest one of the prices relied upon by Sweco regarding lot 4 of IRTC's 2010 tender[512]. According to Claimants, Sweco misunderstood the subject matter of the part of the tender relating to hot water meters. The tender was a bundled tender offer also containing other non-comparable meters[513]. However, in order to calculate the price per device, Sweco divided the entirety of the meters purchased (including the non-comparable meters) during this tender by the global price paid. But it should have been taken into account the fact that the total price for the lot was split between 2,208 data transmitting meters and 2,292 non-transmitting meters. Accordingly, the cost of a data transmitting meter under lot 4 was EUR 108.24 including

[508] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1513; **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 690-699, **Exhibit CEX-012**; **CEX-003:** Rebuttal Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 23 January 2019, para. 78.

[509] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1511.

[510] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 233; **CEX-003:** Rebuttal Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 23 January 2019, para. 77; **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 1379.

[511] **CEX-003:** Rebuttal Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 23 January 2019, para. 8, para. 77.

[512] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1143.

[513] Examination of Jonsson, Day 15: P31:L2-P32:L19, referencing to **REX-004 Add:** Addendum to Sweco Expert Report, dated 14 August 2021, para. 8 and footnote 10.

VAT, or around EUR 89.45 excluding VAT. This price shows that Axis's prices were not inflated[514].

588. In their Reply PHB, Claimants address Respondents' assertion that Claimants' argument on manipulations of the meters is irrelevant because Sweco's comparators had been used on the market [515]. Claimants reassert that losses due to the manipulation of meters have been quantified and found to be material[516]. Claimants also deny any relevance to IRTC's tender, relying upon AFRY's report to assert that IRTC's bid is unrealistic due to the fact that it is based on an average installation time of one hour per meter. Accordingly, IRTC's price for installation works should not be considered a benchmark[517].

5.3.2 The Experts' Evidence

a. Sweco's Evidence

589. Sweco's report states that, in 2010, VE organised its largest procurement (in terms of monetary value), namely, the purchase of nearly 300 000 hot water meters[518].

590. From a general standpoint, Sweco criticises the VE tender itself.

591. Firstly, the tender included technical specifications so narrow that only a Siemens WFH, a type of Siemens electronic hot water meter, could qualify[519]. This refers particularly to the requested maximum weight[520] and battery lifetime[521]. Since Siemens WFH is also delivered by Axis Industries (a company from in the Rubicon group), Sweco assumes that VE "intended to award the contract to Axis Industries from the outset" [522].

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[514] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1143.

[515] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 731.

[516] **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 283; **CWS-016:** Third Witness Statement of Tadas Janušaukas, dated 29 May 2020, paras. 99-100.

[517] **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 283.

[518] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 375.

[519] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 398.

[520] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 401.

[521] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 403.

[522] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 375; **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 688.

592. Secondly, VE requested a delivery of up to 293,000 hot water meters, where Sweco claims that this was more than VE needed and that this quantity could only have been provided by large suppliers like Axis Industries and not by small providers in Lithuania[523].

593. In this general context of criticism of the tender itself, Sweco's benchmarking analysis tends to show that the hot water meters and services purchased by VE from Axis Industries could have been procured at lower cost had competitive tendering and other meter types with sufficient functionality have been encouraged[524].

594. Sweco's method consists of comparing the prices offered by the two companies in competition during this tender: Axis and IRTC (according to Respondents and Sweco, the very limited number of bidders is due to technical specifications clearly pointing to a specific hot water meter[525]).

595. Axis Industries' first bid, submitted on 13 September 2010, indicated a global tender price of LTL 185 928 600 incl. VAT (Hot water meters LTL 106 359 000; Collection of accounting data LTL 79 569 600)[526]. Then, Axis Industries provided its second bid on 14 March 201 and proposed a tender price of LTL 172 456 460 incl. VAT (7.2% lower than the first offered price), including: Hot water meters LTL 92 886 860 (12.7% lower than its original bid) and collection of accounting data LTL 79 569 600 (same price)[527].

596. IRTC offered a price of LTL 148 535 970 incl. VAT, broken down as follows: LTL 84 732 670 for hot water meters and LTL 63 803 300 for collection of accounting data[528].

597. According to Sweco's calculation, IRTC price was 20% cheaper than the initial offer of Axis Industries, and 14% cheaper than the final offer of Axis Industries[529].

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[523] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 404; **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 688.

[524] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 412.

[525] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 426.

[526] **R-956:** Axis Industries, Tender Bid, Procurement No. 89014, September 10, 2010, dated 10 September 2010, p. 1-2.

[527] **R-972:** Axis Industries, Tender Bid, Procurement No. 89014, March 14, 2011, dated 14 March 2011, p. 2.

[528] **R-946:** UAB IRTC, Tender Bid, Procurement No. 89014, June 10, 2010, dated 10 June 2010.

[529] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 415.

598. Sweco then adds that the individual price per meter was 262.00 LTL (75.9 EUR), comprising 170.00 LTL/pcs (49.2 EUR) for each device, and 92.00 LTL/pcs (26.6 EUR) to install each device[530].

599. In order to compare Axis meters' prices, Sweco obtained lists of prices for similar (according to Sweco) meters[531]. In 2010, Polish Apator meters of type JS 90-1,5-NK and JS 90-2,5-NK were sold for 22.40 EUR and 27.70 EUR respectively in Ukraine. These meters have the capability of metering hot water consumption and to transmit data remotely, so that they can be connected to a remote data collection system. This meets the goal of VE's procurement, that is, to install hot water meters with a possibility to remotely collect data from them.

600. Challenging the relevance of this comparison, Claimants assert that IRTC meters (as well as the Czech meters used by Respondents to make their own comparison) are not comparable to Axis's meters[532]. The latter consists of an integrated system in one piece while the former are composed of two parts. Sweco addresses this issue by stating that IRTC meters (and Czech meters) have the capability of metering hot water consumption and to transmit data remotely, so that they can be connected to a remote data collection system[533]. Even though the mechanical meter and a data transmission module are separate products, they still allow the functionality of the meter to remotely send the data[534]. Sweco also adds that these meters are used commercially. Consequently, there are no reasons to question their functionality[535].

601. Sweco concludes that Axis Industries' meters (49.20 EUR) were 96% more expensive than the Polish meters (25.05 EUR, which is the average of the two different prices listed above), and 54% more expensive than the Czech meters (32 EUR)[536].

602. Sweco's benchmark continues with a larger comparison of the prices of hot water meters from Lithuanian public procurements that took place in or around 2010. The

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[530] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 416.
[531] **R-858:** Energopribor Zaporozhye, Single-jet Dry Dial Water Meters, List of Prices, dated 01 January 2019.
[532] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 232.
[533] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 419.
[534] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 419.
[535] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 419.
[536] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 420.

prices are indicated in Sweco's Table 20[537]. Table 21 summarizes the outcome of this benchmarking by presenting a comparison between the prices in the contract between VE and Axis Industries and those of the tenders listed in Table 20. According to Sweco, the comparison with other Lithuanian public procurements of hot water meters from the same period shows that the prices paid by VE were 444% above the average prices from other procurements of meters only, 72% above the average prices from procurements on installation only, and 252% above the average prices from procurements of meters and installation purchased together[538].

b. AFRY's Evidence

603. Regarding Sweco's comparators, AFRY's main criticism of Sweco's analysis lies in the fact that in its benchmarking Sweco relies on two-part meters rather than "all-in-one" hot water meters in its benchmarking. The comparison with the Polish and the Czech two-part meters is thus misleading due to incomparability to VE's meters[539]. The two-part meters consist of "add-on" parts that are physically attached to the meters and are not integrated with the other functions of the meters inside of a single device. In their expert report, AFRY mentions issues related to two-part meters: improper installation; deliberate customer actions, *e.g*. by affecting the meter cover or by hot water meter manipulation with a magnet or a needle; technical issues, *e.g*. due to vibrations in the hot water pipe[540]. The "all-in-one" solution had none of the above-mentioned problems and data was transmitted straight from the meter without equipment in between, eliminating the interface failure risk.

604. Further, according to AFRY, the prices for the Polish and the Czech meters that Sweco presents do not account for shipping, installation, and data transmission set-up costs which can be substantial[541]. AFRY state that the scope of the installation works in Sweco's tenders only includes the mechanical installations but, unlike VE's tender,

[537] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 421.
[538] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 427.
[539] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 706.
[540] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 695.
[541] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 706.

does not include a qualified person to configure the installed hot water meter to function properly with the data collection system[542].

605. More specifically, as to IRTC's bid and the fact that it was not accepted while it was cheaper than Axis's bid, AFRY states that IRTC made a financially more attractive initial bid, but failed to fulfill the formal tender qualification requirements, which meant that IRTC's bid was ultimately not available[543]. Thus, VE has obtained the best available price[544].

606. Entering into the financial comparison of prices, AFRY notes that Axis Industries and IRTC have offered Siemens WFH meters (Option C meters). According to AFRY, this shows that Axis Industries was not in a better or exclusive position for offering Siemens WFH[545]. AFRY compared Axis, IRTC and Vilmista (another Lithuanian company) prices in order to show the lack of significant difference between IRTC and Axis, both being well below the Vilmista catalogue prices[546]. In particular, AFRY states that the second Axis Industries bid was 47.66 EUR per hot water meter equipment and 73.54 EUR for hot meter equipment and works and the Vilmista catalogue price would be 87.91 EUR per hot water meter[547]. RTC and Axis Industries' first bids are on about the same level and by about 31% below the catalogue price of Vilmista. This indicates that both IRTC and Axis Industries are on market price level. The price level of IRTC's and Axis Industries' initial bid represent benchmark level[548].

607. In addition to these considerations, AFRY address Sweco's criticism regarding the bundled tender chosen by VE (increasing administrative efforts, multiple contractors, *etc*).[549]

5.3.3 The Arbitral Tribunal's Analysis

[542] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 66.
[543] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 68.
[544] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 712.
[545] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 68.
[546] **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 711-713.
[547] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 713.
[548] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 715.
[549] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 724.

608. At the outset of this analysis, it should be emphasized that it is not for the Arbitral Tribunal to second-guess from a financial standpoint the main features of a tender nor the choice finally made by the organizer of a tender by fully reviewing the tender's and offers' terms. Any organizer benefits from a margin of appreciation, provided that the rules of the applicable law are followed. A difference exists between the legal assessment of a tender and the financial assessment of a tender. It is only insofar as the financial outcome of a tender demonstrates a wrongful act of the organizer that it is of interest to the Arbitral Tribunal. Considering that Vilnius Energy's procurements were subject to the Lithuanian Law on Public Procurement and other public procurement governing orders and regulations[550], the Arbitral Tribunal is to apply the Lithuanian law when reviewing the tender at hand as well as the final decision reached by the organizer.

609. It is argued by Respondents that Vilnius Energy paid an inflated price for Axis Industries hot water meters that were purchased in 2010[551].

610. The Claimants' defense is based on two sets of arguments. The first one challenges the relevance of the comparators chosen by Respondents as well as by Sweco. Even admitting these comparisons, the second one contests several points of Sweco's method of assessment of the prices at hand.

611. The first set of arguments pertains to the comparability of the hot water meters sold by Axis and by its competitors or similar companies. Claimants emphasize that Axis Industries' meters are integrated devices while other meters are not[552]. Claimants then rely upon AFRY's concordant report, according to which it was reasonable for Vilnius Energy to choose the all-in-one electronic hot water meters considering that the two other options on the market "had severe shortcomings, especially regarding accurate and reliable measurements, and they were vulnerable to manipulation." [553] .

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[550] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 947; **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 1323; **CWS-013:** Witness Statement of Mantvydas Veršulis, dated 10 January 2019, paras. 37-38, para. 108; **C-607:** National Commission for Energy Control and Prices, Evaluation and Coordination Procedure of Energy Company Investments, No. O3-252, dated 17 April 2015.

[551] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 376.

[552] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 232; **CWS-006:** Second Witness Statement of Tadas Janušaukas, dated 15 January 2019, paras. 69-72.

[553] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1513; **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 690-699; **CEX-003:** Rebuttal Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 23 January 2019, para. 78.

Respondents reply that these shortcomings should not be overstated given the fact that two-part meters are commonly used on the market[554] and that there is no major difference in functionality between integrated devices and two-part devices since they both allow the remote transfer of data, which is the only critical function that they need to assure[555].

612. The Arbitral Tribunal stands with Respondents on the fact that integrated meters and two-part meters are comparable. This is because they are substitutable. No further key function is assured by an integrated meter in comparison to a two-part meter. Therefore, two-part meters' prices are fully relevant when it comes to the assessment of the overpricing claim at hand.

613. The Arbitral Tribunal is mindful of the differences in price that tend to be revealed by Sweco's analysis (subject to the Tribunal's views on this point, set out below).

614. Nevertheless, one cannot ignore that an integrated meter presents more advantages in terms of safety and simplicity than a two-part meter. AFRY's report convincingly substantiates this view by pointing out the risks of interface malfunction and meter manipulation[556]. This is not to say that the two-part meters were ill-adapted to VE's needs, but that an integrated device provides high quality functions that are reflected in the price per meter.

615. It remains to be seen whether these enhanced safety and efficiency of all-in-one meters were necessary for the city of Vilnius.

616. Such an assessment must made with regard to the commitments and representations made by Veolia at the time of the formation of the lease as well as to the guidelines provided by the Lithuanian law. In particular, Veolia promised Respondents in its tender proposal of October 1, 2001, that, by virtue of its "*experience in designing, installing and managing district networks*", it "*can develop innovative solutions that help ensure*

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[554] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 731.

[555] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1990; **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 418-419.

[556] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1513; **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 690-99; **CEX-003:** Rebuttal Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 23 January 2019, para. 78; see also **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 232.

installation reliability and environmental protection at the lowest cost for customers"[557]. In addition, the guidelines provided by the 2009 Heat Price Methodology (the ones in force at the time of the tender at hand) are also enlightening: "*the components of heat prices shall be based on the supplier's necessary expenses (rationed by the state) (…)*"[558]. Pricing is designed to, *inter alia*: "*ensure long-term, reliable and good quality heat supply at the lowest possible cost*" [559].

617. The search for the best offer made by a bidder must be placed in the light of these representations and requirements that form the legitimate expectations of the city of Vilnius.

618. Given the above representations and requirements, the Arbitral Tribunal considers that the "*lowest possible cost*" to the customers – which entertains close ties with the lowest price offered by a bidder in a tender that will affect the final price paid by customers – is in each case put into balance with installation reliability.

619. This implies that the best offer that should be identified by the organizer of a tender is not necessarily the lowest offer but the one that shows the best ratio between low price and reliability.

620. Going back to the issue at hand, the Arbitral Tribunal finds that, although all-in-one meters are undeniably more expensive than two-part meters, both are to be compared in light of their respective ratios of cost and reliability.

621. Holding that all-in-one meters are more reliable than two-part meters, difference in price is thus justified, but only to a certain extent. Reliability cannot be used as a way to conceal inflated prices.

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[557] **R-029:** Dalkia's Proposal for Tender of Vilnius City Municipality for Assets, Lease and Operation of VŠT, dated 01 October 2001, p. 69 (of the pdf), (Emphasis added.); see also **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1335.

[558] **C-183:** National Commission for Energy Control and Prices, Resolution Regarding Methodology for Setting Heat Prices, No. O3-96, dated 08 July 2009, para. 64; **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 11246.

[559] **C-183:** National Commission for Energy Control and Prices, Resolution Regarding Methodology for Setting Heat Prices, No. O3-96, dated 08 July 2009, para. 3.2; **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1246.

622. This leads the Arbitral Tribunal to review the second range of arguments raised by both Parties regarding the prices themselves in order to determine whether the difference in price between Axis meters and comparable meters – including two-part meters – is significant enough to amount to the overpricing conduct alleged by Respondents.

623. For the sake of clarity, it should be recalled that Sweco not only compared Axis all-in-one meters with two-part meters made by several other competitors but also compared Axis all-in-one meters with IRTC all-in-one meters.

624. Regarding the first comparison, *i.e.* with other competitors' two-part meters, the scale of the difference in price needs to be properly assessed by taking the right figures that pertain to the same type of device considering the above-mentioned ratio cost/reliability. It then requires comparing the price of all-in-one meters with the price of two-part meters, which includes not only the price of the meters but also the price of their second part dedicated to remote data transmission. However, Sweco's Table 20[560] only reflects the prices of meters without their unit of data transmission, as shown by AFRY's analysis[561]. This renders Sweco's calculation, according to which there was an overall 252% difference between Axis meters and like meters, at least partially irrelevant.

625. As to the second comparison, *i.e.* with IRTC all-in-one meters – which is a more straightforward comparison than the former comparison with two-part meters given the fact that Axis and IRTC products are quite identical – a 20% difference in initial price per meter has been calculated by Sweco[562]. Axis lowered its prices in a second offer, but IRTC did not have the opportunity to do so due to its withdrawal from the tender. In any case, IRTC's offer compared to Axis's second offer still shows a difference of 14%. It is reasonable to assume (as Sweco did[563]), that, should IRTC have maintained their presence in the tender, they would also have lowered their price to a certain extent, which may have brought the price difference back to its initial 20%.

626. At this stage of the comparison, it must be noted that a difference of 20% (all the more of 14%) is nothing comparable to other figures put forward by Sweco, in particular, the

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[560] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 421.

[561] **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 708-709, especially Table 33.

[562] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 412-415.

[563] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 415.

252% alleged difference with competitors' two-part meters. Given the fact that the Arbitral Tribunal has determined that, compared to two-part meters, all-in-one meters' technology is also a reasonable option, the above percentage of 20% seems particularly relevant to the Arbitral Tribunal.

627. Now that it is established in the eyes of the Arbitral Tribunal that there was no disproportion between Axis prices and market prices, it remains to be seen whether a 20% increase was justified by any reasons and, absent any sound justification, if the difference is to be seen as acceptable due to the margin of appreciation given to the organizer of a tender.

628. Regarding the justifications of such a difference, AFRY tries to demonstrate that the part of the price that regards the works for the installation of the purchased meter has been underestimated by IRTC[564]. It is quite difficult to assess the proper time needed to install a meter. The Arbitral Tribunal is not to second-guess bidders' prices and to appreciate whether the offered prices were realistic. Bidders' terms are presumably feasible unless demonstrated otherwise. The Arbitral Tribunal holds that AFRY's report has not established underpricing practices coming from IRTC, especially because, as admitted by AFRY, the exact hourly rate of an IRTC installer in 2010 is not known[565].

629. Accounting for all above considerations, the Arbitral Tribunal finds that there was no significant difference between Axis' prices and its competitors' prices. The actual difference in price between Axis and IRTC, which is the most relevant comparator, given the identity of the products sold, is around 20% (or slightly less, around 14%, if one does not take into account the possible price reduction that may have been offered by IRTC). There is no straightforward explanation to this price difference in AFRY's report. AFRY rather relies on the fact that IRTC eventually did not participate in the last stage of the tender[566]. Therefore, according to AFRY, the price offered by IRTC was not available in practice and cannot be taken into account.

[564] **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 718-723.
[565] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 719.
[566] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 723.

630. In the absence of other relevant comparators, the Arbitral Tribunal considers that, although IRTC did not participate in the tender until the end, the price proposed by IRTC remains relevant.

631. However, the Arbitral Tribunal does not consider the difference of 20% to constitute a significant overpricing. Rather, the price difference in the range of 20% remains within the acceptable financial margin of appreciation left to the organizer of the tender.

5.4 The Economizer

5.4.1 The Parties' Positions

a. Respondents' Position

632. Respondents contend that VE skewed the tender for the procurement of the "Economizer" in the VE-2 plant to "*siphon funds to Rubicon*"[567]. Respondents allege that this procurement was one of the largest contracts ever awarded by VE.[568] They rely on the evidence of their expert Sweco to argue that VE purchased the Economizer (and its installation) over market prices.

633. According to Respondents, VE's resort to an "unannounced negotiation" procedure to procure the Economizer (instead of an open tender) was meant to "*ensure that its related party* [*i.e.* Rubicon company Axis] *was the successful candidate*".[569] Such procedure is reserved to extraordinary circumstances such as extreme urgency, and no such justification existed in the case of the Eonomizer procurement.[570] VE further put five credible competitors to Axis at a disadvantage, by initially not inviting them to bid, or by refusing certain requests for extensions of time to submit bids.[571] Based on the chronology of competitors' requests and VE's decisions on the same during the tender procedure, Respondents calculate that "*Axis Industries had 50 days to prepare its bid, the foreign companies had 41 days, whereas Ernestena* [*i.e.* a bidder not initially

[567] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1010.

[568] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1010. Respondents refer to Annex 2 of the "Counter-Memorial", which is however not on record in this arbitration.

[569] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1011.

[570] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1011.

[571] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1012-1013.

invited to bid but which was so upon its request] *had only 25 days to prepare a bid*" and note that the foreign companies likely spent part of their preparation time translating tender documents that were only available in Lithuanian.[572]

634. Further, VE awarded the Economizer contract to Axis without knowing the producer and technology to be used for the Flue Gas Condenser ("**FCG**"), a vital component of the Economizer.[573]

635. Finally, Axis' bid failed to provide certain performance guarantees because it did not have a supplier lined up for the FCG. "*In other words, Vilnius Energy had no guarantee as to the quality of the equipment that it was purchasing for EUR 7.9 million*."[574]

636. Respondents consider that these actions "*were squarely inconsistent with the Law on Public Procurement*"[575] and that prove that the tender procedure was conducted in a manner that ensured that Axis would win.[576]

637. They led, according to Respondents' expert Sweco, to VE overpaying for the Economizer an amount initially estimated by Sweco to be minimum EUR 4.9, [577] that is a 162% overprice. [578] Following certain criticisms of AFRY, Sweco adjusted this estimation and Respondents revised their position to assert a 67% overpricing[579] when compared to one project in Finland (herein referred to as the "Oulu" project). Contrary to Claimants' allegations, "*Sweco's analysis in its report relied on extensive comparators and is robust*" and Sweco "*further strengthened its analysis by accounting for certain criticisms made by AFRY*".[580] "*The availability of additional documents to AFRY does not render its analysis more reliable than Sweco's. In fact, the opposite is*

[572] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1014.
[573] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1017.
[574] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1018.
[575] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1019.
[576] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1020.
[577] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1023, 1163.
[578] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1995.
[579] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 738, **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, paras. 176, 180.
[580] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 182.

true. Sweco has acted impartially and has not hesitated to bridge certain gaps with AFRY."[581]

b. Claimants' Position

638. Claimants deny any manipulation of the tender procedure for VE's procurement of the Economizer from Axis. VE elected to use an "unannounced negotiation" procedure, a procedure duly recognized under the PPL in cases where services or goods are needed urgently, in order to complete the Economizer's procurement in a timely manner.[582] The urgency to procure the construction of the Economizer came from Respondents' refusal to approve the Economizer investment, which meant that VE "*bore the entire risk for this project*."[583] In addition, Claimants refer to the reduction of costs and thus of tariffs the Economizer would bring about, as well as the fact that the construction had to take place between heating seasons in order not to disrupt the heat supply to consumers.[584]

639. Regarding participants to the tender, Claimants emphasize that after VE changed the requirements of the tender, it sent invitations to bid to seven Lithuanian companies plus four foreign companies on the same date, which it considered to be the ones which would offer the most competitive bids. VE further extended the deadline for the submissions of bids after Enerstena joined the competition.[585]

640. As to the incompleteness of Axis' bid, Claimants note that 1) VE's procurement commission determined that none of the omissions was sufficiently serious to warrant a dismissal of Axis' only bid; and that 2) the tender specifications did not require Axis' bid to include the identity of the FCG supplier.[586] Similarly, "[a]*t the time, the PPL did not mandate that a bidder must disclose all of the intended subcontractors*".[587] The

[581] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 187.

[582] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 2089.

[583] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 2090.

[584] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 2090.

[585] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 2091-2092.

[586] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 2094-2095.

[587] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 2095.

tender specifications did not require either that Axis guarantees exact performance figures: "*it is typical practice for such performance figures to represent target values; the bidder's actual guarantee figures typically undergo economic analysis in the tender evaluation*."[588]

641. This is in line with AFRY's benchmarking of the Economizer procurement, which led AFRY to conclude that VE did not overspend. Claimants ask the Arbitral Tribunal to prefer AFRY's benchmark as "*AFRY's understanding of the economizer procurement is significantly more accurate than that of Sweco*."[589] This has been demonstrated by the numerous admissions and adjustments by Sweco when criticized by AFRY.[590]

5.4.2 The Experts' Evidence

a. Sweco's Evidence

642. Sweco submits that, had VE managed the tender process professionally and diligently, to ensure competition, the price of Procurement No. 71344 would not have been higher than EUR 3 million (vs the EUR 7.8 million paid by VE to Axis).[591] This corresponds to a 161% overpricing.[592]

643. According to Sweco, it is likely that VE favoured Axis Industries in the tender and intended to award the procurement to Rubicon from the outset.[593] Sweco flags in particular the following elements of the tender procedure as being contrary to best practices:

- First, VE failed to invite Ernestena, a well-know Lithuanian company with the appropriate capability and experience and the main competitor to Axis at the time,[594] which Sweco concludes to be "*more than a simple oversight*".[595]

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[588] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 2095.

[589] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1156, see also **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 285.

[590] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 1157-1158.

[591] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 571

[592] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 696, Table 37.

[593] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 522, 575.

[594] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 535, 573.

[595] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 536.

- Second, the period for the submission of bids was too short in Sweco's opinion. They calculate that "[f]*ollowing the granting by VE of a first extension of time to submit bids, the Lithuanian companies initially invited to bid had 50 days* […], *the foreign companies had 41 days, and Enerstena had only 25 days*."[596] In view of the technical complexity of the bids to be submitted, Sweco considers that the short time-limit to do so has been "*a major contributing factor as to why Enerstena did not submit a bid*"[597] and that VE rushed a high-value investment which would have interested international bidders with no reason given that VE was not under no particular time pressure.[598]

- Third, in addition to setting a short time-limit to bid, VE failed to provide extensions of time to three potential tenderers. Sweco refers to such requests from companies SRE and Condens which were refused, whereas it was VE which had failed to timely provide all technical specifications for the bid.[599] Sweco further refers to Enerstena's request for extension, necessary in view VE's failure to initially invite Enerstena to participate to the tender.[600]

- Fourth, Axis' failure to provide the guaranteed heat power of the Economizer as part of its bid leads Sweco to conclude that VE 1) at least discriminated against companies by not making it clear in the tender documents that deviations to the required heat power were allowed, or 2) at worst, "*deliberately requested a heat power that no company could provide and thereby eliminated all potential competition to Axis Industries*."[601]

- Fifth, Axis' bid did not even name the supplier of the Flue Gas Condenser ("**FCG**"), a central element of the Economizer procurement. Sweco finds this

[596] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 539.
[597] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 541.
[598] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 542, 544.
[599] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 545-547, 573.
[600] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 548.
[601] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 553.

"*surprising*" from a prudent operator's standpoint.[602] There was an increased risk since Axis had no confirmed agreement with a supplier when they submitted the bid, therefore Sweco would have expect VE to include a premium on the price of their tender bid.[603]

644. The deficiencies in the tender as analysed above, lead Sweco to conclude that VE "probably" favoured Axis Industries in the tender which led to overpayment by VE.[604]

645. To conclude on overpayment, Sweco benchmarked VE's procurement of the Economizer against confidential information on comparable projects which might be considered to be similar in terms of scope of work.[605] This benchmarking exercise leads Sweco to establish a large market price range (from EUR 2.7 to 7.5 million),[606] it justifies by technological differences with the Economizer procurement. Specifically, the supplier who eventually provided the FCG to Axis to complete the procurement was SRE, whose technology is much simpler than the type of FCG from other procurements against which it is compared. Further, the type of water condensate cleaning system used also differed, and there was a possibility to by-pass the FCG in the case of VE's procurement to Axis.

646. For these reasons, Sweco considers that "*the contract price for a purchase similar to Procurement No. 71344 using SRE technology would be close to the lower end of the price range provided in Table 29, i.e. close to 2.7 MEUR. Conservatively, we estimate that the contract price would not be expected to be higher than 3.0 MEUR*."[607] AFRY contested such position and Sweco replied at the hearing that after adjustment its range narrowed to EUR 2.7 to 5.6 million.[608]

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[602] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 554-556, 572.
[603] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 574.
[604] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 575.
[605] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 559-561, Tabley 29 and 30.
[606] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 565.
[607] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 567, see also paras. 566, 568.
[608] Sweco's Direct Presentation, slide 46.

647. Following AFRY's criticism that Sweco's benchmark ignored dismantling and other work costs, technical project costs and the cost of the Wet Electrostatic Precipitator ("**WESP**"), Sweco adjusted its benchmark as follows:

- Sweco added EUR 0.26 million for the WESP.

- It further added 2% (EUR 69,000) for technical project costs,[609] whereas AFRY proposes 3.6% because VE did the technical planning and design works itself in the planning stages of the tender. Sweco states that "[i]*n short, Vilnius Energy has presented high level technical planning documents with the tender conditions. This would complement/expedite the work for the contractor and reduce the costs*."[610]

- In addition, Sweco added EUR 45,000 to its benchmark for dismantling and demolition works that were required for the brown-field nature of the project, disagreeing with AFRY's estimate that the works would have cost EUR 0.3 million.[611]

- Finally, Sweco added EUR 0.37 million to the benchmark for the "DH-piping".[612]

648. Considering the above, Sweco estimates that the Economizer should not have cost more than EUR 3.44 million.[613]

649. Sweco further observes in relation to the (confidential) data referred to by AFRY that it has been able to identify one of the projects in the benchmark, the so called "Oulu project" of 2006 in Finland. Referring to the contract for that project, Sweco considers that it "*needs significant adjustments to be comparable to the Economizer installed by Rubicon in VE-2*"[614] notably due to the difference in the technologies used (the RADSCAN technology for the Oulu project, as opposed to the allegedly much simpler SRE technology for the VE-2 Economizer). When comparing the two projects, Sweco

[609] **REX-004 Add:** Addendum to Sweco Expert Report, dated 14 August 2021, paras. 23, 28.
[610] **REX-004 Add:** Addendum to Sweco Expert Report, dated 14 August 2021, para. 23.
[611] **REX-004 Add:** Addendum to Sweco Expert Report, dated 14 August 2021, para. 25.
[612] **REX-004 Add:** Addendum to Sweco Expert Report, dated 14 August 2021, para. 27.
[613] **REX-004 Add:** Addendum to Sweco Expert Report, dated 14 August 2021, para. 28.
[614] **REX-004 Add:** Addendum to Sweco Expert Report, dated 14 August 2021, para. 30.

first found that the VE-2 Economizer should not have cost more than EUR 3.54 million,[615] *i.e.* Sweco calculated an overpricing of 127%.[616]

650. Following AFRY's criticisms of Sweco's adjustment of the Oulu project benchmark, Sweco incorporated certain changes in its assessment which led it to conclude that the VE-2 Economizer should not have costed more than EUR 4.7 million.[617]

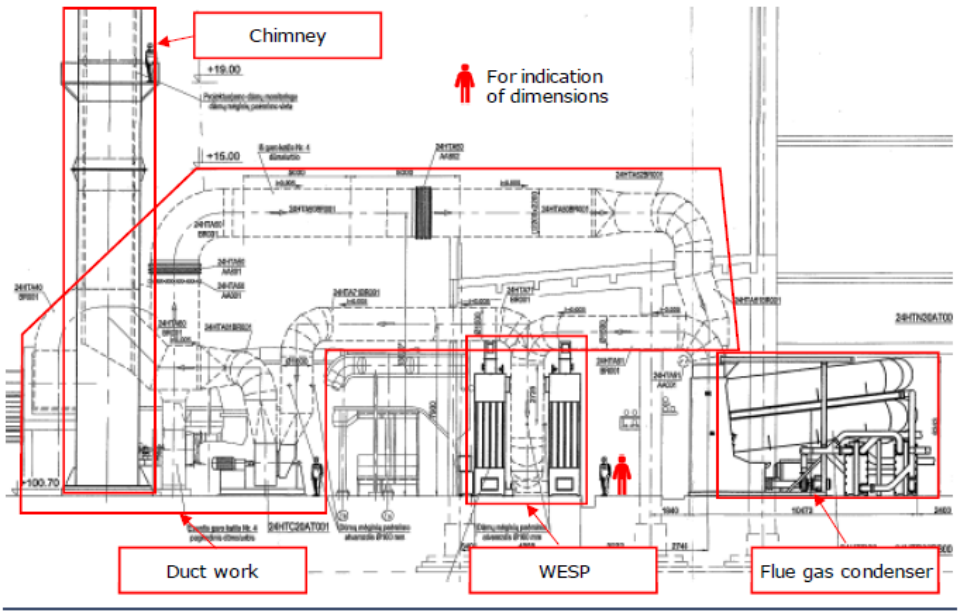
b. AFRY's Evidence

651. Regarding Sweco's allegation that Axis' bid did not comply with guarantee requirements required by the tender, AFRY replies that "*Sweco report fails to recognise that the figures given in the technical specification were intended as target values*.", as confirmed by both 1) mention of "preliminary" and "≥" or "≤" on said specifications and 2) AFRY's experience.[618] AFRY further refers to guarantee tests performed by University of Technology Kaunas in 2010 which concluded that the FCG met the guarantees.[619]

652. On benchmarking, AFRY criticized Sweco for overlooking the fact that the Economizer procurement was a "brown field" delivery, *i.e.* one requiring unique, tailored solutions for design and implementation. Such procurement required extensive dismantling of old equipment and structures, extensive flue gas duct work and long pipe connections to connect to existing facilities.[620] AFRY corrected the presentation of the different components of the Economizer procurement to show that FCG is not the central piece of the equipment, as Sweco alleges, and that the above items constitute an important part of the costs:[621]

[615] **REX-004 Add:** Addendum to Sweco Expert Report, dated 14 August 2021, para. 30.
[616] **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, para. 260.
[617] Sweco's Direct Presentation, slide 48.
[618] **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 790-791, Figure 26.
[619] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 792.
[620] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 773, see also para. 793.a,
[621] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 774, Figure 37.

Figure 37 – Sectional view of FGC Economizer installation depicting the extensive ductwork[554]



653. Sweco further fails to account for several works and items in its cost benchmark, such as the WESP (which was however part of the Axis contract), civil constructional works and technical project costs.[622] The omissions of Sweco which are assessable account for EUR 1.6 million, representing over half of the total Sweco's benchmark at EUR 3 million which Sweco qualifies as conservative. To the contrary, Sweco "*strongly underestimates the adequate project costs*".[623]

654. AFRY's own benchmarking of the Economizer procurement is made against the prices of seven FGC economizer procurements in Finland and Estonia in AFRY was involved from 2006 to 2010. AFRY argues that its benchmark is more representative than Sweco's because the capacity range in the AFRY sample is smaller and closer to the reference point, and its data is geographically and temporally closer to the VE Economizer procurement.[624] Accounting for the higher requirements from VE's brown-field integration, AFRY's benchmarks in Finland and Estonia range from EUR 6.3 to 8.3 million, with a median of EUR 7.7 million.[625] In AFRY's experience, bid prices can easily

[622] **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 776-778.
[623] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 782.
[624] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 787, Table 41.
[625] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 788.

vary by +/- 20% for the same project, and therefore, the 1.3% higher pricing of VE's procurement at EUR 7.8 million compared to the median of AFRY's benchmark at EUR 7.7 million "*demonstrates clearly that VE has not overspent as alleged by Sweco*."[626]

655. AFRY acknowledges that, following its criticisms, Sweco adjusted its benchmark to account for technical project costs, the cost of the WESP, dismantling costs and the cost of DH piping. It however notes that 1) Sweco's estimated costs for these items are 38% less than AFRY's estimates and that 2) Sweco in any event failed to incorporate several further missing adjustments that AFRY considers necessary.[627] The resulting small reduction of alleged overpricing from 161% to 127% reflects these persistent flaws in Sweco's analysis.[628]

656. Regarding technical project costs estimated by Sweco to correspond to a surcharge of 2% of the total project costs, AFRY observes that Sweco's "*assumption that a Technical Project would be covered by the contractor's basic and detailed engineering is wrong*."[629] To the contrary, technical projects require considerable additional efforts "*mainly as the requirements rising from a Technical Project do not match often with the needs of a project from the contractor's view*"[630] and because the "technical project" as such is in fact based on a design specific to the contractor.[631] AFRY therefore prefers the Sistela guidelines which suggest a surcharge of 3.6% for projects worth more than EUR 1.45 million.[632]

657. The dismantling costs are also underestimated by Sweco, who ignore the fact very specific and challenging conditions of the Economizer installation: "*For example, much had to be done by hand, existing foundations had to be cut in pieces using diamond saws to minimize the risks of any disturbances to the running activities, and excavations in the existing boiler building had to be carried out using shovels, since the use of an excavator was not possible*."[633] In addition, the activity of VE-2 in parallel to the

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626 **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 788, Figure 38, see also para. 793.b.
627 **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, para. 258.
628 **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, para. 260.
629 **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, para. 264.
630 **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, para. 264.
631 **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, para. 266.
632 **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, para. 264.
633 **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, para. 268.

installation would have made demolition works particularly delicate to plan.[634] For these reasons, AFRY's estimation of dismantling costs at EUR 0.3 million (vs EUR 0.045 million according to Sweco) is more reasonable.[635]

658. Sweco also failed to adjust its benchmark for ductwork,[636] and made inaccurate assumptions regarding the Oulu project which lead them to incorrectly adjust its data for comparison with the VE-2 Economizer.[637]

659. Finally, AFRY points to Sweco's reference to the lower range of its price range instead of the median or average of the same as "remarkable".[638] The fact that SRE technology was simpler than RADSCAN's "*cannot explain Sweco's low end estimate, because the condenser technology affects only a limited portion of the overall costs*."[639] Similarly, the maximum impact of the type of condensate cleaning system is about EUR 0.1 million. Further, a plant including a by-pass implies a higher investment cost.[640]

5.4.3 The Arbitral Tribunal's Analysis

660. What the Parties have referred to as the "Economizer" procurement corresponds to VE's Procurement No. 71344. To put it simply, Procurement No. 71344 concerned the construction of chimney No. 5 and flue gas ducts (or "smoke channels" or "smoke ducts") in the VE-2 plant.[641] This contract was awarded to Axis for EUR 7.8 million.[642]

661. A diagram of the different elements of the procurement is reproduced below:[643]

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[634] **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, para. 269.

[635] **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, para. 271.

[636] **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, paras. 272-273.

[637] **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, paras. 274-282.

[638] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 783.

[639] **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, para. 281.

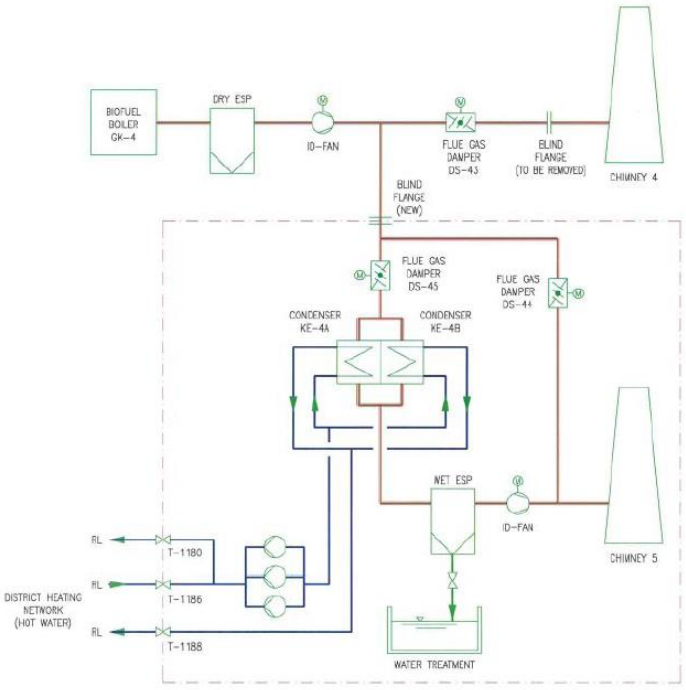
[640] **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, paras. 282.

[641] **R-889:** Vilnius Energy, Technical Conditions, Procurement No. 71344, dated 28 July 2008, **R-860:** Vilnius Energy, Draft of Contract, Procurement No. 71344, see also **R-357:** Vilnius Energy report to the Public Procurement Office on tender procedure No. 71344, dated 14 September 2017, **R-913:** Vilnius Energy, Minutes of Meeting No. 1, Procurement No. 71344, dated 12 November 2008, **R-912:** Vilnius Energy, Minutes of Meeting, Procurement No. 71344, dated 06 November 2008.

[642] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 522.

[643] **REX-004:** Sweco Expert Report, dated 13 October 2019, p. 179, Figure 35.

Figure 35 Process Flow Diagram of Flue Gas System of Steam Boiler GK-4 in Plant E-2



662. Regarding Sweco's analysis of the tender, which lead them to "*consider that it is likely that VE intended to award this procurement to Rubicon from the outset*"[644], the Arbitral Tribunal first notes that Respondents criticize the fact that VE resorted to the "unannounced negotiations" procedure to procure the Economizer.[645] Respondents emphasize that such procedure is only allowed under the PPL when extraordinary circumstances such as extreme urgency justify it.[646] Respondents refer to Art. 73(1) of the PPL, which provides that the so-called unannounced procedure (precisely, the "Negotiated Procedure without Publication of a Contract Notice") may be used in certain situations.[647] The fourth *alinea* of Art. 73(1) of the PPL does indeed refer to the situation "*when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority in question, the time limit for the open, restricted or negotiated*

[644] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 522 (emphasis added).
[645] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1011.
[646] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1011.
[647] **RL-008:** Law on Public Procurement (as amended on June 21, 2011), dated 21 June 2011, Art. 73(1).

procedures with publication of a contract notice cannot be kept within the time limits fixed by this Law."[648] The Parties have not explored this language in more detail.

663. Claimants have replied to Respondents that "[u]*nder the PPL, an Unannounced Negotiated Procedure is a recognized and legitimate method of conducting a public procurement in cases when goods and services are needed urgently*."[649] Claimants' references to the VE's report to the PPO concerning the Economizer Procurement[650] and to the witness statement of Mr. Veršulis, VE's Head of Procurement at the relevant time,[651] are however not very informative. Both merely prove that the unannounced procedure is an option under the PPL, without going into the conditions for being allowed to use such procedure or how they would be fulfilled in the case of the Economizer procurement.

664. Probably due to Respondents' focus on the condition of urgency (without addressing the possible requirement that such urgency be also brought about by events unforeseeable), the Parties' discussion has focused on whether urgency existed in the present case. Respondents assert that "[n]*o such justification* [such as extreme urgency] *existed here; the Economizer tender was not, for instance, a case of perishable goods*."[652] Respondents then add that in view of the size of the procurement at stake, common sense would have also required holding an open tender, instead of the most restrictive type of tender allowed under the PPL, and swiftly conclude that "[t]*he motive behind Vilnius Energy's conduct is transparent: to ensure that its related party was the successful candidate of a significant public procurement contract*".[653]

665. Claimants have protested that VE needed to procure the construction of the Economizer as quickly as possible in order to 1) decrease the risk of this investment which Respondents had refused to approve, and 2) reduce costs rapidly during the Lease's term, which would "*ultimately benefit consumers by reducing heat tariffs*" as

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[648] **RL-008:** Law on Public Procurement (as amended on June 21, 2011), dated 21 June 2011, Art. 73(1)(4).

[649] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 2090.

[650] **R-357:** Vilnius Energy report to the Public Procurement Office on tender procedure No. 71344, dated 14 September 2017.

[651] **CWS-013:** Witness Statement of Mantvydas Veršulis, dated 10 January 2019, para. 1.

[652] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1011.

[653] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1011 (emphasis added).

efficiency gains would be passed to them.[654] Further, Claimants refer to the limitation that "*the Economizer needed to be built between heating seasons, which run between October and April each year in Lithuania.*"[655]

666. The Arbitral Tribunal finds the Parties' respective arguments and overall debate on VE's use of the unannounced procedure in the case of the Economizer procurement inconclusive as to whether this reflects any manipulation and/or intention to favour Axis. It moves to examine Respondents' other arguments in support of their allegation of manipulation.

667. Respondents and Sweco further conclude from VE's omission of certain competitors in its initial invitation to prospective bidders and VE's refusals to grant certain extensions of time to submit bids that "*Vilnius Energy treated Rubicon differently than the other potential suppliers in terms of time accorded to prepare the bid* [which] *shows bias in favor of Axis Industries. Unsurprisingly, Axis Industries was the only company that submitted a bid*."[656]

668. However, regarding the case of the initially uninvited competitor, upon request, Enerstena was able to participate in the tender. Sweco's speculation that VE's omission of Enerstena from its initial invitations was "*more than a simple oversight*" rests solely on the observation that Enerstena "*was (and is) a well-known and respected company in Lithuania, with the appropriate capability and experience to bid for the 'Economizer'*".[657] This is too conjectural to convince the Arbitral Tribunal. In any event, Sweco's conclusion that VE's failure to invite Enerstena to bid from the outset of the unannounced procedure was a major deficiency that precluded VE from obtaining the best price[658] can only be correct insofar as Enerstena's bid would have been lower than Axis'. For instance, Sweco does not offer evidence of the price level at which Enerstena would have possibly bid based on other similar projects. In other terms, the decision of

[654] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 2090.

[655] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 2090.

[656] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1015.

[657] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 536.

[658] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 537.

the Arbitral Tribunal comes down to whether overpricing is established through Sweco's benchmarking exercise, in line with what has already been stated above.[659]

669. As to the time granted to potential tenderers to submit bids, Sweco calculate that "[f]*ollowing the granting by VE of a first extension of time to submit bids, the Lithuanian companies initially invited to bid had 50 days* […], *the foreign companies had 41 days, and Enerstena had only 25 days*."[660] The Arbitral Tribunal however notes from Sweco's own factual chronology of the different steps of the tender procedure that it seems to reflect VE's equal treatment of competitors at a given stage of the procedure, rather than bias towards Axis.[661] According to Sweco, when Enerstena requested to take part in the tender, Axis issued an invitation to bid to Enerstena on the same date.[662] It is only close to one month later that Enerstena requested an extension of time to submit its bid which was refused by VE. If VE's intention had been to exclude all competitors of Axis from the outset, it could have delayed the sending of its invitation to Enerstena. The denial of its subsequent request for extension was more likely justified by the fact that, at that stage, Axis' bid was already before a VE evaluation committee ready to engage in back-and-forth negotiations with Axis.[663]

670. In any event, it remains that, as Claimants emphasize, VE sent invitations and revised tender documents to seven Lithuanian companies and four foreign companies on the same date, *i.e.* 3 September 2008.[664]

671. In view of the urgency of the procurement, VE's conduct does not seem to have been unreasonable, but rather tailored to expedite the process and commence construction of the Economizer rapidly during the Lease's term. The Claimants' explanation that enhancing the efficiency of production at VE-2 was an urgent goal is, in the Arbitral Tribunal's view, plausible. It is reinforced by the fact that, at the relevant time, none of

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[659] [cross-reference to overall introduction of section on overpricing]

[660] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 539.

[661] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 533.

[662] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 533 (p. 182). This is also confirmed by Mr. Veršulis in his second witness statement: **CWS-019 :** Second Witness Statement of Mantvydas Veršulis, dated 29 May 2020, para. 27.

[663] See **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 533 (p. 182), **R-732:** Vilnius Energy Minutes of the Meeting for Technical Evaluation of the Offer, dated 16 October 2008, pp. 1-4.

[664] **R-357:** Vilnius Energy report to the Public Procurement Office on tender procedure No. 71344, dated 14 September 2017, **CWS-019 :** Second Witness Statement of Mantvydas Veršulis, dated 29 May 2020, para. 27.

the competitors filed any complaint about the tender process,[665] whereas such possibility is provided for in the PPL.[666] In view of the significant size of the procurement, if VE's initial omission of Enerstena or its refusals of extensions had been egregious, one would expect that complaints would have been raised by other bidders. In any event, there is no evidence on record that Enerstena's bid would have been more favorable to VE. The Arbitral Tribunal thus finds Sweco's statement that VE's omission of Enerstena from initial invitations to bid was "*a major flaw preventing VE from achieving the best contractual price and conditions*"[667] to be unfounded.

672. Respondents have also argued that Axis' bid failed to comply with the requirements of the tender in that it did not list the supplier of the FCG,[668] and accordingly did not provide certain performance guarantees.[669] However, the technical specifications for the tender did not require bidders to name the supplier of the FCG.[670] Respondents refer to VE's concerns about the procurement even after the contract with Axis was signed.[671] It is however clear from the internal chain of emails to which Respondents refer that the concerns were not of a nature to put in question the quality of Axis' offer. The conclusion to the discussion of these concerns was that Axis' bid satisfied VE "*with certain reservations which d*[id] *not have a significant effect on the conformity of the Offer with the requirements of the Technical Conditions*."[672] While this formulation can be considered to be "cryptic", it can certainly not be considered to prove persistent concerns about the Economizer procurement at VE.

673. In view of the above, at this stage of the reasoning, the Arbitral Tribunal is not convinced that VE manipulated the tender. It now turns to examine whether Respondents have

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[665] **R-357:** Vilnius Energy report to the Public Procurement Office on tender procedure No. 71344, dated 14 September 2017, **CWS-019 :** Second Witness Statement of Mantvydas Veršulis, dated 29 May 2020, para. 28.

[666] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 2092-2093; **RL-008:** Law on Public Procurement (as amended on June 21, 2011), dated 21 June 2011, Article 93 (p.152 of pdf).

[667] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 551.

[668] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 557.

[669] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1018.

[670] **R-889:** Vilnius Energy, Technical Conditions, Procurement No. 71344, dated 28 July 2008.

[671] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1018, fn 1650.

[672] **R-738:** Email correspondence from Mr. Mindaugas Stankevičius to Ms. Skaidrė Dedūrienė, dated 12 December 2008, p. 2 of the PDF.

established overpricing of the Economizer procurement, which remains a necessary element for a finding of liability on Claimants' part.

674. As recalled above, Sweco's benchmarking against a pool of comparable projects led to a large market price range (from EUR 2.7 to 7.5 million[673], later adjusted to a range of EUR 2.7 to 5.6 million[674]). Based on the assumption that "*the technology used in the Economizer is simple*"[675] and that the FCG which according to Respondents is the main component of the Economizer, only cost EUR 2.3 million, Respondents calculate a 126%[676] overpricing with reference to the lower range of the benchmark only.

675. AFRY proceeded to do its own benchmarking against a different pool of comparable projects in Finland and Estonia, out of which was one identified by Sweco as the "Oulu" project in Finland. The median price in that pool was of EUR 7.7 million.[677] Accounting for the fact that bid prices can vary by +/- 20% for the same project, the 1.3% found between the median price of the benchmark and the price of the Economizer establishes that VE did not overspend.[678]

676. AFRY explained that the wide difference between the experts' assessment after Sweco adjusted its position is based principally on Sweco's persistent underestimation or omission of 1) technical project costs,[679] 2) dismantling costs,[680] and 3) ductwork.[681] The Arbitral Tribunal notes in that regard that it is clear from the technical specifications that the Economizer procurement was broad in its scope and encompassed extensive

[673] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 565.

[674] Sweco's Direct Presentation, slide 46.

[675] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 186, see also **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 566, 568.

[676] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 184.

[677] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 788.

[678] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 788, Figure 38, see also para. 793.b, AFRY's direct presentation, slides 28, 30, 48, 49.

[679] **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, para. 264.

[680] **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, paras. 268-271.

[681] **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, paras. 272-273, see also Transcript, Day 14, 187/6 ff.

design (which Respondents alleged would be minimal)[682], installation and dismantling work.[683]

677. The experts have further benchmarked the Economizer against the "Oulu" project alone, the contract for which is on record.[684] Sweco concludes to a 66% overpricing.[685] AFRY, which was involved in the "Oulu" project argues that it has better information,[686] according to which the "Oulu" project cost EUR 6.3 million.[687] Respondents thus conclude that "*on AFRY's own case, the Economizer purchased by Vilnius Energy from Axis Industries should not have cost more than EUR 6.3 million based on the Oulu project (a 24% overpricing).*"[688]

678. Regarding Sweco's benchmarking against a pool of comparable projects, the Arbitral Tribunal does not find it logical or sufficiently justified by Sweco to consider solely the lower range of its benchmark to calculate whether VE overspent, in particular as the importance of the FCG (which in any event only corresponds to about 25% of the project overall value according to Sweco[689]) is debated amongst the experts.[690] The Arbitral Tribunal also notices that the higher range of Sweco's initial benchmark was EUR 7.5 million, a price rather close to the price of VE-2's Economizer. In these circumstances, Sweco's assessment which is based solely on the lower range of its benchmark is not persuasive.

679. As to the "Oulu" project comparison, it evidences an overpricing of 24% on AFRY's own case.[691] The Arbitral Tribunal however notes that this figure comes from a comparison between one contract or project with another, rather than a comparison of the Economizer of VE-2 with a pool of contracts/projects. The Arbitral Tribunal is not convinced that such comparison is relevant to assess overpricing which should be

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[682] **REX-004 Add:** Addendum to Sweco Expert Report, dated 14 August 2021, para. 23.
[683] **R-889:** Vilnius Energy, Technical Conditions, Procurement No. 71344, dated 28 July 2008.
[684] **R-1804:** Contact, Oulun Energia, FGC plant, March 1, 2006, dated 01 March 2006.
[685] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 184.
[686] **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, paras. 276-277.
[687] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 787, Table 41.
[688] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 186.
[689] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 568.
[690] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 772.
[691] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 787, Table 41.

compared to price level of the relevant market). The Arbitral Tribunal therefore is not persuaded that Respondents have proved that the Economizer was overpriced.

5.5 The Heat Meters

5.5.1 The Parties' Positions

a. Respondents' Positions

680. Respondents rely on Sweco's evidence to assert a 33% overpricing of the heat meters purchased by VE from Axis.[692] They draw the Arbitral Tribunal's attention to the fact that "[t]*his finding is aligned with the conclusion of a 2008 audit by the Municipality Audit Office, which determined that Vilnius Energy's investments in heat meters were overpriced by up to 40%*".[693]

681. Respondents contend that such overpricing results from a manipulation of the tender process which included unreasonable bundling of the procurements of heat meters, the devices to remotely collect their data, and their installation.[694] Respondents further point to the requirement that the procured meters and remote data collection devices be compatible with the Rubisafe system.[695]

682. Like for other tenders, the legitimacy of which they question, Respondents also criticize the language of the tender documentation (Lithuanian only), which according to Sweco did not comply with the prudent operator's standard whose goal would have been to enhance international competition.[696]

683. Respondents contend that Claimants' criticism that their position fails to consider the right benchmark, *i.e.* the prices offered by Terma in VE's tender against which Sweco performed the benchmarking, is biased. Respondents indeed consider that the Terma

[692] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 726.
[693] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 726.
[694] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 991-993.
[695] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 992.
[696] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 994.

offer should be excluded from the analysis given that this tender (and other tenders analysed by Respondents) were manipulated.[697]

684. As to the alleged lack of sufficient comparators for all products in the benchmarks they use, Respondents respond that 7 out of 10 data points (*i.e.* 98%) were correctly compared in Sweco's benchmarking exercise, as a comparator exists for such data from prices other than those introduced by AFRY's own benchmarking.[698]

b. Claimants' Position

685. Claimants rely on AFRY's evidence to oppose a finding of VE' paid price to be "between 12% less and 0.8% more than benchmark price.[699]

686. Regarding Respondents' allegation of tender manipulation, Claimants have answered that "*Respondents inappropriately apply the modern concept of "bundling" to this procurement*", whereas "[i]*n 2012 neither EU or Lithuanian law required the division of procurements into separate parts*".[700] Claimants further rely on AFRY's evidence that good reasons justified the bundling of the procurements of heat meters, the devices to read their data remotely, and their installation. Claimants explain that such bundling made sense from a technical perspective, as "[h]*eat meters and data reading equipment are part of the same remote data collection system*."[701] Also with the support of AFRY, Claimants further refer to the more general advantage that comes with bundling procurements In terms of cost and time savings.[702]

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[697] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 728; **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 162.

[698] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 163.

[699] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1146.

[700] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 2111.

[701] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 2111.

[702] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 2113.

687. As to Respondents' attack on the tender documents in Lithuanian only, Claimants respond that the PPL only required contracting authorities to draw up procurement documents in Lithuanian.[703]

688. On the question of the appropriate benchmark, Claimants argue that Respondents' exclusion of Terma's offer and its justification for the same do not make sense. If Respondents' case is that the tender was manipulated, it means that the Terma bid would have won and thus its pricing is a legitimate indicator of a winning price.[704] The Terma data set is not only necessary to address the lack of comparators for various heat meters sizes in the sources of comparison considered by Sweco, it is also "*the most relevant benchmark data possible, as it responds directly to the procurement at issue*."[705]

689. Claimants rely on this reasoning to assert an under-pricing of 4% when Axis's price paid by VE is solely compared to Terma's price,[706] and on other approaches followed by AFRY that lead to "*a price equivalent to, or only slightly above, Sweco's benchmark (and at or below AFRY's benchmark)*."[707]

5.5.2 The Experts' Evidence

a. Sweco's Evidence

690. Sweco criticizes VE's bundling of its procurements for meters and remote transmission devices into one. They allege that such counter-productive bundling hampered competition, as companies producing only one or the other good could not participate to the bundled tender. The fact that the data transmission devices needed to be compatible with the Rubisafe system was an additional barrier to competition.[708]

691. Sweco further points to VE's bundling of installation works and the meters themselves. According to Sweco, unbundling the two could have "*enhanced competition, as*

[703] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 2114.
[704] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para 1149(a).
[705] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para 1149(b)(ii).
[706] **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, para. 245.
[707] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para 1151.
[708] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 337 and 345.

companies producing only heat meters or only remote transmission devices could have participated in the separate tenders".[709] Furthermore, unbundling of meter (devices) and installation (works) would have "most likely" increased the interest of international bidders because they would have not needed to ensure the installation of the meters in Lithuania.[710]

692. Like for other procurements analyzed, Sweco criticizes the availability of tender documents in Lithuanian language only as a limiting factor to international competition. It emphasizes that "[h]*eat meters are off-the-shelf technology that various suppliers outside of Lithuania can offer*."[711]

693. For its benchmarking, Sweco compares prices paid by VE for the meters only, *i.e.* excluding their installation cost,[712] against those the prices of heat meters purchased by other Lithuanian heat suppliers from two companies, Utenos Šilumos Tinklai and Fortum. Like VE, Utenos Šilumos Tinklai purchased its meters from Axis, whereas Fortum purchased its meters from Terma.[713] Sweco considers that the meters purchased through these two tenders are comparable to those purchased by VE, including remote data reading services. Sweco's comparison leads to an average 33% overpricing of VE's procurement for heat meters, and notes a 77% overpricing of the meters purchased by VE from Axis when compared to the prices of meters purchased by Utenos Šilumos Tinklai from Axis.[714]

b. AFRY's Evidence

694. AFRY replies to Sweco that VE's decision to bundle the procurement of heat meters with the remote data collection devices was justified by many reasons, notably the necessity and increased performance of compatible systems.[715] More generally, AFRY

[709] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 337.
[710] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 338.
[711] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 339.
[712] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 342.
[713] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 342, Table 14; **REX-004 Add:** Addendum to Sweco Expert Report, dated 14 August 2021, para. 2.
[714] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 343-344 and 346; Table 15.
[715] **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 738-740.

submits that bundling tenders can result in lower prices of purchase and ensuing reduced operation costs.[716]

695. AFRY further criticizes Sweco's benchmarking as it "*fails to include prices of heat meters with larger size as well as prices of Terma's final offer in its benchmark. Both could distort the calculated average price*."[717] AFRY further points to the fact that the Utenos Šilumos Tinklai and Fortum tenders referred to by Sweco "*relate to procurements of a significantly different magnitude than the VE procurement in question*" as they were "*just 3.5% of the size of the VE tender.*"[718] The Utenos Šilumos Tinklai and Fortum data sets are also said to be comparable only insofar as 5 and 6 out of the 10 relevant products are concerned, respectively.[719]

696. AFRY thus proposed four approaches to correct Sweco's benchmarking, including the following two: 1) AFRY added Terma's final offer (*i.e.* the only sources which contains all sizes of meters) to Sweco's data sets from Utenos Šilumos Tinklai and Fortum, which leads to an overpricing of 9% (vs 33% when omitting Terma's final offer);[720] 2) AFRY added the "Vilmista catalogue prices" (covering 8 out of the 10 sizes of meters). This leads to an overpricing of 0%.[721]

697. It should be noted that AFRY also proposed a "benchmark 3" based on Sweco's benchmark as supplemented with Terma's final offer plus the Vilmista prices, "*enriched by lacking data points in the prices of Utenos Šilumos Tinklai, Fortum and Vilmista*.[722] A methodological debate took place between the experts on this further benchmark as it involved interpolation and extrapolation of data. However, AFRY itself eventually concluded that "*the debate about interpolation and extrapolation side tracks and cannot*

[716] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 741.

[717] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 746 (emphasis added); see also **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, para. 233.

[718] **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, para. 238.

[719] **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, para. 253.

[720] **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 753-754; Table 37;see also **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, para. 234(a).

[721] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 755; Table 38; see also **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, para. 234(b).

[722] **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 756-760.

justify Sweco's ill-borne initial analysis […] *Ultimately, the key is which data sets are considered as comparators*."[723]

5.5.3 The Arbitral Tribunal's Analysis

698. VE's Procurement No. 130342 concerned heat meters not procured together with heating substations.[724] The tendering process for this procurement led to two applications, one from Axis and one from a consortium composed of UAB Terma and UAB Šilumos šaltinis ("**Terma**").[725] Sweco's analysis of the tender process itself highlights that it involved a request from VE's procurement commission to Terma to provide additional information "*to ensure fulfilment of the qualification criteria*."[726] In fact, as pointed out by Sweco, Terma was later found to comply with the qualification requirements of the tender.[727]

699. Most importantly, Sweco acknowledges that Terma's final offer was higher (EUR 2,798,790.31) than Axis' winning offer (EUR 2,696,739.49).[728] The Arbitral Tribunal will revert to the relevance of Terma's final offer in the course of its reasoning.

700. Regarding the regularity of the tender process, the Parties and their experts' debate has mainly focused on the bundling of VE's procurements. The disputed bundling concerns 1) heat meters and the devices to remotely collect data from the same; and 2) heat meters/the data collection devices and their installation.

701. Regarding the first aspect of bundling, the Arbitral Tribunal notes AFRY's explanations as to the specific link between the heat meters and the devices to collect data from the same when the data reading process is done remotely:

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[723] **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, para. 248.

[724] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 328; **R-989:** Vilnius Energy, Negotiation Conditions, Procurement No. 130342, dated 23 November 2012; **R-990:** Vilnius Energy, Notice on Procurement, Procurement No. 130342, dated 27 November 2012.

[725] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 332; **R-992:** Vilnius Energy, Minutes of Meeting, Procurement No. 130342, dated 31 December 2012.

[726] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 333.

[727] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 333.

[728] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 336; **R-1009:** Vilnius Energy, Minutes of Meeting, Procurement No. 130342, April 5, 2013, VEOLIASCC0029330, dated 05 April 2013.

> "[I]*n case of remote data collection process, heat meters and data reading equipment are part of the same remote data collection system. Therefore, in order to receive data on time and in required quality, all parts must interact in a flawless way to constitute a properly functional system. Only in in case of a manual data reading process, heat meters and substation control units / data readers act separately, i.e. as non-interacting equipment.*
>
> *Usually equipment from different manufacturers is not entirely compatible (contrary to what is often claimed), which may require additional protocol conversion and other additional configuration. These factors can greatly affect the final price or cause additional problems during equipment installation and commissioning.*
>
> *Thus, the bundled procurement supports the proper functioning of the remote data collection system. A high degree of compatibility cannot be emphasized too much as it has an impact on operational reliability and maintenance. Of course, high compatibility also impacts the purchase decision with respect to pricing as it simplifies installation and commissioning and reduces unexpected complications or malfunctions.*"[729]

702. AFRY further pointed to the more general advantages of bundling procurements in terms of time, cost and efficiency savings:

> "*Sweco also fails to acknowledge two important aspects of how tenders with bundled contracts can result in lower prices. First, several companies can form a consortium, leveraging their individual competencies. Second, the large lot size allows the benefit from economies of scale. Suppliers (or consortium of suppliers) can lower the equipment price because of higher volumes of goods or compensate a higher price on goods by reducing prices on services. Furthermore, it can save staff for installation works. Via a consortium, the collaborating companies do not have to hire staff and train specialized staff to purchase and install meter and transmission equipment. This way, bundling of procurement can reduce CAPEX and OPEX, as well as the risk of mistakes in the day-to-day work.*"[730]

703. AFRY includes in the benefits of bundling 1) the reduction of the costs of the single procurement process and of the total purchase periods, 2) the reduction of further

[729] **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 738-740 (emphasis added); see also **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 2111.

[730] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 741.

operating expenses with a single contractor or consortium, and 3) a reduction of risks in the sense that a single point of responsibility in case of problems encountered with the procurement is always a high added value.[731] AFRY concludes generally that "*it depends on the specific case, where to find the optimum of bundling vs unbundling.*"[732]

704. In the case of the meters and remote data reading devices, AFRY considers that the bundling was justified in view of the technical specificity of the bundled goods.[733]

705. The Arbitral Tribunal further notes that Terma's losing bid (which nevertheless fulfilled the qualifications for it to participate in the tender) came from a consortium, which supports AFRY's explanations that suppliers not individually equipped to answer a call for bundled tenders can form consortiums with partners to leverage their individual competencies, compete jointly and so meet the requirements of the bundled tender. In this specific case, this shows, as highlighted by Claimants, that "*the bundling of the three parts of the tender did not discourage competition*."[734]

706. Regarding price benchmarking, the Arbitral Tribunal notes here that Claimants' proposed alternative benchmarking based on enriched data through interpolation and extrapolation need not be discussed in view of Claimants' own distancing from this proposed further price comparison.

707. As to the inclusion or not of Terma's loosing offer in the benchmark, the Arbitral Tribunal agrees with AFRY's and Claimants' suggestion that, from the methodology perspective, it would be logical to include it as the best measure of the market price at the time:

> *"As a preliminary point, before any alternative procurement prices are considered, it must be remembered that VE did in fact procure its heat meters through a competitive tendering process: VE received two bids, one from Axis Industries and one from Terma. The final bid of Axis Industries was lower than the bid from Terma and thus Axis Industries was the awarded winner, as acknowledged by Sweco. Therefore,*

[731] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 741.
[732] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 742.
[733] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 743.
[734] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 2112.

empirically, VE procured its heat meters at the lowest price available in the market at the time, and cannot be said to have overspent."[735]

"It is clear that Sweco's exclusion of these data sets is inconsistent with its broader position. Firstly, in Sweco's initial peer group, there are numerous size classes where there is not a single comparator, meaning that without these data points, Sweco cannot undertake the benchmarking analysis that it states is necessary. Secondly, this excluded data is highly relevant. The Terma offer is the most representative data possible; it comes from a final offer in the VE tender in question and exactly responds to VE's tender. Moreover, both the Terma and Vilmista data sets have strong coverage across size classes. Therefore the Terma and Vilmista data sets should be included in any relevant benchmark, and that they are not represented in Sweco's benchmark undermines its credibility."[736]

"*AFRY believes that the Terma data set is the most representative data set, as it is the only data set that is truly responsive to the contested tender."*[737]

"Both Axis Industries and Terma submitted tender bids and Vilnius Energy invited both companies to negotiate their final offers. Axis Industries' submitted the lower final bid and therefore won the tender. By definition, Vilnius Energy paid the market price under the tender because the tender conditions were legal and fair."[738]

708. Sweco's answer to the criticism that it did not consider Terma's offer was unpersuasive. In the addendum to its report, Sweco limited its answer to a statement that it "*does not comment here on these alleged comparators* [*i.e.* the Terma offer and the Vilmista catalogue prices] *because it considers that they should not be included in the price benchmarking analysis.*"[739]

[735] **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, para. 236.

[736] **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, para. 240 (emphasis added).

[737] **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, para. 251 (emphasis added).

[738] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 2115 (emphasis added).

[739] **REX-004 Add:** Addendum to Sweco Expert Report, dated 14 August 2021, para. 3.

709. Sweco later clarified that it "[c]*onsidered irrelevant to include the loser of the VE procurement as the intention for Sweco is to benchmark with relevant competitive tender procedures*".[740]

710. In their Post-Hearing Brief, Respondents summed up their position as follows:

> "*AFRY criticizes Sweco for not having included in its analysis the prices offered by Terma in Vilnius Energy's tender against which Sweco performed the benchmarking. This criticism screams bias. Where the Respondents have shown the consistent manipulations in Vilnius Energy's tenders, including notably this very tender, any price issued from this procurement cannot be considered representative of "market prices". Terma's prices should therefore be ignored in the benchmarking analysis.*"[741]

711. Respondents' argument falls back on allegations it has failed to prove so far, *i.e.* Respondents have not established the existence of consistent manipulations in VE's tenders, and they have not established that the bundling of procurements and the Lithuanian language aspects of this heat meters procurement proved that it was manipulated to favour Axis. Respondents' reasoning is circular as it relies on its own allegations which remain unproven: "*Respondents rely on their criticisms of the Terma tender procedure to assert that the Terma tender should be ignored*."[742]

712. In light of the foregoing, Respondents' only justification for ignoring what is the evidently more accurate benchmark for its analysis fails to convince the Arbitral Tribunal.

713. Further, Respondents' allegation of manipulation does not logically lead to the conclusion that the loosing tender should be dismissed but to the contrary. If the tender was manipulated to favour Axis' bid, why should the Terma's losing bid be considered irrelevant to reflect market prices? Claimants have emphasized this unexplained aspect of Respondents' case on overpricing:

> "*Terma's contested tender only lost out to the Axis Industries tender now being questioned. If the Respondents deny the propriety of the winning Axis tender, logically, the Terma tender should have won the Vilnius Energy heat meter procurement. In that*

[740] Sweco's Direct Presentation, slide 63.

[741] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 728 (emphasis added), see also **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 162.

[742] **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 281.

case, the Terma tender is theoretically a winning tender, and the pricing it features is a legitimate indicator of a winning price. As such, if the Respondents wish to deny the propriety of the Axis tender, they must logically include the Terma tender in their benchmark".[743]

714. The Arbitral Tribunal agrees with this conclusion, and notes the discussion that took place on the same topic at the Hearing between Respondents' Counsel and AFRY's Mr. Laue:

"Q. […] Now, you say they [i.e. Sweco] should have included Terma in the benchmark because Terma bid in the same tender is that –

MR LAUE: That's correct, yes.

Q. Terma lost that tender; right? It was Axis Industries who, once again –

MR LAUE: Axis Industries won that tender. That's correct.

Q. So the Terma price in the tender is not the relevant market price because it's not the price – the best price that you can find on the market at that time; right?

MR LAUE: Well, that's where I disagree. There was a competitive tender and Terma and Axis Industries were qualified bidders and handed in […] bids. And it then turned out that, under this tender – and I guess it's a PPO tender – then Axis Industry offered 4 per cent lower price than Terma did. And this means that, at that point in time, for this procurement VE obtained the best available price.

Q. Assuming VE had manipulated the tender, would that price – the price obtained in this tender – still reflect the best market price, in your view?

MR LAUE: Assuming VE would have manipulated the tender?

Q. Yes.

MR LAUE: What do you mean by this?

[743] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1149(a) (emphasis added).

Q. For example they tailor the tender so that Axis Industries would win. It's an assumption. You don't have to agree with the assumption.

MR LAUE: But Terma had the same tender conditions and offered exactly what was required.

[…] *assuming hypothetically* […] *So let's say Terma's price is then what Terma would want to offer. And then my assumption is that Terma –* […] *would not have offered if they did not want to win that bid. And, for that reason, my assumption is that* […] *the Terma price is probably not out of the market, but it's what Terma wanted to offer in a competitive tendering process."*[744]

715. Claimants have further pointed to the fact that Sweco did include losing (Terma) tenders for the purpose of establishing its Rubisafe benchmark.[745] Mr. Jonsson of Sweco was cross-examined on this inconsistency:

"Q. So you have rejected Terma as a benchmark. And if I understand correctly what you said yesterday in your presentation, is that you reject it because you consider that the losing bid is not relevant for a comparison because it's not relevant to determine […] *a market price; is that right?*

MR JONSSON: Yes. I mean, we want to compare with other contracts from […] *other tendering processes that were done under what we understand as competitive – in a competitive way.*

Q. […] *So you understand that the losing tender is not a valid reference for a benchmark?*

MR JONSSON: I mean, I'm not sure I understand. I mean, for definition, so to say, the losing tender must have a higher cost than the winning tender.

[…]

Q. That is the benchmarks that you have selected to price remote data collection devices [i.e. Rubisafe devices]; right?

[744] Transcript, Day 14, 109/18-111/23 (emphasis added).
[745] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1149(a).

MR JONSSON: Yes.

Q. […] *in that case, in that tender, you are considering, as valid references, the winning bid* […] *And the ones also appearing as "Offer" which is the losing bids; right?*

MR JONSSON: Yes, but I mean, this is used for another purpose […] *And I mean, we included also the offers and that makes, so to say, our comparison only more conservative.*

Q. So, in that case, you considered that the losing offer is a valid comparison […]?

MR JONSSON: We did so, as the prices were very similar. I suppose if we have found losing offers that were very much higher, we would have made a comment on that in some way. But we didn't. They were very close in price and they were from other tendering processes. So we thought we should include, in this case, as many data points as possible.

Q. […] *It happened that actually three of the losing offers, they are Terma's offers; right?*

MR JONSSON: […] *Yes.*

Q. *So you are considering valid points of reference, Terma's offers in respect of Rubisafes, losing offers. You are not considering Terma's offer for the* […] *heat* [meters]?

[…]

MR JONSSON: *Yes. But, I mean, we understood as our work to: look at the tendering processes and to do benchmarking. And* […] *I think we* […] *combined the two. So, I mean, we didn't want to compare various tenders in Vilnus Energy's tendering processes and use the results of those as benchmarking in the same processes* […]

Q. […] *Terma actually submitted an offer for the same* […] *timing, same scope of work, same quantities. So it is the closest comparison – point of comparison –*

MR JONSSON: *Of course, but I mean* […] *I think that's not right because* […] *we also pointed on factors – in all our tender process analysis, we pointed on factors that we mwant hampered competition […] that's why we mean that we shouldn't use losing*

tenderers in those tender processes that we are analysing to compare – to use in the benchmarking."[746]

716. Mr Jonsson's answers fail to convince for the reason already mentioned, why would the manipulation of a tender renders the losing bid irrelevant? Claimants addressed this in the conclusion of their questioning of Sweco on heat meters:

"*Q. And the* [tenders] *you are referring to are Utenos and Fortum; correct?*

MR JONSSON: Yes.

Q. So, actually, the supply of Fortum is actually another supply by Terma; right?

MR JONSSON: Yes, I think you're right there.

[…]

Q. And in this case, you didn't believe that Terma had any issues in respect of its offer. You believed Terma is a reputable company whose prices are to be taken into consideration as valid comparator; right?

MR JONSSON: Yes."[747]

717. In view of the above, it appears that the most correct benchmarking of VE's procurement of heat meters ought to consider the final offer made by Terma in the same tender. When adding such data to the comparison, the overpricing is reduced from 33% to 9%.[748]

718. The questions whether a discrepancy between VE's costs and market prices of 9% is significant enough to find "overpricing", and whether this can be attributed to the tender process in which Axis was selected, notably the bundling of such procurement, are open. The Arbitral Tribunal, however does not consider it necessary or appropriate to delve into these issues in detail. As noted above, the fact remains that the procurement

[746] Transcript, Day 15, 23/16-26/15.

[747] Transcript, Day 15, 27/17-28/5.

[748] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 745; **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, para. 242.

for VE's heat meters did lead to two qualifying bids and ultimatly negotiated offers, and that VE selected the least expensive of the two offers.

719. This fact on its own makes a finding of overpricing difficult. The Arbitral Tribunal notes, in addition, that the initial and final offers of the two bidders were close and suggest a healthy competition throughout the tender process.[749] In fact, if one accepts that the benchmark is the loosing tender in a situation where two bids were qualified, the simpler comparison between Axis and Terma's offers show that VE's costs were 4% below benchmark.[750]

720. In light of these considerations, the Arbitral Tribunal would in any event not be convinced that the 9% variation between VE's costs and the benchmark found when considering both Terma and the two tenders relied on by Sweco is sufficient evidence of "overpricing".

721. Indeed, Sweco and Respondents' allegation of overpricing relies on tenders the comparability of which remains in doubt. The difference in volumes of these tenders, on the one hand, compared to that of VE's procurement, on the other hand, has not been addressed satisfactorily by Respondents. Further, Sweco's comparators fail to cover several heat meter sizes.[751]

722. In other terms, Respondents and Sweco have failed to establish overpricing of the heat meters purchased by VE from Axis.

723. For the sake of argument, the Arbitral Tribunal notes that the Respondents' reliance on the finding of the Municipality Audit Office of 2008[752] is inapposite and slightly misleading, as it concerned a different procurement that took place in 2003.[753]

724. In view of the Arbitral Tribunal's reasoning and resulting conclusions, Claimants' reliance on the Vilmista catalogue prices is not in issue insofar as the Arbitral Tribunal

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[749] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 335-336.

[750] **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, para. 245, Table 9.

[751] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1149(b)(i), with ref. to **REX-004:** Sweco Expert Report, dated 13 October 2019, Table 15.

[752] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 726.

[753] **R-757:** Vilnius City Municipality Audit Office, Inspection Report, October 10, 2008, dated 10 October 2008.

has found above that the Terma offer (or the Terma offer combined with Sweco's sources) are the correct comparators and both lead to the Arbitral Tribunal's conclusion that no significant overpricing is established, even at a level of 9%.

5.6 The Rubisafe devices

725. Respondents pursue claims for the overpricing of Rubisafe devices, a component of VE's IHS, under both Counterclaim 5[754] and Counterclaim 13.[755] Respondents state that the Rubisafe devices installed by VE during the relevant period included unnecessary functions which increased the costs. Relying on the evidence of Sweco, Respondents compared the cost of the Rubisafe devices to devices with sufficient functions (remote data reading and IHS controllers) for what they say was sufficient for a district heating supplier, such as VE, to ensure reliable and efficient heat supply. On the basis of Sweco's comparison, Respondents state that VE paid an overprice of €1.3 million for Rubisafe devices.[756]

726. Rubisafe devices (produced by Rubicon) afford automated data collection and transmission and remote control of the IHS[757]. It appears that Dalkia and Rubicon discussed the option to use Rubisafe devices in the event that Dalkia's bid on the Lease was successful. On 1 September 2000, Rubikon Apskaitos Sistemos invited Dalkia to

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[754] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1979-1996, para. 2026.

[755] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1066, para. 1163. See also **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 719-725. Respondents say that Claimants and Rubicon pre-agreed to install Rubisafe devices before the signature of the Lease and, therefore, there was no separate tender in respect of Rubisafe devices. According to Respondents and Sweco, the cost of the Rubisafe devices was four times more expensive than devices capable of performing the remote data reading and substation control functions required in the IHS in the Vilnius system. Claimants say that the Rubisafe devices provided substantially more features or functionalities than was required and that this "gold-plating" resulted in VE overpaying to Rubicon €1.3 million. In addition, Sweco was of the view that the installation of Rubisafe devices in the IHS could have been one of the reasons why the IHS costs were as high as it calculated them to be (an overpricing of 50% above Sweco's proposed benchmark). Sweco was also of the opinion that the use of Rubisafe devices also locked VE into purchasing compatible devices from Rubicon and this affected VE's tenders related to the functionality of the communication system, including heat meters, hot water meters and data collection services for which, according to Sweco, VE paid an overprice. See **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 371-374.

[756] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1979-1982. After 2013, after a change in Lithuanian Law (which prevented VE from using the remote-control monitoring functions of its Rubisafe devices), VE purchased less expensive versions of the Rubisafe devices in respect of which it appears there is a dispute concerning whether these devices ("ENCO" devices) were also overpriced. Respondents say that the devices purchased after 2013 adequately provided the remote data reading and IHS control functions and that the comparison between the cost of these devices and the Rubisafe devices installed prior to 2013 confirms the overpricing of the latter.

[757] Sweco and AFRY offered detailed descriptions of the Rubisafe and its various functionalities.

attend a presentation on its new data transmission and control system ("Rubisafe").[758] In August 2001, an internal audit document prepared for Dalkia to support the tender for the Lease referred to Rubisafe devices as an "experimental system" produced by a small manufacturer. The audit went on to consider, in a first phase, the installation of Rubisafe devices in 30 IHS and then, in a second phase, the installation of Rubisafe devices in 5000 IHS.[759] Subsequently, on 21 January 2002, at an extended board meeting, a decision was made to install Rubisafe devices in all of VE's IHS.[760]

727. Thereafter, from 2002 until 2013, VE installed Rubisafe devices in all of its IHS. In 2011, Lithuania amended its Law on the Heat Sector to prohibit heat suppliers from providing maintenance services to IHS. This amendment rendered a number of Rubisafe devices functionalities useless to VE, and, as such, the Parties removed the IHS from the assets leased under the Lease. For accounting purposes, the Parties agreed on a monetary value of the Rubisafe devices as part of the allocation of costs between those attributable to basic data collection and transmission and those attributable to remote-control and other functions rendered obsolete by the change in the law.[761] From 2013 until the end of the Lease, VE installed simpler devices with remote meter reading and data transmission and local control equipment.[762] The Parties do not discuss in any detail the alleged overpricing of Rubisafe devices (ENCO devices) installed as of 2013.[763]

728. VE procured Rubisafe devices to install in IHS commencing in 2002. Prior to 2013, it appears that VE procured almost all Rubisafe devices with IHS installed during that period and that, between 2007 and 2009, VE procured a number of Rubisafe devices

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[758] **R-859:** Rubikon, Invitation of Rubikon, dated 01 September 2000.

[759] **R-608:** Dalkia, PROJECT Heatman, CRI002, dated 02 August 2001, p. 18 of the PDF.

[760] **R-612:** Minutes of Meeting of Extended Board, dated 21 January 2002, p. 3 of the PDF.

[761] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 281; **C-1100:** Letter from VE to VŠT "On the distribution of the values of the leased heat points", dated 04 January 2012; **C-194:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 16 April 2012.

[762] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 351-353; **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 677. According to Sweco, these devices were known as ENCO devices.

[763] As discussed below, the Experts do not agree on the appropriate benchmark price for devices which would be sufficient to replicate the remote data reading and local control functions needed by a district heating supplier to provide heat and hot water. Sweco estimates this cost as approximately €744; See **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 363-369. AFRY, on the other hand, estimates that the appropriate benchmark price would be €1,857; See **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 673-674.

separately by way of five contracts concluded between it and City Service.[764] Since the Rubisafe devices were included and installed with the IHS, the vast majority of Rubisafe devices were ostensibly procured and installed in 2003 and 2004 when VE procured and installed the great majority of its IHS.[765]

5.6.1 The Parties' Positions

a. Respondents' Position

729. Respondents allege that Claimants procured Rubisafe devices at a massive overprice from Rubicon companies in order to benefit its partner, Rubicon. They allege that this was the result of an agreement reached between Claimants and Rubicon in advance of the signature of the Lease. According to Respondents, the cause of the overpricing was the unnecessary functions included in the Rubisafe devices which were not required for the performance of remote data reading and substation control functions essential for supplying heat and hot water to consumers and were not commonly used by other district heating companies. Respondents rely on the evidence of Sweco who take the view that a number of the functions included in the Rubisafe, in particular remote operation of the IHS, were not needed to ensure reliable supply of heat. According to Sweco, the vast majority of heat suppliers are able to ensure reliable and safe supply of heat without the remote operation of IHS and any benefit which might flow from the use of Rubisafe devices does not outweigh the additional costs.[766]

730. On the basis of Sweco's analysis, Respondents maintain that the Rubisafe devices procured and installed by VE prior to 2013 were overpriced by at least 311%. As the Rubisafe devices were, for the most part, purchased together with the IHS, Respondents' claim with respect to those Rubisafe devices are included as part of the

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[764] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 348.

[765] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 324, Figure 26, which tracks the number of IHS installations. According to Sweco, as of 2009, very limited numbers of IHS were installed. According to Sweco, based on a VE Report prepared in 2015, VE purchased 1448 Rubisafe devices between 2005 and 2023 (for a total cost of €4,324,000): **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 361 and the sources cited there. Note that in its 2015 Report, VE sets out the various functionalities of the three available data collection systems in use in Lithuania at the time: Rubisafe/RIS, Ametrinas, and DPS-01. The VE Report was a submission for the coordination of the investments made in the Rubisafe devices between 2005-2013 made to the VKEKE (which appears to be VST/Municipality's relevant commission/authority).

[766] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1066, para.1163, paras. 1979-1982; **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras 719-725.

claim for overpricing of the IHS. With respect to the Rubisafe devices that were purchased separately from the IHS, Respondents claim €1.3 million with respect to overpricing prior to 2013.[767] In response to Claimants' arguments, Respondents state that after 2013, VE stopped purchasing the overpriced Rubisafes and relied on less expensive devices, for which they say VE paid €468, without any loss in efficiency, transmission or sales. As a result, the additional functions included in the Rubisafe devices did not increase the efficiency of VE's operations, confirming that the Rubisafe was heavily gold-plated.[768]

731. Respondents also state that Claimants and AFRY have not demonstrated the alleged economic benefits of installing Rubisafe devices. They maintain that the benefits attributed to the Rubisafe, such as "reduction of heat loss" and "heat theft prevention" are largely dependent on accurate metering, not remote control or remote monitoring of a substation. They say that other heat suppliers in Lithuania did not use Rubisafe devices and were able to collect from the substations data that Claimants state could only be collected with the Rubisafes.

732. Respondents also challenge AFRY's calculation regarding the benefits of the Rubisafe which AFRY attribute to "saving on remote execution of periodical condition monitoring" flowing from the legal obligation requiring the entity maintaining the substation to visit them once a week. Respondents state that the rules requiring weekly visits to substations were not enforced for the full Lease period, Further, VE was not in charge of maintenance of all of the substations where Rubisafes had been installed; the hourly wage used to calculate the cost of visits to the substations was twice the hourly wage in Lithuania for unqualified workers; and the Ministry of Energy rules required

[767] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1982, fn 3032. It is unclear whether, and, if so, to what extent, Claimants claim damages in respect of overpricing of Rubisafe devices after 2013. In his Expert Report, Dr. Roques states that he was instructed to include Rubisafes purchased as of 2013 onwards in the category of "other investments" in respect of which he calculated a premium of €8.7 million. See, **REX-003:** Second FTI Expert Report, dated 13 October 2019, para. 5.36. Mr. Roques calculated the overpricing of the Rubisafe devices purchased separately from the IHS by applying a premium rate of 311% to the total amount invested in them from the period 31 March 2009 to 31 December 2010 to obtain a total premium of €1.3 million.

[768] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 720.

independent, bi-weekly visits to the substations such that additional weekly visits were not required, in any event.[769]

733. Further, Respondents state that in their calculations AFRY improperly decreased the actual costs of remote data services. According to Respondents, in addition to the cost of remote data services at a monthly cost of €12, AFRY should have also calculated the monthly cost of €23 charged by Axis for the maintenance of each data collection system. Correcting for these errors, Respondents state the cost of remote data services were more than 10 times higher than the alleged yearly benefits of the Rubisafe devices. Further, Respondents maintain that AFRY's analysis did not include the actual cost of the unnecessary remote data service functionality (€1,047 per Rubisafe device). Correcting for that oversight, Respondents state that there was a minimum overspending for Rubisafe devices of 52%. However, Respondents state that a better measure of the overspending is the difference between the actual cost of the Rubisafe devices and the cost of the ENCO devices purchased by VE after the change in legislation, €468, which did not negatively affect VE's efficiency.[770]

734. With respect to Rubisafe devices procured together with the IHS prior to 2013, Respondents claim overpricing which they include in their claim relating to the IHS, which they say were overpriced at a rate of 43%. That claim amounts to €8.7 million.[771] Overpricing of the Rubisafe devices purchased separately from the IHS was at a rate of 311% for a claim of €1.3 million.

b. Claimants' Position

735. Claimants state that as part of their goal to modernize and improve the efficiency of the Vilnius district heating operations, VE sought to implement a smart network system which included the ability to remotely control the substation and to remotely collect data for invoicing and monitoring the technical parameters of the DHN. In doing so, VE sought to install remote controller units in the IHS. In this regard, Dalkia examined the available options and concluded that the Rubisafe devices produced by Rubicon were

[769] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 719-722.

[770] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 725. See also Sweco's Direct Presentation, slides 65-67.

[771] See **REX-003:** Second FTI Expert Report, dated 13 October 2019, para. 5.36, Table 5-1.

the most suitable for their purposes. Unlike other devices on the market, the newly developed Rubisafe could perform both local and remote control and remote data collection through a single device.[772] Claimants state that there was pressure to move quickly to improve the heating network and to meet the scope of works required under the Lease.

736. Claimants state that the structure of the Lease encouraged them to act swiftly since doing so would improve the efficiency of the heating system and yield higher profits. Claimants posit that the structure of the Lease also benefited Respondents since it gave Claimants the incentive to invest quickly and efficiently and the impetus to engage contractors and prepare implementation plans before the Lease was signed. According to Mr. Greim, who was in charge of Dalkia's operations in the Baltic States at the time, Veolia's standard business practice for projects similar to the Lease was to prepare in advance and commence projects with early, front-end investments. In addition, as an international operator it had a practice of employing local specialists which was a common practice in the district heating business.[773] Claimants state they developed a plan to select Rubicon as the General Contractor and Project Manager to improve the network and to install the Rubisafe devices throughout the network.[774]

737. According to Claimants, the Rubisafe devices offered the most cost-effective solution to meet their objectives to modernize the VST management system, reduce heat losses, improve the security and reliability of the heat supply and to develop an integrated computerized system for efficient cost management. Claimants state that the Rubisafe devices performed as expected and permitted VE to optimize its maintenance costs, energy efficiency and substation performance, and improve service quality.[775] According to AFRY, the remote control, data collection and data transmission features, which distinguish the Rubisafe devices from other devices, were an essential part of

[772] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 1072-1073; **CWS-016:** Third Witness Statement of Tadas Janušaukas, dated 29 May 2020, para. 78; **CWS-018:** Third Witness Statement of Andreas Greim, dated 28 May 2020, para. 47.

[773] **CWS-018:** Third Witness Statement of Andreas Greim, dated 28 May 2020, paras. 39-40.

[774] **CWS-018:** Third Witness Statement of Andreas Greim, dated 28 May 2020, paras. 36-38.

[775] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1077; **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 629, paras. 637-643.

VE's operation and maintenance activities until 2011 and brought numerous benefits which outweighed the additional costs.[776]

738. Claimants state that the benefits VE achieved, such as reduction of heat loss and heat theft prevention, would not have been realized without the Rubisafe. With respect to the cost of attendance at the substations in the absence of the Rubisafe's functionalities, Claimants state that the €10 per hour rate used by AFRY did not represent the wages of an unqualified worker but, rather, the total cost per hour for interventions performed by a technician. In addition, the Rubisafe remote monitoring and control system ensured that the frequency of visits to the IHS was reduced. In the absence of Rubisafe devices, maintenance staff would have been required to undertake meter readings, heat supply perimeter management and malfunction rectification at least two or three times a week pursuant to the Ministry of Energy's Rules.[777] Claimants also state that when assessing the benefits of the Rubisafe installed in IHS compared to average substations, it is appropriate to include the cost of additional data collection (€12 per month) but not the cost of maintaining substations generally (€23 per month) which would have been required whether or not Rubisafe devices were included in a substation.

739. According to Claimants, if Sweco's benchmark upon which Respondents rely were adjusted to correct the failure to benchmark the full functionality and costs of the Rubisafe devices, VE's procurement price was 9% below the correct benchmark. Therefore, no overpricing occurred.[778]

740. With respect to Respondents' comparison of the cost of the Rubisafe device prior to 2013 to the cost of the ENCO devices used thereafter, Claimants state that this does not prove that the advanced functions of the Rubisafe devices were unnecessary and, therefore, that VE paid too much for the Rubisafe devices. Claimants state that Respondents ignore the change in circumstances due to the 2011 amendment of the Law on the Heat Sector. Prior to that amendment, the substations were assets leased

[776] **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 641-661.

[777] **C-853:** Ministry of Energy, Rules on the Maintenance of Heat Networks and Heat Consuming Installations, Approved by Order No. 1-111, dated 07 April 2020, Art. 264.1, Art. 264.2, Art. 264.3, Art. 264.6.

[778] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1140. The Claimants say that VE's procurement price was €2,640 per unit in 2003 prices and that the correct comparable benchmark was €2,905.

from VST to VE pursuant to the terms of the Lease and VE was in charge of installing, maintaining and optimizing the operation of the IHS. Claimants state that the Rubisafes were important for that purpose and offered many advantages. However, after the amendment, the substations were no longer leased assets and heat suppliers were prohibited from providing maintenance services on the substations. As a result, VE was responsible for only the heat meters connected to the substations and various functions of the Rubisafe devices, such as the ability to remotely control the substations, were no longer useful to VE, although these functions were still helpful for the companies permitted to provide maintenance services. Claimants state that as a result, VE then economically decided to install simple remote meter reading and data transmission devices, which lacked the full functionality offered by the Rubisafe devices.

741. Claimants state that the prices of ENCO devices were comparable to those of other meter reading and data transmission devices on the market. Claimants state that but for the amendment to the Law on the Heat Sector, VE would have continued to install Rubisafe devices and would have used their additional functions.[779] Claimants also state that Sweco's benchmark, which consists of adding the price of individual substation controllers and remote data collection devices, excludes key additional equipment that would be necessary to replicate the Rubisafe remote control and advanced data reading functions. The appropriate benchmark would need to include the additional cost of that equipment and works required to replicate the functions of the Rubisafe devices.[780]

742. Claimants also argue that Respondents did not disagree with VE's valuation of the Rubisafe devices. After the change in the Law on the Heat Sector, the IHS were removed from the pool of leased assets under the Lease. Since the Rubisafe devices had been treated as separate from the IHS and VE had originally paid a single price for the integrated IHS and Rubisafe devices, the parties agreed on an allocation of that

[779] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 1078-1079.

[780] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 1078-1080. The Claimants say that Sweco's cost benchmark of €744 is too low. They say that including the cost of the additional equipment required would yield a benchmark of €2,904, without considering the added value of the various functions integrated into a single device such as the Rubisafe. The Claimants also say that Sweco's benchmark must be adjusted for inflation to compare the price of VE's Rubisafes in 2009 that Sweco used to establish the appropriate reference price for VE's actual cost to procure Rubisafes in 2003.

price between the Rubisafe devices, which VE retained, and the IHS. The Parties agreed on an allocation of value of between LTL 10,560 and LTL 12,500 per Rubisafe device,[781] Claimants state this demonstrates that Respondents recognized the value of the Rubisafe devices and their multi-functionality.[782]

5.6.2 The Experts' Evidence

a. Sweco's Evidence

743. In Sweco's view, the investments made by VE in the Rubisafe devices from 2002 to 2013 represent substantial costs and high risks in a district heating system which needed many more basic investments to provide the supply and distribution of heat.[783] Sweco is of the opinion that VE's agreement prior to the signature of the Lease in 2002 when the devices were considered experimental was imprudent. At the time, remote control functionality of IHS was commercially available, for example in Sweden where several large-scale projects for remote reading electricity meters had been commenced. However, although the market for such devices has developed since then, remote control of heating substations was not common at the time. Although in current practice such devices are readily available and integrated in many digital controllers for heating substations, the ownership of these heating substations and the responsibility for setting parameters for control of indoor and hot water temperatures often lie with the building owner and not with the district heat provider. As a result, remote control functionality of IHS is more relevant to large property owners who operate many buildings.[784]

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[781] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1081 and the sources cited there.

[782] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 1081-1082. The Claimants also say that in a 2014 inspection of VE's operations, the NCCPE did not criticize the separation of the Rubisafe from the IHS explained in VE's documents, nor did it find that the allocated vaue of the Rubisafe was excessive. See **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1082; **C-570:** NCCPE, Resolution regarding the unscheduled inspection of Vilnius Energija activities No O3-54, dated 20 February 2014, p. 3 and 14.

[783] See **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 347-374; Sweco's Direct Presentation, slides 65- 67.

[784] Sweco provides the example of the City of Stockholm (and not the Stockholm District Heating Company) which operates remote IHS installed at its municipal buildings such as schools. See **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 356.

744. In Sweco's view, according to usual practice the functionality of Rubisafe devices would normally be split between various devices since the IHS is usually owned by the building owner, who controls heat consumption, while the meter is owned by the district heating company, which can also remotely collect metering data and use it for billing purposes. According to Sweco, remote control of IHS is not commonly used by district heating companies.[785]

745. In its comparison of the functionality of the Rubisafe devices and the functionality it says is the usual practice, Sweco concludes that the Rubisafe devices purchased by VE from 2002 to 2013 contained various functions, and in particular remote operation of the IHS, that were not essential for the purpose of supplying heat and hot water to consumers in Vilnius. According to Sweco, the vast majority of heat suppliers ensure reliable and safe supply of heat without remote operation of IHS. While the Rubisafe device has "nice-to-have" features, they are not essential for good functionality of IHS. Further, in Sweco's view the benefit added by the Rubisafe devices does not outweigh the additional costs. Sweco concludes that in light of the condition of the assets of the Vilnius district heating system at the beginning of the Lease and the requirements of the investment plan, it was unreasonable for VE to invest in the superfluous functionality of the Rubisafe devices at the expense of investments into essential system components.[786]

746. For the purpose of its analysis, Sweco determined that the cost of the Rubisafes installed by VE between 2002 and 2013 ranged from €2,986 to €3,620.[787]Sweco then calculated the price of devices which would be sufficient to replicate the functions required for a district heat supplier, specifically the prices of remote data reading devices and local IHS controllers, which it considers sufficient to ensure reliable and efficient heat supply.

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[785] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 357.

[786] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 359.

[787] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 361 and the sources cited there, which include three contracts from 2007 and 2009 between VE and City Service and the cost of 1,448 Rubisafe devices purchased between 2005 and 2012 at an average cost of €2,986. According to Sweco, these figures are consistent with the documents said to have been produced by the Claimants in the ICSID Arbitration which lists two primary prices for pre-2013 Rubisafe devices: €3,058 and €3,630.

747. To construct its benchmark price, Sweco analysed three procurements of remote data collection devices for heat meters by Kauno Energija between 2011 and 2013.[788] The average price calculated by Sweco was €344 for the remote collection of billing data from heat meters in the IHS. According to Sweco, this was the only cost that should be added to the cost of a standard IHS equipped with a standard digital controller to fulfill the basic functionality for a district heating substation including remote data collection from the heat meter. In addition, Sweco says that prefabricated IHS included pre-installed controllers, the common list price of which was approximately €400.[789]

748. On this basis, Sweco calculated that replacing the functionality of the Rubisafe devices which was essential for a district heating company, the maximum appropriate price was €744. For the purposes of its comparison analysis, Sweco used the figure of €3058, which was the lowest amongst the prices of Rubisafe devices it had found, as a conservative figure. This yielded what Sweco says was overspending on the Rubisafe devices by 311%. This percentage would be even higher if a lower price of € 574, which Sweco found that a prudent operator could obtain, were used for the comparison. Therefore, the prices paid by VE for the Rubisafe devices, between €2968 and €3620 were between 300% and 530% more expensive than the devices that would be required to replace the basic functions of the Rubisafe devices essential for the operation of the IHS.

749. Sweco was also of the view that when VE organized tenders for the installation of IHS, it requested that Rubisafe devices be installed in the IHS by way of its technical specifications. Sweco says that it was imprudent to install such a large number of Rubisafe devices without comparing the prices and technical characteristics compared to alternatives available on the market. Sweco says that the Rubisafe devices installed by VE could have been one of the reasons why the substation costs, discussed above, were so high.

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[788] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 363-367. The prices relied on by Sweco were prices of either concluded contracts or contract offers during the period.

[789] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 368. Sweco says this is the list price when the controller was purchased separately as a spare part. According to Sweco, when included in a prefabricated heating station, the cost of a controller was lower. It found one example in which the parties had agreed to a price of €230: see **R-866:** Annex to January 13, 2000 Danfoss Agreement, Controller Price, May 12, 2003, dated 12 May 2003. Nevertheless, Sweco used the higher figure of €400 for the purposes of its calculation.

750. Sweco also commented that according to its instructions, Axis Industries did not share the specifics of communication between the Rubisafe devices and the other features in the RIS (Rubisafe Information System). Since the installation of the RIS was combined with the Rubisafe devices from 2002, VE was practically locked in to continue to purchase compatible devices from Rubicon. As a result, Sweco says that tenders associated with functionality of the communication system such as heat meters, hot water meters and data collection services favoured Rubicon. Sweco is of the view that this either provided a very strong advantage to Rubicon over other competitors or had the result that the only company able to provide the required devices or services were Rubicon companies.[790]

751. , Sweco challenges AFFRY's analysis that €1,047 of the cost of the Rubisafe was for the additional functionality of the Rubisafe device. Sweco says that AFRY improperly used list prices in calculating the cost of some sensors included in the Rubisafe costs. It says that these prices are much higher than the actual prices in a standard prefabricated IHS where the controller as well as the sensors would be included and pre-installed. Further, Sweco says that AFRY improperly adds costs for startup, installation and adjustment which are included in the supply of a standard IHS and, therefore, should be omitted. In addition, Sweco notes that AFRY incorrectly adjusted the cost of the Rubisafe devices for inflation. On these bases, Sweco calculates that the cost of alternative equipment for local control and remote heat meter reading is €854. It compares this to AFRY's calculation of €1,857.48.[791]

b. AFRY's Evidence

[790] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 372-374. Sweco says that this strong bargaining position of Rubicon was likely one of the core reasons for VE paying more for devices and services than should have been the case. Sweco says that VST remains locked in with the Rubisafe system after the end of the Lease.

[791] Sweco's Direct Presentation, slides 66-67.

752. AFRY is of the opinion that Sweco's criticism of the cost of the Rubisafe devices is unfounded.[792] According to AFRY, Sweco disregards several features of the Rubisafe and, thereby, underestimates the benefits of the device. As a result, Sweco's qualitative cost-benefit assessment is flawed. In addition, Sweco does not provide evidence for its claim that Rubisafe's additional cost for the remote control of the IHS was greater than the related benefits. AFRY also says that Sweco's cost estimate for the basic alternative devices to Rubisafe is incorrect since it does not take into account all the technical components required for local control of IHS and remote meter data collection.[793]

753. In summary, AFRY says that the technical, economic, environmental and other benefits of the Rubisafe remote control features justify the related cost and demonstrate why the requirement for the IHS to be compatible with Rubisafe was essential for the modernization of the Vilnius District Heating Network and supported energy efficiency. It also maintains that the cost of alternative devices required for local IHS control and remote meter reading collection amounted to €1,857.48, substantially greater than Sweco's estimate, even disregarding the other additional benefits of the Rubisafe devices. If the latter are included in the analysis, Sweco's reference price for VE's procurement cost of Rubisafes is 9% below the total cost of single components replicating all features of the Rubisafe. AFRY also says that VE's purchase price for remote meter reading and data transmission devices after 2013 (ENCO) is 11% below Sweco's benchmark. As a result, AFRY says that Sweco has not demonstrated overspending, either with respect to VE's purchase price for Rubisafe devices or the price of the basic remote meter reading and data transmission devices (ENCO devices).

754. With respect to the benefits of the Rubisafe devices, AFRY says that the advanced automated data collection and transmission and remote control of IHS features were essential for modernization of the district heating network and provided energy

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[792] **CEX-012:** AFRY Expert Report, dated 26 May 2020 paras. 621-685; AFRY's Direct Presentation, slides 37-39. AFRY distinguishes between the Rubisafe devices installed prior to 2013 and the devices installed thereafter. It says that the post-2013 devices were not Rubisafe devices. Rather, they were only remote meter reading and data transmission devices without the full functionality of Rubisafe devices. Sweco refers to these devices as ENCO devices. AFRY says that Sweco's criticisms refer only to the pre-2013 Rubisafe devices and only to those devices' additional functionality beyond remote heat meter readings for billing, which Sweco says was useful. AFRY is also of the view that VE invested in the Rubisafe devices because these support remote IHS maintenance which was performed by VE until 1 November 2011 when the law was changed. See: **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 621.

[793] **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 625-626.

efficiency, which was a goal of Lithuanian regulation, commencing in 2001. In this regard, AFRY accepts that these features of the Rubisafe devices supported the achievement of energy efficiency and reflected VE's plan in that regard.[794]

755. AFRY says that Sweco underestimates two main aspects of the Rubisafe benefits: the remote control feature and remote data collection and transmission, beyond heat meter readings for invoicing. Further, AFRY says that the Rubisafe devices also permitted advanced remote collection and transmission of technical and operational data which: enabled constant monitoring of the DHN, including the HIS; high and consistent quality of heat supply, timely response in case of malfunction or emergencies; as well as in-depth remote analysis of heat data. From its review of publicly available information on the Rubisafe device and interviews with VE technical staff, AFRY referred to the following benefits of the Rubisafe devices:

a. Security of supply benefits, including faster response to malfunctions and emergencies via remote control such as adjusting performance of all the IHS at once in case of pipe rupture in the DHN; fast response to power outages of IHS by way of remote monitoring; quick detection of stop or breakage IHS controller equipment via remote monitoring; daily remote monitoring for leakages in the hot water heat exchanger to reduce corrosion of pipes in the heating network; accident reports and data analysis of patterns of accidents;

b. Economic benefits, including lower operational costs, via remote monitoring of the condition of IHS to ensure cost efficient operation; reduction of revenue losses from meter manipulation by way of remote monitoring and data analysis; quicker detection of malfunctions or emergencies to reduce operation costs and damage repairs; reducing fuel consumption in boiler rooms and higher consumption efficiency in buildings by way of remote control and monitoring of performance, and by remote maintenance of supply and return temperatures to avoid heat losses in the DHN; lower electricity consumption in boiler rooms by way of remote maintenance of volumes of circulating water

[794] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 631; **CWS-016:** Third Witness Statement of Tadas Janušaukas, dated 29 May 2020, para. 83 and more generally, paras. 76-84.

at minimum requirements; more precise planning of fuel demand to improve long-term business planning;

c. Service quality benefits, including: legionella prevention via constant monitoring of minimum temperature levels; remote maintenance and control of heating systems while residents are at home/available rather than scheduling in-person meetings; quicker response times for customer requests or complaints; optimizing heating parameters in apartments taking into to account the circumstances of the buildings and preferences of residents.

756. AFRY also referred to the ability to make data collected available to the public, including heat users and energy experts in order to improve energy efficiency benchmarking.[795]

757. AFRY concludes that the various benefits it says were ignored by Sweco give good grounds to offset the additional cost of those devices. In its view, VE's cost of the IHS, including the cost of the Rubisafe devices was at a reasonable price.

758. AFRY also critiques Sweco's benchmarking. In this regard, it says that Sweco's estimate of the price for alternative equipment sufficient to replicate the functions required for a district heating provider, specifically, remote data reading devices and local IHS controllers is inadequate. In reaching its benchmark price of €744, AFRY says that Sweco is inconsistent in its adjustment of prices for inflation. AFRY says that adjusting Sweco's reference price of €3058 for one Rubisafe device from the assumed 2009-time value of money to real 2003 prices result in a reduction of the benchmark to €2640.08.[796] Further, AFRY says that in addition to the equipment benchmarked by Sweco, other equipment was required in order to provide a valid comparison. For example, it says that with respect to AFRY's benchmark controller, temperature sensors for outdoor temperature and for district heating and hot water were also necessary for any controlling function. According to AFRY, providing this equipment would add costs of €269. Other additional auxiliary equipment and installation work

[795] **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 636-641. AFRY refers to VE's statistical data which appears to indicate that consumers were practically free from heat supply disruptions during the course of the Lease. AFRY also referred to a number of other alleged benefits of the Rubisafe devices, in particular, the benefits of the remote control and remote collection of data. See **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 642-661.

[796] **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 663-666.

would be required to enable local control and remote data reading. Moreover, AFRY notes that this necessary additional equipment would add substantial costs and require Sweco's benchmark to be adjusted to €1857.48.[797] Applying Sweco's methodology and comparing this cost of €1,857 to Sweco's' adjusted benchmark of €2,640.08 (€3,058 adjusted for inflation), VE spent only 42% more for the Rubisafe devices, including their additional functionalities, than VE would have had to spend on single components with the simple features of local control and remote data reading for invoicing only, and not 311% as calculated by Sweco.[798]

759. According to AFRY, including the total cost of single components required to achieve the same functionality as the Rubisafe would increase Sweco's benchmark even further (by €1,047.06). Adding this cost to the actual costs of components required for local control and remote data reading for invoicing, €1,857.48, yields a total cost for single or separate component alternatives to the Rubisafe of €2,904.53. Therefore, Sweco's adjusted reference price for VE's procurement cost of Rubisafe device, €2,640.08 is 9% below the correct benchmark price of single components replicating Rubisafes.[799]

760. On this basis, AFRY is of the view that there were good grounds for VE to accept the cost of Rubisafe devices given all of the benefits; AFRY says that any claim of overspending is unsubstantiated.[800]

761. With respect to VE's purchase price for ENCO devices after 2013, AFRY says that Sweco has not compared this cost against its own benchmark price used in Sweco's benchmarking of the Rubisafe devices. Although Sweco does not expressly opine that VE also overspent with respect to the post-2013 remote meter reading and data transmission devices, this appears to emerge from Sweco's Expert Report at Table 16 and paragraph 358. AFY says that Sweco implies that VE procured control equipment after 2013 which, as a heat provider, VE was no longer legally allowed to use. AFRY says this was not the case and notes that Sweco incorrectly implies overspending. According to Sweco's Expert Report, the average price of data reading equipment after

[797] **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 667-669. AFRY maintains that this estimate is conservative.

[798] **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 669-670.

[799] **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 671-672.

[800] **CEX-012:** AFRY Expert Report, dated 26 May 2020, para. 674.

2013 was €344 in real 2011 value. Adjusting €344 to real 2015 value translates to an average price of €358.28. VE's procurement of remote meter reading and data transmission devices after 2013, adjusted for inflation, was €318.16. As a result, VE's procurement costs were €40.12 or 11% below Sweco's adjusted benchmark and did not overprice the replacement devices as of 2013.[801]

5.6.3 The Arbitral Tribunal's Analysis

762. The Arbitral Tribunal considers that the key question relates to the reasonableness of purchasing a Rubisafe device with advanced functionalities, particularly the remote control function of the IHS and the setting of temperatures, beyond those of a basic device (the ENCO device). While the Vilnius system could have been operated with a simpler, less expensive device, as in Kauno, the question is whether purchasing the more advanced Rubisafe devices breached the Lease (notably, Articles, 3,12,16 ,and 37). In sum, the decisive issue is whether VE acted as a reasonable and prudent operator exercising the skill which would reasonably and ordinarily be expected from a skilled and experienced international operator considering all the circumstances (Article 37(i) – Complete State).

763. It is accepted that the Rubisafe offered advantages and there does not appear to be any dispute over whether it performed well. The question is whether it was "gold-plated" such that its purchase was unreasonable. AFRY proffered a fairly extensive cost-benefit analysis. Sweco did not. It was more general and relied on what other operators did at the time and the fact that, after the change in the law, VE was able to operate with simpler, less expensive devices. However, the Rubisafe devices were purchased and installed well before the change in the law, which does not appear to have been predictable.

764. The Arbitral Tribunal finds that, absent a clear indication of overpricing (in order to favour Rubicon as part of a collusive scheme, or otherwise), there is no room for the Arbitral Tribunal to second-guess, after the passage of 15 years, the Claimants' decision to purchase and install Rubisafe devices for the reasons they explain. While

[801] **CEX-012:** AFRY Expert Report, dated 26 May 2020, paras. 675-682.

the purchase of Rubisafe devices was undoubtedly profitable for Rubicon, it was not abusive.

5.7 The Pipes or District Heating Networks

5.7.1 The Parties' Positions

a. Respondents' Position

765. Respondents rely on the evidence of their expert Sweco to allege that the tender for the supply and installation of pipes for VE was manipulated as to favour Rubicon company Axis Industries who won the tender. They refer to the technical specifications of the tender which they contend restricted (international) competition, including a requirement that the pipes monitoring system be compatible with the Rubisafe devices. Respondents add that the short delay for submitting bids in a foreign language precluded the participation of international suppliers.[802]

766. Respondents plead a 60% overcharge in the price paid by VE for the supply and installation of pipes.[803] After some final sparring between the Parties' experts which involved Sweco adjusting some of its positions following AFRY's criticisms, Respondents maintain the following arguments in support of their assessment of overpricing:

- Sistela prices are generally 20-30% higher than market prices, as established in official documents. This is the reason why Sweco resorted to use statistics from Sweden that AFRY itself produced to account for landscaping costs,[804] even though it used Sistela 1 data for the rest of its assessment.[805]

[802] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1025-1026.

[803] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 532, 736, 738.

[804] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 737.

[805] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1984.

- Another and determinant reason against the use of Sistela 1 data is that information on where the pipes were installed was not available in VE's data used for comparison (which was extracted from VE's quarterly investment reports).[806]

- AFRY's second comparison against the German and Swedish benchmarks for the purposes of further substantiation shows that under that test too, VE's procurement was overpriced. Respondents refer to the cross-examination of Sweco during which the latter replied to AFRY's criticisms of its methodology to counter AFRY's second comparison, and underline that these criticisms do in any event not entail a material impact on Sweco's analysis.[807]

b. Claimants' Position

767. Claimants rely on the evidence of their expert AFRY to answer Respondents' criticism of the tender requirements.[808] In addition, Claimants clarify the context of the procurement, which was split in two parts for two separate areas of the district network. "*Axis Industries won the tender for one part; UAB Alvora, another Lithuanian company, won the tender for the other part.*"[809] They further point to the involvement of the EU who was to provide financial support for the modernization works procured under this tender, which entailed additional scrutiny,[810] and to the fact that the local language of tender documents and the 12-day time-limit to receive bids complied with the PPL for this type of procurement procedure.[811]

768. As to Respondents' allegation of resulting overpricing, Claimants oppose the assessment of AFRY who conclude that VE paid 14.6% less than benchmark prices.[812]

[806] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 737.

[807] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 738.

[808] See generally **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 2076-2087.

[809] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 2076.

[810] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 2076.

[811] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 2084-2085.

[812] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1124.

Claimants stand by their position that VE's pipes were under rather over-priced, with in particular the following arguments that support of AFRY's assessment:

- Sweco's correction of its initial benchmarking to account for landscaping costs, scaled up based on Swedish data, is flawed insofar as the categories of costs in Sistela 1 and the Swedish data do not align, involving a "distortion error" in Sweco's correction which would have not arisen had Sweco instead used Sistela 1 to incorporate landscaping costs in its assessment.[813]

- Sweco's argument that it could not use Sistela 1 data for landscaping costs because it did not know where the pipes were installed is incoherent: "*whilst Sweco did not know how and where pipes were installed in Lithuania, by indexing against the Kulvertskostnadskatalog* [*i.e.* the Swedish data] *it was still estimating those parameters, it was just doing so unconsciously by using the parameters implied by the categories of "Outer Areas" and "Park Areas" in the Kulvertskostnadskatalog. Sweco has provided no evidence that these parameters were in line with those in Lithuania, and therefore no evidence that the parameter error resulting from the Kulvertskostnadskatalog indexation would be smaller than the parameter error that would result from Sweco estimating Lithuanian parameters using Sistela 1*".[814]

- Should Sweco have used Sistela 1 prices for landscaping, it would have avoided a distortion error arising notably from mixing sources of comparison, and would have led to a conclusion of under-pricing, which is also the conclusion to which AFRY's Sistela 2 benchmarking led.[815]

5.7.2 The Expert's Evidence

a. Sweco's Evidence

769. With regard to the tender process, Sweco opines that "*VE's tender conditions restricted competition and included requirements likely driving project costs up*".[816] Sweco refers to the lack of promotion of international competition and the fact that all tenderers were

[813] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1126.
[814] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1127.
[815] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 1129-1131.
[816] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 518.

Lithuanian companies, arguing that "*it is likely that the combination of a short period of time for tendering (twelve days) in combination with the documents being provided in the Lithuanian language only* […] *have contributed to this fact*".[817]

770. Sweco further points to 1) the requirement of including a monitoring system compatible with the Rubisafe devices, which "*could also have contributed to limiting the competition*"[818], 2) the fact that design data for the pipes was specified at a pressure that varies from the most common district heating standard,[819] and 3) the allegedly unusual requirement that a specific chemical composition and mechanical properties be respected for the steel, whereas specifications commonly refer to a code or standard setting the quality of the steel. Sweco argues that such specification "*might potentially hamper competition*"[820] as most international manufacturers follow quality codes or standards.

771. As to Sweco's price benchmarking of the pipes, it was carried out for a number of other VE projects reported by VE in 603 quarterly investment reports,[821] Sweco having been instructed by Claimants "*that these projects were implemented by the Rubicon group companies or through general management agreements*."[822] Sweco initially compared VE's investment reports to data from the Sistela database for relevant years and pipe diameters. Sweco found overpricing of 83% between the price paid by VE (EUR 29.6 million) and the average cost for a similar project in Lithuania based on Sistela (EUR 16.2 million).[823]

772. Following AFRY's criticisms as to its benchmarking, Sweco was allowed to file an addendum to its first expert report, in which it adjusted its benchmarking by adding landscaping costs and technical project costs to the Sistela 1 data for comparison (4.3% for each category of additional costs).[824] Sweco however disagrees with AFRY's

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[817] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 507.

[818] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 519, see also para. 509.

[819] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 510.

[820] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 508.

[821] 27 of which having been excluded from Sweco's analysis because of missing data in Sistela for some pipe diameters. **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 516.

[822] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 512.

[823] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 517, Figure 34, Table 27.

[824] **REX-004 Add:** Addendum to Sweco Expert Report, dated 14 August 2021, paras. 10-11.

calculation of landscaping costs and more generally with AFRY's reference to Sistela 2 for its benchmarking. According to Sweco, Sistela 2 is not an appropriate reference as Sistela prices are generally too high. The level of excess prices in the Sistela database(s) is quantified by the National Audit Office to range from 20 to 30%.[825] Therefore, Sweco does not use Sistela 2 when estimating the landscaping costs. Instead, Sweco analyzed technical project costs in Sweden on the basis of a report produced by AFRY and which specifies costs for different projects based notably on their location (parks, new developments, outer city and inner city). Sweco explains its analysis based on the Swedish data for landscaping costs as follows: these costs vary dramatically depending on where the pipes are laid. Typically, laying pipes in park areas comes with no landscaping costs. In contrast, Sweco considers the category of "outer city" to represent "*a typical project with full landscaping costs, i.e. pavement, pedestrian sidewalk, etc*".[826] Sweco goes on to state that "[m]*aterials (pipes) should cost around the same for both projects*" and deducts that "[t]*herefore, landscaping costs, as a standalone item, can be calculated by deducting work costs (i.e., all other costs with the exception of materials) in park areas from work costs in outer city areas.*"[827]

773. Based on the adjustments made to account for landscaping and technical project costs, Sweco still finds an overpricing of 60%.[828]

774. As to AFRY's comparison of VE's costs against publicly available Swedish and German benchmarks, "to substantiate further" AFRY's findings based on Sistela 2 that the pipes and their installation was not overpriced, "*Sweco considers that this analysis is flawed because it does not take into account the different labour costs in Lithuania, Sweden and Germany.*"[829] Sweco therefore adjusts this further benchmarking of AFRY, by reference to Eurostat data on labor costs in the construction sectors for Lithuania, Sweden and Germany, and arrives at an overpricing of 84% compared to German prices, and of 143% compared to Swedish prices.[830]

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[825] **REX-004 Add:** Addendum to Sweco Expert Report, dated 14 August 2021, paras. 12-13, Sweco's Direct Presentation, slides 54 and 56.

[826] **REX-004 Add:** Addendum to Sweco Expert Report, dated 14 August 2021, para. 14.

[827] **REX-004 Add:** Addendum to Sweco Expert Report, dated 14 August 2021, para. 14.

[828] **REX-004 Add:** Addendum to Sweco Expert Report, dated 14 August 2021, para. 16.

[829] **REX-004 Add:** Addendum to Sweco Expert Report, dated 14 August 2021, para. 17.

[830] **REX-004 Add:** Addendum to Sweco Expert Report, dated 14 August 2021, para. 18-20.

b. AFRY's Evidence

775. In its report answering Sweco's initial assessment of the pipes procurement, AFRY answers the criticisms of the tender specifications. The requirements for steel quality are explained by the previous use of inferior quality of steel pipes "*found to be prone to faults due to increased internal corrosion*."[831] The requirements specified in the tender for the steel quality are also within the European standard for district heating pipes: "*VE applied detailed (expanded) but not specific (exclusive) requirements for pipelines it purchased from 2004 onwards*",[832] which has led to significantly fewer defects due to internal corrosion.[833] Not only was this requirement justified given the particular situation in Vilnius, it also has no impact on competition given that "*enough (if not all) international steel pipe manufacturers are able to supply steel according to the VE DH pipe specification*".[834]

776. Regarding the requirement to install pipes compatible with the Rubisafe system, Sweco repeats that it is *"a modern and advanced method of operation for a district heating system*".[835] Harmonizing and standardizing the manufacturer, size, type, rating, lubricants, control systems, and materials of construction of components, *i.e.* the "*compatibility approach*", is widely applied among heating and power plant operators. The goal is to rationalize inventories, unify maintenance requirements and improve safety of operation.[836] For AFRY, the compatibility with Rubisafe devices requirement is not stringent, as is demonstrated by the fact that in tenders including such requirements, several tenderers were usually able to comply with it.[837] AFRY further "understands" that the value of the works for the implementation and installation of the Rubisafe system only accounted for 0.5% of the project value.[838]

777. As to design pressure for the pipes, alleged to be above the norm by Sweco, AFRY points to the inconclusiveness of Sweco's remarks. Sweco accepted that a different

[831] **CEX-012 :** AFRY Expert Report , dated 26 May 2020, para. 514.
[832] **CEX-012 :** AFRY Expert Report , dated 26 May 2020, para. 518.
[833] **CEX-012 :** AFRY Expert Report , dated 26 May 2020, para. 520.
[834] **CEX-012 :** AFRY Expert Report , dated 26 May 2020, para. 521.
[835] **CEX-012 :** AFRY Expert Report , dated 26 May 2020, para. 523.
[836] **CEX-012 :** AFRY Expert Report , dated 26 May 2020, para. 524.
[837] **CEX-012 :** AFRY Expert Report , dated 26 May 2020, para. 528.
[838] **CEX-012 :** AFRY Expert Report , dated 26 May 2020, para. 529.

pressure would only lead to increased costs, not reduced competition.[839] Sweco also observed that the potential reason for specifying a higher-pressure design could be considerable differences in elevations in the areas for the district heating system and hence higher static pressures. However, Sweco did not refer to these elevation differences, which are considerable in Vilnius and made the 2.5MPa pressure design necessary.[840] AFRY further observes that the design pressure variation between 1.6 and 2.5MPa has little impact on the costs of the pipes.[841]

778. On price benchmarking, AFRY submits that Sweco's use of the Sistela database is flawed, as it considers solely the costs for material and installation, omitting the other costs incurred for the implementation of the projects reported in VE's quarterly investment reports used by Sweco for the comparison. Such other costs include design, landscaping, permitting costs etc. involved in the delivery of a turnkey project.[842] In sum, "*Sweco compares apples with pears*."[843] AFRY explains that there are two Sistela databases, Sistela 1 for "Approximated Construction Price Calculations" and Sistela 2 for "Comparative Economic Indicators of Estimated Prices of Building Construction". While Sistela 2 is used early on in a project for estimates of the total investment costs covering all major costs (materials, workmanship and landscape restoration costs) under a turnkey delivery by a single contractor, Sistela 1 data is much more granular and enables a more refined estimate of the technical project cost based on the project's particular requirements. It is therefore used at a later stage, when specific technical details are fully known.[844] However, AFRY notes, it is theoretically possible to come near the Sistela 2 benchmark using Sistela 1 data "*when estimating the correct quantum requirements for all cost components included in the respective Sistela 2 benchmark*."[845]

779. In its analysis, Sweco used the Sistela 1 database and so only considered the costs of material and installation, ignoring the cost of landscaping, *i.e.* the restoration of the

[839] **CEX-012 :** AFRY Expert Report , dated 26 May 2020, para. 533.
[840] **CEX-012 :** AFRY Expert Report , dated 26 May 2020, paras. 534-535.
[841] **CEX-012 :** AFRY Expert Report , dated 26 May 2020, para. 537.
[842] **CEX-012 :** AFRY Expert Report , dated 26 May 2020, para. 553.
[843] **CEX-012 :** AFRY Expert Report , dated 26 May 2020, para. 544.
[844] **CEX-012 :** AFRY Expert Report , dated 26 May 2020, paras. 548-552.
[845] **CEX-012 :** AFRY Expert Report , dated 26 May 2020, para. 552.

ground cover after the pipeline is laid. Sweco's benchmark is therefore too low and its analysis flawed.[846] The Sistela databases (including Sistela 2) also omit the costs for conducting the technical project and technical supervision of the project. These additional "technical project costs" can however be estimated based on Sistela's recommendation to add a surcharge varying from 3.6 to 7.2% depending on the type of construction.[847]

780. AFRY benchmarked VE's costs against the data of Sistela 2 which includes landscaping and other materials and implementation costs, and added a surcharge for project costs of 4.3% (the lowest range of the surcharge recommended by Sistela for repair and reconstruction). This leads to a correct benchmarking which is 51% higher than Sweco's,[848] and to the conclusion that VE's costs were in fact 11% below the correct benchmark (once surcharge for the technical project costs is added).[849]

781. To "substantiate further" its finding that VE did not purchase pipes at an overprice, AFRY further benchmarked VE's costs against publicly available international benchmarks for Sweden and Germany. This exercise led AFRY to conclude to that VE's investment cost was well below that which would have been applicable for Sweden and Germany.[850]

782. Further to the filing by Sweco of an addendum to its first expert report,[851] AFRY had the opportunity to reply to it, and maintained its position that the pipes and their installation were not overpriced.[852] In the process of commenting on Sweco's addendum to its expert report, AFRY highlighted mathematical errors and double counting in Sweco's database (made from VE quarterly investment reports), which it calculated to account for EUR 1.87 million.[853]

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[846] **CEX-012 :** AFRY Expert Report , dated 26 May 2020, para. 554.
[847] **CEX-012 :** AFRY Expert Report , dated 26 May 2020, paras. 550 and 559.
[848] **CEX-012 :** AFRY Expert Report , dated 26 May 2020, paras. 555-559.
[849] **CEX-012 :** AFRY Expert Report , dated 26 May 2020, paras. 559, 566-567.
[850] **CEX-012 :** AFRY Expert Report , dated 26 May 2020, paras. 562-564.
[851] **REX-004 Add:** Addendum to Sweco Expert Report, dated 14 August 2021.
[852] **CEX-020 :** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022.
[853] **CEX-020 :** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, paras. 168-173.

783. As to Sweco's adjustment of its benchmarking (based on Sistela 1) to account for landscaping and technical project costs but with reference to Swedish data, AFRY criticizes both the methodological approach of Sweco and its ignorance of the Sistela 1 data. Since Sistela 1 contains costs for the reconstruction of ground cover, it is difficult to understand why Sweco did not use it and instead decided to mix sources and use data from the Swedish Kulvertkostnadskatalog.[854] "*Mixing sources when all information is available from one source is a methodological flaw in AFRY's view. Sweco's conduct is particularly troubling as using Sistela 1 data is possible and confirms AFRY's Sistela 2 analysis*."[855]

784. In any event and regardless of the availability of better suited Sistela 1 data, Sweco's incorporation of landscaping costs by reference to Swedish data in its benchmarking is flawed.[856] The Swedish Kulvertkostnadskatalog reports costs for four categories of different projects based on their location, which are parks, new developments, outer city and inner city. Sweco estimated the cost of landscaping by deducting work costs in park areas from work costs in outer city areas, based on the assumption that the pipes should cost around the same in the two situations. However, Sweco's methodology leads to completely ignore the cost of machinery.[857] This is also illogical given that "*Vilnius is an urban area and thus the category inner city could also be used.*"[858] This would have led to vastly higher costs of supply and installation.[859]

785. AFRY therefore replies with a benchmarking based on Sistela 1, based on certain assumptions for some of the technical data required for benchmarking, given that "*it remains the case that there is not sufficient technical data available for an exact Sistela 1 calculation*."[860] AFRY's Sistela 1 benchmarking, with all adjustments accounted for in compared data, confirms that VE's costs for the supply and installation of pipes were

[854] **CEX-020 :** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, paras. 194-195.
[855] **CEX-020 :** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, para. 196.
[856] **CEX-020 :** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, para. 197.
[857] **CEX-020 :** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, paras. 198-200.
[858] **CEX-020 :** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, para. 201.
[859] **CEX-020 :** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, paras. 201-203, Table 6.
[860] **CEX-020 :** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, para. 204.

lower than Sistela 1-based costs. This also confirms the analysis conducted by AFRY based on Sistela 1 as part of its first expert report.[861]

786. Concerning the comparison of VE's costs to the Swedish and German benchmarks, which Sweco attempted to correct for differences in labor costs by reference to Eurostat data, AFRY criticizes Respondents' assumption that labor cost accounts for 82%, which is unsupported.[862] When applying a more reasonable proportion of 30%, Sweco's alleged overpricing disappears.[863]

5.7.3 The Arbitral Tribunal's Analysis

787. The debate between the Parties regarding Respondents' allegations that Procurement No. 82316 regarding the supply and installation of district heating pipes[864] was manipulated and led to overpricing has very much crystallized into a technical debate between experts.

788. Regarding Respondents' and Sweco's criticism of the tender process, the Arbitral Tribunal first notes that the winner of the tender (Axis, a Rubicon company) was the lowest of the three bids received by VE.[865] It also appears from VE's report on this procurement and the ensuing contracts that the supply and installation of another part of the pipes required for separate areas of the district network was awarded to a non-Rubicon company.[866] Second, Sweco's analysis has failed to convince the Arbitral Tribunal, as it was not sufficiently definite in the first place. All of Sweco's conclusions as to the impact of allegedly stringent tender requirements are in fact only suggestions.

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[861] **CEX-020 :** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, paras. 204-212.

[862] **CEX-020 :** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, para. 189.

[863] **CEX-020 :** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, paras. 190-191.

[864] See **C-1223:** Vilnius Energy, Report on Public Procurement Procedure No. 82316, dated 08 December 2009, **R-1212:** Vilnius Energy, Technical Specifications, Modernization of the Vilnius City District Heat Supply, From ŠK-92410 to ŠK-92415, 2009, dated 01 January 2009, **R-917:** Vilnius Energy, Technical Specifications, Modernization of the Vilnius City District Heat Supply, From ŠK-92105 to ŠK92110, 2009, dated 01 January 2009, **R-960:** Contract between Vilnius Energy and Axis Industries, dated 09 November 2010.

[865] Axis Industries won the tender with a bid at EUR 1,765,429.96 EUR (**R-929:** Axis Industries, Initial tender for Modernization of the District Heat Supply System of Vilnius City, dated 23 December 2009) against Montuotojas MF Alytuje at EUR 1,809,989.81 (**R-923:** AB Montuotojas Montavimo firma Alytuje, Initial tender for LOT I of the Procurement Object, dated 12 December 2009) and Alvora at EUR 1,879,131.24 (**R-930:** UAB Alvora, Initial tender for LOT I of the Procurement Object, December 23, 2009, VEOLIASCC0087934, dated 23 December 2009).

[866] **C-1223:** Vilnius Energy, Report on Public Procurement Procedure No. 82316, dated 08 December 2009, **C-1225:** Agreement No. 526 between Vilnius Energy and UAB Alvora, dated 05 November 2010.

According to Sweco, "*VE's tender conditions restricted competition and included requirements likely driving project costs up*"; [867] "[i]*t is likely that the combination of a short period of time for tendering (twelve days) in combination with the documents being provided in the Lithuanian language only* […] *have contributed to this fact*"; [868] the requirement of including a monitoring system compatible with the Rubisafe devices "*could also have contributed to limiting the competition*".[869] As put by AFRY in its first response to Sweco, "*Sweco does not explicitly draw this conclusion but implies that* [the alleged overspending on pipes] *could be related to the tender conditions and specific requirements*."[870]

789. In the Arbitral Tribunal's opinion, all the connections between the alleged overpricing on the one hand, and the criticism of the tender requirements on the other hand, remain, as they were pleaded, nebulous.

790. In fact, Respondents seem to have stretched some of their expert's statements. For instance, at paragraph 1025 of their Rejoinder, Respondents state that the 2.5MPa pressure requirement was uncommon and "*thereby reduc*[ed] *the pool of pipes that would potentially qualify for the tender.*"[871] Respondents refer to Sweco in support of that statement, but what Sweco states is that "[p]*ipes and other equipment designed for 2.5 MPa should generally be available from all suppliers, but to a higher cost*"[872], to quickly come to the conclusion that, although information on the specific tender at hand is not available, the technical requirements, the local language and the short time-limit for submitting bids "*leaves little doubt that Axis Industries was Vilnius Energy's designated winner of the tender from the start.*"[873] In the Arbitral Tribunal's view, not only do Sweco's conclusions, on which Respondents rely, not actually affirm manipulation of the procurement at stake, Respondents and Sweco also fail to

[867] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 518 (emphasis added).

[868] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 507 (emphasis added).

[869] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 518 (emphasis added), see also para. 509.

[870] **CEX-012 :** AFRY Expert Report , dated 26 May 2020, para. 510.

[871] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1025, p. 378.

[872] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1025, p. 378.[872] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 510, see also **CEX-012 :** AFRY Expert Report , dated 26 May 2020, para. 537 where AFRY further opines that "*it should be noted that the costs of the district heating pipes will not increase significantly by increasing the design pressure from 1.6 to 2.5 MPa*."

[873] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1026.

sufficiently prove the link between any manipulation and a resulting overpricing of the contract awarded to Axis.

791. With regard to the requirement that the pipes installation be compatible with the Rubisafe system, which at first sight struck the Arbitral Tribunal as suggestive of manipulation in favour of Rubicon companies, the Arbitral Tribunal notes that, as pointed out by Claimants, non-Rubicon companies also fulfiled the relevant requirements in that regard.[874]

792. In view of the foregoing, the Arbitral Tribunal's intermediary conclusion is that any overpricing was not sufficiently linked to the alleged manipulation of VE's tender for pipes. It nevertheless proceeds to examine whether Respondents and Sweco have established the overpricing of pipes and their installation.

793. The benchmarking of VE's costs is what the experts' and then the Parties' debate focused on. Sweco has responded to certain of AFRY's criticism and adjusted its estimation from an 83% to a 60% overpricing of pipes.[875] As such, the experts' exchange has not appreciably narrowed the question as to whether pipes purchased by VE were overpriced, AFRY finding that VE purchased them 14.6% below-market prices.[876]

794. The Arbitral Tribunal first notes that Sweco's initial benchmarking, based on "*other VE projects*",[877] is problematic. Sweco explains that "*neither the three bids nor the volumes of the supplied equipment and works*" were available for review.[878] Respondents are clear as to the fact that "[b]*enchmarking cannot be perfomed for this specific tender due to the fact that there is not enough information in the tender documents to identify the*

[874] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 2082, **CEX-012 :** AFRY Expert Report , dated 26 May 2020, para. 528.

[875] The Arbitral Tribunal notes that, in the addendum to Sweco's expert report dated 14 August 2021, Sweco maintains that its finding that pipes and their installation was overpriced by 83% (**REX-004 Add:** Addendum to Sweco Expert Report, dated 14 August 2021, para. 20). However, at the hearing and in their PHBs, Sweco and Respondents made it clear that their final position is that the overpricing was at 60%. See Sweco's Direct Presentation, slide 56, **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 532, 736, 738.

[876] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1124, **CEX-020 :** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, para. 210.

[877] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 512.

[878] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 512.

precise scope of the contract".[879] Notwithstanding this affirmation, they allege that *"given Rubicon's persistent overcharging, in all likelihood Axis Industries overcharged for the pipes supplied pursuant to this specific contract*."[880] Sweco was questioned by Claimants' counsel on this lack of direct data:

> "*Q. So now I would like to see the -- the benchmarks that you have used in respect of the -- of this category of* […] *procurements. And, in that respect, you do not analyse only that tender -- the pricing of that tender, but you analyse the whole category of this price; right?*
>
> *MR JONSSON:* […] *The reason was that we did not have the technical information about these tenders that was necessary to do the price benchmarking.*"[881]

795. The Arbitral Tribunal appreciates that Sweco's work in this case only started after the document production phase was closed and when no significant amount of information and data could be further requested. However, it notes the "default approach" taken by Sweco in its assessment, which weakens its persuasive value.

796. As to the better suited data for comparison, a threshold issue is whether Sistela prices, be they from Sistela 1 or Sistela 2, are, as alleged by Respondents, so high that they cannot be used for benchmarking VE's procurements.

797. Respondents state in their Post-Hearing Brief that "*both the Sistela 1 and the Sistela 2 pricing cannot be used, as they are too high*".[882] Yet, Sweco used Sistela 1 for its initial assessment before the issue of landscaping costs was raised by AFRY,[883] to then depart from it when landscaping costs were added to its assessment.[884] Claimants highlight this contradiction:

> "*First, the Respondents allege that Sistela prices are excessive* […] *this is simply not true. The Respondents know this: in their first submission on district pipes, they utilised Sistela 1 prices without ever alleging any Sistela overpricing. It was only once the*

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[879] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1027.

[880] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1027.

[881] Transcript, Day 14, 250/21-251/6.

[882] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 737.

[883] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 517, Figure 34, Table 27.

[884] **REX-004 Add:** Addendum to Sweco Expert Report, dated 14 August 2021, paras. 12-13, Sweco's Direct Presentation, slides 54 and 56.

> *Respondents realised that Sistela supports Veolia's case that they have disavowed its prices. Second, the Respondents attempt to account for landscaping costs by scaling their Lithuanian Sistela cost estimate using a Swedish database. This is nonsensical. In particular, it is undisputed that: (i) the Respondents use Sistela 1 prices as the basis for their district heating piping cost estimate; (ii) Sistela 1 can be used to account for landscaping costs, with some parameter error and no distortion error; and (iii) the Swedish database is incompatible with Sistela 1, and using it to account for landscaping costs ensures the existence of both distortion error and parameter error. Therefore, the Swedish database method is inferior; Veolia submits that the Respondents must have chosen this methodology solely to avoid the fact that using Sistela confirms that there was no overpricing of district heating pipes*."[885]

798. During its cross-examination, Sweco had nothing else to answer than that they used Sistela 1 data because they "*didn't find anything more relevant, even though* [they] *would more like to use a benchmark from actual procurements*".[886]

799. Sweco's incorporation of landscaping costs into their assessment based on Swedish data, whereas Sistela 1 contained data on Lithuanian landscaping costs, was also called into question at the Hearing. While Sweco repeated that Swedish data was used because they did not know where pipes were installed in Vilnius, their explanations were puzzling since they are contradicted by their immediately following statement that Sistela remains the "better benchmark" even if it is not usable in this case:

> "*Q.* […] [Y]*ou didn't use Sistela prices to determine the price of landscaping that was missing from your original report; right?*
>
> *MR JONSSON: Correct* […] *But we didn't have readily available the information of where those pipes, that we used in our price benchmarking, were installed or how they were installed. And I mean, the landscaping cost is the cost that varies the most when you install pipes* […] *there are so many parameters influencing the cost of the reinstatement* [*i.e.* the landscaping].
>
> *So, therefore, we decided to use a Swedish benchmark which is, so to say, more an average cost. So we compared how much the addition cost in per cent was* […] *in*

[885] **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 284 (emphasis added).
[886] Transcript, Day 14, 251/24-252/1.

> *Sweden. And used that same percentage in Lithuania. We thought it would be* […] *a better benchmark because it was based on average, real costs at the time.*
>
> *Q. So, if I understand correctly, do you considered Sistela as the valid source of information to benchmark DHN installation? But then you considered that Sistela is not the appropriate, so to say, source to actually benchmark the landscaping -- the landscaping cost. And you considered that using a Swedish base is a better source of information; right? Is that your testimony?*
>
> *MR JONSSON: No, not all of what you said was correct. I think Sistela is probably the better benchmark, as I said, if you are going to build a better -- then it could still be too high, or too low, of course. That's another issue. But I think it is a better benchmark if you're going to install a kilometre of pipes, and you know where you're going to install it, you know how much asphalt you expect, you know the conditions and so forth; then I think you can do that calculation. Then, of course, that's the way but it is difficult to use all those very detailed calculations if you do it afterwards."*[887]

800. First, the above reflects the "default approach" of Sweco which, as already mentioned, is a concern for the Arbitral Tribunal. Second, the issue is that, as underlined by Claimants, the resort to Swedish data does not convincingly address the lack of knowledge about the location of the pipes:

> *"whilst Sweco did not know how and where pipes were installed in Lithuania, by indexing against the Kulvertskostnadskatalog [i.e. the Swedish data] it was still estimating those parameters, it was just doing so unconsciously by using the parameters implied by the categories of "Outer Areas" and "Park Areas" in the Kulvertskostnadskatalog. Sweco has provided no evidence that these parameters were in line with those in Lithuania, and therefore no evidence that the parameter error resulting from the Kulvertskostnadskatalog indexation would be smaller than the parameter error that would result from Sweco estimating Lithuanian parameters using Sistela 1".*[888]

801. The weakness of Sweco's reliance on the Swedish data was also demonstrated in relation to the methodology used by it to extract data from the Swedish

[887] Transcript, Day 14, 255/7-257/3 (emphasis added).

[888] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1127 (emphasis added).

Kulvertkostnadskatalog, in view of the misalignment of categories between the different sets of data compared, in AFRY's comments on Sweco's initial assessment:

> *"The break down of cost in Sistela 1 and in the Swedish source in Kulvertkostnadskatalog is not comparable and therefore Sweco's conclusion from its comparison of Swedish culvert material cost and Lithuanian Sistela material cost is flawed.*
>
> *Sistela 1 breaks down total direct cost into the cost categories 'works' (D.užm.), 'material' (Medžiagos) and 'machinery' (Mechanizm.).*
>
> *Kulvertkostnadskatalog uses a different system. It breaks cost into work packages. Those are 'culvert splicing' (Kulvertskarvning), 'culvert material' (Kulvertmaterial), 'plumbing' (Rörarbeten), 'earthworks' (Markarbeten) and 'project planning and controlling' (Proj,kontroll). It does not differentiate by cost category.*
>
> […] *To arrive at the full cost for Sistela 1, the cost for ground cover restoration, the technical project and indirect costs also need to be added*.
>
> […]
>
> *Kulvertkostnadskatalog and Sistela 1's different compositions mean that individual elements from both sources cannot be compared directly with each other. For instance the category "material" in Sistela 1 contains not only the pipeline material but also the sand for the back-filling of the trench. The latter is not contained in culvert material but in earthworks in Kulvertkostnadskatalog.*
>
> *Comparing the cost of materials from Sistela 1 with culvert material costs from Kulvertkostnadskatalog, as Sweco has done in Table 4 of the Sweco Addendum, is thus inaccurate and meaningless. As, therefore, is Sweco's related conclusion that "the costs of pipes in Sweden are even lower than the corresponding Sistela 1 costs, as shown in the table."*[889]

802. And during Sweco's cross-examination at the Hearing:

[889] **CEX-020 :** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, paras. 180-185.

Q. […] *So, essentially, you go to the "Swedish Costs" database, Kulvertskostnadskatalog; right? And have obtained the price for "other". And "other" includes, I understand, everything that is not material; right?*

MR JONSSON: Correct.

Q. And then you have calculated the cost in a "park area" and in what you identify as an "outer area"; right? […] *And you have determined the proportion between these other costs in "outer areas" and "park areas"; right?*

MR JONSSON: Correct […]

Q. And then you have obtained this percentage […] [a]*nd you have applied that* […] *to what you identify as "other" in Sistela; right?*

MR JONSSON: Correct.

Q. And this "other" is what you have after excluding material; right? […]

Q. That would be the value of landscaping, in your view; right?

MR JONSSON: Correct. Yes.

Q. So I think I would like to now look at what is included in the Kulvertskostnadskatalog in material, what you have excluded […]

Q. So if we go to number 2 […] *that will be translated as "civil works"; right?*

MR JONSSON: Yes.

Q. So the rest will be in "others" right?

MR JONSSON: That's correct, yes.

Q. So if we go to number 2 -- and I will not read the title of number 2 for the - that will be translated as "civil works"; right?

MR JONSSON: Yes.

Q. And if we go to the words that are highlighted there for -- if my translation is correct -- to "back filling, restoration of the ground surface, concrete work chamber and building technical material such as culverts"; right?

MR JONSSON: Yes. Correct

Q. So the Kulvertkostnadkatalog includes material outside of the material category you have excluded; right? It includes that within the civil works element; right?

MR JONSSON: The civil works aren't really material, but I suppose you refer to those like covers for -- yes, some material, yes.

Q. Some materials are there.

So now if we – go to Sistela – There you see what in Sistela is included in the materials […]

We have "iron".

If we scroll down, we have "general building materials"; like natural sand, construction sand, electromechanical material, such as wires, plumbing, material, concrete – reinforced concrete products, and other materials; right?

So the definition of "materials" in Sistela is a bit wide than the definition what is included in "materials" in the Swedish catalogue; right?

MR JONSSON: Correct. There is some differences. Not substantial, but differences […] There might be a small difference, yes.

Q. Okay. Well, whether it's small or big, it's probably a matter that can be debated, which I understand you have not calculated."[890]

803. The Arbitral Tribunal finds Sweco's justifications for its methodology to be unsatisfactory, whereas AFRY's reliance on Sistela 2 (or 1) appears to be on point. Sources used by AFRY are consistent amongst each other, which reduces the margin of mistakes in the assessment made by AFRY.

804. Respondents argue that Sistela costs must necessarily be grossly inflated, because the costs of pipes in Sistela 1 (which presents lower costs than Sistela 2) show to be higher than the costs of pipes in Sweden.[891] Respondents also argue that Sistela costs are overpriced since "*Sistela 2's reinstatement costs are extremely close to the*

[890] Transcript, Day 14, 257/16-261/12 (emphasis added).

[891] **REX-004 Add:** Addendum to Sweco Expert Report, dated 14 August 2021, paras. 12-13.

maximum restoration costs under Sistela 1, a clear sign that they are excessively high and unfit to calculate a market price"[892]

805. Respondents seem to argue that costs of pipes in Lithuania should necessarily be lower than in Sweden, and that Sistela 1 prices and Sistela 2 prices should be wider apart. Respondents' argument however fails to persuade the Arbitral Tribunal that Sistela prices are unfit to benchmark VE's costs. AFRY explains the lack of relevance of Respondents' general comparisons:

> "*Sweco alleges that AFRY's Sistela 2 benchmark must be wrong, because a Sistela 2 cost would be much higher than the cost of real-life projects, but does not prove its contention.*
>
> *Sweco's reasoning is that Sistela 2 gives higher prices than Sistela 1, which in turn gives higher prices than the costs of pipes in Sweden, so 'Sistela 2 prices are not an appropriate comparator because they are overly expensive'.*
>
> *The suitability of a benchmark for pricing a project comes from how accurately it can predict the final price of that project. Therefore, that the final Sistela 2 cost is more expensive than: (i) Sweco's incomplete Sistela 1 cost, which is missing necessary items; and (ii) a Kulvertkostnadskatalog benchmark which is built upon different grounds (meaning that it cannot be used as a direct comparator), does nothing to undermine its fitness for purpose, and arguments to that effect should be disregarded.*
>
> *AFRY remains of the view that Sistela 2 is the most appropriate benchmark with which to calculate the VE's investment costs for DHN pipelines, as it is the benchmark which most accurately encapsulates the costs to be taken into account.*
>
> […]
>
> *Sweco's Sistela 1 estimate is incomplete. It fails to take account of, for example, the cost of ground cover restoration and the cost of the technical project. This was shown by AFRY, and admitted by Sweco. Indirect costs also need to be added.*
>
> *Therefore, it should be of no surprise that Sweco's Sistela 1 cost is lower than AFRY's Sistela 2 cost – Sweco is essentially pricing a subset of the project that AFRY has*

[892] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 737, see also **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 174.

> *priced*. Sweco's statement '*For example, Sistela 1 (used by Sweco for its benchmarking) presents lower costs than Sistela 2', states the obvious, but it is not a proof that Sistela 2 is wrong – it is simply a symptom of the fact that Sweco is incorrectly modelling the costs involved*."[893]

806. Further, in view of the wide discrepancies in the methodologies available to compare different benchmarks, as is evident from the debate of the Parties' experts, Respondent's general comparisons between benchmarks are not reliable enough to support an argument that Sistela prices are inflated.

807. The Arbitral Tribunal has taken due note of Respondents' and Sweco's references[894] to the Sistela website which states that tender prices are likely to end up being lower than Sistela prices: "[i]*f the estimated price is calculated responsibly, there is a high possibility that the tender price will be lower due to individual construction costs, discounts, rebates, etc.*"[895] The quotation however follows with the statement that prices very low in comparison to Sistela prices should also be considered carefully "*in order to prevent acceptance of unfair offers.*"[896] Therefore the variation does not appear to be considered dramatic, and the website confirms that although "*declared retail prices that is, the prices without any trade discounts*" are considered, "*unreasonably high prices*" are excluded from the database.[897] Respondents point to a 20-30% overpricing of Sistela based on a report of the Lithuanian National Audit Office ("**NAO**") on the procurement of construction work by the Lithuanian road administration.[898] The Arbitral Tribunal notes that the prices themselves are described as being in the range

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[893] **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, paras. 174-179 (emphasis added).

[894] See **REX-004 Add:** Addendum to Sweco Expert Report, dated 14 August 2021, para. 13; **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 737 and Sweco's Direct Presentation, slide 54.

[895] **C-843:** Sistela website, "Relevant Comments," *available at*: http://www.sistela.lt/Aktualus/komentarai, dated 01 January 2020.

[896] **C-843:** Sistela website, "Relevant Comments," *available at*: http://www.sistela.lt/Aktualus/komentarai, dated 01 January 2020.

[897] **C-843:** Sistela website, "Relevant Comments," *available at*: http://www.sistela.lt/Aktualus/komentarai, dated 01 January 2020.

[898] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, with ref. to **R-1896:** National Audit Office Report, Procurements of Construction Works by the State Enterprise Lithuanian Road Administration, No. VA-P2-20-11-26, dated 23 December 2009.

of 15-20% above tender prices. Rather it is the overall "possibility to increase efficiency of their activities" for the contractors which is estimated by the NAO at 20-30%.[899]

808. In any event, these two references do not cure the lack of proof of overpricing of the pipes purchased by VE from Axis, as the Tribunal is not persuaded that the alternative benchmarks and methodology used by Sweco are reliable.

809. In view of the above, the Arbitral Tribunal does not consider it necessary to delve into the details of the experts' argument regarding AFRY's alternative benchmark ("for further substantiation") against the German and Swedish publicly available benchmarks. It notes however, for the sake of completeness, that it is not persuaded by allegation of overpricing by 143% and 84% overpricing on the basis of the difference between VE's costs and the Swedish and German benchmarks, respectively.

810. In particular, Sweco's assumption that works account for 82% of the project costs in its adjustment of labor costs with Eurostat data seems unsupported.[900] In the Arbitral Tribunal's opinion AFRY's answer in that regard closes the debate:

> "*Sweco does not provide evidence for its assumed 82% labour cost share; while Sweco has stated '[t]he documents produced by AFRY show that works account for 82% of the project costs for pipes in both Sweden and Germany', this is untrue. The Swedish and German sources do not provide a share of labour cost, in fact the sources do not even break down total cost into cost types (labour, material, machinery, services).*
>
> *For example, the Swedish source uses a breakdown by work steps (earthworks, plumbing, culvert material, culvert splicing, project planning and controlling). Those work steps can contain material, labour and also machinery cost. Thus Sweco has not reliably derived the share of cost which is driven by labour cost, and its adjustment is not appropriate.*
>
> *Such a high labour cost share would be counterintuitive in the first place. If labour cost accounted for 82% of total cost, one would expect that total cost for 123km of DHN pipes would be highest in Sweden, given that Swedish labour costs are 13% higher*

[899] **R-1896:** National Audit Office Report, Procurements of Construction Works by the State Enterprise Lithuanian Road Administration, No. VA-P2-20-11-26, dated 23 December 2009, p. 39 of the pdf.

[900] See **REX-004 Add:** Addendum to Sweco Expert Report, dated 14 August 2021, para. 18.

than German labour costs. In fact, the Swedish benchmark is 20% lower than the German benchmark.

When applying a labour cost share of up to 30% to Sweco's adjustment calculation, Sweco's alleged overspending disappears (measured against the corrected VE investment cost of 42.26 MEUR); Lithuanian cost is just 2% above the adjusted Swedish cost and is 18% below adjusted German cost […]

As Sweco has provided no reliable evidence to suggest that a percentage of even 30% should be used, its allegation that overspending is evidenced by the German and Swedish projects is not reliable, and should be disregarded."[901]

811. This was confirmed by the fact that Sweco was unable to defend its assumption on its omission of the cost of machinery at the Hearing:

"Q. What you do there, if we take just the Swedish, as you explain in paragraph 18 is on the basis of Eurostat data on labour cost in the construction sector, to adapt the prices from Swedish to Lithuanian; right?

MR JONSSON: Yes […]

Q. […] *And in that respect you apply to what is the works part of the price; right? You are not applying that* […] *indexation on the material that is taken into consideration; right?*

MR JONSSON: Correct.

Q. You are separating before material from work; right?

MR JONSSON: Correct.

Q. So you do not exclude machinery; right?

MR JONSSON: No, that's correct. I used the same index for all costs related to work. Yes.

Q. So, at the end of the day, when you are indexing, you are not just indexing on labour cost, you are indexing on labour cost and on machinery as well; right?

[901] **CEX-020 :** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, paras. 189-192.

MR JONSSON: On everything that is categorized as work, yes."[902]

812. To conclude, the Arbitral Tribunal finds that Respondents have failed to establish overpricing of the pipes purchased from and installed by Axis pursuant to Procurement No. 82316.

6. Conclusion

813. The Arbitral Tribunal's detailed analysis of Respondents' allegations of overpricing and of the experts' debate about such allegations has not led to a finding that VE overspent on goods and services from Rubicon affiliated companies.

814. As explained above,[903] in the absence of an established overpricing, Counterclaim 13 in any event fails for lack of a compensable damage incurred by Respondents. Counterclaim 13 is in consequence dismissed.

D. COUNTERCLAIM 4: VE-3 CONVERSION

815. Counterclaim 4 concerns Respondents' allegation that Claimants had an obligation to modernize the VE-3 plant by conversion to biofuel, which is denied by Claimants. Respondents claim EUR 260,634,765 based on a scenario under which VE-3 would have been converted to biofuel, with annual interest of 6% calculated from 30 March 2017 until full payment.[904]

1. Time limitation

1.1 THE Parties' POSITIONS

1.1.1 Claimants' Position

[902] Transcript, Day 14, 264/23-265/24.

[903] See above paras. 488 ff.

[904] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1138.

816. Claimants object to Counterclaim 4 as time-barred as from 2005, *i.e.* the date at which Respondents claim a reasonable operator would have considered the modernisation of VE-3.[905]

1.1.2 Respondents' Position

817. The Arbitral Tribunal notes that Claimants' time-bar objection was raised specifically in relation to Counterclaim 4 only in their Post-Hearing Brief. In their Reply Post-Hearing Brief, Respondents have not addressed the question of time-bar specifically in relation to Counterclaim 4.

1.2 THE Arbitral TRIBUNAL'S ANALYSIS AND DECISION

818. Claimants' position according to which the statute of limitation started running on the date at which Respondents claim a reasonable operator would have considered the modernization of VE-3 (*i.e.* 2005) is doubtful as the date seems difficult to determine, and the Arbitral Tribunal has not been provided with specific argumentation in defense from Respondents. The Tribunal however notes that considering the date on which the Millenium Project was refused (June 2010) would have made more sense, even though it was not referred to by Claimants.

819. In any event, whether considering 2005 or 2010 as the date triggering the 3-year statute of limitation, [906] Counterclaim 4 which was submitted in this arbitration with Respondents' Statement of Defense and Counterclaim of 19 February 2018 is time-barred.

820. In any event, in view of the importance of Counterclaim 4 and the time devoted to it by the Parties, the Arbitral Tribunal has analyzed the merits of the claim.

2. Liability

2.1 Introduction

[905] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1302 (table), with reference to **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 1044-1061.

[906] **RL-044:** Civil Code of the Republic of Lithuania (including amendments of April 12, 2011).

821. Respondents' Counterclaim 4 concerns their allegation that Claimants were under an obligation but failed to transform the VE-3 plant to run on biofuel. VE-3 is one of VST's two combined heat and power plants in Vilniaus. Before the Lease, VE-3 was VST's most important source of electrical and heat supply[907] and "*an efficient and reliable energy production plant*".[908]

822. Claimants respond that they did submit a proposal of conversion, which however entailed a Lease extension permitting Veolia to recoup that additional investment. However, Respondents submit that this proposal does not exonerate Veolia from its liability under the Lease. They quantify their claim at EUR 260,634,765 million[909] based on a model conversion of VE-3 to biofuel which they allege would have allowed Veolia to profit from such investment within the initial term of the Lease.

823. In relation to other Counterclaims, Respondents explain that "*the VE-3 Counterclaim would potentially subsume the following counterclaims in the event that the Respondents prevail: Counterclaim 3 (Emissions Allowances), Counterclaim 5 (Failure to Invest) and Counterclaim 12 (Total Aggregate Value)*."[910]

2.2 The Parties' Positions

2.2.1 Respondents' Position

824. Respondents submit that Claimants had an obligation to convert VE-3 to biofuel insofar as they realized at least by 2010 that such conversion "*would be necessary to preserve* [the plant's] *economic viability*"[911] and to the extent the investment was feasible in light of the market situation.[912]

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[907] **R-029:** Dalkia's Proposal for Tender of Vilnius City Municipality for Assets, Lease and Operation of VŠT, dated 01 October 2001, p. C37, **R-047:** World Bank Project appraisal document , dated 27 July 2001, p. 3.

[908] **R-029:** Dalkia's Proposal for Tender of Vilnius City Municipality for Assets, Lease and Operation of VŠT, dated 01 October 2001, p. C11.

[909] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1138, confirmed in **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 307, see also **FTI Slides:** Hearing Presentation of FTI (Dr. Fabien Roques), dated 08 June 2022, slides 35 ff.

[910] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 927.

[911] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 925.

[912] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1606.

825. Respondents rely on several provisions of the Lease to delineate the obligation of converting VE-3 as necessary to conduct VE's business. They contend that, in spite of the absence of a specific reference to biofuel conversion in the Lease, it was abundantly clear at the time the Lease was concluded that Claimants would proceed to "*CHP upgrades*", as provided in the Investment Plan at Annex 2 of the Lease.[913] This need to adapt to anticipated major changes in the market was acknowledged by Veolia itself in its bid for the Lease.[914]

826. According to Respondents, Claimant's investment obligations extended beyond the items listed in the Investment Plan that was meant to be "indicative only". "*Veolia's investment obligations were expressed in qualitative terms (i.e., rather than by detailing investments) precisely because the future needs of the system could not be predicted with any certainty in 2001/02*."[915]

827. Respondents refer to Art. 16.1 of the Lease which expressly stipulates VE's undertaking to invest beyond the Investment Plan as necessary to ensure VE's "Business" and achieve the goals of the "Project" as described in Art. 3.[916] Respondents emphasize that the obligation included protecting VST's "*heat and power production* […]".[917]

828. Respondents also consider that the Investment Plan is qualified in the Lease as a list of key obligations expressed in qualitative terms. Veolia acknowledged at the relevant time that not every detail could be foreseen, and that it would need to adapt its performance in the future.[918] "*The assumption of risk regarding market and technical*

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[913] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1584 and 1617-1618.

[914] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1592-1597, with ref. to **R-029:** Dalkia's Proposal for Tender of Vilnius City Municipality for Assets, Lease and Operation of VŠT, dated 01 October 2001, pp. C17, C22-C24, C36, see also **Rejoinder**, paras. 1619-1621 and **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 936-940.

[915] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 942.

[916] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 943. With regard to in particular Art. 3 of the Lease, see **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1606-1611 and **RPHB**, para. 947.

[917] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 944 (emphasis in the original).

[918] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1589-1591, **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 946-947.

developments necessitating additional investments was one of Veolia's main undertakings under the Lease Agreement."[919] Respondents explain that "*it is in the context of* […] *representations and undertakings regarding the need to adapt flexibly to future market changes that Veolia's promise not to raise heat tariffs on account of investments must be understood. If Veolia's investment obligations were essentially restricted to those enumerated in the Investment Program, then the undertaking not to raise prices on account of additional unforeseen investments would be largely redundant*".[920] Respondents further point to Art. 12(vi) of the Lease which obliged Claimants to rehabilitate and upgrade the Facilities with reference to general standards and aims of the Lease, which "*must be given effect*".[921]

829. As to Art. 27.3 of the Lease, - which provides that the Parties shall cooperate to adapt to varying legal and economic circumstances during the Lease's term, Respondents contend that it reflects the position of the general law according to which the Parties were obliged to implement the Lease in good faith. This in turn entailed Veolia's obligation to modernize the VE-3 plant without extending the Lease.[922]

830. In any event, Claimants could not rely on Art. 27.3 to renegotiate the Lease unless they could "*show that the Lease Agreement, as a whole, had become loss making.*"[923] Similarly, a renegotiation of the Lease could not be demanded by Veolia simply "*because a particular investment was not profitable in and of itself* […] *It was Veolia's responsibility to obtain financing for investments and this was a key promise in its bid*".[924] Respondents' position is indeed that "*the Lease does not guarantee a particular*

[919] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1588.

[920] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1596, see also para. 1598 with references to provisions of the Lease relied on by Respondents in relation to Claimants' undertaking not to raise tariffs.

[921] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1613, see also paras. 1614-1615.

[922] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1630, **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 954.

[923] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1631 (emphasis in the original), see also para. 1638 and **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 953.

[924] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1632, **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 951-952.

level of profitability to Veolia, nor does it guarantee that Veolia would make money on each and every investment."[925]

831. Questions arose during the hearing as to how the Lease allocated responsibility and risk between the Parties for major investments beyond the Investment Plan. Respondents point in that regard to the facts against which the intention of the Parties must be analysed, including that 1) "*VE-3 was by far and away the most valuable and essential generation asset that was conveyed into the possession of Veolia*",[926] and 2) "*VŠT's electricity generating business was almost exclusively dependent on the economic viability of the VE-3 plant*".[927] These two important factors mean that the assumption that VE-3 would be modernized to protect its value was core to the agreement of the Parties to enter into the Lease.[928]

832. Respondents further point to the fact that changes were anticipated in the Lithuanian energy sector at the time of the conclusion of the Lease, when Lithuania was negotiating its accession to the EU which was foreseen to require fundamentally reorienting the energy sector from its former dependency on the Soviet Union. At that time, a new heating law was under preparation and the risk of an incoming regulatory regime contradicting the principles of co-operation set out in the Lease was acknowledged in the same, at Art. 27.3.[929] With respect to VST's electricity business, the dramatic structural changes that were upcoming were already known, notably the liberalization of the market, the phasing out of certain quotas and the increase of competition in the sector.[930] With respect to fuel sources, Lithuania was moving in the direction of reducing its total dependence on Russian gas imports, and it was plainly known that compliance with EU standards would bring the obligation to limit greenhouse gas emissions.[931]

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[925] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 953.
[926] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 929.
[927] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 929.
[928] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 930.
[929] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 932-933.
[930] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 934.
[931] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 935.

833. According to Respondents, the above factual matrix explains that the Lease envisaged a level of investment from Veolia's part "*well above the EUR 164 million contemplated by the first iteration of the Investment Program*."[932] However, by the end of the Lease Veolia had only invested a total EUR 168 million. Such low levels of investment had the consequences of destroying VST's electricity business and giving away most of VST's share of the heat generation business market to IHPs.[933]

834. Respondents state that the conversion proposal that Claimants presented (the Millenium Project) corresponded to a request of a 20-year extension of the Lease to pay for the conversion to biofuel, which contradicts Claimants' undertaking to upgrade CHPs regardless of the profitability of such investment. The analysis of Respondents' experts (Sweco and FTI) shows that Claimants should have, as per the prudent operator standard, designed and implemented a model of conversion "*at least as good as that considered by Sweco and FTI.*"[934] According to Respondents, "*there is simply no credible case on which the Sweco conversion would not have been significantly profitable before the end of the Lease*."[935] Respondents account notably for part of the investment costs being financed by EU subsidies and the sale of emission allowances proceeds. Respondents' modeling also involves an analysis of the increased efficiency of VE-3 as upgraded.[936] Aside from Sweco's own conversion model, Sweco also adjusted the Millenium Project metrics to calculate that Veolia would have recouped its investment within the term of the Lease as well.[937]

835. Respondents submit that Claimant's Millenium Project is not a legal defense to Counterclaim 4.[938] Their position is that the extension of the Lease included in the Millenium Project makes it irrelevant as a legal defense as Claimants' obligation was to modernize the plant "*within the terms of the Lease (to the extent possible), not to*

[932] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 948 and 952.

[933] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 950.

[934] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 955.

[935] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1024.

[936] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1717 ff.

[937] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1713 ff; Respondents' Opening Presentation, slides 62 and 64.

[938] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 1024, see also **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1735 ff.

fabricate a pretext to extent the Lease for 20 years."[939] Claimants cannot argue that they were released from that obligation because Respondents did not agree to an illegal 20-year extension of the Lease as "*under Lithuanian law, it is not a defense to an allegation of breach of contract that one's contractual counterparty did not agree to vary the contract terms.*"[940] If anything, the Millenium Project evidences Claimants' bad faith. It was designed to mislead Respondents as to the necessity of the extension sought. According to Respondents, Claimants inflated the level of investment required well beyond what was required to justify the extension and ensure their return on investment.[941]

836. Meanwhile however, Claimants "*planned internally to recover* [their] *investment extremely quickly and to* […] *make the Vilnius Lease even more profitable*",[942] as evidenced by their internal documents (which were not known to Respondents at the relevant time).[943]

837. Respondents further contend that the Millenium Project was not a credible proposal, set out in a "*14-page cartoon*" which offered only two choices to Respondents: "*economically suicidal*" investments into filter technologies, or the 20-year extension of the Lease.[944] The proposal also lacked the most basic information on the project finances, as well as certain technical information requested by Respondents during the Parties' negotiation.[945] The proposal was immature at the time Veolia pitched it to the Municipality, which is evidenced by the fact that, at that time, Veolia was already considering the much better option of fuelling VE-3 with wood chips instead of the wood dust fired option proposed as part of the Millenium Project.[946]

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[939] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1028, see also **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1737.

[940] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1737.

[941] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 1030-1032, see also **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1740.

[942] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1033.

[943] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 1034-1037.

[944] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1039, see also **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1752.

[945] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 1040-1041.

[946] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 1042-1046.

838. Regarding the negotiations of the Millenium Project, Respondents deny any relevance thereof insofar as "*only the Municipal Council had the power to enter into a variation of the Lease Agreement and Veolia was fully aware of this*."[947]

839. In any event, the Lease extension associated to the Millenium Project was illegal, as confirmed by the warnings of key State institutions.[948] "*Veolia cannot justify its failure to perform its pre-existing Lease obligations on the basis that the Municipality refused a contract proposal that was illegal and would have been struck down by the courts (as happened in the case of Veolia's Alytus lease)*."[949]

2.2.2 Claimants' Position

840. For Claimants, the omission of the VE-3 conversion to biofuel from the Investment Plan cannot be an omission: "*the Parties consciously considered VE-3 when agreeing the Investment Plan, and included specific items in it in relation to VE-3 and its modernization – none of these related to a biofuel conversion*". [950] Indeed, the Investment Plan includes investments related to upgrade of (VE-2 and) VE-3, but not a conversion to biofuel of VE-3.

841. Claimants further consider that a conversion of VE-3 cannot be understood as "*necessary*" pursuant to Art. 16.1 of the Lease.[951] They refer notably to paragraph 8 of the Investment Plan at Annex 2 of the Lease, which makes it clear that a necessary investment is one that, if it is not made, would disrupt "*normal operational condition*[s]" or the *"proper technical level of the heat supply facilities*." [952] "*Respondents must therefore prove, not merely that the conversion of the VE-3 plant to biofuel would* [have] *improve*[d] *the district heating system or serve the Article 3 goals, but rather that the*

[947] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1739.

[948] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 1047-1049, see also **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1765-1776.

[949] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1049.

[950] **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 42.

[951] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 454 ff, see also **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 781 ff.

[952] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 1134.

business would suffer technical disruptions to heating services in the absence of the conversion."[953] The fact that the business of VE remained effective despite the lack of conversion demonstrates that such conversion was not *"absolutely needed"* to ensure the viability of VST's business.[954]

842. Claimants further point to the fact that any modernization of VE-3 would have required coordination with and approval of Respondents, not least because such major additional investment could not have been undertaken without both Parties agreeing to modify the Investment Plan under the Lease.[955]

843. Claimants rely on the reference to Art. 27.3 of the Lease in the draft documents related to the Millenium Project. Art. 27.3 relates to amendments of the Lease and of the Investment Plan to accommodate certain investments that have become necessary in view of legal changes. In the absence of any agreement of the Parties as per that provision, the Lease was not amended and Claimants were under no obligation to convert VE-3 to biofuel.[956]

844. Regarding Sweco's conversion model, Claimants submit that it is under-priced and does not withstand scrutiny, leaving Respondents' allegation that Claimants could have converted VE-3 profitably largely unsubstantiated. "*As Veolia has demonstrated, the Conversion Scenario would likely have cost EUR 188-252 million, and would not have been profitable for Veolia.*"[957]

2.3 The Arbitral Tribunal's Analysis and Decision

2.3.1 Introduction

[953] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 1135 (emphasis in the original).
[954] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 456.
[955] **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, paras. 50-52 and 473 ff.
[956] **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, paras. 53-56.
[957] **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 36.

845. Counterclaim 4 is quantified at EUR 260,634,765 million[958] and thus corresponds to the largest amount claimed by Respondents in this arbitration. The Arbitral Tribunal has carefully reviewed the thorough and diverse exchange of submissions and arguments from the Parties, and has identified that the key questions are the following:

- Whether Veolia had an obligation to modernize VE-3 under the Lease;

- In the affirmative, whether and how the Millenium Project impacts on such obligation.

846. As will be explained below, the question whether Claimants could have modernized VE-3 to run on biofuel, recover their investment without any extension of the Lease's term and made profits is not in and of itself a decisive factor.

2.3.2 Claimants' undertakings

847. The Parties first disagree as to the very existence of an obligation on Claimants to modernize VE-3 under the Lease. A good portion of their debate has focused on the language of the Lease and of Veolia's (then Dalkia)'s bid, which is referred to in the Lease.

b. *The main part of the Lease*

848. Insofar as the main part of the Lease is concerned, the following provisions have been discussed by the Parties.

849. Article 16.1, which provides that "[t]*he Lessee* [VE] *undertakes to carry out any works and make investments which are not included in the Investment Plan but are necessary for ensuring the Business and achieving the objectives set out in Article 3 above, assets taken on from the Related Companies, newly connected Customers and other works in VŠT's branch Vilniaus Elektriné inclusive, all of which works will be carried out with no request for any extra payments and/or reimbursements by the Lessor*."[959]

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[958] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1138, confirmed in **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 307, see also **FTI Slides:** Hearing Presentation of FTI (Dr. Fabien Roques), dated 08 June 2022, slide 42.

[959] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 16.1.

850. Respondents recall that the term Business is, pursuant to Article 1 which lists defined terms under the Lease, to be understood as "*heat and power production*".[960] Respondents further note in relation to Article 16.1 that, at the time of conclusion of the Lease, the need for large additional investments into VST's power generation assets was acknowledged and the Lease therefore anticipated that "*the Parties would adapt the Investment Plan in good faith to incorporate such investments*."[961]

851. Article 3 of the Lease, which is directly referred to in Article 16.1, broadly defines the Lease's goals as follows:

> "3.1. *Newco undertakes to operate the Facilities and make Investments envisaged in the Investment Plan with a view to achieving the following targets:*
>
> *(i) to cut down the costs of electricity and heat production, and the costs of district heating and hot water supply in Vilnius causing the technical level of the Facilities engaged in the Business to improve;*
>
> *(ii) to upgrade the heat and electricity generation, and district heating and hot water supply systems and heat supply pipeline routes in in Vilnius, in terms of responsiveness to Consumer needs and improvement of their technical and economical specifications;*
>
> *(iii) to support the commercial and financial viability and status of VŠT, to retain the existing and attract new Consumers.*
>
> *3.2. All Investments shall be performed under the terms and conditions set forth in Annex 2 of the Agreement (the Investment Plan) and shall not serve as grounds to raise heat and power pri*[c]*es or cut the amounts due to the Lessor as have been determined and/or calculated pursuant to Article 11 of this Agreement."*[962]

[960] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 944.

[961] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 944.

[962] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 3.

852. For Respondents, the language in Article 3 referred to in Article 16.1 covered a modernization of VE-3 to run on biofuel insofar as "*Veolia's investment obligations extended to protecting VŠT's electricity business as well as its heat business*."[963]

853. The Arbitral Tribunal disagrees with such an interpretation. The general obligations set out in Article 3, in particular, are too vague to form the basis of a firm investment undertaking by Claimants. Article 16.1 cannot be reasonably understood as applying to the modernization of the VE-3 plant and the Tribunal agrees with Claimants' and their witness' interpretation that an investment only became necessary in the meaning of Article 16.1 of the Lease *"if the Vilnius district heating system could not adequately function and serve consumers without the investment"*.[964]

854. Respondents have also referred to Article 12(v) and (vi) of the Lease,[965] pursuant to which VE undertook to:

> "*(v) manage and maintain the Facilities and the Units strictly in accordance with the applicable rules and other standards and make improvements to them so as to keep them in appropriate condition for heat and hot water supply, as well as for electric energy and heat production. Throughout the duration of the Term* […] *and thereafter the Lessee will be required to re-deliver to the Lessor the Facilities and the Units in the condition suitable to ensure reliable heat and hot water supply and power and heat production at the sum total of the aggregate residual value of such re-delivered Facilities being no less than their value at the date of Closing* […]
>
> *(vi) rehabilitate and upgrade acting in accordance with the Investment Plan enclosed at Annex 2, the heating and hot water systems and pipe-line routes (network), including in-house heat exchanger units and power generating facilities, with the aim of achieving a sustainable and affordable heating system for Consumers*."[966]

855. The reference to Article 12(v) and (vi) do not make Respondents' interpretation more convincing as they only set general obligations. Further, Respondents themselves

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[963] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 944.

[964] **CWS-009**: Bernotas, First Witness Statement, ¶33; **CWS-022**: Bernotas, Second Witness Statement, ¶24.

[965] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 48.

[966] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002,, Article 12 (emphasis added).

explain that these provisions establish the "Total Aggregate Value" or "Returned Value" which is the object of Claim 6 and Counterclaim 12.[967] As such, these provisions do not directly inform the Tribunal as to whether the Lease bound Veolia to convert VE to run on biofuel.

c. *The Investment Plan at Annex 2 to the Lease*

856. The relevant provisions in the main part of the Lease (Articles 16.1 and 3) are very general and lead the Arbitral Tribunal to assess that the scope of VE's committed investments under the Lease, which was addressed in greatest detail in the Investment Plan enshrined in Annex 2 to the Lease:

> "***General***
>
> 2. *This Annex sets forth major technical strategy directions selected to attain the goals set by the Municipality and VŠT. The Annex has been drawn up taking due account of the VŠT's production needs and output and, equally, relying upon information received in the course of the tender for lease of the VŠT' s assets*."
>
> *3. The Annex contains a program for upgrading and renovation of the heating sector for a period of fifteen years which will be reviewed, adjusted and approved on a yearly basis in accordance with sub-article 21.4 of the Agreement (or in the event of any other new investments planned).*
>
> *4. The Investment Program is described in detail in Schedule 1, Schedule 2 and Schedule 3 of this Annex*: […]
>
> *5. The Parties agree to hold strategic meetings as frequently as at least once in every 3 years, at which the Investment Program will be adjusted taking into account changes on the market and the company's economic and technical development*.
>
> ***Investment Obligations by the Lessee***
>
> *"2. to upgrade CHPs thus proceeding with the renovation and upgrading of facilities originally commenced by VŠT and carry out any necessary works non-included into the Investment Program but having become apparent in the course of operation.*

[967] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1074.

> *Should there be an objective need for higher CHP capacities due to changes on the power supply market, the Lessee undertakes to make all such feasible investments.*"[968]
>
> *"8. to carry out any extra works and make additional investments to finance such works in order to ensure normal operational condition of the leased assets of the heating sector. The Lessee undertakes to carry out all necessary works to ensure proper technical level of the heat supply facilities regardless of whether or not such works have been included in the Investment Program of the Lessee*".[969]

857. Respondents rely primarily on paragraph 2 of the section "Investment Obligations by the Lessee" of Annex 2. Respondents interpret that paragraph as including Claimants' specific obligation to upgrade CHPs to run on biofuel with no need for amendment of the Investment Program.[970] Respondents explain that the Investment Program contains "*the precise means by which Veolia's investment obligations were to be implemented*"[971] and stress that, pursuant to paragraph 3 of the section "General" of Annex 2 to the Lease, the Parties were to hold strategic meetings at least once every three years to adjust the Investment Program.[972]

858. The Arbitral Tribunal considers that the provision of the Lease that best supports Respondents' interpretation, insofar as it refers specifically to CHPs, is paragraph 2 of the Investment Plan – Investment Obligations by the Lessee.[973] Respondents' reference to paragraph 8 of the section "Investment Obligations by the Lessee" of Annex 2 is not entirely on point, as that paragraph solely refers to additional investments to be made to ensure proper condition and technical level of the heat supply facilities, whereas CHPs are power generation assets of VE.

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[968] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Annex 2, p. 2, para. 2 (emphasis added).

[969] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Annex 2, p. 2, para. 2 (emphasis added).

[970] See **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1616 1624.

[971] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 947.

[972] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 947, **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Annex 2 (emphasis added).

[973] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Annex 2 – Investment Obligations by the Lessee, p. 2, para. 2.

859. However, when looking closely at paragraph 2 of the Investment Plan – Investment Obligations by the Lessee, the Arbitral Tribunal observes that the reference is to CHPs, plural, whereas a conversion of VE-2 to biofuel was not discussed. Should the Parties have intended to make the conversion of VE-3 to biofuel a firm obligation, VE-3 would have been referred to specifically instead of the general reference to CHPs. Respondents claim that the Investment Plan must be read together with Article 16.1 of the Lease which provides that "*the amounts of investments stated in the Investment Plan are indicative only*" as is "*the list of works included in the Investment Plan*".[974] However, the absence of a firm commitment from Veolia to convert VE-3 also stems from the fact that such list of works in the Investment Plan as agreed by the Parties covers certain upgrades to VE-3, for example the "[r]*enovation of burners*" or the "[a]*utomatization of turbines*",[975] but does not even mention the possibility of a conversion to biofuel. Despite the anticipated changes to the electricity market and the need to comply with EU standards limit greenhouse gas emissions, referred to above.

860. Further, like Article 16.1, paragraph 2 contains the language "*necessary*". The Arbitral Tribunal agrees with Claimants' argument that the fact that the business of VE remained effective despite the lack of conversion proves that such conversion was not *"absolutely needed"* to ensure the business.[976]

d. *Veolia's bid for the Lease*

861. As seen above, Annex 2 however does refer to Veolia (then Dalkia's) bid at the very outset of Annex 2, stating that it "*has been drawn up taking due account of the VŠT's production needs and output and, equally, relying upon information received in the course of the tender for lease of the VŠT' s assets*."[977]

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[974] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 16.1.

[975] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Annex 2.

[976] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 456.

[977] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Annex 2.

862. Respondents rely on that bid to assert that "*Veolia made clear that* [upgrades to electricity production facilities] *would not require additional payment. That is because, as Veolia clearly represented in its bid, such upgrades would be 'paid off through the revenues on sale of additional electricity'".*[978]

863. For the Arbitral Tribunal, the references to the conversion of VE-3 to biofuel in Veolia's bid are too vague to form the basis of a firm undertaking from Veolia to invest a further EUR 144.9 million (according to Sweco's model of conversion)[979] to a range between EUR 187.8 million to EUR 251.6 million (according to AFRY's corrected conversion model)[980] in addition to the initial minimum amount of investment of EUR 163 million (later increased to EUR 168 million)[981] firmly committed to under the Lease. It is at least clear that the Parties did not intend to make a project of the magnitude of the conversion of VE-3 to biofuel an obligation without amendment of the Lease to provide compensation for the necessary additional investment.

864. This interpretation is in line with the content of the sub-section entitled "Modernisation and renovation of CHP stations" in Veolia's bid, which states that:

> "*Dalkia* [Veolia] *has designed its investment plan with the focus on supplying heat for consumers at the lowest cost with no investments into the increase or replacement of production facilities (or their part). When changes in the electricity market allow more production from the CHP stations, the operator will make all the required investments, which will be paid off through the revenues on sale of additional electricity.*"[982]

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[978] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1621, see also para. 1624.

[979] **REX-004 Add:** Addendum to Sweco Expert Report, dated 14 August 2021, paras. 33 and 36, Swecos' hearing presentation, slide 19, **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, Table 4, para. 118.

[980] **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, Table 4, para. 118, **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 528.

[981] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Annex 2, Investment Program at Appendix 1, see also **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 57, **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 51, **REX-002:** Expert report of FCG Design and Engineering Ltd., dated 19 February 2018, para. 61.

[982] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Annex 2, Investment Program at Appendix 1, see also **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 57. **R-029:** Dalkia's

865. The following pages in the bid further specify a number of planned maintenances, automation and revisions in VE-2 and VE-3. Notably, the control system of boilers and turbines in VE-3 was programmed to be renovated. However, nothing suggests in that content that a conversion of fuel source would be undertaken for VE-3.[983] Relevant excerpts of the bids that follow confirm this interpretation:

> "*Our investment plan includes only the necessary upgrading of the production and supply of electricity that targets to ensure more reliable and efficient production of power for the operating production means. This part of the business plan may be revised considerably owing to introduction of new electricity production processes and equipment following the upcoming liberalisation of the domestic electricity market. Thus, Dalkia has planned to implement a new control system on the steam boilers (BKZ) and on the 12 Mwe turbine, adding new field instrumentation and new drivers. In addition, Dalkia has planned to reinforce the electricity equipment by:*
>
> - *replacing the 6kV large oil switches (about 20 items);*
> - *replacing the accumulators batteries (2 items – 230V).*
>
> *CHP: VE3*
>
> *First, the renovation of the unit 1 will be completed by refurbishing the air pre-heater.*
>
> *As VE-3 is the heart of VŠT's electrical and heat supply, Dalkia has planned to renovate the control system of both boilers and turbines and implement the following means of automation* […]
>
> *The entrapping masout capacity for fuel-oil storage will be increased in order to meet current EU rules* […]"[984]

866. The above passages in Veolia's bid, which formed the basis for Annex 2 to the Lease, clarifies that CHP upgrades as mentioned in the Lease were agreed to include renovation to maintain the asset, maybe modernize it in a way, but not to the extent

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Proposal for Tender of Vilnius City Municipality for Assets, Lease and Operation of VŠT, dated 01 October 2001, p. C35.

[983] **R-029:** Dalkia's Proposal for Tender of Vilnius City Municipality for Assets, Lease and Operation of VŠT, dated 01 October 2001, pp. C35-C37.

[984] **R-029:** Dalkia's Proposal for Tender of Vilnius City Municipality for Assets, Lease and Operation of VŠT, dated 01 October 2001, pp. C36-C37.

that it would cost from EUR 144.9 million (according to Sweco's model of conversion)[985] to a range between EUR 187.8 million to EUR 251.6 million (according to AFRY's corrected conversion model)[986] that were not included in the Investment Program.

867. Further, while major changes in or replacement of electricity production facilities were mentioned as a possibility in Veolia's bid, these were clearly only part of a promise from Veolia to consider such changes, not to undertake them.[987]

> "***Adapting of energy production to the future national electricity market:***
>
> *The Lithuanian electricity market will change drastically in the upcoming 15 years, due to following factors:*
>
> - *restructurisation* [sic] *of the distribution networks;*
>
> - *shutdown of the first block of Ignalina nuclear power plant;*
>
> - *the possibility to ensure direct servicing of big customers (such as industrial plants, public transport operators, city lighting, administration buildings, etc.),*
>
> - *the possibility to export electricity,*
>
> - *the increasing demand in Lithuania and in cross-border countries (Belarus, Russia, Poland especially if the high tension link is built).*
>
> *Soon these changes will create new opportunities for electricity production, which can be seized by VŠT.*
>
> *In the short term, Dalkia plans to maintain the current equipment and does not foresee any increase of electrical production power. The turbo-generators will not be replaced, in order to guarantee a solid base price of heat in the future.*

[985] **REX-004 Add:** Addendum to Sweco Expert Report, dated 14 August 2021, paras. 33 and 36, Swecos' hearing presentation, slide 19, **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, Table 4, p. 42 and para. 39.

[986] **CEX-020:** AFRY's Commentary on the Sweco Addendum, dated 01 April 2022, Table 4, p. 42, **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 528.

[987] **R-029:** Dalkia's Proposal for Tender of Vilnius City Municipality for Assets, Lease and Operation of VŠT, dated 01 October 2001, pp. C23-C24.

Once the new situations and conditions in the electricity market are clear, Dalkia and VŠT will use all opportunities to upgrade or replace electricity production facilities.

[…]

Decrease Dependency on Gas

Today, out of all possible fuel resources, gas is the cheapest and most environment-friendly raw material. Another main fuel is heavy fuel oil with high sulphur concentration. According to the EU requirements, it will be difficult to use this fuel as basic raw material in the future.

This gives rise to dependency on gas, which has to compete with other energy sources and fuel types. Moreover, currently the sole gas and heavy fuel oil supplier is Russia. There are no plans as to the supply of gas from the Nordic countries.

Since major changes are forecast in the gas market, Dalkia will have to envisage and analyse various solutions:

Local fuel resources:

Peat or wood: the resources of this fuel are sufficient and are being developed by Dalkia. However, the production and accumulation of such fuel is insufficient in order to supply Vilnius district heating network.

Environmental policy of every country provides for maximum processing, recovery and storage of waste. In the case of Vilnius City, VE3 would make a perfect place of waste recovery, since the steam produced as a result of waste incineration might be used for two purposes – for production of electricity and for satisfying the needs of the heat network.

Such a solution would allow ensuring a constant production basis independent of gas prices, however so far taxes on waste recovery are fairly low – they are far from equal with the EU rates. Implementation of such a plan would require huge investments from the municipalities and a significant increase of heat prices. Due to these reasons, we do not so far have economic preconditions for a serious analysis of such an investment plan.

This fuel is manufactured by the PDVSA (a Venezuelan oil extraction company). It is used by large energy generation companies in various countries. On the one hand,

the use of such fuel would require large investments into the areas which have to comply with the necessary environmental requirements, on the other hand, however, this would constitute new fuel in the market supplied independently from Russia.

Dalkia believes that today this makes a realistic possibility to create competition for lobbying interests in the field of gas. Details on orimulsion are provided in a separate part."[988]

868. The above makes it clear that, at the time the Lease was concluded, major changes in the energy market's regulation as well as the need to decrease Lithuania's dependency on imports of Russian gas were known. However, it is equally clear that, at that time, the Parties had naturally not yet come to a conclusion on how to address these anticipated changes.

869. Rather, Veolia was only anticipating possible changes in its bid, without making any commitment. As the Parties did not agree on how the possible changes would be dealt with to preserve VE's Business, it is highly unlikely that Veolia would have committed to the specific very substantial undertaking of modernizing a plant from running on gas to running on biofuel.

870. From its review of all of the relevant circumstances and the Lease, the Arbitral Tribunal is not persuaded that at the time of the conclusion of the Lease, the Parties had any intention to conclude, nor did they agree to include within the scope of the Lease, such a large investment into the modernisation of VE-3 beyond the Investment Program without agreement and amendment of the Lease.

871. Rather, as is discussed in the following subsections, the modernization of VE-3 fell within the scope of situations requiring an amendment of the Lease pursuant to Article 27 of the same. As discussed in the two following sub-sections, this appears from the language of Article 27.3 as well as from the Parties' reference to that provision when discussing the Millenium Project, *i.e.* Claimants' proposal of 2010 to convert VE-3 to biofuel that was dismissed by Respondents.

[988] **R-029:** Dalkia's Proposal for Tender of Vilnius City Municipality for Assets, Lease and Operation of VŠT, dated 01 October 2001, pp. C23-C24.

2.3.3 The mechanism of Article 27 of the Lease

872. Respondents' submission is that the Arbitral Tribunal should first consider whether Veolia was obliged to modernize VE-3 under the Lease (which it has done) and whether Veolia could have modernized VE-3 without request for additional payment in view of the profitability of Sweco's conversion model within the term of the Lease. The Arbitral Tribunal has already determined that Veolia was under no obligation under the Lease to modernize VE-3 without any amendment of the Lease. The question whether the conversion would have been profitable without any amendment is therefore secondary if not irrelevant as the Parties' obligations must be considered within the framework of Article 27.3.

873. Respondents submit that once the two issues have been considered, the Arbitral Tribunal should "*move on to its assessment of whether Article 27.3 would have been triggered and, if so, what a good faith solution would have required*."[989]

874. Article 27 of the Lease provides as follows:

> "*The Parties agree to co-operate in good will seeking to implement the provisions of this Agreement. Should the Legal Requirements become amended to such an extent that the provisions of this Agreement would become unenforceable or principally no longer beneficial economically, or should resolutions passed by the Government Bodies, and in particular by SCC, be inconsistent with the principles of co-operation laid down in this Agreement, or if some other major changes occur in the Lithuanian economy causing considerable (by at least 10 percent) variation of the thermal energy supply rates, the Parties shall agree on some new models of co-operation without any major deviation from the principles laid down in this Agreement*".[990]

875. Respondents argue that Article 27.3 could not have been triggered on any analysis. According to Respondents and their expert FTI, Claimants would have been able to recoup the investment of their own funds by the end of the Lease when accounting for

[989] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1021.

[990] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 27.3 (emphasis added).

the EU subsidies and the proceeds of freely-allocated emissions allowances.[991] Given the profitability of the Lease as a whole, Respondents argue that the threshold set out in Article 27.3 that the Lease would have been impacted so fundamentally could never be met by Veolia.[992]

876. Claimants respond that the facts of the case make it clear that both Parties believed that the conversion of VE-3 to biofuel fell within the scope of Article 27.3 of the Lease,[993] *i.e.* an investment that fell outside the existing terms of the Lease and required "new models of co-operation".[994]

877. The Arbitral Tribunal has reviewed all of the Parties' submissions which describe how the Lease is to be interpreted. However, the Parties' interpretation and understanding of their obligations under the Lease at the relevant time, *i.e.* when the VE-3 modernization was discussed, has greater evidentiary value. It is thus appropriate to look at the Millenium Project and the Parties' exchanges in that regard in detail before proceeding to any further analysis of Sweco's model and "*the morass of factual and expert material that has been submitted*"[995] on the manner in which VE-3 should have been converted and the cost of such hypothetical conversion.

2.3.4 The Millenium Project

878. As emphasized by Respondents, "*Lithuanian law requires the Tribunal to interpret* Veolia's *obligations vis-a-vis the VE-3 plant in a common sense and good faith manner taking into account the relevant factual matrix and the intentions of the parties*."[996]

879. In the following paragraphs, the Arbitral Tribunal reviews the factual chronology of the negotiations that took place between the Parties prior to and after the Claimants' proposal of the Millenium Project to Respondents.

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[991] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 958 and 1022-1025.

[992] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 958, see also para. 1025.

[993] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 467.

[994] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 27.3.

[995] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 957.

[996] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 929 (emphasis added).

880. "*By 2008, it became clear that the European Union would soon enact increasingly stringent emissions limitations for pollutants that would affect the operations of the VE-3 plant*."[997]

881. Respondents themselves rely on this clear anticipation of the new heating law under preparation and the risk of an incoming regulatory regime, at the time when Lithuania was negotiating its accession to the EU which expected to fundamentally reorient the energy sector from its former dependency on the Soviet Union.[998]

882. In the Arbitral Tribunal's view, the facts that 1) major disruptions of the market were clear to both Parties, and acknowledged by them when their contract was negotiated, and 2) the Parties nevertheless omitted to include a conversion of VE-3 to biofuel in their contract meant that they did not intend to include the conversion as an obligation under the contract. Respondents' references to the anticipated changes in the Lithuanian market regulation therefore do not support their interpretation.

883. In November 2010, the EU Directive 2010/75/EU imposed stricter emissions requirements for large power plants like VE-3.[999]

884. On 1st February 2010, the Mayor of the Municipality sent a letter to VE regarding the European Union Environment Protection Requirements, inviting Veolia to propose solutions to changing EU legal requirements "*on the basis of item 27.3 of the Lease*":[1000]

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[997] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 1028; **CLA-046:** Commission of the European Communities, Proposal for a Directive of the European Parliament and of the Council on Industrial Emissions (Integrated Pollution Prevention and Control), COM(2007) 844, dated 21 December 2007; see also **CWS-007:** Second Witness Statement of Jean Pierre Henri Sacreste, dated 18 January 2019, para. 99.

[998] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 932 ff, see also **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1746.

[999] **RL-020:** Directive 2010/75/EU of the European Parliament and of the Council on industrial emissions (integrated pollution prevention and control), dated 24 November 2010; **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 1029.

[1000] **C-610:** Letter from Mayor of Vilnius City Municipality to Vilnius Energy regarding the European Union Environment Protection Requirements, dated 01 February 2010, see also **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 54; **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 486.

"MAYOR OF VILNIUS CITY MUNICIPALITY

[…]

To: President, Mr. Linas Samuolis

[…]

REGARDING THE EUROPEAN UNION ENVIRONMENT PROTECTION REQUIREMENTS

In view of the (draft) proposal prepared by the EU Council in 2007 regarding a new wording of the European Parliament and Council Directive on industrial exhausted pollution (integrated pollution prevention and control) (hereinafter referred to as the Directive), by which it has been blueprinted to tighten rationing of pollution exhausted from large combustion facilities since 2016, the requirements of the Accession Agreement of the Republic of Lithuania into the European Union as well as the National energy strategy, approved by resolution No. X-1046 of the Seimas (Parliament) of the Republic of Lithuania and decision No. 1-657 of Vilnius City Municipality Council as of 12 November 2008 regarding the Implementation of the Measures related to the Reduction of the centralized supplied Heating Prices and on the basis of item 27.3 of the Lease Agreement concluded between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija and Dalkia on 1 February 2002 (<…> should the Legal Requirements become amended to such an extent that provisions of this Agreement would become unforceable or principally no longer beneficial economically <..> The Parties shall immediately agree on the new models of co-operation without any deviation from the principles laid down in this Agreement). Therefore, we ask the company Dalkia and its subsidiary UAB Vilniaus Energija to submit the proposals regarding possible technical and financial solutions in reference to the tightening requirements of the EU environment protection since 2016: in order to reduce the pollution emission to environment exhausted from fuel combustion facilities in Vilnius, at thermal power plants, as far as it is possible to maximally use economically feasible local and renewable primary energy sources i.e. all types of bio-fuel (wood waste, straw, bio-mass, organic waste), reducing the consumption of imported gas and oil products, not to increase heating prices for the

residents of Vilnius, ensure the uninterrupted and qualitative supply of heating energy."[1001]

885. The Mayor's letter is unequivocal as to the basis on which the modernization of VE-3 was to be negotiated: Article 27.3 of the Lease. The Arbitral Tribunal has noted Respondents' argument that Veolia counted on Mr. Navickas' administration being "*in the pocket of Rubicon*" and that "*Mayor Navickas* […] *had risen to power on the basis of a secret agreement pursuant to which it was agreed that the Municipality would prioritize a series of Rubicon projects*".[1002] The support for these allegations are two press articles that are evidently favoring one opinion and cannot be considered as establishing facts for the purpose of the Tribunal's decisions. Respondents' submission in relation to the alleged pre-arrangements made by Mayor Navickas for a Lease extension also fail to convince the Arbitral Tribunal, being based mainly on press articles that are obviously not neutral and part of a political debate of which the Arbitral Tribunal does not have a full picture through this arbitration.[1003]

886. Respondents have also raised that, before 2010, the Parties' discussions regarding the conversion of VE-3 to biofuel were in fact already taking place "*behind closed doors for some time prior*."[1004] Respondents refer to Veolia's internal documents showing that discussions with the Municipality started in summer of 2009 a "*working group*" was meeting since at least 7 December 2009,[1005] and to other documents showing that an extension of the Lease could take place in Q4 2009 or Q1 2010.[1006] The starting time of the discussions is however not the determinant question. What matters, rather, is whether the Millenium Project was a serious proposal of VE-3 conversion and how it was treated by Respondents.

[1001] **C-610:** Letter from Mayor of Vilnius City Municipality to Vilnius Energy regarding the European Union Environment Protection Requirements, dated 01 February 2010 (emphasis added).

[1002] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1749.

[1003] **R-1396:** Diena.lt, "Collusion between Vilnius politicians", dated 11 February 2011**, R-1479:** tv3.lt, "Rubicon Group seeks to renew the monopolistic heat sector agreement", dated 13 May 2010**, R-1482:** 15min.lt, "G. Švilpa, advisor to the Vilnius mayor, left", dated 27 August 2010**, R-430:** Lrytas, "A. Kubilius Wishes that Company "Dalkia" is Admitted to Vilnius Heating Sector through a Transparent Tender Procedure only", dated 01 July 2010**.**

[1004] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1751.

[1005] **R-1401:** Dalkia Memo on the Millennium Project, dated 01 July 2009, p. 14.

[1006] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1751 with ref. to **C-339:** VPT Report 2010, Report on Public Procurement Procedures, dated 07 April 2010 and **R-1401:** Dalkia Memo on the Millennium Project, dated 01 July 2009.

887. On 26 February 2010, Claimants sent a letter[1007] and draft amendment of the Investment Plan[1008] proposing to convert one of the gas-fired VE-3 units to burn biofuel. In exchange, Claimants requested the Lease Agreement to be extended for an additional 20 years. This proposal is what is referred to as the "**Millennium Project**". When submitting that proposal in February 2010, Claimants were very clear that they were ready to finance this project against an extension of the Lease:

> "*If the first option to install pollution reduction systems and almost exceptional attachment to fossil fuels is selected, Dakia Group companies will not even partially contribute to the financing of such project. We think that this option would create added value neither to the company Vilniaus Energija, nor to its customers. It will be impossible for us to receive bank financing for such project.*
>
> *If your decision would be to transit in the most part of the facilities to the use of biofuel and installation of filtration systems necessary for this, we would be able to provide financing for such project.*
>
> *The lease agreement signed on February 1, 2002 by and between AB Vilniaus Silumos Tinklai, Vilniaus City Municipality, UAB Vilniaus Energija and French company Dalkia expires in 2017. The investment plan which makes an annex to this agreement includes neither such investment objects, nor such volume of funding. Therefore, our main condition for taking part in this project is extension of our agreement for the period, which provides the conditions for economic justification of the project."*[1009]

888. On 23 March 2010, a meeting between the Municipality and Veolia was organised.[1010] Veolia made a power point presentation of the Millenium Project.[1011]

[1007] **R-290:** Letter from Dalkia to Municipality, dated 26 February 2010.

[1008] **R-289:** Draft Amendment of the Lease Agreement, 2010, dated 06 May 2010,

[1009] **R-290:** Letter from Dalkia to Municipality, dated 26 February 2010 (emphasis added).

[1010] **R-348:** Letter from Municipality to Dalkia and Vilnius Energy, dated 16 March 2010; **C-408:** Minutes of the Meeting between Vilnius City Municipality, Vilnius Silumos Tinklai, Vilniaus Energija, and Dalkia, dated 23 March 2010.

[1011] **C-401:** Vilniaus Energija Presentation regarding Substantial Fuel Conversion, March 23, 2010, dated 23 March 2010.

889. During that meeting, the investment's rate of return was discussed, and Claimants made the alternative proposal that the Municipality would pay for the VE-3 conversion itself rather than extending the Lease, as follows:[1012]

> *"The Deputy Mayor*
>
> *The President of Vilniaus Energija UAB Mr. Samuolis* […] *dre*[w] *attention that if the Municipality had necessary funds for investment, then there* [w]*ould be no need to consider the e*[x]*tension of the Lease agreement*. [H]*e mentioned that the investments made* [w]*ould pay back until 2036.*
>
> *The Chairman of the Economy and Finance Committee Mr. Nénius*[…] *pressed an opinion that an amendment to the Lease agreement and further actions by transiting to the use of biofuel should be considered in a comple*[…] *way.* [H]*e told that all emerging problems should solved by negotiations.*
>
> *The Director of Vilniaus Silumos Tinklai AB Mr. Keserauskas approved the* […] *pressed offer and proposed to solve issues on the revision of the Lease agreement and the offer on fuel conversion submitted by Vilniaus Energija UAB in a comple*[…] *manner.*"[1013]

890. This element in itself contradicts Respondents' suggestion that "[t]*he desire for an extension was not driven by a genuine assessment regarding the best way of performing the Lease Agreement, but rather Veolia's quick realization that it had struck gold in Lithuania*", [1014] as it is clear that Veolia was willing to lead the conversion even if the Lease would not be extended. Indeed, Veolia alternatively proposed to Respondents that Respondents finance the modernization themselves, in which case the Lease would not be extended but the modernization would still be led by VE.

891. On 13 April 2010, the Negotiation group had a meeting, during which Claimants stated that the proposed 20-year extension of the Lease corresponded to "*the period during*

[1012] **C-408:** Minutes of the Meeting between Vilnius City Municipality, Vilnius Silumos Tinklai, Vilniaus Energija, and Dalkia, dated 23 March 2010.

[1013] **C-408:** Minutes of the Meeting between Vilnius City Municipality, Vilnius Silumos Tinklai, Vilniaus Energija, and Dalkia, dated 23 March 2010.

[1014] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1741, see also paras. 1742-1746.

which investments for the implementation of the fuel conversion project would pay off without increasing the heating price."[1015]

> "*In paragraph 1.6 of the draft amendment to the Lease Agreement, the Lessee's representatives proposed to amend Article 7 of the Lease Agreement and recast it to be read as follows: "The Lease Agreement shall remain in full force and effect for 35 years from the date of the Closing specified in Article 4 above, unless it is extended due to certain circumstances on the ground provided under Article 36 below or unless it is terminated earlier".*
>
> *They said that it is proposed to extend the Lease Agreement for additional 20 years because this is the period during which investments for the implementation of the fuel conversion project would pay off without increasing the heat price. They noted that the calculations made showed investments necessary for implementing the objectives and the time frame for the investments to pay off. They underlined that at the end of the term of the Lease Agreement they would additionally transfer new assets for at least LTL 100 million free of charge or for LTL 1.00 to the Lessor.*
>
> *The Lessor's representatives asked whether the Lessee's representatives could provide specific calculations of the time frame for the investments to pay off*."[1016]

892. On 15 April 2010, the Negotiation group had another meeting, during which Respondents requested more details from Veolia on the mechanics of the financing of the project through the Lease extension, as follows:[1017]

> "*The Lessor's representatives suggested considering the issue regarding the amendment to Article 7 of the Lease Agreement referred to in paragraph 1.6 of the draft in question after the Lessee provides specific calculations based on which it is proposed to extend the term of the Lease Agreement for a certain period. They asked about the extension term of the Lease Agreement should EU support be obtained for the implementation of the draft.*

[1015] **R-293:** Minutes of Meeting of the Negotiation group, April 13, 2010, dated 13 April 2010, p. 2.

[1016] **R-293:** Minutes of Meeting of the Negotiation group, April 13, 2010, dated 13 April 2010, p. 2 (emphasis added).

[1017] **R-349:** Minutes of Meeting of the Negotiation group, April 15, 2010, dated 15 April 2010, p. 2.

The Lessee's representatives promised to provide calculations regarding the extension of the term of the Lease Agreement, which are currently being specified."

893. In view of the above, the Arbitral Tribunal has no doubt that Respondents did start to negotiate with Claimants upon the initial submission of the Millenium Project proposal. The Tribunal is also firmly convinced that both Parties fully understood that the investment fell outside the Investment Plan and required them to negotiate an amendment of the Lease, pursuant to Article 27.3.

894. On 30 June 2010, Respondents rejected the Millenium Project.[1018]

895. Respondents state that "*the four issues that arose during the Municipality's consideration of the Millennium Project proposal were as follows: (i) Veolia's failure to provide information sufficiently detailed information regarding the proposed technical solution or the financing of the project; (ii) concerns about improper usage of emissions allowances; (iii) systematic breaches of public procurements; and, (iv) collusion with the Rubicon Group.*"[1019]

896. Regarding the first issue, it is established, as seen above in the minutes of the 15 April 2010 meeting, and further evidence on the record, notably the minutes of the later meeting of 27 April 2010,[1020] that Respondents lacked sufficient precise information on certain parameters of the conversion proposal despite Respondents' requests.[1021] The Arbitral Tribunal acknowledges this fact, but considers, as further developed below, that, against the background of the negotiations described above, any insufficient information could not justify the complete withdrawal from negotiations by Respondents.

897. The three other issues raised by Respondents are closely related to Counterclaim 3 and Counterclaim 13 and do not justify the Respondents' conduct when considering that VE tried to seek alternative arrangements to preserve VE-3 in view of the importance of VE-3 for VST's Business.

[1018] **R-300:** Minutes of Meeting of the City Council No. 60, dated 30 June 2010.

[1019] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1779, see also **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 1032.

[1020] **R-295:** Minutes of Meeting of the Negotiation group, dated 27 April 2010.

[1021] See **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 1040-1046.

898. Respondents have also referred to page 4 of the cover letter to the Millenium Project proposal which states that Claimants' "*main condition for taking part in this* [Millenium Project] [was] *extension of* [the Lease] *for the period, which provide*[d] *the conditions for economic justification of the project*."[1022] However, given that Claimants were under no obligation to modernize VE-3 as part of the existing Lease, this argument is irrelevant. The condition of the extension of the Lease was explained by Veolia by the fact that "[t]*he investment plan which makes an annex to* [the Lease] *includes neither such investment objects, nor such volume of funding*."[1023]

899. This makes the extensive submission of Respondents that the Millenium Project was a "hold-up" for a 20-year extension[1024] and that Claimants misrepresented their rate of return on investment to obtain it secondary to the Tribunal's analysis. For the sake of argument and because this is related to Claimants' good faith under notably Article 27.3 of the Lease, the Arbitral Tribunal nevertheless briefly addresses this issue. Respondents rely, amongst others, on documents internal to Veolia, alleging that they reveal the true intention of Claimants: obtain a 20-year extension of the Lease whereas they in fact knew that their time of return was much shorter (7.6 years).[1025] The document pointed out by Respondents is Exhibit R-1405,[1026] which looks as follows:

[1022] **R-289:** Draft Amendment of the Lease Agreement, 2010, dated 06 May 2010;

[1023] **R-289:** Draft Amendment of the Lease Agreement, 2010, dated 06 May 2010;

[1024] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1749-1762, see also **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1028.

[1025] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1758.

[1026] **R-1405:** Veolia Engagement Committee, Millennium Project, dated 08 June 2010 (emphasis added).

Relevé de décision: COMITE D'ENGAGEMENT VEOLIA ENVIRONNEMENT

Nom du Projet : Millenium	Division :	Energie	Date : 8 juin 2010
	UO :	Lituanie	

Description du Projet :
Extension du contrat du réseau de chaleur de Vilnius pour 20 ans (2017-2036) moyennant le passage en biomasse des installations.

Projet présenté au COMEX Veolia environnement du : 07-juin-10

Projet inclus dans l'enveloppe budgétaire de la Division? Oui/Non [ ] N/A [X]

Chiffres clés du projet (en M€) :

		Cible à 100%	2015	Moyen
Montant Investissement/cession :	275			
CMPC :	8,7%	PAO	79	237
TRI :	19%	CAFOP	62	78
Temps de Retour :	7,6 ans	RESOP	50	60
VAN à CMPC :	269	R_net	33	48
		ROCE avant impôts 2015	19,0%	
		ROCE avant impôts moyen 2011-15	9,0%	

Décision du Comité d'engagement Veolia Environnement

Décision favorable sous réserve d'un financement en devises.

Olivier Orsini

900. The Arbitral Tribunal notes that Claimants comment in footnote 1530 of their Rejoinder on Counterclaim that, during their presentation of the Millenium Project, reflected in the Minutes at Exhibit C-408, VE did inform Respondents about the pay back. The relevant excerpt of the minutes read as follows:

> *"The Deputy Mayor Mr. Romas Adomavicius en[q]uired [w]ithin [w]hat period the investments made* [w]*ould be paid back.*
>
> *The Director of Verslo Raktas UAB G. Valiukonis told that due to investments into the installation of biofuel, 27 percent* [w]*ould be paid back* [w]*ithin 7 years through increased profits.*"

901. As can be seen above, Exhibit C-408 records a statement that 27% of the investment would be paid back within 7 years. When making the calculation, this appears to amount to a return on investment (of 100%) in approximately 20 years. Claimants have however not raised this interpretation of the document, which was also not discussed at the Hearing. The Arbitral Tribunal thus falls back on Respondents' interpretation of the documents, but considers that any representation made by Claimants regarding their anticipated rate of revenue is secondary in the context of cooperation required by Article 27.3 of the Lease.

902. In the Tribunal's view, the Millenium Project represented the result of negotiations pursuant to Article 27.3 of the Lease. Although Respondents rejected the Millenium Project as a whole, alternative funding or other solutions could have been explored and may have been agreed. In this regard, as mentioned above, Claimants proposed the alternative solution that the conversion could be performed within the term of the Lease if the Municipality financed the conversion itself.

2.3.5 The Parties' exchanges after the Millenium Project's dismissal

903. On 24 September 2010, VE sent a letter to VST acknowledging the decision rejecting the Millenium Project noting that the Municipal Council had not provided any indication as to what aspects of the solution proposed did not correspond to the Municipality's objectives. VE further informed VST that VE was prepared to present a new proposal in any format requested:[1027]

> ***REGARDING MEASURES TO REDUCE DISTRICT HEATING PRICES AND ENVIRONMENTAL REQUIREMENTS***
>
> *In response to your letter we believe it essential to stress that the professionals at UAB Vilniaus energija had prepared, coordinated with the investor, i.e. French company Dalkia, and submitted to the Municipal Government Administration of the City of Vilnius and AB Vilniaus silumos tinklai the optimum technical, financial and legal solutions designed to achieve the objectives laid down in the Municipal Government Administration's decision of November 12th, 2008 Regarding measures to reduce district heating prices and any future stricter environmental and anti-pollution requirements to be introduced in the European Union.*
>
> *On June 30th, 2010, the Municipal Council of the City of Vilnius dismissed the solutions presented without indicating what aspects of these solutions specifically did not meet the objectives set out in the said decision of November 12th, 2008, EU and Lithuanian legislation, or the priorities of the National Energy Strategy as approved, and failed to provide any alternative solutions to achieve the objectives. Under these circumstances the Company cannot go against the will of the Municipal Government Administration of the City of Vilnius to refrain from addressing the matters referred to in your letter.*

[1027] **C-912:** Letter from Vilnius Energy to VŠT, dated 24 September 2010.

Despite this and in attempt to ensure the appropriate and stable supply of heat, reduce heat and electricity prices, and encourage the use of less polluting alternative fuels and energy from renewable resources, qualified staff at UAB Vilniaus energija are prepared to present once again and in any format requested the appropriateness, relevancy and effectiveness of the solutions developed, including their benefits to the district heating infrastructure of the city and to all of its residents".

904. On 19 May 2011, VE sent a letter to the Municipality reminding it of the EU Directive and its incoming application to VE. VE recalled the two investment options again and urged Respondents to select one. VE confirmed in that letter that the proposal was made "*on the basis of Items 27.3 and 16.4 of the Lease Agreement*", as follows:[1028]

On 24 November 2010, Directive 2010/7S/EU of the European Parliament and of the Council on industrial emissions (integrated pollution prevention and control) was approved. The requirements of this Directive shall be applied from 1 January 2016.

[…]

[T]*he exemption on the application of limits of emission of sulphur dioxide and oxides of nitrogen shall apply to Vilnius CHP Plant No. 3 until 31 December 2015.*

On the basis of Items 27.3 and 16.4 of the Lease Agreement signed on 1 February 2002 and in order to guarantee reliable heat supply for Vilnius city after 2016, we provide the basic and the alternative environmental action investment plans for your reconciliation as a matter of urgency.

Please note that the Investment Plan under the Lease Agreement did not and could not address these investments because the need for them occurred due to the newly emerging circumstances that fundamentally change the balance between the obligations incurred by the Parties under the Lease Agreement.

Attachments:

1) *Basic Environmental Action Investment Plan in order to implement Directive 2010/75/EU of the European Parliament and of the Council on industrial emissions* […];

[1028] **C-454:** Letter from Vilnius Energy to Municipality regarding Reconciliation of the Environmental Action Investment Plan, dated 19 May 2011.

> 2) *Alternative Environmental Action Investment Plan in order to implement Directive 2010/75/EU* […]"

905. On 11 April 2012, VE sent yet another letter to the Municipality requesting the latter to provide VE with its decision on one of the solutions it had proposed in similar terms.[1029]

906. On 14 May 2012, the Municipality sent a letter to VE requesting to be provided with the solutions it had prepared in the context of a tender to be announced by VST to search for another investor "*to finance the modernization of the Cogeneration Plant VE-3 in order to meet the requirements of the* [EU] *Directive*".[1030] The tender was however never announced.[1031]

907. In August 2013, upon VST's request,[1032] VE submitted another proposal for a minimal investment for boiler reconstruction in order to comply with the Lease requirement to return the leased assets in conformity with applicable rules at the end of the Lease.[1033] In its proposal, VE stated that "*taking into consideration all* [conditions], *it means closing electricity and heat production in E-3 plant*".[1034]

908. Eventually, in April 2014, the Parties to the Lease agreed on the "Nox Agreement" under which VE installed just EUR 6 millions worth of NOx-reducing assets in the VE-2 plant and the RK-8 boiler, to be paid outside the Lease.[1035] The same investment in VE-3 was not approved.[1036]

[1029] **C-595:** Letter from Vilnius Energy to Vilnius City Municipality regarding Transitional National Plan, dated 11 April 2012.

[1030] **C-456:** Vilnius City Municipality, Decision on the Announcement of the Tender for Modernization of Vilnius City Heating Networks, dated 14 May 2012.

[1031] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 916, with ref. to **RWS-001:** Witness Statement of Mr. Valdas Benkunskas, dated 19 February 2018, paras. 24-25; **CWS-021:** Witness Statement of Arunas Keserauskas, dated 29 May 2020, para. 63; **C-1204:** "Modernisation of Vilnius Heat Sector Has Not Even Started," *15 min.lt*, dated 02 October 2012.

[1032] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 916.

[1033] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 916. **C-914:** Vilnius Energy Memorandum on NOx investments, dated 26 September 2013.

[1034] **C-914:** Vilnius Energy Memorandum on NOx investments, dated 26 September 2013, p. 8.

[1035] **C-042:** Agreement on the Environmental Investment Plan 2014-2020 for Heat Generation Installations of Vilnius City, No. 14-329, dated 17 April 2014

[1036] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 918.

909. Later in 2014, Respondents started negotiating with State-owned company Lietuvos Energija,[1037] to whom they sold the VE-3 plant shortly after the end of the Lease.[1038]

910. On 1 January 2016, Vilnius Energy returned the VE-3 plant to VST. VE-3 was thereafter put in conservation.[1039]

911. In January 2022, VE-3 was shut down entirely.[1040]

2.3.6 Conclusion

912. The above analysis of the Millenium Project has made it clear that the Parties discussed a modernization based on Article 27.3.

913. The Parties' conduct at the relevant time indeed leads the Arbitral Tribunal to conclude that Article 27.3 was triggered. This conclusion is reached on the basis of the relevant facts outlined above which support and are consistent with the Arbitral Tribunal's interpretation of Article 27.3 and of the other provisions of the Lease discussed by the Parties in relation to the modernization of VE-3.

914. First, the Arbitral Tribunal finds no clear language in the Lease that provides for an obligation to modernize the VE-3 plant, whereas other anticipated upgrades are listed and quantified.

915. Second, the general obligations referred to by Respondents such as Articles 16.1 and 3 are too vague to form the basis for a firm investment undertaking by Claimants.

916. Third, common sense suggests that co-ordination and amendment to the Lease would be required for such a major change and investment as a fuel conversion of the core electricity production asset of the Lessee. Regardless of the Lease's economics, it is

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[1037] **C-436:** Letter from Vilnius Silumos Tinklai regarding Collaboration for Heat Industry Modernization, July 1, 2014, dated 01 July 2014; **C-435:** "Proposal to Renovate Vilnius Combined Heat and Power Plant Without Lietuvos Energija is Moving Forward," *Baltic News Service*, March 5, 2014, dated 05 March 2014.

[1038] **R-287:** Sale-purchase Agreement of VE-3, dated 12 October 2017.

[1039] **C-134:** GOPA-International Energy Consultants, Revised Assessment Report regarding Procurement of Expert Services for Purposes of a Transfer-Back Inspection of Heating Installations in Vilnius, Lithuania, dated 01 August 2017; **REX-001:** Expert report of FTI Consulting, dated 19 February 2018, **CWS-006:** Second Witness Statement of Tadas Janušaukas, dated 15 January 2019 .

[1040] **C-1384:** Ignitis gambya website extract, Vilnius Third Cogeneration Plant (TE-3), access on 17 April 2022.

logical that the owner and the tenant of a property would co-ordinate a major modification of the property, in particular when that property is to be delivered back to the owner in a specific (complete) state. A tenant of an apartment would not discretionarily modify important elements of the apartment without his or her owner's approval. In the present case, it is unreasonable for VST and the Municipality to argue that Veolia was under the obligation to modernize a CHP plant without the adaptation and co-operation foreseen under Article 27.3 of the Lease. In other terms, given the dimension and consequence of the investment and the importance of VE-3 for VST's Business, co-ordination pursuant to Article 27.3 was required regardless of whether Claimants could require, or, be entitled to additional payment under the Lease. There was simply no room for a unilateral decision by Veolia to make the investment without Respondents' agreement and co-operation in the conversion project.

917. In the situation where the Tribunal were to find that Article 27.3 was triggered, Respondents submit that "*the Tribunal would need to form a view as to what a good faith solution may have looked like and then assess how that would impact damages*".[1041]

918. The Arbitral Tribunal agrees that the analysis does not stop here, as the Parties were under a duty to co-operate. In the present case, Claimants did make a proposal of conversion to biofuel.

919. The question arises as to why Respondents did not follow-up on the Millenium Project proposal, if only to request modifications thereto. Respondents have stated that the Millenium Project was not a credible proposal, set out in a "*14-page cartoon*" which offered only two choices to Respondents between "*economically suicidal*" investments into filter technologies and the 20-year extension of the Lease.[1042]

920. They explain that "[g]*iven that Veolia was asking the Municipality to agree to a 20-year extension of the Lease Agreement (i.e., so as to bring the total lease period to 35 years) and a raft of major decisions on the modernization of the Facilities, it was incumbent on Veolia to present a detailed analysis justifying inter alia: (i) the technical solution*

[1041] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 959.

[1042] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1039, see also **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1753.

proposed for the biofuel conversions and alternatives to that proposal; (ii) an economic analysis explaining why a 20-year extension to the Lease Agreement was in fact required rather than no extension or a lesser extension; and, (iii) the other proposals made in relation to the proposed Lease Extension."[1043] The Arbitral Tribunal agrees with this in principle. However, Respondents' criticisms are very general and Respondents could not simply reject the Millenium Project and not engage further with Claimants about the modernization of VE-3.

921. The factual background above shows that Respondents' rejection of the Millenium Project was followed by several attempts by Claimants to find a solution for VE-3 and no proper action from Respondents, but for requests for further details. There is no indication that Respondents clearly communicated the reasons for their refusal of the Millenium Project to Claimants at the relevant time or, that they pointed to the elements that required changes and in which direction.

922. The tender announced by Respondents to find another investor,[1044] which never took place, raises a question as to Respondents' good faith. Respondents did not follow up with Claimants' proposal to modernize VE-3, although at the time the Lease was still in effect for 7 more years. Rather, they searched for another investor to undertake that investment. They now consider, 7 years after that refusal, that Claimants should have gone ahead and proceeded to convert VE-3. This must also be seen under Respondents' duty to mitigate the damages they are now seeking.

923. This conduct does not reconcile well with Respondents' acceptance in this arbitration that some coordination would have been required. They state that "[a]*ll that would have been required would be good faith discussions to allocate the overhang as between the Parties and for the Respondents to finance their portion.*"[1045] Under Article 27.3 and more generally, the obligation to co-operate in good faith applies to both Parties. Dismissing the Millenium Project and not pursuing good faith negotiations with Claimants to find an alternative, even if based on an assessment that the Millenium Project was not a good faith proposal demonstrate Respondents' failure to effectively

[1043] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1753.

[1044] **C-456:** Vilnius City Municipality, Decision on the Announcement of the Tender for Modernization of Vilnius City Heating Networks, May 14, 2012, dated 14 May 2012.

[1045] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1026.

co-operate with Claimants. The obligation to co-operate on Respondents' side is evidenced by the very facts Respondents have themselves emphasized: VE-3 was the "*crown jewel*" of VST's assets[1046] and "*VŠT's electricity generating business was almost exclusively dependent on the economic viability of the VE-3 plant*".[1047] This recognition of the importance of VE-3 for the Business of VST makes it difficult to understand why Respondents did not take an active approach to finding an agreement with the then current lessee of that crucial asset.

924. In these circumstances, Respondents cannot reasonably submit Counterclaim 4 as if they bear no responsibility for the absence of conversion of VE-3. The qualities of the Millenium Project do not put an end to the Tribunal's inquiry given that Article 27.3 applies. Regardless of whether the initial proposal of Claimants enshrined in the Millenium Project was made in good faith or not, the Municipality failed on its duty to co-operate in good faith with Veolia to find alternatives thereto. Respondents' reliance on illegality of the Millenium Project also fails to convince the Tribunal, as the crucial issue is not whether the Millenium Project, as such, would have been illegal or not.[1048] If the proposal as such was not legally feasible, it does not mean that Respondents could sit on it and wait 7 years to claim that other models of conversion legally feasible should have been undertaken by Veolia.

925. Despite the above conclusion, in light of the chronology of events described above, it could be said that both Parties contributed to the failure to reach an agreement on the conversion project to the extent that Veolia, as the Lessee, did not inform Respondents sufficiently on their Millenium Project proposal in order for Respondents to make an informed choice.

926. In conclusion, the Arbitral Tribunal determines that:

[1046] **SoD:** Statement of Defense and Counterclaim, dated 19 February 2018, para. 533, see also **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 929 and **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1640-1643.

[1047] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 929.

[1048] See **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1765-1776, **R-298:** Letter from PPO to Municipality, dated 11 June 2010, **R-299:** Letter from Competition Council to Municipality, dated 15 June 2010.

- Claimants had no obligation to modernize VE-3 without any additional compensation;

- Rather, the necessity to convert VE-3 to biofuel and the corresponding investment required the Parties to amend the Lease as per Article 27.3 thereof;

- Claimants failed on their duty to co-operate with Respondents to adapt the Lease pursuant to Article 27.3, by withholding information during the negotiations of the Millenium Project;

- Respondents failed on their duty to co-operate with Claimants to adapt the Lease pursuant to Article 27.3, and their inaction was such that it precludes a finding that the quality of the Millenium Project's initial proposal is the primary cause of the failure to convert VE-3 to biofuel;

- There is therefore no link of causality between the quality of the Millenium Project's proposal and the damage claimed by Respondents under Counterclaim 4, which is dismissed.

E. CLAIM 5/COUNTERCLAIM 6: COMPLETE STATE

1. Introduction

927. Claimant's Claim 5 is for a declaration from the Arbitral Tribunal that VE returned the leased Facilities in a Complete State in the following terms:[1049]

> "*(b) DECLARE:*
>
> *(ii) that Veolia's interpretation of Complete State under the Lease is correct, including that the Complete State requirement did not require Vilnius Energy to repair or replace assets that:*
>
> • *have been replaced by new, modernized assets;*

[1049] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1450.

- *have been decommissioned and put into conservation;*

- *are no longer needed due to, for example, age or changes to the way that heating, and electricity services are provided; or*

- *show pre-existing defects or defects that do not affect the utility of the Facilities*."

928. Alternatively, Claimants request the Tribunal to declare that if the assets were not in a Complete State, Claimants are not liable for any defect that Claimants could have corrected before the handover, as quoted hereunder:[1050]

"*(iii) or, if the Tribunal determines that any such asset would not be classified as being in a Complete State:*

- *that Veolia is not liable for any defect that it could have corrected before the handover if the Respondents had acted appropriately in appointing the expert*."

929. In the further alternative, if the Tribunal were to find that Claimants are liable for defects that could have been corrected before the handover, Claimants request that the Tribunal either order Respondents to give Claimants access to the Facilities to perform the repairs, or declare that Respondents may only claim against Claimants upon a showing that the repairs have in fact been performed:[1051]

"*(iv) or, if neither declaration (ii) nor declaration (iii) is granted:*

- *that Veolia, or its designees, shall be given access to the Facilities to correct any defects; or, if for any reason that is not possible, to declare that the Respondents may only claim against Veolia upon a showing that the repairs have in fact been performed (at a reasonable cost)*".

930. Respondents have raised Counterclaim 6 in relation to Complete State. Counterclaim 6 is for damages in the amount of EUR 988,911.25:[1052]

*(vi) as regards the Claimants' failure to return Facilities in Complete State (**Counterclaim 6**):*

[1050] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1450.
[1051] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1450.
[1052] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1138.

EUR 988,911.25;

annual interest of 6% calculated from the date(s) on which the relevant costs/losses were incurred until full payment of the amount awarded."

2. The Complete State Standard

2.1 The Parties' Positions

2.1.1 Claimants' Position

931. Claimants argue that VE met the "Complete State" standard provided for in Article 37(i) of the Lease. According to Claimants, under Article 37 of the Lease, VE "*was required to return the Facilities in a 'Complete State', i. e. in a condition where the Facilities had been 'maintained' by VE (i) acting as a reasonable and prudent operator and (ii) in accordance with its investment undertakings and the Investment Plan*."[1053]

932. Claimants submit that "[t]*he Complete State standard, at its core, is a standard of adequate maintenance and operations during the life of the Lease*" during which VE "*was required to act as a reasonable and prudent operator*. *Hence, it was required to make reasonable and prudent maintenance decisions and to upgrade and modernize the system in accordance with the Investment Plan*."[1054] Based on this language, Claimants submit that the Complete State obligation is a maintenance obligation and not an investment obligation.[1055] Therefore, according to Claimants, VE maintained the Facilities for 15 years as a reasonable and prudent operator and returned them in a Complete State.[1056]

933. Claimants further assert that the Investment Plan according to which VE had to maintain the Facilities with a capped budget of EUR 167 million set general guidance for how much VE was required to invest in any particular asset from the overall budget.

[1053] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 177.

[1054] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 179; **SoC:** Claimants' Statement of Claim, dated 16 October 2017, paras. 244-260;

[1055] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1115.

[1056] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 179-180.

Claimants argue that they did not have to upgrade or replace every asset of the Facilities, as the budget of the Investment Plan represents about 14 % of the funds that would have been required to renovate the entirety of the Facilities according to Fichtner's expert report.[1057]

934. Furthermore, according to Claimants, it was understood by the Parties that "*by the end of the Lease term, some of the assets would be at, or near the end of, their operating lifespan. Those assets would still be in a Complete State even if they were not new and modernised, so long as Vilnius Energy had maintained them in the same way as a reasonable and prudent operator would have*."[1058] Claimants therefore argue that they had to strike a balance between upgrading and maintaining assets to maximize the capabilities of the heating system and minimize the costs charged to consumers.[1059]

935. According to Claimants, Respondents misinterpret the Complete State standard when they seek to hold VE responsible for ordinary wear and tear of an aged system and claim that VE should have returned the Facilities with upgrades and new assets. Claimants argue that such obligations were not stipulated in the Lease or the Investment Plan. Respondents' interpretation of the Complete State standard is "*manifestly inaccurate, and places inappropriately, an impossibly broad investment obligation upon Veolia*".[1060]

936. Claimants conclude that the Complete State standard does not mean and the Lease does not require VE to (i) provide a brand new district heating system; (ii) continue operating and maintaining equipment that did not contribute to the provision of services to Vilnius customers; (iii) upgrade and replace every single asset that had been part of the Facilities; (iv) re-build aging buildings or examine and remediate an outdated and unused heavy fuel oil transportation system; or (v) remove any assets that it was no longer using.[1061]

[1057] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 181-182; **CEX-005:** Rebuttal Expert Report of Jürgen Heinrich, Wolfgan Schroder, and Rainer Ratzesberger of the Fichtner Group, dated 11 January 2019, para. 79.

[1058] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 182.

[1059] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 183.

[1060] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 184.

[1061] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 185-186.

2.1.2 Respondents' Position

937. Respondents also rely on Article 37 of the Lease under which Claimants undertook to *"(i) maintain the assets as a reasonable, prudent, skilled and experienced international operator and (ii) modernize the Vilnius district heating infrastructure and assets in line with the investment obligations and as detailed in the Investment Plan*."[1062]

938. Respondents argue that the Complete State obligation was valid through the term of the Lease. According to Article 12(v) of the Lease, Claimants undertook to manage, maintain and improve the assets in accordance with the market standards and applicable rules.[1063]

939. Consequently, VE had to (i) re-deliver the Vilnius district heating assets in a Complete State at the end of the Lease and had to (ii) manage and maintain the Vilnius district heating assets during the Lease as a reasonable, prudent, skilled experienced international operator, in line with the applicable law and market standards, by taking into account the Investment Plan and the need for other improvements required to keep the Facilities in an appropriate condition for heat and water supply.[1064] Respondents underline that VE was meant to improve the state of the assets and increase their efficiency for the benefit of the Vilnius' consumers.[1065]

940. Respondents contend that Claimants artificially reduce the scope of the Complete State obligation. They argue that Claimants' interpretation fails to take into account their promise to modernize the Facilities and to achieve the objectives set out in Article 3 of the Lease and the fact that they were required to carry out all necessary investment according to the Investment Plan.[1066]

[1062] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 1145, see also para. 65.

[1063] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 1146.

[1064] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 1147 and paras. 1148-1155.

[1065] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 1163-1165.

[1066] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 1156-1162.

941. Respondents further argue that Claimants "*cannot argue that certain assets were defunct and therefore not deserving of maintenance while at the same time claiming* [depreciation] *and return in respect of those same assets in the heat tariffs. Heat tariffs are intended to cover the costs of the operating assets; unused assets do not qualify*".[1067]

942. Finally, Respondents note that Claimants were not forthcoming about their maintenance practices. They rely in that respect on the fact that their appointed expert, FCG, was not able to perform progress analysis of the Vilnius District Heating Network due to lack of data and because VE allegedly withheld information from VST.[1068]

2.2 The Arbitral Tribunal's Analysis

943. Article 37 of the Lease regulates the matter of transfer of the leased Facilities at the end of the Lease's term. In particular, Article 37(i) stipulates the meaning of "Complete State", as follows:

> *"(i) "Complete State" means a condition where the Facilities are complete and have been maintained by Newco (a) acting as a reasonable and prudent operator (that is, one that has exercised that degree of skill which would reasonably and ordinarily be expected from a skilled and experienced international operator engaged in the same type of undertaking, considering all circumstances, including technical standards, the prior use of the Facilities, manufacturers' recommendations, and the "average service life" of the Facilities as to be defined in an annex to the Lease Agreement, or any party thereof), and (b) in accordance with investment undertakings given by Newco and in the Investment Plan. All improvements of the Facilities and Units included in the Investment Plan must be conveyed into the Lessor's ownership together with the Facilities upon the terms and conditions determined under Annex 10. The Parties covenant that should any mandatory certification requirements be applicable to the Facilities and the Units, the period of validity of any such certificates or similar documents should not be less than half of the period determined by the Legal Requirements, except for the heat meters, the Units and the Facilities for which the certification is given for the maximum period of one year;*

[1067] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 1166.
[1068] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 1168.

(ii) no later than one (1) year before the expiry of the Agreement, the Parties will jointly appoint an Expert, the cost for whom shall be equally shared by the Parties, to analyse and prepare a report on the technical condition of the Facilities, the report will be prepared and delivered to Newco no later than six (6) months prior to the expiry of the Term and will specify in detail the actions or repairs necessary to bring the Facilities to the Complete State;

(iii) all actions or repairs necessary to bring the Facilities to a Complete State will be borne by Newco;

(iv) upon transfer, Newco will be released and discharged from any liability with regard to environmental hazards related to the Facilities, unless they are due to the actions of Newco committed during the Term;

(v) disputes with respect to the Complete State of the Facilities, or with respect to any other technical aspect of the transfer of the Facilities, will be resolved by an Independent Expert to be appointed by mutual consent of the Lessor and Newco. It shall be the responsibility of Newco to remedy any defects and shortcomings as may be pointed out by the Independent Expert before the hand-over of the Facilities and the Units made."[1069]

944. Annex 2 of the Lease Agreement contains the Investment Plan, *i. e.* an annex to the Lease that "*sets forth major technical strategy directions selected to attain the goals set by the Municipality and VŠT*", which in turn encloses a schedule (sometimes referred to as the "Investment Program") which is "*a program for upgrading and renovation of the heating sector for a period of fifteen years which will be reviewed, adjusted and approved on a yearly basis* […] *(or in the event of any other new investments planned).*"[1070] The Investment Program at Appendix No. 1 to Annex 2 lists amounts of investments Veolia committed to by category of investment. This list is in the form of the table below:[1071]

[1069] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, p. 60 to 61 of the pdf, Article 37 (emphasis added).

[1070] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, p. 71 of the pdf, Article 3.

[1071] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, p. 76 to 78 of the pdf, Appendix No. 2 to Annex No. 2.

Appendix No 1 to Annex No 2 to Lease Agreement: Schedule No.1 Consolidated Investment Program

Name	Investment Plan M LTL	Other actions of Operator M LTL	Total MLTL
IT and communications	7.000	8.000	15.000
CHP upgrade	95.040	66.500	161.540
District boiler stations upgrade	29.500	-	29.500
Heat supply routes	201.200	39.000	240.200
Liquidation of group boiler stations	83.597	36.120	119.717
Total, MLTL	416.337	149.620	565.957

945. The Tribunal notes that Article 37(i) of the Lease incorporates two different approaches for the assessment of the Facilities' Complete State, one related to whether VE maintained the Facilities as a reasonable and prudent operator (Article 37(i)(a)) and the other related to the fulfilment of Claimants' investment obligations according to the Investment Plan (Article 37(i)(b)). The two approaches provide for a different standard of assessment.

946. Claimants argue that, in order to determine the Complete State of an asset, one must first determine how a reasonable and prudent operator would have treated each asset taking into account all circumstances (*i. e.* technical standards, prior use of the Facilities, manufacturers' recommendations, and average service life of the Facilities as per Article 37(i)(a) of the Lease). Second, one must determine whether Claimants acted as a reasonable and prudent operator in maintaining the asset.[1072]

947. Respondents argue that under the Complete State obligation Claimants were also required to carry out all necessary investments in accordance with the Investment Plan,[1073] modernize the Facilities and achieve the objectives set out in Article 3 of the Lease.[1074]

948. Article 37(i)(a) of the Lease stipulates with regard to the Complete State obligation that VE was required to maintain the Facilities, *inter alia*, taking into account their prior use and their "*average service life*" in accordance with the investment undertakings and the

[1072] See **SoC:** Claimants' Statement of Claim, dated 16 October 2017, para. 246.
[1073] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 1162.
[1074] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 1161.

Investment Plan. Thus, it is clear from the language of Article 37(i) of the Lease that the main obligation for VE in relation to Complete State was to maintain the Facilities and only make reasonable upgrades. VE did not have an obligation to turn the Facilities into "*state-of-the-art*", modernized Facilities beyond the specific commitments of the Investment Program at Annex 2 Appendix 1 of the Lease.

949. Respondents base their argument that Claimants were required to maintain and return the Facilities in a modernized state with reference to Article 16.1 of the Lease which refers to the general objectives set in Article 3.[1075] However, as mentioned above in relation to Counterclaim 4,[1076] Article 3 of the Lease solely sets general obligations and are too vague to form the basis for construing an obligation from Veolia to invest beyond the amounts firmly committed to pursuant to the Investment Plan/Program at Annex 2 to the Lease.

950. Article 16.1 of the Lease, which sets out an obligation for Veolia to "*carry out any works and make investments which are not included in the Investment Plan but are necessary for ensuring the Business and achieving the objectives set out in Article 3*,"[1077] refers directly to Article 3 of the Lease which, - as just recalled, - is too vague to create an investment obligation on Veolia's part beyond a commitment to invest the amounts stated in the Investment Plan/Program at Annex 2 (Appendices 1 and 2) to the Lease. Respondents have also not established that VE's alleged failure under Article 37(i) would have precluded VE from conducting the Business, which is defined as "*heat and power production, exchange and distribution as well as any related business as presently carried out by VST and TE*." [1078]

951. A careful review of the structure and language of Article 37(i) reinforces the Arbitral Tribunal's conviction that, ultimately it is the state (*i. e.* the technical condition) of the Facilities that determines whether the Facilities were returned in a Complete State or

[1075] See **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 48-58.

[1076] See above para. 852.

[1077] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 16.1.

[1078] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 37(i).

not, not the level of investment of Claimants. In Article 37(i), "Complete State" is directly qualified as a condition: "'*Complete State' means a condition* […]". The main obligation is also clearly one of maintenance: "[…] *a condition where the Facilities are complete and have been maintained by Newco* […]". While maintenance may mean some reasonable upgrades, it cannot expand to become new investment obligations on Veolia's part that would exceed its financial commitment as per Annex 2, Appendix 1 to the Lease.

3. Procedure Envisaged in the Lease to Determine the Complete State of the Assets

3.1 The Parties' Positions

3.1.1 Claimants' Position

952. According to Claimants, Article 37 of the Lease provides for the Parties' joint appointment of an expert to assess whether the returned Facilities are in a Complete State. Since VE was required to bear the costs of all actions or repairs necessary to bring the Facilities to a Complete State, it was important for VE to obtain that expert report (including the recommendations for repair) well in advance of the expiry of the Lease, in order to review the report and make the necessary repairs in time before returning the Facilities to VST.[1079]

953. According to Claimants, VST and the Municipality were responsible for the delay in appointing the expert, which harmed VE as it lost the opportunity to efficiently implement remedial work.[1080] Claimants argue that VE made several proposals to Respondents for finding a suitable expert, but Respondents refused to agree to any process that would allow the Parties to each have an "*equal input into the appointment process.*"[1081]

[1079] **SoC:** Claimants' Statement of Claim, dated 16 October 2017, para. 261.
[1080] **SoC:** Claimants' Statement of Claim, dated 16 October 2017, paras. 262-263.
[1081] **SoC:** Claimants' Statement of Claim, dated 16 October 2017, para. 263.

954. Claimants contend that VST initially agreed in January 2016 that VE would organize a public procurement process to select an independent expert, but it reneged on that offer.[1082] Claimants argue that, for nine months, VST insisted that the Parties could not jointly appoint the independent expert "*because 'the alleged equal voting power of the parties' was 'not possible'*".[1083]

955. As a consequence of Respondents' conduct, VE initiated this arbitration in November 2016. In December 2016, Respondents requested that the SCC appoint an Emergency Arbitrator who would in turn appoint an expert.[1084] Claimants put forward that "[t]*he SCC Rules do not allow for emergency arbitration without also commencing a standards (i.e., non-emergency) SCC arbitration, so Claimants believed this was the most expedient approach*."[1085] Claimants further explain that, in their Request for Arbitration of 30 November 2016, they had requested that the expert be appointed by February 2017, and planned to themselves request the appointment of an Emergency Arbitrator if the proceedings did not advance quickly.[1086]

956. Due to the delay in appointing a joint expert, in the summer of 2016, Claimants had in the meantime appointed experts of Fichtner to determine whether additional repairs would be needed to ensure that the Facilities were in a Complete State. Fichtner presented VE with a report of its conclusions in December 2016.[1087]

3.1.2 Respondents' Position

[1082] **SoC:** Claimants' Statement of Claim, dated 16 October 2017, para. 80; see also **C-007:** Letter from Vilniaus Šilumos Tinklai to Vilnius Energy, dated 20 January 2016; **C-008:** Letter from Vilniaus Šilumos Tinklai to Vilnius Energy, dated 29 January 2016.

[1083] **SoC:** Claimants' Statement of Claim, dated 16 October 2017, para. 80.

[1084] **SoC:** Claimants' Statement of Claim, dated 16 October 2017, paras. 263 and 83, see also **RFA:** Claimants' Request for Arbitration, dated 30 November 2016 and **R-308:** Respondents' Application for appointment of emergency arbitrator and issuance of emergency order, dated 27 December 2016.

[1085] **SoC:** Claimants' Statement of Claim, dated 16 October 2017**,** para. 83.

[1086] **SoC:** Claimants' Statement of Claim, dated 16 October 2017**,** para. 83, see also **RFA:** Claimants' Request for Arbitration, dated 30 November 2016, para. 71.

[1087] **SoC:** Claimants' Statement of Claim, dated 16 October 2017, para. 267; see also **C-136:** Fichtner, Determination of the Technical Condition of the Assets Leased to UAB Vilniaus Energija under the Lease Agreement of 2002, dated 01 December 2016.

957. Respondents contend that Veolia obstructed the appointment of an expert provided for in Article 37(ii) of the Lease.[1088] According to Respondents, VE put a lot of effort to take over the control of the appointment of the expert and prevent the Parties from finding a reasonable solution. Respondents nevertheless made effort to ensure the joint and equal appointment of the expert.[1089] However, Claimants refused the reasonable proposals of Respondents who intended to appoint the expert in a timely manner.[1090]

958. As a consequence, on 25 July 2016, Respondents invoked their right to inspect the Facilities as envisaged in Article 16.10 the Lease.[1091] Claimants however prevented the independent experts from inspecting the Facilities.[1092]

959. According to Respondents, Claimants initiated this arbitration to frustrate the expert appointment mechanism under the Lease.[1093] Respondents explain that, when Fichtner, - who had been instructed by Claimants without any input or involvement from Respondents' part,- finished the inspection of the Facilities, "*Claimants employed their final stalling measure in hope that it would prevent the timely expert appointment*."[1094]

960. According to Respondents, "*there was no realistic possibility for an arbitral tribunal to be constituted and for the expert to be appointed in two months, much less for the inspections to be done in the same period. It was obvious that the Claimants were seeking to further frustrate the expert appointment mechanism under the Lease Agreement (and to arrogate to themselves the title of Claimants in an arbitration they knew was coming and the scope of which would be much larger than the expert appointment issue*".[1095] On 27 December 2016, Respondents reacted to Claimants' ruse by initiating emergency arbitration proceedings that ultimately led to the designation of GOPA by the Emergency Arbitrator on 23 January 2017.[1096]

[1088] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 576 and 581.
[1089] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 582-583.
[1090] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 584.
[1091] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 585.
[1092] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 586-587.
[1093] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 590.
[1094] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 590.
[1095] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 590.
[1096] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 591.

961. Respondents contend that Claimants insisted that GOPA should not be allowed to make any substantive tests or inspections of the Facilities and should base its report on visual inspection only. Further, Claimants pushed GOPA to complete their inspection before 29 March 2017, prior to the transfer of assets, and prevented GOPA from continuing their inspection thereafter.[1097]

962. Respondents conclude that despite Claimants' attempts to frustrate the appointment of the expert and then to restrict the actual inspections, GOPA revealed that in many aspects Claimants failed to comply with Articles 12(v) and 37 of the Lease and return the assets in Complete State.[1098]

3.2 The Arbitral Tribunal's Analysis

963. Article 37 (ii) and following of the Lease provide that:

> *(ii) no later than one (1) year before the expiry of the Agreement, the Parties will jointly appoint an Expert, the cost for whom shall be equally shared by the Parties, to analyse and prepare a report on the technical condition of the Facilities; the report will be prepared and delivered to Newco no later than six (6) months prior to the expiry of the Term and will specify in detail the actions or repairs necessary to bring the Facilities to the Complete State;*
>
> *(iii) all actions and repairs necessary to bring the Facilities to the Complete State will be borne by Newco;*
>
> *(iv) upon transfer, Newco will be released and discharged from any liability with regard to environmental hazards related to the Facilities, unless they are due to the actions of Newco committee during the Term;*
>
> *(v) disputes with respect to the Complete State of the Facilities, or with respect to any other technical aspect of the transfer of the Facilities, will be resolved by an Independent Expert to be appointed by mutual consent of the Lessor and Newco. It shall be the responsibility of Newco to remedy any defects and shortcomings as may*

[1097] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 594.
[1098] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 595.

be pointed out by the Independent Expert before the hand-over of the Facilities and the Units made."[1099]

964. The Parties agree that Article 37(v) of the Lease provided for the mutual appointment of an independent expert.[1100] Nevertheless, Article 37(v) of the Lease does not provide for an exact method of appointing the independent expert. The Parties started negotiations regarding such appointment in January 2016.[1101] The weight to be given to the findings of GOPA is necessarily linked to the validity of its appointment as per Article 37(ii) of the Lease. The Arbitral Tribunal therefore finds it useful to briefly recall the main elements of the Parties' failed attempt to agree on a method to appoint the Expert as per Article 37(ii), and how this led to the appointment of GOPA.

965. While Claimants suggested that the procurement of services of establishing the technical condition of the Facilities should be conducted by VE,[1102] Respondents considered that this was to be performed by the Municipality.[1103] Respondents further suggested that "[t]*wo representatives of each party to the Lease Agreement should be appointed to the Procurement Commission*" and that "[t]*he chairman of the Procurement Commission should be a representative of the party performing the Procurement*."[1104]

966. During a meeting held on 1 March 2016, VST formulated its proposal as follows:

"1) VST should be charged to organize the joint procurement of the independent expert, 2) the public procurement commission is formed of eight persons, with equal number (two) representatives from each party, chaired by VŠT representative, 3) the parties shall seek to make all decisions jointly but if the casting vote is used, Veolia and/or

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[1099] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, p. 60 to 61 of the pdf, Article 37.

[1100] **SoC:** Claimants' Statement of Claim, dated 16 October 2017, para. 261; **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 576.

[1101] **C-007:** Letter from Vilniaus Šilumos Tinklai to Vilnius Energy, dated 20 January 2016.

[1102] **R-001:** Letter from Vilniaus Energy to VŠT and Municipality, dated 22 January 2016, p. 2 of the pdf; see also **R-003:** Letter from Vilniaus Energy to VŠT and Municipality, dated 05 February 2016, p. 3 of the pdf; **R-008:** Letter from Vilniaus Energy to VŠT, dated 05 February 2016, p. 51 of the pdf.

[1103] **R-002:** Letter from Municipality to Vilniaus Energy, dated 29 January 2016, p. 3 of the pdf; see also **C-008:** Letter from Vilniaus Šilumos Tinklai to Vilnius Energy, dated 29 January 2016, p. 4; **R-004:** Letter from VŠT to Vilniaus Energy, dated 01 March 2016, p. 1; **C-009:** Letter from Vilniaus Šilumos Tinklai to Vilnius Energy, dated 21 March 2016, p. 2.

[1104] **R-002:** Letter from Municipality to Vilniaus Energy, dated 29 January 2016, p. 3 of the pdf.

> *Vilniaus energija have a right to reject the candidacy of the expert selected on objective grounds agreed by the parties." VŠT noted that its proposal met the requirements of the Lease, "ensur*[ed] *the parity of right of the parties" and "provide*[d] *reasonable safeguard for VŠT against the above-mentioned information asymmetry".*[1105]

967. In a letter to VST dated 14 March 2016, VE qualified VST' proposal as disingenuous since the procurement procedures proposed by VST would admittedly give VST greater voting power. In particular, VE pointed to the fact that Respondents' proposed procurement procedures "*would give VŠT the power to appoint unilaterally the chairman of the procurement committee, who will cast the deciding vote*".[1106] VE also opposed Respondents' view that it was impossible to allow VE and Veolia to have an equal voting power. VE repeated its position that such equal voting power on Claimant's side was possible under Lithuanian law.[1107]

968. After further unfruitful exchanges between the Parties,[1108] in a letter dated 16 June 2016, VST proposed to VE to include an independent member in the procurement commission. VE proposed a candidate for such independent member, Mr. Olaf Martens.[1109] However, in its letter dated 28 June 2016, VE objected to Mr. Martens' candidacy for being closely related to the Lithuanian state.[1110] In its reply, VST indicated that it was open to proposals of other candidates for independent member.[1111]

969. In response, on 27 July 2016, VE proposed to take the commission chair appointment out of the hands of the parties and entrusting it to an independent expert appointed by an independent, qualified organization outside of Lithuania, which would "*ensure a*

[1105] **R-004:** Letter from VŠT to Vilniaus Energy, dated 01 March 2016, p. 2 of the pdf.

[1106] **C-013:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 24 March 2016.

[1107] **C-013:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 24 March 2016.

[1108] See *e.g.*: **C-015:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 12 May 2016; **C-011:** Letter from Vilniaus Šilumos Tinklai to Vilnius Energy, dated 06 May 2016, **C-012:** Letter from Vilniaus Šilumos Tinklai to Vilnius Energy, dated 07 July 2016

[1109] **C-014:** Letter from Vilniaus Šilumos Tinklai to Vilnius Energy, dated 16 June 2016, p. 6 of the pdf.

[1110] **R-005:** Letter from Vilniaus Energy to VST, dated 28 June 2016.

[1111] **C-012:** Letter from Vilniaus Šilumos Tinklai to Vilnius Energy, dated 07 July 2016.

neutral result because the deciding vote of the procurement commission would be held by a truly independent, neutral person with experience in the field".[1112]

970. In a letter dated 22 August 2016, VST informed VE that "*a second meeting of the procurement commission for appointment of the joint expert with independent member Mr. Olaf Martners* [had taken] *place on 10 August 2016*". It further noted with regard to VE's proposal that it rejected the method of jointly procuring an expert because VE was in the possession of the Facilities and information related thereto, which according to Respondents put VST at a disadvantage with regard to inspection of the Facilities. VST consequently rejected VE's proposal to "*unilaterally control the procurement of the joint expert"*, stating that such proposed procedure completely undermined the balance between the Parties.[1113]

971. With letter dated 25 August 2016, VE rejected VST's proposal to appoint Mr. Olaf Martens as VE considered that he "*is not independent*".[1114] VE considered that Mr. Martens has "deep ties with the Lithuanian State" as a former employee of a subsidiary of Lietuvos Energija, a large energy company owned and controlled by the Lithuanian State.[1115] In response, with a letter dated 16 September 2016, VST acknowledged the deadlock faced by the Parties which had "*not been able to agree on the appointment method for the joint expert for over seven months*". VST declared that it remained open to goodwill cooperation and, as a way forward, proposed to VE to agree on a specific candidate to be the expert: AF Consulting.[1116]

972. On 29 September 2016, VE replied that they "*ha*[d] *substantial doubts whether the company suggested by VST, AF Consulting, ha*[d] *the expertise and the resources to successfully perform such important work, particularly under such strict deadlines*." Claimants further pointed to AF Consulting "*act*[ing] *as advisor and as subcontractor of Lietuvos Energjia in relation to its major energy projects*". Therefore, for similar reasons as those for which it had rejected the candidacy of Mr. Olaf Martens to chair the

[1112] **R-007:** Letter from Vilniaus Energy to VŠT, dated 02 August 2016
[1113] **C-010:** Letter from Vilniaus Šilumos Tinklai to Vilnius Energy, dated 22 August 2016, p. 3 of the pdf.
[1114] **R-006:** Letter from Vilniaus Energy to VŠT, dated 25 August 2016, p. 1 of the pdf.
[1115] **C-017:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 12 July 2016.
[1116] **C-021:** Letter from Vilniaus Šilumos Tinklai to Vilnius Energy, dated 16 September 2016, p. 2 of the pdf.

procurement commission (*i.e.* a conflict of interest due to links with the Lithuanian State then opposed to VE in the ICSID parallel arbitration)[1117] VE concluded that AF Consulting did not meet the crucial requirement that the Expert be neutral and free of conflicts of interest." VE proposed three alternative international engineering firms: GOPA, Poyry PLC and AECOM.[1118]

973. VST responded on 17 November 2016 that it "*w*[ould] *propose additional candidate for the purpose of maintaining parity between the parties in Joint Expert appointment procedure*."[1119] VST also noted that the new draft technical specifications proposed by VE would delay the process. Furthermore, it noted that, since the Lease provided for 6 months for the inspection of the Facilities, the 5 weeks period for the analysis of the Facilities proposed by VE would not be sufficient. VST nevertheless agreed that the Parties *"should jointly approach proposed candidates- Poyry PLC, GOPA-international Energy Consultants, Ramboll Group as well as additional expert proposed by VST- with joint letter which would include technical specifications agreed on by the parties*."[1120]

974. On 24 November 2016, VE replied to VST' latest requests, in which it counter-proposed that the Parties jointly invite Poyry, GOPA and Ramboll to submit bids by 23 December 2016 "*for an expert report to be submitted to both parties no later than 1 March 2017*." VE further proposed that the invited experts propose the technical specifications as parts of their bids. In view of the critical time constraint, VE gave VST an ultimatum to accept or leave that counter-offer by 28 November 2016 in the following terms:[1121]

> "*Any new conditions, proposals, and further delays by VST threaten to make it impossible to appoint an expert and receive its report sufficiently in advance of the end of the Lease contract and transfer of the facilities. It is obviously essential that the expert's work be carried out prior to the transfer, so that the assessment is carried out while the facilities are in the custody of VE and their conditions are fully attributable to VE. Any expert report carried out after the transfer once the facilities are in VST's*

[1117] **C-017:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 12 July 2016.

[1118] **C-022:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 29 September 2016, p. 4 of the pdf.

[1119] **C-027:** Letter from Vilniaus Šilumos Tinklai to Vilnius Energy, dated 17 November 2016, **R-010:** Letter from VST to Vilniaus Energy, dated 17 November 2016.

[1120] **C-027:** Letter from Vilniaus Šilumos Tinklai to Vilnius Energy, dated 17 November 2016, **R-010:** Letter from VST to Vilniaus Energy, dated 17 November 2016.

[1121] **C-028:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 24 November 2016.

custody cannot possibly provide a reliable assessment of their condition prior to the end of the Lease."

975. On 29 November 2016, VST replied to VE's ultimatum with a counter-proposal that Sweco be added to the pool of bidders according to previously agreed specifications, and expressed regret that VE switched the tone of the Parties' discussions with its ultimatum. The relevant excerpt of VST's reply reads as follows:[1122]

"*We are disappointed by the ultimatum style of the Letter. Needless to say, VST is not prepared to entertain such a tone of discussion. At the same time, we remain committed to exercising all efforts to make sure that the independent expert can be appointed by the agreement of the parties, as we have consistently done throughout the lengthy exchanges.*

In order to proceed, the parties must respect what has been already agreed and coordinated and seek to make constructive proposals for the matters where the opinions still differ. Based on this, VST will not accept the turnaround of the position of Vilniaus energija with respect to the technical specifications for the experts' work. The parties have, after considerable efforts, agreed on technical specifications and Vilniaus energija has confirmed their suitability in writing on 12 May 2016 by the letter No 013-01-9785R. Vilniaus energija has only submitted one comment (relating to the inclusion of VE-3 into the scope) to the technical specifications proposed by VST. VST has taken into account the said comment and amended technical specifications in accordance with Vilniaus energija's request. Final technical specifications were submitted to Vilniaus energija by VST letter of 16 June 2016 No 02-435. The agreed technical specifications are attached hereto, together with the copies of above-mentioned correspondence confirming them. It is both unacceptable and unconstructive to now reopen the agreed technical specifications. If Vilniaus energija refuses to proceed on the basis of the agreed technical specifications, VST will have no choice but to interpret such conduct as a refusal by Vilniaus energija to engage in constructive discussion and a deliberate attempt to encumber the appointment of an independent expert in accordance with the Lease agreement.

[1122] **R-011:** Letter from VST to Vilniaus Energy, dated 29 November 2016.

With regard to the proposed deadline for submission of Expert report, it goes without saying that analysis should be carried out as soon as possible. However, such deadline should in no way impact the scope of analysis or quality of Expert report.

In addition, as indicated in VST letter of 17 November 2016 No 02-0755, VST submits additional candidate for the purpose of maintaining parity between the parties in Expert appointment procedure. VST proposes that in addition to already proposed candidates — Poyry PLC, GOPA-international Energy Consultants, Ramboll Group — the parties contact Sweco as a potentiel candidate.

As already stated in previous correspondence, VST agrees that VST and Vilniaus energija should jointly approach proposed candidates — Poyry PLC, GOPA-international Energy Consultants, Ramboll Group and Sweco — with a joint letter which would include technical specifications already agreed on by the parties. We also agree that the indicated candidates should be approached no later than on 30 November 2016. Therefore, for your convenience VST has drafted and attached an invitation requesting express of interest from the proposed candidates. VST and Vilniaus energija could jointly send the invitation to the proposed candidates.

VST is committed to appointing an Expert in accordance with Article 37 (ii) of the Lease agreement and has made every effort to that regard. Vilniaus energija has put forward a number of baseless accusations relating to this in the last letter, which we will not comment, except for stating once again that such accusations are completely false, as confirmed by overwhelming evidence."[1123]

976. On the same date, Claimants signed powers of attorneys to Sidley Austin to represent them in this arbitration.[1124] As mentioned in the overview of the Parties' positions above, the day after, on 30 November 2016, Claimants initiated this SCC arbitration in accordance with Article 38.4 of the Lease and requested the Tribunal to appoint the independent expert.[1125]

[1123] **R-011:** Letter from VST to Vilniaus Energy, dated 29 November 2016, **C-005:** Letter from Vilniaus Šilumos Tinklai to Vilnius Energy, dated 29 November 2016**.**

[1124] **C-023:** Letter of Authority from Veolia Environnement S.A. to Sidley Austin LLP, dated 29 November 2016, **C-024:** Letter of Authority from Vilniaus Energija to Sidley Austin LLP, dated 29 November 2016.

[1125] **RFA:** Claimants' Request for Arbitration, dated 30 November 2016, para. 70(ii).

977. In response, Respondents initiated the procedure of the emergency arbitrator pursuant to Appendix II of the SCC Rules.[1126]

978. The above is not an exhaustive chronology of the Parties' correspondence. It is however illustrative of the extent of efforts made by each Party to find a solution to the gap left in Article 37 regarding the method to be followed by the Parties to jointly appoint the Expert referred to in that provision. The various exchanges of proposals and counter-proposals demonstrates that the Parties tried their best to jointly appoint the Expert.

979. However, the Arbitral Tribunal also notes the consequence of the absence of a report established by the Expert by the end of the Lease, as under the Lease VE would only be released from certain liabilities upon re-delivery of the Facilities in a Complete State to be assessed by the Expert. In the Arbitral Tribunal's interpretation of Article 37(ii) of the Lease, the timing was as important as the scope of the Expert report. Claimants' ultimatum of 24 November 2016 must be assessed in that context, as well as VST's reply, which came one day after the deadline fixed by VE to answer its ultimatum. The circumstances of Claimants' filing of its Request for Arbitration on 30 November 2016 lead the Arbitral Tribunal to consider that it was an attempt from Claimants to solve the deadlock between the parties.

980. Accounting for these good faith efforts and legitimate concerns on each side, the Arbitral Tribunal considers that none of the Parties can be held responsible for the failure of their negotiation to jointly appoint the Expert pursuant to Article 37(ii).

981. Since the Parties could not agree on a joint Expert or the method to agree on its appointment in time, VE could not remedy any defects and shortcomings before the hand-over of the Facilities. Through this arbitration based on Article 38.4 of the Lease, an expert, GOPA, was eventually appointed. The Arbitral Tribunal therefore concludes that the Parties' failure to jointly appoint an independent expert was cured and substituted by the Emergency Arbitrator who appointed GOPA. The Arbitral Tribunal

[1126] **R-308:** Respondents' Application for appointment of emergency arbitrator and issuance of emergency order of December 27, 2016, dated 27 December 2016.

notes that the Emergency Arbitrator received two rounds of comments from both Parties.[1127]

982. The Arbitral Tribunal therefore considers that GOPA should be regarded as the jointly appointed independent expert as per Article 37 of the Lease. It is clear from that provision that the Parties intended and agreed to have the state of the leased Facilities determined by an expert at the end of the Lease. For the reasons stated above, there is no reason to now re-visit the findings of the GOPA experts insofar as they have been appointed to a procedure that correctly filled the gap of the Lease.

4. The GOPA Report

4.1 The Parties' Positions

4.1.1 Claimants' Position

983. According to Claimants, the GOPA report demonstrated that VE returned the leased assets to VST in a Complete State and that it operated and maintained the Facilities correctly. GOPA found that, out of the 35,323 assets, only 2 % were found not to be in a Complete State.[1128]

984. Claimants argue that, for most of the assets that GOPA found not to be in a Complete State, GOPA erred because it did not apply the definition of the Lease.[1129] Claimants note that many of these assets deemed not to be in a Complete State that are not in use are in fact a Complete State because they are stored or maintained in accordance with applicable manufacturer recommendations or because they would no longer be useful to a reasonable and prudent operator. Claimants contend that these assets largely fall into the following main categories: (a) assets that have been replaced by new, modernized assets, (b) assets that are not needed presently, but have been placed into conservation, (c) assets that are no longer needed because of changes to

[1127] See **C-053:** Procedural Order No. 2, Case No. SCC EA V/2016/195, dated 23 January 2017, para. 13.

[1128] **SoC:** Claimants' Statement of Claim, dated 16 October 2017, paras. 272-275; **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, paras. 407-408.

[1129] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 409, **CWS-006:** Second Witness Statement of Tadas Janušaukas, dated 15 January 2019, para. 72.

the needs of the heating system and (d) assets that may have defects that preceded VE's operation of the Facilities or may be run-down but function adequately.[1130]

985. Regarding the validity of GOPA's conclusions, Claimants state that, contrary to Respondents' allegation, VE did not manipulate the process which led to the appointment of GOPA. Claimants argue that Respondents were the ones who did not cooperate in the appointment process and who delayed the appointment of the expert. Claimants further assert that Respondents tried to influence GOPA's assessment by writing to them directly.[1131]

986. Claimants also deny Respondents' allegation that VE improperly restricted the scope of GOPA's inspection by insisting to "*high-level visual inspection only*"[1132]. Claimants argue that "[n]*one of the bids submitted to the Emergency Arbitrator claimed that this proposed method of review was insufficient to conduct a thorough inspection of the Facilities. As explained by Veolia, when asking GOPA (and the other bidders) for a proposal to complete the work, the Emergency Arbitrator contemplated that* '[t]*he scope of the Expert's work is to carry out inspection of the heating installations as determined by what the Parties have referred to as the 'Expanded February Specifications.'*"[1133]

987. With regard to Respondents' contention that Claimants improperly restricted the time frame of GOPA's inspections, Claimants note that GOPA's initial proposal of January 2017 estimated that it would need ten weeks to inspect and assess the Facilities. In the service contract that was ultimately signed, this timeframe was reduced, but only on the proviso that GOPA could assign a larger team to the project than first proposed.[1134] Ultimately, GOPA spent more than nine weeks on the site using a larger team on the inspection of the Facilities. Therefore, GOPA spent more "man hours" on its assessment than it originally planned. Thus, Respondents cannot argue that GOPA had insufficient time to complete its mandate.[1135]

[1130] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 276.
[1131] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 193.
[1132] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 593-594.
[1133] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 194.
[1134] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 195.
[1135] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 195.

988. Contrary to Respondents' allegation that GOPA conducted only a superficial examination of the Facilities which uncovered numerous deficiencies, Claimants argue that GOPA conducted a thorough technical assessment of the Facilities and concluded that nearly all of them were returned in a Complete State.[1136]

989. According to Claimants, it is undisputed between the Parties that GOPA did not apply the test set out in Article 37 of the Lease in its full wording. "*Rather, GOPA applied a literal test* […] *In particular, GOPA applies the test set out in the technical specifications agreed by both Parties and confirmed by the Emergency Arbitrator*."[1137] Based on the GOPA report, Claimants state that "*only 1.94% of the Facilities that were still in use were found by GOPA not to be in a Complete State*."[1138] They assert that, had GOPA adopted the Complete State standard under Article 37 of the Lease, these 1.94% of the Facilities would have been found to be in a Complete State.[1139]

990. In response to Respondents' counterclaim that VE returned a broken and mismanaged system and that, after the end of the Lease, Respondents discovered technical defects related to ST-5, the economizers of Boilers No. 6 and 7 at RK-2 and three minor sections of the DHN,[1140] Claimants reply that *"GOPA confirmed that all three of the sections identified by the Respondents were in a Complete State at the end of the Lease*".[1141] Therefore, the matter should not be re-opened.[1142] In any case, according to Claimants, the defects identified by Respondents do now show unusual weakness, and Respondents' approach to select these small, isolated sections is misrepresentative as the assessment of the network should be holistic.[1143]

991. Finally, the Lease expired at the end of the heating season, when ordinary tear and wear is expected and must be repaired as standard by the network operator after each

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[1136] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 197-198.
[1137] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 199.
[1138] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 199.
[1139] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 200.
[1140] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 202-205.
[1141] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 221.
[1142] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 221.
[1143] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 222-223.

heating season. Since the end of the heating season coincided with the expiry of the Lease, it was not reasonable to expect the network to be in pristine condition upon handover, but this was not a reflection of any shortcoming in VE's maintenance activities.[1144] Therefore, VE returned the Facilities in a Complete State and, thus, Respondents' counterclaim should be dismissed.[1145]

4.1.2 Respondents' Position

992. Respondents commissioned FCG to review and assess the way in which VE modernized, kept and operated the Vilnius district heating facilities during the Term of the Lease. Respondents however explain that Claimants failed to provide most of the data required for FCG's analysis to Respondents.[1146] Therefore, Respondents started testing the Facilities as part of routine procedures after the end of the Lease, and identified failures with regard to Steam Turbine No. 5 ("**ST-5**"), the District Heating Network ("**DHN**"), VSK-6 (Steam Boiler 6) and VSK-7 (Steam Boiler 7) at the RK-2 power plant. Respondents consider these failures to be due to Claimants' lack of proper maintenance. Respondents therefore raised Counterclaim 6 with regard to these assets.[1147]

993. Respondents plead that Claimants have failed to maintain the Facilities and allowed assets to deteriorate over the course of the Lease.[1148] According to Respondents, this allegation is confirmed by the GOPA report which identified numerous deficiencies.[1149] In addition, Respondents also identified a number of technical defects with Steam Turbine No. 5, the RK-2 power plant biofuel boilers, Steam Boiler 6 and Steam Boiler 7 as well as "*the DHN pipes and other transferred assets*".[1150]

994. In response to Claimants' argument that the unused assets should not form part of the Complete State assessment, Respondents note that VE kept the unused assets and

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[1144] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 222-224.
[1145] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 225-226.
[1146] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 650.
[1147] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 653.
[1148] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 1171.
[1149] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 1173-1174.
[1150] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 1175.

included them into the Regulated Asset Base for the purpose of setting the heat tariffs, which means that the consumers paid for the assets to be maintained despite of Claimants' failure to keep them in Complete State.[1151] Respondents note that VE had the opportunity to dismantle, decommission or return such assets pursuant to Annex 10 to the Lease.[1152] VE failed to exercise this right, hence Claimants cannot argue that those assets did not warrant maintenance.[1153] Respondents note that FCG and GOPA also confirmed that a reasonable operator would have either dismantled or returned such assets. [1154]

995. In response to Claimants' argument that a prudent and reasonable operator would not have maintained these assets, Respondents state that "*the Lease Agreement does not distinguish between used and unused assets. All assets not returned during the term of the Lease and paid by consumers to be maintained had to be kept in Complete State. In case some assets became obsolete, the Lease Agreement provided for a process of early return of obsolete assets*."[1155]

996. In conclusion, Respondents consider that Claimants' obligation to return the assets in a Complete State applies to all assets equally. The Lease does not distinguish between preexisting defects and defects that became apparent during the Lease. Thus, Claimants' attempt to limit their obligations by excluding certain groups of assets from the scope of the Lease has no legal basis.[1156]

997. Respondents note in relation to the *quantum* of their Counterclaim 6 that they only claim damages for VE's failure to re-deliver certain specific equipment in the required condition, *i.e.* they do not seek damages quantified based on a counterfactual in which VE would have invested and re-invested in efficiencies over the 15 year Term of the

[1151] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 644-646.
[1152] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 1182.
[1153] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 1184.
[1154] **REX-002:** Expert report of FCG Design and Engineering Ltd., dated 19 February 2018, para. 175.
[1155] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 647-648.
[1156] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 1203-1204.

Lease. According to Respondents, this limits the potential overlap between Counterclaims and make their Counterclaim 6 inherently reasonable.[1157]

4.2 The Tribunal's Analysis

998. As decided above, the GOPA report should be regarded as the report of the jointly appointed independent Expert as per Article 37 of the Lease. The Arbitral Tribunal should in consequence follow the findings of GOPA to determine Claim 5 and Counterclaim 6.

999. GOPA delivered its report on the Complete State of the Facilities on 8 August 2017 and delivered an excel spreadsheet with the list of assets on 30 August 2017,[1158] *i.e.* after the date for the transfer of the assets of 29 March 2017.[1159]

1000. The Facilities consist of 35,323 assets,[1160] from which GOPA inspected 21,921 assets from 26 January to 29 March 2017 and extrapolated its conclusions to the rest of the assets.[1161] In its assessment, GOPA followed the technical specifications determined by the Parties, *i. e.* "Expanded February Specifications" [1162] which required the establishment of the condition of the Facilities in accordance with the Programme (Annex 1 of the technical specifications) and to draw up a report on that condition. The technical specifications further provided that GOPA had to determine whether the Facilities were returned in compliance with the Complete State requirements, and if not, it had to indicate what were the required actions to return those Facilities in a Complete State:[1163]

[1157] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 226, see also **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 90.

[1158] **SoC:** Claimants' Statement of Claim, dated 16 October 2017, para. 264.

[1159] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 594.

[1160] **C-134:** GOPA-International Energy Consultants, Revised Assessment Report regarding Procurement of Expert Services for Purposes of a Transfer-Back Inspection of Heating Installations in Vilnius, Lithuania, dated 01 August 2017, p. 1.

[1161] **C-134:** GOPA-International Energy Consultants, Revised Assessment Report regarding Procurement of Expert Services for Purposes of a Transfer-Back Inspection of Heating Installations in Vilnius, Lithuania, dated 01 August 2017, p. 1.

[1162] **C-143:** Expanded February Specifications, attached to Letter from Emergency Arbitrator, dated 09 January 2017.

[1163] **C-143:** Expanded February Specifications, attached to Letter from Emergency Arbitrator, dated 09 January 2017, paras. 4.1 and 4.4.1.2, see also Table 1 (emphasis added).

"The technical condition must be established in accordance with the requirements laid down in these Technical Conditions and the Programme prepared by the Purchaser (Annexes 1.1 to 1.15) and the service timetable drawn up by the Provider."

[…]

"The level of detail of the Report drawn up must make it possible to determine the compliance of the Facilities on the basis of the Report with the Complete State requirements. Where the Report allows to objectively determine that the technical condition of the Facilities does not meet the principle of the Complete State, the Provider must indicate what reasonable and adequate action or repair tasks are to be undertaken as to bring the Facilities concerned in line with the Complete State criteria."

1001. Based on the technical specifications determined by the Parties, GOPA conducted an external inspection of the assets in operation and reviewed maintenance and repair works from the prior five years:

"Thus, Lessee (VE) and Lessor (VST) agreed to mandate [GOPA] *to enter, inspect, and establish the technical condition of different facilities and to draw-up a report on the current condition of the facilities. Object of the appointment of an independent expert is to establish the condition of the leased property installed in the Vilnius city heating sector and power generation, prior to its return to the Lessor."*[1164]

[…]

"Due to time limitations, the inspections carried out by the Consultant (Expert) were visual only, irrespective whether the plant under inspection was in operation or in shutdown mode."[1165]

[…]

"Where available, the Experts also carried out a thorough review of the available operation and maintenance records and of different tests carried out during the past 5 years and longer. This also included discussions with the operators' (Lessees')

[1164] **C-134:** GOPA-International Energy Consultants, Revised Assessment Report regarding Procurement of Expert Services for Purposes of a Transfer-Back Inspection of Heating Installations in Vilnius, Lithuania, dated 01 August 2017, p. 4, section 2.1.

[1165] **C-134:** GOPA-International Energy Consultants, Revised Assessment Report regarding Procurement of Expert Services for Purposes of a Transfer-Back Inspection of Heating Installations in Vilnius, Lithuania, dated 01 August 2017, p. 5, section 2.2.

> *operation and maintenance staff concerning the current plant (asset) performance."*[1166]

1002. The GOPA experts set out their own definition of Complete State, according to which:

> "*Complete State indicates that the inspected asset was physically complete in all respects and that documentary evidence was available with the operator that regular plant inspection and tests were carried out by operator and witnessed where so required by the responsible state authorities*."[1167]

1003. They further defined "Not Complete State" as indicating:

> "[…] *that the inspected asset is incomplete, e.g.*
>
> *- pump is leaking; it is not sufficiently corrosion protected, etc.*
>
> *- various rotating equipment such as induce draft (ID) and forced draft (FD) fan bodies were found severely corroded, the coupling (drive motor to fan) was not at all protected against prolonged shutdown, etc.*
>
> *- steam piping in places lacking heat insulation and metal cladding, etc.*
>
> *- asset is in prolonged (long) stand-by / in conservation or decommissioned and has to undergo the complete recommissioning procedure if used again*
>
> *- re-conservation of plant parts not carried out*
>
> *- in some buildings / housing, the facilities were found in neglected state and in dire need of repair*
>
> *- heavy fuel oil forwarding equipment found in neglected state*
>
> *- certification / operation permit withdrawn or not renewed for pressure plant parts*."[1168]

1004. The Arbitral Tribunal sees no reason to deviate from the findings of the GOPA report and to reopen the assessment of the Facilities, in particular as the definition of Complete State applied by GOPA is in line with the conclusion of the Arbitral Tribunal

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[1166] **C-134:** GOPA-International Energy Consultants, Revised Assessment Report regarding Procurement of Expert Services for Purposes of a Transfer-Back Inspection of Heating Installations in Vilnius, Lithuania, dated 01 August 2017, p. 6, section 2.3.

[1167] **C-134:** GOPA-International Energy Consultants, Revised Assessment Report regarding Procurement of Expert Services for Purposes of a Transfer-Back Inspection of Heating Installations in Vilnius, Lithuania, dated 01 August 2017, p. 2.

[1168] **C-134:** GOPA-International Energy Consultants, Revised Assessment Report regarding Procurement of Expert Services for Purposes of a Transfer-Back Inspection of Heating Installations in Vilnius, Lithuania, dated 01 August 2017, p. 2.

that Complete State refers to the well-maintained technical state of the Facilities. With regard to the limited time at GOPA's disposal for its inspection, the Arbitral Tribunal notes that GOPA sent 11 experts for an inspection over 9 weeks.[1169] In any event, the limited time at the disposal of GOPA was due to the Parties' failure to agree on the appointment of the Expert as per Article 37(ii) of the Lease. As already mentioned, this failure cannot be attributed to one Party or the other. However, this failure to jointly appoint the Expert led to the appointment of GOPA through the adequate procedure for the resolution of disputes under the Lease. The findings of GOPA must therefore be regarded as authoritative.

1005. Further, even though the Parties consider that GOPA applied a different definition of Complete State than the one in the Lease[1170], both Parties rely on the conclusions of the GOPA report.[1171] Their disagreement as to the findings of GOPA stems mainly from their divergence of interpretation of Article 37(i), which the Arbitral Tribunal has decided above in favor of an interpretation according to which Complete State means that Claimants had to re-deliver the Facilities in the state in which a prudent operator would have re-delivered it, not in the state in which significant investments beyond the Investment Program at Appendix 1 of Annex 2 to the Lease would have been made.

1006. Regarding the general state of the Facilities, the GOPA experts conclude that:

> *"In general, the documentary information provided by Lessee (VE) appears to show that the inspected assets have been operated and maintained in accordance with the operation and maintenance instructions and schedules provided by the equipment manufacturers. Various tests prescribed in the operation and maintenance manuals as well as those prescribed by the Ministry of Energy of Lithuania were carried at the due dates. The Client's (VE) well-maintained documentation of the tests carried out in the past was made available to the Consultant for review."*[1172]

[1169] **C-138:** GOPA Service Contract, dated 25 January 2017, p. 3, section 1.1 and p. 10, Attachment 3.

[1170] **SoC:** Claimants' Statement of Claim, dated 16 October 2017, paras. 243 and 269-270; **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 2140-2145.

[1171] **SoC:** Claimants' Statement of Claim, dated 16 October 2017; paras. 265-294; **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 2146-2189.

[1172] **C-134:** GOPA-International Energy Consultants, Revised Assessment Report regarding Procurement of Expert Services for Purposes of a Transfer-Back Inspection of Heating Installations in Vilnius, Lithuania, dated 01 August 2017, p. 2.

[…]

"Some of the plants were modernized / upgraded with state-of-the-art modern technologies."[1173]

[…]

"When comparing the E2 facility with other facilities installed elsewhere in the world similar in age or younger and of identical source of supply, the Consultant concludes that E2 facility is operationally well-maintained with the exception of the issues highlighted elsewhere in this report and as such can remain in operation for a number of years to come."[1174]

1007. Overall, the GOPA report concluded that the inspected assets had been operated and maintained in accordance with their manufacturers' instructions:[1175]

"the inspected assets have been operated and maintained in accordance with the operation and maintenance instructions and schedules provided by the equipment manufacturers. Various tests prescribed in the operation and maintenance manuals as well as those prescribed by the Ministry of Energy of Lithuania were carried at the due dates. The Client's (VE) well-maintained documentation of the tests carried out in the past was made available to the Consultant for review."

1008. According to Claimants, the GOPA report found that only a fraction of the assets included in the "List of Assets" of the "Expanded February Specifications" and listed in GOPA's asset list attached to its report were not in a Complete State, *i. e.* 690 out of the 35,323, or just under 2 % of the overall assets included in the asset list.[1176] Claimants note that most of those assets were assets that were either replaced, placed into conservation or no longer needed, and thus recommended to be

[1173] **C-134:** GOPA-International Energy Consultants, Revised Assessment Report regarding Procurement of Expert Services for Purposes of a Transfer-Back Inspection of Heating Installations in Vilnius, Lithuania, dated 01 August 2017, p. 2 (emphasis added).

[1174] **C-134:** GOPA-International Energy Consultants, Revised Assessment Report regarding Procurement of Expert Services for Purposes of a Transfer-Back Inspection of Heating Installations in Vilnius, Lithuania, dated 01 August 2017, p. 2. (emphasis added).

[1175] **C-134:** GOPA-International Energy Consultants, Revised Assessment Report regarding Procurement of Expert Services for Purposes of a Transfer-Back Inspection of Heating Installations in Vilnius, Lithuania, dated 01 August 2017, p. 2.

[1176] **SoC:** Claimants' Statement of Claim, dated 16 October 2017, paras. 272-275; **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 408.

decommissioned.[1177] According to Claimants, these items did not need to be replaced or repaired before re-delivery. Claimants' (principal) Claim 5 is for a declaration to this effect. It reads as follows:[1178]

> "*For all the reasons set out above and in its prior submissions, Veolia respectfully requests the Tribunal to:*
>
> […]
>
> *(b)* ***DECLARE:***
>
> *(ii) that Veolia's interpretation of Complete State under the Lease is correct, including that the Complete State requirement did not require Vilnius Energy to repair or replace assets that:*
>
> - *have been replaced by new, modernized assets;*
> - *have been decommissioned and put into conservation;*
> - *are no longer needed due to, for example, age or changes to the way that heating and electricity services are provided; or*
> - *show pre-existing defects or defects that do not affect the utility of the Facilities.*
>
> *(iii) or, if the Tribunal determines that any such asset would not be classified as being in a Complete State:*
>
> - *that Veolia is not liable for any defect that it could have corrected before the handover if the Respondents had acted appropriately in appointing the expert;*
>
> *(iv) or, if neither declaration (ii) nor declaration (iii) is granted:*
>
> - *that Veolia, or its designees, shall be given access to the Facilities to correct any defects; or, if for any reason that is not possible, to declare that the Respondents may only claim against Veolia upon a showing that the repairs have in fact been performed (at a reasonable cost)".*

1009. Respondents reply that Claimants' obligation to return assets in a Complete State applies to all assets equally. They highlight that the Lease does not distinguish between

[1177] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 276.

[1178] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1335 (emphasis added), confirmed in **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 304.

preexisting defects and defects that became apparent during the Lease. Respondents therefore consider that Claimants' attempt to limit their obligations by excluding certain groups of assets from the scope of the Lease has no legal basis. [1179]

1010. The Arbitral Tribunal agrees in principle with Claimants that, taking into account the "*prior use of the Facilities*" and their "*average service life*" would make sense when assessing the condition of the Facilities at the end of a 12-year Lease. It also seems reasonable to consider that certain assets became outdated due to the change in the technology used.

1011. However, as mentioned above, the findings of the GOPA report must be considered as authoritative given the procedure according to which GOPA was appointed. The GOPA experts took the position that assets which had been "*prolonged (long) stand-by / in conservation or decommissioned and has to undergo the complete recommissioning procedure if used again"* were incomplete, *i.e.* not in a Complete State. [1180] The declaration sought by Claimants that VE did not need to repair or replace assets that "*have been decommissioned and put into conservation*" is thus in direct contradiction with GOPA's definition. In these circumstances, Claim 5 can only be partly granted, to the exclusion of that portion of the declaration sought by Claimants.

1012. The Arbitral Tribunal notes that this partial dismissal of Claim 5 does not impact the outcome of Counterclaim 6, which is a claim for EUR 988,911.25 plus pre-award interest and corresponds to elements of the Facilities that were found to be in Complete State by GOPA. The breakdown of Counterclaim 6, which is therefore rejected, is as follows:

[1179] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 1203-1204.

[1180] **C-134:** GOPA-International Energy Consultants, Revised Assessment Report regarding Procurement of Expert Services for Purposes of a Transfer-Back Inspection of Heating Installations in Vilnius, Lithuania, dated 01 August 2017, p. 2.

Defect	Damages
Breakdown of Steam Turbine No. 5 at VE-2	EUR 486,642.15 (repair costs)
	EUR 455,836 (losses from the Turbine's downtime)[3468]
Defects in the economizers of Boilers Nos. 6 and 7 at RK-2	EUR 16,210.95 (repair costs)
Various leaks in the DHN	EUR 30,222.41 (repair costs)
Interim total:	EUR 988,911.51

1013. With regard to Steam Turbine No. 5 at the VE-2 plant, Respondents argue that it broke down and could not be operated until 28 July 2017 due to VE's failure to implement the manufacturers' recommendations to exchange the sunwheel and to inspect the gear wheels.[1181] Respondents therefore argue that VE is responsible for the breakdown.[1182]

1014. According to Claimants, Steam Turbine No. 5 was in a Complete State, as according to the GOPA report the VE-2 plant was found to be in a Complete State.[1183] Claimants also argue that according to the separate GOPA report dated April 2017, Steam Turbine No. 5 was confirmed to be "*running smoothly without excessive vibration and without steam or oil leakage*s" and to be in a "*mint condition*".[1184] Therefore, according to Claimants, Steam Turbine No. 5 was re-delivered to VST in a Complete State at the end of the Lease.[1185]

1015. The Arbitral Tribunal notes that Steam Turbine No. 5 in VE-2 was assessed by GOPA separately from other assets, as on 20 March 2017, VE and VST requested GOPA to carry out an independent Integrity Assessment of "*Steam Turbine 5, Electric Generator*

[1181] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 654-660; **R-039:** Letter of VST to Vilniaus Energy, 7 June 2017, dated 07 June 2017, p. 21 of the pdf.

[1182] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 661-664.

[1183] **C-134:** GOPA-International Energy Consultants, Revised Assessment Report regarding Procurement of Expert Services for Purposes of a Transfer-Back Inspection of Heating Installations in Vilnius, Lithuania, dated 01 August 2017, p. 21 of the pdf.

[1184] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 209; see also **R-311:** GOPA's Integrity Assessment Report for Steam Turbine Generator 5, Boiler 4 Wet Flue Gas Condenser & Duct and Pump 19, April 2017, dated 01 April 2017, p. 11 of the pdf.

[1185] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 209.

5, Boiler 4 Wet Flue Gas Duct & Condenser and District Heating cum Steam Condenser cooling Pump 19 (TS19) installed at E2 power plant in Vilnius, Lithuania."[1186]

1016. In the separate Integrity Assessment, GOPA indeed concluded from external visual inspection that Steam Turbine No. 5 *was "running smoothly without excessive vibration and without steam or oil leakages"* and was in *"mint condition"*: [1187]

> "*During the visual inspection, steam turbine and electric generator (STG) were in operation with all their auxiliaries and ancillaries* […]. *Both machines were running smoothly without excessive vibration and without steam or oil leakages. External visual impression is that steam turbine and generator are both in best mint condition*."

1017. Thus, according to GOPA's assessment, Steam Turbine No. 5 was operational at the end of the Lease and its conclusion did not raise any concern that Steam Turbine No. 5 would shortly go out of operation. Therefore, based on the conclusion of GOPA's Integrity Assessment, Steam Turbine No. 5 is deemed to have been returned by VE to VST in a Complete State.

1018. With regard to the two biofuel boilers at the RK-2 power plant in which Respondents argue that they detected failures, *i.e.* VSK-6 (Steam Boiler 6) and VSK-7 (Steam Boiler 7), [1188] Respondents note that GOPA identified numerous deficiencies in RK-2, especially in relation to the cast iron economizer.[1189] According to Respondents, the maintenance actions carried out by VE were not sufficient to prevent assets from future failures and repairs.[1190] Thus, Respondents contend that VE is responsible for failures and repairs in RK-2 due to failure to replace the cast iron economizer.[1191]

[1186] **R-311:** GOPA's Integrity Assessment Report for Steam Turbine Generator 5, Boiler 4 Wet Flue Gas Condenser & Duct and Pump 19, April 2017, dated 01 April 2017, p. 1.

[1187] **R-311:** GOPA's Integrity Assessment Report for Steam Turbine Generator 5, Boiler 4 Wet Flue Gas Condenser & Duct and Pump 19, April 2017, dated 01 April 2017, p. 7, emphasis added.

[1188] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 669.

[1189] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 670; **C-134:** GOPA-International Energy Consultants, Revised Assessment Report regarding Procurement of Expert Services for Purposes of a Transfer-Back Inspection of Heating Installations in Vilnius, Lithuania, dated 01 August 2017, p. 65 of the pdf; **REX-002:** Expert report of FCG Design and Engineering Ltd., dated 19 February 2018, para. 206.

[1190] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 672.

[1191] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 673.

1019. In response, Claimants assert that "*Respondents acknowledged GOPA's conclusion that these economizers had been handed over in a Complete State.*"[1192] Claimants further emphasized that GOPA's recommendation that the RK-2 economizers be replaced with steel equivalents was a simple suggestion and that it did not affect the Complete State of the two boilers.[1193]

1020. Regarding specifically Boiler No. 6, GOPA observed that it suffered from frequent repairs and recommended to replace the cast iron economizer by a steel one:[1194]

> "[t]*his boiler suffers from frequent repairs / replacement of the case iron economizer; two tubes of the lower section of the economizer were replaced on 03.02.2013. On 20.03.2014, the complete economizer unit was replaced. On 23.09.2014, repairs on the economizer were carried out. On 23.11.2014, the convection section was replaced and on 24.04.2015, some tubes in the economizer were again replaced. In order to reduce the frequency of economizer repairs, the Consultant recommends that serious consideration should be given to replace the cast iron economizer by a steel one.*

1021. Regarding specifically Boiler No. 7, GOPA acknowledged the inspections conducted and did not make any recommendations:[1195]

> *"Boiler no. 7 (water heating boiler KV-7-145, inventory no. 405/40270) with cast iron economizer operates on bio fuel the unit was installed in 2015.*
>
> *Tests and inspections:*
>
> *– Inspection in operation was due on 09.04.2016, but was actually done on 12.05.2016. The next one is due in April 2017.*
>
> *– Internal inspection is due in 2018.*

[1192] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 217; See also **R-039bis:** Letter of VST to Vilniaus Energy, 7 June 2017 (with Annex 2), dated 07 June 2017.

[1193] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 218.

[1194] **C-134:** GOPA-International Energy Consultants, Revised Assessment Report regarding Procurement of Expert Services for Purposes of a Transfer-Back Inspection of Heating Installations in Vilnius, Lithuania, dated 01 August 2017, p. 53.

[1195] **C-134:** GOPA-International Energy Consultants, Revised Assessment Report regarding Procurement of Expert Services for Purposes of a Transfer-Back Inspection of Heating Installations in Vilnius, Lithuania, dated 01 August 2017, p. 53.

– Hydrostatic test was carried out on 28.05.2015; the next one is due in 2023."

1022. It is in GOPA's excel spreadsheet of 1st August 2017 that GOPA qualifies the two boilers as being in a Complete State, in rows 108 and 109 of Tab. 1.2.1 of GOPA's asset list attached to the report. As can be seen in the excerpt below, Boiler No. 6 (in set with the cast iron economizer) and Boiler No. 7 (in set with the cast iron economizer) are marked as being 'Complete':[1196]

108	86	RK2	405/40278	VK6 Vandenssildymokatilas, komplektuojamaskartusuketiniuekonomaizeriu / Water heating boiler house No. 6 - Water heating boiler, in set with cast iron economizer	KA-01-00813	No abnormalities, seen during visual inspection.	In operation	Commissioned in 2011 In 2014 economizer fully replaced; Next hydro test in 2022	Complete	No abnormalities No damages
109	87	RK2	405/40279	VK7 Vandenssildymokatilas, komplektuojamaskartusuketiniuekonomaizeriu / Water heatin boiler house No. 7 - Water heating boiler, in set with cast iron economizer	KA-01-00814	No abnormalities seen during visual inspection	In operation	Hydro tested in 2015; next hydro test in 2023	Complete	No abnormalities No damages

1023. As seen above, GOPA established that VE carried out frequent repairs and replacement on the cast iron economizer regarding Boiler No. 6. GOPA thus recommended replacing the cast iron economizer with a steel one but did not indicate concerns that Boiler No. 6 would otherwise go out of operation. Furthermore, GOPA did not make any recommendations regarding Boiler No. 7. Finally, GOPA marked the economizers to be in a Complete State in its asset list attached to the report.[1197] Based on these findings of GOPA, it can be concluded that Boilers No. 6 and No. 7 at Plant RK-2 were in a Complete State at the end of the Lease.

1024. Finally, with regard to the District Heating Network or pipes, Respondents contend that the pipes exceed 30 and in some cases 50 years, and that historical data shows that, during the period of the lease, VE has consistently identified breaches and leakages in the pipes.[1198] During the hydraulic tests in 2017, after the return of the assets, VST identified additional leakages. [1199] Respondents contend that VE bears the responsibility for the consistent failures and subsequent repairs of the District Heating Networks due to VE's failure to improve and maintain their performance in accordance with international market standards.[1200]

[1196] **C-137:** Asset List attached to GOPA Report, dated 01 August 2017, Tab. 12.1, rows 108 and 109.
[1197] **R-039bis:** Letter of VST to Vilniaus Energy, 7 June 2017 (with Annex 2), dated 07 June 2017, p. 7.
[1198] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 665.
[1199] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 665-668.
[1200] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 668.

1025. In response, Claimants argue that VE made improvements to the pipes during the Lease, which reduced the amount of breaks and leaks during the heating season and increased the reliability of the network. Claimants highlight that wear and tear is expected in a District Heating Network, especially during the heating season. According to Claimants, "*the issues identified by Respondents are no more than examples of such predictable deterioration*".[1201]

1026. GOPA, for its part, has classified all of the District Heating Network pipes as being "Complete" in Worksheet 13 of GOPA's asset list attached to its report.[1202]

1027. As the Tribunal earlier concluded that, for the determination of the Complete State of the Facilities, the conclusions of the GOPA report would be followed, the Arbitral Tribunal follows GOPA's finding that the District Heating Network pipes were returned in a Complete State. The Expert GOPA was appointed in accordance with the mechanisms on which the Parties agreed in the Lease, and the Tribunal therefore sees no legitimate reason to re-open these findings.

5. Conclusion

1028. Following the above assessment, the Arbitral Tribunal partly admits Claim 5, excluding the declaration sought by Claimants that VE was not required to repair or replace assets decommissioned and put into conservation.

1029. As to Counterclaim 6, as discussed above, the Arbitral Tribunal adopts the findings of GOPA in its reports dated April 2017[1203] and August 2017[1204] that the Steam Turbine No. 5, Steam Boiler 6 and Steam Boiler 7 at the RK-2 power plant, and the District

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[1201] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 219.

[1202] **C-137:** Asset List attached to GOPA Report, dated 01 August 2017, Tab. 13.

[1203] **R-311:** GOPA's Integrity Assessment Report for Steam Turbine Generator 5, Boiler 4 Wet Flue Gas Condenser & Duct and Pump 19, April 2017, dated 01 April 2017.

[1204] **C-134:** GOPA-International Energy Consultants, Revised Assessment Report regarding Procurement of Expert Services for Purposes of a Transfer-Back Inspection of Heating Installations in Vilnius, Lithuania, dated 01 August 2017.

Heating Network pipes were all in a Complete State when VE re-delivered them to VST at the end of the Lease. Counterclaim 6 is in consequence dismissed.

F. CLAIM 1/COUNTERCLAIM 8: DISPUTED ASSETS

1030. Under Claim 1 and Counterclaim 8, both Claimants and Respondents claim ownership of the Disputed Assets. Claimants consider that they owned these assets at the end of the Lease, and that Respondents must pay them an amount of EUR 20,619,000 for these assets.

1031. Respondents for their part consider that they always owned the Disputed Assets and request the Arbitral Tribunal to declare that "*the price of all Disputed Assets and all the Units is equal to the outstanding amount of Lease Fee No. 4 at the end of the Term of the Lease Agreement.*"[1205]

6. The Parties' Positions

6.1 Claimants' Position

1032. Claimants request the Arbitral Tribunal to declare that they own "*certain categories of assets that are not subject to the Lease's leasing or end-of-Lease transfer terms*",[1206] and to order Respondents to pay them EUR 20,619,000 for these assets which VST has kept but never paid to VE.[1207] Claimants explain that these so-called Disputed Assets belong to VE, *i.e.* they do not belong to any of the categories of assets that were leased and were to be returned to VST at the end of the Lease.[1208] The Disputed Assets are 1) a flue gas condenser referred to as the "Economizer", 2) an electricity generating steam turbine and its connected water pump, Steam Turbine No. 5 or "**ST-5**", 3) certain

[1205] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1138.
[1206] **SoC:** Claimants' Statement of Claim, dated 16 October 2017, para. 91.
[1207] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 228.
[1208] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 229-230.

vehicles referred to as the "Disputed Cars", 4) certain stock and supplies referred to as the "Disputed Inventory" and 5) the Hot Water Meters.[1209]

1033. According to Claimants, VE had the right, and chose to invest a total amount of over EUR 29 million in the Disputed Assets, in some instances despite the fact that these investments had not been approved by Respondents.[1210] The Disputed Assets were neither included in the initial nor in the amended Investment Plan, nor were they necessary to ensure the supply of heat or needed for emergency reasons. Therefore, these assets did not become the property of Respondents.[1211]

1034. Claimants further point to the fact that, "*while Vilnius Energy sought their coordination and approval, the Economizer, ST-5 and the Disputed Cars were never approved by the Respondents*."[1212] By default, these assets belong to VE unless they are not detachable from the Facilities. Claimants explain that, pursuant to Article 16.6 of the Lease, assets freely invested in by VE shall remain its property, whereas "*non-detachable assets shall be transferred to the Respondents pursuant to Annex 10 of the Lease*."[1213]

1035. The Economizer, ST-5 and the Disputed cars are detachable, and thus belong to VE. Respondents must pay for these assets.[1214] Claimants argue that they also own the Hot Water Meters, which were purchased and installed outside the investment mechanism of the Lease and for which Respondents must be ordered to pay Claimants. Claimants explain that VE installed the Hot Water Meters "*as a result of a change in law which made it a regulated hot* [water] *supplier, status it never had before*."[1215] This new regulated activity was not encompassed by the Lease and was therefore not included in the Investment Plan or necessary to the Business which was initially limited to "*heat and power production*".[1216] In any event, even if the Arbitral Tribunal were to

[1209] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 227, 229 and 238 ff.
[1210] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 227 and 248.
[1211] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 231-233.
[1212] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 234.
[1213] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 238.
[1214] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 234, see also para. 249.
[1215] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 296.
[1216] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 297.

consider that the Hot Water Meters were investments under the Lease, they are detachable assets for which Veolia is entitled to payment.[1217]

1036. According to Claimants, the Disputed Inventory was not a Leased Asset either. It consisted mostly of spare parts and supplies and also comprised some short-term, daily use items such as furniture. Claimants refer to Annex 5 to the Lease on the "Short Term Assets Transfer Conditions" to argue that Respondents should have purchased the Disputed Inventory at the end of the Lease, just like VE purchased the "short term assets" following the procedure of Annex 5 at the start of the Lease.[1218]

6.2 Respondents' Position

1037. Respondents request the Arbitral Tribunal to dismiss Claim 1. In addition, they have submitted a Counterclaim 8, whereby they seek declarations that 1) no payment is due by VST for the Disputed Assets, 2) the Economizer, the Steam Turbine No. 5 and the associated Network Pump No. 19 and the Disputed Cars are VST's property, and 3) the price of all Disputed Assets is equal to the outstanding amount of Lease Fee No. 4 at the end of the Lease.[1219]

1038. Respondents' position is that the Disputed Assets fall within the category of investments mandated by the Lease as necessary for the normal operation of VST's Business.[1220] The Disputed Assets are therefore subject to the Lease's transfer provisions regardless of any approval of them by Respondents.[1221] Respondents argue that Claimants mislead the Tribunal by focusing on Respondents' approval or lack thereof in relation to certain of the Disputed Assets.[1222] Regarding the Disputed Cars and the Disputed Inventory, Respondents add that "[i]*n any event, the items that comprise Cars and Inventory were each below 1,000,000 Litas and therefore VST's approval was expressly not required by Article 16.5 of the Lease*."[1223]

[1217] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 313-317.
[1218] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 318-320.
[1219] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1138.
[1220] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1083.
[1221] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 2438 ff.
[1222] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2368.
[1223] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2369.

1039. According to Respondents, "*this matter is very simple*"[1224] and must be decided by applying Annex 10 to the Lease, which makes it clear that all investments made by VE in the Business during the term of the Lease must be transferred to VST at the end of the Lease without cash payment.[1225] Contrary to Veolia's allegations, investments beyond those included in the Investment Plan do not need to be somehow converted into leased assets, but are automatically subject to the Lease including its transfer provisions.[1226]

1040. Respondents explain that *"the only exception to this is non-business-related investments that have been made without VST's prior approval and which may be 'detached from the Facilities' (those three conditions being cumulative)*."[1227]

1041. Respondents have also put forward, as an alternative position, that the Economizer, ST-5 and the Disputed Cars were "*needed* […] *in connection with the Business*" as per Article 16.4.[1228]

1042. Based on their interpretation of the Lease, including its very purpose, Respondents submit that "*the short point is more practical and commercial. When Veolia took over the Facilities, VŠT handed over the keys to the Business together with everything that was used to operate it. The same process was intended in reverse at the end of the Lease and that is what the relevant provisions are designed to achieve* […] *Given* [that consideration], *the Tribunal may dispose of these claims and counterclaims without considering whether individual assets are detachable*."[1229]

[1224] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2365.

[1225] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2374.

[1226] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2374.

[1227] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2365, see also paras. 2368, 2374.

[1228] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 2457 ff.

[1229] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 1085-1086, see also Respondents' Opening Presentation, Part IV, slide 95 on the purpose of each of the Disputed Assets, **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2370, **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 303.

1043. In their Post-Hearing Brief, Respondents have nevertheless focused on evidence from the hearing on the detachability requirement as applied to certain of the Disputed Assets.

1044. Respondents have emphasized that the Hot Water Meters are not detachable due to Lithuanian law. They rely in that respect on Article 15.2 of the Lithuanian Law on the Heat Sector, which provides that "[t]*he hot water supplier shall install in apartment blocks and other premises hot water meters*".[1230] Respondents point to the admission of Claimants' expert Dr. Ratzesberger (of Fichtner) that the criteria for detachability should include compliance with the law, and conclude that "[t]*his concession is outcome-determinative: hot water meters cannot be detached without breaching Lithuanian law*". Therefore, according to Respondents, the Hot Water Meters are not detachable.[1231]

1045. Regarding ST-5, Respondents criticize the approach of Fichtner, Claimants' expert, who considered that the production of electricity is irrelevant to the assessment of detachability of ST-5. Respondents consider that VE's obligation to "*cut down the costs of*" and "*upgrade* […] *electricity generation*" pursuant to Article 3.1 of the Lease means that VE was obliged to support VST's electricity generation business, and that Fichtner's approach is thus flawed.[1232] Respondents rely on the explanation of their expert, Sweco, that detaching ST-5 "*would further decimate the Lease's electrical generation business*."[1233]

1046. Regarding the Economizer, Respondents put forward that, should it be removed from the Facilities, there would be "*an unacceptable risk that particulates emitted by Biofuel Boiler GK-4 would exceed the monthly average limit of 30 mg/Nm^3 and the daily average limit of 33 mg/Nm^3 imposed by EU law*."[1234]

[1230] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1088, with ref. to **CLA-008:** Republic of Lithuania, Law on the Heat Sector, No. XI-250, as amended, dated 12 May 2009, Article 15.2, see also **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 2486 and 2489.

[1231] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1088.

[1232] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1089.

[1233] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1090.

[1234] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1093.

1047. Respondents argue that the Disputed Cars, which form part of "*the vast bulk of the fleet*", are not only necessary or connected to the Business but may also not be detached, as detaching the most part of such fleet would cripple the Business.[1235]

7. The Arbitral Tribunal's Analysis and Decision

7.1 The Lease Provisions

1048. The Parties each rely on various provisions of the Lease, which they interpret differently, to support their respective claim/counterclaim. The Arbitral Tribunal therefore starts its analysis with a review of the relevant provisions of the Lease.

1049. Article 16 of the Lease sets out works and investments to be undertaken by VE under the Lease. It notably sets out VE's Investment Obligation with reference to the Investment Plan at Article 16.1, already discussed above in relation to Counterclaim 4 on the modernization of VE-3.

1050. Articles 16.4 and 16.6 deal for their part with investments undertaken by VE outside the Investment Plan:

> ***ARTICLE 16: PERFORMANCE PARAMETERS:***
>
> *16.1. Newco will do renovations of and investments in the Facilities in accordance with the Investment Plan. The amounts of investments stated in the Investment Plan are indicative only and will be credited by the actual costs. Also indicative is the list of works included in the Investment Plan and designated for achieving the objectives set in Article 3 above. The Lessee undertakes to carry out any works and make investments which are not included in the Investment Plan but are necessary for ensuring the Business and achieving the objectives set out in Article 3 above* […]
>
> *16.4. Newco shall have the right to do any investments and renovations that are not provided in the Investment Plan but needed in case of emergency or in connection*

[1235] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1098, **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. + and 2525-2528.

with the Business. Newco shall give prompt notice of and co-ordinate any such investments or renovations with the Lessor. All and any other investments or renovations made by the Lessee outside the scope of the Investment Plan or outside the Business, or not in case of emergency must be co-ordinated with the Lessor beforehand; this equally applies to depreciation rates of any assets newly created or renovated.

16.5. The Lessor shall be required to give its consent or refusal to any such unforeseen renovations and investments within 30 business days after receipt of the appropriate request. Single unforeseen investments or renovations not exceeding 1.000.000 Litas are excluded from these provisions. The Lessee shall not divide large investment, i.e. those in excess of 1.000.000 Litas, into small units to take advantage of this exception.

16.6. Any other investments or renovations that are not falling into the scope of the provisions stipulated in this Article 16 and made by the Lessee without prior approval required per sub-article 16.4 above will be undertaken at the Lessee's own risk and will not be subject to the monetary compensation or reimbursement payable on termination or expiration of the Agreement. Where the improvements made in the course of such Investments to the Units or the Facilities may not be detached from the Facilities, such improvements shall upon the expiration or termination of the Lease Agreement be transferred to the Lessor pursuant to ***Annex 10***."[1236]

1051. Having scrutinized the text of Article 16 of the Lease, the Arbitral Tribunal notes that:

a. A procedure was envisaged for VE to undertake "*any investments and renovations that are not provided in the Investment Plan but needed in case of emergency or in connection with the Business"* (Article 16.4);

b. Under such procedure, VST was required to approve or not the proposed investment or renovation within 30 days of its proposal, save for "[s]*ingle unforeseen investments or renovations not exceeding 1.000.000 Litas*" (Article 16.5);

c. Investments undertaken by VE outside the above-described procedure and unapproved by VST would be undertaken at VE's own risk and "*not be subject*

[1236] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 16 (emphasis added).

to the monetary compensation or reimbursement payable on termination or expiration of the Agreement" (Article 16.6);

d. The improvements to the Facilities made in the course of such unapproved investments would be transferred to VST pursuant to Annex 10 if such improvements "*may not be detached from the Facilities*" (Article 16.6).

1052. The Arbitral Tribunal considers that Article 16.6 is clear as to the fact that VE was in principle free to remove and take away with it any improvements to the Facilities which it had decided to invest in at its own expense and risk and without VST's approval. This is in line with the fact that VE was not entitled to monetary compensation or reimbursement for such investments.

1053. However, the Parties provided for the possibility that the removal of certain investments would not be possible, in which case the improvements shall be transferred to VST pursuant to the mechanism set out in Annex 10 to the Lease, entitled "Lease Fee 4 Calculation and Payment Procedures".

1054. Annex 10 refers in its preamble to Article 11.2(iv) of the Lease, which states that Lease Fee 4 is "*payable to cover depreciation of the Facilities of SP AB VST through the Investment Program implemented by the Lessee*."[1237]

1055. Annex 10 reads in relevant part as follows:

Lease Fee Calculation and Payment Procedures

1. Calculation of Lease Fee 4:

1.1 Lease Fee 4 is calculated as a difference between the total depreciation amount of all assets leased to the Lessee and the principle [sic!] *amount of Lease Fee 1 (excluding interest for long term liabilities). Monthly Lease Fee 4 is calculated as a difference between the monthly depreciation amount of the assets leased to the Lessee and the principle* [sic!] *amount of Lease Fee 1 (excluding interest for long term liabilities) in proportion to the relevant month. Depreciation amount shall*

[1237] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 11.2(iv).

depend on the nature of the assets leased to the Lessee and is calculated following the procedure established in this Annex.

2. *Procedure for Calculation of Depreciation in Proportion to* ***Immovable Property*** *Leased to the Lessee:*

2.1. *Immovable property leased by the Lessor to the Lessee is specified in section 'Immovable property' of Annex 1 'Facilities' to this Agreement.* [NB: Annex 1 to the Lease is the List of Facilities] *Monthly depreciation rate of this immovable property is fixed at the beginning of the Term and could be changed during the Term only in cases indicated in and following the procedure established by this Annex upon mutual agreement of the Parties;*

2.2. *During the Term the Lessee shall perform reconstruction and/or repair works of the leased immovable property and creates new immovable property as provided for in Annex 2 'Investment Plan' to this Agreement.*

2.2.1. *Immovable property reconstruction and repair works, the value of which exceeds 50% of the acquisition value of the leased immovable property under repair, which is determined in Annex 1 to this Agreement as well as immovable property newly created during the Term shall be sold to the Lessor in compliance with the procedure established in Annex 2 'Investment Plan' to this Agreement immediately after completion of the work or after commissioning of the immovable property and signing of Acceptance Certificate of the completed works. In case reconstruction and repair works performed or/and immovable property newly created during the Term are not foreseen in Annex 2 'Investment Plan', but they were necessary and therefore performed and/or created by the Lessee, such work and assets shall be sold to the Lessor at the price paid by the Lessee's to contractors or price equal to costs incurred for the creation of the new immovable property.*

2.2.2. *Immovable property repair works, the value of which does not exceed 50% of the acquisition value of the leased immovable property under repair or other improvements carried out by the Lessor with respect to the above property shall remain the ownership of the Lessee during the whole Term and shall be sold to the Lessor for I (one) Litas at the expiration of the Term, unless the Lessor and the Lessee agree otherwise;*

2.3. The Lessor upon acquisition from the Lessee of reconstruction and repair works of the immovable property, the value of which exceeds 50% of the acquisition value of the leased immovable property shall increase by the value of such works the acquisition value of the immovable property leased to the Lessee, and depreciation part of Lease Fee 4 proportional to the immovable property shall be increased by the depreciation calculated based on the amount of reconstruction and repair acquired from the Lessor. In such case Annex 1 shall be correspondingly amended by indicating new increased acquisition value of the leased immovable property as well as monthly depreciation amount by accordingly adjusting Lease Fee 4;

[…]

2.6. At the end of the Term the Lessee shall sell under the VAT invoice to the Lessor the remaining and not sold during the Term reconstruction and repair work the value of which exceeds 50% of the acquisition value of the leased immovable property as well as other immovable property created during the Term at a price equal to the amount of outstanding Lease Fee 4 due for the leased immovable property at the end of the Term.

*3. Procedure for Calculation of Depreciation in Proportion to **Movable** Assets Leased to the Lessee:*

3.1. The movable assets leased to the Lessee by the Lessor are specified in section 'Movable Assets' of Annex 1 'Facilities' to this Agreement. The monthly depreciation rate of these movable assets is fixed at the beginning of the Term and is subject to change during the Term only in cases indicated in and following the procedure established by this Annex upon mutual agreement of the Parties;

3.2. During the Term the Lessor shall perform repair works of the leased movable assets as well as creates new movable assets as provided for in Annex 2 'Investment Plan' to the Agreement:

3.2.1. Movable assets repair, the value of which exceeds 50% of the acquisition value of the leased movable assets under repair determined in Annex 1, also newly created during the Term movable assets shall be sold to the Lessor immediately after completion of repair works or after creation of the new movable assets and signing of the Acceptance certificate of the performed works following the procedure established by Annex 2 'Investment Plan' to this Agreement. In case

when repair works and/or newly created assets are not foreseen in Annex 2 'Investment Plan', but they were necessary and therefore performed and/or created by the Lessee, such works and/or assets shall be sold to the Lessor at a price paid by the Lessee to the contractors or at a price equal to the costs incurred for creation of new movable assets.

3.2.2. Movable assets repair works the value of which does not exceed 50% of the acquisition value of the assets under repair or other improvements of movable assets performed by the Lessee shall remain the ownership of the Lessee during the whole Term, and at the end of the Term shall be sold to the Lessor for 1 (one) Litas, unless the Parties agree otherwise.

3.3. Upon acquisition from the Lessor of movable assets repair works exceeding 50% of the acquisition value of the leased movable assets, the Lessor increases by the value of such repair works the acquisition value of the movable assets leased to the Lessee and the depreciation amount of Lease Fee 4 proportional to the above assets shall be increased by depreciation amount calculated from the value of repair works acquired from the Lessee. In such case Annex 1 shall be changed accordingly by determining a new increased acquisition value of the leased movable assets and a new monthly depreciation amount as well as Lease Fee 4 shall be correspondingly adjusted.

[…]

3.6. At the end of the Lease term the Lessee shall sell to the Lessor under the VAT invoice the remaining and not sold during the Term repair works the value of which exceeds 50% of the acquisition value of the leased movable assets as well as other assets created during the Term at a price equal to the outstanding amount of Lease Fee 4 due at the end of the Term in proportion to leased movable assets."[1238]

1056. Annex 10 provides the mechanism of transfer of certain non-detachable assets that is to take place pursuant to Articles 16.4 and 16.6 of the Lease. The improvements to the Facilities which VE made in the course of unapproved investments because VE found that such investments beyond the Investment Plan were needed in connection with the

[1238] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Annex 10.

Business, if they are not detachable from the Facilities, shall be transferred to VST according to the mechanism set out in Annex 10 to the Lease.

1057. The Disputed Assets must therefore fulfil the following conditions to be subject to the transfer conditions of Annex 10: 1) they must correspond to unapproved investments of Claimants that were made by VE because VE considered them to be necessary in connection with the Business and 2) they may not be detached from the Facilities.

1058. Pursuant to Annex 10, paragraphs 2.2.1 and 2.2.2 (with respect to immovable property) and paragraphs 3.2.1 and 3.2.2 (with respect to movable assets), the Disputed Assets that may not be detached from the Facilities should in principle (and subject to further factual review specific to each of them) be transferred to VST as follows:

a. Immovable property invested in by VE in the course of reconstruction/repair works or creation of new immovable property performed outside the Investment Plan, and the value of which exceeded 50% of the acquisition value of the leased immovable property under repair, shall be sold to VST at the price paid by VE to contractors or the price equal to costs incurred for the creation of the new immovable property (Annex 10, paragraph 2.2.1);

b. Immovable property invested in by VE in the course of reconstruction/repair works or creation of new immovable property performed outside the Investment Plan, and the value of which did not exceed 50% of the acquisition value of the leased immovable property under repair, shall be sold to VST for 1 Litas (Annex 10, paragraph 2.2.2);

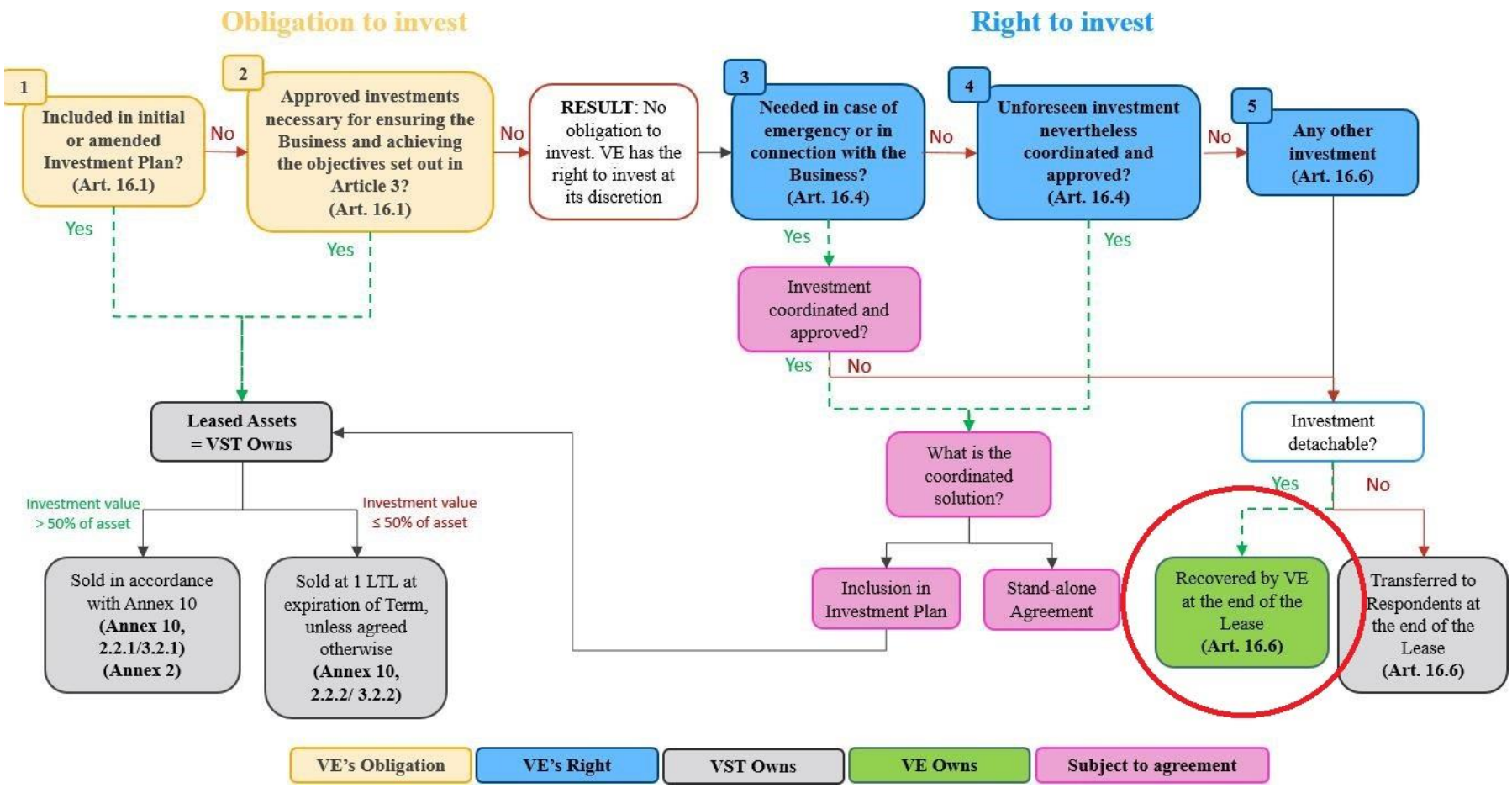
c. Movable assets repair or creation invested in by VE outside the Investment Plan, and the value of which exceeded 50% of the acquisition value of the leased movable asset under repair, shall be sold to VST at the price paid by VE to contractors or the price equal to costs incurred for the creation of the new movable asset (Annex 10, paragraph 3.2.1);

d. Movable assets repair or creation invested in by VE outside the Investment Plan, and the value of which did not exceed 50% of the acquisition value of the leased movable asset under repair, shall be sold to VST at the price of 1 Litas (Annex 10, paragraph 3.2.2).

1059. Since Claimants argue that all Disputed Assets may be detached from the Facilities, the question arises as to what conditions apply to the possible transfer of immovable property and movable assets in which VE invested outside the Investment Plan and without the approval of Respondents, but which may be detached from the Facilities and therefore fall outside the scope of application of Article 16.6 *in fine* of the Lease.

1060. Claimants argue that they own such assets and have no obligation to transfer them to VST, let alone for free.[1239] Claimants are nevertheless willing to sell those assets at a reasonable price.[1240] Claimants indeed interpret Article 16.6 of the Lease as providing that the assets in which VE chose to invest outside the Investment Plan, if detachable, remain VE's property.[1241] Claimants submit that the Disputed Assets fall within the category in green at the right bottom of their illustrative diagram reproduced hereunder:[1242]

[1239] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 230.
[1240] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 92.
[1241] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 238.
[1242] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 231.


Obligation to invest
Right to invest
1
Included in initial or amended Investment Plan? (Art. 16.1)
No
2
Approved investments necessary for ensuring the Business and achieving the objectives set out in Article 3? (Art. 16.1)
No
RESULT: No obligation to invest. VE has the right to invest at its discretion
3
Needed in case of emergency or in connection with the Business? (Art. 16.4)
No
4
Unforeseen investment nevertheless coordinated and approved? (Art. 16.4)
No
5
Any other investment (Art. 16.6)
Yes
Yes
Yes
Yes
Investment coordinated and approved?
Yes
No
Leased Assets = VST Owns
What is the coordinated solution?
Investment detachable?
Yes
No
Investment value > 50% of asset
Investment value ≤ 50% of asset
Sold in accordance with Annex 10 (Annex 10, 2.2.1/3.2.1) (Annex 2)
Sold at 1 LTL at expiration of Term, unless agreed otherwise (Annex 10, 2.2.2/ 3.2.2)
Inclusion in Investment Plan
Stand-alone Agreement
Recovered by VE at the end of the Lease (Art. 16.6)
Transferred to Respondents at the end of the Lease (Art. 16.6)
VE's Obligation
VE's Right
VST Owns
VE Owns
Subject to agreement

1061. Respondents for their part argue that, despite the above discussed provisions regarding the transfer of improvements to the Facilities at the end of the Lease, all Disputed Assets fall within the category of investments mandated by the Lease, and are therefore leased assets that must be transferred back to VST "*without the need for separate approval by the Respondents.*"[1243] Respondents rely on the "rationale" or overarching purpose expressed in Article 3 of the Lease that sets out the general targets of the Lease Project.[1244]

1062. The Arbitral Tribunal finds that Respondents' references to Article 3 are not specific enough to enlighten the interpretation of the Lease as to the ownership of assets in which VE invested outside the Investment Plan without the approval of Respondents. Respondents further interpret Article 16.1 of the Lease as mandating broad classes of investments beyond those set out in the Investment Plan.[1245] The Arbitral Tribunal considers that this provision is not directly relevant to the transfer of assets or property actually invested in but not anticipated in the Investment Plan, but rather to the scope of the Investment Plan itself.

1063. Respondents' position that VST's approval was not required for investments "*necessary to ensure the Business and achieving the objectives set out in Article 3*" or "*needed in case of emergency or in connection with the Business*"[1246] fails to convince the Tribunal. According to Respondents, their approval of investments outside the Investment Plan was only required with respect to "non-business investments":[1247]

> *"Under Article 16.6, only those investments that are cumulatively: (i) <u>not business-related</u>, (ii) have not been approved, and (iii) are may be 'detached from the Facilities' can be taken away by Vilnius Energy at the end of the Lease. Even then, VST does not pay for them, but rather Vilnius Energy physically takes them with it. VST simply would not have been in a position to pay for any assets at the end of the Lease, much less assets that are not business-related, given its hibernation."*[1248]

[1243] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2369.

[1244] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2376.

[1245] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 2381 ff.

[1246] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2414, see also paras. 2368-2369.

[1247] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2415, see also para. 2408.

[1248] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2431.

1064. The Arbitral Tribunal is not convinced that any investment could be made by VE that would have been "not business-related". Respondents have referred to the examples of "*tennis courts or a feature wall*"[1249] or "*staff vending machines*"[1250]. These illustrations are unconvincing and only lead the Arbitral Tribunal to conclude that Respondents' construction is artificial. In any event, the suggestion that any other investment than those in tennis courts and vending machines could have been made without the prior approval of Respondents is nonsensical.[1251] The procedure of approval set out in Article 16 is unequivocal. Further, Article 16.4 of the Lease suggests that even investments or renovations made by VE "outside the Business" must be co-ordinated with VST beforehand to be subject to monetary compensation or reimbursement.[1252]

1065. As stated above, Article 16.6 is clear as to the fact that VE was in principle free to remove and take away with it any improvement to the Facilities which it had decided to invest in at its own expense and risk and without VST's approval if such improvement is detachable from the Facilities. If the Disputed Assets are indeed detachable from the Facilities, VE is their owner and VST must pay for these Disputed Assets which it kept at the end of the Lease.

1066. For the reasons explained above, the necessity of a given Disputed Asset is not the determinant criterion to decide Claim 1. The Disputed Assets were all invested in "in connection with the Business". They however correspond to investments that were made outside the Investment Plan and outside the approval procedure set out in Article 16 of the Lease. If they are detachable, they fall outside the scope of application of Annex 10 which only deals with the transfer of assets/property that became subject to the Lease, and VST must purchase them to keep them. The detachability of each of the Disputed Asset is therefore a relevant criterion to determine Claim 1.

7.2 The standard for detachability

[1249] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 83.

[1250] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2368.

[1251] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2368.

[1252] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 16.4.

1067. Claimants contend that the word "detached" must be understood as physically detached from the Facilities. They point to the Lithuanian Civil Code according to which an investment made by a lessee without the approval of the lessor may be taken by the lessee at the end of the Lease if such investment can be detached "*without harm to the leased thing*."[1253] Claimants further rely on the definition adopted by its expert Fichtner, according to whom an asset is detachable from the facilities if 1) the asset is a complete, individual facility with its own function, and 2) the facilities can continue operating without said asset:[1254]

> *"In its expert opinion, and based on common knowledge and practice in the industry, the Consultant considers for the Disputed Assets that the following two factors appropriately demonstrate an asset's detachability:*
>
> *a) The asset is a complete, individual facility with its own function, i.e. in the case of the Flue Gas Condenser and the Steam Turbine, the generation of power or heat; and in the case of the hot water meters the measurement of hot water usage. In other words, the asset is not merely an integrated part of another facility, like a burner in a boiler. The asset is a facility in and of itself that performs a function to complement the other facilities.*
>
> *b) If the facility is completely removed, the remaining facilities can continue to operate properly and continuously*."[1255]

1068. Respondents' experts of Sweco have for their part relied on the following instruction to determine the detachability of the Disputed Assets:

> "*In the absence of a standard industry definition, we consider that the meaning of 'detached' must be understood in the context of the Lease. We do not purport to interpret the provisions of the Lease. We therefore rely on the following instructions given to us by Counsel for the Respondents as to the object and operation of the Lease:*

[1253] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 239.

[1254] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 240-241.

[1255] **CEX-005:** Rebuttal Expert Report of Jürgen Heinrich, Wolfgan Schroder, and Rainer Ratzesberger of the Fichtner Group, dated 11 January 2019, para. 141 (emphasis added), see also **CEX-013 :** Expert Report of Rainer Ratzesberger of the Fichtner Group, dated 26 May 2020, para. 188, Transcript, Day 13, 123/25-124/7.

a) The object of the Lease was the operation, upgrade and renovation of the DH facilities.

b) The Lease therefore obliged VE to invest in the DH facilities for the purpose of achieving the following targets, as set out in Article 3 of the Lease: […]

c) During the term of the Lease, VE had the following investment rights and obligations:

i) VE was obliged to do renovations of and investments in the DH facilities in accordance with the Investment Plan. The Investment Plan was to be periodically revised by the parties.

ii) VE was obliged to carry out any works and make investments which are not included in the Investment Plan but which are necessary for ensuring the DH business and achieving the targets set out in (b) above.

iii) VE had the right to do any investments and renovations that are not provided in the Investment Plan but needed in case of emergency or in connection with the DH business.

d) VE was obliged to transfer all investments described in (c) above to VST either during the term of the Lease, or at its end

e) VE could make other, non-business-related investments during the Lease term but was obliged to seek VST's prior approval to such investments. In relation to any such non-business-related investments made without VST's prior approval, those that "may not be detached from the Facilities" had to be transferred to VST at the end of the Lease.

f) During the term of the Lease, VE was obliged to ensure the regular, reliable and safe supply of heat, hot water and steam to customers in compliance with all legal requirements.

g) At the end of the Lease term, VE was obliged to hand back the upgraded and renovated DH facilities to VST in a Complete State, namely, facilities that would have been operated and maintained by a prudent, reasonable, skilled, and experienced international operator."[1256]

[1256] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 1174.

1069. Based on these instructions, Sweco adopts the following definition of detachability:

> *"In the context of the Lease as instructed to us, we consider that for an improvement to be 'detached from the Facilities', it should be able to be physically separated whilst meeting all of the following conditions:*
>
> *(a) On being separated, the remaining asset will not be damaged.*
>
> *(b) On being separated, no significant re-engineering/changes are required to permit the remaining asset to operate.*
>
> *(c) On being separated, the remaining asset will be able to fulfil its primary function whilst the operating parameters are no worse than the remaining asset had at the start of the Lease.*
>
> *(d) On being separated, the remaining asset will be able to be operated whilst meeting all legal requirements."*[1257]

1070. Sweco explains why it chose this definition as follows:

> "*We have identified these criteria for the following reasons. First, we consider that the criteria ought to focus on the effect of physical separation of the improvement from the remaining asset, and not the effect on the improvement itself. This is because the purpose of the Lease (as instructed to us) is to ensure that VST is handed back upgraded and renovated DH facilities. If the remaining asset is damaged by separating the improvement from it, or requires significant re-engineering/changes to operate, the improvement cannot be said to be capable of being "detached". This is reflected in our conditions (a) and (b).*
>
> *Second, we consider that upon separation of the improvement, the remaining asset should be able to fulfil its primary function within operating parameters no worse than those that existed at the start of the Lease. The operating parameters would, for example, include the heat and electrical output capacity. We consider that this arises from the object of the Lease being the upgrade and renovation of the DH facilities. In our view, an improvement cannot be said to be capable of being 'detached from the*

[1257] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 1175 (emphasis added).

Facilities' if to do so would mean that the remaining asset would operate with worse operating parameters than those prevailing at the start of the Lease. For example, if

separation of an improvement would mean that the remaining asset was generating less electricity than at the start of the Lease, that would mean that the improvement could not be 'detached from the Facilities'.

Third, it is not sufficient that the remaining asset be undamaged and able to physically operate – it must also be able to operate in compliance with the law. As set out above, we are instructed that VE was obliged to operate the DH facilities in compliance with the law. Therefore, in our view, an improvement 'may not be detached from the Facilities' at the end of the Lease if to do so would mean that the remaining asset could no longer operate in compliance with the law.

In identifying our criteria, we considered the criteria set out by FCG in its report."[1258]

1071. Experts from FCG had indeed been instructed by Respondents at the outset of the arbitration, before the instruction of Sweco, and had opined that an asset is detachable if three conditions are satisfied: 1) "[t]*he detached asset remains functional/operational after its complete removal and therefore could be re-used without substantial modifications from its original intended purpose*"; 2) "[c]*omplete removal of the detached asset from the remaining asset which it serves* […] *will not prevent the functioning/operation of the remaining asset*"; and 3) "[c]*omplete removal of the detached asset does not render the system inoperable or significantly inefficient*" it being understood that "*FCG considers that the system is inoperable in cases when, e.g., the remaining asset(s) cannot meet the occupational safety standards, the local emission standards or other mandatory requirements*."[1259]

1072. The Arbitral Tribunal first notes that the definition adopted by Claimants' expert Fichtner corresponds to the solution set forth by the Lithuanian Civil Code, which provides the following at Article 6.501:

*"**Article 6.501. Improvement of a thing***

[1258] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 1176-1179 (emphasis added).

[1259] **REX-002:** Expert report of FCG Design and Engineering Ltd., dated 19 February 2018, paras. 344-347 (emphasis added).

1. In the instances where the lessee with the permission of the lessor has made improvements of the leased thing, he shall have the right to compensation of the necessary expenses incurred by him for that purpose.

2. In the event where the improvements made by the lessee without the permission of the lessor are separable without harm to the leased thing, and where the lessor does not agree to compensate for them, they may be taken out by the lessee.

3. The value of improvements which are not separable without harm to the leased thing made by the lessee without the permission of the lessor shall not be subject to obligatory compensation."[1260]

1073. Fichtner's criteria for detachability are indeed that 1) the asset is a complete, individual facility with its own function to complement the other facilities, and 2) if the facility is completely removed, the remaining facilities can continue to operate properly and continuously.[1261]

1074. Respondents acknowledge Article 6.501(2) of the Lithuanian Civil Code quoted above,[1262] but add several criteria, notably two criteria to the effect that 1) upon removal of the Disputed Asset, the Facilities must be able to continue "*fulfil*[ing] *their primary function whilst the operating parameters are no worse than the remaining asset had at the start of the Lease*" and 2) upon the removal of the Disputed Asset, the Facilities must be able to continue "*operat*[ing] *whilst meeting all legal requirements*."[1263]

1075. In Respondents' submission, the standard of detachability must incorporate yet another criterion arising from a legal perspective, which entails a consideration of whether a given investment (in a Disputed Asset) "*advances the fundamental targets identified in Article 3 of the Lease Agreement — i.e. cutting the cost of electricity and heat production and of heat and hot water supply, upgrading heat and electricity generation and supply, retaining existing, and attracting, new customers*" [1264]. In the affirmative,

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[1260] **CLA-0007bis:** Civil Code of the Republic of Lithuania, Law No. VIII-1864 (Articles 6.210, 6.249, 6.501, and 6.535), Article 6.501.

[1261] **CEX-005:** Rebuttal Expert Report of Jürgen Heinrich, Wolfgang Schroder, and Rainer Ratzesberger of the Fichtner Group, dated 11 January 2019, para. 141 (emphasis added), see also **CEX-013 :** Expert Report of Rainer Ratzesberger of the Fichtner Group, dated 26 May 2020, para. 188, Transcript, Day 13, 123/25-124/7.

[1262] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2567.

[1263] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 1175 (emphasis added).

[1264] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2564.

according to Respondents, "*it cannot be said to be capable of being 'detached' from the Facilities. To hold otherwise would contradict the object of the Lease Agreement*."[1265] Respondents specify that this "*condition is in addition to those set out by Sweco*."[1266]

1076. The Arbitral Tribunal considers that the legal criterion argued by Respondents is not directly relevant to the issue of detachability. As already mentioned in its analysis of the Lease provisions relied on by Respondents, Article 3 and similar general provisions cannot be the basis for determining the conditions for the transfers of the Disputed Assets not included in the Investment Plan, let alone for setting out the standard of detachability under the Lease. As put by Claimants, "*for the Disputed Assets to belong to Vilnius Energy, the Disputed Assets would not only have to meet the Sweco criteria, but Veolia would also have to show that the Disputed Assets do not further any of the broad Article 3 objectives.*"[1267] Such approach would not only add to the text of Article 3, but would also deprive of meaning the criterion of detachability in Article 16.6 of the Lease. The Tribunal agrees with Claimants' statement in that respect that "*Respondents' so-called 'legal' criterion for detachability expands the concept of detachability beyond reason*".[1268]

1077. Regarding the condition set out by Sweco that upon removal of the Disputed Asset, the Facilities must be able to continue fulfilling their function "*whilst the operating parameters are no worse than the remaining asset had at the start of the Lease"*, as mentioned it has been a core issue of dispute between the Parties and their experts.

1078. Claimants argue that Sweco's approach is contrary to a technical and industry understanding of detachability and to the economics underlying the Lease:

> *"Sweco argues that separating a disputed asset must not worsen the operating parameters of the remaining assets.* […] *Sweco's standard would make it essentially impossible for any investment to be deemed 'detachable' because, by definition, the Facilities will almost always work more efficiently with the asset in question than without it. That is precisely why the asset was installed in the first place; all the more*

[1265] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2564.
[1266] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2564.
[1267] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 245.
[1268] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 246.

so, since Veolia exercised its right to make those investments at its own risk and cost. It should also be recalled that, as previously mentioned, efficiency was the only way for Veolia to reduce costs, and thus maximise its profits, under the Lease. Accepting Sweco's condition would necessarily make any asset that improves the system's operation 'non-detachable'. That simply cannot be the proper definition for detachability in a contract in which the only way to increase profits is to increase efficiency."[1269]

1079. Claimants' expert Fichtner has explained that Sweco's added condition is tied to Respondents' instruction on the legal interpretation of the Lease (with which the Arbitral Tribunal has disagreed):

"192. In the Consultant's opinion, expenses made for maintenance are in general for non-detachable assets. Whereas expenses for investments have to be considered as detachable if these are investments for asset groups such as generating units which are complete, individual facilities with their own functions.

193. Furthermore, maintenance expenses occur regularly during the performance of the business to keep the facilities operational. For example, during the lease period, the Client had expenses to the extent of EUR 70.8 million to maintain the facilities operational; which relates an average of EUR 4.7 million per year.

194. Investment expenses, on the other hand, are in general one-time investments, that do not recur once the asset is implemented. Also, expenses made as investments are usually in order to improve the facilities, like those in the investment plan.

[…]

196. For the disputed assets the Client invested expenses of about EUR 28.0 million for three distinctive investments to improve the facilities.

197. Since investments are considered by the Consultant in general to improve the facilities, the Consultant objects to Sweco's criteria to consider an asset detachable /3/, para. 1175, item (c) that separating a disputed asset shall not worsen the operating parameters of the remaining assets.

[1269] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 243 (emphasis added).

198. It appears that Sweco builds its detachability assessment around the notion that there are business and non-business-related investments. In the Consultant's opinion, this is not the result of any technical assessment by Sweco, but the result of legal instructions given to Sweco by Respondents. The Consultant therefore is not able to respond to or rebut such assessment that is based on differing legal opinions of the Client and Respondents."[1270]

"*Respondents' expert, Sweco, has used more criteria and more complex criteria which I do not agree comes in, particularly on one argument; and this is the argument: that if a facility, when it is detached, the remaining facilities are working the same, but Sweco is using the argument at the beginning of the lease. And my understanding of a term 'detachability', it should be prior to the instalment of this questioned facility.*"[1271]

1080. Fichtner was cross-examined by Respondents' counsel on the definition of detachability. Fichtner confirmed its technical, rather than legal approach as follows:

"Q. Yes. Okay. So what we -- what do we mean by to operate properly and continuously? Can I just confirm that this is a -- an engineering definition -- a fairly strict engineering definition?

A. Yes or a strict -- a strict -- straight into it if a facility which is detachable is installed there are changes in the overall system. And if I remove it and it's -- the remainder works as previously then it -- it's detachable, the facility is detachable. That is my understanding.

[…]

Q. So, sir, you don't seek to come up with a definition of 'detachability' that's harmonious with the other provisions of the lease agreement, correct?

A. I tried to define technical criteria -- technical criteria on the detachability to be able to judge if the disputed assets are detachable or not.

Q. Without taking into account any other provisions of the lease agreement; correct?

[1270] **CEX-013 :** Expert Report of Rainer Ratzesberger of the Fichtner Group, dated 26 May 2020, paras. 192-198 (emphasis added).

[1271] Transcript, Day 13, 124/8-15 (emphasis added).

A. I've not analysed the lease agreement in whole. I've looked from a technical perspective."[1272]

1081. The debate between the Parties as to whether the assessment of detachability must incorporate a legal dimension is, to some extent, tied to the Tribunal's analysis of the Lease provisions in the preceding section. This analysis has led the Tribunal to conclude that detachability, rather than the overall necessity to the Business, is the relevant criterion to determine Claim 1 and Counterclaim 8.

1082. In the same line of thinking, the Arbitral Tribunal is convinced that Fichtner's approach to detachability is more logical than Sweco's, who evidently struggled to integrate legal instructions on the overall interpretation of the Lease in what should have been a technical assessment for engineers. The Tribunal also agrees with Fichtner that the state in which the Facilities operate without the detached Disputed Asset should be compared to the state in which the Facilities operated before the addition of the Disputed Asset, not the state of the Facilities at the beginning of the Lease.

1083. In these circumstances, the Tribunal finds that the correct standard for detachability should not include a test whether the Facilities can continue fulfilling their function "*whilst the operating parameters are no worse than the remaining asset had at the start of the Lease"*, as such test incorporates legal aspects that are not directly relevant to the detachability of a given asset.

1084. Regarding Sweco's criterion that upon the removal of the Disputed Asset, the Facilities must be able to continue "*operat*[ing] *whilst meeting all legal requirements*",[1273] the Arbitral Tribunal notes that during its cross-examination on the detachability of the Hot Water Meters, Mr. Ratzersberger of Fichtner admitted that, generally, compliance with legal requirements should be part of the standard for detachability:

"Q. So would a reasonable and prudent operator look at Lithuanian law? And would it detach several hundred thousand hot water meters and leave its client in a position where it is in non-compliance with the law?

[1272] Transcript, Day 13, 199/25-202/9 (emphasis added).

[1273] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 1175 (emphasis added).

A. I've looked in my report from a technical perspective. I've not analysed the legal consequences. I was not aware on the legal requirements; and I have not analysed the legal -- the purpose of the legal requirements on the hot water meters.

THE CHAIRMAN: Would you agree then, in fact, that your criteria for detachability should also include the respect of the law, the compliance with the law?

A. Yes, sure, because my understanding is that the leased equipment had to be operated according to the law. But I -- in my expert report -- have looked from the technical perspective.

THE CHAIRMAN: But we may add that to the list of criteria that it should be --

A. Yes. Yes."[1274]

1085. In view of the above, it appears that the Parties' experts agree on the inclusion of the criterion that a Disputed Asset is only detachable if, after its removal, the Facilities are able to continue operating whilst meeting all legal requirements.

1086. In sum, the Arbitral Tribunal finds that, in order to be considered detachable for the purpose of Article 16 of the Lease, the following conditions must be fulfilled:

a. The Disputed Asset is a complete, individual asset with its own function;

b. If the Disputed Asset is completely removed from the Facilities, the Facilities can continue to operate properly and continuously.

c. Upon removal of the Disputed Asset, the Facilities will be able to be operated whilst meeting all legal requirements.

7.3 The Economizer

1087. The Parties disagree as to whether the Economizer was necessary, the reasons for Respondents' non-approval of that investment, and whether the Economizer is detachable from the Facilities.

[1274] Transcript, Day 13, 216/7-25.

1088. As decided above, the detachability of a given Disputed Asset is the first relevant issue to be determined. Indeed, if the Economizer is not detachable from the Facilities, it is subject to the transfer provisions of Annex 10 to the Lease. If it is detachable, it is an asset owned by VE which must be paid for by Respondents who have kept it in the VE-2 plant.

1089. Respondents argue that the Economizer is not detachable from the Facilities as its removal would bring an unacceptably high risk that Biofuel Boiler GK-4 in VE-2 emits particulates beyond the monthly average limit of 30 mg/Nm3 and the daily average limit of 33 mg/Nm3 imposed by EU law. Respondents refer in that regard to the conclusions of Sweco, who performed an analysis of particulate concentration testing taken from the boiler when the Economizer was bypassed:[1275]

> "*1200. Fichtner attaches to its report a table of data that states the results of four measurements over a period of about two hours. The results record that the concentration of particles 'after the electrostatic filter' was up to 21.4 mg/Nm³.*
>
> […]
>
> *1201. In our opinion, this testing was too limited to draw conclusions as to what the emissions levels from Steam Boiler No. 4 would be if the Economizer was removed. The measurements have been taken on Steam Boiler No. 4 during a limited period from 12:11 to 14:25 hours on a single day. During that limited period, the boiler was operated at a single load condition (namely, full load, as indicated by the reference to 75 tonnes of steam per hour) and would only have been able to burn one type of wood. Different types of wood will produce different particulate emissions levels, depending on their bark content, for example. The emission levels might also change if the boiler operates under different operating parameters (e.g. differing moisture content of the fuel, excess air ratio, flue gas temperature, etc.).*
>
> *1202. It is expected that Steam Boiler No. 4 will operate with different types of wood and at different loads. Therefore, a range of measurements should be taken for varying wood fuel types and load conditions in order to determine whether emissions levels would be within the permissible range. In our view, the measurements presented by Fichtner are not sufficient to demonstrate that the emissions levels from Steam Boiler No. 4, having been through the dry ESP*

[1275] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1094.

only before being exhausted to atmosphere through the chimney, would be within the permissible range.

1203. In September 2019, VST commissioned an external certified agency to conduct an independent assessment of the emissions level from the dry ESP. Table 50 show the results of that test and that the concentration of particles "After electrostatic filter" was up to 130.5 mg/Nm³ with an average of 43.4 mg/Nm³."[1276]

1090. Sweco observe that, based on the results of their own and VST's further test, "*Steam Boiler No. 4 could not operate in compliance with current emissions regulations if the Economizer was removed*".[1277] Sweco however quickly follows with a caveat that these tests are not more reliable than Fichtner's:

"*1204. These results indicate that Steam Boiler No. 4 could not operate in compliance with current emissions regulations if the Economizer was removed. However, these test results are limited in the same way as those relied upon by Fichtner are, i.e. they were taken over a limited period (between 12:30 hours and 14:00 hours) when the boiler was operating under at a single load condition (namely, at or close to full-load). Therefore, like the Fichtner results, they are too limited to draw conclusions as to what the emissions levels from Steam Boiler No. 4 would be if the Economizer was removed and Boiler No. 4 was operated with different fuels and under different, but normal, operating conditions.*

1205. VST itself also carried out two other tests to measure the particulate matter concentration in chimney no. 5 at VE-2 when the Economizer is by-passed, in August and October 2019.

1206. Figure 84 below shows the results a test carried out in August 2019, between 10:28 hours on 6 August 2019 and 00:42 hours on 8 August 2019. The first graph shows the results over that period. The average measurement (after correcting for pressure, to 6% O2 and moisture content in the flue gas) was 29 mg/Nm³. This is very close to the monthly average value limit of 30 mg/Nm³, and the daily average value limit of 33 mg/Nm³.

[…]

[1276] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 1200-1203 (emphasis added).
[1277] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 1204.

1209. The tests conducted in August and October 2019 are also limited in that they were conducted whilst operating the boiler on one load only. Therefore, the August and October 2019 tests, although conducted over a longer time period than the 23 September 2019 test and the test relied upon by Fichtner, are not conclusive. It is possible that using different types of fuel, for example, will result in different particulate matter emission levels.

1210. In Sweco's opinion, a proper series of tests should be conducted to validate whether Boiler No. 4 meets the regulated emission limit when it is operating under a range of different, but normal, conditions, and with a range of typical wood fuels for which the boiler was designed."[1278]

1091. Fichtner criticized Sweco's references as inconclusive, and emphasized that the results of the tests conducted by Sweco include an outlier which Sweco nevertheless includes in the average emission value it relies on to conclude that the Economizer is not detachable:

"206. Sweco claims /3/ para. 1201 that the measurements taken in 2014 after the refurbishment of the ESP (21.4 mg/Nm3) and cited by Fichtner /2/ are not relevant, stating that the duration of the test of about 2 hours on a single day limits the range of fuel quality and operating conditions too much.

207. On September 23rd, 2019 a test was carried out by a certified agency commissioned by the Respondent. The table presented by Sweco /3/ table 50 shows values of 12.6 / 19.2 / 130.5 / 11.2 mg/Nm3 at standard terms. The average of these values is 43.4 mg/Nm3. The singularity of a value of 130.5 mg/Nm3 exceeding the other values by one order of magnitude and thus bringing the average value to 43.4 mg/Nm3 was not commented by Sweco. However, again Sweco draws the conclusion that the short duration of the test of 1.5 hours limits the range of the fuel quality and operation conditions too much to draw valid conclusions on the emission values of the boiler under different fuel and operation conditions /3/ para. 1204.

208. In August 2019 the Respondent carried out two tests, on August 6th and August 9th, /3/ Figure 84 and a third test was carried in attendance of Sweco on October 7th, 2019. All these three tests resulted in values for particulate matter lower than the legal limit of 30 mg/Nm3. Even though the tests were run over a longer period of time the results have been dismissed by Sweco claiming the boiler was operated at one load (full load) only /3/ para. 1209.

[1278] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 1204-1210 (emphasis added).

209. Sweco concluded that the particulate matter emission value can only be established conclusively if the boiler is operated over a longer period of time, in different loads within the boilers load range and with a range of typical wood fuels for which the boiler was designed /3/ para. 1210.

210. From the tests presented by Sweco, the Consultant can only derive that no violation of legal requirements could be testified by the Respondents. Even the seemingly high value of 130 mg/Nm3 is, as a timely isolated occurrence, within the allowed legal limits for time averaging.

211. Furthermore, lower loads with lower flue gas amounts will result in lower particulate matter emission values. And firing fuels with the same or higher quality than applied during the test will further contribute to lower particulate matter emissions. Therefore, the Consultant consider that these tests are sufficient to conclude that, once the flue gas condenser is detached, the facilities could still operate within the legal limits for particulate matter emission.

212. The flue gas condenser is, in the opinion of the Consultant, a detachable item since the condenser can be detached without undue effort and the remaining boiler system was designed to be operational without violation of legal emission requirements depending on the dry ESP installed downstream the boiler and not being part of the detachable flue gas condenser with its allocated wet ESP."[1279]

1092. Respondents have answered these criticisms as follows:

"1094 […] *Fichtner criticizes this analysis, noting that of the four data points, (i) three are below the EU law threshold and (ii) the one datapoint above the EU law threshold is an outlier.1 This analysis is flawed for one simple reason: If Fichtner is ex hypothesi correct that the one datapoint is an outlier, the remaining datapoints are perilously close to the EU threshold: taking for instance the test of 6-8 August 2019, during which emissions were 29 mg/Nm3.*

1095. Respondents could theoretically contract for the highest possible quality biofuel to minimise emissions […] However, *a single non-conformant delivery from its supplier would render the operation of the biofuel boiler illegal. It is not plausible that the Parties would, when concluding*

[1279] **CEX-013 :** Expert Report of Rainer Ratzesberger of the Fichtner Group, dated 26 May 2020, paras. 206-212.

the Lease, have considered an asset to be 'detachable' if its removal means that the remaining facilities are only intermittently lawful to operate."[1280]

1093. The Arbitral Tribunal's decision comes down to whether the Facilities would emit particulates beyond limits set by the EU. The Tribunal is provided with the opinions of two experts, but these experts rely on data which they qualify themselves as insufficient.

1094. As seen above, Sweco's conclusion that the Facilities could not operate in compliance with current emissions regulations if the Economizer was removed stems from tests that Sweco itself recognizes to be limited. Sweco's ultimate opinion seems to be that "*a proper series of tests*" is in fact necessary to validate their conclusion.[1281] Further, save from one test value, the other test results to which Sweco refers tend to support a conclusion that the emissions were within the acceptable daily limit of 33 mg/Nm3.[1282] Sweco's finding that the emissions would or may exceed the legal limit is therefore solely based on what is commonly referred to as an "outlier". This is not a situation in which an outlier figure may have influenced the average considered by Sweco. Rather, the outlier is the sole figure that supports Sweco's findings. When excluding this figure, Sweco's demonstration fails.

1095. In these circumstances, the Arbitral Tribunal finds it reasonable to rely on the broader results relied on by Fichtner who conclude that tests established that the Economizer would be able to operate within the emissions limits imposed by the EU.

1096. In view of the above, the Arbitral Tribunal decides that removing the Economizer would have not precluded VST from operating the Facilities in compliance with legal requirements.

7.4 The Hot Water Meters

[1280] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1095.
[1281] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 1210 (emphasis added).
[1282] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 1203 ff.

1097. Respondents contend that VE was obliged to install the Hot Water Meters "*by law and the terms of the Lease*" and that these Meters are therefore subject to the transfer provisions of the Lease.[1283] Respondents rely on Article 15.2 of the Lithuanian Law on the Heat Sector of 2009, which provides as follows:

> *"2. Until the consumer chooses the supplier of hot water or the method of supply of hot water, hot water shall be supplied by the supplier of heat. The hot water supplier shall install in apartment blocks and other premises hot water meters, monitor the meters and carry out the conformity check on the apartment blocks, if contracts for installing, supervising and carrying out conformity check on them in apartment blocks if contracts concluded before the entry into force of this law do not provide otherwise.*"[1284]

1098. Claimants oppose that the Lease defines the Business as "heat and power production" and that "[f]*rom the outset, Veolia's Business* […] *did not encompass the supply of hot water as a regulated hot water supplier- it only comprised the heating of cold water for customers*."[1285] According to Claimants, given that VE's activity of hot water supplier was not envisaged in the Lease but brought about by the 2009 amendment of the Law on the Heat Sector, "*the disputed* [Hot Water Meters] *are wholly unrelated to Veolia's Business under the Lease.*"

> *"299* […] *Respondents maintain that the Lease, as negotiated and concluded in 2002, encompassed the HWM in dispute, which Veolia only became obliged to install following a change in law occurring in 2010, some eight years later. This is misleading. For the avoidance of doubt, the HWM in dispute are not the meters referenced in Article 22.1 of the Lease, but are instead the HWM that Vilnius Energy installed pursuant to an amendment to the Law on the Heat Sector in 2009 ("**2009 Law on the Heat Sector**"), which re-categorized Veolia as a "hot water supplier". Until then, Veolia had been supplying heat for three main purposes: (i) to heat air in buildings and homes (ambient heat), (ii) to heat cold water (water heat), and (iii) to maintain the temperature of hot water so that it was available on demand (circulation heat) in its capacity of regulated "heat supplier".*

[1283] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2369, see also **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1088.

[1284] **CLA-008:** Republic of Lithuania, Law on the Heat Sector, No. XI-250, as amended, dated 12 May 2009.

[1285] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 297.

300. In 2009, Lithuania amended the Law on the Heat Sector such that "heat suppliers" were required to also become regulated "hot water suppliers" in order to retain the ability to supply the water that they had merely been heating for customers prior to this. This forced Veolia to become a regulated "hot water supplier", a position it had never previously held. The supply of hot water by a "hot water supplier" was treated under an entirely separate regime to the heating tariff regime, in accordance with a "hot water tariff" established by the Pricing Commission. Being a "hot water supplier" did not require the same licensing as being a "heat supplier". Clearly, the business of supplying hot water (which includes sourcing the water itself) is not the same as the business of supplying heat to heat cold water (without being able to charge consumers the regulated water tariffs).

301. The 2009 Law on the Heat Sector required hot water suppliers to "install in apartment blocks and other premises hot water meters, [and to] monitor the meters" to be able to charge customers the regulated hot water tariff. These HWM, once installed, remained Vilnius Energy's property. These meters are the disputed HWM, and only relate to the status of a regulated "hot water supplier", which Veolia became in 2010 (when the 2009 Law on the Heat Sector entered into force).

302. The disputed HWM are wholly unrelated to Veolia's Business under the Lease. By passing the 2009 Law on the Heat Sector, the Lithuanian Government essentially added a new regulated activity to Veolia's enterprise in Lithuania. From 2010, Vilnius Energy could supply hot water to customers in Lithuania, entirely outside of the investment mechanism under the Lease, and without a "heat supplier" license from the Lithuanian Government – in fact, Veolia could even continue to do so now, after the Lease expired.

303. Because the HWM in dispute were not comprised in the scope of Veolia's Business, they were never included in the Investment Plan: neither the Respondents nor Veolia had anticipated that Veolia would have to install this type of HWM during the course of the Lease, and so there could never have been discussions around their inclusion in the Investment Plan.

[…]

305. Accordingly, the HWM never entered, and never could have entered, the pool of Leased Assets that VŠT owns pursuant to Article 16.1 of the Lease. Therefore the HWM did not belong to VŠT."[1286]

[1286] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 299-305 (emphasis added).

1099. It is undisputed that VE/VST became a regulated hot water supplier as from 2010. In view of the obligation for the hot water supplier to install and monitor Hot Water Meters, there is therefore no debate as to the fact that removing them from the Facilities would make it impossible to operate them legally. The fact that such legal requirement was nonexistent at the beginning of the Lease cannot alter this conclusion. Indeed, VE did supply hot water to Vilnius citizens as from 2010 and it did so through the leased Facilities. It would therefore be artificial and unfair to consider that VE's activity as a hot supplier falls entirely outside the Business as per the Lease.

1100. Claimants further submit that, even if the Tribunal were to consider that the Hot Water Meters are subject to the lease, these are detachable:

> *"The HWM were installed in 2010 by replacing a small portion of pipe from the customers' private pipe sections with the HWM. This means that: (i) the HWM are not attached to the Facilities at all – again, they are attached to the customers' section of the pipes, which do not belong to the Respondents; and (ii) even if such pipe sections on which the HWM are installed were to be considered as part of the Facilities, the HWM could be removed and replaced by the initial section of pipe which Veolia removed to install them without causing any damage and the supply of hot water would continue to flow to the customers' housing seamlessly. Another illustration of the HWM' detachability is the fact that, every six years, hot water suppliers remove the HWM to perform metrological tests*".[1287]

1101. Respondents have not answered the above comments on the possible removal of the Hot Water Meters, and have rather focused on other weaknesses in Fichtner's analysis due to a lack of Fichtner's information as to notably the number of Hot Water Meters concerned:

> "*Fichtner's opinion that hot water meters are detachable (i) is contrary to common sense and (ii) is unsustainable in light of concessions made during the hearing. Dr. Ratzesberger's opinion that hot water meters are detachable is based on the assumption that there were 'around 7,000 customers' with hot water meters. This admission demonstrates that:*

[1287] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 316.

- *Fichtner failed to verify basic facts material to its opinion. Dr. Ratzesberger confirmed, 'there's* [...] *an economic aspect to engineering'. The 'economic aspect' of replacing 7,000 hot water meters is already highly doubtful and becomes wholly nonsensical when applied to several hundred thousand meters.*

- *Fichtner is ignorant of basic aspects of the Business due to its limited instructions. The EUR 50 m hot water meter tender, through which VE contracted with a Rubicon entity for 293,000 hot water meters,1942F1943 was VE's largest procurement in monetary terms. Further, there were about 223,600 hot water customers in Vilnius in 2011, not 7,000. According to Veolia's representations in this arbitration, 170,000 meters were installed up until 2017.*

- *Fichtner's approach does not comport with basic common sense. How is it possible that 'five to ten' Fichtner engineers spent 'several weeks' in Vilnius preparing Fichtner's 2016 study, yet Dr. Ratzesberger (i) formed the opinion that a city with a population of over 500,000 people had a mere 7,000 hot water meters and (ii) held this opinion with such conviction that he did not consider it necessary to verify its accuracy?*"[1288]

1102. The Arbitral Tribunal has decided that the detachability standard it would apply includes a condition that upon removal of the Disputed Asset, the Facilities will be able to be operated whilst meeting all legal requirements. All conditions of that standard are cumulative, and the question whether it would be feasible to remove the Hot Water Meters from the Facilities, is therefore not determinant in itself, as the Facilities must also be able to be operated whilst meeting all legal requirements.

1103. The fact that the activity of hot water supplier was inexistent at the beginning of the Lease does not affect the conclusion that the Facilities could not be operated whilst meeting the requirement of Article 15.2 of the Law on the Heat Sector if the Hot Water Meters were to be removed from them.

1104. In these circumstances, the Arbitral Tribunal concludes that the Hot Water Meters are not detachable, and therefore fall within the scope of Article 16 of the Lease.

[1288] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1087 (emphasis added).

7.5 Steam Turbine No. 5 (ST-5)

1105. Claimants and Fichtner argue that ST-5 is detachable from the Facilities.[1289] Fichtner explains that the parallel turbine ST-4 would pick up the electricity generation required to supply heat to the Vilniaus consumers:

> *"218. The Consultant considers the steam turbine ST-5 including the district heating water pump TS-19 dedicated to ST-5 (the "Steam Turbine") to be detachable because it meets the conditions that the Consultant believes are applicable to the determination of detachability.*
>
> *219. Figure 9.3-1 depicts the generation unit comprising the steam turbine ST- 5 with other related equipment. As could be seen from the Figure 9.3-1 this generation unit can be removed (detached). The steam expanded by the turbine ST-5 and utilized for district heating could then be processed by either steam turbine ST-4 or the existing pressure reducing stations expanding steam from 40 bar to the 1.2 bar header.*
>
> *220. The Consultant is of the opinion that the addition of steam turbine ST-5 improved the facilities.*
>
> *221. In case steam turbine ST-5 is removed from the facilities, the parallel operating steam turbine ST-4 can further generate electricity. Sweco (/3/, para. 1244) state that Fichtner fail to account for the fact that removal of steam turbine ST-5 would reduce overall electrical output of the facilities. This is incorrect. In Consultant's opinion, it is irrelevant to the assessment of detachability whether the electricity production of the facilities would be reduced, if steam turbine ST-5 were removed. Electricity required by the Client to operate the facilities or to supply the customers with heat could be generated by steam turbine ST-4 or supplied by the electrical grid. Therefore, even if ST-4 failed, electricity could be supplied by the electrical grid. The major purpose of the facilities is to supply heat to the customers. This function can be fulfilled without electricity production from steam turbine ST-5. As such, the reduction of overall electrical output of the facilities is not relevant to determine whether steam turbine ST-5 can be detached.*
>
> *222. Additionally, in case steam turbine ST-5 is removed from the facilities, an unlimited supply of heat to the district heating network by utilizing the reducing stations*

[1289] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 282-286.

bypassing steam turbine ST-4 and steam turbine ST-5 is possible. Furthermore, heat to the district heating network could be supplied via steam turbine ST-4.

223. The Consultant is of the opinion that steam turbine ST-5 and related equipment can be detached since it is a separate generating unit."[1290]

1106. Respondents argue that ST-5 is not detachable, as detaching it would further decimate the Lease's electrical generation business.[1291] Respondents detail the importance of ST-5 in terms of electricity generation as follows:

If Steam Turbine No. 5 was removed, VE-2's total electrical output would fall to 12 MW. The situation becomes more dire again if the moth-balling of VE-3 is taken into account. At the start of the Lease, the electrical generation capacity of the Business was 384 MW (i.e., combining VE-2 and VE-3s's initial output in heat extraction mode). At the end, if Steam Turbine No. 5 was detached, it would be 12 MW. Furthermore, if Turbine No. 5 was detached, Dr. Ratzesberger confirmed that the VE-2 plant would only be left with Turbine No. 4. This turbine was commissioned in '1956[/]*1957' and has 'reached the end of its operational life'* […] *The Parties cannot rationally have intended for an asset to be detachable for the purposes of Article 16.6 where the removal of that asset would be contrary to the objectives of the Lease*."[1292]

1107. Respondents' position is supported by Sweco, which states on ST-5 that:

"In our opinion, although Steam Turbine No. 5 is capable of being physically separated from the Facilities, it does not meet our condition (c), i.e. that on being separated the remaining asset will be able to fulfil its primary function whilst the operating parameters are no worse than at the start of the Lease period. Therefore, Steam Turbine No. 5 may not be "detached from the Facilities".

[…]

While Fichtner is correct that the system could continue to produce heat in a high efficiency hot water boiler, the plant's electricity production levels would fall far below 2002 levels.

[1290] **CEX-013 :** Expert Report of Rainer Ratzesberger of the Fichtner Group, dated 26 May 2020, paras. 218-223.
[1291] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1090.
[1292] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 1090-1091 (emphasis added).

[…]

As stated above, the removal of Steam Turbine No. 5 would mean the electrical output capacity would be far worse than at the start of the Lease. For this reason, we do not consider that Steam Turbine No. 5 may be "detached from the Facilities".[1293]

1108. As is clear from Respondents' above quoted submission as well as from Sweco's statements, Sweco applies its condition that "[o]*n being separated, the remaining asset will be able to fulfil its primary function whilst the operating parameters are no worse than the remaining asset had at the start of the Lease*"[1294] to conclude to ST-5's detachability.

1109. That condition was rejected by the Tribunal and does not form part of the standard of detachability the Tribunal has decided should apply to Claim 1 and Counterclaim 8. The condition that the Tribunal has retained as part of the standard it would apply is that, if the Disputed Asset is completely removed from the Facilities, the Facilities can continue to operate properly and continuously, as they were able to at the beginning of the Lease. The Facilities need not be operable at the same level of efficiency as they were prior to the installation of the Disputed Asset. They just need to be able to operate properly and continuously, in line with an engineering understanding of what is detachability.

1110. As seen above, Respondents and Sweco do not contest that ST-5 can be physically removed from the Facilities and that the Facilities could continue being operated. Rather, they state that "*the removal of Steam Turbine No. 5 would 'result in a significant commercial impact on the overall plant economy*".[1295] However, as rightly put by Claimants, "[t]*he Respondents' assertion regarding a 'significant commercial impact' is not a legally defensible criterion for assessing whether ST-5 is detachable*."[1296]

1111. In view of the above, the Arbitral Tribunal concludes that ST-5 is detachable.

[1293] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 1240-1246.

[1294] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 1175 (emphasis added).

[1295] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 1348.

[1296] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 284.

7.6 The Disputed Cars

1112. Regarding the Disputed Cars and Inventory, Respondents submit, in addition to their allegation that they were necessary to the Business, that "[i]*n any event, the items that comprise Cars and Inventory were each below 1,000,000 Litas and therefore VST's approval was expressly not required by Article 16.5 of the Lease*."[1297] Claimants answer that this does not mean that such investments automatically become leased assets, because Article 16.5 of the Lease does not prohibit approval.[1298] The Arbitral Tribunal will interpret the situation in light of Article 16.5 which reads as follows:

> "*16.5. The Lessor shall be required to give its consent or refusal to any such unforeseen renovations and investments within 30 business days after receipt of the appropriate request. Single unforeseen investments or renovations not exceeding 1.000.000 Litas are excluded from these provisions. The Lessee shall not divide large investment, i.e. those in excess of 1.000.000 Litas, into small units to take advantage of this exception*."[1299]

1113. This provision states that "[s]*ingle unforeseen investments or renovations not exceeding 1.000.000 Litas are excluded from these provisions.* The Arbitral Tribunal however notes that, if the lessee shall not divide large investments into small units to by-pass the approval procedure set out in Article 16.5, it is only a logical and fair corollary that the lessor may not divide investments into individual units to avoid paying for them outside of the Lease's terms.

1114. Respondents have also argued that the Disputed Cars are not detachable in light of their "vast bulk" nature.

> *"An individual vehicle may be detachable. However, if this grouping is applied to the Business' fleet of vehicles, Dr. Ratzesberger of Fichtner confirmed expressly that the vehicle fleet* "[is] *not detachable" if* "[it is] *required to do the business". Here, the vehicle fleet is inarguably needed for the Business, as without a fleet of vehicles, it would be*

[1297] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2369.

[1298] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 189.

[1299] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 16 (emphasis added).

impossible to transport the staff and equipment needed to maintain a district heating network with a linear length of (as Fichtner itself assessed) 725 kilometres.

It is similarly not permissible to detach the vast bulk of the fleet. Depending on how the fleet is defined, Veolia removed either 87% (if the fleet is defined as the number of vehicles transferred to VE in 2002) or 90% of the fleet (if the fleet is defined as the number of vehicles VE held in 2016). Fichtner's detachability test would not consider 87%-90% of the fleet (if grouped together) to be detachable, as the Business would be crippled. It would also defeat the Parties' intentions if Veolia could circumvent the detachability provision by keeping 90% of a "facility" for itself. Veolia's actions therefore breached the Lease Agreement. That the Respondents seek relief in respect of only 24 vehicles illustrates the modest and conservative nature of this counterclaim."[1300]

1115. Dr. Ratzesberger's exchange with the Tribunal regarding the detachability of VE's cars fleet was as follows:

"THE CHAIRMAN: Again, to gain time, are the cars detachable? Because if you say they are detachable but you take them away, the business could not continue operate because the people who are doing the maintenance are not supposed to go there by foot or on a bike.

A. Hmm.

THE CHAIRMAN: So they need these cars, given the large 700 km network.

A. Yes.

THE CHAIRMAN: So if you say they are detachable, you might incapacitate the maintenance of the network. That would imply that they are not detachable?

A. Yes, if they are -- if they are required to do the business they are not detachable."[1301]

1116. Dr. Ratzesberger seems to have deviated from his clear engineering approach to detachability when accepting that cars should be deemed not detachable "*if they are*

[1300] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 1097-1098.
[1301] Transcript, Day 13, 207/7-25.

required to do the business". The Arbitral Tribunal however disagrees with Dr. Ratzesberger's departure from the standard he has himself set, according to which an asset is detachable if 1) the asset is a complete, individual facility with its own function, and 2) the facilities can continue operating without said asset.[1302] The third condition is, as accepted by Dr. Ratzesberger,[1303] that 3) upon removal of the asset, the Facilities will be able to be operated whilst meeting all legal requirements.

1117. The third condition on conformity with legal requirements is not in dispute. Further, it is evident that each of the 24 cars is an asset which is, as such, a complete, individual facility with its own function (first condition). Finally, without such cars, the Facilities would continue to operate properly and continuously (second condition). Hence, all three conditions of detachability are met.

1118. In any event, even if the Arbitral Tribunal were to deviate from the engineering approach to detachability, Respondents' argument that the Disputed Cars are not detachable because they are necessary to VST's Business is defeated by the number of cars in discussion. As put by Claimants:

> *"While it may be that the district heating business needs cars in a general sense, it is not credible for the Respondents to argue that the district heating business would not be able to function without the 24 specific Disputed Cars, particularly when Vilnius Energy used more than 180 cars in the operation of the Business. A large part of these cars (which belong to VŠT) are now at the Respondents' disposal to be used to operate the Business. This was confirmed by the Respondents at the Hearing. The Respondents' allegation that the business could not operate normally without the 24 Disputed Cars is preposterous."*[1304]

1119. In view of the above consideration, the Arbitral Tribunal decides that the Disputed Cars are detachable and must therefore be paid by VST outside the Lease mechanism.

7.7 The Disputed Inventory

[1302] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 240-241.
[1303] Transcript, Day 13, 216/7-25.
[1304] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022,para. 294.

1120. Claimants refer to Annex 5 to the Lease on the "Short Term Assets Transfer Conditions" to argue that Respondents should have purchased the Disputed Inventory at the end of the Lease, just like VE purchased the "short term assets" following the procedure of Annex 5 at the start of the Lease.[1305]

1121. Respondents for their part submit that the Disputed Inventory "*is not the inventory referred to in Annex 5 of the Lease, but a group of disputed assets that the Parties defined as "Inventory' in Annex 2 of the 2017 SPA*",[1306] which was concluded by the Parties pending resolution of their dispute on the ownership of the Disputed Assets.[1307]

1122. Annex 5 to the Lease is entitled "Short Term Assets Transfer Conditions". Its preamble refers directly to Article 4.2(iv) of the Lease, which stipulates the following:

> ***"ARTICLE 4. EFFECTIVE DATE OF THE LEASE AGREEMENT AND CONDITIONS OF CLOSING***
>
> […]
>
> *4.2. The Parties agree to deem the Facilities leased and the Closing completed upon fulfilment of the following pre-requisite conditions:*
>
> *(iv) payment to the Lessor to its bank account for any short-tem1 assets (fuel, materials, consumer debts, etc.) transferred (sold) to Newco in accordance with Annex 5."*[1308]

1123. The above as well as the procedure set out in Annex 5 for the purchase of certain assets concerns the transfer of short-term assets at the beginning of the Lease, not at the end of its Term. Claimants' reliance on Annex 5 is therefore inapposite, but it does not impact on the outcome of Claimants' Claim 1, which concerns assets that must in any event be paid for by Respondents insofar as they fall outside the scope of Article 16 of the Lease. As put by Claimants:

[1305] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 318-320.

[1306] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2534.

[1307] **C-032:** Sales-Purchase Agreement between Vilniaus Šilumos Tinklai, Vilnius City Municipality, Vilnius Energy and Veolia Environnement S.A., dated 29 March 2017.

[1308] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 4.2(iv).

> *"In is undisputed that the Disputed Inventory was not needed or purchased in response to an emergency. On the contrary, the Disputed Inventory was available to prevent the need to purchase spare parts in the event of such an emergency. The Disputed Inventory is therefore excluded from Category 3.*
>
> *For the same reason, the Disputed Inventory did not result from an unforeseen situation – it was precisely available to face such situations. The Disputed Inventory is therefore excluded from Category 4.*
>
> *As a result, if considered as an investments under the Lease, the Disputed Inventory would be comprised in Category 5. It is undisputed that the Disputed Inventory is detachable – it is by its very nature not attached to the Facilities. Therefore, the Disputed Inventory remained Vilnius Energy's property at the end of the Lease, for which it is entitled to payment from the Respondents."*[1309]

1124. Indeed, Respondents do not dispute that the Disputed Inventory is detachable.

1125. The Tribunal notes Respondents' reliance on Article 16.5 and the exception of investments below 1,000,000 Litas from the approval procedure. It refers in that regard to its conclusions in relation to that argument made in the section on Disputed Cars.[1310]

1126. In view of the above considerations, it can be concluded that the Disputed Inventory fulfills all conditions of the detachability test and that it corresponds to investments that were not approved by Respondents pursuant to the procedure set out in Article 16 of the Lease. The Disputed Inventory is therefore not subject to Article 16 and Annex 10, and must be purchased by VST.

7.8 Conclusions

7.8.1 The Economizer, ST-5, the Disputed Cars and the Disputed Inventory

1127. The Arbitral Tribunal has decided that the Economizer, Steam Turbine No. 5, the Disputed Cars and the Disputed Inventory were detachable, in addition to being assets that correspond to unapproved investments. Since these assets are detachable, they

[1309] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 326-329.
[1310] See above para. 1117.

do not fall within the scope of Article 16.6 of the Lease. Respondents must pay for these assets outside of the Lease mechanism.

1128. The Parties however disagree on the valuation of certain assets, as summarized by Claimants in the table reproduced below:[1311]

Veolia's Quantum (EUR)	Respondents' Quantum (EUR)
Economizer	
3,890,000[379]	Between 504,000 and 747,000[380]
Steam Turbine No.5	
5,470,000[381]	65,930[382]
HWM	
9,630,000[383]	5,900,000[384]
Disputed Cars	
201,000[385]	Respondents do not put forward any alternative valuation of the Disputed Cars[386]
Disputed Inventory	
1,430,000[387]	The Respondents do not put forward any alternative valuation of the Disputed Inventory[388]

a. *The Economizer*

1129. The Economizer is assessed by Claimants' expert Dr. Hesmondhalgh at EUR 3.89 million based on its Technical Book Value, with reference to the conclusions of Claimants' technical experts of Fichtner.[1312] Dr Hesmondhalgh considers that "*the technical book value of the Machinery is the most appropriate valuation methodology to determine the value of the Machinery at the end of the Lease. The calculation is straightforward and it splits the value of the assets proportionally to the use that VE and VST will make of them.*"[1313]

1130. Dr Hesmondhalgh points to the inadequacy of the market value methodology in the present case in the absence of a second-hand market for the Economizer: "*the market*

[1311] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 330.

[1312] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 332, with ref. to **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 1481-1493 and **CEX-010:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 29 May 2020, paras. 238, 249 and p. 102, Table 27.

[1313] **CEX-010:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 29 May 2020, para. 247, see also **CEX-003:** Rebuttal Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 23 January 2019, para. 82.

value methodology relies on finding appropriate comparable sales, which is difficult in this case, since there is not a well-developed second hand market."[1314]

1131. Respondents' expert Dr. Roques calculates a valuation of the Economizer between "*between EUR 504,000 and 747,000*" [1315] based on market value. Dr. Roques is instructed that VE's claim will only succeed if the Economizer is deemed detachable. In his opinion "[t]*he appropriate valuation method must therefore be determined in the context of the detached asset*".[1316] Dr Roques opines that:

a. "[T]*he appropriate value of the claim is the value that VE could realise by selling the detache*d [asset] *in the market*."[1317]

b. "[W]*here possible, market value should be assessed for each item of detached Machinery* [*i.e.* the Economizer and ST-5], *in its entirety, less any costs incurred to disassemble the item (which would be borne by the vendor, i.e. VE)*."[1318]

c. "*In the event that there is not a liquid second hand market for the items of Machinery as a whole (which I understand is the case), I consider that the next most appropriate value is the sum of the market values for the parts for which there is a second hand market, plus the scrap value of the remaining parts, less any costs incurred to disassemble the parts.*"[1319]

d. "*Even if the second hand market is not 'well developed'*", Dr. Roques "*still consider*[s] *an estimate of the Machinery's realizable value to be more appropriate than* [the Technical Book Value]."[1320]

1132. According to Dr. Roques, the Technical Book Value methodology used by Dr. Hesmondhalgh is suited for estimating the remaining value of an asset in its current installation, not an asset to be detached. If the asset is to be detached, "*unless it can*

[1314] **CEX-010:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 29 May 2020, para. 247, see also **CEX-003:** Rebuttal Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 23 January 2019, para. 82.

[1315] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2637.

[1316] **REX-003:** Second FTI Expert Report, dated 13 October 2019, para. 10.29.

[1317] **REX-003:** Second FTI Expert Report, dated 13 October 2019, para. 10.30.

[1318] **REX-003:** Second FTI Expert Report, dated 13 October 2019, para. 10.31.

[1319] **REX-003:** Second FTI Expert Report, dated 13 October 2019, para. 10.32.

[1320] **REX-003:** Second FTI Expert Report, dated 13 October 2019, para. 10.34.

be sold as a whole and reused in another plant without substantial modification, the [Technical Book Value] *does not provide a reasonable estimate of the 'realisable value' that VE could achieve for the detached assets*."[1321]

1133. For his valuation of the Economizer, Dr. Roques relies on the conclusions of Sweco, who opined that VE would likely not be able to find a buyer with the same boiler arrangements who could re-use the Economizer as a whole unit in another plant without substantial modifications.[1322] Sweco further consider that, in principle, certain individual parts of the Economizer could be re-used in another plant, whereas the remaining parts "*could be sold as scrap*". Sweco however observes that there is no liquid second-hand market for the individual elements of the Economizer it has identified as transferrable to another plant. Therefore, Sweco is unable to assess the market value of the elements that could be re-sold as such.[1323] Sweco explains that it has "*nevertheless sought to estimate what a willing buyer(s) of the parts would pay for them*", according to the following logic:[1324]

- *"First, we consider what value the Economizer as a complete unit would have to a buyer, in the event such a buyer could be found (though we consider this unlikely). A buyer of the Economizer would make a significant discount for its age. In the absence of any other data, we use 50% to reflect the fact that the Economizer is 49.53% of the way through its operational life* […]

- *We apply the 50% figure to the reasonable acquisition cost and not the actual acquisition cost* […] *we consider that VE overpaid considerably for the Economizer and that the price paid for the Economizer in 2010 should not have been more than 3.0 MEUR. Fifty percent of that reasonable acquisition cost would be 1.5 MEUR*

- *From that 1.5 MEUR figure, it is necessary to deduct the costs the buyer would incur in re-engineering, new materials, erection and commissioning (since the buyer would factor this into the sum offered to the vendor)* […] Our estimated

[1321] **REX-003:** Second FTI Expert Report, dated 13 October 2019, para. 10.33.

[1322] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 1222, see also **REX-002:** Expert report of FCG Design and Engineering Ltd., dated 19 February 2018, para. 361.

[1323] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 1223-1225.

[1324] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 1226-1230 (emphasis added).

re-engineering, erection and commissioning costs come to a total of 14%, and we therefore adopt that figure for the purpose of our estimate of what a willing third party would pay for the Economizer – specifically, we deduct it from the 50% explained above.

- *Based on the foregoing, we estimate that a third party buyer (assuming one could be found) would offer 1.08 MEUR for the Economizer as a complete unit, i.e. (50% - 14%) * 3 MEUR*

- *Next, we apply the formula above to the proportion of parts that we consider could be re-used. We estimate that these parts comprise approximately 40 to 70% of the reasonable original acquisition cost of the Economizer* […]

- *Thus, we arrive at a figure in the range 600 000 to 1 050 000 EUR (= 50% * 40 to 70% * 3 MEUR).*

- *The buyer(s) of the separate parts would incur costs of re-engineering, erection and commissioning and therefore as in the case of the foregoing, for this, we adopt a total of figure 14% of the reasonable acquisition cost of the separate parts of the Economizer.*

- *Thus, we estimate the aggregate price that a willing third party buyer or buyers would pay for the parts of the Economizer that could be re-used would be in the range 432 000 to 756 000 EUR (=600 000 EUR - 14% * 40% * 3 MEUR to 1 050 000 EUR - 14% * 70% * 3 MEUR).*

1227. We would estimate the scrap value of the remainder of the Economizer parts as follows.

- *Based on our experience, we know that material costs are typically 40 to 50% of the total contract price. Therefore, of the 3 MEUR which should have been paid for the Economizer, about 1.2 to 1.5 MEUR would have been the cost of materials. To be conservative, we adopt 50% for the purpose of the present estimate.*

- *The scrap value of materials is of course dependent on the type of material being scrapped but for this calculation we shall assume a very conservative*

scrap value of 15% of the materials when new. Therefore, the scrap value of the Economizer as a whole is about 0.18 to 0.225 MEUR (being the 1.2 to 1.5 MEUR material costs, multiplied by 15%).

- *Because material costs are typically up to 50% of the total contract price (we are conservatively assuming 50% in this instance), and the value of these materials as scrap is approximately 15% of their value when new, we adopt a factor of 7.5% (i.e. 0.5 *0.15).*

- *We estimate 30 to 60% of the reasonable acquisition costs relate to parts that can only be sold for scrap value (this being the corollary of the 40 to 70% that we consider could be re-used).*

- *Based on the foregoing, we estimate the scrap value of the remaining parts of the Economizer to be 67 500 to 135 000 EUR (= 7.5% * 30 to 60% * 3 MEUR).*

1228. Thus, we estimate that VE would receive in total 567 000 to 823 500 EUR for the Economizer, of which 432 000 to 756 000 EUR would be the price a willing third party buyer(s) would pay for the parts that could be re-used, and 67 500 to 135 000 EUR the scrap value of the remainder.

1229. We are instructed that the cost to VE of dismantling the Economizer must be deducted from this 567 000 to 823 500 EUR sum. We estimate that the cost of dismantling the parts of the Economizer that could be re-used would be approximately 3% of its reasonable acquisition price, and 1.5% for the scrap parts. These estimates are conservative and based on our experience as engineers.

1230. Therefore, we estimate dismantling costs of: (i) between 36 000 and 63 000 EUR for the parts that could be re-used; and (ii) 13 500 and 27 000 EUR for the scrap parts, based on a reasonable acquisition price of 3 MEUR. Subtracting this from 567 000 to 823 500 gives a realisable value of between 504 000 to 747 000 EUR […]."

1134. The Arbitral Tribunal notes that the selection of the market value methodology when there exists no market to value against is surprising. In the absence of a second-hand market for the Economizer or parts thereof, it seems more logical to find an alternative method of valuation. Respondents' aforementioned elucidations regarding the various estimations and approximations essential to their valuation process reinforces this impression of the Tribunal.

1135. Respondents define the Technical Book Value of an asset as "*the purchase cost of the equipment adjusted to take into account the proportion of its technical life that has elapsed (i.e., depreciation).*" [1325] This methodology appears to be well-suited for evaluating the ownership and allocation of assets, determining the retention of specific items, and identifying the compensation responsibilities of each party upon the conclusion of a long term lease such as the one between the Parties.

1136. The reason why Respondents consider that the Technical Book Value methodology is inadequate is that the asset to be valued may be detached. This reasoning rests entirely on Dr. Roques' opinion. [1326] However, the Arbitral Tribunal fails to understand Respondents' (or Dr. Roques') reasoning. In Article 16.6 of the Lease, the Parties agreed that the rules on the transfer of leased assets at the end of the Lease set out in Annex 10 would be limited to unapproved, non-detachable assets. In this context, the purpose of the criterion of detachability agreed by the Parties is to sort between the different investments made by VE during the Lease's term and settle some of them (which have been approved by Respondents) with Lease Fee 4. The investments that are deemed detachable fall outside the transfer mechanism set out in the Lease at Annex 10. This is because, as mentioned above, VE was in principle free to remove and take away with it any improvement to the Facilities which it had decided to invest in at its own expense and risk and without VST's approval. This is the pendant of VE not being entitled to monetary compensation or reimbursement for such investments. Conversely, insofar as those investments are concerned, VST is not entitled to keep them for free and/or rely on Annex 10 and the mechanism of Lease Fee 4, which is meant to cover depreciation of leased assets, not the sale of items VE owned but left in the Facilities despite their non-detachability.[1327]

1137. In the present case, the Economizer, while being detachable, has not been removed from the Facilities.[1328] VST kept that investment in VE-2, and there is therefore no

[1325] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2598.

[1326] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2599.

[1327] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 11.2(v).

[1328] Transcript, Day 16, 275/6-11.

reason to value it as if it had actually been detached and resold in several parts and scrap. This has been pointed out by Claimants as follows:

> "*First, Dr Roques' does not consider* ***at all*** *that the Machinery is functioning and, although detachable, has not been nor will ever be detached from the Facilities by VŠT; rather, VŠT will keep the Machinery and continue to use it. As Dr Roques acknowledged, his approach does not reflect the value of the Machinery as functioning equipment.*[399] *Evidently,* ***reducing the price of functioning efficiency-increasing machinery such as the ST-5 or the Economizer to the value of scrap, leads to an unfair and unrealistic valuation****.*
>
> *Second, Dr Roques justifies the Respondents' abusive valuation of Machinery on the fact that, in his view, VŠT is in a dominant position and "would be dictating the price" of these assets. This is also wrong. As Dr Roques admits, if Vilnius Energy as the rightful owner of the Machinery simply removes them from the Facilities (as it has the right to do), then VŠT would have to buy replacement equipment in the market and would never be in a position to acquire it at a "scrap value minus disassemble costs". Logically, it follows that VŠT is not in a dominant position at all – instead, it is attempting to abuse its position and avoid paying what it owes to Veolia under the Lease – and any valuation of the Machinery should, at the very least, strike a balance between the Parties' interests*."[1329]

1138. Considering all preceding observations, the Arbitral Tribunal finds that the Technical Book Value is better suited for the valuation of the Economizer.

1139. In such situation, Respondents submit that the Technical Book Value of the Economizer should be adjusted to reflect 1) "*the fact that Vilnius Energy inflated the costs of the Economizer when it awarded the procurement to Rubicon-owned Axis Industries*"[1330], 2) "*that the Economizer was almost 50% through its operational life as at March 2017*"[1331] and 3) "*the fact that Vilnius Energy directed EUR 580,109 in emissions allowance sales proceeds to the Economizer in 2010*"[1332].

[1329] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 339-340 (emphasis in the original).

[1330] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2607, see also **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 1231, **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 06 December 2022, para. 306.

[1331] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2607.

[1332] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2608.

1140. Regarding the first point, the Arbitral Tribunal has found that Respondents had not established the alleged overpricing of the Economizer purchased from Axis.[1333]

1141. Regarding the second point (*i.e*. the fact that the Economizer was almost 50% through its operational life at the end of the Lease), Sweco state that "[a]*ssuming a purchase price of 3.0 MEUR* [instead of the EUR 7.8 million actually paid by VE to Axis for the Economizer] *and multiplying it by Fichtner's calculation of the remaining lifetime of 49.53% (i.e. 49 530 hours of 100 000 hours remaining), the technical book value* [of the Economizer] *would be 1.5 MEUR*."[1334] Such adjustment seems reasonable, and Claimants and their experts do not seem to object to it.

1142. Multiplying the right amount of purchase of EUR 7.8 million by 49.53% of remaining operational life of the Economizer leads to a compensation of EUR 3,863,340, close to Dr. Hesmondhalgh's valuation at EUR 3.89 million and in line with 1) her instruction to evaluate the value of the Disputed Assets as of 29 March 2017[1335] and 2) the assessment of Fichtner of 4 October 2017.[1336]

1143. As to the third point, Respondents argue that "*the sale of an emissions allowance-funded asset constitutes a breach of the restrictions the Lease Agreement places on Vilnius Energy's use of emissions allowance proceeds. Therefore, any sum awarded to Vilnius Energy must be reduced by EUR 580,109*."[1337] Respondents' argument is not clear. Their statement apparently cross-refers to their position under Counterclaim 5 (Investment Obligation) that Veolia was not allowed to count EU funds (such as EAs sales proceeds) towards the satisfaction of its quantitative Investment Plan commitments.[1338] First, Respondents have not explained how the failure of VE to fulfil

[1333] See above para. 679.

[1334] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 1231.

[1335] **CEX-001:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 16 October 2017, para. 14.

[1336] **C-082:** Fichtner, Valuation Report on Flue Gas Condenser owned by Vilniaus Energija, dated 04 October 2017, p. 5.

[1337] **CEX-001:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 16 October 2017, para. 14.

[1337] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2608.

[1338] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1851.

its Investment Obligation solely with its own funds implies that the sale of an emissions allowance-funded asset constitutes a breach of the Lease.

1144. Second, there is a contradiction between 1) VE's alleged obligation to re-invest EA proceeds into the Facilities, as argued by Respondents and 2) at the same time, the prohibition to re-sell EAs funded assets to VST at the end of the Lease, which is what Respondents seem to submit in relation to the valuation of the Economizer. Following Respondents' interpretation would mean that, if VE re-invested EA proceeds into the Facilities without Respondents' approval, and therefore sought to sell the so funded investment to VST at the end of the Lease (subject to detachability, which is established in the case of Economizer), it would find itself in breach of the Lease. Under that interpretation proposed by Respondents, it would have sufficed for Respondents to decide not to approve certain important investments into emission reduction improvements to the Facilities to ensure that they would acquire them at no or reduced cost at the end of the Lease.

1145. Such interpretation cannot be correct, as it would defeat the entire purpose of distinguishing between different improvements made to the Facilities at the re-delivery of those Facilities to VST. The Arbitral Tribunal refers in this regard to his analysis of the relevant Lease provisions.[1339]

1146. The Arbitral Tribunal therefore considers that no reduction in the payment of VST for the Economizer should be made in relation to VE's investment of EAs sales proceeds.

b. *The Steam Turbine No. 5 (ST-5)*

1147. Steam Turbine No. 5 or ST-5 is assessed by Claimants' expert Dr. Hesmondhalgh at EUR 5.47 million based on its Technical Book Value, with reference to the conclusions of Claimants' technical experts of Fichtner.[1340] Dr. Roques for his part adopts Sweco's

[1339] See above paras. 1051 ff.

[1340] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 332, with ref. to **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 1481-1493 and **CEX-010:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 29 May 2020, paras. 238, 249 and p.102, Table 27, **CEX-001:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 16 October 2017, para. 22, **C-083:** Fichtner, Valuation Report on Steam Turbine No. 5 owned by Vilniaus Energija, dated 04 October 2017, p. 4-8.

estimation that the realizable value of ST-5 is its scrap value, estimated at EUR 0.07 million.[1341]

1148. The Parties' and their experts' debate as to the correct methodology between Technical Book Value (Claimants and Dr. Hesmondhalgh) and the market value (Respondents and Dr. Roques) is relevant to both the Economizer and Steam Turbine No. 5.[1342]

1149. The Arbitral Tribunal has decided above that the Technical Book Value methodology was to be applied to the Economizer, and there is evidence that sufficient reliable data for assessing the fair market value of ST-5 is lacking as well.[1343] In these circumstances, the Arbitral Tribunal finds it consistent and reasonable to apply the Technical Book Value to the valuation of ST-5.

1150. Sweco explain that it should be adjusted to reflect their finding that VE overpaid for ST-5, as follows:[1344]

> "*Sweco has shown elsewhere in this report that the prices paid by VE for purchase of equipment were too high. Sweco obtained a budget offer from a respected steam turbine supplier, Siemens, to determine if the price paid for Steam Turbine No. 5 was fair and should be used in the calculation of its technical book value.*
>
> *The offer by Siemens for a similar steam turbine is for up to about 5 MEUR. Therefore, we calculate the technical book value of Steam Turbine No. 5 to be 3.5 MEUR (= 5 MEUR x (200 000 – 58 369 actual operating hours)/200 000).*"

1151. Sweco seems to make a general reference to its analysis of other purchases by VE from VST, without offering a full benchmarking of ST-5. There is indeed no detailed analysis of the procurement of ST-5 "*elsewhere in this report*". With regard to Respondents' allegations of overpricing (Counterclaim 13), the Arbitral Tribunal has, after a lengthy discussion, decided that Respondents have failed to establish a general

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[1341] **REX-003:** Second FTI Expert Report, dated 13 October 2019, para. 10.44.

[1342] **CEX-010:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 29 May 2020, para. 247, **REX-003:** Second FTI Expert Report, dated 13 October 2019, paras. 10.30-10.34.

[1343] **CEX-003:** Rebuttal Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 23 January 2019, paras. 87-89.

[1344] **REX-004:** Sweco Expert Report, dated 13 October 2019, paras. 1259-1260.

and systematic overpricing of purchases made by VE from Rubicon-related companies. While ST-5 was not discussed in detail because it was not relied on by Respondents as one of the main examples of the overpricing they alleged, the Tribunal's decision that no systematic overpricing took place in VE's procurements to Rubicon-related companies suffices to discard Sweco's alternative purchase price. In any event, Sweco do not justify why the Tribunal should account for an alternative purchase price in their report and in these circumstances, the Arbitral Tribunal will consider the actual price paid by VE for ST-5.

1152. The other debate amongst the Parties' experts concerns the operational lifetime of ST-5 that should be accounted for in its valuation under the Technical Book Value methodology. Respondents and Sweco argue that the Technical Book Value of ST-5 "*should assume an operating lifetime of 200 000 hours*", based on their knowledge that "*200 000 operating hours is requested most frequently to be a plant's design lifetime and* […] *the most appropriate lifetime to be used in the calculation of its technical book value*."[1345] Sweco also refer to the statements of their predecessors, FCG:[1346]

> *"407. Even if the technical book value is considered, as suggested by the Claimants, the technical book value is miscalculated.*
>
> *408. Fichtner estimates that the expected total life-time operating hours for ST-5 and P-19 are 300,000 hours. Taking into account the actual operating hours as of March 29, 2017 (58,369 hours), according to Fichtner the remaining operating life of ST-5 and P-19 is 80.54% of the expected total life-time operating hours. On that basis, the Claimant asks EUR 5.467 million for ST-5 and P-19.*
>
> *409. However, FCG considers that 300,000 lifetime operating hours is neither normally applied in their design, nor in economic evaluations for similar steam turbines. Usually the steam turbines are designed for 200,000 operating hours with 200 cold starts. This typically means 25 years in base load use or 30-40 years in cycling operation. It is quite normal that the turbine, being a high-speed rotating machine subject to vibrations, needs more extensive maintenance and repair interventions beyond the 200,000 operating hours. The same consideration applies also to the aging generator*

[1345] **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 1258.

[1346] **REX-002:** Expert report of FCG Design and Engineering Ltd., dated 19 February 2018, paras. 407-410.

and its electrical resistance. Demand for maintenance and thus maintenance costs will increase after reaching the design lifetime. In addition, the risk of major damage significantly increases after reaching the design lifetime.

410. Based on the above, the technical book value of ST-5 and P-19 should be calculated on 200,000 expected total operating hours, leading to the remaining operating life of 141,631 hours (70.82% of the expected total operating hours). This means the technical book value will be closer to EUR 4.54 million as opposed to the Claimants' estimation of EUR 5.467 million."

1153. Claimants' expert Dr. Ratzesberger of Fichtner has addressed the question of the remaining operational life of ST-5 as follows:[1347]

"Sweco reduces the EUR 5 million amount to reflect the age of the steam turbine ST-5, adopting a total operational lifetime of 200 000 hours only. A design life of 200 000 operating hours as stated by the Respondents is normally applied to equipment which is designed for material which underlies creep strength effect. Since the turbine was designed and is operated at life steam parameters with 40 bars and life steam temperature of 435°C most of the generating unit's materials will not suffer time related deterioration of the material strength. Hence the Consultant assumes that with appropriate preventive maintenance with regular material structural investigations a lifetime of 300 000 operating hours or more could be achieved for the generating unit comprising steam turbine ST-5. For example, the steam turbine ST-4 has already accumulated more than 350 000 operating hours."

1154. The issue of the operational lifetime of Steam Turbine No. 5 in relation to Claim 1 was not discussed with the relevant experts at the hearing, the oral debate having crystallized around the threshold question of which methodology was appropriate (*i.e.* Technical Book Value vs market value). The only brief evocation of the operational lifetime of ST-5 was during Dr Roques' cross-examination, without any conclusion being taken:[1348]

"Q. […] *So you reach a value of €70,000* [under the fair market methodology] *for a turbine that was installed in 2009. Therefore in 2017 it was only eight years old. Right?*

[1347] **CEX-013 :** Expert Report of Rainer Ratzesberger of the Fichtner Group, dated 26 May 2020, para. 229.
[1348] Transcript, Day 16, 278/23-279/10.

A. Yes. Well, if you think about it, it's probably a good part of the life of a turbine. I mean, to my knowledge turbines probably, you know, would have 15 years max life and would need to undergo significant refurbishment.

Q. So it is a turbine which is let's say in your opinion – it was approximately half of its useful life, and actually it is a turbine that remains in operations today, capable of generating electricity, and you considered that value of €70,000?"

1155. Dr. Roques did not confirm his opinion that ST-5 was approximately half through its operational lifetime, as he brought back the discussion with Counsel to the issue of the correct methodology to apply to the valuation of the Machinery.

1156. In any event, the technical experts on each side have proffered figures in that regard that are higher than 50%. Claimants' experts of Fichtner submit that ST-5 was at 80.54% of its remaining operational lifetime at the end of the Lease, based on a total operational lifetime of 300,000 hours. This leads to the figure of EUR 5.47 million claimed by Claimants. Fichtner consider that 300,000 hours is the typical lifetime of similar rotating machines undergoing regular maintenance.[1349] Fichtner have further observed that, "*for example, the steam turbine ST-4 has already accumulated more than 350 000 operating hours*."[1350]

1157. Respondents' experts of FCG for their part submit that ST-5 was at 70.82% of its estimated total operating hours, based on a total operational life of 200,00 hours. FCG recommend the consideration of a 200,000-hour operational lifetime based on the original design of ST-5. FCG explain that that the rotation of the turbine makes it subject to vibration, in turn requiring more extensive maintenance and repair interventions beyond the 200,00 hours of operation for which it is initially designed.[1351]

1158. The Arbitral Tribunal understands that, in brief, FCG assess the operational lifetime of ST-5 based on its design, whereas Fichtner account for practical considerations and experience of how the operational lifetime of a turbine is generally improved by regular

[1349] **C-083:** Fichtner, Valuation Report on Steam Turbine No. 5 owned by Vilniaus Energija, dated 04 October 2017, pp. 4-7 to 4-8.

[1350] **CEX-013 :** Expert Report of Rainer Ratzesberger of the Fichtner Group, dated 26 May 2020, para. 229.

[1351] **REX-002:** Expert report of FCG Design and Engineering Ltd., dated 19 February 2018, paras. 409-410.

maintenance programs. The latter approach seems more realistic and thus reasonable to the Arbitral Tribunal. Further, Fichtner's reference to the 350,000 hours of operation of ST-4 is a good indication that Fichtner's figure of 300,000 hours is closer to the likely operational lifetime of ST-5. Fichtner's approach and figure must therefore be preferred.

1159. Multiplying the purchase price of EUR 6.788 million[1352] by a remaining operational life of 80.54% leads to a compensation of EUR 5.4 million, close to Dr. Hesmondhalgh's valuation at EUR 5.47 million.

1160. The Tribunal notes that Respondents' experts, without prejudice to their position on the methodology for valuation and their other objections addressed above, have acknowledged the correctness of Dr. Hesmondhalgh's calculations of the Technical Book Values of the Economizer and of ST-5.[1353]

c. *The Disputed Cars*

1161. Claimants claim EUR 201,000[1354] for the value of 24 cars of various types. Dr. Hesmondhalgh's calculation of the Disputed Cars' fair market value rests on the valuation reports that VE commissioned from a third-party licensed market valuer, APUS, in January 2017.[1355]

1162. In his second expert report, Dr. Roques states that "[i]*f the Tribunal finds that the Inventory should be Cash Settled Assets then I agree that the relevant value is market value*".[1356] Dr. Roques also accepts that Dr. Hesmondhalgh's calculations are "*mechanically correct",* save for the fact that they are as at 17 January 2017, whereas the end of the Lease was 29 March 2017:[1357]

[1352] **CEX-001:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 16 October 2017, Table 3, **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 1247.

[1353] **REX-001:** Expert report of FTI Consulting, dated 19 February 2018, para. 10.22.

[1354] **CEX-001:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 16 October 2017, para. 40 and Table 5.

[1355] **SoC:** Claimants' Statement of Claim, dated 16 October 2017, para. 167, **C-094:** Apus Movable Property Valuation Report, No. 17-027 KT, dated 17 January 2017, **C-095:** Apus Movable Property Valuation Report, No. 17-028 KT, dated 17 January 2017, **C-096:** Apus Movable Property Valuation Report, No. 17-029 KT, dated 17 January 2017, **C-097:** Apus Movable Property Valuation Report, No. 17-035 KT, dated 17 January 2017.

[1356] **REX-001:** Expert report of FTI Consulting, dated 19 February 2018**,** para. 10.32.

[1357] **REX-003:** Second FTI Expert Report, dated 13 October 2019, para. 2.91.

> *"2.90 Dr Hesmondhalgh has calculated the market value of the Cars by summing the individual market value of each car provided by Apus (as at 17 January 2017).*
>
> *2.91 In the First FTI Report, Mr Harman confirmed that Dr Hesmondhalgh's calculations were mechanically correct. However, he noted that Dr Hesmondhalgh's valuation used market values over two months prior to the Lease. Therefore, the market value of the Cars at the end of the Lease are likely to be lower due to depreciation over the two-month period.*
>
> *2.92 Dr Hesmondhalgh appears to agree that the value of the Cars should be reduced. However, she does not update her valuation accordingly. I am instructed that the burden is on the Claimants to quantify the claim accurately and assume Dr Hesmondhalgh will do so in due course. Therefore, I am currently unable to adjust the market value of the Cars for this depreciation with the information available and I value the Cars at €201,000, as estimated by Apus.*

1163. Dr. Hesmondhalgh did acknowledge FTI's criticism in her second and her third expert reports,[1358] but noted that FTI did not attempt to quantify the effect of the two-month depreciation on the Disputed Cars' value. Dr Hesmondhalgh found it unnecessary, in these circumstances, to adjust her calculation for the Disputed Cars.[1359]

1164. Dr. Roques has explained that he was under an instruction not to quantify the effect of the extra two month-depreciation. Respondents justify this point as follows in their Rejoinder:

> *"The onus is on Veolia and Dr. Hesmondhalgh to quantify the depreciation that Dr. Hesmondhalgh does not deny must have occurred. Veolia has thus failed to establish the market value of the Cars as at the date of handover."*[1360]

1165. Respondents seem to take the approach that since 1) Claimants bear the burden of proving the *quantum o*f Claim 1, and 2) Dr. Hesmondhalgh's assessment was criticized

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[1358] **CEX-003:** Rebuttal Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 23 January 2019, para. 94, **CEX-010:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 29 May 2020, para. 237(c).

[1359] **CEX-003:** Rebuttal Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 23 January 2019, para. 94, **CEX-010:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 29 May 2020, para. 241.

[1360] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2623.

but not adjusted, Claimants have failed to meet their burden of proof on *quantum* and therefore, Claimants' Claim should be dismissed.

1166. If this is truly the approach taken by Respondents, the Arbitral Tribunal finds it unreasonable. If one were to accept it, this would mean that, each time a responding party contests the *quantum* of a claim without submitting an alternative figure, the claiming party would be deemed to have failed to meet its burden of proof and the claim would fail on its merits. Further, Respondents assume that Dr. Hesmondhalgh did not oppose the criticism, but Dr. Hesmondhalgh did nothing more than acknowledge the criticism and observe the lack of an alternative quantification of the Disputed Cars' value:[1361]

> "*94. Mr. Harman also points out that the cars' evaluation was done two months before the end of the Lease, so their value is slightly overestimated because they will have depreciated a little more during that two-month period. However, he does not attempt to quantify this effect.*
>
> *95. Accordingly, I do not see a need to adjust the calculations presented in the Brattle First Report for the inventory and cars* […]"

1167. Dr. Hesmondhalgh does not state in her reports that she agrees that her figure is overstated. Rather, she takes the view that she does not have anything to respond to since FTI did not quantify the impact of their objection to the date of valuation, *i.e.* she considers that her figure of EUR 201,000 remains uncontested since FTI have not proffered an alternative figure. Strictly speaking, this is correct: Claimants have put forward a *quantum* for their Claim 1, and Respondents should have stated clearly their alternative figure for that Claim in order to submit a full defense based on the date of assessment. The unreasonableness of Respondents' approach is particularly striking when reading Dr. Roques' statement that he is unable to adjust the value of the Disputed Cars simply because he is under an instruction not to do so:

> *"I am instructed that the burden is on the Claimants to quantify the claim accurately and assume Dr Hesmondhalgh will do so in due course. Therefore, I am currently*

[1361] **CEX-003:** Rebuttal Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 23 January 2019, paras. 94-95.

unable to adjust the market value of the Cars for this depreciation with the information available and I value the Cars at €201,000, as estimated by Apus."[1362]

1168. The Arbitral Tribunal considers that Claimants have put forward a figure, which was criticized by Respondents based on the date of assessment. Dr. Hesmondhalgh did not state whether or not she agreed that the date of valuation should be moved to the end of March 2017 or not, but focused on the lack of quantification by Respondents. Respondents were aware of this criticism and of the fact that the Tribunal only has one figure before it. In these circumstances, it is Respondents who failed to submit a full defense when they could have easily instructed Dr. Roques to quantify the impact of moving the valuation date to the end of the Lease. The Arbitral Tribunal therefore grants Claimants' request for compensation for the Disputed Cars as claimed by Claimants and quantified by Dr. Hesmondhalgh, *i.e.* EUR 201,000.

d. *The Disputed Inventory*

1169. The Disputed Inventory includes safety and medical equipment, furniture, PCs, communication devices, IT hardware, long-term assets and unused supplies. Its scope was agreed by the Parties in a SPA pending settlement of their dispute regarding the regime applicable to the Disputed Assets.[1363]

1170. Claimants' expert Dr. Hesmondhalgh has valuated the Disputed Inventory at EUR 1,430,000.[1364] She explains that the values accounted for are based on the information in the annexes to the SPA.[1365] To assess the value of the Disputed

[1362] **REX-003:** Second FTI Expert Report, dated 13 October 2019, para. 2.92.

[1363] **REX-001:** Expert report of FTI Consulting, dated 19 February 2018, para. 10.25, with ref. to **C-032:** Sales-Purchase Agreement between Vilniaus Šilumos Tinklai, Vilnius City Municipality, Vilnius Energy and Veolia Environnement S.A., dated 29 March 2017, pp. 82 ff.

[1364] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 330, see also **CEX-001:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 16 October 2017, paras. 26-27, Table 4, **CEX-010:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 29 May 2020, para. 240, Table 27, **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1507.

[1365] **CEX-001:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 16 October 2017, para. 27 with ref. to **C-032:** Sales-Purchase Agreement between Vilniaus Šilumos Tinklai, Vilnius City Municipality, Vilnius Energy and Veolia Environnement S.A., dated 29 March 2017.

Inventory at the end of the Lease, Dr. Hesmondhalgh applied a "*simplified valuation approach*" which she describes as follows:[1366]

> "[D]*ue to the low values involved, I have adopted a simplified valuation approach. For the unused supplies, the value of each item has been set equal to its acquisition value, while for most of the other categories, the value of each item has been set equal to between 10% and 50% of its acquisition value. In some cases, where it seems likely that the cost of an item may have declined over time e.g. computers, the value has been set equal to 50% of what VE's management assumed to be the market price as of March 2017. The 10-50% reduction reflects the fact that the assets are still useful but they are not new. Whilst the reduction factors are somewhat arbitrary, carrying out an item-by-item assessment of their depreciated value does not seem worthwhile given their low total value*."

1171. Regarding her valuation of unused supplies at their acquisition cost, Dr. Hesmondhalgh explains that VE's valuation is justified by the fact that "*the unused supplies have never been used and they are assets whose value does not depreciate unless they are used*."[1367] Dr. Hesmondhalgh further opines that "[i]*n most instances, this is a conservative approach since purchasing a replacement would now likely cost more than VE originally paid for the asset*" because "*the costs of most of the types of items included in the inventory of unused supplies have tended to increase over time*"[1368] The unused supplies correspond to the category of assets with the highest value in the Disputed Inventory, accounting for EUR 1,320,000.[1369]

1172. Regarding long-term assets, Dr. Hesmondhalgh values them at their acquisition cost as listed in the SPA.[1370]

[1366] **CEX-001:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 16 October 2017, para. 28 (emphasis added).

[1367] **CEX-001:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 16 October 2017, para. 29.

[1368] **CEX-001:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 16 October 2017, para. 29.

[1369] **CEX-001:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 16 October 2017, para. 27, Table 4.

[1370] **CEX-001:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 16 October 2017, para. 33.

1173. As to the depreciation factor applied by Dr. Hesmondhalgh to other components of the Disputed Inventory, her explanations are scarce, with the repetition for each item that the total value for each category of items was assessed based on 50% of VE's estimate of their market value,[1371] followed by a statement that "*carrying out an item-by-item assessment of their depreciated value does not seem worthwhile given their low total value*."[1372]

1174. Dr. Roques has criticized Dr. Hesmondhalgh's valuation of the unused Inventory as unsupported by any evidence that these assets do not depreciate over time.[1373] As to the other items of the Inventory, Dr. Roques agrees that their low value justifies a simplified approach, but points to the lack of rationale for the 10 to 50% reduction applied by Claimants, which they allege reflect the depreciation of such assets:[1374]

> "*The reduction factors that Dr Hesmondhalgh applies to the 'used' Inventory are based on internal VE calculations. She admits that these factors are 'somewhat arbitrary'. I have no information that would allow me to verify whether the reduction factors are reasonable. If they are not, the value of the 'used' Inventory would differ. As the value of the 'used' Inventory (after reduction factors) is only €0.1 million, I have not considered this matter further at this stage.*
>
> *Given the issues above, it is not possible for me to verify the reasonableness of Dr Hesmondhalgh's valuation of the Inventory. If additional information becomes available, I may need to update my views. For the purposes of presenting the relevant value of the Disputed Assets in this section, I adopt the valuation provided by Dr Hesmondhalgh (i.e. €1.4 million).*"

1175. In her next report, Dr. Hesmondhalgh replied to the criticism as follows:[1375]

> *"Mr. Harman accepts my approach to the valuation of the inventory but states that he is unable to evaluate if the price reduction factors I used in my First Report are*

[1371] **CEX-001:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 16 October 2017, paras. 34 ff.

[1372] **CEX-001:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 16 October 2017, para. 35.

[1373] **REX-001:** Expert report of FTI Consulting, dated 19 February 2018, para. 10.27.

[1374] **REX-001:** Expert report of FTI Consulting, dated 19 February 2018, paras. 10.29-10.30 (emphasis added).

[1375] **CEX-003:** Rebuttal Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 23 January 2019, paras. 92-93 (emphasis added).

reasonable. As he acknowledges, I accept that the reduction figures (10-50%) which I applied to all the items except the unused supplies are somewhat arbitrary, but they lead to a Claim of only €1.434 million from over 900 items. Given the low monetary value of these individual items, it does not seem worthwhile to spend time attempting to justify the figure in detail. Moreover the reduction percentage was suggested by VE, who based its assumption on its experience of running the district heating business.

I also explained why I did not reduce the value of unused assets and I pointed out that the value of these assets was very close to that in the General Ledger of VE, which was audited up until the end of 2016."

1176. Dr. Roques however corrected that Mr. Harman had not accepted the lack of depreciation of unused items of the Disputed Inventory, and opined that depreciation of unused inventory can, in some situations, take place. Dr. Roques further highlighted that the lack of justification for the reduction factors for depreciation applied by VE to value the used items of the Disputed Inventory were still unexplained and therefore did not provide an alternative valuation. He pointed out that, taken globally, the amounts claimed under Claim 1 are not so low:[1376]

"I consider that Dr Hesmondhalgh misrepresents Mr Harman's position […] [She] *suggests that Mr Harman accepted Dr Hesmondhalgh's approach to not depreciate the 'unused' Inventory. However, Mr Harman did not accept this as he had seen no evidence to verify the reasonableness of this approach. I agree that no evidence has been provided to verify the reasonableness of this approach.*

As a matter of accounting principles, I would not expect unused inventory to be depreciated. However, consider a hypothetical example where two unused identical items were buying sold. If one of these items was brand-new and the other had been purchased two years earlier (but not been used), you would expect the brand-new item to sell for a higher price. Therefore, I consider it reasonable that the unused inventory may sell for less than its acquisition value. However, I am unable to determine what a reasonable reduction factor may be.

In the First FTI Report, Mr Harman also explained that he was unable to verify the reasonableness of the value of the other groups of Inventory given that there was no

[1376] **REX-003:** Second FTI Expert Report, dated 13 October 2019, paras. 10.50-10.54 (emphasis added).

> *evidence to support the reduction factors. Dr Hesmondhalgh* […] *has still not provided any support for her reduction factors in her second report […]*
>
> *I am unable to verify the reasonableness of the reduction factors used for the other groups of Inventory.*
>
> *Whilst these Inventory items may be individually low value, due to the large quantity of such items the total amount that Dr Hesmondhalgh calculates (€103,000) is not low in value.*"

1177. Dr. Hesmondhalgh's reaction was limited to her observation that Dr. Roques' (and Dr. Harman's) criticisms in relation to the valuation of the Disputed Inventory were still unaccompanied by an alternative valuation:

> *"Mr. Harman also criticized other aspects of my evaluation, but did not implement any other changes because he claimed to not have enough information. He: […] stated that he could not verify the discounts I applied in estimating the market value of the inventory assets, although he agreed with a simplified approach and did not investigate further the value of used inventory since it 'is only €0.1 million'".*[1377]
>
> *"Dr Roques also criticizes my calculations for inventory and cars, but does not adjust them. For inventory, he agrees that accounting principles would suggest that unused inventory should be valued at its acquisition value but he suggests that in practice a buyer would wish to pay less than this. He states that he cannot verify the reasonableness of my choice of reduction factors for used inventory, even arguing that the total value €0.103 million is not low in value, which seems to contradict Mr. Harman's opinion."*[1378]

1178. The experts' subsequent reports did not expand further on the valuation of the Disputed Inventory, and FTI never provided an alternative value for the Disputed Inventory.[1379]

[1377] **CEX-010:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 29 May 2020, para. 237 (emphasis added).

[1378] **CEX-010:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 29 May 2020, para. 241 (emphasis added).

[1379] **REX-003 Add:** Addendum to the Second FTI Expert Report, dated 14 August 2021, para. 5.20, Table 5-1.

1179. Respondents consider that Veolia bears the burden of proving their claim and insist that "*FTI is unable to determine what a reasonable reduction factor would be based on the information available*."[1380] They conclude that "*there is no evidentiary basis on which the Tribunal can determine the sum to be paid by VST*."[1381]

1180. Claimants have answered as follows:[1382]

> *"Dr. Hesmondhalgh already explained her calculations in her last two reports:*
>
> - *As regards unused items, FTI argues that it is unreasonable to assume that these items could be sold for their acquisition value. Yet, FTI does not provide any alternative value, or suggest how much the value of these items should be reduced. As explained by Dr. Hesmondhalgh, she bases her valuation of the unused item on the General Ledger of Vilnius Energy which was audited up until December 31, 2016. When comparing the list of the assets at that point in time with those returned to VST in 2017, Dr. Hesmondhalgh finds that the overall value determined for the unused inventory items to be within €31 of the value recorded in the General Ledger of 2016—a negligible difference. As such, Dr. Hesmondhalgh's valuation of the unused items is reasonable.*
>
> - *As regards used items, FTI claims that there is no basis to assess the reasonableness of the reduction factors applied by Dr. Hesmondhalgh and criticizes her alleged failure to explain her figures in more detail. This is disingenuous considering that FTI admitted in its first report that a 'simplified approach' to the valuation of these items was reasonable given their low value of 'only €0.1 million.' In any event, Dr. Hesmondhalgh has explained her conclusions. It is important to recall that the Disputed Inventory consists of over 900 items of low value. Naturally, Dr. Hesmondhalgh did not and could not be expected to provide detailed reasoning for the reduction factors applied to each item. As she explains, she arrived at her figures with the assistance of Vilnius Energy based on their experience of running the district heating*

[1380] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 2628-2630.

[1381] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2631.

[1382] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 1508-1509.

> *business. The reduction figures thus represent business practice and industry experience.*
>
> *Therefore, Vilnius Energy has indeed put forward a reasonable valuation of the Disputed Inventory. Respondents, again, have failed to provide any alternative amount or to rebut Claimants' valuation. The Tribunal should thus adopt Dr. Hesmondhalgh's valuation of the Disputed Inventory at EUR 1.43 million as the reasonable price at which the Disputed Inventory should be sold to VST.3."*

1181. The Arbitral Tribunal finds Claimants' position reasonable, and for reasons similar to those evoked in relation to the *quantum* of the Disputed Cars, the approach of Respondents (*i.e*. not to submit any alternative figure to the Tribunal) appears unreasonable. Dr. Hesmondhalgh did state that she relied on VE's valuation and approximations, and Respondents could have given instructions to FTI to undertake their own valuation in a way similar to that adopted by Claimants. In that regard, the Arbitral Tribunal fails to understand why FTI would have lacked the information to assess the market value and appropriate rates of depreciation of the Disputed Inventory, which has been transferred to VST as per the SPA of 29 March 2017.[1383]

1182. Like for the Disputed Cars, the Tribunal considers that contesting the *quantum* of the Disputed Inventory Claim without submitting an alternative for the Tribunal's consideration is unreasonable. Respondents state that VE has failed to substantiate the *quantum* of its Claim for the Disputed Inventory, but the correct affirmation is that the Arbitral Tribunal is faced with what it must consider from a legal point of view to be an uncontested *quantum* for the portion of Claim 1 related to the Disputed Inventory, which is therefore granted in full.

e. *Interest*

1183. The Arbitral Tribunal has decided to award Claim 1 insofar as the Economizer, ST-5, the Disputed Cars and the Disputed Inventory are concerned, in a total amount of EUR 10,894,340, broken down as follows:

[1383] **C-032:** Sales-Purchase Agreement between Vilniaus Šilumos Tinklai, Vilnius City Municipality, Vilnius Energy and Veolia Environnement S.A., dated 29 March 2017.

Economizer	EUR 3,863,340
ST-5	EUR 5,400,000
Disputed Cars	EUR 201,000
Disputed Inventory	EUR 1,430,000
Total	EUR 10,894,340

1184. Claimants request pre and post-award interest on that amount, starting on 29 March 2017,[1384] at the same rate of 8% (which is allegedly the pre-judgment default rate), for the following reasons:[1385]

> *"For the Disputed Assets, the Lithuanian Law on Late Payments applies. Under that law, one rate is applicable from the point at which interest becomes payable until the commencement of the proceedings (the default interest rate), and another rate is applicable during the proceedings until payment of the award (the procedural interest rate). Under the law, these rates can differ from each other. Dr. Hesmondhalgh has assumed the same rate for both time periods (the default rate) because it is not reasonable that Vilnius Energy would receive a lower rate by commencing arbitral proceedings than it would in the normal course of business. Thus, Dr. Hesmondhalgh applies pre-judgment interest at 8% per year."*

1185. Respondents highlighted that Claimants provide "*no explanation why in this particular case the Arbitral Tribunal should apply the same interest rate, nor do they provide any argumentation as to why that rate should be 8 per cent*."[1386]

1186. Respondents oppose that the Law on Late Payments only applies to payments that derive from commercial contracts and the commercial contract must clearly set the payment deadline, therefore the Law on Late Payments is not applicable. According to Respondents, since Claimants' main argument is that VST did not own the Disputed Asset, the Lease does not provide a legal basis on which the Law on Late Payments could apply.[1387]

[1384] **SoC:** Claimants' Statement of Claim, dated 16 October 2017, para. 194.

[1385] **SoC:** Claimants' Statement of Claim, dated 16 October 2017, para. 169, see also **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1515.

[1386] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 1403.

[1387] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 1405-1407.

1187. Respondents further contend that no payment is outstanding since the Parties agreed in the 2017 SPA that in case the Arbitral Tribunal would issue an award in favour of VE with respect to all or some of the Disputed Assets, VST undertook to pay the prices established in the award within 5 days from the date on which the award would become enforceable. Hence, according to Respondents, "*any payment for the Disputed Asset could only fall due five days from the Tribunal's Award as set out in Article 3.2 of the 2017 SPA.*"[1388]

1188. Claimants' explanation in answer to Respondents' above criticisms is that the scope of the Law on Late Payments is broader than as argued by Respondents:[1389]

> "*The Law on Late Payments applies to situations like the present where one party enjoys the property of another without paying due consideration. It is not limited to outstanding invoices, as Respondents seem to suggest. Pursuant to the Law, an interest rate of 8% is imposed where a debtor in a commercial contract is enjoying the creditor's property at the creditor's expense. This could not be more applicable here: VST is enjoying the Disputed Assets and Software Modifications at Vilnius Energy's expense*."

1189. Article 1 of the Lithuanian Law on Late Payments sets out its scope of application as follows:[1390]

> *"**Article 1. Purpose of the Law***
>
> *1. The purpose of the Law is to establish periods of payment for the goods delivered, services provided and works carried out under commercial contracts, to establish the rate of interest on late payments, the procedure for their calculation and the rights of creditors in case of late payment.*
>
> *2. This Law applies to all commercial contracts concluded between economic entities or between economic entities and public entities which lead to the delivery of goods,*

[1388] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 1409.

[1389] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1516.

[1390] **C-098:** Republic of Lithuania, Law on the Prevention of Late Payment in Commercial Transactions, No. IX-1873, as amended March 30, 2017, dated 09 December 2003, Article 1 (emphasis added).

provision of services or performance of works for remuneration and in which payments are made.

3. This Law does not regulate:

[…]

3) interest related to payments made as compensation for damages, including payments from insurance companies […]"

1190. Article 3 relied on by Claimants sets out the rate of interest applicable to payments in commercial contracts, as is clear from both Article 3 and Article 1 quoted above.

1191. It is clear from the above that the Lithuanian Law on Late Payments only applies to late payments under commercial contracts. It is also clear that the Disputed Assets, save for the Hot Water Meters, fall outside the scope of the Lease mechanism for the transfer of leased assets. As such, these Disputed Assets were VE's property at the end of the Lease and therefore the Tribunal agrees with Respondents that VE cannot now claim that its damage arises from the Lease.

1192. As underlined by Respondents, the Parties agreed that the amounts decided by the Arbitral Tribunal in the above sections would become due within 5 days from the date on which this Award would become enforceable. In such circumstances, the Arbitral Tribunal can only conclude that no pre-award interest is due. Further, it concludes that the Lithuanian Law on Late Payments does not apply to Claim 1, and that the correct rate to apply is found in the Lithuanian Civil Code, which provides for 6% at Article 6.210:

"*1. Where a debtor fails to meet his monetary obligation when it falls due, he shall be bound to pay an interest at the rate of five percent per annum upon the sum of money subject to the non-performed obligation unless any other rate of interest has been established by the law or contract.*

2. Where both parties are businessmen or private legal persons, the interest at the rate of six percent per annum shall be payable for a delay in payment unless any other rate of interest has been established by the law or contract."[1391]

7.8.2 The Hot Water Meters

1193. The Arbitral Tribunal has found that the Hot Water Meters are not detachable from the Facilities. They therefore fall squarely within the scope of Article 16.6 of the Lease and "*shall upon the expiration* […] *of the Lease Agreement be transferred to the Lessor pursuant to Annex 10*."[1392]

1194. The Arbitral Tribunal therefore declares that no payment should be made by Respondents to Claimants in respect of the Hot Water Meters, thus partially granting Counterclaim 8. The rest of the declarations sought by Respondents under Counterclaim 8 cannot be granted in view of the Tribunal's decisions that the other Disputed Assets were VE's property at the end of the Lease.

G. COUNTERCLAIM 3: EMISSIONS ALLOWANCES

1195. Counterclaim 3 arises from Respondents' allegation that "[t]*he EU's Emissions Trading System presented Veolia with yet another means to use the Lease to illicitly profiteer*."[1393] Respondents consider that Veolia misappropriated and misused the profits from sales of around 4 million Emissions Allowances that were allocated to the Facilities for free.[1394] Respondents' Counterclaim 3 is for an order to Claimants to pay them "[b]*etween EUR 52,287,088 and EUR 53,865,188, corresponding to harm incurred as at 30 March 2017*" (the "historical" component of Counterclaim 3) and "*EUR 5,660,735, corresponding to harm incurred between 2018 and 2019*" (the "future"

[1391] **RL-044:** Civil Code of the Republic of Lithuania (including amendments of April 12, 2011), Article 6.210 (emphasis added).

[1392] **CEX-001:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 16 October 2017, para. 33.[1392] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 330, see also **CEX-001:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 16 October 2017, para. 27.[1392] **CEX-001:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 16 October 2017, Table 3, **REX-004:** Sweco Expert Report, dated 13 October 2019, para. 1247.[1392] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 16.6.

[1393] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 861.

[1394] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 861.

component of Counterclaim 3) with annual interest of 6% calculated from 30 March 2017 until full payment of the amount awarded. Respondents further request declarations related to the title of certain Emissions Allowances in account number EU-100-5006040-0-2.[1395]

1196. Claimants consider that Counterclaim 3 is not only time-barred but also a fabricated attempt to "*obtain a 32% increase in Vilnius Energy's investment obligation, by Claimant that Vilnius Energy was required to reinvest the Emissions Allowances' proceeds for the improvement of the Facilities*."[1396] In the event the Arbitral Tribunal were to accept the merits of Counterclaim 3, Claimants submit that its *quantum* is "*completely inflated and inappropriate*."[1397]

1. Time limitation

1.1 The Parties' Positions

1.1.1 Claimants' Position

1197. Claimants assert that "*the Municipality had direct knowledge that Vilnius Energy was not reinvesting the totality of its EAs* [*i.e.* Emission Allowances] *profits in the Facilities since at least* [28] *December 2010*",[1398] when VE provided the data requested by the Public Prosecutor, including information on emission allowances ("**EAs**").[1399]

1198. Claimants further point to the fact that, more generally, "*the very information on which Respondents rely* [to claim that Respondents misused and misappropriate VE's

[1395] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1138.

[1396] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 592.

[1397] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 595.

[1398] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 594; **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 961.

[1399] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1302 (table), **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 961, **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 685-687 and 701.

proceeds from EAs] *is from sources that were available to Respondents since as early as 2005*."[1400]

1199. Since VE filed the publicly available information on how VE was using EA profits on which Respondents rely each year, "*Respondents were well aware, or should have been aware, of how Vilnius Energy was using emissions trading profits throughout the term of the Lease*."[1401]

1.1.2 Respondents' Position

1200. Respondents submit that the alleged triggering event for the statute of limitation cannot be the submission of VE's information to the Public Prosecutor in December 2010 because the latter is not the same person/entity as Respondents. "This alleged "trigger event" is irrelevant because the Prosecutor is not the Respondents".[1402]

1201. "*More fundamentally however* […] *Veolia agreed for its performance of its investment obligations to be assessed at the end of the Lease, and the prescription period for Veolia's failure to reinvest the EA proceeds thus begins commences* [sic] *at the end of the Lease*."[1403] Respondents rely on Art. 37(i) of the Lease according to which VE agreed to re-deliver the Facilities to Respondents in a Complete State at the end of the Lease, as well as Article 3 which expresses the Lessee's overarching duties, Article 16.1 setting out Claimants' Investment Obligation and Article 16.8 that obliged Claimants to operate the Facilities in accordance with international standards.[1404]

1202. In any event, Respondents state that "*Lithuanian law considers that when damage occurs after the unlawful act, the prescription period commences when the person becomes aware*

[1400] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 960, **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 685-687 and 701.

[1401] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 960, see also para. 962.

[1402] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 253.

[1403] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 253.

[1404] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1474-1475.

of, or should have become aware of, the damage."[1405] Given that the Lease granted Veolia reasonable latitude as to the timing of its investments according to the Investment Plan, it was only at the moment of the return of Facilities that Respondents' damage crystallized.[1406]

1.2 The Arbitral Tribunal's Analysis and Decision

1203. The Parties agree on the fact that a three-year limitation applies to Counterclaim 3,[1407] but disagree as to the starting date of this time limitation.

1204. Claimants submit that this 3-year statute of limitation starts running when the aggrieved party becomes aware or should have become aware of the breach forming the basis of its claim.[1408] Therefore, according to Claimants, Respondents had 3 years to file Counterclaim 3 from the time they became aware or should have become aware of VE's use of EAs sales profits for purposes other than re-investment into the Facilities.[1409]

1205. Respondents' submission on the starting date of the applicable prescription is linked to the fact that Respondents have asserted different contractual bases for their Counterclaim 3, both in relation to the time-limitation and to the merits of that Counterclaim. Specifically, in defense to Claimants' time-limit objection, Respondents have pointed to Article 1.127(2) of the Lithuanian Civil Code[1410] which provides that:

[1405] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1478 (emphasis in the original), with ref. to **RL-151:** Supreme Court of Lithuania, Civil Case No. e3K-3-457-684/2017, Ruling, dated 28 December 2017.

[1406] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1479, 1481.

[1407] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1479, 1481.

[1407] **RL-044:** Civil Code of the Republic of Lithuania (including amendments of April 12, 2011), Article 1.125(8).

[1408] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 698, **RL-044:** Civil Code of the Republic of Lithuania (including amendments of April 12, 2011), Article 1.127(1).

[1409] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 959.

[1410] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1476.

"2. Where there is a time-limit established for the performance of an obligation, prescription of a claim arising from such obligation shall start its run upon the expiry of the time-limit allotted for the performance of that obligation."[1411]

1206. Respondents consider that, pursuant to Article 1.127(2) of the Lithuanian Civil Code, the time limitation of Counterclaim 3 did not start running before the end of the Lease because the time-limit allotted for the performance of the underlying obligation did not expire before the end of the Lease. Respondents' reasoning is that:

- VE leased the Facilities under the express provision that its obligations were to be assessed at the end of the Lease. Respondents rely in that regard on Article 37(i) under which VE undertook to "*re-deliver*[…] *and/or hand*[…] *over*" the Facilities at the end of the Lease in *a* "*Complete State*".[1412]

- VE had the obligations to 1) meet its overarching duties expressed in Article 3 which sets the general goals of the Lease; 2) fulfill its Investment Obligation pursuant to Article 16.1 of the Lease which provides that VE shall renovate and invest in the Facilities in accordance with the Investment Plan; 3) "*operate, manage and maintain the Facilities in accordance with the internationally recognised and accepted practices*" pursuant to Article 16.8 of the Lease.[1413] According to Respondents, these obligations are "*outcome oriented*" and "*do not prescribe a* specific *time frame for compliance. Vilnius Energy was thus not constrained to time its investments to a specific schedule and could reinvest the emissions allowance proceeds whenever it wanted, including in the final year of the Lease*."[1414]

1207. Respondents argue that the consequence under Lithuanian law is that the statute of limitation starts running upon the re-delivery or hand-over of the Facilities from Claimants to Respondents, as it is the date on which the time-limit expired for Claimants to perform

[1411] **RL-044:** Civil Code of the Republic of Lithuania (including amendments of April 12, 2011), Article 1.127(3).
[1412] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1474.
[1413] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1475.
[1414] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1475.

their obligations to 1) operate the Facilities as per certain standards, 2) preserve the value of the Facilities or 3) meet their Investment Obligation.[1415]

1208. Claimants answer that Respondents' reliance on these provisions is misplaced, as Article 1.127(2) of the Lithuanian Civil Code refers to "*contracts for performance of some undertaking by a certain date, such as, for example, a contract in which a contractor undertakes to perform a particular work (e.g., painting a house) by a date certain or a contract in which an insurer undertakes to pay an indemnity by a certain date* […] *Absent a deadline, the statute of limitations begins to run as soon as the aggrieved party becomes aware, or should have become aware, of the factual circumstances forming the basis of their claim.*"[1416] Claimants also point to the fact that Respondents rely on case law in which specific performance, rather than damages, was sought.[1417] According to Claimants, since "*the Lease provisions to which Respondents refer do not impose a deadline to reinvest emission allowance proceeds in the Facilities* […] *it is absurd for Respondents to argue that the statute of limitation does not begin to run until the end of the Lease*."[1418] Claimants submit that Respondents' references to Articles 3, 16.1 and 16.8 are also unavailing, as they relate to the operation of the facilities rather than to the re-investment of emissions allowances.[1419]

1209. The Arbitral Tribunal generally agrees with Claimants' position and finds Respondents' reference to these general provisions inapposite. As mentioned above in relation to Counterclaim 4, Article 3 simply defines in broad terms the Lease's goals.[1420] Article 16.1 is focused on Veolia's commitment to the Investment Plan/Program at Annex 2 to the Lease, which does not deal with emission allowances revenues. As to Article 16.8, which provides that VE will operate, manage, and maintain the Facilities in accordance

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[1415] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1476, with ref. to **RL-044:** Civil Code of the Republic of Lithuania (including amendments of April 12, 2011), Article 1.127(2), see also para. 1479.

[1416] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 690.

[1417] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 690.

[1418] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 691-692.

[1419] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 693-697.

[1420] See above para. 852.

with internationally recognized standards, it is also a provision that is unrelated to the proceeds of emissions allowances. The Arbitral Tribunal further notes that, as pointed out by Claimants,[1421] these provisions are not the kinds of obligations contemplated by Article 1.127(2) of the Lithuanian Civil Code as they do not specify a certain date for performance or compliance/assessment.

1210. The Arbitral Tribunal now turns to Respondents' second argument on the starting date of limitation for Counterclaim 3 under Lithuanian law. Respondents submit that, in situations where the damage occurs later than the corresponding breach, under Lithuanian law the time at which the damage crystallizes is the starting date on which the 3-year statute of limitation starts running. Respondents refer to a decision of the Lithuanian Supreme Court of 2017. [1422] Claimants disagree with Respondents' interpretation of the Lithuanian Supreme Court's decision on which Respondents rely. Claimants argue that said decision solely confirms the basic rule of Article 1.127(1) of the Lithuanian Civil Code according to which the statute of limitation starts running when the aggrieved party is (or should have been) aware of the breach, not the damage.[1423] The relevant decision reads as follows:[1424]

> "*The Panel of Judges notes that when a plaintiff makes a claim for damages, then, in order for such a claim to be satisfied, a set of conditions of civil liability must be established: the defendant's wrongful acts, the fact and extent of the damage, the causal link between the wrongful acts and the damage, as well as the fault of the defendant (except where the liability arises without fault). In such cases, the start of the run of the limitation period shall be deemed to be the moment when the plaintiff became or should have become aware that he had suffered damage as a result of the defendant's wrongful acts. The plaintiff may not yet know the exact amount of the damage at that moment, but he must understand the fact of the damage. In cases where the damage occurs at the same time as the wrongful acts are committed, the moment of becoming aware (having to become aware) about the wrongful acts will*

[1421] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 697.

[1422] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1478.

[1423] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 700.

[1424] **CLA-129:** Supreme Court of Lithuania, Civil Case No. e3K-3-457-684/2017, Ruling (expanded translation of RL-151), dated 18 December 2017.

coincide with the becoming aware (having to become aware) about the fact of the damage. In cases where the damage occurs later than the wrongful acts, the start of the run of the limitation period shall be deemed to be the moment when the plaintiff became aware or should have become aware that the damage had occurred."

1211. The Arbitral Tribunal interprets the above decision as meaning that the starting date for the 3-year statute of limitation applicable to Counterclaim 3 started running when Respondents became aware of the damages, they allege they have suffered as a consequence of VE's failure to re-invest EA proceeds into the Facilities, rather than the date on which Respondents became aware that a damage may possibly have been caused by VE's allegedly wrongful use of the EA proceeds.

1212. The Arbitral Tribunal notes that Respondents' references to other provisions of the Lease such as Article 3, 16.1 or 16.8 in support of its Counterclaim 3 are not directly on point. As will be seen below, the issue at stake is an issue of title to revenues based on Article 10 of the Lease. In the present case, the Parties have agreed in Article 10.2 that EAs sales proceeds do not fall within the revenues to which VE is entitled. Respondents might have understood, however, that any objection as to the use of EAs would only be ripe at the end of the Lease when liquidation accounts would be drawn, and the overall returned value of the Facilities and amount of Claimants' investments would be assessed.

1213. In any event, this legal determination has little impact on the Tribunal's conclusion regarding time limitation. Respondents have explained that it was not possible to read from VE's publicly available reports how it used the EAs sales proceeds. Further, the Arbitral Tribunal agrees with Respondents' submission that it ought not have been necessary for VST to have to scrutinize Vilnius Energy's annual reports in light of the tailored reporting requirements that Veolia submit investment reports.[1425]

1214. Respondents' second defense relies on the fact that it was the Vilnius Prosecutor and not Respondents who triggered the 2010 investigation that was concerned with the repayment of allegedly misappropriated funds. Time-bar however does not rely on who

[1425] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1480.

raises a damage issue, but rather on the principle of a claimant's awareness that a damage is occurring, which triggers the running of time-bar.

1215. Therefore, the relevant question is whether Respondents were aware of the District Prosecutor Office's investigation about a possible misuse of income flowing from the sale of EAs by VE. The Prosecutor's investigation was triggered by an application of Mr. Vidmantas Martikonis, a member of the Vilnius City Municipal Counsel, one of the Respondents in this arbitration. The aim of the application is practically identical to Counterclaim 3, which was filed about 7 years later in this arbitration. Mr. Martikonis relies in his application on the analysis of the National Commission for Energy Control and Prices, which had data at hand showing that VE had received LTL 172.2 million for Emission Allowances sold. The aim of Mr. Martikonis' application was to secure the repayment to Respondents of such "misappropriated" funds. This is also the aim of Counterclaim 3.

1216. The Prosecutor wrote to VE on December 14, 2010 and VE replied by a 10-page letter on December 28, 2010. The District Prosecutor Office's inquiry of 14 December 2010 reads as follows:[1426]

> *"Vilnius District Prosecutor's Office received the application of Vilnius City Municipal Council member Vidmantas Martikonis for protection of the public interest. The applicant maintains that according to the data of the National Commission for Energy Control and Prices, which carried out the analysis of investments of UAB Vilniaus energija, the company received LTL 172.2 million for emission allowances sold to other EU Member States during the past five years. Having regard to the provision of paragraph 70 of the Heat Price Determination Methodology approved by Resolution No O3-96 of the National Commission for Energy Control and Prices, the Application specifies that income received from sale of allowances for release of emissions into the atmosphere must be used for investments into the reduction of carbon dioxide emissions or included in revenues for of heat price reduction. Funds unused for their purpose, according to the Applicant, had to be repaid to AB Vilniaus šilumos tinklai or to Vilnius City Municipality.*

[1426] **C-288:** Letter from Prosecutor to Vilnius Energy, dated 14 December 2010 (emphasis added).

It is requested in the Application to determine where the amount of LTL 172 200 000, received for sold emission allowances during 2005-2009 was used by UAB Vilniaus energija and to bring the action on ordering UAB Vilniaus energija to repay the misappropriated funds to the State, Vilnius City Municipality or AB Vilniaus šilumos tinklai."

1217. The most relevant parts of VE's response to the Vilnius District Prosecutor Office's inquiry read as follows:[1427]

"*In response to your request of 15 December 2010, please be advised that* […]

[…]

Where emissions of the installation exceed the allocated quantity of allowances, the operator can sell the surplus allowances to those operators whose emissions are larger than the allocated quantity of allowances […] *This flexibility of the scheme, in particular, explains why the EAT scheme offers the best cost-effectiveness in achieving the established environmental protection goals. Total costs would be significantly higher if all companies have to spend more on the reduction of emissions in their installations. Due to this particular reason, also including according to interpretations of the European Commission, the use of funds from the EAT is not regulated in any Member States of the EU (excluding Lithuania, since 23-07-2009, see below), because this could lead to the distortion of the meaning and principles of the EU EAT scheme as such.*

[…]

The emission allowance is allocated to the ***operator*** *regardless of whether or not the operator is the owner of the installation.* […] *http://mic.vmi.lt/documentpublicone.do?id=1000041886). The emission allowances are the property of the operator and are accounted for as intangible fixed assets or current assets (Interpretation No (18.3-31-2)-R-11412 of the State Tax Inspectorate under the Ministry of Finance of the Republic of Lithuania of 23 December 2005-12-23.* […]

[…]

[1427] **C-289:** Letter from Vilnius Energy to Prosecutor, December 28, 2010, dated 28 December 2010 (emphasis in the original).

In response to the questions raised by you, it is necessary to note that neither the allowances allocated to the operator UAB Vilniaus energija and constituting the property of this operator, nor the result (revenue or loss) of trading carried out by UAB Vilniaus energija are the property of the State or of Vilnius City Municipality, or of AB Vilniaus šilumos tinklai neither according to the Lease Agreement signed on 1 February 2002-02-01 between Vilnius City Municipality, AB Vilniaus šilumos tinklai, UAB Vilniaus energija and the French Company Dalkia (hereinafter – the Lease Agreement), nor under any legal acts of Lithuania or EU. […]

Even if there were any theoretical prerequisites to consider that income from EAT should be treated as related not to the result of financial activity (EAT) carried out at the risk of UAB Vilniaus energija, but with leased installations (although emission allowances are allocated to the operator in particular and, as such, have no financial value, e.g., their market price at the end of 2005-2007 period was close or equal to 0), then it is also imperatively established by Article 6.488 of the Civil Code of the Republic of Lithuania that 'Income generated by the leased object <…> are owned by the lessee, unless the contract establishes otherwise'.

Thus, there are no legal grounds for allegations concerning "illegal misappropriation" of the financial result of the sale or purchase of the transferred or held allowances that were owned by UAB Vilniaus energija from which all taxes had been paid into the budget. The allowances, as such, may be taken form the operator (transferred to the reserve for new installations) only if the operation of installation itself is discontinued and the greenhouse gas emissions permit is cancelled. Meanwhile, the EAT result is the property of the operator and is not subject to any 'return' to anybody, 'taking away' or 'transfer' under any legal acts.

[…]

[I]*t should be noted further that Vidmantas Martikonis, as a member of Vilnius City Municipal Council, is very well aware of all the aforementioned circumstances, because in accordance with the Law on Heat Sector, investment plans of heat suppliers are coordinated not only with the Commission, but also with municipal councils.* […] *Representatives of Vilnius City Municipality also participated at the Commission's meetings which approved the long-term regulated activity investment programme of UAB Vilniaus energija for 2009-2013, the basic heat prices and components of the hot water price of UAB Vilniaus energija, they have got familiarized*

> *with the Certificates published by the Commission* […]*, provided observations and proposals regarding them and participated in the performance of functions of local municipalities established by laws in the spheres of determination of heat prices and in related areas. Under such circumstances, we can assess the equivalent allegations/complaints of Mr. Vidmantas Martikonis, not supported by legal acts or by the Lease Agreement only as incorrect politicization, possibly related to the approaching elections to local municipalities.*"

1218. The above correspondence may suggest that the Municipal Council, *i.e.* the representative of Respondent 2 in this arbitration, may have been aware of VE's free use of the EA proceeds it acquired as operator of the leased Facilities. Was it an informal, private question or an application by the Municipal Council for an investigation by the Vilnius Prosecutor about possible misappropriation of income, to the detriment of the Respondents?

1219. The Prosecutor wrote an official letter and requested financial documentation and information about the use of funds, with certified copies of the documents supporting the data. The Applicant's request was thus entertained by the Prosecutor and addressed in detail by Claimants. It was an official investigation brought against Claimants by a member of the Vilnius City Municipal Council. Under these circumstances, it may be doubtful to consider that the Municipal Council was unaware of the inquiry.

1220. Strictly speaking, Respondents do not claim unawareness. Rather, they argue that the investigation was not brought by Respondents, but by a third party, the Prosecutor. In their Reply Post-Hearing Brief, they merely state about the Prosecutor's investigation, considered as the triggering date by Claimants, that "[t]*his alleged 'trigger event' is irrelevant because the Prosecutor is not Respondents*".[1428]

1221. The Prosecutor was requested in the application to precisely investigate the point of a possible misappropriation of funds and VE squarely replied that these profits were its property. If this information was provided by the Prosecutor to the applicant, Respondents would have known about what they consider misappropriation. Under that assumption, the time bar would have started running.

[1428] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 06 December 2022, para. 253.

1222. However, the Arbitral Tribunal has to account for the fact that Claimants bear the burden of establishing their time-bar objection, and for the circumstance that the above correspondence is not exchanged with the Municipal Council nor one of its members, but with the Vilnius City District Prosecutor's Office.

1223. The Arbitral Tribunal would therefore have to assume that VE's answer to the Vilnius City District Prosecutor's Office and/or the result of the latter's inquiry would have been communicated to Respondents, whereas there is no evidence on the record, such as minutes of the meetings to which VE refers to in its response to the Vilnius City District Prosecutor's Office, which establishes such communication and/or at least Respondent 2's awareness of Respondents' damage back in 2010.

1224. In view of the above, there is, at a minimum, a doubt as to whether Respondents, *i.e.* VST and the Vilnius City Municipality, were aware of possible damages.

1225. In addition, as mentioned above, the correspondence on which Respondents rely was not exchanged with Respondents. Even if the Arbitral Tribunal considered that the Municipal Council could have been aware of the damage arising out of VE's alleged misuse of the EA proceeds it had received as the Facilities' operator, the Arbitral Tribunal cannot simply assume the Municipality's awareness. The legal representative of a municipality is its mayor. A municipal council does not represent a municipality. *A fortiori*, a member of a municipal council (here, Mr. Martikonis), who does not seem to represent the municipal council (since the municipal council would normally be represented by the mayor), does not represent the municipality and therefore does not function or serve as the Municipality's mind in respect of possible damage caused to it.

1226. There is no indication on record the the Mayor or the Municipal Council had delegated authority to Mr. Martikonis to start an investigation on their behalf. Consequently, without any legal power of representation and without any mandate given by the legal representatives of the Vilnius City Municipality, Mr. Martikonis' acts did not reflect the Municipality's awareness of the damage that is the object of Counterclaim 3. The Arbitral Tribunal further notes that the Vilnius City District Prosecutor's Office never communicated with the Municipality itself.

1227. In view of the above, the Arbitral Tribunal is not in a position to reach a firm conclusion as to the Municipality's awareness more than three years prior to the expiry of the Lease or the submission of the Respondents' Counterclaim of the damage possibly caused to it. Therefore, the Tribunal concludes that neither the Vilnius District Prosecutor Office's inquiry nor VE's answer thereto establish that Respondents were aware of VE's use of EA proceeds at the time of the inquiry. Claimants' time-bar objection is consequently dismissed.

2. Liability

2.1 The Parties' Positions

2.1.1 Respondents' Position

1228. Respondents interpret Article 10.2 of the Lease regarding VE's rights to receive revenue as an exhaustive list of the profits VE could treat as its own under the Lease.[1429] Respondents consider that *"(i) in light of the breadth of Veolia's duties and undertakings, (ii) given the exhaustive definition of revenue, and (iii) given that the ETS was not yet in force, it was simply unnecessary for emissions allowances to be expressly mentioned in the Lease Agreement*."[1430]

1229. According to Respondents, the fact that Veolia might have reduced emissions during the Lease period is irrelevant as, in any event, "*Article 10.2 would not permit Veolia to take 'property associated with the main activity of* [VST]*' simply because it thought it had created some value for its client* […] *Veolia's profits were to come from the tariffs (not from selling VŠT's property).*[1431]

1230. Respondents rely on further provisions of the Lease to infer a positive obligation of Claimants to re-invest EAs: Article 3.1 which sets out VE's binding and overarching

[1429] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 874; **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1379-1395.

[1430] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1403.

[1431] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 875.

operational commitments to "*cut down the costs of electricity and heat production, and the costs of district heating and hot water supply in Vilnius*", to "*upgrade the heat and electricity generation* […] *in terms of* […] *improvement of their technical and economical specifications*". These commitments must be assessed in reference to the capabilities promised by Veolia in its tender.[1432] Respondents further rely on Article 37 of the Lease on Complete State to contend that the standard of a "*skilled and experienced international operator*" must be considered,[1433] a standard that is confirmed in Article 16 of the Lease.[1434] Respondents consider that these provisions are relevant to VE's usage of EAs as they are closely related to VE's obligation to make the necessary investments to ensure that the Facilities remain economically viable under the EU EAs trading system.[1435]

2.1.2 Claimants' Position

1231. Claimants' position is that they are the rightful owners of the EAs and are thus free to enjoy them as they wish. EAs are the property of the operators who can use them freely pursuant to both EU and Lithuanian law.[1436] Further, VE was under no legal obligation to re-invest EA proceeds. [1437]

1232. VE was also under no contractual obligation to trade EAs profitably or to re-invest EA profits, the Lease being absolutely silent on EAs.[1438] "*Respondents wrongly rely on provisions of the Lease that are completely unrelated to emissions trading*."[1439]

1233. With respect to Article 10.2 of the Lease relied on by Respondents, Claimants respond that its language refers solely to the administration of the contracts for services from

[1432] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1331-1337.
[1433] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1338-1342.
[1434] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1343-1347.
[1435] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1348.
[1436] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 596-604.
[1437] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 605-607.
[1438] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 618-636.
[1439] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 618.

and for customers[1440] and that the list of revenues therein is not an exhaustive list of all revenues VE was entitled to under the Lease.[1441]

1234. Claimants emphasize that Article 10.2 of the Lease cannot be read as prohibiting VE from pursuing other activities generating revenues. "*Any prohibition in this sense would need to have been expressly provided in the Lease*."[1442]

2.2 The Arbitral Tribunal's Analysis and Decision

2.2.1 EU and Lithuanian law

1235. Claimants' expert Mr. Radov of NERA Consulting has provided two experts reports on the trading of emissions allowances.[1443] Mr. Radov explains the system as follows in his first report:

> "***Allocation of emission rights and trading activity***
>
> *51. According to the EU ETS Directive, Member States must distribute free allowances due to existing installation operators in February each year* […]
>
> *52. After each calendar year, to comply with the requirements of the EU ETS Directive, operators regulated by the EU ETS must have the emissions from each of their installation verified by an independent certified company* […]
>
> *53. If an operator does not hold enough emission rights to cover its installations' emissions for the preceding year, the operator must acquire additional allowances – either from other market participants, or from government auction* […]
>
> *54. Installation operators must open an Operator Holding Account (OHA) to comply with the ETS. Only operators are eligible to receive free allowances from Member States, and require an OHA to do so* […] *Therefore, where an installation operator is not the same as the installation owner, and where contractual terms do not stipulate*

[1440] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 622.
[1441] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 621.
[1442] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 622.
[1443] **CEX-008:** Expert Report of Daniel Radov, dated 21 January 2019, **CEX-011 :** Supplemental Report of Daniel Radov, dated 26 May 2020.

> *anything to the contrary, proceeds from the sale of free allowances received by the operator will accrue to the operator, rather than to the owner* […]
>
> *55. The making of payments, and the use of any payments received for traded allowances is* […] *outside the operation of the* [European Union Transaction Log]. *Furthermore, the EU ETS Directive does not specify what should be done with the proceeds of the sale of any emission rights*."[1444]

1236. As confirmed by Mr. Radov and demonstrated by the market that has developed for the trade of EAs, there is no doubt under EU law that Veolia, as an installation operator, was allowed to trade EAs insofar as the Lease did not provide otherwise.[1445]

1237. Regarding Lithuanian law, Claimants rely on Article 6.488 of the Civil Code of Lithuania,[1446] which provides that "[t]*he incomes, fruits, livestock increase received from the leased thing shall belong to the lessee unless otherwise provided for by the contract*."[1447]

1238. Claimants further point to the decision of Lithuania's Court of Appeals in the so-called "Alytus case", a case in which the Alytus Municipality and "Alytaus šilumos tinklai" or "AST" (the equivalent of VST in this case) filed a claim against VE's sister company Litesko, alleging *inter alia* that Litesko had failed to re-invest emissions allowances proceeds in the facilities it had leased from the Alytus Municipality and AST. Claimants state that, in that decision, "*Lithuanian courts have determined* […] *that emission allowances are the property of the operators*."[1448] This statement is correct, but it does not address the great emphasis put by the judges in the Alytus case on the absence of any contractual terms stipulating the contrary. The relevant part of the Alytus decision reads as follows:[1449]

[1444] **CEX-008:** Expert Report of Daniel Radov, dated 21 January 2019, paras. 51-55 (emphasis added).

[1445] **CEX-008:** Expert Report of Daniel Radov, dated 21 January 2019, paras. 56-61, see also **CEX-011:** Supplemental Report of Daniel Radov, dated 26 May 2020, paras. 6-12.

[1446] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 597.

[1447] **RL-044:** Civil Code of the Republic of Lithuania (including amendments of April 12, 2011), Article 6.488 (emphasis added).

[1448] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 599, see also Claimants' opening statement, Hearing, Day 1, 45/12-46/5, Claimants' opening presentation, slide 68.

[1449] **RL-266:** Court of Appeals of Lithuania, Case No. 2-56-3-01044-2016-4, dated 28 March 2019.

"Regarding revenues generated from the sale of emission allowances

185. In the appeal the claimant UAB 'Alytaus šilumos tinklai' stated that the respondent UAB "Litesko" generated revenues not because it used in civil circulation the assets of the heat sector received based on the Modernization Agreement and the Asset Lease Agreement but because it obtained emission allowances and sold them […] *According to the claimant,* […] *UAB 'Litesko' had to invest the funds received from transfer of emission allowances into the Alytus heat sector. Amounts of allowances were granted taking into account the amounts of greenhouse gas emissions produced by the assets transferred to the respondent through lease, consequently, the respondent generated additional revenues only because of the management of the claimants' assets and the amount of allowances is determined not by the respondent's activities but by the technical indicators of the Alytus heat sector.*

186. The panel of judges of the appellate court, after assessing the case file, the parties' arguments and the legal regulation relevant to the issue concerned, has no reason to agree with the claimant's position […]

187. The [Law on Financial Instruments for Climate Change Management] *shows that emission allowances differ not with respect to the installation as such but namely with respect to the operator, i.e. in this case, UAB 'Litesko' which manages and uses in its activities the installations emitting greenhouse gases and has at its disposal the economic instruments to address the issues of technical functioning of the installations.* […]

190. Therefore, the court of first instance, taking into account the principles and regulations of the operation of the emission allowances allocation system, absolutely reasonably recognized that emission allowances (and especially their sale result) must be regarded as the respondent's operating income received using leased assets, and whereas there has been no agreement between the parties on transfer of the respondent's operating income or part thereof generated using leased assets to the landlord (UAB 'Alytaus šilumos tinklai'), the claimant's arguments regarding the right of ownership to such income are unfounded.

191. Furthermore, the claimant, stating that the respondent UAB 'Litesko' had to invest the proceeds from the sale of emission allowances namely into the Alytus heat sector, specified not a single contractual provision or legal rule set out by law in support of the appellant's argument […]

> *193. Conditions establishing an obligation of the respondent as the tenant of the Alytus heat sector and a heat supplier to additionally invest the funds generated from emission allowances namely into the measures reducing pollution from the Alytus heat sector, are provided neither in the Modernization Agreement nor in the Asset Lease Agreement, hence, in the assessment of the panel of judges, the claimant's arguments that the respondent, failing to invest (or prove the investment of) the funds received from the sale of emission allowances allocation system laid down by the law or an agreement, are based only on the claimant's declarative considerations of general nature and thus must be rejected.*
>
> *194. The panel of judges considers that in this case, in the absence of an agreement between the counterparties that the respondent will transfer (will have to transfer) its operating income or part thereof to the landlord, also given that neither the law nor the agreement establishes the respondent's obligation to use the result (funds) obtained from the sale of allowances in implementing measures designed to reduce pollution namely in the Alytus heat sector complex, there is no reason to speak of a possibility of unlawful actions with respect to the claimant and of causing damage to the claimant as the owner of the Alytus heat sector and the landlord*".[1450]

1239. In view of the above, it is clear under both EU and Lithuanian law that, in the absence of a contrary agreement between the lessor and the lessee to the contrary, EAs and their sales proceeds must be regarded as the operator's (not the owner's) income, which the operator receives when using the leased assets. Claimants referred to further decisions which confirm the same.[1451]

1240. Claimants rely on this general rule to argue that they were therefore entitled to dispose of EAs. However, while EU and Lithuanian laws treat EA proceeds as revenue from the leased assets as the default rule, the above provision of the Lithuanian Civil Code and the Court of Appeals' decision are clear as to the fact that the parties to the lease are free to agree otherwise.

[1450] **RL-266:** Court of Appeals of Lithuania, Case No. 2-56-3-01044-2016-4, Ruling of March 28, 2019, dated 28 March 2019, paras. 185-194 (emphasis added).

[1451] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 600-602, Claimants' hearing presentation, slides 69-70.

1241. In that regard, Respondents point to the difference of language between the Lease between the Parties on the one hand, and the lease between Litesko and Alytus/AST, on the other hand.[1452] Article 4.5 of that lease provides as follows:

> *"All income or benefits received during the Property lease period from use of the Property shall be full ownership of the Lessee and the latter shall use it at its own discretion, but in the manner consistent with the regulatory legal acts of the Republic of Lithuania."*[1453]

1242. Respondents compare Article 4.5 of the above quoted contract with the terms of the Lease (*i.e.* Article 10) and conclude that VE did not have ownership of the profits from EAs under the Lease, as the list of revenues to which VE is entitled is exhaustively set out in Art. 10.2:[1454]

1243. In view of the contrast between the Lease between Claimants and Respondents on the one hand, and the lease between Litesko and Alytus/AST on the other hand, the Arbitral Tribunal considers that the Alytus case is not directly relevant to its analysis. In any event, like the EU ETS and the Lithuanian Civil Code, in the Alytus decision the Court's holding that EA proceeds are the operator's income does not apply in the presence of contrary contractual terms. Mr. Radov himself stated that the ownership of EA proceeds is within the scope of what Parties can define contractually. The Arbitral Tribunal's decision thus comes down to an interpretation of the Parties' intention against the relevant provisions of the Lease and their context.

2.2.2 The Lease Provisions

1244. Before turning to its analysis of the relevant provisions of the Lease, the Arbitral Tribunal notes that the Lease and its annexes are silent as to the specific issue of EA proceeds.

[1452] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 876, Respondents' opening presentation, part IV, slide 31.

[1453] **R-1420:** Property Lease Contract between Alytus Šilumos Tinklai UAB and Litesko UAB No. 01-08-02-014, dated 02 August 2001, Article 4.5.

[1454] Respondents' Post-Hearing Brief, para. 876.

1245. The Arbitral Tribunal further notes Claimants' argument that "[d]*espite the Respondents' allegations to the contrary, the entry into effect and applicability of the emission trading scheme was unforeseeable when the Lease was first entered into in 2002*" [1455]. However, the Arbitral Tribunal has also taken note of the opinion of Claimants' expert Mr. Radov, which contradicts Claimants' assertion. Mr. Radov has opined that:

> *"By February 2022* [*i.e.* when the Lease was concluded]*, it was expected that the EU would be implementing an emission trading system, which would come into effect in 2005*"[1456]
>
> "[W]*hile none of the details of the policy had been finalised, various high level design principles had been proposed, including that operators would receive some volume of free allowances and would be able to benefit from the proceeds of trading emission rights.*"[1457]

1246. Respondents rely notably on Article 10.2 of the Lease in support of their Counterclaim 3. Article 10.2 lists VE's rights to receive revenue, which they interpret as an exhaustive list of the revenues VE could treat as its own under the Lease.[1458]

1247. Claimants for their part consider that the language in Article 10.2 makes it clear that it is only concerned with "*rights to the revenues and to the administration of the contracts for services*". Claimants contend that Article 10.2 does not regulate other revenues than those stemming from contracts with consumers.[1459]

1248. Article 10.2 of the Lease reads as follows:

> ***ARTICLE 10. GRANT OF LEASE RIGHTS***

[1455] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 633.

[1456] **CEX-011 :** Supplemental Report of Daniel Radov, dated 26 May 2020, para. 41.

[1457] **CEX-011 :** Supplemental Report of Daniel Radov, dated 26 May 2020, para. 2.d, see also para. 42.

[1458] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 874; **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1379-1395.

[1459] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 622.

10.1. Newco shall have the right and obligation to render the following services throughout the Term: […]

10.2. Rights to receive revenues. Newco shall have the following rights to the revenues and to the administration of the contracts for services, i.e.:

(i) to collect or empower other third party to collect all payments due for its services from the Customers […]

(ii) to introduce following the Legal Requirements new billing, metering and collecting services for the Customers;

(iii) to discontinue services to non-paying Customers […]

(iv) to cancel or terminate […] *supply contracts with business Customers* […] *which are considered by Newco to be not economically viable* […]

(iv) to have any debts due and payable to the Lessor for heat, hot water and electricity and other receivables recovered by the date of signing of this Agreement.

10.3 Operational rights […]"[1460]

1249. The Arbitral Tribunal considers that the language "*Rights to receive revenues. Newco shall have the following rights to the revenues and to the administration of the contracts for services, i.e.:*" – followed by a definite list of the type of revenues VE was entitled to, – should be interpreted as setting out an exhaustive list. Article 10 is also the only provision in the Lease referring to VE's revenues under the Lease. In that regard, Claimants' argument that the scope of Article 10 is limited to VE's revenues under consumers contract is difficult to follow. Claimants themselves present their remuneration under the Lease as the tariffs charged to consumers:

"*The Lease is long and complex, but the basic deal that the Parties struck was simple: Vilnius Energy leased the Facilities and agreed to operate, maintain, and significantly upgrade them pursuant to specific obligations set out in the Lease. In exchange,*

[1460] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 10 (emphasis added).

Vilnius Energy was entitled to provide, and be paid for, heating services and electricity for the city of Vilnius during the 15-year term of the Lease."[1461]

1250. Since the whole mechanics of the Lease was that the counterpart for Claimants' investment were the tariffs Claimants would charge to Vilnius consumers, the only rights to revenues Claimants were granted under the Lease were rights to receive funds from the Vilnius consumers. The language of Article 10 is thus sensical and Claimants do not point to other types of revenues due to VE that would be mentioned in the Lease. There are none. The structure of Article 10 (and of the Lease in general) is explicit as to the Parties' intention that VE would only be entitled to revenues related to tariffs charged to Vilnius' customers.

1251. Claimants have also argued that, since VE was under no obligation to engage in EAs trading, VE "*could not possibly be obligated to share profits from an activity that Vilnius Energy was not even required to undertake*."[1462] However, if VE were to choose to trade EAs, it would necessarily use leased assets to generate revenues, as it would have to first receive EAs as the Facilities' operator and start trading them. It thus seems logic, when one accounts for the overall structure of the Lease, that the proceeds of VE's trading of EAs it was allocated as the operator of the Facilities, be excluded from revenues VE was entitled to.

1252. In addition, as mentioned above, the Parties were aware of the possible revenue that the upcoming EU ETS entailed at the time they drew up the Lease. Accounting for these elements, Claimant's submission that the Parties' omission of EA proceeds from Article 10 was unintentional is not credible. If the Parties had intended VE to possibly be entitled to other revenues than tariffs, including proceeds from EAs trading, they would have included language such as "*among others* […] *but not limited to*" immediately before the list of VE's rights to revenues, to make it clear that the list of revenues at Article 10.2 was not meant to be read as exhaustive. Obviously, the Parties

[1461] **Revised RFA:** Claimants' Revised RFA, dated 26 May 2017, para. 3.

[1462] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 527, see also **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 905, **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 593.

wanted to be precise in Article 10, as is clear also from the overarching title of Article 10, *i.e.* "Grant of Lease rights".

2.2.3 Conclusion

1253. In light of the above, the Arbitral Tribunal concludes that, according to Article 10.2 of the Lease, VE does not have the right to the proceeds of EAs sales and that, rather, VST is the owner of these proceeds. In consequence, Counterclaim 3 is admitted in its principle.

3. Quantum

3.1 The Parties' Positions

3.1.1 Respondents

1254. Respondents' quantification of their Counterclaim 3 rests on the instruction to their *quantum* expert that "*VE was required to reinvest all EA Profits in the Facilities and that VE did not properly reinvest all of the EA profits over the period 2005 to 2016*".[1463]

1255. Respondents' expert has quantified the misuse of EAs in two distinct components: 1) the historical component which corresponds "*all EA Profits retained by VE at the end of the Lease*", and which is quantified at EUR 52.3 to 53.9 million,[1464] and 2) the future component which corresponds the "[p]*resent value of costs VŠT incurred to buy additional EAs over the period 2017 to 2020*", and which is quantified at EUR 5.7 million.[1465] This second leg of the Counterclaim is also grounded on the assumption that VE was to reinvest EAs sales profits in the Facilities. As explained by Respondents' expert, "*Respondents claim that, because VE did not properly reinvest all EA Profits, VŠT's future emissions will be higher than if VE had appropriately reinvested EA Profits.*

[1463] **FTI Slides:** Hearing Presentation of FTI (Dr. Fabien Roques), dated 08 June 2022, slide 19, see also **REX-001:** Expert report of FTI Consulting, dated 19 February 2018, paras. 2.50, 8.4, 8.46, **REX-003:** Second FTI Expert Report, dated 13 October 2019, paras. 8.2 and 8.29.

[1464] **FTI Slides:** Hearing Presentation of FTI (Dr. Fabien Roques), dated 08 June 2022, slide 29, **REX-003:** Second FTI Expert Report, dated 13 October 2019, paras. 2.48 ff.

[1465] **FTI Slides:** Hearing Presentation of FTI (Dr. Fabien Roques), dated 08 June 2022, slide 29, **REX-003:** Second FTI Expert Report, dated 13 October 2019, paras. 2.56 ff.

They are therefore counterclaiming for the present value of the additional costs incurred by VŠT purchasing additional EAs to cover its shortfall through to 2020."[1466]

1256. Respondents' assessment of the historical part of its EAs Counterclaim has been criticized by Claimants' expert, amongst others because Respondents' expert was instructed that VE was required to re-invest all EAs sales profits "*with no distinction by source (i.e. freely-allocated EAs vs own account trading)*." [1467] According to Respondents, Veolia's request that EUR 45.8 million be deducted from Respondents' damages under Counterclaim 3 because it allegedly stemmed from VE's own-account trading, is misplaced.[1468] Respondents point to the vague definition that Claimants give to their own-account trading. They contend that, in any event, "[t]*he evidence demonstrates that in the crucial period of 2005 to 2008 —a period in which Vilnius Energy realized EUR 49.8 million from selling EAs, the vast bulk of its EA profits during the Lease—absolutely no own-account trading occurred whatsoever*."[1469]

1257. Respondents' assessment of the *quantum* of Counterclaim 3 is also criticized by Claimants as based on pre-tax EA profits, whereas Claimants consider that tax would have been payable on the profits made by VE from trading EAs. Respondents consider that Claimants have not proven that such tax was paid or that it would have been due should Claimants have appropriately re-invested the EA proceeds in the Facilities. Respondents have in consequence instructed their expert to maintain his calculation on a pre-tax basis, while presenting an alternative calculation on a post-tax basis.[1470]

3.1.2 Claimants

[1466] **FTI Slides:** Hearing Presentation of FTI (Dr. Fabien Roques), dated 08 June 2022, slide 29, see also **REX-001:** Expert report of FTI Consulting, dated 19 February 2018, para. 2.51 and 8.35.

[1467] **FTI Slides:** Hearing Presentation of FTI (Dr. Fabien Roques), dated 08 June 2022, slides 30 and 32, see also **REX-003:** Second FTI Expert Report, dated 13 October 2019, para. 2.54, **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1512-1532, **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 883-912, **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, paras. 250-251.

[1468] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 883 and 885-888.

[1469] **FTI Slides:** Hearing Presentation of FTI (Dr. Fabien Roques), dated 08 June 2022, slide 32, **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 884 and 889-900.

[1470] **FTI Slides:** Hearing Presentation of FTI (Dr. Fabien Roques), dated 08 June 2022, slide 31, **REX-003:** Second FTI Expert Report, dated 13 October 2019, paras. 8.17-8.20.

1258. In their arguments on *quantum*, Claimants first refer to their position on the merits that, with respect to the historical part of Counterclaim 3, "*Veolia demonstrated that it did not misuse the profits that it earned from its EA trading activity*."[1471] Their expert has summarized that the issues of *quantum* are largely a legal determination of what was required under the prevailing laws and the Lease.[1472]

1259. Claimants submit that, in any event, the historical part of Counterclaim 3 is largely overstated.[1473] Claimants recall in their Post-Hearing Brief that this portion of Counterclaim 3 is part of Respondents' conditional waiver. It is also integrally claimed as part of at least two other Counterclaims: illegality and VE-3 conversion.[1474]

1260. Regarding own-account trading, Claimants deny that their expert would have changed her definition thereof. To the contrary, it has been consistent throughout the proceedings.[1475] Own-accounting trading is, according to Claimants and their expert, *"(a) profits that would have been made by a company acting in a passive manner, not attempting to optimize its position* […]; *and (b) profits that VE made from a more proactive approach to trading – selling more than just its surplus EAs and buying more than just what was necessary to meet any shortfalls*."[1476] Claimants' position is that trading any EAs, including freely allocated EAs, comes with a risk.[1477] Respondents' wrong premise that there would be no own-account trading when trading freely allocated EAs leads them to incorrectly analyze EA proceeds and to wrongly conclude that there was no own account trading between 2005 and 2008.[1478]

1261. Claimants further consider that the assessment of the *quantum* of Counterclaim 3 should account for post, rather than pre-tax profits from EAs sales.[1479] Claimants'

[1471] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para.398,

[1472] **Brattle Slides:** Hearing Presentation of Brattle (Dr. Hesmondhalgh), dated 08 June 2023, slide 25.

[1473] **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, paras. 111-122, **CEX-010:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 29 May 2020, paras. 133 ff.

[1474] **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 111.

[1475] **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 112.

[1476] **CEX-010:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 29 May 2020, para. 146.

[1477] **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 13, **CEX-010:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 29 May 2020, para. 147.

[1478] **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 114, see also below para. IX.G.c.1285.

[1479] **Brattle Slides:** Hearing Presentation of Brattle (Dr. Hesmondhalgh), dated 08 June 2023, slide 25, **CEX-010:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 29 May 2020, paras. 140-143.

expert explains that "[a]*lthough there is no specific tax on EA profits, if VE paid taxes in a year in which it also recorded profits from the sale of EAs, it follows that part of the taxes that VE paid can be associated with the EA profits – put another way, if VE had not made the EA profits it would have paid lower taxes.*"[1480]

3.2 The Arbitral Tribunal's Analysis and Decision

1262. As seen above, both experts have assessed the *quantum* of Counterclaim 3 based on the instruction that Claimants were to reinvest EAs sales proceeds in the Facilities. The historical part of Counterclaim 3 deducts the EA profits appropriately re-invested in the Facilities over the course of the Lease.[1481] The future part of Counterclaim 3 is based on the assumption that VE should have properly re-invested all EA profits but did not, and that, in consequence, VST's future emissions will be higher than they would have been if VE had appropriately re-invested profits from EAs trading.[1482]

3.2.1 The historical component of Counterclaim 3

a. *Amount of EA profits appropriately re-invested*

1263. The historical component of Counterclaim 3 is assessed by Respondents' expert on a pre-tax basis in a range between EUR 52.3 and 53.9 million,[1483] with the range reflecting the option for the Tribunal to adjust the *quantum* to its findings on the amount of EA profits appropriately re-invested.[1484] Dr. Hesmondhalgh has clarified that the difference in the two investment assumptions "*relates only to whether the cost of the economizer should be included (Low) or excluded (High)*."[1485] She explains further:[1486]

[1480] **CEX-010:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 29 May 2020, para. 140.

[1481] **FTI Slides:** Hearing Presentation of FTI (Dr. Fabien Roques), dated 08 June 2022, slide 30.

[1482] **FTI Slides:** Hearing Presentation of FTI (Dr. Fabien Roques), dated 08 June 2022, slide 33.

[1483] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1489, **REX-003:** Second FTI Expert Report, dated 13 October 2019, para. 8.69.

[1484] **REX-003:** Second FTI Expert Report, dated 13 October 2019, paras. 2.55, 8.4, 8.37 and 8.69.

[1485] **CEX-010:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 29 May 2020, para. 144.

[1486] **CEX-003:** Rebuttal Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 23 January 2019, para. 205.

"Mr. Harman makes two different assumptions regarding the investments that VE allegedly funded from emission allowances profits:

a 'high scenario' where the economizer and all the investments that he has been instructed to consider as included in the Investment Plan (€12.50 million) are offset against the Misuse of Emission Allowances Counterclaim, and

a 'low scenario' in which the economizer investment is excluded but all the other investments are offset against the Counterclaim (leading to total investments of €10.69 million)."

1264. Respondents instructed Mr. Harman to exclude the Economizer from the EA profits appropriately re-invested because VE did not transfer the Economizer to VST for free at the end of the Lease:[1487]

"In 2010, Vilnius Energy reported that it used EUR 580,109 of proceeds from sale of emission allowances in order to finance the Economizer in VE-2 plant. The said investment was not directly foreseen in the Investment Plan. Thus, financing the Economizer with emission allowances would be a proper use of emission allowances. Yet, Vilnius Energy did not transfer the Economizer to VST at the end of the Lease Agreement without seeking compensation. Instead, in the current proceedings the Claimants request the Respondents to purchase the Economizer as part of their Disputed Assets claim. This is both a breach of the Lease Agreement […] *and misuse of emission allowances."*

1265. The Arbitral Tribunal has decided in relation to Claim 1 that the Economizer is detachable from the Facilities, and therefore falls outside the Lease mechanism for the transfer of assets at the end of the Lease. Rather, it is VE's property and must be paid by VST which kept it. Claimants' request for payment of the Economizer is neither a breach of the Lease nor a misuse of emission allowances. Further, as mentioned in relation to the Disputed Assets, Respondents' argument that selling an emissions allowances-funded asset constitutes a breach of the Lease does not withstand scrutiny.[1488] In these circumstances, the correct amount of historical damages under

[1487] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 519.

[1488] See above para. 1148

Counterclaim 3 is EUR 52.3 million, subject to possible reductions argued by Claimants.

1266. Claimants have put forward several arguments to deny and/or reduce the amount awarded under Counterclaim 3, and the experts have debated certain calculations and data which have led to adjustments of the above figures, notably with regard to his estimates of VE's EA profits in 2005 and 2016 and to the amounts of EAs actually allocated to VE by Lithuania.[1489]

1267. In their Post-Hearing Brief, Claimants have summarized and to some extent re-structured their main arguments with regard to the *quantum* of Counterclaim 3. First, Claimants repeat their defense on the merits,[1490] which has been rejected by the Arbitral Tribunal above.

1268. Alternatively, Claimants submit that Counterclaim 3 is largely over-stated, and must be reduced because 1) Respondents' Counterclaim 3 fails to account for tax paid on EA profits, whereas taxes are payable on these profits, and 2) it further fails to account for EA profits made from its own-account trading. In addition, Claimants present two alternative *quantum* scenarios, as follows:[1491]

> "[A]*s Dr Hesmondhalgh explained, Dr Roques' calculations are grossly overestimated. Particularly, Dr Roques failed to account for the tax Vilnius Energy paid on its EA profits* […] *and Vilnius Energy's profits from its own account trading of EAs* […] *Additionally, as alternative scenarios for the calculation of damages, Dr Hesmondhalgh considers what (if any) the EA Historical Counterclaim would be, if VŠT were entitled to receive the profits that Vilnius Energy made from trading, spare free EAs between 2009 and 2014* […]. *Finally, Dr Hesmondhalgh estimates damages if a three year statute of limitations applies such that any EA Historical Counterclaim can only relate to the profits from the sale of spare free EAs in 2015 and 2016".*

[1489] **CEX-003:** Rebuttal Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 23 January 2019, para. 205. [1489] **REX-003:** Second FTI Expert Report, dated 13 October 2019, paras. 8.66-8.67, see also **CEX-010:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 29 May 2020, para. 134.

[1490] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 638.

[1491] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 642.

1269. Claimants had also previously argued that Respondents' damages claims are improper under Lithuanian law as they are a simplification which equates to claiming disgorgement damages.[1492]

1270. The Arbitral Tribunal examines these issues in the following sections.

b. *Taxes*

1271. Claimants' expert Dr Hesmondhalgh states that Counterclaim 3 is overstated because it considers EA profits on a pre-tax basis.[1493] She has compared taxes that VE paid having earned EA profits with taxes VE would have paid without any EA profits, to show that VE would have only paid around 11% taxes of what VE actually paid.[1494] Applying that comparison to relevant years of the Lease, she finds "*that the historical element of the Counterclaim is reduced by €10.6 million in the main scenario and from €10.7 to €11.5 million in the alternative scenario*".[1495]

1272. Respondents' expert Dr. Roques is short in his explanations as to why EA proceeds should be considered on a pre-tax basis, as he follows an instruction from Respondents that the payment of these taxes alleged by Claimants is not proven:[1496]

> "*I am instructed that VE has not proven that it in fact paid tax on these EA Profits, or that tax would have been paid on these EA Profits had they been appropriately reinvested, and as such I am instructed that VE's EA Profits should be assessed on a pre-tax basis.*"

1273. Respondents' position is in brief that VE was under an obligation to re-invest EA proceeds into the Facilities, and that, should VE have appropriately re-invested the proceeds, VE would not have paid taxes on them. However, this reasoning does not

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[1492] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 670.

[1493] **CEX-003:** Rebuttal Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 23 January 2019, para. 200.

[1494] **CEX-010:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 29 May 2020, paras. 133-142.

[1495] **CEX-010:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 29 May 2020, para. 143.

[1496] **REX-003:** Second FTI Expert Report, dated 13 October 2019, para. 8.19, see also **FTI Slides:** Hearing Presentation of FTI (Dr. Fabien Roques), dated 08 June 2022, slide 31.

make much sense from an accountancy and/or tax perspective. Presumably, VE would have had to record each transaction, in and out, and would have paid taxes on the proceeds of the sales regardless of their future use. The re-investment of the proceeds may thereafter give rise to a right for a tax credit, but this does not mean that VE did not pay taxes on the EAs sales proceeds.

1274. Second and in any event, it is in fact established in VE's response to the Vilnius District Prosecutor Office's inquiry of late 2010 that "[d]*ue taxes from the total EAT result were paid by UAB Vilniaus energija into the budgets of the Republic of Lithuania in accordance with the procedure set out by applicable legal acts*."[1497]

1275. In those circumstances, the Arbitral Tribunal finds that the EA profits of VE should be accounted for on a post-tax basis. Ms. Hesmondhalgh asses that this translates into a reduction of the amount of Counterclaim 3 of EUR 10.6 million. Respondents and Dr. Roques have argued that "*a proper counter-factual scenario assessing the effect of taxation would have to account for depreciation and* [tax] *incentives*".[1498] However, Respondents do not submit an alternative calculation and the Arbitral Tribunal agrees with Claimants that "*it is not for Dr. Hesmondhalgh nor Veolia to perform a counter-factual scenario assessing the effect that taxation incentives would have on the depreciation of EA financed investments taxable profits*"[1499] because the burden of such analysis is on Respondents who have only submitted a partial defense to the calculation of the impact of taxes on their Counterclaim 3.

1276. The amount of EUR 52.3 million is therefore to be reduced by the amount of EUR 10.6 million, leading to a compensation of EUR 41,726,000 million subject to further reductions discussed below. Dr. Roques has, for the sake of argument, calculated historical damages in his low scenario on a post-tax basis. He arrives at roughly the same figure.[1500]

[1497] **C-289:** Letter from Vilnius Energy to Prosecutor, dated 28 December 2010.

[1498] Transcript, Day 16, 168/2-15, see also **FTI Slides:** Hearing Presentation of FTI (Dr. Fabien Roques), dated 08 June 2022, slide 31.

[1499] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 646.

[1500] **REX-003:** Second FTI Expert Report, dated 13 October 2019, Appendix 5, Worksheet "Analysis (historical)", line 29.

c. *Own-account trading*

1277. While FTI was instructed that VE was required to re-invest all of its EA profits in the Facilities, Claimants and Dr. Hesmondhalgh consider that Counterclaim 3 should only account for EA profits resulting from the trade of EAs that were freely allocated to VE as the operator of the Facilities.

1278. The Arbitral Tribunal has decided above that, according to Article 10.2 of the Lease, VE does not have the right to the proceeds of EAs sales and that, rather, VST is the owner of these proceeds.[1501] The Parties' agreement in Article 10.2 should logically be limited to the proceeds of the EAs freely allocated by the EU to VE as the operator of the Facilities. In line with its interpretation of Article 10.2 of the Lease, the Arbitral Tribunal finds that VST's compensation should therefore be limited to the profits VE made from the sales of EAs that VST owned, *i.e.* the EAs freely allocated to the Facilities' operator.

1279. The Arbitral Tribunal however notes that calculating the amounts of 1) VE's EA profits stemming from freely allocated EAs on the one hand, and 2) VE's profits from the sale of EAs purchased in the course of its trading activity on the other hand, is very difficult, if not impossible.

1280. This difficulty is apparent from the experts' disagreements on how to assess the amount of reduction that would be required to limit the *quantum* of Counterclaim 3 to profits stemming from sales of freely allocated EAs. The experts relied on different methodologies and data, which led them to debate the very definition of own-account trading for the purpose of such assessment.

1281. As Dr. Hesmondhalgh recognizes, the source of a given EA sale's profit is difficult to determine given that the profits were not distinguished in VE's accounts:[1502]

[1501] **REX-003:** Second FTI Expert Report, dated 13 October 2019, Appendix 5, Worksheet "Analysis (historical)", line 29.

[1502] **REX-003:** Second FTI Expert Report, dated 13 October 2019, Appendix 5, Worksheet "Analysis (historical)", line 29.

"Q. […] *Anyway your analysis is based on there being two forms of trading activities that are hard to distinguish. Correct?*

A. You mean when I seek to distinguish between the two forms, yes, they are, because clearly VE did not make that distinction. It thought it had the right to trade all its emission allowances.

Q. Sure.

A. So there was no need for it to divide up in any way.

Q. Sure. Just to be clear about what those two forms are, one is Veolia's facilities related trading and another is Veolia's personal trading. It is as if there were two sub-accounts for each sort of trading that happened in one single account?

A. If you want to make that distinction, yes.

[…]

Q. […] *-- it is difficult to tell these apart because they happened in the same account. Correct?*

A. Yes."

1282. The experts have nevertheless submitted valuations of the amounts they consider should be deducted from the compensation under Counterclaim 3 if, as is the case, the Arbitral Tribunal considers in principle that VE's proceeds from the sales of EAs it purchased itself should be deducted.

1283. The definition of own-account trading applied by Dr. Hesmondhalgh to sort which EA profits should be accounted for has added a layer of complexity to the experts' debate.

1284. Without prejudice to Respondents' main position that no reduction should be made to account for own-account trading, Dr. Roques was instructed by Respondents to subsidiarily assume that 1) no material own-account trading took place in the period 2005-2008, but that 2) some own-account trading occurred in the period 2009

onwards.[1503] When Respondents' expert attempted to identify EA profits stemming from the sale of freely allocated EAs in 2009 onwards, he considered VE' amounts of EAs allocated by the EU to VE, and the amounts VE surrendered, to arrive at a surplus figure that he multiplied by an average market value.[1504] Dr Roques explains that he was instructed to rely on "*a ledger setting out VE's EA-related transactions over the relevant period* […] [which] *identifies VE's annual allocation of EAs, the number of EAs surrendered by VE each year, and VE's purchases and sales of EAs during the period*".[1505]

1285. On her end, Dr. Hesmondhalgh adopted a definition of own-account trading that encompasses all EA profits that stemmed from "efficient" EAs trading undertaken by VE, regardless of whether VE traded EAs it had received from the EU for the Facilities in Vilnius or EAs it had otherwise purchased/obtained/traded as part of its trader's activity:[1506]

> *"Dr Roques' approach raises the issue of how own account trading should be defined. In the Brattle Second Report, I implicitly defined own account trading as the difference between:*
>
> *a. the profits that would have been made by a company acting in a passive manner, not attempting to optimize its position, as VE has done, but simply selling the free spare EAs it had each year at a uniform rate from the time it received the allowances until the end of the relevant compliance year or compliance period; and*
>
> *b. the profits that VE made from a more pro-active approach to trading – selling more than just its surplus EAs and buying more than just what was necessary to meet any shortfalls in an attempt to arbitrage price differences.*
>
> *Whilst it is true that it was only possible for VE actively to decide when and how to trade spare free EAs because it operated the Facilities, it was still using its initiative*

[1503] **REX-003:** Second FTI Expert Report, dated 13 October 2019, para. 8.33.

[1504] **REX-003:** Second FTI Expert Report, dated 13 October 2019, Table III.C, Worksheet "Analysis (historical)".

[1505] **REX-003:** Second FTI Expert Report, dated 13 October 2019, p. 84, footnote 247, **R-818:** Vilnius Energy's Carbon Trading Ledger, dated 12 December 2015.

[1506] **CEX-010:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 29 May 2020, paras. 145-147.

> *and taking risks and incurring trading costs from so doing. For this reason, VE's sale of more than just its surplus free EAs and purchase of other types of emission instruments is just as much own account trading as its purchase and the resale of other EAs that it did not receive for free. This definition of own account trading is supported by the fact that I am instructed VE never separately considered the trading of spare free EAs, as VE understood all EAs to be its property as operator of the facilities.*"

1286. Respondents criticizes Claimants' definition of own-account trading as follows:

> "*Veolia asks the Tribunal to deduct EUR 45.8 million from the Respondents' damages because of alleged 'own account trading'. As used by Veolia, 'own account trading' is a euphemism for comingling client assets (those allocated for free to the Facilities) and personal assets (those allegedly purchased with Veolia's own funds), in a manner that—as confirmed by Veolia's expert—made such assets "difficult to tell* [...] *apart". Veolia seeks to be rewarded for this unethical alleged behaviour to the tune of EUR 45.8 million.*"[1507]

> "*Dr. Hesmondhalgh sought to create a new definition—untethered to the lease, the law or industry practice—to the effect that any profits above the hypothetical profits of a passive trader starting with the same amount of freely-allocated EAs would become own account trading funds and would no longer be subject to any restrictions. In other words, in Dr. Hesmondhalgh's view, the characterization of profits depends not on the original source of the funds, but on how well they were traded*."[1508]

1287. The Arbitral Tribunal agrees with Respondents. Dr. Hesmondhalgh considers that any profits above the level of profits that a passive trader would have made are to be included in VE's own-account trading profits. The Tribunal fails to understand how reducing Counterclaim 3 by such "efficient" profits has anything to do with the questions discussed on the merits of Counterclaim 3, which concerned the title of VST to the profits made from the sale of EAs allocated to the Facilities. As Respondents put it, Dr. Hesmondhalgh has based her figures on a distinction of "*how well* [EAs] *were traded*", rather than a distinction of source of the EAs. This does not reconcile with the Tribunal's interpretation of the Lease and Claimants' figures will therefore no be considered.

[1507] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 883 (emphasis added).

[1508] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 888 (emphasis added).

1288. As to Respondents' alternative calculations, they rely on VE's Carbon Trading Ledger at Exhibit R-818. Dr. Hesmondhalgh comments on this Excel spreadsheet as follows:[1509]

> "*In making his calculations, Dr Roques relies partly on instructions and partly on the basis of what VST refers to as a 'ledger' of VE's EA related transactions (Exhibits R-818 and its English translation, R-1454). On this basis, he comes to the conclusion that none of the EA profits prior to 2009 should be classified as profits from 'own account trading'. However, the use of the term ledger implies that that data contained in the file formed part of VE's accounts and I am instructed that this file was nothing more than an internal working file, which was not relied upon for any accounting purposes. Indeed, it appears that the file was not necessarily correctly filled in for all the years – 2006 to 2009. In particular, the file shows a purchase of 1.475 million allowances for €5.81 million in 2007 under the columns for 'free emission allowances'. This clearly makes no sense as, by definition, free allowances are free and not purchased. This means that the majority of the allowances that VE sold in 2007 had previously been purchased.*"

1289. The above considerations make the figures relied on by Respondents doubtful, and it remains that Claimants' figures are, for the reasons stated above, based on a definition of own-account trading which the Tribunal has rejected. In conclusion, each of the expert's quantification of the own-account EA profits to be deducted is insufficiently certain to be relied on by the Arbitral Tribunal to proceed to said reduction. Claimants bore the burden of proving the *quantum* of the reduction they sought. In consequence, the Arbitral Tribunal will not reduce the amount of compensation under Counterclaim 3 by any amount of own-account trading profits.

d. *Limitation to the 2009-2014 period*

1290. Claimants submit that the *quantum* of Counterclaim 3 should be reduced to account for the fact that the Law on Climate Change obliging operators to re-invest EAs sales

[1509] **CEX-010:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 29 May 2020, para. 145, see also **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 713.

proceeds in carbon reduction emissions only came into effect in late July 2009 and was amended in December 2014. Dr. Hesmondhalgh explains that "[b]*etween mid-2009 and the end of 2014 inclusive, even if the requirement were applicable, VE met the legal conditions that entitled it to retain its profits from emission allowances trading*."[1510]

1291. Therefore, according to Claimants, "*if the Tribunal considers that Vilnius Energy 'misused' it's EAs, this misuse should, at most, relate to the profits, that it is reasonable to assume that Vilnius Energy made from the sale of the emission allowances it received for free, from 2009 to 2014*."[1511]

1292. However, the Arbitral Tribunal's decision to in principle grant Counterclaim 3 rests on the Tribunal's interpretation of Article 10.2 on VE's rights to revenue under the Lease,[1512] not on the Lithuanian Law on Climate Change. That legislation does directly affect the title to the sales proceeds as per the Lease, and is therefore not directly relevant to the *quantum* of Counterclaim 3.

e. *Limitation to the 2015-2016 period*

1293. Claimants refer to the Lithuanian Civil Code's 3-year statute of limitation applicable to claims for damages, to request a further reduction of the *quantum* of Counterclaim 3. Claimants' time-bar objection to Counterclaim 3 has, however, been rejected by the Tribunal,[1513] and can therefore not be the basis for a reduction of the *quantum* of Counterclaim 3.

f. *Prohibition under Lithuanian law*

1294. Claimants submit that "*demanding that Vilnius Energy turn over its profits from emissions trading is a demand for disgorgement, plain and simple*",[1514] whereas "[a]*t*

[1510] **CEX-003:** Rebuttal Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 23 January 2019, para. 32.

[1511] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 657, see also **CEX-010:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 29 May 2020, para. 165.

[1512] See above paras. 1051 ff.

[1513] See above para. 1231.

[1514] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 670.

the same time, Respondents demand actual (and hypothetical future) damages in the form of reimbursement for expenses related to the purchase of additional emission allowances." [1515] Claimants explain that, under Lithuanian law, disgorgement of "unlawful profits" is an alternative to actual damages where actual losses are difficult to calculate, and that Respondents can thus not claim both.[1516]

1295. Respondents respond that Claimants mischaracterize the nature of Counterclaim 3 and that "*Respondents claim their actual damages*"[1517]:

> "*Had Veolia not misappropriated the emissions allowances or abided by its duty 'to support the commercial and financial viability and status of VST', Veolia would, as a bare minimum, have remitted to VST Facilities worth EUR 52.3 million to EUR 53.9 million more*."

1296. The fact that Counterclaim 3 is valuated at the level of profits made from EAs sales stems from the fact that VST owns the EAs revenues as per Article 10.2 of the Lease. It is not, like Counterclaim 1 or 13, a claim for disgorgement of all profits made by VE under the Lease in face of the difficulty to create a counter-factual scenario where VE would have not won and performed the Lease. In other words, VST's lost revenues from EAs sales proceeds happen to be the actual damages of VST. Respondents therefore do not claim <u>both</u> their actual losses and a disgorgement of profits and Counterclaim 3 is not prohibited under Lithuanian law.

3.2.2 The future component of Counterclaim 3

1297. The future component of Counterclaim 3 corresponds to Respondents' claim "*for the <u>present value</u> of the <u>estimated additional future costs</u> incurred by VST for the purchase*

[1515] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 670.

[1516] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 669-672.

[1517] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1497.

of EAs".[1518] It is quantified by FTI at EUR 5.66 million.[1519] This second leg of Counterclaim 3 is grounded on the assumption that VE was to re-invest EAs sales profits in the Facilities. As explained by Respondents' expert, "*Respondents claim that, because VE did not properly reinvest all of its EA Profits, VST's future emissions will be higher and as a result VST will experience a shortfall in EAs in future years, leading to VST having to purchase additional EAs*."[1520]

1298. The Arbitral Tribunal notes that this portion of the damages sought by Respondents is for the present value of estimated losses, and that the legal basis for that portion of Counterclaim 3 is necessarily different than that for the historical damages granted by the Tribunal for the period of the Lease' duration or that, at least, it requires further steps of causality to be established.

1299. In support of that portion of their Counterclaim 3, Respondents rely on the following provisions of the Lease:[1521]

> "*Pursuant to Articles 3.1, 27.3, and 37(i) of the Lease Agreement and Article 6.200(1) of the Lithuanian Civil Code, Vilnius Energy was obliged to act as 'a skilled and experienced international operator' subject to fiduciary-like duties like Vilnius Energy inter alia 'to cut down the costs of electricity and heat production, and the costs of district heating and hot water supply'; was obliged to act 'in a proper way and in good faith'; and was required to 're-deliver the Facilities in a 'complete' condition (in the sense that the Lease must have been 'implemented by attracting investments and not depriving of property'). In addition, pursuant to Article 10.2, Vilnius Energy was prohibited from treating emissions allowance proceeds as revenue. Cumulatively and individually, these provisions prevented Vilnius Energy from pocketing emissions allowance proceeds.*

[1518] **FTI Slides:** Hearing Presentation of FTI (Dr. Fabien Roques), dated 08 June 2022, slide 19, see also **REX-001:** Expert report of FTI Consulting, dated 19 February 2018, paras. 2.50, 8.4, 8.46, **REX-003:** Second FTI Expert Report, dated 13 October 2019, paras. 8.2 and 8.29.

[1519] **REX-003 :** Second Addendum to the Second FTI Expert Report, dated 19 May 2023, para. 2.4, see also **FTI Slides:** Hearing Presentation of FTI (Dr. Fabien Roques), dated 08 June 2022, slide 33, **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 921.

[1520] **REX-003:** Second FTI Expert Report, dated 13 October 2019, para. 2.56.

[1521] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1460-1461 (emphasis added).

> *Pursuant to Articles 3.1, 16.1, 16.8 and 37(i) of the Lease Agreement, Vilnius Energy was obliged to 'operate, manage and maintain the Facilities' as 'a skilled and experienced international operator' and in accordance with the aforementioned fiduciary-like duties to the Respondents, and was required to 're-deliver' the Facilities in such condition where it had 'carr[ied] out [...] investments [...] necessary for ensuring the Business'.' As shown above,' 'a skilled and experienced international operator' subject to these obligations would have reduced the Facilities environmental-compliance costs such that they remained viable for the long-term under the EU ETS.*"

1300. Article 6.200 of the Lithuanian Civil Code setting out "principles of performance of a contract" provides at its first paragraph that "[a] *contract must be performed by the parties in a proper way and in good faith*."[1522] In brief, Respondents rely on general obligations of VE as the Lessor, Article 10.2 of the Lease according to which the proceeds of freely allocated EAs are VST' property, and the general obligation of good faith applicable to the performance of contracts under Lithuanian law.

1301. Respondents apply these general provisions to the facts as follows:[1523]

> *"Vilnius Energy breached Articles 3.1, 10.3, 27.3, and 37(i) of the Lease Agreement and Article 6.200(1) of the Lithuanian Civil Code by delivering the Facilities back to VST at the end of the Lease bereft of the economic value of the emissions allowance proceeds. This breach is most clearly evidenced by Veolia's admission in this arbitration that 'Vilnius Energy did not require all of the emission allowances it received, and it sold its excess allowances for a profit'.'*
>
> *Vilnius Energy breached Articles 3.1, 16.1, 16.8 and 37(i) of the Lease Agreement and left VST in a dire emissions allowances position by failing to reduce the Facilities' environmental-compliance costs such that they remain viable under the EU ETS. In 2017, at the Lease's end, VST's Facilities emitted 330,478 metric tons of CO2 despite being allocated 200,400 allowances, leaving a shortfall of 130,078 allowances. In 2018, the Facilities emitted 350,652 metric tons of CO2 and were allocated 195,436 allowances, leaving a shortfall of 155,216 allowances. By virtue of the logic of the EU ETS system, this shortfall will get more severe every year. VST has been forced to*

[1522] **RL-044:** Civil Code of the Republic of Lithuania (including amendments of April 12, 2011), Article 6.200 (emphasis added).

[1523] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1463-1464 (emphasis added).

> *purchase 155,000 emissions allowances in April 2019 for EUR 3,458,825 (including a 0.6% brokerage fee) to avoid being penalized for excess emissions under EU Directive 2003/87/EC.*"

1302. Dr. Roques observes that, if freely allocated EAs had to be re-invested by VE*, VE would have been obliged to invest the proceeds it received from trading these non-surplus EAs too. In addition, any profit from this activity* […] *would be a profit that could only be earned from selling the freely allocated EAs in the first place."*[1524] Dr. Roques confirmed this at the hearing:[1525]

> *"I also know, looking at the record, that there are a number of documents that would suggest, and I think some of these were presented today, that VE was indeed expecting at least for part of this period to be required to reinvest EA profits."*

1303. Respondents in turn allege that Claimants failed to re-invest the profits appropriately, which led to a shortfall of allowances for which VST must be compensated. Respondents submit that "*by delivering the Facilities back to VST at the end of the Lease bereft of the economic value of the emissions allowance proceeds*".[1526]

1304. However, in the Arbitral Tribunal's opinion, the issue of whether Claimants re-delivered the Facilities to Respondents "*bereft of the economic value of the emissions allowances proceeds*" goes to the economic value of Facilities at the end of the Lease, which is the object of Article 12(v) on the total aggregate residual value of the re-delivered Facilities and of Respondents' Counterclaim 12. In consequence, the Arbitral Tribunal finds that the legal basis for the future portion of Counterclaim 3 on which Respondents rely is inapposite.

1305. Further, Dr. Hesmondhalgh has pointed to important omissions in Respondents' approach to the assessment of their alleged future damages. Her explanations cast

[1524] **REX-001:** Expert report of FTI Consulting, dated 19 February 2018, para. 8.49.
[1525] Transcript, Day 16, 166/24-167/4.
[1526] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para.1463.

doubt on the existence of a damage on VST's part, notably when considering VST's own obligation to act as a prudent operator and mitigate any damage:[1527]

> "*Dr Roques relies on the actual purchases of allowances by VST in 2018 and then projects costs for 2019 and 2020 based on (a) Sweco's view of the output of the facilities and (b) a CO2 price forecast from the time that he submitted his report. He accepts that VST did not purchase any allowances in 2017.*
>
> […]
>
> *In calculating the total CO2 shortfall costs, Dr Roques ignores the fact that, according to his own calculations, VST will have excess allowances in 2020, which it will be able to sell to mitigate any earlier costs it may face. The impact of this omission is significant, since including the mitigation would reduce Dr Roques' estimate of the future allowances Counterclaim by €4.4million from €5.4 million194 to €1.0 million* […]
>
> […]
>
> *However, I also consider that even this adjusted calculation overstates any future Counterclaim. This is because VST waited until April 2019196 before purchasing the additional EAs that it needed for 2018* […] *with CO2 prices rising from early 2018 onwards, I would have expected a prudent and efficient company to start buying allowances much sooner to cover its anticipated future shortfalls. Assuming that VST should have purchased the additional allowances it anticipated that it would require in 2018 and 2019 at the average (calendar year) 2018 price of 16.0 €/t CO2, and sold the excess 2020 allowances at the 2020 price assumed by Dr Roques, there is no future Counterclaim* […]
>
> *However, CO2 prices have fallen since May 2019 as a result of the coronavirus. If instead of using Dr Roques price, I rely on the average 2020 price to date, 21.7 €/t CO2 as opposed to 25.9 €/t CO2, then there is a small future Counterclaim of €122 thousand. Of course, CO2 prices may recover over the remainder of the year, in which case there might well not be a Counterclaim. The 2020 CO2 price only has to rise to 22.44 €/t CO2 for the Counterclaim to disappear.*

[1527] **CEX-010:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 29 May 2020, paras. 170-176 (emphasis added), see also **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 731-732.

[…]

[…] *More broadly, I consider that it is unreasonable for VST to claim for costs that it could have avoided had it acted appropriately*."

1306. The Arbitral Tribunal notes that Dr. Roques has only adjusted his estimations to account for further data received on the amount of EAs purchased by VST in the *addenda* to his second expert report, and that he has not directly addressed the uncertainties highlighted by Dr. Hesmondhalgh at the hearing. Rather, Dr. Roques confirmed that his instruction was solely to look at incurred costs of VST for the purchase of emission allowances in 2017-2020:[1528]

> "*I will fast forward and I conclude with this future component. I think there is perhaps a misunderstanding here with Dr Hesmondhalgh. This is not a counterclaim for the future loss benefits. There could be by the way if we think about it in economic terms a counterclaim for the lost future benefits in the sense that had the EA profits been reinvested in some equipment that would generate savings in the future, this could increase future benefit, but this is not what it is. This is based on my instruction a much simpler computation to look at the incurred costs between the end of the lease, 2017 and 2020. I think once you know we establish that, it helps to explain the divergence in position between what I find and Dr Hesmondhalgh*."

1307. The Tribunal considers that it would be inappropriate to impose on VE to pay for further EAs purchased by VST if VST itself may have been (at least partly) responsible for the need to purchase further EAs. It further notes that Dr. Roques' assessment is a mere computation/verification of the amounts spent by VST to purchase further EAs. The whole assessment of Respondents thus seems to rest on a bare assumption that any EAs purchased in 2017-2020, *i.e.* after the end of the Lease, must be paid by VE because it is necessarily VE's fault if VST had to purchase additional EAs. The Arbitral Tribunal finds such assumption unreasonable, and tied to legal positions that have not been sufficiently demonstrated to underly a reliable assessment of any damage that Respondents would have allegedly incurred after the end of the Lease.

[1528] Transcript, Day 16, 168/21-169/11.

1308. In addition, the Arbitral Tribunal notes that Claimants argue that they were under no obligation to leave enough EAs to VST at the end of the Lease, but that they in any event took appropriate steps to retain sufficient emission allowances for VST, the subsequent operator. According to Claimants, Respondents' allegations of bad faith and imprudent management are therefore misplaced:

> "[…] *as Mr. Alexander Husty explains, Vilnius Energy believed that VST would have sufficient credits from 2017 onwards, because of the anticipated increase in alternative heat production in Vilnius due to a new biofuel plant expected to open in 2020. This new plant (which is still planned, but delayed) would have lowered the amount of heat—and correspondingly, the emissions—to be produced from the Facilities. Based on Vilnius Energy's reasonable expectations and projections regarding future emission allowance requirements, Vilnius Energy took appropriate steps to retain sufficient emission allowances for VST, the subsequent operator. It is worth noting that, as Mr. Radov explains, under the EU ETS system, Vilnius Energy had no obligation to reduce emissions and to retain surplus emission allowances in the first place. It would have been 'entirely legal, and perfectly consistent with the spirit of the [ETS] policy [for Vilnius Energy] to increase emissions,' provided it was able to purchase sufficient emission allowances on the market and surrender them at the appropriate time. It follows that Respondents have simply fabricated a supposed requirement for Vilnius Energy to leave 'enough' emission allowances for VST, when no such requirement exists under the EU ETS or the Climate Change Law. Moreover, Dr. Hesmondhalgh explains that Mr. Harman underestimated the number of free allowances VST will receive, because Mr. Harman failed to account for the fact that the VE-2 plant will continue to receive additional free Article 10c emission allowances.*
>
> *For these reasons, Dr. Hesmondhalgh concludes that Respondents' future damages projections are speculative and inaccurate* […]"[1529]

1309. The Arbitral Tribunal agrees that Respondents have in any event not demonstrated that VE's management of the Facilities would have led to VST's alleged future damage.

[1529] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, paras. 972-973.

1310. In view of all above considerations, the Arbitral Tribunal is not convinced that VST incurred damages after the end of the Lease, and consequently dismisses Respondents' Counterclaim 3 insofar as the future component thereof is concerned.

3.2.3 Conclusion

1311. The Arbitral Tribunal has decided above that the amount of compensation due by VE to VST under Counterclaim 3 is EUR 41,726,000 for historical damages, and has rejected Respondents' claim for future damages.

1312. Respondents request that the amount granted as compensation under Counterclaim 3 bear annual interest at the statutory rate of 6%, calculated from 30 March 2017 until full payment of the amount awarded.[1530] Respondents submit "*that the 6% simple interest rate under Article 6.210(2) of the Lithuanian Civil Code is the correct rate to apply for all claims and counterclaims*."[1531]

1313. Aside from the Parties' debate as to which interest rates should apply to certain of Claimants' Claims, - which will be discussed in relation to these Claims, as the case may be,- Claimants have not contested that the 6% annual rate provided for in Article 6.210(2) of the Lithuanian Civil Code applies to Respondents' Counterclaims.

1314. Article 6.210 of the Lithuanian Civil Code reads as follows:

> "*1. Where a debtor fails to meet his monetary obligation when it falls due, he shall be bound to pay an interest at the rate of five percent per annum upon the sum of money subject to the non-performed obligation unless any other rate of interest has been established by the law or contract.*
>
> *2. Where both parties are businessmen or private legal persons, the interest at the rate of six percent per annum shall be payable for a delay in payment unless any other rate of interest has been established by the law or contract*."[1532]

[1530] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1138, **REX-003 Add:** Addendum to the Second FTI Expert Report, dated 14 August 2021, para. 4.27.

[1531] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1108.

[1532] **RL-044:** Civil Code of the Republic of Lithuania (including amendments of April 12, 2011), Article 6.210 (emphasis added).

1315. Claimants have not argued that another interest rate should apply to Counterclaim 3 in the event the Arbitral Tribunal would grant it. In these circumstances, there is no reason for the Arbitral Tribunal to depart from the legal rate under Lithuanian law for delay in payment in the situation of a commercial relationship, which is set out in Article 6.210(2) quoted above. The interest shall flow from the end of the Lease, *i.e.* 30 March 2017.

1316. Respondents request the following further relief in relation to Counterclaim 3:

> "*4. Declare that all title, right and interest over the emissions allowances in account number EU-100-5006040-0-2 lie with and are vested in VŠT;*
>
> *5. Order UAB Vilniaus energija to submit in writing a request to the Environmental Projects Agency of the Lithuanian Ministry of Environment (in its capacity as register management body) to lift the suspension over account number EU-100-5006040-0-2 so that all emissions allowances in this account be transferred to VŠT;*
>
> *6. Order UAB Vilniaus energija to transfer the emissions allowances in account number EU-100-5006040-0-2 to VŠT within ten (10) days of the account suspension being lifted*."[1533]

1317. In view of the Arbitral Tribunal's acknowledgement that VST is the owner of EAs (and of their proceeds) pursuant to Article 10.2 of the Lease, the above declaration and orders stem naturally from it and are therefore admitted.

H. COUNTERCLAIM 2: TARIFF OVERCHARGE

1. Introduction

1318. This Counterclaim concerns Respondents' allegation that Claimants overcharged Vilnius' heat customers by charging them inflated tariffs, contrary to the provisions of the Lease and Lithuanian law. Respondents rely on two investigations by the Lithuanian Energy Regulator, the NCCPE, which determined that the tariffs charged by VE to Vilnius customers were in excess of what was permitted under the applicable regulatory

[1533] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1138.

methodologies and resulted in excess profits. The amount claimed in damages has varied over the course of the arbitration as the NCCPE's resolutions and related litigation have progressed through the Lithuanian courts.[1534]

1319. Respondents maintain that the NCCPE's recalculation of the tariff initially set by it has determined the appropriate tariff which should have been charged. They contend that the NCCPE's redetermination, after having been considered by the Lithuanian administrative courts, is now final and binding. Respondents submit that they have standing to pursue this claim to recover Claimants' overcharge and that the Tribunal has the jurisdiction to award damages, contrary to Claimants' submissions. Respondents take the position that Claimants' allegations relating to the conduct of the NCCPE and the Lithuanian courts and in the ICSID Arbitration are not relevant to the Tribunal's determination in this case. Moreover, they state that the Tribunal should exclude Claimants' evidence addressing the merits of the Administrative Courts' findings regarding the NCCPE since they are irrelevant.[1535]

1320. Claimants maintain that the Tribunal has no jurisdiction to determine Counterclaim 2 which, according to them, seeks to use the Lease to enforce NCCPE's decisions following regulatory and court proceedings to which Respondents were not parties. According to Claimants, administrative law claims are not covered by the arbitration clause in the Lease and Lithuanian law prohibits submitting administrative or regulatory claims to arbitration. Further, Claimants state that Respondents have no standing to bring Counterclaim 2 since they have not demonstrated that they suffered any harm and have no right to claim damages on behalf of consumers under Lithuanian law. Claimants also submit that the regulatory and court proceedings upon which Respondents rely form part of Claimants' international law claims against Lithuania in

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[1534] See **SoD:** Statement of Defense and Counterclaim, dated 19 February 2018, paras. 893-957; **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1170-1278; **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 850-860, 1138(d)(ii); **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, paras. 231-246. Initially, in their SoD, Respondents claimed €17,510,700, before interest, and reserved the right to update their claim once the NCCPE concluded its calculations relating to the second relevant period. In their Rejoinder, Respondents increased their claim to €25,000,000 before interest. In their Reply PHB, Respondents reduced their claim to €9,319,680, before interest. See **RRPHB**, paras. 859-860, 1138(d)(ii); **REX-003 - Addendum to the Second FTI Expert Report:** REX-003 - Addendum to the Second FTI Expert Report, dated 14 August 2021, para. 2.12 and fn 15.

[1535] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1173-1175, 1208.

the ICSID Arbitration. In that context Claimants state that the regulatory and court decisions that Respondents ask this Tribunal to enforce are violations of international law.[1536]

1321. Claimants also deny any overcharging by VE. Claimants state that the NCCPE was tasked with setting the relevant tariffs which VE charged to consumers; they maintain that they had no control over setting those tariffs. They state that since VE only applied the tariffs set by the NCCPE, there is no basis to find a breach of the Lease in respect of the subsequently recalculated regulated tariffs.[1537] Claimants also submit that certain of the NCCPE's recalculation of VE's tariffs are flawed and that they have been deprived of the opportunity to challenge the recalculations before the courts. Further, they allege that the Lithuanian Courts have recently annulled certain relevant resolutions and remitted various issues back to the NCCPE. Claimants also contest Respondents' allegations that VE misled the NCCPE and submitted inflated costs when the Commission originally set the tariffs in 2010 and challenged on the merits the NCCPE's determinations of the alleged overcharges.[1538]

2. Time limitation

2.1 The Parties' Positions

2.1.1 Claimants' Position

1322. Claimants assert that Counterclaim 2 is time-barred as "*Respondents have known of this alleged overpricing* [*i.e*. overcharging Vilnius consumers through inflated tariffs] *at least since the Ambrazaitis Report was issued in January 2015*".[1539]

[1536] See, generally, **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, paras. 677-903; **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 436-524; **CPHB:** Cls' Post-Hearing Brief, dated 18 October 2022, paras. 718-755; **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, paras. 135-158.

[1537] **CPHB:** Cls' Post-Hearing Brief, dated 18 October 2022, para. 728. See in general paras. 727-737.

[1538] **CPHB:** Cls' Post-Hearing Brief, dated 18 October 2022, paras. 738-742.

[1539] **CPHB:** Cls' Post-Hearing Brief, dated 18 October 2022, para. 722. See in general paras. 720-723 and 1301-1303.

1323. According to Claimants, their claims for damages are subject to a three-year limitation period under Lithuanian law, which starts on "*the day on which a person becomes aware or should have become aware of the violation of his right*".[1540] Therefore, Claimants assert that Counterclaim 2's limitation period had long expired when Respondents submitted it, which makes Counterclaim 2 inadmissible.[1541]

2.1.2 Respondents' Position

1324. Respondents state that this objection has been raised late.[1542] In any event, Respondents state that Claimants' time limitation objection has no merit since it was only in April 2018 that the NCCPE recalculated VE's tariff which led to the overcharge.[1543] Further, and in any event, Respondents state that they first raised their overcharge Counterclaim in their Answer to the Revised Request for Arbitration on 3 July 2017, well within Claimants' alleged time-limit.[1544]

2.2 The Arbitral Tribunal's Analysis and Decision

1325. Claimants rely on Art. 1.125.8 and Art. 1.127(1) of the of the Lithuanian Civil Code to support their time-bar objection, according to which the prescription period of three years applies to claims for damages and starts running on "*the day on which a person becomes aware or should have become aware of the violation of his right*".[1545] The Parties are in agreement regarding the application of these rules in the present case.

1326. The Parties however disagree as to the time when Respondents became aware of the alleged violation of their rights. Claimants argue that Respondents became aware of the overpricing when the Ambrazaitis Report was issued, in January 2015.[1546] On their end, Respondents argue that the Ambrazaitis Report did not establish the existence of

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[1540] **CPHB:** Cls' Post-Hearing Brief, dated 18 October 2022, para. 722 and para. 1302; **RL-044:** Civil Code of the Republic of Lithuania (including amendments of April 12, 2011).

[1541] **CPHB:** Cls' Post-Hearing Brief, dated 18 October 2022, para. 1301.

[1542] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 244.

[1543] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 245.

[1544] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, paras. 246.

[1545] **RL-044:** Civil Code of the Republic of Lithuania (including amendments of April 12, 2011), Art. 1.127 (1), p. 323 of the pdf.

[1546] **CPHB:** Cls' Post-Hearing Brief, dated 18 October 2022, para. 722. See in general Claimants' PHB, paras. 720-723 and 1301-1303.

overcharge. According to them, the overcharge was determined by the NCCPE on 27 April 2018.

1327. Respondents argue that, in any case, they first raised their claim on 3 July 2017 in their Answer to the Revised Request for Arbitration and Preliminary Statement of Claim.[1547] In that submission, Respondents make reference to the NCCPE's Resolution of 14 October 2016, according to which "*the NCCPE determined that Vilnius Energy improperly included a number of expenses into its regulated heat activities*"[1548] and "*reduced the heat price of Vilnius Energy for the period in 2016-2017*".[1549] The SAC also determined in 2017 that VE had been fraudulently reporting its costs to the NCCPE and decided to annul the base heating price for VE set by the NCCPE in 2010.[1550] The NCCPE recalculated the base heating price for VE set by it in 2010.

1328. From Respondents' own submission, it appears clearly that they became aware of the overcharge in tariffs with the NCCPE's Resolution of 14 October 2016. Considering that date, the prescription period to raise a claim for damages elapsed on 14 October 2019.

1329. Respondents raised their Counterclaim 2 with their Answer to the Revised Request for Arbitration and Preliminary Statement of Claim on 3 July 2017[1551] and formally submitted it as a prayer of relief with the Submission supplementing the Statement of Defense and Counterclaim on 19 February 2018, *i.e.* two years after gaining knowledge of the overcharging.[1552]

1330. Consequently, the Arbitral Tribunal determines Counterclaim 2 was submitted in a timely manner and is not time-barred under Lithuanian law.

[1547] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 246.

[1548] **Answer to revised RFA and Preliminary CC:** Respondents' Answer to the Revised Request for Arbitration and Preliminary Statement of Counter-Claim, dated 03 July 2017, para. 70.

[1549] **Answer to revised RFA and Preliminary CC:** Respondents' Answer to the Revised Request for Arbitration and Preliminary Statement of Counter-Claim, dated 03 July 2017 para. 72.

[1550] **Answer to revised RFA and Preliminary CC:** Respondents' Answer to the Revised Request for Arbitration and Preliminary Statement of Counter-Claim, dated 03 July 2017, para. 73.

[1551] **Answer to revised RFA and Preliminary CC:** Respondents' Answer to the Revised Request for Arbitration and Preliminary Statement of Counter-Claim, dated 03 July 2017, paras. 69-78.

[1552] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 893-957.

3. Tribunal's jurisdiction

3.1 The Parties' Positions

3.1.1 Claimants' Position

1331. Claimants state that Counterclaim 2 cannot appropriately be decided by this Tribunal as it lacks subject matter jurisdiction. According to Claimants, Counterclaim 2 is a regulatory dispute which was addressed in administrative proceedings and before the Lithuanian courts. Claimants note that Lithuanian law on commercial arbitration prohibits submitting administrative or regulatory claims for arbitration.[1553]

1332. Claimants state that Respondents cannot use these arbitration proceedings to enforce decisions of the Lithuanian Regulator, the NCCPE.[1554]

1333. Claimants also maintain that Respondents cannot bring Counterclaim 2 as a contractual claim. They state that the Lease was not a contract concluded for the benefit of third persons, in this case the consumers of Vilnius.[1555] In this regard, they state that the Lithuanian Civil Code requires that any contract concluded in favor of third persons must contain a specific stipulation for the benefit of a third person, which the Lease does not contain.[1556] The high-level policy goals of the Lease, and the fact that the consumers may be the ultimate economic beneficiaries of the Lease are irrelevant to establish the existence of a contractual stipulation in favor of the consumers.[1557] Further, Claimants state that any relation between VE and the consumers did not arise from the Lease, but, rather, the separate private service contracts entered directly between VE and the individual consumers.[1558] Claimants state that any obligations VE had under the Lease that may have benefited the consumers are different from those contained

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[1553] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 720, 1265-1271; **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 436-437, 469-471; **Claimant's Reply PHB:** Cs' Reply Post-Hearing Brief, dated 06 December 2022, paras. 847-849.

[1554] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, paras. 847-848; **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 437, 469-471; **Claimant's Reply PHB:** Cs' Reply Post-Hearing Brief, dated 06 December 2022, para. 847.

[1555] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, paras. 887-890.

[1556] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, paras. 888-889.

[1557] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 889.

[1558] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1299.

in the separate contracts between VE and the consumers. Accordingly, the third-party beneficiary provisions of the Lithuanian Civil Code (Article 6.191) do not apply.[1559]

1334. Furthermore, Claimants consider that Respondents have not proven that Claimants committed an unlawful act by "overcharging" as Respondents have not identified any provisions under the Lease or Lithuanian law that Claimants have breached.[1560] Finally, Claimants argue that VE never charged more than the tariff set by the NCCPE.[1561]

3.1.2 Respondents' Position

1335. Respondents rely on NCCPE's resolutions and decisions which recalculated the tariffs charged by VE and concluded that consumers had been overcharged. Respondents state that the NCCPE's decisions are now final, that the merits of those decisions are not arbitrable, and that they are beyond the jurisdiction of this Tribunal.[1562]

1336. Respondents submit that they are entitled to pursue claims to recover VE's overcharges. They maintain that, by overcharging consumers, VE breached its obligations under the Lease since VE was obliged to keep tariffs below the maximum levels permitted by the NCCPE.[1563] Further, and in any event, Respondents state that the Lease was a contract for the benefit of third parties whose interest they are entitled to pursue.[1564]

[1559] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1299.

[1560] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 484-494; **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, paras. 852-871.

[1561] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 495-504 and 896-898; **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, paras. 870-871.

[1562] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1170-1172; 1178-1186; 1196-1206; **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, paras. 238-243; **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 238-243.

[1563] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 895-905, 917-923; see also **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 851-858; **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 236.

[1564] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 931-954; see also **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 851-858; **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 236.

1337. According to Respondents, Claimants' rights to receive revenue are defined in Article 10.2(i) of the Lease, which is clear as to the fact that VE was not entitled to receive anything more than what Lithuanian law permits.[1565] This limit of Lithuanian law is confirmed in Articles 10.3 and 10.4 of the Lease.[1566] Respondents further point to Article 12(ix) of the Lease which states that VE's rights to receive revenue are to be exercised in accordance with legal requirements and that VE is to refrain from raising prices for heat and power.[1567] The Lease also specifies in Article 21.1 that VE's operation of the facilities and supply of services, energy, power and hot water must comply with legal requirements.[1568] Article 22 establishes that any tariffs are subject to the NCCPE's supervision and authority,[1569] In addition, Article 31 required each of the parties to the Lease to "*abide by the Legal Requirements of Lithuania*", which are broadly defined as including laws, regulations, decrees and rules.[1570] Finally, Respondents state that Claimants breached their duty of good faith, expressed in Article 27.3, "*to cooperate in good will seeking to implement the provisions of* [the Lease]".[1571]

1338. Respondents submit that Claimants' refusal to refund the excess amounts found by the NCCPE constitutes a breach of their obligations under the Lease.[1572] Respondents state that as the public bodies responsible for the supply of heat in Vilnius, they represent the interests of the consumers. They state that contracts concluded by a municipality for services of its inhabitants are qualified by the Lithuanian courts as contracts for the benefit of third parties which, pursuant to the Lithuanian Civil Code, both the contractual party and the ultimate beneficiary have the right to enforce.[1573]

[1565] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1226.

[1566] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1227-1228.

[1567] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1229.

[1568] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1230.

[1569] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1231.

[1570] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1231.

[1571] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 893-905; **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1232.

[1572] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 917-923.

[1573] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, paras. 854-856. Respondents distinguish the case involving Alytus Municipality relied on by Claimants on the basis that the two leases are fundamentally different in that the Alytus Lease was bare usufruct and did not contain any provisions for the protection of the consumers. Further, the claim in the Alytus case was not presented on a contractual basis and, therefore, the Court did not address the question of the enforceability of the contractual undertakings for the benefit of third parties.

4. The Arbitral Tribunal's Analysis and Decision

1339. Claimants state that this Tribunal has no jurisdiction over this Counterclaim as it is a matter of administrative law which has been addressed by the NCCPE and the Lithuanian Administrative Courts. Lithuanian law on commercial arbitration provides that administrative law matters are not arbitrable. Claimants note that Respondents take the position that this Tribunal cannot review the merits of the NCCPE's decision as the setting of tariffs is solely within the NCCPE's jurisdiction.

1340. In addition, Claimants state that the conduct of the NCCPE and the Lithuanian courts is before the ICSID Tribunal where they claim abusive and arbitrary decisions throughout the Second Base Tariff proceedings and the denial of the opportunity to challenge the Pricing Commission's calculations. As discussed above, the Lithuanian SAC has upheld the Pricing Commission's determination that the tariff charged by VE should have been approximately 2% lower in the period 2011-2016; however, the Court did not review the NCCPE's calculation of "unjustified income" received by VE, which the NCCPE performed separately and announced in its letter of 27 July 2018 in response to the Municipality's request. For this reason, Claimants state that Counterclaim 2 is not properly before this Tribunal. If Claimants were to succeed in their claim in the ICSID proceedings and be awarded damages flowing from the conduct of the NCCPE, then it appears that any damage award on the basis of the NCCPE's resolutions and calculations in this arbitration would be affected.

1341. Claimants argue that if the Tribunal treats Counterclaim 2 as a contractual claim, they must be allowed to challenge the NCCPE's calculation of the alleged "*additional revenue*" set out in its letter of 27 July 2018. Otherwise, they will be deprived of any opportunity to do so since the courts have refused to hear their challenge on the basis that it is not a reviewable decision of the NCCPE and has no legal effect on VE. Arguably, the calculation of the alleged additional or excess income in the NCCPE's letter is different from its decision, adopted by resolution and certificate (ultimately upheld by the SAC), that VE's tariff should have been approximately 2% lower during the period from 2011 to 2016.

1342. Respondents state that their claim is a contractual claim based on alleged breaches of the Lease which is an agreement for the benefit of a third party, the Vilnius consumers. As such, this claim is based on the specific language of the Lease. It should be noted that Lithuanian law, more generally, does not appear to permit a municipality to bring a claim on behalf of consumers, particularly where those consumers have individual contracts with the service provider. Therefore, the interpretation of the provisions of the Lease which the Respondents say have been breached is particularly important.

1343. Respondents acknowledge that Lithuania has a claim in the courts against the Claimants for damages suffered by it resulting from the overcharge. It is not clear how these damages would differ from those claimed in this arbitration. Nor is it clear what the status of the case before the courts. In any event, Respondents state that the case in the Lithuanian courts is still pending and will not be decided before the award in this arbitration is rendered and, therefore, there is no danger of double recovery.[1574]

1344. In order to determine its jurisdiction over this Counterclaim, the Tribunal must assess whether Counterclaim 2 is a contractual claim arising out of the Lease and falls within the scope of the arbitration clause, and whether it is arbitrable.

1345. The Tribunal notes that VE's obligations to reduce energy production and supply costs are provided *inter alia* in Articles 3.1, 3.2, 10.2(i) and 12(ix) of the Lease, while Articles 10.3, 10.4, 21.1 and 31 reiterate VE's obligation to abide by, exercise rights, set prices and supply energy, hot water and other services in accordance with the Legal Requirements of Lithuanian law. Article 22 establishes that the tariff charged under the Lease would be subject to the NCCPE's supervision and authority.[1575]

1346. Respondents rely on the decisions of the NCCPE to demonstrate that VE breached these contractual obligations by providing insufficient and fraudulent information to the NCCPE, which as a result set higher tariffs than necessary and which resulted in the

[1574] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 860: "*Lithuania's claims before the Lithuanian courts have not been admitted as matters stand and will be decided (if at all) after this Tribunal renders its award*".

[1575] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, pages 11, 20, 21, 22, 26, 39 and 52 of the pdf.

overcharge of consumers.[1576] Taking into account these circumstances, the Tribunal observes that, in order to establish that VE breached the Lease, the overcharge must be accepted as factually established in the form of a final and binding decision of the NCCPE. The separate issue of the value or validity of such a decision, from the perspective of international law is not before this Arbitral Tribunal and does not need to be discussed in the context of this Tribunal's decision.

1347. In view of the above, it appears that, even though Respondents' Counterclaim 2 is based on the Lease, it is predicated on the existence of a final and enforceable decision of the NCCPE to establish the fact and amount of overcharge, which is a question of Lithuanian administrative law.

1348. Evidently, this Arbitral Tribunal lacks jurisdiction to determine the existence let alone the amount of the alleged tariff overcharge. Pursuant to Article 12(2) of the Law on Commercial Arbitration of the Republic of Lithuania, issues of administrative law fall within the exclusive jurisdiction of Lithuanian authorities and administrative courts and are not arbitrable:

> *"Arbitration may not settle disputes that are subject to the administrative procedure or hear cases that fall within the remit of the Constitutional Court of the Republic of Lithuania."*[1577]

1349. However, the question of whether this Arbitral Tribunal has jurisdiction to draw consequences of an administrative decision in this arbitration in terms of monetary damages, and so adjudicate Counterclaim 2, is a separate one. In the present case, the question is whether Counterclaim 2 (as opposed to the determination of the tariff overcharge itself) is arbitrable and within the scope of the Parties' arbitration agreement. This is a complex multifold issue which has not been pleaded, neither extensively nor in detail, by the Parties.[1578]

[1576] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 917-923; **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1170-1186; **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, paras. 238-243.

[1577] **RL-081:** Law on Commercial Arbitration of the Republic of Lithuania (as amended on June 21, 2012), dated 21 June 2012, Article 12(2) emphasis added).

[1578] See **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 445-466; **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 467-476.

1350. This (complex) jurisdictional issue raised by Claimants would become irrelevant to the reasoning of the Tribunal if it were to dismiss Counterclaim 2 on its merits.

1351. In view of these considerations and for the sake of efficiency, noting also that Claimants accept that the Arbitral Tribunal could in principle draw *"civil consequences"* from an enforceable final decision,[1579]

1352. The Arbitral Tribunal first examines whether the NCCPE's decision can form a valid basis for Respondents' Counterclaim 2. It then addresses whether Counterclaim 2 must be dismissed on the merits as the NCCPE's decision is not final.

1353. The analysis of Claimants' jurisdictional objection to Counterclaim 2 is therefore moot and will not be discussed further by the Arbitral Tribunal.

5. Respondents' standing

5.1 The Parties' Positions

5.1.1 Claimants' Position

1354. Claimants submit that Respondents lack standing to bring Counterclaim 2 since they have not demonstrated that they, themselves, have suffered any damages resulting from any alleged unlawful acts for which Claimants are at fault.[1580] Claimants state that in another similar case the NCCPE set the tariffs which they charged consumers, and that VE had no control over these. They also submit that neither of the administrative proceedings upon which Respondents rely concluded that VE had overcharged consumers. In any event, Claimants maintain that any possible damages were suffered

[1579] **CPHB:** Cls' Post-Hearing Brief, dated 18 October 2022, para. 1273.

[1580] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, paras. 850, 901-902; **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 477-481; **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 1287-1300; **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, paras. 151-154.

by the consumers which Respondents have no standing to represent.[1581] In this regard, Claimants state that the Lithuanian Court of Appeal dismissed claims by the Ministry of Energy and by the Municipality of Alytus on the basis that Claimants failed to show specific damages incurred by them as opposed to harm caused to consumers who paid a higher price for heating.[1582]

1355. Claimants state that the Lease was not a contract concluded for the benefit of third persons, in this case the consumers of Vilnius. In this regard, they state that Article 6.191 Lithuanian Civil Code requires that any contract concluded in favor of third persons must contain a specific stipulation for the benefit of a third person, which the Lease does not contain.[1583] The high-level policy goals of the Lease, and the fact that the consumers may be the ultimate economic beneficiaries of the Lease are irrelevant to establish the existence of a contractual stipulation in favor of the consumers. Further, Claimants state that any relation between VE and the consumers did not arise from the Lease, but, rather, the separate private service contracts entered directly between VE and the individual consumers. Claimants state that any obligations VE had under the Lease that may have benefited the consumers are different from those contained in the separate contracts between VE and the consumers. Respondents themselves are the primary beneficiaries of the Lease as they own the leased assets and are entitled to fees. While the consumers might have benefitted indirectly from improvements to the Facilities, this does not make them the legal beneficiaries of the Lease. If that were so, any contract between a state or a public entity and a private party would constitute a contract on behalf of a third party, as public entities are presumed to act for the benefit of consumers. Accordingly, the third-party beneficiary provisions of the Lithuanian Civil

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[1581] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, paras. 850, 901-902; **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 477-481; **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 1287-1300; **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, paras. 151-154.

[1582] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 1284-1296; **CLA-371:** Lithuanian Court of Appeal's ruling in case No e2-429¬516/2022, dated 28 June 2022, paras. 44, 27.5, 51, 57, 55, 59 (The "240M Case"); **RL-266:** Court of Appeals of Lithuania, Case No. 2-56-3-01044-2016-4, Ruling of March 28, 2019, dated 28 March 2019, para. 177 (*Alytus Municipality v Litiesko*). See also the Supreme Court of Lithuania's decision: RL-368: Supreme Court of Lithuania Case No. e3K-3-317-969-2021, 16 December 2021, relied upon by the Respondents. The Claimants say that in that case, the Court found contracts which qualified as transactions for the benefit of third parties where management services were provided without the prior consent of consumers and without entering into separate contracts between the service provider and the consumers. They contrast those circumstances with those of this case where VE entered into separate contracts for the provision of heat with consumers. See: **CPHB**, para. 152.

[1583] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, paras. 888-889.

Code (Article 6.191) do not apply, and thus, Respondents lack authority to bring Counterclaim 2 on behalf of the Vilnius' consumers under Lithuanian law.[1584]

1356. In any case, Claimants further argue that Article 6.191 of the Lithuanian Civil Code provides that the third person beneficiary has the right to demand performance of the agreed obligation. Therefore, Article 6.191 gives a right to the third party, in its own right, to enforce the obligation expressly granted to it under the contract and does not purport to give the signatory of the contract to enforce on behalf of the third party.[1585]

1357. Finally, according to Claimants, the Law on the Protection of Consumers' Interests ("**PCI Law**") provides mechanisms that allow for representative claims only under very specific circumstances. Only three categories of entities are entitled to initiate litigation on behalf of consumers: (1) official consumer associations, (2) the State Consumer Rights Protection Authority and (3) other State institutions named in the applicable law under clearly defined circumstances. Respondents do not fall under any of these categories. Pursuant to the Law on Heat Sector municipalities are assigned a role to oversee district heating services and setting prices, but not to represent consumers.[1586]

5.1.2 Respondents' Position

1358. Respondents argue that they have standing to pursue Counterclaim 2 because Veolia has breached its obligation to Respondents not to charge tariffs above the level permitted by the NCCPE, and in any event the Lease was a contract for the benefit of third parties.[1587] Respondents emphasize that Counterclaim 2 is based on contractual obligations that Veolia undertook with the Lease, namely to reduce energy prices and not to charge consumers above the level permitted by the Lithuanian law. Veolia's

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[1584] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, paras. 850, 901-902; **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 477-481; **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 1287-1300; **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, paras. 151-154.

[1585] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, paras. 890, 894-895.

[1586] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, paras. 891-892.

[1587] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 852; see also **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1276-1278; **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 924-930.

refusal to refund the excess amounts found to have been charged by the NCCPE puts Veolia in breach of its contractual obligations to Respondents.

1359. According to Respondents, the Lease is a contract concluded for the interest of third parties in accordance with Article 6.191(1) of the Lithuanian Civil Code. In the case of a contract concluded for the interest of third parties, both the contractual party and the ultimate beneficiary of the contract have the right to enforce it.[1588]

1360. According to Respondents, since the overcharge of the consumers is a direct breach of the Lease, Respondents have a right to claim remedies for the damage caused to the beneficiary, *i. e.* the consumers under the Lease.[1589]

1361. Finally, Respondents have undertaken to return the full amount of any overcharge recovered from Veolia to consumers. Respondents explain that the overcharge determined by the NCCPE would be returned to the consumers through reductions to future heat bills.[1590]

5.2 The Arbitral Tribunal's Analysis and Decision

1362. Respondents refer to Article 14 of the Lease as a "*stipulation in a contract for the benefit of a third person"* pursuant to Article 6.191 of the Lithuanian Civil Code.[1591] Respondents also refer to Articles 3.1(i) and (ii), 12(i) and 12(ix), 17(iii), 30 and 31 of the Lease to demonstrate that Claimants' obligations under the Lease are established for the benefit and the protection of VST, the Municipality and Vilnius' consumers.[1592]

1363. Article 6.191(1) of the Lithuanian Civil Code provides that:

[1588] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 855; see also **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1276-1278; **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 924-930; **RL-044:** Civil Code of the Republic of Lithuania (including amendments of April 12, 2011).

[1589] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, paras. 851-858; **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1276-1278; **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 924-954;

[1590] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 859; see also **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1276-1278; **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 924-930.

[1591] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 931-934.

[1592] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 935-938.

> "*If a contracting party has made a stipulation in a contract for the benefit of a third person, the stipulation shall give both the contracting party and the third person beneficiary the right to demand performance of the agreed obligation unless otherwise provided for by laws or contract, or appears from the essence of the obligation*."[1593]

1364. Article 14 of the Lease on "*commitments by the Municipality*" refers in its introductory paragraph to Vilnius' customers as follows:

> "*Taking into account the common interest of all the Customers in the Vilnius city to cause the termal energy rates to become maximally reduced and to maintain operation of the centralised heating system of the city on a modern and effective level, the Municipality undertakes throughout the time-life of this Agreement to* […]."[1594]

1365. Article 3.1(i) and (ii) of the Lease defines the Projects as follows:

> "*Newco undertakes to operate the Facilities and make Investments envisaged in the Investment Plan with a view to achieving the following targets:*
>
> *(i) to cut down the costs of electricity and heat production, and the costs of district heating and hot water supply in Vilnius causing the technical level of the Facilities engaged in the Business to improve;*
>
> *(ii) to upgrade the heat and electricity generation, and district heating and hot water supply systems and heat supply pipeline routes in in Vilnius, in terms of responsiveness to Consumer needs and improvement of their technical and economical specifications* […]."[1595]

1366. Article 12 of the Lease regulates the commitments of the lessee, and Article 12(i) and (ix) specifically provide:

> *"The Lessee undertakes to:*

[1593] **RL-044:** Civil Code of the Republic of Lithuania (including amendments of April 12, 2011), Article 6.191(1) (emphasis added).

[1594] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002 (emphasis added), Article 14.

[1595] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002 (emphasis added), Article 3.

(i) ensure regular, reliable and safe supply of heat to Customers in compliance with the procedure set by Lithuanian laws and regulations;

[…]

(ix) refrain from raising prices for heat and power on any grounds and in any manner other than set fort herein and make no attempts to do the same"[1596]

1367. Article 17(iii) of the Lease provides in relation to the selection of equipment for the Project the following:

"Newco will have control over the selection of any equipment for the renovation or investments acting pursuant to this Agreement, having co-ordinated the same with the Lessor and subject to:

(iii) the standards of quality and cost-effectiveness applicable to all investments made throughout the duration of the Term." [1597]

1368. Article 30 of the Lease provides for VE's obligation to maintain financial statements in accordance with Lithuanian law, while Article 31 stipulates the contracting parties' obligation to abide by Lithuanian laws.

"30.1 Newco will maintain financial statements (profit and loss account, balance sheet, cash flow statements) in accordance with the laws of Lithuania and in accordance with international Accounting Standards and the bookkeeping principles generally recognised in the U.S. Newco shall, at the Lessor's request, make available to the Lessor any such financial statements.

30.2. Newco will furnish to SCC any information stipulated by the Legal Requirements."[1598]

Article 31 "Each Party will abide by the Legal Requirements of Lithuania." [1599]

[1596] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002 (emphasis added), Article 12.

[1597] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002 (emphasis added), Article 17.

[1598] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 30.

[1599] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 31.

1369. Respondents also rely on Articles 5(3) and 46(5) of the Lithuanian Constitution according to which the Municipality must serve the people and the interests of the consumers.

1370. The issues to be determined are 1) whether the terms of the Lease establish that it constitutes a contract for the benefit of third parties as per Article 6.191 of the Lithuanian Civil Code and 2) whether Lithuanian law expressly provides for the Municipality's right to represent consumers in legal disputes and to claim damages on their behalf.

1371. Aside from the fact that Article 14 of the Lease concerns the Municipality's commitments, and not Claimants' obligations, the Tribunal notes that it merely refers to the "*common interest*" of the consumers in Vilnius, but does not stipulate an explicit and precise obligation that would "*give both the contracting party and the* third *person beneficiary the right to demand performance of the agreed obligation"* as required by Article 6.191 of the Lithuanian Civil Code.

1372. As for Articles 3.1(i) and (ii), 12(i) and (ix), 17(iii), 30 and 31 of the Lease referred to by Respondents,[1600] only Article 12(i) and (ix) provide for VE's obligation to ensure *"regular, reliable and safe supply of heat to Customers in compliance with the procedure set by Lithuanian laws and regulations*". This general obligation is however not directly related to heat and hot water prices. Article 12(ix) of the Lease mentions for its part VE's obligation to "*refrain from raising prices for heat and power on any grounds and in any manner other than set forth herein and make no attempts to do the same*"[1601]. In the present case, however, the prices charged by Claimants have been set by the Lithuanian authorities and can therefore not be said to have been "raised" by VE. The other provisions relied on by Respondents concern the general aim of the Project (Article 3.1(i) and (ii)), the selection of equipment for the Project (Article 17(iii)), VE's obligation to maintain financial statements in accordance with Lithuanian law (Article 30) and the contracting parties' obligation to abide by Lithuanian laws (Article 31).

[1600] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 935-938.

[1601] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002 (emphasis added), p. 25 and 26 of the pdf.

Articles 3.1(ii), 12(i) and 14 refer to customers or consumers in general terms, not as properly identified third party beneficiaries of VE's undertakings.

1373. The Lease defines the term "Customer" as "*any present and future consumers of heat, hot water, steam and power, including without limitations multi-apartment home-owners associations and based on appropriate decision of such associations -their members*".[1602]

1374. The Lease mentions the term Customer several times. In Article 10, concerning the grant of lease rights, it is stipulated that VE must "*sell and supply under newly signed and currently existing VŠT contract with Customers*"[1603] and that VE has a right to "*collect or empower third party to collect all payments due for it services from the Customers*".[1604] In Article 12(i) and (ii), the Lease provides that VE must "*ensure regular, reliable and safe supply of heat to Customers*"[1605] and "*ensure supply of steam to business Customers*" [1606].

1375. Article 14 regulates the Municipality's commitments whereby "[t]*aking into account the common interest of all the Customers in the Vilnius city to cause the thermal energy rates to become maximally reduced*", the Municipality undertook to *inter alia* to "*take decision regarding change of the thermal energy prices*" and ensure that enterprises and organizations financed by the Municipality remain Customers.[1607]

1376. Article 21 governs the issue of energy sales and provides that VE must operate the Facilities and *"supply thermal energy, power hot water and other services in accordance with the Legal Requirements to VŠT's existing and future Customers*." [1608]

[1602] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 1.

[1603] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 10.

[1604] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 10.

[1605] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 12.

[1606] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 12.

[1607] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 14 (emphasis added).

[1608] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 21.1.

Article 21.11 also mentions that "*the quality and quantity of heat and steam supplies for business Customers for purposes other than space heating and domestic hot water will be defined in individual supply contracts negotiated on a case-by-case basis between NewCo and the individual Customers*."[1609]

1377. Article 22 provides for billing and payment terms, specifically it stipulates that VE can set lower prices with regard to certain large Customers, and that from the date of the Lease's Closing, VE would invoice Customers on a monthly basis for the heat energy supplied.[1610]

1378. The above provisions make it clear that the references to Customers in the Lease are not proper provisions for the benefit of a third party, and that VE's undertakings towards Vilnius' Customers is to be found in individual contracts of sale of electricity and heat between VE and the Customers.[1611]

1379. In sum, the Lease does not stipulate any specific right of Customers to demand the performance of VE's obligation to ensure supply of heat. As put by Claimants:

> *"Respondents fail to articulate what precise obligation arising out of the Lease or Lithuanian law they allege Claimants violated that would give Respondents ground for a counterclaim in this contractual dispute. In reality, none exists."*[1612]

> "*Respondents cite various Lease provisions in an effort to create from them a new Lease obligation to 'reduce energy production costs and tariffs.' Respondents' legal argument is little more than a haphazard compilation of Lease provisions that mention or tangentially relate somehow to reducing costs. Somewhere in the penumbras of these provisions, Respondents hope to find an obligation that will allow Respondents to enforce entirely separate Lithuanian regulatory and court decisions to which they are not parties in this arbitration under the Lease.*"[1613]

[1609] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 21 (emphasis added).

[1610] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 22.

[1611] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 22.

[1612] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 849.

[1613] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 855.

1380. The Arbitral Tribunal agrees that the provisions of the Lease referred to by Respondents are too vague to create obligations towards Vilnius consumers. The Tribunal further notes that the above cited provisions of the Lease and the references to Customers are explained by the nature of the Lease, a private-public partnership (PPP), and the fact that the Municipality is a contracting party. These elements however remain insufficient to conclude that the Lease includes a "*stipulations pour autrui*" or "*provisions in the interest of*" the Vilnius' heat and electricity consumers.

1381. In fact, as pointed out by Claimants, the main rights and obligations stipulated in the Lease primarily relate to the rights and obligations of the contracting parties and not that of the consumers:

> "*Respondents were the primary beneficiaries under the Lease: they own the leased assets, so Respondents benefitted from any improvements to those assets made under the Lease. Respondents were also paid Lease Fee and were relieved of VŠT's heavy debt burden, which Vilnius Energy paid off as part of the Lease. Consumers may have benefitted indirectly from improvements to the Facilities in the form of improved service quality and price, but that does not mean that they were the legal beneficiaries of the Lease. If that was the case, then any contract between a State or public entity and a private party would constitute a contract on behalf of a third party, the general public; public entities are presumed to be acting for the benefit of their constituents*."[1614]

1382. The Tribunal concurs and concludes that the requirement of Article 6.191 of the Lithuanian Civil Code according to which "*a stipulation in a contract for the benefit of a third person"* gives *"both the contracting party and the third person beneficiary the right to demand performance of the agreed obligation"* is not met in the present case.

1383. Regarding the provisions of Lithuanian law, Respondents rely on Articles 5(3) and 46(5) of the Lithuanian Constitution according to which the Municipality must serve the people and must serve the interests of the consumers. The Tribunal however considers that these general provisions of the Lithuanian Constitution alone do not in themselves suffice to prove that the Municipality has a right to represent the rights of consumers in

[1614] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 889 (emphasis added).

legal proceedings, in particular where such claims may be raised under the individual consumer contracts VE concluded with Vilnius' users.

1384. Further, the Lithuanian Law on the Protection of Consumers' Interests, provides that only official consumer associations, the State Consumer Rights Protection Authority and other State institutions may represent Lithuanian consumers in legal proceedings. Respondents do not fall under any of these categories. Pursuant to the Law on the Heat Sector municipalities are assigned a role to oversee district heating services and setting prices, but not to represent consumers.[1615]

1385. Finally, the setting and review of heating tariffs is a regulatory matter within the exclusive jurisdiction of the NCCPE and the Lithuanian courts which, as descried above, have exercised their jurisdiction and process in respect of the tariffs charged by VE.

1386. In view of the above, the Arbitral Tribunal considers that Respondents lack standing to pursue Counterclaim 2. In any event, the Arbitral Tribunal has proceeded to analyze the merits of the Counterclaim. Even if the Arbitral Tribunal's decision as to standing were to have been different, this would have had no impact on the outcome of Counterclaim 2, which, as explained in the following sections, is unavailable on the merits.

6. Finality of The Lithuanian Court Proceedings

6.1 The Parties' Positions

6.1.1 Claimants' Position

1387. Claimants have submitted a number of detailed objections to the NCCPE's recalculation of VE's tariffs for the Second Base Tariff Period as well as the underlying Ambrazaitis Report and the Inspection Report.[1616] Further, Claimants state that, in

[1615] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, paras. 891-892.

[1616] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, paras. 684-882; **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 441-466; **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 727-742. Claimants presented most of

response to their challenge, the SAC annulled the Inspection Commission's Resolution approving the Inspection Report and referred the matter back to the Inspection Commission for reconsideration, which was still pending at the date the Parties filed their Post Hearing Briefs (6 December 2022).[1617] In addition, Claimants state that the Supreme Court has confirmed the VRAC's judgment annulling the Pricing Commission's Resolutions calculating the Third Base Tariff by which some of the alleged overcharge by Vilnius Energy was recovered during the last few months of the Lease.[1618]

1388. Claimants also challenge Respondents' reliance on the NCCPE's letters of 27 July and 7 September 2018 in which it calculated the overcharge on the price of heat sold by VE in the Second Base Tariff Period (EUR 9.3 million). Claimants state that the Commission's letter was not a decision from the NCCPE and was abusive. They also state that, although they challenged the NCCPE's letter of 27 July and subsequent decision of 7 September 2018 calculating the alleged overcharge, their challenge was ruled inadmissible on the basis that the NCCPE's letter had no legal effect and bore no consequence for VE since it could not be practically enforced.[1619] Claimants also appealed before the SAC which rejected VE's challenge of the Second Base Tariff recalculation on the basis that "[…] *the Resolutions adopted by the Commission will have no effect* [on Vilnius Energy's] *rights or legitimate interest*."[1620]

1389. Claimants argue that the actions of the NCCPE which Respondents ask the Tribunal to enforce in Counterclaim form part of their international law claims in the ICSID

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these same arguments in the ICSID Arbitration. Respondents, for the most part, do not reply since they say that for the purposes of this arbitration the NCCPE's findings are final and binding.

[1617] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 740; **C-1274:** Supreme Administrative Court, Ruling in Adminstrative Case No. eA-20-525/2020, dated 25 November 2020; **CLA-370:** Decision from the Pricing Commission extending deadline to conclude inspection of VE, dated 08 June 2022; **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 157(b).

[1618] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 740; **CLA-368:** Supreme Administrative Court decision regarding Vilnius energy's III base price, in case No A-160-815/2022, dated 21 September 2022; **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 157(c).

[1619] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 735; **C-1391:** Vilnius Regional Administrative Court, Resolution in Administrative Case No. eI-4336-473/2018, September 3, 2018, dated 09 March 2018.

[1620] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 735; **CLA-064:** Vilnius Regional Adminsitrative Court, Ruling in Administrative Case No. eI-3244-473/2018, dated 21 September 2018; **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para.158.

Arbitration where the Claimants argue that the domestic Lithuanian regulatory and court decisions violated international law.[1621] Claimants also argue that enforcing the NCCPE's resolutions and calculation of the alleged amount of excess revenue received by VE would deprive them of the opportunity to challenge those resolutions and calculation.[1622]

1390. According to Claimants, Respondents rely on determinations of the NCCPE which the Lithuanian courts have found to have no legal effect. Therefore, the overcharge Counterclaim must fail. Claimants also challenge Respondents' calculation of damages for the same reasons.[1623]

6.1.2 Respondents' Position

1391. In response, Respondents challenge Claimants' interpretation of the findings of the NCCPE and subsequent court decisions. According to Respondents, after the SAC annulled VE's Second Base Tariff, the NCCPE recalculated VE's Second Base Tariff and determined that consumers should have paid 0,41 LTL ct/kWh (0,12 EUR ct/kWh) less for each unit of heat sold by VE.[1624]

1392. On 25 November 2020, the SAC dismissed VE's appeal and validated the NCCPE's Resolution of 27 April 2018. Respondents state that this is a final and binding decision. Subsequently, by way of its letters 27 July and 7 September 2018, the NCCPE carried out a calculation in which it determined the impact of the overcharge on the pricing of heat sold by VE.[1625]

[1621] **Claimant's Reply PHB:** Cs' Reply Post-Hearing Brief, dated 06 December 2022, para. 677; **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 736.

[1622] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 736.

[1623] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 737, 743-755.

[1624] **R-781:** NCCPE, Certificate Concerning the Newly Calculated Heat Price Related to Vilniaus Energija, No. O5E-79, April 3, 2018, dated 03 April 2018, pp. 214-215 of pdf; **R-1695:** NCCPE, Resolution on the Newly Calculated Components of Heat Base Price for the Limited Liability Company Vilniaus Energija No. O3E-132, April 27, 2018, dated 27 April 2018.

[1625] **C-515:** Letter from National Commission for Energy Control and Prices to Vilnius City Muncipality, July 27, 2018, dated 27 July 2018, p. 9 of pdf; **C-253:** National Commission for Energy Control and Prices, Letter No. R2-(ŠBK)-1981, September 7, 2018, dated 07 September 2018, p. 9 of pdf.

1393. Respondents state that it is only the NCCPE's specific calculation that the Courts have refused to review in the decisions cited by Claimants.[1626] Respondents state that the SAC's decision of 25 November 2020 validated the NCCPE's Resolution of 27 April 2018 which determined that consumers should have paid 0,41 LTL ct/kWh for each unit of heat sold by VE and that as a consequence, the overcharge is a legally binding fact.[1627] Respondents also note that in the VRAC's judgment of 3 September 2018, which was upheld by the SAC, the calculations of the price difference could be used as evidence in this arbitration.[1628]

1394. Respondents also submit that Claimants incorrectly attribute to the SAC a finding that "…*resolutions adopted by the Commission will have no effect* on [Vilnius Energy's] *rights or legitimate interests*." According to Respondents, this language is from the judgment of the VRAC in a different proceeding which concerned the NCCPE's Resolution of 27 April 2018, and not its letter of 27 July 2018. Respondents state that the VRAC's decision in question was subsequently overruled by the SAC which confirmed NCCPE's Resolution on the recalculation of the Second Base Tariff. Therefore, Respondents state that the NCCPE's finding of an overcharge of 0,41 LTL ct/kWh during the Second Base Tariff Period has a legal effect and is enforceable.[1629]

1395. Respondents note that Claimants' position on the merits of the NCCPE's decisions are largely the same as those presented in the ICSID Arbitration and that the Tribunal should strike out Claimants' submissions and evidence to the effect that NCCPE's decisions are incorrect.[1630]

1396. With respect to *quantum*, Respondents state that there is no risk of double recovery in this case since VE is no longer a heat supplier and therefore the NCCPE has no means

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[1626] **C-1391:** Vilnius Regional Administrative Court, Resolution in Administrative Case No. eI-4336-473/2018, September 3, 2018, dated 09 March 2018; **CLA-064:** Vilnius Regional Adminsitrative Court, Ruling in Administrative Case No. eI-3244-473/2018, dated 21 September 2018.

[1627] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 239.

[1628] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 241; **C-1391:** Vilnius Regional Administrative Court, Resolution in Administrative Case No. eI-4336-473/2018, September 3, 2018, dated 09 March 2018, pp. 6-7 of pdf.

[1629] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 242.

[1630] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019Respondents' Rejoinder, paras. 1173-1175.

of enforcing its outstanding decisions relating to overcharges. Further, Respondents have withdrawn their Counterclaim for the alleged overcharges in the ICSID Arbitration and the Lithuanian Court has not yet admitted Lithuania's claims relating to the overcharges. Any such claims, if admitted, would only be decided after the Tribunal renders its award in this arbitration. In any event, Respondents state that any claims by Lithuania in the courts do not seek to compensate the same damage in that Respondents' claims are contractual in nature and concern damages suffered by them and consumers, while Lithuania's claims concern damages suffered by the State.[1631]

6.2 The Arbitral Tribunal's Analysis and Decision

1397. Claimants have argued extensively about the fundamental flaws of the NCCPE's recalculation of VE's tariffs for the Second Base Tariff Period as well as the underlying Ambrazaitis Report and the Inspection Report. [1632] On their end, Respondents put forward that the decisions of the NCCPE that have been upheld by the Lithuanian administrative courts are binding and cannot be opened for re-examination.[1633]

1398. Based on Article 12(2) of the Law on Commercial Arbitration of the Republic of Lithuania providing that "[a]*rbitration may not settle disputes that are subject to the administrative procedure or hear cases that fall within the remit of the Constitutional Court of the Republic of Lithuania*",[1634] Respondents assert that the Tribunal does not have jurisdiction to make a determination on the correctness of the NCCPE's findings.[1635] Respondents further argue that the SAC and the regional administrative courts have exclusive competence over administrative matters.[1636] During their opening statement, Respondents contended that "*the decisions of the administrative courts are*

[1631] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022 , paras. 859-860.

[1632] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, paras. 684-882; **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 441-466; **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 727-742.

[1633] Respondent's Opening Statement, 18 April 2022, p. 20; see also **RL-081:** Law on Commercial Arbitration of the Republic of Lithuania (as amended on June 21, 2012), dated 21 June 2012, Article 11 and Article 12.

[1634] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1189.

[1635] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1195.

[1636] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1190.

res judicata in binding on other parts of the legal system, so this tribunal forms part because it is applying […] *Lithuanian law*."[1637]

1399. Respondents' ground for their Counterclaim 2 thus rests on the assumption that the NCCPE's decisions are final, whereas Claimants state that "*Respondents have admitted that certain decisions they rely upon are still being litigated*".[1638] The finality of the NCCPE's decisions is therefore the determinant question to decide whether Counterclaim 2 has a valid legal basis. Indeed, if these decisions are not final, they cannot form a valid legal basis for Counterclaim 2. Respondents are not asking the Arbitral Tribunal to calculate a tariff overcharge but rather to adopt the NCCPE's calculations, as is evident from Respondents' instructions to their expert on *quantum*.[1639]

1400. Regarding the finality of the decisions, Respondents put forward that, on 24 January 2017, the SAC annulled VE's Second Base Tariff, and that on 25 November 2020, it validated the NCCPE's resolution dated 27 April 2018 recalculating VE's Second Base Tariff with its final and legally binding decisions.[1640] In consequence, Respondents submit that *"the 0,41 LTL ct/kWh overcharge is a legally binding fact, confirmed by the highest instance court in Lithuania*".[1641]

1401. Nevertheless, Respondents confirm that the Lithuanian courts have refused to review the NCCPE's letters dated 27 July and 7 September 2018 carrying out the calculations ascertaining the impact of the overcharge on the pricing of the heat sold by VE, with

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[1637] Mr. Herbert's oral presentation, Transcript, Day 1, 224/1-5.

[1638] **CPHB:** Cls' Post-Hearing Brief, dated 18 October 2022, para. 1273.

[1639] **REX-001:** Expert report of FTI Consulting, dated 19 February 2018, para. 4.30; **REX-003:** Second FTI Expert Report, dated 13 October 2019, paras. 4.19-4.20, **REX-003 - Addendum to the Second FTI Expert Report:** REX-003 - Addendum to the Second FTI Expert Report, dated 14 August 2021, para. 2.10; **FTI Slides:** Hearing Presentation of FTI (Dr. Fabien Roques), dated 08 June 2022, slide 20.

[1640] **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 238; **R-033:** Ruling of the Supreme Administrative Court of Lithuania of January 24, 2017 in Case No. A-2681-822/2016, dated 24 January 2017; **C-1275:** Supreme Administrative Court, Ruling in Adminstrative Case No. eA-1765-261/2020, dated 25 November 2020.

[1641] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 239.

the *caveat* that the VRAC established that the calculations "*may be used as evidence in the dispute between the parties*".[1642]

1402. The crucial question is therefore whether the NCCPE's decisions, and specifically the NCCPE's letters dated 27 July and 7 September 2018 are final and enforceable. The factual background to the NCCPE's decisions as pleaded by the Parties is complex and thus benefits from a clarification in the following paragraphs.

1403. The heat tariff which VE was entitled to charge was fixed under the Lease, according to sections 22.2 and Annex 6. VE charged the tariff agreed to under the Lease with limited exceptions until 2008, when the regulated tariff price dropped below the Lease tariff price and VE was required to implement the regulated tariffs.

1404. From 2008 through to the end of the Lease, VE charged the regulated tariff calculated by the NCCPE.

1405. In December 2010, the NCCPE set VE's Second Base Tariff, which was to remain in effect from 2011 to 2015 (the "**Second Base Tariff Period**").[1643]

1406. On 14 January 2011, Mr. Juozas Imbrasas, a former Mayor of Vilnius, and Mr. Bronius Cicenas, the former General Manager of VST when the Lease was signed, challenged the NCCPE's newly established Second Base Tariff before the VRAC, alleging that the VE's Second Base Tariff had been set too high.[1644] The VRAC appointed Mr. Kestutis Ambrazaitis as an expert to prepare a report to assist it in its analysis and to confirm that the regulations, accounting and tariff calculations related to the NCCPE's were correct and complied with the applicable methodologies.

[1642] **C-1391:** Vilnius Regional Administrative Court, Resolution in Administrative Case No. eI-4336-473/2018, September 3, 2018, dated 09 March 2018, p. 8 of the pdf; **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, paras. 240-241.

[1643] **C-086:** National Commission for Energy Control and Prices, Certificate on the Determination of Components of the Heat Base Price and Hot Water Price of UAB Vilniaus Energija, No. O5-292, dated 02 December 2010

[1644] **C-500:** *Lithuanian National Consumer Federation v. National Commission for Energy Control and Prices*, Complaint to the Vilnius Regional Administrative Court, January 14, 2011, dated 14 January 2011. VE also challenged the Pricing Commission's setting of the Hot Water Tariff and the two complaints were addressed in the same case.

1407. Mr. Ambrazaitis submitted his report to the VRAC in January 2015 (the "**Ambrazaitis Report**").[1645] The Report concluded, *inter alia*, that VE had misled the NCCPE by submitting inflated costs figures upon which the NCCPE relied to set the tariff.

1408. The NCCPE and VE objected to the Ambrazaitis Report, which they alleged contained a number of fundamental flaws.[1646]

1409. On 11 December 2015, the VRAC issued its judgment which accepted the findings of the Ambrazaitis Report and upheld the challenge to the NCCPE's Second Base Tariff. The VRAC ordered the NCCPE to reopen and revise VE's Base Heating Tariff.[1647]

1410. VE and the NCCPE appealed the VRAC's decision. However, the SAC, relying on the Ambrazaitis Report, found that NCCPE's setting of VE's Second Base Tariff was based on incorrect data. The Court's judgment was issued on 24 January 2017.[1648]

1411. Following the SAC's decision, the NCCPE reviewed its earlier decision and determined that VE's Second Base Tariff should have been fixed at a lower rate.[1649]

1412. On 27 April 2018, the NCCPE formally adopted VE's recalculated (lower by approximately 2%) Second Base Tariff ("**Second Base Tariff Resolution**").[1650] The NCCPE also voted to calculate "*the extra revenue received*" by VE, in light of the recalculated tariff.[1651]

[1645] **R-240:** Lithuanian National Consumer Federation, Bronius Cicėnas, and Juozas Imbrasas v. National Commission for Energy Control and Prices, Opinion of KęstutisAmbrazaitis, January 9, 2015, dated 09 January 2015.

[1646] **CLA-022:** *Lithuanian National Consumer Federation, Bronius Cicenas, and Juozas Imbrasas v. National Commission for Energy Control and Prices*, Ruling of the Supreme Administrative Court, dated 26 September 2016; **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 697.

[1647] **R-243:** Vilnius Regional Administrative Court, Case No. I-2731-426/2015, Judgment of December 11, 2015, dated 11 December 2015.

[1648] **R-033:** Ruling of the Supreme Administrative Court of Lithuania of January 24, 2017 in Case No. A-2681-822/2016, dated 24 January 2017.

[1649] **C-242:** National Commission for Energy Control and Prices, Certificate Concerning the Newly Calculated Heat Price Related to Vilniaus Energija, No. O5E-79, April 3, 2018, dated 03 April 2018, Annex 4.

[1650] **C-252:** Minutes of Pricing Commission Meetings, April 27, 2018, dated 27 April 2018.

[1651] **C-252:** Minutes of Pricing Commission Meetings, April 27, 2018, dated 27 April 2018.

1413. VE subsequently challenged the Second Base Tariff Resolution adopting its recalculated Second Base Tariff before the VRAC and before the SAC. VE's appeals were eventually dismissed.[1652]

1414. On 27 July 2018, the head of the NCCPE sent a letter to Respondents informing them that, on the basis of its retroactively recalculated Second Base Tariff, it had determined that VE earned EUR 15 million "*excess*" revenues during the Second Base Period.[1653] The NCCPE subsequently recalculated the amounts referred to in its letter to Respondents dated 8 September 2018 ("**NCCPE's Letter'**).[1654] VE challenged the recalculation set out in NCCPE's Letter before the VRAC. The VRAC dismissed Claimants' challenge as inadmissible on the basis that the NCCPE's letter had no legal effect and bore no effect on VE's rights or legitimate interests.[1655]

1415. Meanwhile, in November 2014, the NCCPE had ordered an inspection of VE's regulated activities for 2012 to 2014.[1656]

1416. On 14 September 2016, the NCCPE issued its Inspection Report (the "**Inspection Report**").[1657] In its Report, the NCCPE concluded that VE had overstated its regulatory costs and failed to recognize significant income. The Report determined that VE earned excess profits of EUR 24.3 million, composed of alleged excess profits of €19 million and overcompensation of EUR 5 million based on VE's trading of greenhouse gas emissions allowances. Claimants challenged the Inspection Report before the

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[1652] See **RL-243:** Vilnius Regional Administrative Court, Case No. el-305-484/2019, Judgment of March 26, 2019, dated 26 March 2019; **C-1275:** Supreme Administrative Court, Ruling in Adminstrative Case No. eA-1765-261/2020, dated 25 November 2020.

[1653] **C-515:** Letter from National Commission for Energy Control and Prices to Vilnius City Muncipality, July 27, 2018, dated 27 July 2018.

[1654] **C-253:** National Commission for Energy Control and Prices, Letter No. R2-(ŠBK)-1981, September 7, 2018, dated 07 September 2018C-253: National Commission for Energy Control and Prices, Letter No. R2-(SBK-1981), September 8, 2018.

[1655] **C-1391:** Vilnius Regional Administrative Court, Resolution in Administrative Case No. el-4336-473/2018, September 3, 2018, dated 09 March 2018.

[1656] **R-239:** NCCPE, Order No. 01-84 Regarding Approval of the Plan of the NCCPE for Inspections of Regulated Activities in Energy Companies in 2015, November 20, 2014, dated 20 November 2014.

[1657] **C-226:** National Commission for Energy Control and Prices, Report of Scheduled Inspection of UAB Vilniaus Energija, dated 14 September 2016.

Lithuanian courts.[1658] On 25 November 2020, the Supreme Court annulled the Inspection Commission's Resolution approving the Inspection Report and referred the matter back to the Inspection Commission for reconsideration.[1659] The NCCPE's reconsideration of the Inspection Commission was still pending at the time the Parties submitted their Post Hearing Briefs.[1660]

1417. On 14 October 2016, the NCCPE set VE's Third Base Tariff ("**Third Base Tariff Resolution**").[1661]

1418. The NCCPE reduced VE's Third Base Tariff in light of the findings of the Inspection Report, which resulted in a reduction of VE's tariff by approximately EUR 6.8 million in the final months of the Lease (from December 2016 through March 2017). The NCCPE did not issue any order requiring VE to pay a fine or reimburse any amounts.

1419. On 21 September 2022, the SAC partially annulled the Third Base Tariff Resolution calculating the Third Base Tariff set in December 2016 (by which the NCCPE recovered a portion of VE's alleged revenues during the Second Base Tariff Period) and remitted the matter back to the NCCPE. The NCCPE's determination remained outstanding at the time the Parties' final pleadings were submitted.[1662]

1420. From the above summary, it appears that the Second Base Tariff Resolution finding that VE's tariffs in the Second Base Tariff Period should have been 2% lower has been upheld by the SAC and is final. For the sake of clarity and completeness, the Tribunal summarizes the procedural sequence of the Second Base Tariff Resolution:

[1658] Claimants devote lengthy submissions to the flaws in the Inspection Report and the process adopting it. These form part of Claimants' claim in the ICSID proceedings.]

[1659] **C-1274:** Supreme Administrative Court, Ruling in Adminstrative Case No. eA-20-525/2020, dated 25 November 2020.

[1660] **CPHB**, para. 740; **C-1274:** Supreme Administrative Court, Ruling in Adminstrative Case No. eA-20-525/2020, dated 25 November 2020; **CLA-370:** Decision from the Pricing Commission extending deadline to conclude inspection of VE, dated 08 June 2022; **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 157(b).

[1661] **C-192:** National Commission for Energy Control and Prices, Resolution regarding the Setting of the Components of the Base Price of Heat of Private Limited Liability Company Vilniaus Energija, No. O3-318, dated 14 October 2016.

[1662] **CLA-368:** Supreme Administrative Court decision regarding Vilnius energy's III base price, in case No A-160-815/2022, dated 21 September 2022.

- When Claimants challenged the Second Base Tariff Resolution for the first time in front of the VRAC, the VRAC in its ruling dated 21 September 2018, dismissed Claimants' claim ruling that the Second Base Tariff Resolution did not itself prejudice Claimants' rights or legitimate interests: "*it is perfectly obvious in the situation concerned that the Resolutions adopted by the Commission will have no effect on its rights or legitimate interests*".[1663]

- The VRAC's judgment dated 21 September 2018 was overturned by the SAC which referred the matter back to the VRAC. The VRAC, ruling for the second time on the same matter, as requested by the SAC, took the position that the challenge was admissible, considering this time that the Resolution may harm Claimants' interests. Therefore, the VRAC reviewed the Resolution and found in its judgment dated 26 March 2019, that the challenge of the Resolution was "*unfounded*".[1664]

- This second decision of the VRAC was upheld by the SAC.[1665]

1421. Regarding the status of the NCCPE's letters, the Tribunal further notes the finding of the VRAC stating that:

> "[h]*aving assessed the contents of the disputed letter of the Commission "On formation" and the notice "Information on Overpayment Amounting to 7.54 million EUR Made by the Consumers of UAB Vilniaus Energija as a Result of Recalculation of the Heating Price by the Commission", the court concludes that such acts are not the decisions of public administration with binding dictorial empowerments against applicant, are not the solved issue on the rights or duties of the applicant, are not expressed binding*

[1663] **CLA-064:** Vilnius Regional Adminsitrative Court, Ruling in Administrative Case No. eI-3244-473/2018, dated 21 September 2018, p. 6 of the PDF.

[1664] **RL-243:** Vilnius Regional Administrative Court, Case No. eI-305-484/2019, Judgment of March 26, 2019, dated 26 March 2019, p. 26.

[1665] **C-1275:** Supreme Administrative Court, Ruling in Adminstrative Case No. eA-1765-261/2020, dated 25 November 2020.

arrangements providing any rights or duties for the applicant or other persons, the applicant has not been imposed any enforcement measures."[1666]

1422. Therefore, the Tribunal concludes that while the NCCPE's letters may be used as evidence, they are not final, binding and enforceable decisions of the NCCPE imposing a direct obligation on Claimants, and do not determine definitely and with *res judicata* effect the amount of damages claimed by Respondents.

1423. Respondents have grounded and quantified their Counterclaim 2 solely based on the NCCPE's calculation, and therefore fail to prove the elements of their Counterclaim 2 which is dismissed on the merits. Therefore, even if the Arbitral Tribunal were to find that Respondents had standing to bring the counterclaim on behalf of the consumers and the Tribunal had jurisdiction, the counterclaim must fail.

1424. In view of this decision, Respondents request that the Arbitral Tribunal dismiss all evidence related to the ICSID Arbitration as irrelevant[1667] becomes moot. Hence, the debate as to the correctness of the NCCPE's decision and whether it respected Claimants' due process rights also becomes moot.

I. CLAIM 4/COUNTERCLAIM 11: VE-3 LEASE FEE

1. The Parties' Positions

1.1 Claimants' Position

1425. Under Claim 4, Claimants seek EUR 251,764 in compensation for the Lease Fee that VE was improperly forced to pay to VST in respect of VE-3 after VE had rightfully attempted to return the VE-3 plant to Respondents, as authorized under the Lease.[1668]

[1666] **C-1391:** Vilnius Regional Administrative Court, Resolution in Administrative Case No. eI-4336-473/2018, September 3, 2018, dated 09 March 2018 (emphasis added).

[1667] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1208.

[1668] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 549 and para. 1335(a)(iv).

1426. Claimants argue that the VE-3 plant became economically unviable after the Lithuanian State eliminated a public support system designed to ensure its viability in October 2015.[1669] Shortly after that, VE gave notice to VST that it would be returning the VE-3 plant.[1670] Nevertheless, Respondents refused to take back the plant and requested VE to continue paying the Lease Fee related to the VE-3 plant until the end of the Lease. To avoid the escalation of the dispute, VE paid the Lease Fee under protest, and simultaneously requested Respondents to pay them back.[1671]

1427. Claimants argue that under the Lease, VE was entitled to return any unused, obsolete assets to Respondents, as per paragraph 2.5 of Annex 10 to the Lease, which determined the procedure governing the return of unused assets.[1672] Under this procedure, VE had to provide some basic information about the asset it was returning and the reason for the return. The process was therefore *pro forma*, leaving VST little or no discretion to take back the unused assets.[1673]

1428. Claimants argue that Respondents fundamentally misread and misinterpreted the Lease and completely ignored the way the Parties handled the return of obsolete assets.[1674] Respondents argue that it is Article 13(i) of the Lease that primarily regulates the right to return obsolete assets before the end of the Lease, which only allows the return of assets that have become obsolete due to the implementation of the Investment Plan.[1675] According to Claimants, paragraphs 2.5 and 3.4 of Annex 10 to the Lease regulate Claimants' right to return the assets, while Article 13(i) of the Lease only refers to one of Respondents' commitments under the Lease, *i. e.* to accept those assets that have become obsolete due to the implementation of the Investment Plan. It is therefore

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[1669] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1608.

[1670] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1608.

[1671] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1608.

[1672] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1636.

[1673] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1637.

[1674] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1638.

[1675] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1639.

paragraphs 2.5 and 3.4 of Annex 10 to the Lease that contain the full spectrum of grounds for the return of assets*, i.e.*, "*obsolete*" assets that "*shall not be used during the Term*" of the Lease.[1676]

1429. With regard to Respondents' argument that Article 13(i) and paragraphs 2.5 and 3.4 of Annex 10 to the Lease require the parties to mutually agree to whether an asset is obsolete, Claimants contend that this does not give ground to Respondents to refuse the return of an asset without a legitimate reason. This is rather a mechanism to ensure that VE would still be able to provide heating services without the respective asset.[1677] Thus, VST did not have a wide-range discretion to refuse the return of assets that VE no longer needed to use to supply heat.[1678]

1430. Furthermore, contrary to what Respondents assert regarding the meaning of the word "*obsolete*" (*i. e.* meaning "*to be replace*[d] *by something newer*"),[1679] according to Claimants the word obsolete means an asset that is unused, without the need of replacement, as agreed by the parties in the 2002 Protocol.[1680] Under the 2002 Protocol, the parties agreed that the equipment would be "*recognized as obsolete*" within the meaning of paragraph 2.5 and paragraph 3.4 of Annex 10, if the real estate or movable property was unused or expected to be unused in economic activity.[1681] In response to Respondents' arguments that the 2002 Protocol is not relevant and does not modify the conditions of returning assets, Claimants argue that the 2002 Protocol serves to interpret the substantive conditions of the Lease under which an asset is deemed to be

[1676] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1639.

[1677] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1643, see also paras. 1645-1646.

[1678] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1644.

[1679] Respondents' Rejoinder at para. 2844.

[1680] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1640; see **C-111:** SP AB Vilniaus Šilumos Tinklai, Procedure of returning and transferring within the company long-term assets that were leased from SP AB Vilniaus Šilumos Tinklai according to the Lease Agreement of 1 February 2002 and are not used in the economic activity of UAB Vilniaus Energija and of leasing unleased longtermassets of SP AB Vilniaus Šilumos Tinklai to the private limited company UAB Vilniaus Energija, dated 31 October 2002.

[1681] **C-111:**, dated 31 October 2002, 2002 Protocol at Part. I, Item 2; **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1641.

obsolete, and thus, can be returned.[1682] In any event, Claimants argue that VE had come up with a new alternative to VE-3.[1683]

1431. Lastly, Claimants claim that the individual substations which were returned in 2012 because they became economically obsolete – similarly to the VE-3 plant –, were also returned in accordance with paragraphs 2.5 and 4.3 of Annex 10 to the Lease. This was acknowledged by VST as well, as it did not object to the return of those assets.[1684]

1432. Claimants argue that Respondents' request for relief must be rejected because Claimants are entitled to the return of the Lease Fee paid under protest. According to Claimants, once the assets have been returned to Respondents because they have become obsolete, they are to be removed from Annex 1 of the Lease and excluded from the calculations of the Lease Fee. Since Respondents unjustly refused the return of the VE-3 plant, they unjustly continued to claim Lease Fee.

1433. In any event, Claimants argue that Respondents' claim for damages fails because VE did not default on the improper Lease Fee payments under Article 11.3 of the Lease, and thus, Respondents are not allowed to charge interest on these fees. Instead, the payments made by VE must be credited to have been paid for the full amount of Lease Fee for the VE-3 plant after it was closed on 1 January 2016.[1685]

1.2 Respondents' Position

1434. Respondents argue that the public support system designed to ensure the viability of gas-powered CHP plants, such as the VE-3 plant, was a temporary measure, thus Veolia should not have expected to be able to rely on it in the long term.[1686] Respondents argue that although VE knew about the forthcoming changes, it failed to

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[1682] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1648.

[1683] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1642.

[1684] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1652.

[1685] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1657.

[1686] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 2791-2792.

implement measures to adapt the VE-3 plant. Thus, Veolia is responsible for the alleged "*economic unviability*" of the VE-3 plant and, by attempting to return it, Veolia simply sought to avoid the consequences of its own mismanagement.[1687]

1435. Respondents argue that the provisions of the Lease relevant to the return of assets are Article 13(i) and paragraphs 2.5 and 3.4 of Annex 10.[1688] According to Respondents, Claimants ignore that Article 13(i) and paragraphs 2.5 and 3.4 of Annex 10 require that the Facilities be recognized as "*unusable*" or "*obsolete*" "*by mutual agreement of the Parties*". Therefore, Claimants' interpretation of the return process as automatic and as leaving no discretion to the Respondents is not in line with the provisions of the Lease.[1689]

1436. Furthermore, Respondents argue that the return of assets as regulated by Article 13(i) only allows returning of those assets that become unusable due to the Investment Plan being implemented. According to Respondents, as VE-3 was not displaced due to the implementation of the Investment Plan, Veolia had no right to return it.[1690]

1437. Respondents contend that VST's refusal to recognize the VE-3 plant as obsolete was not unreasonable, because there were no impediments for the operation of the plant either from a technological or a legal perspective. Furthermore, the return of the asset was not related to the implementation of VE's obligations to modernize and improve the Vilnius district heating system.[1691]

1438. Respondents contest Claimants' interpretation of "*obsolete*" as meaning an asset that VE does not use or no longer intends to use in its business. According to Respondents' interpretation, paragraphs 2.5 and 3.4 of Annex 10 allow VE to return those assets that become replaced or outdated, most notably, because newer and better technologies appear. Nevertheless, Veolia attempted to return the plant because VE allegedly lost

[1687] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 2794-2807.
[1688] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2831.
[1689] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2834.
[1690] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 2836-2841.
[1691] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2835.

the ability to operate it without losses and did not want to search for market opportunities. In this instance, paragraphs 2.5 and 3.4 of Annex 10 do not apply.[1692]

1439. Respondents further argue that the 2002 Protocol and the return of the individual substations do not prove that VE is allowed to return the VE-3 plant, as the 2002 Protocol does not modify the conditions for returning the assets provided for in the Lease.[1693] Furthermore, with regard to the return of the individual substations, Respondents argue that VE fails to recognize that by their mutual agreement the Parties can remove from the Lease any asset. Also, the return of the substations as movable assets could have been performed outside of the scope of Article 13(i) and paragraphs 2.5 and 3.4 of Annex 10.[1694] In any event, VE could not operate the substations legally, which is different than the situation of the VE-3 plant.[1695]

1440. Therefore, according to Respondents, Claimants are not entitled to claim back the VE-3 plant Lease Fee paid in 2016 and 2017.

1441. Respondents counterclaim that Claimants owe them EUR 12,741, as even though Respondents sent appropriate invoices to Veolia in the course of 2016, Veolia only started paying on 14 September 2016. Articles 11(3) and 28(3) of the Lease provide for the payment of interest in the event of default to pay the Lease Fee. As Veolia's payments did not account for the interest accrued during the time of the delay, Veolia remained EUR 12,741 short as far as the principal obligation to pay the Lease Fee was concerned.[1696]

1442. Respondents contend that Claimants' argument related to Article 35(2) of the Lease concerns fundamental breaches, while Respondents rely on Articles 11(3) and 28(3) of the Lease, which directly and explicitly regulate the payment of interest for failures to

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[1692] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 2842-2845.

[1693] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 2853-2855.

[1694] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 2856-2859.

[1695] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2860.

[1696] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2868.

perform under the Lease. According to these provisions, interest starts accruing when a party fails to perform its obligation in time. Since Veolia agrees that a portion of the Lease Fee became due at the end of the first quarter of 2016, Veolia defaulted immediately after it failed to pay, following which interest became due.[1697]

1443. Article 13(i) and paragraphs 2.5 and 3.4 of Annex 10 require that the Facilities be recognized as "*unusable*" or "*obsolete*" "*by mutual agreement of the Parties*". Therefore, Claimants' interpretation of the return process as automatic and as leaving no discretion to the Respondents is not in line with the provisions of the Lease.[1698]

2. The Arbitral Tribunal's Analysis and Decision

2.1 Claim 4

1444. Under Claim 4 Claimants claim that the Lease allowed VE to return VE-3 as obsolete asset. According to Claimants, as VE-3 was returned on 1 January 2016, VE did not have to pay Lease Fee relating to the obsolete and returned VE-3. As VST refused to accept VE-3 and continued to claim Lease Fee in 2016, in order to avoid the escalation of the dispute, VE continued to pay under protest starting from 14 September 2016.

1445. Claimants request the Tribunal to order Respondents to pay back the Lease Fee paid for VE-3 in 2016 under protest in the amount of EUR 251,764.[1699]

2.1.1 Lease provisions

1446. The Parties agree that the provisions relevant to the return of obsolete assets are stipulated in Article 13(i) and paragraphs 2.5 and 3.4 of Annex 10 to the Lease.

1447. Article 13(i) of the Lease provides as follows:[1700]

[1697] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2870.

[1698] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2834.

[1699] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 588.

[1700] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 13(i).

"*The Lessor undertakes to:*

(i) accept from the Lessee the Facilities that have due to the Investment Plan being implemented become no longer usable for the Business. The Facilities shall be qualified as unusable by mutual agreement of the Parties. In any case all costs of acceptance, writing off, technical operation, safeguarding, transportation, warehousing and other expenses relating to such writing off of the Facilities shall be reimbursed to the Lessor by the Lessee based on the actual costs of the Lessor. The Municipality undertakes to release the Lessor from real property tax in respect of such unusable Facilities".

1448. Paragraphs 2.5 and 3.4 of Annex 10 to the Lease read as follows:[1701]

"*In case immovable property leased to the Lessee becomes obsolete and shall not be used during the Term, the Parties agree that such property shall be returned to the Lessor under the Acceptance Certificate by correspondingly amending section 'Immovable property' of Annex 1 'Facilities' to this Agreement, i.e. excluding from the list of leased property the returned immovable property. Equipment shall be recognised as obsolete by mutual agreement of the Parties. In all cases, expenses of acceptance, writing-off, technical maintenance of the Equipment shall be paid by the Lessee to the Lessor based on the actual expenses incurred by the Lessor. The Lessee shall not be liable to pay Lease Fee 4 with respect to the returned immovable property from the date of signing of the immovable property Acceptance Certificate*.

[…]

In case the Lessee during the Term replaces the leased movable assets by new assets, then the replaced old movable assets shall be recognised as obsolete and shall be returned to the Lessor under the Acceptance Certificate. In this case section "Movable Assets" of Annex I "Facilities" to this Agreement shall be correspondingly amended by excluding from the assets' list the returned movable assets. The equipment shall be recognised as obsolete by the mutual agreement of the Parties. In all cases, the actual expenses of acceptance, writing-off, technical maintenance and other costs related to the Equipment incurred by the Lessor shall be compensated by the Lessee. The Lessee shall not be liable to pay Lease Fee 4 for the returned movable assets after the date of signing of the Acceptance Certificate of the movable assets".

[1701] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, item 2.5 and 3.4 of Annex 10.

1449. The Parties disagree on essentially two points regarding the interpretation of Article 13(i) and paragraphs 2.5 and 3.4 of Annex 10 to the Lease and the general procedure and conditions of the return of obsolete assets.

1450. First, the Parties disagree on the meaning of the mutual consent required to recognize the assets as obsolete.[1702] While Respondents consider that an asset may only be declared obsolete upon the mutual agreement of the Parties, Claimants argue that the process was purely *pro forma*, leaving VST little or no discretion to take back the unused assets. Claimants further argue that in any case, Respondents could not refuse to return an asset without a legitimate reason.[1703]

1451. Second, the Parties disagree as to the conditions under which Claimants can return the assets, and when an asset can be declared "*obsolete*". Claimants argue that "*obsolete*" means an asset that is unused, without the need of replacement.[1704] Respondents, however, argue that obsolete means "*to be replace*[d] *by something newer*" as only assets that became obsolete due to the implementation of the Investment Plan may be declared obsolete as per Article 13(i) of the Lease.[1705]

1452. The Arbitral Tribunal has looked at the provisions of the Lease and they are clear as to the fact that, in all situations, a mutual agreement of the Parties must be reached for an asset to be considered as obsolete under the Lease, so giving rise to a right of return of VE and an obligation to accept the returned asset of VST.

1453. The Arbitral Tribunal further considers that, since the present case concerns the VE-3 plant, *i.e.* an immovable asset that became obsolete (as per paragraph 2.5 of Annex 10 to the Lease), and not a movable asset that was substituted by a new asset (as per paragraph 3.4 of Annex 10 to the Lease), the regime applicable is found in paragraph

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[1702] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, paras. 1643-1646; [1702] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2834.

[1703] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1637 and para. 1643, see also paras. 1645-1646.

[1704] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1640.

[1705] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2844.

2.5 of Annex 10 to the Lease read in conjunction with Article 13(i) of the Lease, whereas paragraph 3.4 of Annex 10 to the Lease is not directly relevant to the situation considered. The above interpretation reflects the intent of the Parties as clearly expressed in the provisions of the Lease, and Claimants have not put forward any convincing argument to support an alternative interpretation.

1454. Claimants argue that despite the formulation of Article 13(i) of the Lease and paragraph 2.5 of Annex 10 to the Lease, the procedure governing the return of unused assets set out in paragraph 2.5 of Annex 10 to the Lease is a largely *pro forma* procedure:[1706]

> *"Vilnius Energy had to provide Respondents with some basic information about the asset it was returning and the reason for the return. The process was therefore largely pro forma, leaving VST little or no discretion to take back the unused asset."*

1455. Claimants do not provide convincing evidence to support their argument that the procedure to return unused assets would be subject to a *pro forma* procedure. They refer to a protocol entered by the Parties in 2002 whereby the Parties agreed on certain procedures for the return of unused assets.[1707] Claimants however accept that the relevance of that document is limited when they state that "*the procedures in the 2002 Protocol inform the rights and obligations contained in the Lease*."[1708]

1456. The Parties concluded the Lease on 1 February 2002, and stipulated therein that, based on Article 13(i) and paragraph 2.5 of Annex 10 to the Lease, the mutual agreement of the Parties is necessary to qualify a Facility as an obsolete asset. The protocol of 31 October 2002 does not modify these provisions. *A fortiori*, there is therefore no legal basis for the Arbitral Tribunal to deviate from this express provision agreed by the Parties, which is repeated in several places of the Lease.

[1706] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1637 (emphasis added); see also **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 333.

[1707] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, paras. 333-334, **C-111:** SP AB Vilniaus Šilumos Tinklai, Procedure of returning and transferring within the company long-term assets that were leased from SP AB Vilniaus Šilumos Tinklai according to the Lease Agreement of 1 February 2002 and are not used in the economic activity of UAB Vilniaus Energija and of leasing unleased long term assets of SP AB Vilniaus Šilumos Tinklai to the private limited company UAB Vilniaus Energija, dated 31 October 2002.

[1708] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 334.

1457. As a conclusion, the Arbitral Tribunal finds that, when an asset becomes obsolete, the mutual agreement of the Parties that the asset is obsolete is required to return it, and this is the defining condition for returning an asset taking into account the intent of the Parties expressed in the provisions of the Lease.

2.1.2 Claimants' attempt to return VE-3

1458. Claimants argue that, after VE gave notice to VST to return the VE-3 plant, Respondents refused to take it back and requested VE to continue to pay the Lease Fee related to VE-3 until the end of the Lease. VE explained that, since the Lithuanian State eliminated a public support system designed to ensure the economic viability of gas-powered CHP plants as of 1 January 2016, the VE-3 plant became economically unviable.[1709]

1459. VE first gave notice to VST regarding the return of the VE-3 plant in a letter dated 14 October 2015.[1710] VE explained that, without the quota of the public support system, VE could no longer operate the VE-3 plant without financial losses, due to the technical and economic realities of the plant:[1711]

> *"Having assessed the resolution passed by the Government of the Republic of Lithuania on 07-10-2015 to refuse the implementation of public service obligations provided for in the Law on Electricity of the Republic of Lithuania, i.e. the promotion of the purchase of electricity from cogeneration power plants as from the beginning of 2016, UAB Vilniaus energija (hereinafter - the Company) will not be able to produce heat in* [VE-3] *because the technologic scheme of cogeneration power plant facilities does not allow producing heat without the production of electricity. According to requirements of the currently valid legislation governing the purchasing of quota electricity and pricing of such purchase, if income covering fixed and variable electricity production expenses is not generated from quota electricity sales, staring*

[1709] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1608.

[1710] **C-112:** Letter from Vilnius Energy to Vilnius City Municipality and Vilniaus Šilumos Tinklai, dated 14 October 2015, p. 5 of the PDF; see also **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1608.

[1711] **C-112:** Letter from Vilnius Energy to Vilnius City Municipality and Vilniaus Šilumos Tinklai, dated 14 October 2015, p. 5 of the PDF.

> *from 1 January 2016, it will no longer be possible to use Vilnius* [VE-3] *facilities leased to the Company neither for electricity production nor for the performance of licensed heating activities. The Ministry of Energy also announced in its press release '*[VE-3] *is not necessary for the supply of the city of Vilnius with heat' the fact that* [VE-3] *is no longer necessary for Vilnius heat sector due to the decision taken by the Government of the Republic of Lithuania. In such a case, when respective parts of property leased to the Company become no longer necessary for economic activity due to changed legislation requirements, they are returned to the Lessor (AB Vilniaus Šilumos Tinklai) in accordance with paragraphs 2.5 and 3.4 of Annex No. 10 to the lease agreement (hereinafter – the Lease agreement) of 01-02-2002 and Article 31 of the Lease agreement, no longer calculating the Lease fee No. 4 for the property returned."*

1460. The Municipality responded to VE by letter dated 10 October 2015.[1712] In its letter, the Municipality stated that the resolution concerning the public support system was never adopted. The Government of the Republic of Lithuania announced a public consultation on a draft resolution "On Suppliers of Services of Public Interest and the Setting of the Scope of Provision of Services of Public Interest for 2016". However, according to Respondents, the draft has not been adopted, and it is therefore not true that the quota for services of public interest was annulled for thermal power plants starting from 1 January 2016. Furthermore, the Municipality stated that VE had not presented "*any economic calculations on the planned decision and analysis how and if the* [VE-3] *could function without producing subsidized electricity, also the substantiation of whether* [VE-3] *will not be used, as technologically connected with* [VE-2]."[1713] Consequently, the Municipality asked VE to answer a number of questions related to these issues.[1714]

1461. VE replied on 28 October 2015, and reiterated its position that "*the quota of services of public interest (PIS) and respective scope of production of subsidized electricity for cogeneration power plants for 2016 has been annulled*".[1715]

> [VE-3] *is not necessary for supplying the city of Vilnius with heat'. Furthermore, respective state management institutions have indicated that 'the decision is reasoned*

[1712] **C-114:** Letter from Vilnius City Municipality to Vilnius Energy, dated 19 October 2015, p. 5 of the PDF.
[1713] **C-114:** Letter from Vilnius City Municipality to Vilnius Energy, dated 19 October 2015, p. 5 of the PDF.
[1714] **C-114:** Letter from Vilnius City Municipality to Vilnius Energy, dated 19 October 2015, p. 5 of the PDF.
[1715] **C-115:** Letter from Vilnius Energy to Vilnius City Municipality, dated 28 October 2015, p. 9 of the PDF.

> *by the fact that next year electricity interconnections with Poland and Sweden will be launched and the country will no longer need production of expensive local electricity', i.e. the launch of electricity interconnections in 2016, maintenance of local electricity generation capacities (support throughout the entire validity period of the Lease contract) is given up, because unregulated production of electricity produced by such power plants (in Vilnius, Kaunas and Panevėžys) is not and has never been competitive compared to prices of imported (till 2009 - produced in Ignalina NCPP) electricity, meanwhile without the production of electricity,* [VE-3] *cannot produce heat energy either* […]

1462. On 30 October 2015, VST requested information as to whether VE had assessed the possibility to continue using the VE-3 plant:[1716]

> *"*[VST] *notes that pursuant to Article 13 of the Lease agreement, the assets no longer used in economic activities shall be declared unusable solely by an agreement of the parties, which in turn means that VE should provide the entire information necessary to make such a decision. Accordingly, we ask you to provide information on whether or not an assessment of the possibility to continue using* [VE-3] […] *was conducted (if so, please provide the data thereof) and if calculations of investments necessary to that purpose were made and/or the necessary amendments to laws were assessed (for example, to increase the redistributable share of costs for cogeneration power plants attributed to electricity production). Please also indicate which documentation is planned to be transferred*."

1463. VE replied with a letter dated 16 November 2015, stating that it had already provided detailed explanations concerning the consequences of the new legal regulation under Resolution No. 1083 of the Government of the Republic of Lithuania on the operation of the VE-3 plant. VE further explained that [i]*n view of the fact that the sale of electricity is the only source of revenue of a cogeneration power plant enabling it to cover the relatively fixed costs of the power plant, the sale of electricity on the market would not cover the relatively fixed costs and even some of the variable costs*." VE added that "[a]*fter the Government of Lithuania amended the relevant legal acts regulating the volumes of electricity purchased from cogeneration power plants in late 2013* […] *the electricity generation activity of the Company became loss-making as early as*

[1716] **C-113:** Letter from Vilniaus Šilumos Tinklai to Vilnius Energy, dated 30 October 2015, p. 7 (emphasis added).

2014." [1717] Therefore, the efficient maintenance and control of VE-3 became impossible.[1718]

1464. In its letter dated 3 December 2015, VST replied that Article 13 of the Lease establishes that VST must accept from VE Facilities that have become unusable in Economic Activities in the implementation of the Investment Plan and shall be declared unusable by mutual agreement of the Parties. Nevertheless, VST stated that Article 13 of the Lease is not applicable to VE-3, as the construction of a new heat and power plan which could replace VE-3 is not part of the Investment Plan. VST concluded that VE-3 could therefore not be returned pursuant to Article 13 of the Lease:[1719]

> "[N]*either the Investment plan nor the Aggregate investment programme provide for the construction of new combined heat and power plants, which would replace the current leased assets, i.e. capacities of* [VE-3] *in this specific case, thus your indicated basis of return of* [VE-3] *does not meet the requirements and conditions laid down in Article 13 of the Lease*. *Pursuant to the Lease agreement, the basis for return of* [VE-3] *which you indicated in your letter - the cancellation of PIS quotas for combined heat and power plants - does not meet the criteria listed in the Lease agreement for the return of assets (Facilities) unused in Economic activities before the expiry of the Lease agreement*."

1465. Claimants explain that, in order to avoid the escalation of the dispute, VE continued to pay Lease Fee under protest and simultaneously requested Respondents to pay them back.[1720]

1466. The Tribunal considers that VE requested to return VE-3 to VST on 14 October 2015 due to the annulment of the public support system designed to ensure the viability of gas-powered CHP plants such as VE-3 starting from 1st January 2016. In its press

[1717] **C-110:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 16 November 2015, p. 23.
[1718] **C-110:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 16 November 2015
[1719] **C-118:** Letter from Vilniaus Šilumos Tinklai to Vilnius Energy, dated 03 December 2015, p. 4 of the P
[1720] **C-033:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 15 September 2016, p. 5 to 6 of the PDF.

release, the Ministry of Energy of the Government of the Republic of Lithuania declared that VE-3 was not necessary for the heat supply of Vilnius.[1721]

1467. In response, the Municipality asked VE to present economic calculations on the planned decision and analysis as to how and whether the VE-3 plant could function without producing subsidized electricity.[1722] When VE responded that it had already presented the reasons why it cannot continue to efficiently operate the VE-3 plant without the public support system, VST repeatedly responded that it requires information concerning the assessment of the possibility to continue using the VE-3 plant before deciding on taking it back as obsolete as per Article 13(i) of the Lease.[1723]

1468. When VE could not present an assessment according to which VE-3 could continue to operate efficiently, VST replied that, pursuant to Article 13(i) of the Lease, VST must accept Facilities that have become unusable in Economic Activities in the implementation of the Investment Plan. Nevertheless, VST claimed that, as the construction of a new heat and power plant which could replace VE-3 was not part of the Investment Plan, the VE-3 plant could not be returned pursuant to Article 13 of the Lease.[1724] In other words, the Parties' discussion did not evolve much between October and December 2015, with the Parties maintaining their initial positions in the absence of responsive arguments from the other side.

1469. This correspondence makes it clear that the Parties did not mutually agree to recognize VE-3 as obsolete. Respondents highlighted that such agreement was required, and that Respondents could not consider the request without further indications from VE. VE did not consider that such further indications were on point and did not provide them. Without prejudice to the question whether Respondents' request for further information was legitimate or not, there is no doubt that the Parties did not reach an agreement on the qualification of VE-3.

[1721] **C-112:** Letter from Vilnius Energy to Vilnius City Municipality and Vilniaus Šilumos Tinklai, dated 14 October 2015, p. 5 of the PDF.

[1722] **C-114:** Letter from Vilnius City Municipality to Vilnius Energy, dated 19 October 2015, p. 5 of the PDF.

[1723] **C-113:** Letter from Vilniaus Šilumos Tinklai to Vilnius Energy, dated 30 October 2015, p. 7 of the PDF.

[1724] **C-118:** Letter from Vilniaus Šilumos Tinklai to Vilnius Energy, dated 03 December 2015, p. 4 of the PDF.

1470. While Claimants argue that Respondents refused to take back the VE-3 plant without any legitimate basis,[1725] the Arbitral Tribunal finds, based on the contemporaneous evidence presented by the Parties, that there is no evidence on which a decision can be based that Respondents' refusal to qualify the VE-3 plant as obsolete was illegitimate. Claimants have submitted lengthy explanations as to why, in their opinion, Respondents' requests for inquiries were unreasonable, unrelated to the question whether VE-3 was obsolete and made in bad faith.[1726] Claimants speculate as to the real intention of Respondents when they took an allegedly "combative" approach in the above quoted correspondence, noting that Respondents sold VE-3 to Lietuvos Energija shortly after the end of the Lease.[1727] However, such description only confirms that there was certainly no agreement between the Parties to treat VE-3 as obsolete. It is not for the Arbitral Tribunal to modify a requirement that the Parties have expressly stipulated in 3 different places of their contract.

1471. In view of the above considerations, the Arbitral Tribunal finds that the determining condition which is required by the Lease to qualify a Facility as obsolete, namely the mutual agreement of the Parties, was not reached. Therefore, as per the provisions of the Lease, *i. e.* Article 13(i) of the Lease read in conjunction with paragraph 2.5 of Annex 10 to the Lease, was not met.

2.1.3 Conclusion

1472. The Arbitral Tribunal dismisses Claim 4 because there was no mutual agreement between the Parties to declare the VE-3 plant an obsolete asset. Therefore, there was no obligation on the side of Respondents to accept the VE-3 plant. As seen from the evidence provided by the Parties, VE only returned VE-3 to VST at the end of the Lease (29 March 2017), because its attempt to return it in 2015 did not prosper, as Respondents did not agree on the obsolete state of the plant.

2.2 Counterclaim 11

[1725] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, paras. 331-353.

[1726] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, paras. 335 ff.

[1727] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 920; **R-287:** Sale-purchase Agreement of VE-3, dated 12 October 2017.

1473. Under Counterclaim 11, Respondents request the Tribunal to order Claimants to pay Respondents EUR 12,741 for overdue Lease Fee 2 paid to cover property tax for the VE-3 plant, with daily interest of 0.08 % calculated from 15 March 2017 until full payment of the amount awarded.[1728]

1474. Respondents argue that VE attempted to return the VE-3 plant in breach of the Lease. As a result, Respondents reasonably refused to accept VE-3 from the Lease, because of which, VE-3 continued to be leased by VE, and thus, VE was obliged to continue to pay Lease Fee 2 for VE-3 as per Article 11 of the Lease.[1729]

1475. Respondents contend that, while VST sent invoices to VE throughout 2016, the latter only started paying Lease Fee 2 for VE-3 on 14 September 2016. Thus, VE defaulted on its obligation to pay Lease Fee 2 for VE-3 in time and as a result of these late payments, Respondents were entitled to receive interest under Article 11.3 and 28.3 of the Lease.[1730]

1476. Respondents further argue that, in compliance with Article 6.54 of the Civil Code, Respondents first accounted for payments made by VE to cover the interest for late payment (and not the principal amount of the corresponding Lease Fee). Therefore, according to Respondents, there is still outstanding Lease Fee 2 for VE-3 which must be paid by Claimants.[1731]

1477. Claimants respond that Counterclaim 11 must fail because Respondents were not entitled to interest on the payments that VE paid under protest. First, Claimants argue that the Lease did not permit Respondents to charge interest on the allegedly due Lease Fee 2 for VE-3, as under Article 11.3 of the Lease, Respondents could only charge interest "*in the event of default by the Lessee*" on the Lease Fee payments.[1732]

[1728] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1138(d)(xi).

[1729] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 1559.

[1730] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 1563-1564; **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2868.

[1731] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 1563-1564; **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2868.

[1732] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 378.

1478. Claimants further argue that Article 35.2(iii) of the Lease provides that the non-payment of the Lease Fee (other than Lease Fee 4) constitutes a fundamental breach only if not paid for more than two calendar quarters. According to Claimants, the first Lease Fee 2 payment claimed by Respondents for VE-3 was due at the end of the first quarter of 2016, hence VE could not have defaulted on this payment until the beginning of the fourth quarter of 2016.[1733] In Claimants' view, Respondents must prove the date of default under the Lease, otherwise Respondents have no grounds to argue that VE's payment of Lease Fee 2 for VE-3 was belated.[1734]

1479. In Reply, Respondents contend that Article 35.2(iii) of the Lease regulates fundamental breaches, whereas Respondents did not invoke a fundamental breach regarding the non-payment of Lease Fee 2 for VE-3. Respondents argue that, according to Articles 11.3 and 28.3 of the Lease (which govern the payment of interest for failure to perform the Lease) "*interest starts accruing from the moment when a party fails to perform its obligation 'in time', rather than two quarters later. Since Veolia agrees that a portion of the Lease Fee became due at the end of the first quarter of 2016, Veolia defaulted immediately after it failed to pay, following which interest became due*."[1735]

1480. There is no dispute between the Parties as to the following facts:

1481. VE stopped operating VE-3 on 1 January 2016 and declared that the plant was considered returned to VST and demanded that no Lease Fee be calculated on the value of the VE-3 plant as it was no longer a leased asset.[1736]

1482. VE did not pay the Lease Fee for VE-3 between 1 January 2016 and 14 September 2016 (when VE started to pay Lease Fee for VE-3 under protest), despite the fact that

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[1733] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 378.

[1734] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1658.

[1735] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2870.

[1736] **C-119:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 16 December 2015, p. 6 ("*Please take note that regardless of whether the Certificates are signed by VST or not, the Facilities concerned will be deemed redelivered to the Lessor*. […] *We also request that no Lease Fee 4 be applied to the delivered property as from 1 January 2016*.")

Respondents continued to claim Lease Fee on this asset and issued invoices.[1737] In fact, Claimants acknowledged that the first Lease Fee payment claimed by Respondents was due at the end of the first quarter of 2016.[1738]

2.2.1 Lease Provisions

1483. Article 11.3 of the Lease reads as follow:[1739]

> "ARTICLE 11. LEASE FEE
>
> […]
>
> *11.3. The Parties agree that in the event of default by the Lessee on the above financial liabilities hereunder* [*i.e.* VE's obligations to pay the Lease Fees], *except in respect of payment of Lease Fee 4* [which covers depreciation]*, the Lessee will be obligated to pay double of the default interest rate determined by the Lithuanian Ministry of Finance as applicable under the laws on the date of payment but never less than 0.08 per cent on any such financial liabilities overdue for each day so delayed.*"

1484. Article 28.3 of the Lease provides as follow: [1740]

> "ARTICLE 28. LIABILITY AND THE DEPOSIT
>
> […]
>
> *28.3. The Parties covenant that failing by either Party to fulfil its financial liabilities (other than indemnification of damages) under this Agreement in time the default interest equal to double of the default interest rate determined by the Lithuanian Ministry of Finance as applicable under the laws on the date of payment but never*

[1737] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019; **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 1560; **C-033:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 15 September 2016.

[1738] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 378.

[1739] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 11.3 (emphasis added).

[1740] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 28.3.

less than 0.08 per cent per day on any such financial liabilities overdue will apply, unless otherwise stipulated by this Agreement."

1485. Article 35.2(iii) of the Lease reads as follow:[1741]

"ARTICLE 35. DEFAULT AND TERMINATION

35.1. Either Party hereto shall have the right to terminate this Agreement before the expiration of the Term […] *written notice to the other Parties if such other Party commits a fundamental breach* […]

35.2. The following events and/or acts shall form the fundamental breach of this Agreement on the part of the Lessee and/or the Guarantor in the light of sub-article 35. 1 above:

[…]

(iii) non-payment of the Lease Fee (other than Lease Fee 4) for more than 2 calendar quarters."

1486. The Arbitral Tribunal observes that Article 35 of the Lease concerns "default and termination". This provision sets out the conditions for early termination of the Lease, which requires the existence of a fundamental breach. However, Counterclaim 11 concerns VE's obligation to pay Lease Fees, not the termination of the Lease, which was not invoked. The condition of the existence of a fundamental breach as per Article 35 therefore has nothing to do with Counterclaim 11. As put by Respondents:[1742]

"*Article 35(2)(iii) regulates "fundamental breaches" of the Lease Agreement, whereas the Respondents do not invoke any "fundamental breach" as far as the non-payment of the Lease Fee is concerned. Instead, the Respondents rely on Articles 11(3) and 28(3), which directly and explicitly regulate the payment of interest for failures to perform the Lease Agreement. According to these provisions, interest starts accruing from the moment when a party fails to perform its obligation "in time", rather than two quarters later. Since Veolia agrees that a portion of the Lease Fee became due at the*

[1741] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 32.5(iii).

[1742] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2870 (emphasis added).

end of the first quarter of 2016, Veolia defaulted immediately after it failed to pay, following which interest became due."

1487. The Tribunal agrees with the above cited position of Respondents. Respondents did not invoke a fundamental breach (or terminate the Lease) and Article 35.2(iii) of the Lease does not apply in the present case. Thus, Claimants' argument that Respondents may only claim interest when VE defaulted on its Lease Fee payment obligations for more than two calendar quarters is rejected.

1488. Article 11.3 of the Lease is the provision that is directly relevant in the present situation, where Respondents rely on VE's obligation to pay Lease Fee 2 as set out in Article 11 of the Lease. Article 11.3 of the Lease provides that, in the event of default by VE on the payment of the Lease Fee, except in respect of payment of Lease Fee 4, VE will be obligated to pay double of the default interest rate determined by the Lithuanian Ministry of Finance.

1489. As explained above, Counterclaim 11 concerns amounts dues by VE under their obligation to pay Lease Fee 2 for VE-3. Article 11.3 of the Lease is therefore applicable to VE's default of payment of Lease Fee 2 for VE-3 between 1January 2016 and 14 September 2016. In consequence, VE must pay double the default Lithuanian interest rate as from its default of payment, *i.e.* the first quarter of 2016 (as acknowledged by Claimants).[1743]

1490. Article 28 of the Lease governs the rules of liability and the Parties' obligation to pay damages to each other in case of breaches of the Lease, including default by a Party to fulfill its obligations under the Lease. Article 28.3 of the Lease provides that the failure of a Party to fulfil its financial liabilities (other than indemnification of damages) is subject to double of the Lithuanian default interest.

1491. The Tribunal considers that late payment for the Lease Fee constitutes a default under the Lease and is subject to double default interest as per Article 11.3 of the Lease. As

[1743] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 378.

to the more general provision on interest rate at Article 28.3 of the Lease, the Arbitral Tribunal notes that, in any event, it stipulates for the same rate:

- As per Article 11.3: "*double of the default interest rate determined by the Lithuanian Ministry of Finance as applicable under the laws on the date of payment but never less than 0.08 per cent*"[1744]; and

- As per Article 28.3: "*default interest equal to double of the default interest rate determined by the Lithuanian Ministry of Finance as applicable under the laws on the date of payment but never less than 0.08 per cent per day*"[1745].

1492. As a consequence of VE's late payment for Lease Fee 2 for VE-3, Respondents claimed default interest on the overdue Lease Fee 2 between 1 January 2016 and 14 September 2016 in the amount of double of the Lithuanian interest rate in accordance with Article 11.3 and in line with Article 28.3 of the Lease, and accounted VE's payments for Lease Fee 2 for VE-3 first to the interest owed and then to the principal amount, as per Article 6.54 of the Lithuanian Civil Code:[1746]

> "*Article 6.54 of the Lithuanian Civil Code provides for a specific order in which the payments must be attributed to cover outstanding obligations, where the parties have not regulated this issue themselves. According to this provision, payments are first credited to the interest and only then to the principal obligation. As Veolia and the Respondents had not agreed on any other procedure, Veolia's overdue payments of the lease fees were to be processed in accordance with Article 6.54 of the Lithuanian Civil Code (i.e., interest first, principal second).*
>
> *As Veolia's payments did not account for the interest accrued during the time of the delay, Veolia remained EUR 12,741 short as far as the principal obligation to pay the lease fees was concerned.*"

[1744] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 11.3.

[1745] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 28.3.

[1746] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 1516; **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2868.

1493. Article 6.54 of the Lithuanian Civil Code reads as follows:[1747]

> "*1. Unless otherwise agreed by the parties, payments received by the creditor in result of performance of an obligation shall be imputed first to the creditor's expenses related with the tender.*
>
> *2. Second in line payments shall be imputed to interests in accordance with the sequence of their maturity.*
>
> *3. Third in line payments shall be imputed to a penalty.*
>
> *4. Fourth in line payments shall be imputed to the performance of the principal obligation.*
>
> *5. A creditor shall have the right to reject an offer to pay if the debtor indicates a different order of imputation than established in Paragraphs 1, 2, 3 and 4 of this Article.*
>
> *6. A creditor may reject full repayment of the principle obligation if the current interest at maturity is not paid at the same time*."

1494. The Arbitral Tribunal confirms that the Lease does not stipulate an agreement between the Parties regarding the order of accounting of payments received. Therefore, the Arbitral Tribunal finds that Respondents were entitled to account for the payments made by VE for Lease Fee 2 for VE-3 to interest first and the principal amount second pursuant to Article 6.54 of the Lithuanian Civil Code.

1495. In view of the above, the Tribunal finds that Respondents were entitled to claim interest on the late payment of Lease Fee 2 for VE-3 based on Article 11.3 and Article 28.3 of the Lease and were entitled to account for payments received from VE first to cover the interest and secondly to account for the principal amount of Lease Fee 2 for VE-3. Therefore, the Tribunal grants Counterclaim 11 in principle.

2.2.2 Quantum

[1747] **RL-044:** Civil Code of the Republic of Lithuania (including amendments of April 12, 2011), Article 6.54.

1496. Regarding the *quantum* of Respondents' counterclaim, Mr. Roques explains:[1748]

> *"*[A]*lthough VE paid an amount relating to Lease Fee 2 that is equal to the principal amount it owed, VE did not make all the payments on time. Therefore, the amount paid was not sufficient to cover the principal amount plus the accrued interest as a result of VE paying some of the Lease Fee 2 amounts late. Mr Harman calculated that there was a €16,217 shortfall which VST claimed for (the Lease Fee 2 counterclaim).*"

1497. Dr. Hesmondhalgh confirmed that Mr. Roques' calculations are arithmetically correct, although she was instructed that VE did not owe any Lease Fee 2 payments after it attempted to return VE-3 to VST, and therefore, there is no legal basis for Counterclaim 11. Thus, Dr. Hesmondhalgh did not put forward an alternative calculation:[1749]

> "*In response to VE's Claim for the return of its Lease Fee 2 and Lease Fee 3 payments, VST has brought a Counterclaim (Counterclaim 11) that VE did not make all its payments of Lease Fee 2 on time and, hence, that VE should pay accrued interests at a simple daily interest rate of 0.08% for the delayed payments. Thus, although VE made all of the (disputed) Lease Fee 2 payments, VST attributes a portion of those payments to interest such that some of the Lease Fee 2 payments remain outstanding. Mr. Harman estimates that there was an outstanding Lease Fee 2 balance of €12,741 as of 15 March 2017.*
>
> *These calculations are mathematically correct but I am instructed that VE did not owe any Lease Fee 2 payments after it attempted to return VE-3 to VST and, hence, that there is no legal basis for this Counterclaim.*"

1498. From the above, the Tribunal concludes that Claimants do not contest the *quantum* of Respondents' Counterclaim 11, but merely dispute the legal basis of the counterclaim.

2.2.3 *Conclusion*

1499. The Tribunal has already concluded that Respondents were entitled to claim interest on defaulted Lease Fee payments for VE-3 pursuant to Articles 11.3 and 28.3 of the

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[1748] **REX-003:** Second FTI Expert Report, dated 13 October 2019, para. 13.1; see also **REX-001:** Expert report of FTI Consulting, dated 19 February 2018, para. 11.12; **FTI Slides:** Hearing Presentation of FTI (Dr. Fabien Roques), dated 08 June 2022, slide 47.

[1749] **CEX-003:** Rebuttal Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 23 January 2019, paras. 104-105.

Lease. Furthermore, the Tribunal has concluded that Respondents were entitled to account for the interest first and the principal amount second from the payments received from Claimants for the Lease Fee 2 of VE-3 in accordance with Article 6.54 of the Lithuanian Civil Code, in the absence of a different agreement between the Parties. Finally, the Tribunal concluded that it is uncontested between the Parties that VE did not pay Lease Fee on VE-3 between 1 January 2016 and 14 September 2016, even though Claimants acknowledged that the first Lease Fee payment claimed by Respondents was due at the end of the first quarter of 2016.[1750]

1500. In consequence, Counterclaim 11 is granted in the amount of EUR 12,741 plus interest at the rate of 0.08 % per day as of 15 March 2017. The Arbitral Tribunal notes that the daily interest rate of 0.08 % requested by Respondents differs from the 6% annual rate provided for in Article 6.210(2) of the Lithuanian Civil Code applicable to Respondents' Counterclaims[1751], nevertheless, Claimants have not contested its application.

J. CLAIM 2/COUNTERCLAIM 9: IT SYSTEMS

1501. Claim 2 concerns the title to Software Modifications developed by third party Koris to complement VE's commercial billing software package. Claimants submit that, in the absence of Respondents' approval of the Software Modifications which were initially intended to be part of the Investment Plan, these modifications never became leased assets and therefore had to be purchased by VST. Claimants argue that "*VST is unjustly enriching itself*" by keeping and using the Software Modifications.[1752] They request to be awarded "*EUR 103,000 for the Software Modifications (plus pre and post-Award interest)*".[1753]

1502. Respondents have for their part raised a broader Counterclaim 9 regarding five softwares and a high-definition printer that they consider to be "*integral to the operation of the district heating system*". According to Respondents, VE failed to transfer these

[1750] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 378.
[1751] See above para. 1482.
[1752] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 352.
[1753] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1335.

IT systems at the end of the Lease Agreement despite its obligation to do so, which entailed replacement costs for VST when it took back the Facilities.[1754] Respondents claim the payment of EUR 1,458,567 for the damage incurred by VST in replacing the IT systems.[1755]

1. The Parties' Positions

1.1 Claimants' Position

1503. VE seeks compensation for the "Grandis Software Modifications" that VE commissioned from Koris and Respondents are using, but never paid VE for.[1756] Claimants argue that the Investment Plan specified that VE would invest in a "new billing program".[1757] Accordingly, in May 2007, VE invested in the Grandis Software Modifications and commissioned Koris to develop modifications and customizations thereof ("**Software Modifications**").[1758] Claimants explain that "[a]*lthough the Software Modifications were intended to be part of the Investment Plan, VŠT withheld the necessary approval following which investments are transferred to VŠT and leased back to Vilnius Energy under Article 16.1 and Annex 10. For this reason, the Software Modifications are not Leased Assets* […]. *As such, in order for VŠT to keep and use the Software Modifications, it was required to purchase them from Vilnius Energy. By refusing to pay, VŠT is unjustly enriching itself* […]*. Veolia should be compensated for its investments in Software Modifications, which are reasonability valued* […]."[1759]

1504. Regarding Respondents' Counterclaim 9, Claimants firstly argue that VE did not breach its obligations in the Lease, as VE did not own the IT Systems. Claimants' contend that VST and VE were both licensees, therefore, VST "*would have always needed to purchase its own licenses to the program from third parties at the end of the Lease*".[1760]

[1754] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2461.

[1755] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1138.

[1756] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 349.

[1757] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 351; **C-166:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 13 September 2016, p. 16.

[1758] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 351.

[1759] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 352; see also paras. 353-362.

[1760] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 365.

According to Claimants, "*Vilnius Energy cannot have breached its obligations by not transferring assets which it did not own.*"[1761]

1505. Alternatively, if the Tribunal were to find that the IT Systems were the property of VE, Claimants argue that the IT Systems are not Leased Assets, and therefore, they are not transferable to VST under the Lease. Claimants put forward that VE invested in the IT Systems on its own account and at its own cost, outside of the scope of the Investment Plan and the Lease, as VST never reviewed, or approved the IT Systems as part of the Investment Plan. Therefore, the IT Systems were nothing more than discretionary management tools.[1762]

1506. Claimants further note that the IT Systems were not necessary to the business or critical to the operation of the district heating business.[1763] According to Claimants, because the IT Systems do not fall under the Investment Plan, they fall under Article 16.6 of the Lease, "*to the extent that the IT Systems were detachable and not necessary to the business, they belonged to Vilnius Energy and Vilnius Energy was under no obligation under the Lease to transfer them to VŠT for free*." [1764]

1507. Finally, Claimants argue that VST's Counterclaim 9 is unjustified[1765] and, alternatively, largely overstated. According to Claimants, the IT systems for which Respondents seek compensation are not leased assets. They are detachable and therefore remained VE's property at the end of the Lease.[1766]

1508. As to the *quantum* of Respondents' counterclaims, according to Claimants Respondents' quantification should exclude various elements. First, the costs for license fees for the IT Systems should be subtracted as VE did not own the license and VST would necessarily have had to incur licenses fees.[1767] Second, Respondents

[1761] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 366.
[1762] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 367-369.
[1763] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 370.
[1764] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 372 and paras. 373-374.
[1765] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 363 ff.
[1766] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 364.
[1767] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 377.

are claiming costs that are unrelated to the IT asset.[1768] Finally, claims related to IT training should be rejected, as VST would have still required training in any event.[1769] As a conclusion, Claimants estimate Respondents' claim at EUR 110,000.[1770]

1.2 Respondents' Position

1509. Regarding VE's Claim 2, Respondents argue that the Software Modifications were within the scope of the Investment Plan and were, in any event, necessary for the Business. VE was therefore obliged to transfer the license for Grandis to VST.[1771] Respondents claim that the transfer includes the Software Modifications because – as Claimants put it – they "*do not operate independently from the underlying Grandis billing software.*"[1772] Respondents further claim that the transfer of the Software Modifications could not happen during the Lease, because VE did not provide the information requested on the Software Modifications to VST.[1773]

1510. Respondents contend that VE did not own the copyright of the Software Modifications. Therefore, VE's claim for the Software Modifications, which rests on the premise that VE held the copyright in the Software Modifications, must fail.[1774] Nevertheless, the licenses were capable of transfer to VST, contrary to what Veolia contends.[1775]

1511. Respondents argue that licenses of computer programs are transferable pursuant to Article 4(2) of Directive 2009/24/EC. Therefore, VE could transfer the license it acquired to the five software programs included in the IT Systems to VST without having to inform or obtain the consent of the copyright holders. Therefore, VE's assertion that it could not transfer the software programs must be rejected.[1776]

[1768] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 378.

[1769] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 379.

[1770] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 380.

[1771] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2706.

[1772] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2707; see also **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 243.

[1773] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2708.

[1774] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 2709 and 2712.

[1775] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2733.

[1776] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 2664-2671.

1512. Respondents further argue that in 2017, VST purchased a license to Grandis from Koris. Therefore, if Respondents were to pay for Claim 2, they would be paying for the Software Modifications twice, once to Koris for the license and once again to Veolia for an IT System that Respondents already have.[1777]

1513. Respondents conclude that with Claim 2, VE seeks to deprive Respondents from the benefits of VE's investments made since the relevant assets are all necessary for the normal operation of the Business, and VE cannot use them to extract further payments[1778]

1514. Regarding their Counterclaim 9, which relates to five software programs and a high-definition printer integral to the operation of the district heating system, Respondents contend that VE failed to transfer these IT Systems to VST at the end of the Lease despite its obligation to do so. According to Respondents, Claimants instead "*went about deleting, wiping data from, or physically removing the hardware related to these IT Systems, leaving VST with no choice but to purchase replacement IT Systems upon taking back the Facilities*." [1779] Therefore, Respondents claim damages for the sums VST has incurred and will incur by purchasing IT Systems upon taking back the Facilities.[1780]

1515. Respondents contend that, when VST took back the Facilities in March 2017, it found that the IT Systems had either been physically removed or were inoperable. Therefore, Respondents were forced to procure replacement programs.[1781]

1516. Respondents contend that the Lease, specifically, its Annex 2, Appendix 1, *i. e.* the Investment Program, expressly obliged VE to invest in IT Systems.[1782] Furthermore, VE was obliged to invest in IT Systems as assets necessary for ensuring the Business

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[1777] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2710.
[1778] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1083.
[1779] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2641.
[1780] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2641.
[1781] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2653.
[1782] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 2646-2650.

and achieving the objective set out in Article 3 pursuant to Article 16.1 of the Lease.[1783] As a consequence, the question of "detachability" does not arise since the IT Systems were investments within VE's defined investment obligations and fell within the scope of Article 16.1 and not under Article 16.6.[1784]

1517. Respondents argue that since the IT Systems were regulated by the Lease, VE was obliged to transfer them to VST in accordance with the Lease. Accordingly, VST would have accepted the transfer of Grandis and Navision during the term of the Lease had VE not obstructed the transfer process by refusing to provide VST information it requested.[1785]

1518. According to Respondents, Annex 10 of the Lease created a mechanism pursuant to which all investment made by VE in the business during the term of the Lease would be transferred to VST as a payment for Lease Fee No. 4.[1786] Respondents contend that according to Article 16.1 of the Lease, VE agreed to do renovations of and investments in the Facilities in accordance with the Investment Plan as well as to "*carry out any works and make investments which are not included in the Investment Plan but are necessary for ensuring the Business and achieving the objectives set out in Article 3*".[1787] Such investments are automatically subject to the Lease, including the transfer provisions in Annex 10.[1788] Respondents argue that there is only one narrow category of assets that VE may take away at the end of the Lease. This category of asset is regulated in Article 16.6 and constitutes assets that are not related the business, which are made without VST' prior approval and which may be detached from the Facilities. All other investments must be transferred to VST.[1789]

[1783] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2651.
[1784] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2690.
[1785] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2652.
[1786] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2660.
[1787] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2661.
[1788] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2661.
[1789] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2662.

2. The Arbitral Tribunal's Analysis and Decision

2.1 Claim 2

1519. Under Claim 2, Claimants request that Respondents compensate them for the use and possession of the Software Modifications. According to Claimants, VE invested in the Software Modifications based on the Investment Plan, but these were never transferred to VST because of VST's failure to approve them as an investment.[1790] Claimants claim that, by using the Software Modifications without paying for them, Respondents unjustly enriched themselves.

1520. The Software Modifications are software updates to the Sales Accounting and Management (Billing) Information System *Abonentų Grandis.* [1791] The software modification included the following modules: "*CRM, Electronic Self-Service Centre, Electronic Service Centre, Task Accounting System, Mobile manager, and Messaging and Meters, programs that were developed by Vilnius Energy*."[1792]

1521. As Claimants explain: [1793]

> "*The Software Modifications consist of Vilnius Energy's proprietary customizations of a commercial billing software package that was owned and developed by a third party, Koris. The Investment Plan specified that Vilnius Energy would invest in a new billing program, which was the reason that Vilnius Energy initially invested in the Software Modifications. Vilnius Energy satisfied this obligation by licensing Koris' billing software (called Grandis), which, in its unmodified form, is a program that collects billing data and generates basic invoices, and by then investing in numerous modifications and customizations to the original Koris software, which Koris developed under instructions from Vilnius Energy*.

[1790] **SoC:** Claimants' Statement of Claim, dated 16 October 2017, para. 170.

[1791] **C-046:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 29 August 2008, p. 4; **C-166:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 13 September 2016, p. 16; see also **C-182:** Koris Work Order Invoice, dated 29 August 2006; **C-198:** Koris Work Order Invoice, dated 09 January 2009; **C-199:** Koris Work Order Invoice, dated 22 September 2011

[1792] **Revised RFA:** Claimants' Revised RFA, dated 26 May 2017, footnote 59.

[1793] **SoC:** Claimants' Statement of Claim, dated 16 October 2017, paras. 174-175 (emphasis added).

For example, Vilnius Energy commissioned Koris to customize the software so that it would automatically generate invoices in a format and with content that Vilnius Energy specified. Vilnius Energy also had Koris implement modifications to the program so that it would carry out certain functions, like automating debt prevention processes or calculating the benefits that low-income customers received through government support."

1522. According to Annex 2 of the Lease, the replacement and renovation of the billing system was indeed part of the Investment Plan. Annex 2 provides under the section "Investment Obligations by the Lessee" that VE was to:[1794]

"replace and renovate information systems currently used by VST through introduction of a general integrated information processing system common to the group (for technical work, heat metering and billing, finance, a control room, calls exchange, etc.) using SQL and the Oracle program packages."

1523. Article 16 of the Lease sets out works and investments to be undertaken by VE under the Lease. It notably sets out VE's Investment Obligation with reference to the Investment Plan at Article 16.1, already discussed above in relation to Counterclaim 4 on the modernization of VE-3 and Claim 1 and Counterclaim 8 concerning Disputed Assets.

1524. Having scrutinized the text of Article 16 of the Lease, the Arbitral Tribunal has found above that:

a. A procedure was envisaged for VE to undertake "*any investments and renovations that are not provided in the Investment Plan but needed in case of emergency or in connection with the Business"* (Article 16.4);

b. Under such procedure, VST was required to approve or not the proposed investment or renovation within 30 days of its proposal, save for "[s]*ingle unforeseen investments or renovations not exceeding 1.000.000 Litas*" (Article 16.5);

[1794] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Annex 2, p. 2.

c. Investments undertaken by VE outside the above-described procedure and unapproved by VST would be undertaken at VE's own risk and "*not be subject to the monetary compensation or reimbursement payable on termination or expiration of the Agreement*" (Article 16.6);

d. The improvements to the Facilities made in the course of such unapproved investments would be transferred to VST pursuant to Annex 10 if such improvements "*may not be detached from the Facilities*" (Article 16.6).

1525. The Arbitral Tribunal reiterates its conclusion that Article 16.6 is clear as to the fact that VE was in principle free to remove and take away with it any improvements to the Facilities which it had decided to invest in at its own expense and risk and without VST's approval.

1526. However, the Parties provided for the possibility that the removal of certain investments would not be possible, in which case the improvements shall be transferred to VST pursuant to the mechanism set out in Annex 10 to the Lease, entitled "*Lease Fee 4 Calculation and Payment Procedures*".

1527. In line with the Arbitral Tribunal's decision, the Software Modifications must fulfil the following conditions to be subject to the transfer conditions of Annex 10: 1) they must correspond to unapproved investments of Claimants that were made by VE because VE considered them to be necessary in connection with the Business and 2) they may not be detached from the Facilities.

1528. Claimants argue that, originally, the Software Modifications were part of the Investment Plan, but that Respondents excluded them from the Investment Plan due to their failure to approve the costs of the Software Modifications. As a consequence, Claimants made these investments at their own risk, outside of the provisions of the Lease. [1795]

[1795] **SoC:** Claimants' Statement of Claim, dated 16 October 2017, paras. 186 and 188; **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 251; **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1568; **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 358.

1529. VE sent a letter to VST on 25 May 2007 with an expense list and a transfer acceptance certificate for the IT investments that included the Software Modifications and the Business Management and Accounting System Navision Attain.[1796]

1530. VST replied to VE by letter dated 15 April 2008. In its letter, VST made a number of observations. First, VST noted that, while the costs related to the Software Modifications were incurred by VE and Litesko, the costs were not borne equally by the two companies. Second, the fees for consultancy services were issued to VE only. Third, VST noted that certain costs were indicated to be incurred by Litesko in the list of costs, when in fact they were invoiced to VE. Finally, VST noted that the costs incurred by the two companies must be broken down:[1797]

> "*As the enclosed documents suggests, these applications were developed and installed simultaneously by UAB Vilniaus energija and UAB Litesko. Both these companies are distinct legal entities even though they belong to the same corporate group and, therefore, it is unclear why the costs of development and installation of the Sales Accounting and Management (Billing) Information System Abonentų grandis were not split equally as UAB Vilniaus energija had to cover about 2/3 of the costs and UAB Litesko's share was just 1/3. Moreover, the payment of LTL 440,437 to UAB Ernst & Young Baltic and LTL 51,000 to UAB Arthur Andersen for consulting services was for some reason made by UAB Vilniaus energija only. In our opinion, these costs, like the other costs, must be split equally between UAB Vilniaus energija and UAB Litesko.* […] *Report on Acceptance and Transfer No 030604 of 4 June 2003 states that the invoice for LTL 70,000 including VAT will be issued to UAB Litesko but it was actually issued to UAB Vilniaus energija.* […] *The amounts in summary reports on completed works must be broken down by each Contractor and each invoice and report indicating the amounts to be paid separately by UAB Vilniaus energija and UAB Litesko, also indicating which amount from the invoice relates to the asset unit Business Management and Accounting System Navision Attain and which one to the Sales Accounting and Management (Billing) Information System Abonentų grandis.*

[1796] **C-664:** Letter from Vilnius Energy to Vilniaus Silumos Tinklai regarding Sale of Investments and Transfer of Property, May 23, 2007, dated 23 May 2007. p. 9 of the PDF; **SoC:** Claimants' Statement of Claim, dated 16 October 2017, para. 177.

[1797] **C-158:** Letter from Vilniaus Šilumos Tinklai to Vilnius Energy, dated 15 April 2008, p. 4 (emphasis added).

No copy of the licence or agreement indicating that AB Vilniaus šilumos tinklai would be able to use that software has been provided."

1531. VE replied to VST by letter dated 12 May 2008. VE stated that the installation of the IT systems at VE and Litesko was done simultaneously under the same contract to reduce costs. Under the contract, the costs were split between VE and Litesko in proportion to the volume of work. Accordingly, 2/3 of the costs were borne by VE, as it did not use these applications before, and 1/3 of the costs was borne by Litesko, since it had already been using the applications and only needed an upgrade and additions to its versions. Secondly, VE noted that the consulting fees included the costs of VE only. Thirdly, VE clarified that certain costs were attributed to Litesko by mistake. Fourthly, VE noted that it did not have information on the costs incurred by Litesko and could only submit copies of its own invoices. Lastly, VE noted that the licenses of the software programs would be transferred to VST at the end of the Lease:[1798]

"*Our licences of these software products authorise UAB Vilniaus energija to use them. In our opinion, the licence to use Navision Attain and Abonentų grandis is not objectively needed by AB Vilniaus šilumos tinklai at this time since the company is not a heat supplier. At the end of the lease period, these licences will be re-written in the name of AB Vilniaus šilumos tinklai*."

1532. In its reply letter dated 30 July 2008, VST reiterated its previous concerns and noted that it would not accept the costs presented by VE unless VE would provide copies of agreements and public procurement documentation:[1799]

"If the submitted documents are not corrected and copies of additionally requested documents are not submitted, the assets in question will not be purchased and the issue of their purchase will be referred to the Agreement Performance Monitoring Commission for review."

1533. On 29 August 2008, VE informed VST that, due to VST's refusal to accept the investments, VE would be forced to account for the modified billing program as its own

[1798] **C-159:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 12 May 2008, p. 6 (emphasis added).
[1799] **C-128:** Letter from Vilniaus Šilumos Tinklai to Vilnius Energy, dated 30 July 2008, p. 4 (emphasis added).

asset and, as a result, it would not transfer the program to VST after the expiration of the Lease: [1800]

> *Under these circumstances we believe that the comments repeated in your Letter No 02-522 of 30 July 2008 in relation to the documents of investments to be sold submitted to you more than a year ago are completely unreasonable and such incomprehensible delaying actions are manifestly inconsistent with the purposes of the Lease Agreement of 1 February 2002 concluded by and between SP AB Vilniaus šilumos tinklai, Vilnius City Municipality, UAB Vilniaus energija and Dalkia (the "Agreement"). Under these circumstances, we are forced to enter the accounting systems included in List No 171 into the books of UAB Vilniaus energija as non-current assets and not to transfer these systems, which you have been avoiding to acquire, to AB Vilniaus šilumos tinklai after the expiry of the Agreement*."

1534. Following its earlier notice, VE deducted the amount of its investment related to the billing program from the IT investment category in its 2010 Q4 investment report.[1801] VE informed VST of the reason for that adjustment to the Investment Plan related to the IT investments by letter dated 8 February 2011:[1802]

> "*As we have previously informed you* […] *because of unreasonable avoidance by AB Vilniaus šilumos tinklai to acquire the investments "Business Management and Accounting System Navision Attain" and "Sales Accounting and Management (Billing) Information System Abonentų grandis" specified in List No 171, our company was forced to enter these systems into the books of UAB Vilniaus energija as non-current assets and, accordingly, these systems have not been handed over to AB Vilniaus šilumos tinklai.*"

1535. On 30 March 2011, the Lease Supervisory Commission formally approved the Q4 2010 investment report reflecting the removal of all the IT investments related to the billing program.[1803]

[1800] **C-046:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 29 August 2008, p. 4 (emphasis added).

[1801] **C-142:** Vilnius Energy 2010 4th Quarter Investment Report 2010, dated 01 January 2010, p. 44 of the PDF.

[1802] **C-051:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 08 February 2011, p. 4 of the PDF.

[1803] **C-133:** Protocol of Meeting of the Supervisory Commission for Fulfilment of Lease Agreement between AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia, No. 9-27-(1.1.35-T1), dated 30 March 2011, p. 4.

1536. In preparation of the termination of the Lease, VST sent a letter to VE on 18 March 2016 requesting information concerning the functionalities of the modified billing program and other IT systems:[1804]

> "*In order to ensure the consistency of the operating process after the expiry of the contract, please provide information on functionality of the financial accounting system and principles of operation of the billing system (for example if it is integrated with the financial system). When considering a possibility to acquire financial accounting, payroll and personnel accounting, billing and technological assets management systems from you, we would like to clear up their indicative price and other conditions of acquisition.*"

1537. VE replied in a letter dated 3 May 2016, in which it offered VST to purchase the IT Systems in a public procurement procedure:[1805]

> *"With respect to VŠT's request for information regarding the Company's financial accounting and billing systems, we note that the Parties planned, according to Appendix 3 of the valid version of Annex 2 (Investment plan) to the Lease contract, to invest LTL 14.916 million (EUR 4.32 million) in information technologies and communication. As reflected in the Company's investment reports for QI-IV of 2015 and its investment plan for 2016, the investment obligations foreseen in the preliminary Investment plan have essentially been implemented. For example, VŠT has claimed that the Company's investment plans for 2016 'exceed' its information technology and communication obligations reflected in the Investment Plan, and thus VŠT has refused to approve the investment plans presented by the Company, thus breaching the Lease contract. The result of the Company's investments in information technology and communication has been consistently presented for the Lessor's acquisition in the procedure prescribed by the Lease contract during the entire course of the Lease contract, but VŠT has declined to acquire some of those investments from the Company.*
>
> *Therefore, the Company must presume that the information technology assets currently owned by VŠT / leased to the Company are, in the view of VŠT, sufficient for ensuring consistency of its further operations as a heat supplier after the expiry of the Lease contract. We have neither been informed about any plans of VŠT with regard*

[1804] **C-050:** Letter from Vilniaus Šilumos Tinklai to Vilnius Energy, dated 18 March 2016, p. 5 to 6 of the PDF.
[1805] **C-160:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 03 May 2016, p. 8 of the PDF.

to additional (in addition to those already acquired from the Company) information systems, technologies or programmes which VŠT plans to use/ develop in its activities as a future heat and hot water supplier. However, should VŠT decide otherwise and as a contracting authority announce a public procurement procedure to this end, the Company would consider participating in such a public procurement procedure."

1538. On 7 June 2016, VST sent another request for information to VE regarding the IT systems, specifically a list of information systems used by VE, including the software licenses, their effective term, the interconnections of the information systems, the hardware used and the descriptions of related business processes and other significant information, among others.[1806]

1539. On 20 June 2016, 30 June 2016, and 1 August 2016, VST sent three further letters to VE to provide a list of information systems used in the economic activities of VE and related descriptions of the business processes.[1807]

1540. Between June and November 2016, the Parties exchanged numerous letters concerning the IT systems.[1808] In letters dated 6 September 2016, 13 September 2016, 26 October 2016 and 2 November 2016, VE provided information to VST concerning the functionality of VE's "*finance, supply chain management, purchase, sale and human resources management"* database and additional information concerning the configurations of the Software modifications.[1809]

[1806] **R-370:** Letter from VST to Vilnius Energy June 7, 2016, dated 07 June 2016, p. 3 to 4.

[1807] **R-371:** Letter from VST to Vilnius Energy June 20, 2016, dated 20 June 2016, p. 3 to 4 (same as **C-176**); **R-372:** Letter from VST to Vilnius Energy June 30, 2016, dated 30 June 2016, p. 4 to 6; **R-373:** Letter from VST to Vilnius Energy August 1, 2016, dated 01 August 2016, p. 4 to 6.

[1808] **C-161:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 23 June 2016; **C-162:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 10 August 2016; **C-163:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 16 August 2016; **C-165:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 06 September 2016; **C-166:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 13 September 2016; **C-167:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 04 October 2016; **C-171:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 26 October 2016; **C-172:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 02 November 2016; **C-175:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 30 November 2016.

[1809] **C-165:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 06 September 2016, p. 7 to 13 of the PDF; **C-166:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 13 September 2016 , p. 15 to 26 of the PDF; **C-171:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 26 October 2016. p. 13 to 20 of the PDF; **C-172:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 02 November 2016, p. 5 to 6 of the PDF.

1541. Despite the lengthy correspondence between the Parties, they did not come to an agreement regarding the sale and purchase of the IT systems or their transfer at the end of the Lease. As a consequence, on 30 December 2016, VST initiated a public procurement procedure to obtain the licenses for the billing and accounting software directly from Grandis and Microsoft Dynamics Navision, as explained by Mr. Burokas:[1810]

> "*In the knowledge that such negotiations might end up without any agreement and in view of the fast approaching end of the lease, we could not risk taking over the business without at least the billing and accounting systems that we considered to be critical. Therefore, we needed to have a "plan B" to insure against the risk that Vilnius Energy would leave us without any IT software. From the very scarce information Vilnius Energy revealed, I understood that they are not willing to transfer licenses they obtained to software, nor assign rights they supposedly acquired through development without additional payment. However, such option was not acceptable to us, as it was against what was agreed in the Lease Agreement.*
>
> *Therefore, in December 2016 we started public procurement procedures to acquire suitable billing and accounting software. The time period to organize such procurement procedures was very short since we had only a couple of months before the end of the lease during which we not only had to acquire the software, but also install it and develop certain individual models designed to reflect our business needs.*"

1542. Despite the foregoing, in a letter dated 15 February 2017, VST requested VE to transfer to VST the IT systems, including the Software Modifications.[1811]

1543. Respondents plead that VST did not give approval, *inter alia*, for the Software Modifications "*due to the campaign of obstruction and obfuscation in providing information about its investments*".[1812]

[1810] **RWS-002:** Witness Statement of Mr.Mantas Burokas, dated 15 February 2018, paras. 45-46.

[1811] **C-127:** Letter from Vilniaus Šilumos Tinklai to Vilnius Energy, dated 15 February 2017, p. 6 to 7 of the PDF.

[1812] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 305; see also **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 1433; **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2652.

1544. From its review of the above factual background and the contemporaneous documents, the Arbitral Tribunal concludes that VST refused to approve the costs of the Software Modifications without a reasonable cause, as VE provided ample information on them.[1813] Respondents made a conscious choice to deny approval in view of VE's letters in which they indicated that they would consider the Software Modifications as their investments, absent Respondents' approval and in light of the approval of the Q4 2010 investment report by the Supervisory Commission reflecting the removal of all the IT investments related to the billing program.[1814] There was also no question that VE would have transferred the required rights and licenses to use the Software Modifications had Respondents given their approval of these investments. It was Respondents who initiated a public procurement procedure to obtain the Grandis and Microsoft Dynamics Navision licenses for the billing and accounting software directly from the holders of the rights and with the exclusion of Claimants, despite the fact that VE offered to sell (more precisely to transfer the license for user rights with the approval of Grandis for) the Software Modifications.

1545. The Tribunal therefore concludes that Respondents failed to approve the costs of the Software Modifications without a valid justification, as a result of which, the Software Modifications must be regarded as investments made at VE's own risk as per Article 16.6 of the Lease. Following the Tribunal's earlier decisions, if the Software Modifications are not detachable from the Facilities, their transfer must be governed by Annex 10. If they are detachable, their transfer falls outside of that mechanism and must be paid by VST to VE.

1546. At this point, it must therefore be assessed whether the Software Modifications may be considered to be detachable for the purpose of Article 16.6 of the Lease. The Arbitral Tribunal concluded that, in order for an asset to be considered detachable, the following conditions must be fulfilled: 1) the asset must be a complete, individual asset with its

[1813] **C-165:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 06 September 2016, p. 7 to 13 of the PDF; **C-166:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 13 September 2016 , p. 15 to 26 of the PDF; **C-171:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 26 October 2016. p. 13 to 20 of the PDF; **C-172:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 02 November 2016, p. 5 to 6 of the PDF.

[1814] **C-133:** Protocol of Meeting of the Supervisory Commission for Fulfilment of Lease Agreement between AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia, No. 9-27-(1.1.35-T1), dated 30 March 2011, p. 4.

own function; 2) if the asset is removed from the Facilities, the Facilities can continue to operate properly and continuously and 3) upon removal of the asset, the Facilities will be able to be operated whilst meeting all legal requirements.

1547. Claimants argue that the Software Modifications are detachable from the Facilities:[1815]

> "*The question presented by Article 16.6 is not whether the Software Modifications can be detached from the underlying licensed software, but rather whether the improvement in question can be detached from the Facilities. Although Vilnius Energy's modifications to the billing software presumably cannot be technically separated from the base billing software that they modified, the billing software as a whole is of course detachable. Like any other IT software, the billing software with Vilnius Energy's proprietary modifications could be readily detached from the Facilities, and VST could use other billing software without Vilnius Energy's modifications (such as the Koris software that it procured in early 2017), without any damage to its operations.*"

1548. Respondents do not argue whether the Software Modifications are detachable or not, but rather argue that they are necessary for ensuring the business and achieving the objectives set out in Article 3.[1816] However, the Arbitral Tribunal has already analyzed Respondents' argument related to the necessity of assets in detail, and rejected it. It has in consequence determined that detachability, not necessity, is the correct criterion set out in Article 16.6 of the Lease.

1549. Applying the criterion of detachability, the Arbitral Tribunal considers that the Software Modifications fulfil all the conditions set by the Tribunal. The Software Modifications are a complete, individual asset with its own function, *i.e.* a program that collects billing data and generates invoices with VE's proprietary customizations.[1817] The Tribunal understands that the Facilities can operate with a billing program even without the Software Modifications invested in by Claimants. Thus, even if the Software Modifications are removed, and an alternative billing program is used without the

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[1815] **SoC:** Claimants' Statement of Claim, dated 16 October 2017, para. 187 (emphasis added), see also paras. 186-188.

[1816] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 1423; **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2686.

[1817] **SoC:** Claimants' Statement of Claim, dated 16 October 2017, para. 174.

customized upgrades and software changes, the Facilities can operate whilst meeting all legal requirements. This has not been contested by Respondents. Therefore, the Tribunal concludes that the Software Modifications are detachable.

1550. As recalled above, pursuant to Article 16.6 of the Lease, assets that are detachable from the Facilities must be paid by VST to VE outside the Lease mechanism if VST kept these assets. Claimants are therefore in principle entitled to compensation for the Software Modifications if they were not removed from the Facilities.

1551. Respondents argue that, at the return of the Facilities in March 2017, the IT Systems had either been physically removed or were inoperable (*i.e.* wiped of data or unable to launch),[1818] including the Grandis software (and its Software Modifications) at the return of the Facilities.[1819] Respondents have submitted two statement of Bailiff Irmantas Gaidelis, who testified that, on 5 April 2017 "'*Abonentų grandis' (Subscribers) was not used as there were only three clients entered into the system "Abonentų grandis*"[1820] and other IT programs were missing as well or could not be launched.[1821]

1552. Respondents further refer the witness statement of Mr. Burokas, CEO of VST, who testified that after the handover of the assets, VE deleted the Grandis billing software:[1822]

> "*The billing software Grandis, which was used for generating invoices for consumers, had been wiped out clean. Vilnius Energy wiped the entire database, which previously held the information gathered throughout the years on all of the consumers of Vilnius Energy (i.e. the same customers, whose contracts were transferred to Vilnius Energy at the beginning of the lease), their consumption data, payments and other information.*

[1818] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 1418; **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2653.

[1819] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 1418; **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2653.

[1820] **R-377:** Statement of Facts of Bailiff Irmantas Gaidelis No. FA0008-17-1832, April 5, 2017, dated 05 April 2017, p. 11 of the PDF.

[1821] **R-377:** Statement of Facts of Bailiff Irmantas Gaidelis No. FA0008-17-1832, April 5, 2017, dated 05 April 2017; **R-376:** Statement of Facts of Bailiff Irmantas Gaidelis No. FA0008-17-1824, March 31, 2017, dated 31 March 2017.

[1822] **RWS-002:** Witness Statement of Mr.Mantas Burokas, dated 15 February 2018, paras. 49(i)-52 (emphasis added); see also **R-377:** Statement of Facts of Bailiff Irmantas Gaidelis No. FA0008-17-1832, April 5, 2017, dated 05 April 2017; **R-376:** Statement of Facts of Bailiff Irmantas Gaidelis No. FA0008-17-1824, March 31, 2017, dated 31 March 2017.

Vilnius Energy left this software with only three new clients. Certain modifications to Grandis, namely Mobile Manager, EPC, EAC, Meters and Messaging were uninstalled or access to them was denied through the virtual server and VST was not able to use these modifications. The database of CRM was deleted.

In summary, when Vilnius Energy left, it took with it the majority of the IT software used in the business together with the associated databases and 15 years' worth of historic data. Vilnius Energy supposedly in "good will" left the billing software Grandis, which in fact had been wiped clean of data and with no access to additional modules, or as they call them, the modifications.

Taking into account that we had already carried out a public procurement and acquired the billing software Grandis, and the accounting software Microsoft Dynamics NAV, those programs were installed anew. Additional programming works were carried out by UAB Koris (for Grandis) and UAB Alna Business Solutions (for Microsoft Dynamics NAV) teams together with our personnel. As a result of enormous efforts both on the VST's end and on that of the software developers – who were working day and night – we were able to finalize at least the principle stages of the billing and accounting systems installation, which allowed us to at least issue invoices to consumers and calculate salaries for our employees.

VST already incurred EUR 334,898 expenses for acquisition of Grandis and Microsoft Dynamics NAV."

1553. Respondents have also submitted numerous invoices proving that, after the purchase of the Grandis license directly from UAB Koris through a public procurement procedure (in which VE did not participate), UAB Koris transferred to VST the user's license for information system "Grandis" used for payments for heat and hot water, which is installed in a workstation of VST.[1823]

[1823] **R-383:** UAB Koris Invoice No. 04896, May 18, 2017, dated 18 May 2017; **R-384:** UAB Koris Invoice No. 04897, May 18, 2017, dated 18 May 2017; **R-385:** UAB Koris Invoice No. 04898, May 18, 2017, dated 18 May 2017; **R-391:** UAB Koris Invoice No. 04941, June 15, 2017, dated 15 June 2017; **R-395:** UAB Koris Invoice No. 04985, July 10, 2017, dated 10 July 2017; **R-397:** UAB Koris Invoice No. 05026, August 1, 2017, dated 01 August 2017; **R-404:** UAB Koris Invoice No. 05071, September 22, 2017, dated 22 September 2017; **R-411:** UAB Koris Invoice No. 05176, November 16, 2017, dated 16 November 2017; **R-412:** UAB Koris Invoice No. 05177, November 16, 2017, dated 16 November 2017.

1554. Claimants contest Respondents' position. They assert that VE *"left the fully functioning billing software, including Software Modifications, installed in the Facilities*." Claimants further provide that:[1824]

> *"It appears that VST is presently using the Koris billing software with Vilnius Energy's proprietary modifications (i.e. with the Software Modifications). As noted, Vilnius Energy's Software Modifications reflected years of improvements and customizations of the Koris billing software package that was initially installed. A Koris-based billing system incorporating all of Vilnius Energy's Software Modifications could not be reproduced in just a few months' time. Yet, somehow VST sent its first consumer invoices for heating services—in a format markedly similar to Vilnius Energy's invoices and bearing hallmarks of Vilnius Energy's proprietary Software Modifications—in mid-May 2017, less than four months after it procured new billing software from Koris.*
>
> *If VST were relying only on the new billing software from Koris, VST would have needed to install the new billing software on the servers and then integrate into that new program the billing data that Vilnius Energy provided to VST during the Lease-end transition process. That new billing system should not include any of the improvements or modifications that Vilnius Energy had made to the original billing software package."*

1555. Claimants further contend that: [1825]

> *"It was not an act of bad faith for Vilnius Energy to keep its own property when it handed over the Facilities to VST. On the contrary, Vilnius Energy spent months in good faith negotiating the sale of its Grandis Software Modifications to VST – to no avail. It was VST that suddenly changed its tune and began demanding that Vilnius Energy hand over the Grandis Software Modifications and the rest of the IT Systems gratis at the end of the Lease. Once VST took that position, Vilnius Energy was obviously free to consider that the negotiations had failed to keep its own property at the end of the Lease.*
>
> *Furthermore, contrary to Respondents' accusations, Claimants did not 'wipe the entire database' of data when it removed the IT Systems. Vilnius Energy agreed with VST to leave, and did leave, the latest six-months-worth of customer billing data for VST at*

[1824] **SoC:** Claimants' Statement of Claim, dated 16 October 2017.

[1825] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 269 and 275; see also paras. 276-277.

the time of the takeover. Moreover, Vilnius Energy returned (or rather left in place) all IT assets and infrastructure created pursuant to the Investment Plan that Vilnius Energy sold to VST during the Lease Term or at the end of the Lease. When Vilnius Energy transferred the Facilities to VST, those assets were fully functioning, that is, Vilnius Energy had not modified or deactivated the leased IT assets. Vilnius Energy left all of the IT equipment (computers, telephones, etc.) in place, operating and installed. The passwords and logins of employees who stayed with VST remained active."

1556. Mr. Tadas Janušauskas, Operation Director at Litesko, stated in his witness statement that at the end of the Lease, explained that VE uninstalled all IT Systems except for Grandis and the six programs that VE developed:[1826]

"[a]*t the end of the Lease, Vilnius Energy uninstalled the IT Systems (except for Grandis and the six programs that Vilnius Energy developed, which were left in place) from the Facilities without harm or disruption to the district heating business. Vilnius Energy and Litesko continue to use the Maximo, Cognos, and Termis software programs to this day for their own purposes*."

1557. Mr. Alexander Husty, President of Vilnius Energy and General Director of Litesko confirmed the same in his witness statement:[1827]

"I can confirm that, at the time of the handover of the Facilities from Vilnius Energy back to VST in 2017, Vilnius Energy transferred to VST the latest six months-worth of customer billing data in accordance with the agreement of the parties (in contrast to what Mr. Burokas claims in his witness testimony for VST and the Municipality. Vilnius Energy also left all the IT assets and infrastructure it created pursuant to the Lease fully functioning; that is, operating and installed, in the same workplaces, with passwords and logins activated."

1558. The Arbitral Tribunal notes that the witness statements of Mr. Burokas, Mr. Janušauskas and Mr. Husty contradict each other. While Mr. Burokas states that VE deleted (i) the Grandis Software, (ii) the hydraulic modeling software Termis, (iii) the Microsoft Dynamics NAV program, (iv) the IBM Maximo Asset Management program and (v) the Cognos program, Mr. Janušauskas states that VE uninstalled all IT Systems

[1826] **CWS-006:** Second Witness Statement of Tadas Janušaukas, dated 15 January 2019, para. 110.

[1827] **CWS-011:** Witness Statement of Alexander Husty, dated 10 January 2019, para. 38.

except for the Grandis Software and that from the deleted IT Systems VE continues to use the Maximo, Cognos, and Termis software programs for its own purposes. Finally, Mr. Husty states that VE left all IT assets and infrastructures pursuant to the Lease.

1559. From the witness testimonies, the Tribunal cannot conclusively determine which are the IT assets and software that VE left after the handover of the Facilities and which are the ones that VE removed, deleted, uninstalled and made unavailable.

1560. The Arbitral Tribunal further notes that Claimants' statement that VE left the Grandis Software to VST which has been using it since seems to contradict its statement made with regard to Counterclaim 9, according to which VST should have acquired the license directly from Koris in order to use it:[1828]

> "*Claimants agree that they were licensees, not owners, of the IT Systems software (including the basic IBM Maximo software and basic Grandis software, but not including the modules of IBM Maximo software created upon the requires of Claimants or the bespoke Modifications to the Grandis software, as discussed above). Therefore, Claimants could not have sold or transferred the IT Systems to VST, other than perhaps pursuant to sublicenses or assignment of their licenses, which presumably would have required the consent of the software owners (e.g. IBM, Microsoft, or Koris). This means that, to the extent that VST wished to use the IT Systems or equivalent program upon the end of the Lease, VST would always have had to purchase its own licenses to such software programs from IBM, Microsoft, and the other developers – it could never have expected to receive the right to use the programs directly from Vilnius Energy.*
>
> *The situation is, of course, different as to the Grandis Software Modifications, which Vilnius Energy commissioned Koris to create on a bespoke basis and which remain an asset of Vilnius' Energy's accounts. The Grandis Software Modifications were investments in customizations of the underlying Grandis software. <u>There was no separate license for such modifications, and to use them, as Claimants acknowledge, would have required VST to separately negotiate with Koris for the right to use the underlying software</u>."*

[1828] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, paras. 263-264.

1561. Based on the evidence and the pleadings of the Parties, the Tribunal has a doubt as to whether Respondents kept VE's Software Modifications and continued using them. Indeed, Claimants argue that for Respondents to be able to use the software, Respondents would have had to negotiate separately with Koris for the right to use the underlying software.[1829] The Arbitral Tribunal therefore understands that the license(s) for the Software Modifications were not transferred (*i. e.* sub-licensed or assigned) to Respondents from VE with the approval of Koris, and that therefore, Respondents could not have used VE's Software Modifications. Furthermore, from the evidence submitted by Respondents, it seems plausible that Respondents used the Grandis software purchased directly from Koris through the public procurement procedure.[1830]

1562. The Arbitral Tribunal has noted Claimants' reference to Exhibits C-50 and Exhibit C-185 to demonstrate that the Grandis Software was not removed at the termination of the Lease and the transfer of the Facilities.[1831] Exhibit C-50 is a letter dated 18 March 2016 from VST to VE, in which VST requests information from VE concerning the IT systems.[1832] Exhibit C-185 is VE's offer to purchase the information systems and a draft sale and purchase agreement. However, none of these exhibits prove that VE left the Software Modifications to VST after the return of the Facilities.

1563. In view of the above, the Tribunal cannot conclusively determine that Respondents continued to enjoy the benefits of the Grandis software and the Software Modifications of VE. Therefore, Claimants have not met their burden of proof to demonstrate that Respondents continued to use VE's Software Modifications for which they claim compensation.

[1829] See **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, paras. 263-264.

[1830] **R-383:** UAB Koris Invoice No. 04896, May 18, 2017, dated 18 May 2017; **R-384:** UAB Koris Invoice No. 04897, May 18, 2017, dated 18 May 2017; **R-385:** UAB Koris Invoice No. 04898, May 18, 2017, dated 18 May 2017; **R-391:** UAB Koris Invoice No. 04941, June 15, 2017, dated 15 June 2017; **R-395:** UAB Koris Invoice No. 04985, July 10, 2017, dated 10 July 2017; **R-397:** UAB Koris Invoice No. 05026, August 1, 2017, dated 01 August 2017; **R-404:** UAB Koris Invoice No. 05071, September 22, 2017, dated 22 September 2017; **R-411:** UAB Koris Invoice No. 05176, November 16, 2017, dated 16 November 2017; **R-412:** UAB Koris Invoice No. 05177, November 16, 2017, dated 16 November 2017.

[1831] **SoC:** Claimants' Statement of Claim, dated 16 October 2017, para. 189, footnote 232; **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 359, footnote 443.

[1832] **C-050:** Letter from Vilniaus Šilumos Tinklai to Vilnius Energy, dated 18 March 2016.

1564. While the Software Modifications fall outside the Lease mechanism, they cannot be considered to have been transferred by VE to VST, and there is therefore no basis on which Claimants may seek compensation. Consequently, the Arbitral Tribunal dismisses Claim 2.

2.2 Counterclaim 9

1565. Counterclaim 9 is broader than Claim 2 as it concerns all IT systems, including the following software: (i) Grandis (a billing software and its modifications listed in Claim 2), (ii) Microsoft Dynamics Navision (a financial management and accounting platform), (iii) IBM Maximo Asset Management (a program for managing maintenance of physical assets), (iv) Cognos (a business intelligence tool), (v) Termis (a hydraulic modelling software), and (vi) high definition printer ("**IT Systems**").[1833]

1566. Respondents contend that Claimants had to transfer the IT Systems to VST at the end of the Lease without demanding payment. Due to the fact that VE did not transfer the IT Systems, VST had to acquire new IT Systems and related licenses and therefore, claims damages.[1834]

1567. Respondents argue that the costs of the IT Systems were not approved because VE "*without giving an explanation, refused to submit evidence supporting the claimed expenses*".[1835]

1568. Claimants state that the IT Systems are not leased assets and that VE was under no obligation to transfer them as VE did not consult VST on the decisions to invest in the

[1833] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 1413; see also **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 363; **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2645.

[1834] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 1413; see also paras. 1417-1418.

[1835] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 1433.

IT Systems nor sought VST's approval. Claimants argue that the IT Systems were investments made by VE on its own account:[1836]

> "*IT Systems were all investments that VE made on its own account outside of the Lease, above and beyond the investments it made in satisfaction of its Investment Plan obligations* […] *VST never reviewed or approved the IT Systems as part of the Investment Plan. In fact, VST did not even know about the majority of the IT Systems until the last few years of the Lease, because Vilnius Energy had chosen to license them as part of its management strategy, not as part of the Investment Plan of the Lease.*
>
> *The IT Systems were not Leased Assets. They were never sold to VST nor leased back to Vilnius Energy as 'Facilities', nor did they become approved 'Units' during the Lease. The IT Systems were Vilnius Energy's property, and the Lease does not obligate Vilnius Energy to transfer them to VST for free.*"

1569. Claimants further argue that, under the Investment Plan, VE invested the agreed amount of money "into other IT investments (*i.e.* assets other than the IT Systems at issue here), which VST did approve, accepted, and leased back to Vilnius Energy."[1837] Those other IT investments included IT infrastructure and hardware, a dispatch centre/control room with upgraded operating software, a software to manage and control the flow of documents and processes and internal client call centre and Graphic Information System software.[1838] According to Claimants, these must be contrasted with the IT Systems at stake which were never treated by the Parties as part of the Investment Plan, with the exception of Grandis and Navision, for which investments modifications were rejected by Respondents and which thus also fall outside the scope of leased assets.[1839]

1570. In response to Respondents' assertion that the IT Systems must be considered as leased assets because they are necessary to VST's Business, Claimants affirm that

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[1836] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, paras. 266-267; see also **CWS-006:** Second Witness Statement of Tadas Janušaukas, dated 15 January 2019; see also **CWS-006:** Second Witness Statement of Tadas Janušaukas, dated 15 January 2019, paras. 93-110.

[1837] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 268.

[1838] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 268.

[1839] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 268.

the IT Systems were not necessary for the operation of the Facilities, but were "*discretionary management tools*".[1840]

1571. The Arbitral Tribunal notes that the Parties agree that the IT Systems were never approved by Respondents. The first condition for Article 16.6 of the Lease to apply is therefore fulfilled, and the second condition of non-detachability must be determined by the Tribunal. Indeed, as determined by the Tribunal, the relevant criterion to determine whether the unapproved IT Systems fall within the scope of the Lease mechanism for their transfer is their detachability, not their necessity to the Business as argued by Respondents.

1572. Claimants argue that the IT Systems are detachable from the Facilities without any risk of harm or disruption of the heating district business. In fact, according to Claimants, the IT Systems were already detached.[1841] Respondents have not argued whether the IT Systems are detachable and have instead focused on their argument that the IT Systems are necessary to the Business.[1842]

1573. In making its decision on the detachability of the IT Systems, the Arbitral Tribunal must examine 1) whether the IT Systems are a complete, individual assets with their own function; 2) whether, if the IT Systems are completely removed from the Facilities, the Facilities can continue to operate properly and continuously and 3) whether, upon removal of the IT Systems, the Facilities will be able to be operated whilst meeting all legal requirements.

1574. The Arbitral Tribunal considers that the IT Systems are complete and have their own function, *i. e.* Grandis is a billing software, Microsoft Dynamics Navision is a financial management and accounting platform, IBM Maximo Asset Management is a program for managing maintenance of physical assets, Cognos is a business

[1840] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 269 and 275; see also paras. 269-274.

[1841] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 269 and 275; see also paras. 275-277.

[1842] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2686 and para. 2690; see also **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 1423.

intelligence tool, Termis is a hydraulic modelling software and the high-definition printer is an asset used for printing. The Tribunal considers that, even if the IT Systems are removed, the Facilities can continue to operate properly and continuously. This is corroborated by the fact that, according to Claimants, the IT Systems were in fact removed, *i.e.* detached from the Facilities and the Facilities continued to operate properly, continuously and meeting all legal requirements.[1843] Therefore, the Tribunal considers that the IT Systems are detachable from the Facilities.

1575. In view of the detachability of the IT Systems, pursuant to Article 16.6 of the Lease the transfer procedure envisaged in Annex 10 of the Lease does not apply to the IT Systems. Accordingly, the IT Systems are deemed to be investments undertaken by VE outside Article 16, made at VE's own risk and "*not be subject to the monetary compensation or reimbursement payable on termination or expiration of the Agreement".*[1844]

1576. In view of the above, the Tribunal concludes that Respondents cannot rely on Article 16 of the Lease to claim damages from Claimants for the failure to transfer the IT Systems to Respondents at the end of the Lease. These assets fall outside the scope of the Lease transfer mechanism of Annex 10. Counterclaim 9 is consequently dismissed.

1577. Finally, the Arbitral Tribunal notes Respondents' reference to Claimants' Investment Obligation in relation to Counterclaim 9. Respondents' allegation that Claimants failed to meet their Investment Obligation is (also) the object of Counterclaim 5, which will be reviewed separately below.

[1843] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 269 and 275; see also paras. 275-277.

[1844] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 16.6.

K. COUNTERCLAIM 7: COLLECTIVE AGREEMENT

1578. Counterclaim 7 concerns Respondents' allegation that VE's conclusion in 2015 of "*a gratuitous collective agreement to extravagant labor obligations for five years*", including the obligation to pay severance payments to employees that would be exclusively borne by VST after taking over the Lease.[1845] Respondents contend that "*Vilnius Energy's conclusion of the 2015 Collective Agreement breached both its contractual obligations and its general duty of care towards the Respondents obligation under Lithuanian law*."[1846] They claim EUR 1,111,091.46 with annual interest of 6 % calculated from 30 March 2017 until pull payment of the amount awarded.[1847]

1. The Parties' Positions

1.1 Respondents' Position

1579. Respondents argue that VE concluded the 2015 Collective Agreement to increase its leverage in the negotiations with VST and the Municipality in relation to the extension of the Lease, by increasing the costs of VST's prospective takeover of the Facilities. VE bound the business to the 2015 Collective Agreement with "*extravagant labor obligations*" for five years, more than three of which would encroach on VST's takeover period, thereby significantly burdening VST.[1848] Respondents argue that, by signing the 2015 Collective Agreement, VE breached both its contractual obligations and its general duty of care towards Respondents under Lithuanian law.[1849]

1580. Respondents contend that VST spent EUR 1.3 million more in 2017 and 2018 than it would have otherwise spent on labor benefits,[1850] because the provisions of the 2015 Collective Agreement concerning the severance payments in case of dismissal without

[1845] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2239.
[1846] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2241.
[1847] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1138(d)(vii).
[1848] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 2314-2331.
[1849] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 2238-2243.
[1850] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2242.

fault go far beyond the standard of the Lithuanian Labor Code and the practice of other companies.[1851]

1581. According to Respondents, there was no labor-related incentive to enter into the 2015 Collective Agreement.[1852] Veolia has not shown that there were worker concerns regarding the survival of pre-existing benefits following VST's take-over or that employees were claiming additional benefits.[1853] Article 13(iv) of the Lease and Article 138 of the Labor Code ensured that VST would take on and continue the existing benefits.[1854] Furthermore, from the documents obtained during the document production phase, it is apparent that 1) it was VE that reached out to the trade unions proposing to conclude a collective agreement[1855] and 2) the employee benefits agreed to by VE that cause the most damage to VST were not a priority for the trade unions.[1856] Respondents contend that the idea behind the Collective Agreement was not an employee initiative.[1857]

1582. Respondents argue that, by entering into the Collective Agreement, Veolia breached Article 3.1(i), 3.1(iii), 10.4 and 31 of the Lease as well as Article 35 of the Lithuanian Labor Code. Furthermore, VE failed to behave in accordance with the duty of care stipulated in Article 6.248(3) of the Lithuanian Civil Code and its obligation to act in good faith stipulated in Article 1.5, Article 6.4, and Article 6.38(1) of the Civil Code.[1858]

[1851] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2259.

[1851] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 2244-2278.

[1852] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2279-2294.

[1853] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2290.

[1854] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2286-2287.

[1855] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019 , paras. 2295-2313; see also **R-1537:** Vilnius Energy Letter No. 012-03-17308 to UAB Vilniaus Energija Trade Union, Vilnius Energy Workers Trade Energy, Lithuanian Heat and Electricity Workers Trade Union, May 28, 2014, dated 28 May 2014; **R-1536:** Vilnius Energy Letter No. 012-13355 to Vilnius Energy Workers Trade Union, May 13, 2013, dated 13 May 2013.

[1856] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 2298 and 2990.

[1857] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2290.

[1858] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras 2332-2350.

1583. Respondents put forward that VST suffered financial loss as a result of the 2015 Collective Agreement, and that VST's damage was the direct consequence of VE's allegedly unlawful adoption of the 2015 Collective Agreement.[1859]

1.2 Claimants' Position

1584. Claimants explain that, in April 2015, Veolia signed the 2015 Collective Agreement with its employees in order to provide them with benefits in addition to those guaranteed under the law. Claimants argue that, as per Article 10.3 of the Lease, the selection and management of the workforce is a prerogative of Veolia as long as VST's Collective Agreement of 2001 is not breached. Every provision that Respondents accuse VE of wrongfully providing to its employees is a condition that the Labor Code specifically states "*may be included in the collective agreement of an enterprise*".[1860]

1585. Claimants further argue that Respondents failed to prove all four elements of a civil liability claim. In particular, Respondents did not establish that 1) Veolia engaged in an unlawful action, 2) Respondents incurred damages, 3) Veolia's unlawful action caused Respondents' damages and 4) Veolia is at fault.[1861]

1586. Claimants submit that Respondents did not incur any costs that they would not have otherwise incurred. According to Claimants, from the amount claimed by Respondents, approximately EUR 0.78 million corresponds to severance payments which are unrelated to the provisions included in the 2015 Collective Agreement. Those concern severance payments to employees who were dismissed without fault, whereas the termination contracts at dispute show that the severance was paid to employees who left VST either on their own initiative or based on a mutual agreement. Therefore, the severance benefits paid were not linked to the 2015 Collective Agreement. Further, according to Claimants, VST enacted the 2019 Benefits Order (which is an order of VST's General Manager for certain social benefits and various additional advantages

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[1859] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 2351-2355

[1860] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 666-669; see also **CLA-095:** Republic of Lithuania Labor Code, No. IX-926, June 4, 2002 (effective until June 30, 2017), dated 04 June 2002, Art. 61(2); **CLA-096:** Republic of Lithuania Labor Code, No. XII-2603, September 14, 2016 (effective July 1, 2017), dated 14 September 2016, Art. 193(5).

[1861] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 670-677.

for the VST's employees), which provides many of the same benefits to its employees as the 2015 Collective Agreement. Therefore, VST would have still incurred the costs for providing these labor benefits in the absence of the 2015 Collective Agreement.[1862]

1587. Claimants further criticize Respondents' assessment of the damages they claim. Respondents compare the 2015 Collective Agreement with the minimum requirements of the Lithuanian Labor Code. Respondents then calculate their purported damages as a difference between what VST would have had to pay to workers under those minimum requirements and the amount VST actually paid to workers under the 2015 Collective Agreement. According to Claimants, such assessment is wrong, as "*this is not the situation VŠT would have been in but for the 2015 Collective Agreement*".[1863] Claimants explain that, while the Labor Code sets a floor for employee benefits, the benefits provided by competing employers in the market generally exceed that floor. Claimants argue that it is reasonable to assume that, at a minimum, VE would have replicated the provisions of the 2001 Collective Agreement with some added benefits to account for the passage of time and market conditions. Therefore, according to Claimants, Respondents' damages calculation is highly inflated.[1864]

1588. Furthermore, Claimants argue that Respondents have failed to prove their allegation that VE entered into the 2015 Collective Agreement in an effort to coerce VST to extend the Lease. According to Claimants, evidence shows that VE entered into the 2015 Collective Agreement to retain employees and address employee concerns rather than to pressure VST to extend the Lease.[1865] Claimants further point to the fact that the similarities between the 2015 Collective Agreement and other companies' publicly available collective agreements undermine Respondents' claim that the 2015 Collective Agreement provides above-market benefits.[1866]

[1862] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 678-679.
[1863] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 680.
[1864] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 680.
[1865] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 681-685.
[1866] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 685.

2. The Arbitral Tribunal's Analysis and Decision

1589. Respondents contend that VE signed the 2015 Collective Agreement "*to threaten harm to VST should it take over the Facilities instead of extending Vilnius Energy's Lease*". Accordingly, Respondents argue that "*VE created the* [2015 Collective] *Agreement as part of a scheme to renew the Lease*",[1867] and thus, "*Vilnius Energy's acts trigger its civil liability under Lithuanian law*".[1868]

1590. Respondents submit that, by entering into the 2015 Collective Agreement, VE "*unjustifiably increased the costs of delivery and production of heating and hot water in Vilnius*" and "*inflicted gratuitous and wanton damage to the financial status and viability of VST*", thereby breaching Article 3.1(i) and Article 3.1 (iii) of the Lease (regarding general "targets" of the "Project"), as well as Article 10.4 and Article 31 of the Lease:[1869]

1591. Article 3.1(i) and Article 3.1(iii) of the Lease read as follows:

> "*Newco undertakes to operate the Facilities and make Investments envisaged in the Investment Plan with a view to achieving the following targets:*
>
> *(i) to cut down the costs of electricity and heat production, and the costs of district heating and hot water supply in Vilniaus causing the technical level of the Facilities engaged in the Business to improve;*
>
> *(iii) to support the commercial and financial viability and status of VST, to retain the existing and attract new Consumers*."[1870]

1592. Article 10.4 and Article 31 of the Lease read as follows:

> "***ARTICLE 10. GRANT OF LEASE RIGHTS***
>
> […]

[1867] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2350.

[1868] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2237.

[1869] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 2335-2339.

[1870] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 3(i) and (iii), p. 10.

10.4 All of the above rights are to be exercised in accordance with the Legal Requirements and so as to be consistent with the obligations of Newco under this Agreement. Agreements under which discounts are given to Customers will be required to be signed anew upon the conditions set by the Commission form pursuant to Article 38 hereof no earlier than one year before the expiration of the Term."[1871]

"***ARTICLE 31. CONFORMITY TO THE LEGAL REQUIREMENTS*** *Each Party will abide by the Legal Requirements of Lithuania*." [1872]

1593. The Arbitral Tribunal considers the above provisions to be too general to be relevant to its determination of whether Claimants' civil liability under Lithuanian law is engaged as a result of Claimants' entering into the 2015 Collective Agreement. Article 3.1(i) and Article 3.1(iii) of the Lease refer to VE's obligation to operate the Facilities and make investments in accordance with the Investment Plan with a view (i) to cut down the costs of electricity and heat production and (ii) support the commercial and financial viability and status of VST regarding the retention of existing consumers and acquisition of new consumers. These targets are remote from the issue of the 2015 Collective Agreement, which regulates the benefits of Veolia's employees. VE's obligations stipulated in Article 3.1(i) and Article 3.1(iii) of the Lease, which relate to the cost-effective operation of the Facilities, could not be breached by VE by concluding the 2015 Collective Agreement which provides for VE's employee benefits. Respondents' reference to these provisions in relation to their Counterclaim 7 is inapposite.

1594. As to Article 10.4 of the Lease, it refers to VE's "*lease rights*", which include (i) VE's right of rendering services to customers (Article 10.1), (ii) VE's right to receive revenue (Article 10.2), and (iii) operational rights regarding the operation and management of the Facilities, including a right to "*manage workforce* […] *in no breach of the requirements set by Collective Agreement 2001-07-05 VST*" (Article 10.3). Article 10.4 of the Lease provides that VE must exercise these rights in accordance with the Legal Requirements and VE's obligations under the Lease. Pursuant to Article 1 of the Lease, 'Legal Requirements' means "*the Lithuanian Constitution and any applicable law,*

[1871] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 10.4, p. 20 to 21.

[1872] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 31, p. 51.

statute, treaty, rule, regulation, judgement and any ordinance, decree, order, permit, license or authorisation consistent with this Agreement".[1873] Article 31 of the Lease similarly stipulates that the parties of the Lease must abide by the Legal Requirements of Lithuania.

1595. The Arbitral Tribunal considers that these provisions merely confirm the Parties' general obligation to abide by Lithuanian law in their performance of the Lease, nothing more and nothing specific to the treatment of employees by VE. Article 10.3 of the Lease provides for an obligation of VE to abide by the terms of the 2001 Collective Agreement of VST, but this is not an issue in dispute here. At this stage of the reasoning, the Arbitral Tribunal is not convinced of the relevance of these provisions of the Lease to Counterclaim 7, but nevertheless proceeds to analyse Respondents' arguments made in relation to certain provisions of Lithuanian law.

1596. Respondents contend, *inter alia*, that by signing the 2015 Collective Agreement, VE committed an abuse of right as per Article 35 of the Labor Code, failed to behave in accordance with the duty of care as stipulated in Article 6.248(3) of the Civil Code and acted unreasonably and against good faith, thereby breaching Article 1.5, Article 6.4 and Article 6.38(1) of the Civil Code.[1874] Therefore, according to Respondents, Claimants are liable under civil law to Respondents for the damages caused.[1875]

1597. Both Claimants and Respondents agree that, in order to establish the civil liability of Claimants, Respondents must prove that (i) Claimants engaged in unlawful action, (ii) Respondents incurred damages, (iii) there is a causal nexus between Claimants' unlawful actions and Respondents' damages and (iv) Claimants are at fault.[1876]

1598. Article 35 of the Labor Code provides the following:

[1873] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, p. 6, Article 1.

[1874] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 2340-2349.

[1875] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2237.

[1876] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2334; **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1287.

"1. While exercising their rights and fulfilling their duties employers, employees and their representatives are bound to comply with laws, observe the rules of communal life and act adhere to the principles of reasonableness, justice and honesty. Abuse of one's rights shall be prohibited.

2. Exercise of labour rights and fulfilment of labour duties may not violate other persons' rights and interests protected by law. It shall be prohibited to hinder the formation of trade unions by the employees and to interfere with the lawful activities of the unions."[1877]

1599. Article 1.5(1)-(2), Article 6.4, Article 6.38(1) and Article 6.248(3) of the Civil Code provide the following:

"1. In exercise of their rights and performance of their duties, the subjects of civil relationships shall act according to the principles of justice, reasonableness and good faith.

2. In the cases when laws do not prevent subjects of civil legal relationships from determining their mutual rights and duties upon agreement between themselves, these subjects shall act in accordance with the principles of justice, reasonableness and good faith."[1878]

"The creditor and the debtor must conduct themselves in good faith, reasonably and justifiably both at the time the obligation is created and existing, and at the time it is under performance or extinguishment."[1879]

"1. Obligations must be performed in good faith, properly and without delay, pursuant to the requirements indicated in laws or the contract, and in case of absence of relevant requirements, obligations must be performed in accordance with the criteria of reasonableness."[1880]

[1877] **RL-038:** Labor Code (as valid until 1 July, 2017), extracts, dated 04 June 2002, p. 2 (emphasis added).

[1878] **RL-044:** Civil Code of the Republic of Lithuania (including amendments of April 12, 2011), Article 1(5), p. 3 (emphasis added).

[1879] **RL-044:** Civil Code of the Republic of Lithuania (including amendments of April 12, 2011), Article 6(4), p. 138 (emphasis added).

[1880] **RL-044:** Civil Code of the Republic of Lithuania (including amendments of April 12, 2011), Article 6.38(1), p. 151 (emphasis added).

> *"3. A person shall be deemed to have committed fault where taking into account the essence of the obligation and other circumstances he failed to behave with the care and caution necessary in the corresponding conditions."*[1881]

1600. To establish that VE breached the Lithuanian legal system's Legal Requirements, and thus, Article 10.4 and Article 31 of the Lease, the Tribunal considers whether VE breached Article 35 of the Labour Code or Article 1.5(1)-(2), Article 6.4, Article 6.38(1) or Article 6.248(3) of the Civil Code as Legal Requirements invoked by Respondents.

1601. With regard to Article 35 of the Labor Code, the Tribunal establishes that this provision intends to protect the rights of employees in their relationship to the employers. Article 35 of the Labor Code regulates the contractual relationship of employers, *i. e.* VE and its employees, and therefore does not apply to the lessor-lessee relationship of VST and VE. As a conclusion, VE could not have breached Article 35 of the Labor Code *vis-à-vis* VST by implementing the 2015 Collective Agreement. In conclusion, Claimants' civil liability towards VST cannot be established based on a breach of Article 35 of the Labor Code.

1602. Article 1.5(1)-(2), Article 6.4, Article 6.38(1) of the Civil Code relate to the obligation of contracting parties to act in good faith, in a reasonable, justifiable and proper manner, in accordance with the principles of justice, whereas Article 6.248(3) of the Civil Code regulates the notion of fault between contracting parties when acting without care or the necessary caution.

1603. The Tribunal finds that, by signing the 2015 Collective Agreement, VE was not performing a right or an obligation stipulated in the Lease in relation to VST. The 2015 Collective Agreement was signed between VE (as employer) and the collective body of employees of VE, and did not relate directly to VE's and VST's rights and obligations under the Lease. Therefore, VE could not have breached the obligation to act in good faith and in a reasonable, justifiable, proper manner and with the necessary care and caution towards VST by concluding the 2015 Collective Agreement with the collective body of employees of VE.

[1881] **RL-044:** Civil Code of the Republic of Lithuania (including amendments of April 12, 2011), Article 6.248(3), p. 227 (emphasis added).

1604. Therefore, Article 1.5(1)-(2), Article 6.4, Article 6.38(1) and Article 6.248(3) of the Civil Code cannot serve as a legal basis to establish Claimants' civil liability towards Respondents with regard to the signing of the 2015 Collective Agreement irrespective of its terms and VE's potential rationale behind the conclusion of the agreement.

1605. In any event, the ground on which Respondents seem to truly rely in support of their Counterclaim 7 is the alleged scheme according to which VE entered into the 2015 Collective Agreements with VE/VST's employees in order to obtain an extension of the Lease shortly before the expiration of its Term. A scheme of such sort is not a legal basis. In addition and in any event, as highlighted by Claimants, Respondents have failed to demonstrate that Veolia engaged in an unlawful action, as, for such demonstration, Respondents "*must have shown that: (i) Vilnius Energy entered into the 2015 Collective Agreement in bad faith, or at least unreasonably, and (ii) the 2015 Collective Agreement provided benefits to employees that were well-above market-level to coerce VŠT into extending the Lease beyond its 2017 termination date*."[1882]

1606. The Arbitral Tribunal agrees with Claimants that Respondents have failed to establish that the conclusion of the 2015 Collective Agreement was entered into in bad faith and/or was solely or even mainly aimed at obtaining an extension of the Lease.

1607. First, Claimants have convincingly established that the selection and management of the workforce was Veolia's prerogative insofar as the terms of the 2001 Collective Agreement (which expired in 2003) were complied with. This is set forth in Article 10.3(iii) of the Lease which provides as follows:

> "[i]*n order to operate and manage the Facilities efficiently,* […] *shall have the right to* […] *select and manage the workforce and to determine the size and qualifications of the staff required to operate and manage the Business acting in no breach of the requirements set by Collective Agreement 2001-07-05 of VST throughout the entire period thereof*".[1883]

[1882] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 671.

[1883] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 10.3(iii).

1608. The formulation of Article 10.3(iii) of the Lease makes it clear that VE was competent to enter into a new Collective Agreement after the end of the term of the 2001 Collective Agreement. Further, as pointed out by Claimants,[1884] the provisions that Respondents accuse VE of wrongfully providing to its employees is a condition that the Labor Code specifically states "*may be included in the collective agreement of an enterprise*".[1885]

1609. Respondents specifically refer to the fact that VE bound VST to severance payment obligations in Article 2.16 of the 2015 Collective Agreement which are too high[1886] and that VE bound VST to numerous other extravagant labor obligations.[1887] The benefits criticised by Respondents in the 2015 Collective Agreement can be grouped in the following categories: conditions related to (i) termination of employment (*i. e.* severance payment, termination conditions), (ii) provisions of safe and healthy working conditions (*i. e.* catering, lecture on healthy living, other health care benefits, additional health insurance, sports hall, sports festival for families, medical services) (iii) conditions of remuneration for work (*i. e.* paid days off, conditions for salary reduction, allowances), (iv) working and rest-time (*i. e.* days off), (v) in-service training (*i. e.* funds for training and qualification) and (vi) other labor, economic and social conditions (*i. e.* festival at the end of the heating season, competition of professional excellence, transportation, events). [1888]

1610. Article 61 of the 2002 Labor Code provides that the following conditions may be included in the collective agreement of an enterprise:

> 1*) conditions for conclusion, amendment and termination of contracts of employment;*
>
> *2) conditions of remuneration for work (provisions regarding wage rates, basic salaries, bonuses, additional pays, other benefits and compensatory allowances, systems and forms of remuneration for work and provision of incentives, setting of work quotas,*

[1884] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 669.

[1885] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 669; see also **CLA-095:** Republic of Lithuania Labor Code, No. IX-926, June 4, 2002 (effective until June 30, 2017), dated 04 June 2002, Art. 61(2); **CLA-096:** Republic of Lithuania Labor Code,No. XII-2603, September 14, 2016 (effective July 1, 2017), dated 14 September 2016, Art. 193(5).

[1886] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 2251-3363.

[1887] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 2264-3363.

[1888] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 2268.

indexing and payment of wages and salaries and settlement procedure as well as other provisions);

3) working and rest time;

4) provision of safe and healthy working conditions, granting of compensatory allowances and other privileges;

5) acquisition of a profession or speciality, in-service training, retraining and related guarantees and privileges, as well as guarantees provided during the period of vocational rehabilitation;

[…]

6) procedure for implementing the collective agreement of the enterprise;

7) conditions for the mutual provision of information and consulting between the parties."[1889]

8) other labour, economic and social conditions and provisions of relevance to the parties.

1611. While Article 193(5) of the 2016 Labor Code provides the following:

"5. In an employer- or workplace-level collective agreement, the parties may discuss:

1) terms for the conclusion, amendment and termination of employment contracts;

2) conditions for remuneration;

3) conditions for working and rest time;

4) safety and health at work measures;

5) conditions for the mutual provision of information between the parties;

[1889] **CLA-095:** Republic of Lithuania Labor Code, No. IX-926, June 4, 2002 (effective until June 30, 2017), dated 04 June 2002, Art. 61(2), emphasis added.

6) the procedure for implementing the rights of information, consultation and other employee representative participation in the employer's decision-making process, without reducing the mandate of the work council established by law;

7) other labour, economic and social conditions of relevance to the parties.

8) the procedure for the fulfilment of the collective agreement;

9) the procedure for making amendments and additions to the collective agreement, its period of validity and the system and procedure for enforcement, and other organisational issues related to the conclusion and implementation of the collective agreement."[1890]

1612. Taking into account the categories of provisions in the 2015 Collective Agreement invoked by Respondents and categorised as being "excessive", and the list of provisions that can be put in a collective agreement in accordance with Article 61(2) of the 2002 Labor Code and Article 193(5) of the Labor Code, the Tribunal agrees with Claimants that all the provisions included in the 2015 Collective Agreement pointed out by Respondents concern issues that are allowed to be regulated in a collective agreement as per the provisions of the Lithuanian Labor Code.

1613. In any event, aside from their right to enter into the 2015 Collective Agreement, Claimants have demonstrated that its provisions were in fact in line with market practice, when considering 1) the previous 2001 Collective Agreement, 2) Litesko's and Kaunas Energy's collective agreements, which are comparable and 3) the eight publicly available collective agreements produced by Respondents at Exhibits R-1544, R-1545, R-1546, R-1547, R-1548, R-1549, R-1550, R-1551.[1891]

1614. Claimants argue that the provisions of the 2015 Collective Agreement are consistent with the benefits of the 2001 Collective Agreement.[1892] According to Claimants, all of the benefits included in Respondents' damages calculations appear in the 2001 Collective Agreement. With regard to the severance payment, Claimants note that both the 2015 Collective Agreement and the 2001 Collective Agreement stipulate a

[1890] **CLA-096:** Republic of Lithuania Labor Code,No. XII-2603, September 14, 2016 (effective July 1, 2017), dated 14 September 2016, Article 193(5), p. 73 of the pdf.

[1891] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 674.

[1892] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 980.

collective severance payment agreement, and in most cases, the amount of severance is the same, only when the employee is not at fault, or the employer is liquidated does the 2015 Collective Agreement provide for a higher severance payment than the 2001 Collective Agreement. [1893]

1615. Claimants further argue that the benefits of the 2015 Collective Agreement are consistent with the benefits that other, similar Lithuanian employers offer to their employees*, i. e.* to that of Litesko's and Kaunas Energy's collective agreements.

1616. Claimants specifically refer to the following sections of the Litesko collective agreement: Section 3.7.1.1 (three paid days off before marriage registration), Sections 3.7.1.2 and 3.7.2 (three or four paid days off in case of death of an employee's family member), Section 5.1.18 (lecture on healthy living), Section 6.1.1 (payments for employees' sports, cultural and similar events), Sections 6.2.1.2 and 6.2.1.3 (medical services, *i. e.* vaccination for employees working outside), Section 6.2.2.1 (allowance to employees in case of death for the necessary expenses for burial of the dead employee in the amount not exceeding 4 minimal monthly wages set by the Government), Sections 6.2.2.3 and 6.2.2.5 (allowance for new child in the amount of 2 minimal monthly wages for each newborn), Section 6.2.2.5 (allowance for families with many children in the amount of 1 to 4 minimal monthly wages depending on the employee's work pay), Section 6.2.2.6 (allowance for disabled family members in the amount of 3 minimal monthly wages once per year) and Section 6.2.2.8 (allowance for anniversaries (40th, 50th, 60th and 70th) in the amount of maximum 2 minimal monthly wages depending on the length of the employee's services in the company).[1894]

1617. With regard to the Kaunas Energy collective agreement, Claimants refer to the following sections: Section 43.1 (one paid day off in the case of marriage), Section 43.2 (one paid day off in case of death of an employee's family members), Section 66.17 (medical services*, i. e.* health check-ups of employees, organisation of periodic vaccination against tick-borne encephalitis and flu), Section 70.2 (allowance to employees in case of death in the amount of two last year's average salaries of the Company), Section

[1893] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 984.

[1894] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 986, footnote 1809; see **C-259:** Litesko Collective Agreement, April 17, 2015, dated 17 April 2015.

70.4 (allowance for new child in the amount of 50 % of last year's average salary of the company), Section 70.7 (allowance for anniversary in the amount of 25 % of last year's average salary of the company in case of more than 15 years of services at the company), Section 70.6 (allowance for families with many children and for disabled family members in the amount of 50 % of last year's average salary of the company) and Section 78 (transportation services upon separate agreement).[1895]

1618. The 2015 Collective Agreement contains the following benefits that are similar to the above benefits provided in the Litesko and Kaunas Energy collective agreements: Article 6.2.2.3 (allowance for new child in the amount of 2 minimum monthly wages), Article 6.2.2.8 (allowance for anniversaries in the amount of maximum minimum monthly wages depending on the length of employee's service in the company), Article 6.2.2.5 (allowance for disabled family members in the amount of 3 minimum monthly wages once per year), Article 6.2.2.4 (allowance for families with many children in the amount of maximum 4 minimum monthly wages depending on the employee's work pay), Article 3.7.1.1 and 3.7.1.2 (three paid days off in relation to marriage and four paid days off in relation to the death of a family member), Article 6.2.2.1 (allowance in case of an employee's death in the maximum amount of EUR 1,160), Article 6.2.1.9 and 5.1.18 (medical services, i. e. additional health insurance and preventive health examination), Article 5.1.20 (lecture on healthy living), Articles 6.1.1, 6.2.6.1, 6.2.1.6 and 6.2.6.4 (payments for employee sports and other events).

1619. Claimants submit that the following benefits are only included in the 2015 Collective Agreement, but not in the Litesko and Kaunas Energy collective agreements: Article 2.16 (severance pay), Article 6.2.1.1 and Annex 3 (catering), Article 5.1.3 (bus rental for employee events), Article 6.2.6.4 (Christmas event for employees' children).

1620. Claimants also note that the Litesko and Kaunas Energy collective agreements include some additional employee benefits that do not appear in the Vilnius Energy 2015 Collective Agreement, *e.g.* the Kaunas Energy collective agreement provides three days of paid leave in the case of a wedding of the employee's daughter, son, or

[1895] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 987; see **C-260:** Kaunas Energy Collective Agreement, January 24, 2013, dated 24 January 2013.

legitimate foster child[1896] and a bonus of 500 Litas to deserving employees on Energy Day of Lithuania and Company anniversaries.[1897] Furthermore, Litesko offers more generous allowances for anniversaries than VE.[1898]

1621. In response to Claimants' comparison, Respondents contend that Claimants omitted several benefits from their comparison and failed to calculate the costs that the employers actually incurred. Furthermore, Respondents argue that the benefits included in the Litesko and Kaunas Energy collective agreements are not comparable to the 2015 Collective Agreement, as the latter features more categories of benefits, far greater financial commitments by the employer and more set obligations as opposed to discretionary commitments.[1899]

1622. With regards to Respondents' comments, Claimants noted that the benefits omitted from Claimants' comparison are not part of Respondents' claim for damages and therefore are not relevant.[1900] Secondly, certain terms of the 2015 Collective Agreement and the Litesko collective agreement understandably differ due to the different negotiation process.[1901] Thirdly, Claimants note that they did not calculate the actual costs that Litesko and Kaunas Energy incurred under their collective agreements because the data regarding their financial burdens is not available.[1902] Lastly, with regard to the discretionary nature of the benefits, Claimants argue that the differences are semantic and there is no evidence that the companies' practices materially differed.[1903]

[1896] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 987; see **C-260:** Kaunas Energy Collective Agreement, January 24, 2013, dated 24 January 2013, Section 43.4.

[1897] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019; see **C-260:** Kaunas Energy Collective Agreement, January 24, 2013, dated 24 January 2013, Section 70.10.

[1898] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 987; see

[1899] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2273 and paras. 2270-2273.

[1900] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1277.

[1901] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1278.

[1902] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1279.

[1903] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1280.

1623. With regard to the eight collective agreements selected by Respondents, Claimants argue that none of the companies are in the energy or utilities sectors and all of the companies operate in cities other than Vilnius. Thus, Claimants argue that the collective agreements of the selected companies do not bear relevance to the question of what benefits might be appropriate for VE's employees.[1904]

1624. Nonetheless, Claimants contend that despite the vast differences between the collective agreements of the companies selected by Respondents, there are similarities between those collective agreements and the 2015 Collective Agreement. With regard to the 2015 Collective Agreement's benefit regarding "funds for financing employees' sports, cultural, corporate and similar events, three of the four collective agreements stipulate similar provisions: Section 4.10 of the Collective Bargaining Agreement in Vičiūnai group companies,[1905] Section 120 of the Klaipėda University[1906] and Section 104 of the Kaunas University of Technology.[1907] Claimants further note that the collective agreements of Klaipėda University (at Section 120)[1908] and Kaunas University of Technology (at Section 117),[1909] similarly to the 2015 Collective Agreement, also include the benefit regarding hosting Christmas parties.[1910]

1625. Regarding the duration of the collective agreements, Claimants argue that, contrary to Respondents' allegation that the usual duration of the collective agreements is 1 to 2 years, the collective bargaining agreement of the Vičiūnai group of companies provides for a term of "no longer than 3 years",[1911] the Klaipėda University agreement provides

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[1904] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 989.

[1905] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 991; see **R-318:** Collective Bargaining Agreement in Vičiūnai group companies, March 21, 2014, dated 21 March 2014.

[1906] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 991; **R-316:** Collective Bargaining Agreement of Klaipėda University, June 29, 2012, dated 29 June 2012

[1907] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 991; **R-317:** Collective Bargaining Agreement of the Kaunas University of Technology, February 4, 2013, dated 04 February 2013.

[1908] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 993; **R-316:** Collective Bargaining Agreement of Klaipėda University, June 29, 2012, dated 29 June 2012

[1909] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 993; **R-317:** Collective Bargaining Agreement of the Kaunas University of Technology, February 4, 2013, dated 04 February 2013.

[1910] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 993.

[1911] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 994; see also **R-318:** Collective Bargaining Agreement in Vičiūnai group companies, March 21, 2014, dated 21 March 2014, Section 1.7.

for a term of five years,[1912] the Kaunas University of Technology agreement includes no limit on duration[1913] and Litesko's collective agreement is concluded for a period of five years.[1914]

1626. In response to Claimants' comparison, Respondents submit that the 2015 Collective Agreement includes numerous benefits that cannot be found in the eight publicly available collective agreements, such as (i) free transportation to/from work (Article 6.2.1.5 of the 2015 Collective Agreement), (ii) catering (Article 6.2.1.1. and Annex 3 of the 2015 Collective Agreement), (iii) private health insurance (Article 6.2.1.9 of the 2015 Collective Agreement), (iv) gym, tennis court, etc. (Article 62.1.6 of the 2015 Collective Agreement), (v) festival at the end of the heating season (Article 6.2.6.1 of the 2015 Collective Agreement), (vi) prohibition on recording idle time in the course of reconstruction work (Article 2.8.4 of the 2015 Collective Agreement), (vii) free health examinations twice a year (Article 6.2.2.1 of the 2015 Collective Agreement), (viii) 6 months allowance in case of death of the employee (Article 6.2.2.1 of the 2015 Collective Agreement), (ix) a minimum EUR 160,000 fund for employees training and qualification, raising per calendar year (Article 8.2 of the 2015 Collective Agreement).[1915]

1627. In response to Respondents' contentions, Claimants argue that only four of the provisions listed by Respondents are relevant to Respondents' damages claims and Respondents do not compare the remaining 13 provisions of the 2015 Collective Agreement with the eight publicly available collective agreements that they allege caused damage. Claimants' position is that this is due to the fact that the majority of the benefits in the 2015 Collective Agreement are present in the publicly available collective agreements.[1916] Therefore, Claimants contend that the benefits of the eight

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[1912] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 994; see also **R-316:** Collective Bargaining Agreement of Klaipėda University, June 29, 2012, dated 29 June 2012, Sectoin 8.

[1913] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 994; see also **C-259:** Litesko Collective Agreement, April 17, 2015, dated 17 April 2015, Section 1.8.1.

[1914] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 994; see also **R-317:** Collective Bargaining Agreement of the Kaunas University of Technology, February 4, 2013, dated 04 February 2013.

[1915] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2276, Table 3.

[1916] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1281.

publicly available collective agreements are similar to the benefits included in the 2015 Collective Agreement.[1917]

1628. From the above comparison the Tribunal concludes the 2015 Collective Agreement is comparable with the 1) the previous 2001 Collective Agreement, 2) Litesko's and Kaunas Energy's collective agreements, which are comparable and 3) the eight publicly available collective agreements produced by Respondents.[1918]

1629. Second, Respondents' allegations that 1) there was no labor-related incentive to enter into the 2015 Collective Agreement, [1919] and 2) the idea behind the Collective Agreement was not an employee initiative,[1920] do not withstand scrutiny. Claimants have drawn the Tribunal's attention to several elements of the record that clearly disprove these allegations.[1921]

1630. Among evidence pointed out by Claimants, the Arbitral Tribunal notes the correspondence between the trade unions and VE dating back to 2004 shows that the trade unions sought to negotiate a new collective agreement before the expiry of the 2001 Collective Agreement:

> *"we would like to draw your attention to the fact that according to the data of the current year as announced by the Department of Statistics of the Republic of Lithuania, the expected level of inflation may reach 3.5 %, while the expected price shock due to the considerable increase in fuel prices will cause a significant deterioration of the material situation of all people.*
>
> *For the commitment of the employees in 2004, we request you to find a possibility to pay at least 40% of the amount of the employee's average monthly wage to all*

[1917] **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 1282.

[1918] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 674., para. 1281.

[1919] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2279-2294; see **C-259:** Litesko Collective Agreement, April 17, 2015, dated 17 April 2015, Section 70.10.

[1920] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2290.

[1921] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 672 ff.

employees of the company in December and to allocate the amount of 10,000 LTL for the Christmas events to the children of the employees of the company."[1922]

1631. The Tribunal further refers to the witness statement of Ms. Miksyte, former Former Human Resources Country Director for Lithuania for Veolia and General Affairs Director of VE, who confirmed that the negotiation process of the 2015 Collective Agreement started at the beginning of the Lease and lasted years:

"The 2015 Collective Agreement was the product of years of negotiations and provided benefits that were consistent with the benefits Vilnius Energy had provided to its employees before 2015 […] *the negotiation process, which started from the beginning of the Lease period and remained constant throughout. Contrary to what Respondents say, the 2015 Collective Agreement was not created just for the end of the Lease period or to harm anyone, including VST."* [1923]

1632. This fact was further acknowledged by Ms. Miksyte, who explained that the 2015 Collective Agreement was preceded by the 2006 Regulations[1924] which had been in force during its negotiation:

"Throughout the Lease period, Vilnius Energy delivered employee benefits through a number of agreements, including the collective agreement that VST concluded in 2001 and that Vilnius Energy assumed at the start of the Lease term, (ii) agreements between VST's trade unions and Veolia, and between the Trade Union of Vilnius Energy and the Trade Union of Vilnius Energy Specialists and Vilnius Energy in 2001 and 2002, (iii) the Regulations of Social Bonuses that Vilnius Energy enacted as Company policy in 2006, and ultimately (iv) the 2015 Collective Agreement."[1925]

"The collective bargaining process was not smooth or straightforward. I was responsible for engaging with the Trade Unions regarding their demands, and I encouraged them to think realistically and to prioritize maintaining the benefits that VST's 2001 collective agreement provided. Still, the Trade Unions asked for benefits and pay increases that Vilnius Energy could not feasibly provide. The main

[1922] **C-899:** Letter from the Chairman of the Trade Union of UAB "Vilniaus Energija", Chairman of the Trade Union of Vilnius Energy Specialists, and Chairman of the Trade Union "Solidarumas" of the Employees of UAB "Vilniaus Energija" to Vilnius Energy President Jean Sacreste, dated 10 November 2004, p. 3.

[1923] **CWS-014 :** Second Witness Statement of Renata Miksyte, dated 29 May 2020, para. 24.

[1924] **C-262:** Regulations of Social Bonuses, October 10, 2006, dated 10 October 2006.

[1925] **CWS-014 :** Second Witness Statement of Renata Miksyte, dated 29 May 2020, para. 25.

disagreement between the Trade Unions and Vilnius Energy throughout the entire negotiating process was with regard to the salary system. For example, the Trade Unions wanted to increase certain employees' salaries, in some cases very substantially, and Vilnius Energy did not agree with the Trade Unions. Vilnius Energy and the Trade Unions agreed on social benefit provisions before we were able to settle on remuneration system. For this reason, the Company enacted the "Regulations of Social Bonuses" as Company policy in 2006."[1926]

"Vilnius Energy's employees were concerned that future employers, especially a Government-owned company like VST, would not provide the social benefits that Vilnius Energy offered through its Regulations of Social Bonuses. The employees thought a collective agreement would better protect those social benefits." [1927]

1633. VST itself reported in 2017 and 2019 that the 2015 Collective Agreement which it had taken over was valid and aimed at notably ensuring the rights and legal interests of the employees:

"Collective agreement

The collective agreement which has been taken over from Vilniaus energija, UAB, is valid in the Company.

This collective agreement guarantees better protection to the Company's employees and grants more additional benefits that are not established in the Labour Code of the Republic of Lithuania. The collective agreement is mainly aimed at ensuring effective operation of the Company and to represent the rights and legal interests of all employees of the Company. The agreement establishes work, remuneration, social, economic and professional conditions and guarantees that are not regulated by laws, other normative legal acts. The collective agreement grants additional payments to the employees in case of any accident, disease, death of relatives and in other cases"[1928]

"Collective agreement

[1926] **CWS-014 :** Second Witness Statement of Renata Miksyte, dated 29 May 2020, para. 29; see **C-262:** Regulations of Social Bonuses, October 10, 2006, dated 10 October 2006.

[1927] **CWS-014 :** Second Witness Statement of Renata Miksyte, dated 29 May 2020, para. 40.

[1928] **C-261:** VST Annual Financial Report, 2017, dated 01 January 2017.

> *Until 1 January 2019, the Company had a collective agreement in force which was taken over from UAB Vilniaus energija. This collective agreement ensured greater protection for the employees of the Company and provided more additional benefits that are not available under the Labour Code of the Republic of Lithuania. The main purpose of the collective agreement is to ensure efficient operation of the Company and to represent the rights and legitimate interests of all employees of the Company. The agreement stipulates working, remuneration, social, economic and professional conditions and guarantees which are not regulated by laws and other regulatory acts. The collective agreement provides employees with additional benefits in the event of accidents, illness, death of relatives, etc. In 2018, in the course of implementation of structural changes, the Company parted with employees with whom employment contracts were terminated in accordance with the provisions of the Collective Agreement and provided counselling. The purpose of counselling is to provide employees with the support they need during their career change for job search purposes.*
>
> *Following the expiry of the collective agreement, negotiations on a new agreement have not yet started. However, in early 2019 a separate order of the General Manager of the Company provided for certain social benefits and various additional advantages for the Company's employees*".[1929]

1634. In view of the above contemporaneous evidence of VST's approach to the 2015 Collective Agreement, Counterclaim 7 appears to be an unreasonable, *ex-post facto* reconsideration by Respondents of the conditions they accepted to grant to VST's employees (and of the associated costs for VST).

1635. The above considerations are, in the Arbitral Tribunal's view, sufficient to dismiss Counterclaim 7 which:

a. lacks a legal basis to the extent that Respondents have failed to demonstrate that VE's conclusion of the 2015 Collective Agreement breached the Lease provisions or other provisions of Lithuanian law, was in bad faith and/or principally aimed at obtaining an extension of the Lease Agreement; - the first and fourth conditions of civil liability under Lithuanian law are thus not fulfilled -; and

[1929] **C-901:** VST 2018 Financial Statement, dated 01 January 2019.

b. is contradicted by contemporaneous evidence that Respondents accepted the improved terms of employment (and consequently, the increased costs) of the 2015 Collective Agreement it consciously took over in 2017.

1636. In these circumstances, the Arbitral Tribunal does not find it necessary nor useful to delve further into whether the second and third conditions of civil liability under Lithuanian law, - *i.e.* the existence of a damage and the causal link of such damage with the unlawful act (inexistent here) – are met.

L. CLAIM 3/COUNTERCLAIM 10: 2015-2017 INVESTMENTS

1637. Claim 3 concerns investments made by Claimants (as part of the Investment Plan) in the period 2015-2017. Claimants allege that "*Respondents misrepresented to the Pricing Commission that they had not approved Veolia's investments for 2015-2017*", which "*triggered a refusal from the Commission to include these investments in the regulated asset base and thus deprived Veolia from the benefit of a tariff adjustment*".[1930] Claimants claim damages for the loss incurred as a result of this deprivation in the amount of EUR 624,184, plus pre and post-award interest.[1931]

1638. Respondents reject Claimants' allegation, and seek in turn 1) a declaration that "*Claimants breached their obligations to duly report and sell the 2015-2017 investments to VŠT*" and 2)[1932] in the event the Tribunal would find for the Claimants on Claim 1 (Disputed Assets), Claim 2 (Software Modifications) or this Claim 3 (2015-2017 investments), the Tribunal should set-off the amount of damages awarded to Claimants by EUR 421,601.62."[1933]

[1930] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 282.
[1931] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1335.
[1932] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1138.
[1933] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1138.

1. The Parties' Positions

1.1 Claimants' Position

1639. Claimants explain the chronology of events underlying their Claim 3 as follows:

1640. In 2013, the Parties issued a revised and amended Investment Plan. The amendment was signed by VE, Veolia (then Dalkia), VST and the Municipality. It was thereafter approved by a decision of the Municipal Council on 24 July 2013.[1934]

1641. In 2014, the Parties entered into an "Environmental Investment Plan" pursuant to which they agreed on emissions reduction measures for the next six years. Like the amended Investment Plan of 2013, the 2014 Environmental Investment Plan was signed by all Parties to the Lease and approved by decision of the Municipal Council.[1935]

1642. According to Claimants, "[t]*he 2013 Tri-Annual Investment Plan and 2014 Environmental Plan set out the investments to be made during the period between 2015 and 2017. Thus, those investments were previously approved by the Respondents*."[1936]

1643. Claimants explain that contrary to previous practice over the last 14 years, in the very last year of the Lease's term, the Pricing Commission decided to introduce a new step in the process to approve and take into account VE's Investment Plans. On 14 March 2016, the Pricing Commission wrote to the Municipality to inquire whether the 2015-2016 had been duly approved, urging the Municipality to point to any investments of VE that would not fall within the scope of the Municipality's approval. The Pricing Commission nevertheless acknowledged the decision of the Municipal Council of 24 July 2013 whereby the latter approved the amended Investment Plan.[1937]

1644. Claimants explain that they were surprised by the Municipality's response to the Pricing Commission's inquiry, as the Municipality stated that VE had improperly performed its

[1934] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 385.
[1935] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 385.
[1936] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 385.
[1937] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 388.

investment obligations under the Lease, that "*essential financial discrepancies*" tainted VE's planned investment obligations and that the Municipal Council had not approved investments of VE planned in 2016.[1938] According to Claimants, the discrepancies referred to by the Municipality are in no way related to the amended Investment Plan of 2013 or to the Environmental Investment Plan of 2014 that guided VE's investments for the period 2015-2017. In its response to the Pricing Commission's inquiry, "*the Municipality introduced an entirely new subject concerning the 2016 Annual Investment Plan and the 2015-2017 Quarterly Reports, purposely creating a damaging confusion.*"[1939]

1645. Claimants add that Respondents accepted the ownership of the 2015-2017 investments without requiring any revision to the 2015-2017 Quarterly Reports or the 2016 Annual Plan on which Respondents relied to mislead the Pricing Commission regarding "*essential financial discrepancies*".[1940] These documents were in any event irrelevant to the Pricing Commission's assessment but were rather instruments meant to keep Respondents informed on how the investments were being implemented. "*Conversely, the only approval that does concern the Pricing Commission is the Investment Plan (and its subsequent Tri-Annual amendments), as required by Article 35 of the Law on the Heat Sector. This approval was undisputedly given by the Municipality when it approved the 2013 Tri-Annual Investment Plan.*"[1941]

1646. Finally, Claimants submit that the alleged deficiencies identified by Respondents in the Municipality's answer to the Pricing Commission and in Respondents' submissions are incorrect. [1942] According to Claimants, Respondents' criticisms only show that "*Respondents were ready to deprive Veolia of its right to earn a return on its investments for trivial reasons*", in breach of their obligation to support the Project under Article 27.2 of the Lease,[1943] and in breach of their general good faith obligation.[1944]

[1938] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 389.
[1939] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 390.
[1940] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 392.
[1941] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 393.
[1942] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 395-397.
[1943] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 398.
[1944] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 399.

1647. Claimants note that the amount of compensation they seek under their Claim 3 is not contested by Respondents.[1945]

1.2 Respondents' Position

1648. Respondents allege that VE's 2015-2017 Quarterly Investment Reports contained deficiencies which precluded VST and the Municipality from approving the 2015-2017 investments.[1946] According to Respondents, the Municipality did not approve the 2015-2017 Investments when it approved the 2013 amendment of the "General Investment Plan of 2013" (*i.e.* the 2013 amendment to the Investment Plan and the 2014 Environmental Investment Plan relied on by Claimants). This "General Investment Plan" only contains high-level guidelines for future investments must be distinguished from the "Annual Investment Plan" contemplated at Article 21.4 of the Lease.[1947] Respondents' approval of the "General Investment Plan" did not constitute approval of the 2015-2017 Investments because, according to Respondents, this is not how the investment approval process set out in the Lease works.[1948]

1649. Respondents explain that 1) the Parties first agree on the high-level "General Investment Plan"; 2) VE submits forward-looking "Annual Investment Plans" for VST and the Municipality's consideration; 3) VE submits detailed Quarterly Investment Reports on the implemented investments for the Supervisory Commission's approval.[1949] Respondents submit that "[o]*f the three, the Quarterly Investment Reports are the only documents in the investment planning and approval process that contain the actual value of the implemented investments*" and that "[t]*herefore, only the approval of the Quarterly Investment Reports could be deemed as approval of the investments themselves* […]".[1950] Respondents contend that any other interpretation of

[1945] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 382.

[1946] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2737, **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 714-720.

[1947] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2743.

[1948] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2747.

[1949] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2748.

[1950] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2749.

the Lease's approval process would render the Quarterly Investment Reports meaningless.[1951]

1650. Respondents allege in turn that the Quarterly Investment Reports for 2015-2017 were deficient. They 1) deviated from the Investment Plan, 2) were unsupported by proper documentation and 3) contained factual and arithmetic errors.[1952] According to Respondents, VE's 2016 Annual Investment Plan contained similar deficiencies.[1953] Respondents highlight the fact that, upon receiving the Quarterly Investment Reports, they notified VE about the discrepancies without delay and requested VE to clarify and/or remedy the problems identified, notably over the course of meetings with VE.[1954] Respondents allege that VE nevertheless refused to amend the Quarterly Investment Reports and the 2016 Annual Investment Plan.[1955] Following these exchanges, the Municipality was questioned by the Pricing Commission about the approval of the investments. The Municipality responded to the Pricing Commission that the 2016 Annual Investment Plan had not been approved, attaching VST's correspondence to VE in which VST had informed VE of the deficiencies in the Quarterly Investment Reports and the 2016 Annual Investment Plan.[1956] The Municipality therefore acted consistently with what it had been saying to VE for nearly four months.[1957]

1651. Respondents' Counterclaim 10 rests for its part on Respondents' assertion that VE's conduct prevented VST from purchasing the 2015-2017 investments in a timely manner, during the term of the Lease Agreement. According to Respondents, "[t]*he belated transfer of the 2015-2017 Investments deprived VST and the Municipality of the Lease Fee that would otherwise be calculated as a result of those investments*."[1958]

[1951] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2750.

[1952] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 2752-2761.

[1953] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2762.

[1954] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2766.

[1955] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2767.

[1956] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2775.

[1957] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2778.

[1958] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2738, **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 1487-1492.

1652. Respondents explain that, instead of refusing to revise its Quarterly Investment Reports (which was necessary for the 2015-2017 investments to be approved), VE could have invested under another mechanism of the Lease, as it "*was only required to report the investments which exceeded the values in the General Investment Plan as other investments necessary or related to business*". According to Respondents, "[t]*his would have allowed VST and the Municipality to approve the investments. Vilnius Energy, however, refused this reasonable solution and prevented VST from acquiring the 2015-2017 Investments*."[1959]

1653. Respondents argue that, despite the fact that any amount of Lease Fee No. 4 which would have been calculated on the timely-sold 2015-2017 investments would have been offset against the value of Veolia's investments at the end of the Lease, Respondents still lost a right to claim the payment of EUR 421,601.62 from Veolia for Lease Fee No. 4. Respondents explain that since the more assets VST leases to Vilnius Energy, the more Lease Fee No. 4 will be calculated for the month in question, therefore if investments are not sold to VST in a timely manner, "*the appropriate amounts of Lease Fee No. 4 are not invoiced to Vilnius Energy and VST loses a right of claim*."[1960] Respondents insist that "[t]*he fact that the Parties agreed to offset these amounts at the end of the Lease against Veolia's investments does not undermine the fact that, absent Veolia's breach, VST would have had a claim right to Veolia*."[1961] Respondents do not claim the amount of EUR 421,601.62 as a monetary value, but request that it be off-set with Claimants' claims.[1962]

2. The Arbitral Tribunal's Analysis and Decision

2.1 Claim 3

[1959] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2770.
[1960] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 2780-2783.
[1961] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2784.
[1962] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2785.

1654. Under Claim 3, Claimants claim EUR 0.624 million as damages for depriving Claimants from the benefit of including the investments for 2015-2017 in the regulated asset base ("**RAB**") and having a tariff adjustment.[1963]

1655. According to Claimants, Article 27.2 of the Lease obligated the Municipality to support VE's efforts to have the Pricing Commission recognize its investments for the purpose of calculating the tariff. Claimants argue that the Municipality breached this obligation by providing false information to the Pricing Commission, which led to the Pricing Commission's rejection of Claimants' 2015-2017 investments.[1964]

1656. Respondents for their part deny that the 2015-2017 investments were ever approved,[1965] as they consider that only the approval of the Quarterly Investment Report can be deemed as approval of the investments.[1966] Respondents point to the fact that it is only the Quarterly Investment Report that contain the actual value of the implemented investments, while the Annual Investment Plan and the General Investment Plan contain plans for future investments.[1967] According to Respondents, VE's Quarterly Investment Report for the 2015-2017 period deviated from the agreed 2013 Investment Plan and the 2015 Annual Investment Plan, and was not supported by proper documentation and contained factual and arithmetic errors.[1968]

1657. According to the Parties, the following provisions of the Lease are relevant for the approval of the investments: (i) Annex 2, Paragraph 5 on the tri-annual investment plan; (ii) Annex 2, Paragraph 2 and Article 21.4 on the annual investment plan and (iii) Article 20 concerning the Quarterly Reports.

[1963] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 382; Claimants note that Claim 3 was raised in the parallel arbitration against the Republic of Lithuanian (*Veolia Environnement S.A., Veolia Baltics and Eastern Europe S.A.S., UAB Vilniaus Energija, and UAB Litesko v. the Republic of Lithuania, ICSID Case No. ARB/16/3*). Claimants state that they stand ready to offset their damages claim in this arbitration to account for sums awarded for the parallel claim in the ICSID arbitration, or *vice versa*.

[1964] **SoC:** Claimants' Statement of Claim, dated 16 October 2017, para. 196.

[1965] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2747.

[1966] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2749.

[1967] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2749.

[1968] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2752; **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 716-718.

1658. Pursuant to Annex 2, Paragraph 5, the Parties were to hold strategic meetings at least every three years to adjust the Investment Plan:[1969]

> "*The Parties agree to hold strategic meetings as frequently as at least once in every 3 years, at which the Investment Program will be adjusted taking into account changes on the market and the company's economic and technical development.*"

1659. According to Annex 2, Paragraph 2 of the Lease, the Investment Plan "*will be reviewed, adjusted and approved on a yearly basis*" in accordance with sub-article 21.4.[1970]

1660. Pursuant to Article 21.4 of the Lease, the Parties could amend the Investment Plan in coordination with the Municipality: [1971]

> "*On the 5th of January of each year until the end of the Term, New co will submit to the Lessor and the Municipality an annual schedule of planned maintenance outages (hydraulic and other tests, inspections and technical check-ups) for the coming year and will submit until the 1st of April of each year a plan for the next heating season. The schedule and the plan will be drawn up and carried out in accordance with the Investment Plans annexed to this Agreement relying upon good engineering and operation practices and the Legal Requirements.*"

1661. Finally, pursuant to Article 20 of the Lease, VE had to submit quarterly reports on the progress of the performance of the Lease:[1972]

> "*From the effective date of the Lease Agreement, Newco shall in an agreed format provide the Commission set up pursuant to Article 38 below with quarterly reports describing in reasonable detail the progress of the Project.*"

1662. The Arbitral Tribunal understands that 1) the amendment of the Investment Plan was conducted on an annual and tri-annual basis and required the written approval of the Municipality and 2) the amended Investment Plan needed to be signed by the Parties

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[1969] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Annex 2, Paragraph 5.

[1970] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 118; **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Annex 2, Article 3.

[1971] Energija, and Dalkia S.A.S., dated 01 February 2002, Annex 2, Article 21.4.

[1972] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 20.

to the Lease. The Tribunal further observes that, for VE to include an investment into the RAB, the proposed investment needed to be included in the Investment Plan as approved by the Municipality and by the Pricing Commission.

1663. Claimants argue that for the period between 2014-2016, the Pricing Commission approved VE's investments through two resolutions on the basis of the revised Investment Plan as approved by the Municipality.[1973]

1664. Specifically, Claimants refer to paragraph 46 of the Pricing Commission's Decision on the Approval of the Procedure for Coordination of Investment Projects of Energy Undertakings, No, 03-252 dated 17 October 2015, which reads as follows:[1974]

> "*The topics (names) of the investments and actual investments provide by heat supply undertakings to the Commission shall be an integrated part of the investment plan coordinated with the municipal councils* […]. *If after the public procurement procedure the value of the investment which has been coordinated with the municipal council and the amount of which exceeds the threshold 3 times has increased by more than 20 per cent, such increased investment shall be re-coordinated with the municipal council and the Commission. If the scope and composition of the works in relation to the investment provided to the Commission for coordination differs from the scope and composition of works of the investment coordinated with the municipal council and this results in changes in the essential characteristics of the investment project (aims, objectives, general indicators), the heat supply undertaking shall re-coordinate such investment (with the changed composition and scope of works) with the municipal council and the Commission*."

1665. Claimants explain that the 2015-2017 Investments include (i) the investments set out in the 2013 amendment of the Investment Plan (the "**2013 Investment Plan**") and (ii)

[1973] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 386; see also **C-063:** National Commission for Energy Control and Prices, Resolution Regarding the Amendment of Resolution No. O3-196 "Regarding UAB Vilniaus Energija Investments for 2014-2015," No. O3-671, dated 18 December 2015; **C-1268:** National Commission for Energy Control and Prices, Resolution on the Investments of the Private Limited Liability Company Vilniaus Energija for the 2015-2016, No. O3-670, dated 18 December 2015.

[1974] **C-054:** National Commission for Energy Control and Prices, Decision on the Approval of the Procedure for Coordination of Investment Projects of Energy Undertakings, No. O3-252, dated 17 October 2015, item 46.

the investments set out in a 2014 Agreement on the Environmental Investment Plan (the "**Environmental Investment Plan**").[1975]

1666. According to Claimants, the Municipality approved the 2013 Investment Plan in a decision of 24 July 2013:[1976]

> "*Pursuant to Paragraphs 16.1, 16.2, 16.3 and 16.4 of Article 16 of the Lease Contract concluded by SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija and Dalkia on 1 February 2002, Vilnius city municipality council has resolved:*
>
> *1. to approve the Agreement under the Lease Contract of 1 February 2002 concluded by SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija and Dalkia (enclosed);*
>
> *2. to authorize the Mayor of Vilnius city municipality to sign the agreement indicated in paragraph 1."*

1667. The Parties to the Lease concluded and executed the 2013 amendment of the Investment Plan on 25 November 2013.[1977]

1668. As to the Environmental Investment Plan, the Municipality approved it when it signed the Agreement on the Environmental Investment Plan on 17 April 2014, which was signed by VE, Dalkia, VST and the Municipality:[1978]

> *"Public limited liability company Vilniaus silumos tinklai (the "Lessor"), represented by Director Arunas Keserauskas acting under the Articles of Association of the Company, Vilnius City Municipality (the "Municipality"), represented by the Mayor of the Vilnius City Municipality Artiiras Zuokas authorised by Decision No 1696 of 5 March 2014 of the Council of the Vilnius City Municipality "On the Environmental Investment Plan 2014-2020 for Heat Generation Installations of Vilnius City", private limited liability*

[1975] **SoC:** Claimants' Statement of Claim, dated 16 October 2017, para. 202.

[1976] **C-186:** Municipal Council of Vilnius, Decision on the Approval of the Agreement to the Lease Contract of 1 February 2002 Between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija and Dalkia, No. 1-1366, dated 24 July 2013; **C-040:** Amendment of Annex 2 of the Lease, No. 707, dated 25 November 2013.

[1977] **C-040:** Amendment of Annex 2 of the Lease, No. 707, dated 25 November 2013.

[1978] **C-042:** Agreement on the Environmental Investment Plan 2014-2020 for Heat Generation Installations of Vilnius City, No. 14-329, dated 17 April 2014.

company Vilniaus energija (the "Lessee"), represented by President Linas Samuolis acting under the Articles of Association of the Company, and French company Dalkia (the "Guarantor"), represented by Jean Sacreste acting under the Power of Attorney of 26 March 2014, hereinafter jointly referred to as the "Parties" have entered into the following Agreement on the amendment and modification of the Lease Agreement signed on 1 February 2002 by and between the Vilnius City Municipality, SP AB Vilniaus silumos tinklai, UAB Vilniaus energija and French company Dalkia (the "Lease Agreement").

[…]

2. The Parties hereby agree to:

2.1. Approve the implementation of the Environmental Investment Plan 2014-2020 for Heat Generation Installations of Vilnius City (the "Plan") (enclosed hereto)."

1669. Claimants argue that, after the approval of the 2013 Investment Plan and the Environmental Investment Plan, VE executed the agreed investments in the following years. Claimants argue that, during that time, VE sent the Municipality progress updates and confirmations when it completed an investment.[1979]

1670. VE sought compensation for the investments planned for 2016-2017 by including these investments in the tariff adjustment proposals submitted to the Pricing Commission between December 2015 and April 2016.[1980]

1671. In its decision dated 21 April 2016, the Pricing Commission acknowledged that the Municipality approved the 2016-2017 investments, but noted that investment topics and investment sums specified in VE's request differed from investment names and sums submitted for the 2013 Investment Plan:[1981]

[1979] **SoC:** Claimants' Statement of Claim, dated 16 October 2017, para. 205; see also **C-220:** Letter from Vilnius Energy to Vilnius City Municipality, dated 06 January 2016; **C-189:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, Regarding Investments of Q1 of the Environmental Investment Plan for 2014-2020 in Q1 of 2015, dated 13 May 2015; **C-217:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 13 August 2015; **C-218:** Letter from Vilnius Energy Vilniaus Šilumos Tinklai, dated 06 November 2015; **C-219:** Letter from Vilnius Energy to Vilniaus Šilumos Tinklai, dated 29 January 2016.

[1980] **SoC:** Claimants' Statement of Claim, dated 16 October 2017, para. 205; **C-188:** Letter from Vilnius Energy to National Commission for Energy Control and Prices, dated 01 December 2015; **C-105:** Letter from Vilnius Energy to National Commission for Energy Control and Prices, dated 02 March 2016; **C-152:** Letter from Vilnius Energy to National Commission for Energy Control and Prices, dated 08 March 2016; **C-187:** Letter from Vilnius Energy to National Commission for Energy Control and Prices, dated 06 April 2016.

[1981] **C-068:** Letter from National Commission for Energy Control and Prices to UAB Vilniaus Energija, dated 21 April 2016, p. 44 of the PDF.

"*By its decision No. 1-1366 of 24 July 2013 "Regarding the Approval of the Agreement on the Lease contract of 1 February 2002 signed by SP AB Vilniaus Šilumos Tinklai, Vilnius city municipality, UAB Vilniaus Energija and Dalkia", the Vilnius City Municipality Council approved the Agreement to the Lease contract of 1 February 2002 signed by SP AB Vilniaus Šilumos Tinklai, Vilnius city municipality, UAB Vilniaus Energija and Dalkia, which contains an approved investment plan. Investment topics (names) specified in the Company's investment plan (enclosed), which covered investments for 2016-2017 presented by the Company for approval and investment sums differed from investment names and sums submitted for the Commission's approval by the Company's letter No. 008-10-24555 of 1 December 2015*."

1672. Accordingly, the Pricing Commission sent a letter to the Municipality on 4 March 2016 to seek the latter's confirmation that the investments indicated in the Municipality's decision of 24 July 2013 covered the investments presented by VE for approval:[1982]

"To the best of the Commission's knowledge, investments of UAB Vilniaus Energija for 2016-2017 were approved by Decision No. 1-1366 of the Vilnius City Municipality Council of 24 July 2013. This decision lists the following investment topics (names):

1. Liquidation of group boiler houses;

2. Information technologies, communication and others;

3. Modernization of thermal power plants;

4. Modernization of regional boiler houses;

5. Heat routes:

5.1. Reconstruction of heat routes;

5.2. Connection of new customers (heat routes + heat units);

5.3. Adaptation of pumping stations to variable network flow;

6. Investments related to emergency situation or economic activities (paragraph 16.4 of the lease contract);

[1982] **C-068:** Letter from National Commission for Energy Control and Prices to UAB Vilniaus Energija, dated 21 April 2016, p. 44 of the PDF.

7. "Associated companies" […]

The Company indicated to the Commission that:

1. The investment "Installation and replacement of heat meters" submitted by the Company for approval (in 2016 - EUR 412.9 thousand, in 2017 - EUR 15.8 thousand) falls within the scope of the investment "Liquidation of group boiler houses" approved by the municipality;

2. The investment "Installation of remote data reading system of heat meters" submitted by the Company for approval (in 2016 - EUR 67.3 thousand) falls within the scope of the investment "Liquidation of group boiler houses" approved by the municipality;

3. The investment "Modernization of information system equipment" (in 2016 - EUR 141 thousand, in 2017 - EUR 39 thousand) falls within the scope of the investment "Information technologies, communication and others" approved by the municipality;

4. The investment "Reconstruction of Vilnius heat supply networks in Tilto St." (in 2016 - EUR 22 thousand) falls within the scope of the investment "Reconstruction of routes" approved by the municipality;

5. The investment "Renovation of equipment" (in 2016 - EUR 32.5 thousand) falls within the scope of the investment "Investments related to emergency situation or economic activities" (paragraph 16.4 of the Lease contract) approved by the municipality.

Please confirm whether the listed investments presented by the Company for approval fall within the specified investment topics laid down in the Decision No. 1-1366 of the Vilnius City Municipality Council of 2[4] *July 2013 as we have indicated in this letter. If certain investments of the Company do not fall within the scope of investments mentioned in the said decision of the municipality, please name such investments of the Company."*

1673. The Tribunal notes that in its letter to the Municipality, the Pricing Commission specifically asked whether the investments listed by VE fall within Decision No. 1-1366 of the Municipality dated 24 July 2013, by which the Municipality approved the 2013

Investment Plan.[1983] Therefore, the Pricing Commission did not request the Municipality's confirmation whether the investments listed in VE's request were in accordance with the 2016 Annual Plan or the Quarterly Investment Reports, but whether they were in compliance with the 2013 Investment Plan.

1674. By letter dated 22 March 2016, the Municipality responded to the Pricing Commission that certain planned investments presented by VE did not meet the purpose of approved investments, that VE had in any event improperly performed its investment obligations under the Lease and that essential financial discrepancies tainted VE's "planned investment obligations under the Lease":[1984]

> *"Please be informed that by its letter No. 007-204R of 6 January 2016 and letter No. 007-5049 of 25 February 2016 'Regarding the plans for 2016', the Company presented to the Municipality and the public limited liability company Vilniaus Šilumos Tinklai (hereinafter - AB Vilniaus Šilumos Tinklai) its investment work plan and repair works summary plan for 2016. AB Vilniaus Šilumos Tinklai presented its comments to the Company on investment plans for 2016 in annex 5 of its letter No. 02-095 of 10 February 2016.*
>
> *AB Vilniaus Šilumos Tinklai indicated that the target purpose of the Company's planned investments 'Installation and replacement of heat meters' and 'Installation of remote data reading system of heat meters' did not meet the investment purpose 'Liquidation of group boiler houses'. AB Vilniaus Šilumos Tinklai did not make any other comments related to the issues raised in the Commission's letter on the Company's investments for 2016 submitted for approval, thus they can be concluded to have been covered under investment topics specified in the Decision No. 1-1366 of the Municipality Council of 24 July 2013. The Company has to present revised investment plan for 2016 according to the comments laid down in the letter No. 02-095 of AB Vilniaus Šilumos Tinklai of 10 February 2016.*
>
> *Please note that the Municipality Council approves investments not only by their intended purpose, but also by permissible values approved by the Decision No. 1-*

[1983] **C-186:** Municipal Council of Vilnius, Decision on the Approval of the Agreement to the Lease Contract of 1 February 2002 Between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija and Dalkia, No. 1-1366, dated 24 July 2013; **C-040:** Amendment of Annex 2 of the Lease, No. 707, dated 25 November 2013.

[1984] **R-068:** Excerpt from the Census of Lithuania's Inhabitants and Accommodations 2001, dated 31 December 2001, p. 44 of the pdf (emphasis added).

> *1366 of the Municipality Council of 24 July 2013. Since the Company has improperly performed its investment obligations assumed under the Lease contract of 1 February 2002 signed by AB Vilniaus Šilumos Tinklai, the Municipality, the Company and Dalkia (hereinafter - the Lease contract), essential financial discrepancies have been determined with regard to the Company's planned investment obligations under the Lease contract.*
>
> *The Municipality Council cannot approve the Company's investments exceeding provisions of the Lease contract, because this leads to increased financial obligations of the Municipality to the Company and does not meet the interests of the Municipality and AB Vilniaus Šilumos Tinklai laid down in the Lease contract. Please be informed that the Municipality Council has not approved investments of the Company planned in 2016 to no extent.*

1675. In view of the Municipality's response, the Pricing Commission did not examine VE's investments and did not decide on the approval of those investments. [1985]

1676. There is no dispute that the 2013 Investment Plan and the Environmental Investment Plan were agreed,[1986] and the Arbitral Tribunal agrees with Claimants that Quarterly Investment Reports were meant to keep Respondents informed "*in reasonable detail* [of] *the progress of the Project*."[1987] This is the generally accepted purpose of quarterly "progress" reports, as they are referred to in the Lease. Further, Respondents' argument that the approval of an investment under the Lease is only given by approval of the Quarterly Investment Report that contains the actual value of investment implemented does not make business sense. If one were to follow this interpretation, it would mean that VE would have had to make all investments under the Lease in the dark (*i.e.* not knowing whether they would become leased assets and whether they would count towards VE's Investment Obligation). Under that interpretation, VE would

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[1985] **C-068:** Letter from National Commission for Energy Control and Prices to UAB Vilniaus Energija, dated 21 April 2016, p. 44 of the PDF.

[1986] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2745; **C-040:** Amendment of Annex 2 of the Lease, No. 707, dated 25 November 2013, **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2746; **C-042:** Agreement on the Environmental Investment Plan 2014-2020 for Heat Generation Installations of Vilnius City, No. 14-329, dated 17 April 2014.

[1987] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 20.

have had to wait for the approval of the implementation of a given investment, rather than the approval of the investment itself. Such interpretation does not reconcile with the language of the Lease.

1677. Regarding the discrepancy in areas of investments, VST wrote to the Pricing Commission that *"the target purpose of the Company's planned investments 'Installation and replacement of heat meters' and 'Installation of remote data reading system of heat meters' did not meet the investment purpose 'Liquidation of group boiler houses'"*. VST did not make any other comments on these planned investments. Therefore, the Pricing Commission stated that these investments could "*be concluded to have been covered under investment topics specified in the Decision No. 1-1366 of the Municipality Council of 24 July 2013"*.[1988]

1678. In view of this statement which seems to confirm the Municipality's approval of 24 July 2014, the Arbitral Tribunal considers it contradictory to state that "*the Municipality Council has not approved investments of the Company planned in 2016 to no extent*".[1989]

1679. Furthermore, according to Article 16.1 of the Lease "[t]*he amounts of investments stated in the Investment Plan are indicative only and will be credited by the actual costs*."[1990] The Parties are also in agreement that the tri-annual investment plan is only a high-level, forward-looking plan that does not and cannot contain the precise items and amounts of the investments.[1991]

1680. Considering the above, the Arbitral Tribunal finds that, based on Article 16.1 of the Lease, even if Claimants' investments planned for 2016 and 2017 deviated slightly from the 2013 Investment Plan, the Municipality could not retroactively withdraw its consent

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[1988] **C-068:** Letter from National Commission for Energy Control and Prices to UAB Vilniaus Energija, dated 21 April 2016, p. 44 of the PDF.

[1989] **C-068:** Letter from National Commission for Energy Control and Prices to UAB Vilniaus Energija, dated 21 April 2016.

[1990] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 16.1.

[1991] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019**,** para. 2748; **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 287.

of the 2013 Investment Plan given in July 2013. The above-discussed statement by the Municipality that it had not approved the 2015-2017 investments was therefore not accurate.

1681. Claimants consider this a misrepresentation which constitutes a violation of Article 27.2 of the Lease relied on by Claimants, which provides that: [1992]

> "*The Lessor and the Municipality will within the limits of its competence actively support Newco in connection with the procurement of all consents and approvals of other third parties in Lithuania which approvals are necessary for the proper implementation of the Project. The Lessor and the Municipality will covenant not to interfere with the ability of Newco to implement the Project in a timely manner.*"

1682. The Arbitral Tribunal considers that, even if the Municipality's statement was not in line with its earlier approval of the 2013 Investment Plan, the legal basis invoked by Claimants (*i.e.* Article 27.2 of the Lease) is too broad and general to award damages to Claimants for the Municipality's misrepresentation. Article 27.2 of the Lease concerns the procurement of consents and approvals that are required for the timely implementation of the Project, but not specifically so that Claimants can include their investments in the RAB. In other words, the timely implementation of the Project was not interfered with. Rather, what was interfered with was Claimants' possibility to recover monies as part of tariffs.

1683. Article 27.2 of the Lease does not concern the Municipality's obligation to support Claimants to include their investments in the RAB, hence the Arbitral Tribunal finds that it does not provide a legal basis for damages from the Municipality for its misrepresentation made in its letter dated 22 March 2016 to the Pricing Commission. In consequence, the Tribunal dismisses Claim 3 for lack of legal basis.

2.2 Counterclaim 10

[1992] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 27.2, p. 47.

1684. Under Counterclaim 10, Respondents request the Tribunal to declare that VE breached its contractual obligations to duly report and sell the 2015-2017 investments to VST during the term of the Lease.[1993]

1685. Respondents argue that Claimants breached their contractual obligations under Article 16.1, Article 20 and paragraphs 2.2.1 and 3.2.1 of Annex 10 to the Lease, as Claimants were required to carry out investments (as per Article 16.1 of the Lease), provide progress reports to the Supervisory Commission (as per Article 20 of the Lease) and sell and lease back the investments for a corresponding amount of Lease Fee No. 4 (as per paragraphs 2.2.1 and 3.2.1 of Annex 10 to the Lease). According to Respondents, Claimants failed to properly carry out these obligations with regard to the 2015-2017 investments.[1994]

1686. Specifically, Respondents assert that Claimants' Quarterly Investment Reports on investments implemented in 2015-2017 were materially deficient, as the investments deviated from the Investment Plan as amended in 2013. Respondents further point to the notification of investments which was not supported by underlying documentation and the fact that there were factual and arithmetic errors in the reports.[1995]

1687. Claimants reply that Respondents took over the 2015-2017 investments at the end of the Lease.[1996] They also insist that the amounts and categories of investments set forth in the 2013 Investment Plan were only "indicative", as per Article 16.1 of the Lease, meaning that "the *Investment Plan was a generalized guide for the Parties until more specific investments and their costs in annual plans and/or quarterly reports*".[1997] Thus, according to Claimants, the Investment Plan only contained investment groups without detailed description of each investment, while the specific investments were itemized in the annual plans.[1998] Claimants thus argue that, even if the amounts and the

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[1993] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 1493.

[1994] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, paras. 1472-1481.

[1995] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 1487.

[1996] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 285; **C-032:** Sales-Purchase Agreement between Vilniaus Šilumos Tinklai, Vilnius City Municipality, Vilnius Energy and Veolia Environnement S.A., dated 29 March 2017, at Whereas D, Article 3.5, Annex 1.

[1997] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 287.

[1998] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 287.

descriptions of the investments in the 2016 Annual Report and the Quarterly Investment Reports did not match perfectly the 2013 Investment Plan, this does not mean that the investments and the Quarterly Investment Report were deficient.[1999]

1688. Respondents concur with Claimants' view that the tri-annual Investment Plan, *i. e.* the General Investment Plan contained only assumptions and high-level information concerning the investments to be carried out:[2000]

> "[…] *the Lease Agreement provides for a three-step investment planning and approval process. First, the parties to the Lease Agreement are to agree on the high- level forward-looking General Investment Plan. Second, Vilnius Energy is to submit forward-looking Annual Investment Plans for VST's and the Municipality's consideration. Third, Vilnius Energy submits detailed Quarterly Investment Reports on the implemented investments for the Supervisory Commission's approval.*
>
> *Of the three, the Quarterly Investment Reports are the only documents in the investment planning and approval process that contain the actual value of the implemented investments. The General Investment Plan and the Annual Investment Plans are both forward-looking. Investments envisaged in the plan may still differ from the actual investments in quality or value—Veolia concedes to this. Therefore, only the approval of the Quarterly Investment Reports could be deemed as approval of the investments themselves: this is when VST and the Municipality theoretically reviews the completed investments, the price of the investments, and whether the investments conform to the requirements of the Lease Agreement. Only the Quarterly Investment Reports specify the individual investments.*
>
> *Neither the General Investment Plan nor its amendments (which, again, are forward-looking instruments) are intended to obviate the post-factum approval of implemented investments. Any other interpretation of the Lease Agreement would render the Quarterly Investment Reports meaningless. Instead, the Lease Agreement should be*

[1999] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 288.

[2000] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 2748-2750.

interpreted as giving substance to every plan and report that Vilnius Energy had to submit for the investment process."[2001]

1689. Respondents have also relied on Article 16.1 to plead that investments outside the Investment Plan should have been made by VE. They therefore agree that the amounts set out in the Investment Plan are indicative only.

1690. The Arbitral Tribunal finds it compelling that the 2015-2017 investments were transferred to VST at the end of the Lease, as confirmed by Respondents themselves.[2002] The notes of a meeting of the Supervisory Commission that took place on 28 March 2017 regarding the transfer of the investments implemented in 2015-2017 indicated that the investments should be approved by the Supervisory Commission *"in accordance with good practice*":

"L. Samuolis informs that the Commission has been provided with the plans of investments implemented in 2015-2016, and the Commission has not approved them yet to date. There is a list of investments, and the Commission has already carried out all the necessary actions in the Board of AB Vilniaus šilumos tinklai. The Commission believes that, in accordance with good practices, these investments should be approved, and that they should move towards the end of the Lease Contract."[2003]

1691. The 2015-2017 were further sold by VE to VST at the end of the Lease.[2004]

1692. In view of the above, the Tribunal agrees with Claimants that the mere fact that the 2015 Quarterly Investment Reports and the 2016 Annual Investment Plan did not completely correspond to the items and amounts of investments foreseen in the 2013 Investment Plan does not constitute a breach by Claimants of their obligations under Article 16.1, Article 20 or paragraphs 2.2.1 and 3.2.1 of Annex 10 to the Lease. In other words, Claimants did not breach their contractual obligations to duly report and sell the

[2001] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 2748-2750.

[2002] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2772.

[2003] **R-1578:** Minutes of Meeting of the Supervisory Commission, March 28, 2017, dated 28 March 2017, p. 3 of the PDF.

[2004] **C-032:** Sales-Purchase Agreement between Vilniaus Šilumos Tinklai, Vilnius City Municipality, Vilnius Energy and Veolia Environnement S.A., dated 29 March 2017.

2015-2017 investments to VST during the term of the Lease. Consequently, the Tribunal dismisses Counterclaim 10.

M. COUNTERCLAIM 5: INVESTMENT OBLIGATION

1693. Respondents' Counterclaim 5 rests primarily on their allegations that 1) "*Veolia purchased overpriced investments from Rubicon and counted them in full (inclusive of the overprice) towards its investment obligations*"[2005] and that 2) VE misappropriated the proceeds from trading freely allocated EAs and "*Veolia seeks to count this amount towards its minimum quantitative investment obligation.*" [2006] Respondents seek damages in the amount of EUR 40,385,793 for the failure of Claimants to abide by their obligation to invest in the Facilities, and an annual interest of 6 % calculated from 30 March 2017 until full payment of the amount awarded.[2007]

1694. Claimants request the dismissal of Counterclaim 5.[2008]

1. The Parties' Positions

1.1 Respondents' Position

1695. Respondents contend that VE did not procure goods and services at a fair market value in order to meet its Investment Obligation, whereas it was under an obligation to "*invest into the Facilities efficiently such that only reasonable costs incurred by Veolia could meet its investment obligations*".[2009] Furthermore, Respondents argue that these costs should be reasonable, because they were included in the tariffs paid by the consumers.[2010]

[2005] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 293.

[2006] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 294.

[2007] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1138.

[2008] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1335(c).

[2009] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1053, see also **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1858-1859.

[2010] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1054.

1696. Respondents submit that, by purchasing at an overprice and accounting for these overpriced costs in the calculation of its Investment Obligation, Claimants breached 1) the Lithuanian Law on Public Procurement,[2011] 2) provisions of the Lithuanian Civil Code which impose on the parties to a contract to perform their obligations "*in the thriftiest way possible*" and to "*use the most economical means in the performance of the contract*" as well as provisions of the Lithuanian Civil Code on good faith,[2012] and 3) provisions of the Lithuanian Civil Code on good faith,[2012] and 3) provisions of the Lease.

1697. Regarding the Lease, Respondents refer to Article 37.1 which imposed on Veolia to act "reasonably" and "prudently" and implies a duty to purchase reasonably priced goods. According to Respondents, VE's purchases of overpriced goods and services "*would also breach Vilnius Energy's Complete State obligations*"[2013] since pursuant to Article 37.1 of the Lease, "[t]*he term "complete" is consistent with the parties' express agreement that Vilnius Energy must perform all aspects of its obligations as a 'skilled and experienced international operator'* […] *If Veolia's contrary interpretation was correct, Vilnius Energy would have been able to satisfy its "skilled and experienced international operator standard' by merely employing a world class team of maintenance workers, but otherwise managing the heating network and choosing and implementing investments in a wholly amateur fashion."*[2014] In their Post-Hearing Briefs, Respondents further referred to 1) Article 35.2 of the Lease which provides that the non-fulfilment of the Investment Plan, including the failure to fulfil the minimum quantitative investment obligations, qualifies as a fundamental breach of the Lease,[2015] and 2) Article 3 of the Lease which sets out the general targets of the Lease Project. Respondents consider that none of the overarching principles set out in that provision "*could be achieved unless Veolia invested <u>efficiently</u>*."[2016]

[2011] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1864-1865, see also **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1053

[2012] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1864.

[2013] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1866.

[2014] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1869.

[2015] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1054.

[2016] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 293 (emphasis in the original).

1698. Regarding Claimants' reliance on the fact that VST regularly approved the investments made by Veolia, Respondents answer that, despite their attempts to assess the value of the investments during the Lease, it was only with the document production phase in this arbitration that Respondents obtained VE's procurement documents were able to analyze their pricing.[2017] Respondents further argue that Claimants cannot rely on their own institutional capture, stonewalling, defaulting reporting and bad faith in the transfer of investments to claim contributory negligence on the part of Respondents.[2018] In any event, "*VŠT did reject and challenge certain investments made by Veolia, such as the investments in pipes rejected by Mr. Cicėnas in 2003 and the 2015-2017 investments that are subject of Counterclaim 10*."[2019]

1699. According to Respondents, Lithuanian law prevents parties from relying on contributory negligence where the alleged assumption of risk by the damages party would be "*contrary to mandatory legal norms, public order, good morals, the criterion of good faith, reasonableness and justice"*.[2020] Respondents contend that Veolia acted in bad faith by purchasing overpriced investments from Rubicon, and that it can therefore not rely on any contributory negligence of Respondents. [2021]

1700. Respondents point to the fact that VE's former Chief Legal Officer acknowledged that the Investment Plan investments are purchased without European funds as per the Lease. According to Respondents, Claimants recognized in their Reply that the minimum quantitative investment obligations could not be met using outside funds. Finally, Dr. Hesmondhalgh did not disagree with FTI's exclusion of EU funds from their analysis of Counterclaim 5.[2022] Accordingly, Respondents argue that Claimants cannot use outside funds because these do not represent a *bona fide* investment of private capital that the Lease was designed to attract. [2023]

[2017] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1057.
[2018] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 291.
[2019] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 290.
[2020] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 291.
[2021] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 291.
[2022] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 295.
[2023] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 296.

1.2 Claimants' Position

1701. In response to Respondents' Counterclaim 5, Claimants contend that VE made the investments according to its investment obligation as agreed by the Parties in the Investment Plan and its amendments. "*Under the Lease, Vilnius Energy undertook to make investments for an amount of exactly EUR 164 million, which was later increased by agreement of the Parties to EUR 167.7 million*."[2024] VE's Last Quarterly Report of 2017 (first quarter) shows that VE invested EUR 177.287 million, including EUR 8.636 million of assets funded by EU subsidies. "*Therefore, Vilnius Energy invested EUR 168.7 million throughout the Lease, which exceed the required investment amount of EUR 167.7 million agreed upon by the Parties*."[2025] Claimants highlight that this is not disputed by Respondents.[2026]

1702. Claimants recall that VST and the Municipality oversaw and coordinated the implementation of the Investment Plan with the means provided for under the Lease. VST and the Municipality were heavily involved in VE's decisions to invest, since VST, the Municipality and VE had to sign the amendments of the Investment Plan which had to be approved by a decision of the Municipal Council. Ultimately, the Supervisory Commission, which was controlled by the Municipality and VST, oversaw the implementation of the Lease. Claimants further note that VST and the Municipality were kept informed of VE's investments through the Annual Investment Plans and the Quarterly Reports submitted to the Supervisory Commission, and that these reports contained information on the items that VE was investing in, their costs and the identity of the contractors.[2027]

1703. Claimants further highlight that Respondents accepted ownership of the investments made by VE without any reservations, including the 2015-2017 investments that VST later claimed had not been approved.[2028] According to Claimants, Respondents'

[2024] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 686.
[2025] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 689.
[2026] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 702.
[2027] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 686.
[2028] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 687.

reference to Mr. Keserauskas' testimony is a partial quote taken out of context.[2029] Mr. Keserauskas confirmed that Respondents had effective means to supervise VE's investments before the investments were transferred to VST.[2030]

1704. In response to Respondents' argument that Veolia breached Article 35.2 of the Lease by purchasing overpriced products from Rubicon, Claimants argue that this is a belated argument made in Respondents' post-hearing submission. Furthermore, Claimants note that Article 35.2 simply states that the non-fulfilment of the Investment Plan constitutes a breach of the Lease. Nevertheless, Veolia fulfilled the Investment Plan.[2031] In any event, according to Claimants, pursuant to Article 35.1 and 35.2 of the Lease Respondents should have given a notice of the alleged breaches and provided a period of 360 days to VE to rectify the situation. Respondents did not give such a notice, and therefore cannot claim compensation for allegedly overpriced investments *a posteriori*.[2032] In any event, Claimants argue that Veolia made all of its investments at prices that were in line with, or even below the expected market prices, as demonstrated by AFRY's and Sweco's testimony.[2033]

1705. As to Respondents' allegation that the alleged over expending would have been passed on to the customers via the tariff, Claimants answer that, even if this were the case, the ones suffering harm would be the customers, not the Respondents who cannot seek damages allegedly suffered by third parties. According to Claimants, "*Respondents request a cash payment on top of the EUR 168.7 million they undisputedly received in the form of investments: they did not suffer any damage*".[2034]

1706. Regarding the proceeds of the EAs which Respondents consider should not be counted towards Claimants' Investment Obligation, Claimants rely first on their position that VE was the rightful owner of the proceeds from the EAs, and that these could therefore be

[2029] **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 128.

[2030] **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 129.

[2031] **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 130.

[2032] **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, paras. 131-133.

[2033] **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 134, see also **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 712 ff.

[2034] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 703.

used without any reservation.[2035] In the alternative, Claimants submit that Respondents' logic in relation to EAs and Veolia's Investment Obligation "*remains flawed*."[2036] According to Claimants, the restrictions as to the source of funds used by VE to finance its Investment Obligation is "*a pure fiction created by the Respondents*" which has no basis in the Lease.[2037] Contrary to Respondents' contention, there is nothing contradictory between the fact that VE excludes EU subsidies when calculating its total investments under the Lease and VE's position regarding EA proceeds. "*EAs cannot be equated to EU subsidies, as explicitly stated by Lithuanian courts* […] *Veolia never accounted for EU subsidies as amounts counting towards its investment obligations. Veolia's position in this Arbitration is therefore the same as the one adopted by the Parties' during their relationship*."[2038]

2. The Arbitral Tribunal's Analysis and Decision

2.1 Introduction

1707. The Investment Plan, mentioned in relation to other Counterclaims, sets out VE's Investment Obligation in monetary terms. The Parties agree that the Investment Plan (in its 2013 amended version) required Claimants to invest approximately EUR 167.7 million in the Facilities.[2039] The Parties however disagree on the amount actually invested by VE.

1708. Claimants argue that they fulfilled (and even exceeded) their Investment Obligation by investing EUR 168.7 million in the Facilities.[2040] Claimants arrive at this figure by

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[2035] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 705.

[2036] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 706.

[2037] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 707-709.

[2038] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 710.

[2039] **REX-003:** Second FTI Expert Report, dated 13 October 2019, para. 5.1, **Rejoinder on CCs:** Claimants' Rejoinder on Counterclaims (as revised on 21 May 2021), dated 30 May 2020, para. 744, **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 1169, **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 1104; see also **C-186:** Municipal Council of Vilnius, Decision on the Approval of the Agreement to the Lease Contract of 1 February 2002 Between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija and Dalkia, No. 1-1366, dated 24 July 2013.

[2040] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 1104; see also **C-186:** Municipal Council of Vilnius, Decision on the Approval of the Agreement to the Lease Contract of 1 February 2002 Between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija and Dalkia, No. 1-1366, dated 24 July 2013, p. 14 of the PDF.

deducting any investment financed by EU subsidies from the total investments made in the Facilities as reported in their last Quarterly Report of 2017 (first quarter). VE invested EUR 177.287 million, including EUR 8.636 million of assets funded by EU subsidies. [2041] Therefore, Claimants claim that VE invested EUR 168.7 million throughout the Lease.[2042] This figure is not contested by Respondents.[2043]

1709. Respondents however insist that, when considering the correct amount of actual investment by VE, VE fell short of its Investment Obligation. According to Respondents, VE wrongly counts certain categories of investments towards the fulfillment of its Investment Obligation. In particular, Respondents argue that:

- VE paid a premium on its investments purchased from Rubicon and so made unnecessary or "inefficient" investments which should not be counted towards its Investment Obligation;[2044] and

- VE financed certain investments through the sale of emissions allowances; such investments were not financed with VE's own funds and can therefore not count towards the fulfillment of VE's Investment Obligation.[2045]

1710. Based on the above assumptions, Mr. Roques quantified Counterclaim 5 at EUR 40.4 million [precisely EUR 40,385,793[2046]] which equals the difference between VE's investment obligation of EUR 167.7 million and VE's investments of EUR 127.3 million (*i. e.* VE's reported investments of EUR 168.7 million, less EA-financed investments of EUR 7.2 million, less inefficient investments of EUR 34.2 million):[2047]

[2041] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 689.

[2042] **C-173:** Vilnius Energy 2017 1st Quarter Investment Report, dated 01 January 2017, p. 15 of the PDF.

[2043] **REX-003:** Second FTI Expert Report, dated 13 October 2019, para. 5.40; **FTI Slides:** Hearing Presentation of FTI (Dr. Fabien Roques), dated 08 June 2022, slide 22.

[2044] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1053, see also **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1858-1859.

[2045] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 296, **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 1851 ff.

[2046] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1138(v).

[2047] **REX-003 - Addendum to the Second FTI Expert Report:** REX-003 - Addendum to the Second FTI Expert Report, dated 14 August 2021, para. 5.8.

> *"In summary, my updated assessment of VST's Failure to Invest counterclaim (excluding pre-award interest) is €40.4m, being the difference between:*
>
> *(1) VE's minimum investment obligation of €167.7m; and*
>
> *(2) VE's qualifying investments of €127.3m, being its reported investments of €168.7m, less EA-financed Investments of €7.2m (as in my second report) and less Inefficient Investments of €34.2m (which is the updated value of these investments after I reverse my adjustment to avoid double counting Consumer-financed Investments).*"

1711. The Arbitral Tribunal examines the Parties' disagreements as to the correct level of VE's actual investments to be accounted for in the following sections.

2.2 Rubicon premium

1712. With regard to "inefficient investments", Mr. Roques explains that "*in principle, a regulated entity should not be allowed the opportunity to earn a return on inefficiently incurred capital expenditure. Hence, VE should not be allowed to earn a return on: (1) any 'premium paid (i.e. above an arm's length price) on purchases made from the Rubicon group companies; and (2) any unnecessary investments (i.e. gold-plating)*".[2048]

1713. The Arbitral Tribunal has rejected Respondents' allegations of overpricing and their Counterclaim 13, making the basis of Dr. Roques's reduction unavailable.

2.3 EA financed investments

1714. Respondents argue that VE was required to invest EUR 167.7 million in the Facilities as part of its minimum Investment Obligation from private sector capital. Respondents explain that:[2049]

> "[i]*f, pursuant to Veolia's contention, they could be funded by "any other source—such as emissions trading profits" (which VST would have received itself had it not leased the Facilities), Veolia's consideration becomes optional, and the Respondents do not receive the benefit of their bargain".*

[2048] **REX-003:** Second FTI Expert Report, dated 13 October 2019, para. 5.31.

[2049] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 1819.

1715. Dr. Roques quantified VE's EA-financed investments in the amount of EUR 7.2 million. Dr. Roques considers that this amount should not count towards VE's minimum Investment Obligation, because VE had to use its own funds or funds available to it from financial institutions or VE group companies.[2050] He consequently deducts EUR 7.2 million from VE's claimed investment from EUR 168.7 million.

1716. Two questions are subsumed in the issue of whether EA-financed investments should count toward VE's Investment Obligation. The first threshold question is whether VE's Investment Obligation enshrines a requirement that it be met by VE using its own funds.

1717. Regarding the alleged requirement that VE's Investment Obligation comes with a requirement related to the source of the investments, Dr. Roques explains that, from a regulatory and economic perspective, it is reasonable to exclude third party financed investments:[2051]

> *"*[W]*here a regulated entity used its own funds to finance its investments, then it should have the opportunity to earn a return that corresponds to the 'cost' of obtaining the funds, which in turn will be a function of the 'risk' the entity has taken on. However, if the regulated entity uses funds granted to it for 'free' (e.g. EAs or EU grants) then it has not taken on any risk and there is no economic rationale for providing it with an opportunity to earn a return on that investment. As VE had not taken on any 'risk' when making investments using third party funds, it would not be reasonable for VE to earn a return on such investments."*

1718. Claimants, nevertheless, argue that the Lease does not provide for such a restriction. Notwithstanding this, Claimants claim to have excluded any portion of the investment costs that were paid through European Union subsidies when selling the investments to VST and did not count these funds towards their investment obligation:[2052]

> *"Respondents manufacture three ways in which, they allege, Vilnius Energy did not actually invest the requisite EUR 167.7 million that the Investment Plan required. First, Respondents argue that only investment costs that came out of Veolia's own pocket*

[2050] **SoD:** Respondents' Statement of Defense and Counterclaim, dated 19 February 2018, para. 1114.

[2051] **REX-003:** Second FTI Expert Report, dated 13 October 2019, para. 5.3; **REX-001:** Expert report of FTI Consulting, dated 19 February 2018, para. 5.9.

[2052] **Reply:** Claimants' Reply & Statement of Defense to Counterclaims, dated 23 January 2019, para. 1169.

(or that Veolia financed) may count toward the investment obligation. No such restriction appears in the Lease. The Investment Plan required that Claimants invest approximately EUR 167.7 million into the Facilities. Nothing more. Nevertheless, when it sold the new investments to VST, Vilnius Energy excluded any portion of the investment costs that were paid with outside funds, for example from the European Union. Vilnius Energy, in turn, did not count these outside funds toward its investment obligation. Vilnius Energy invested EUR 168.7 million (which exceeds the amount required in the Investment Plan) into the Vilnius district heating system, not including European Union subsidies. This total also excludes the value of the investments that Vilnius Energy made outside of the Lease (and therefore outside of the Investment Plan), on its own account and at its own risk."

1719. Dr. Hesmondhalgh concurs with Claimants and argues that, from an economic perspective, investing the profits from the trading of emission allowances represented a commercial risk for VE, and therefore, investments made through such funds count towards its Investment Obligation:[2053]

"I consider that, from an economic perspective, investing the profits from its trading of emission allowances represented a commercial risk for VE. VE could have invested the revenues in risk free government bonds rather than in the Facilities. In addition, the trading of emission allowances represents a risky activity for VE. As the FTI Report explains, if VE underestimated its need for emission allowances for a year and sold too many, then it would be forced to buy the necessary emission allowances from the market at the market price. If the market price at which it had to buy the allowances were to be higher than the price at which it had sold them, then VE could have incurred a loss, as happened in 2009 and 2015. Moreover, VE did more than just sell the emission allowances it received that it considered it would not need to use. It also engaged in speculative trading, by which I simply mean buying and selling emission allowances in an attempt to arbitrage movements in the price of the allowances. Such trading is inherently risky but in most years VE succeeded in making a profit on its speculative trading activities. In conclusion the VST Counterclaim is not warranted by an economic interpretation of Article 16.2."

[2053] **CEX-003:** Rebuttal Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 23 January 2019, para. 251.

1720. The Arbitral Tribunal considers that it is evident that the Investment Plan imposes a minimum level of investment by VE as the Lessee. It is also logical for such investment to have been the "price" for the 15-year long operation of the Facilities and the tariffs received from Vilnius consumers that came with it.

1721. The second question is whether EA funded investments, specifically, are to be counted towards the fulfillment of VE's Investment Obligation.

1722. Dr. Hesmondhalgh submits that VST's estimate of the investments that VE funded from the profits of its EAs trading is flawed, as VE funded its investments from the overall profits that it generated from loans that it took out, and therefore, there is no economic basis to argue that some investments were financed directly through the profits made from emission allowance trading:[2054]

> "*In addition, VST's estimate of the investments that VE funded with the profits of its emissions allowance trading is flawed. I have been instructed that VE does not earmark profits from specific sources for specific investments. Instead, VE funded its investments from the overall profits that it generated or from loans that it took out. Thus, there is no economic basis for VST's argument that some investments were financed directly by the profits of trading emission allowances.*"

1723. Dr. Roques answers to Dr. Hesmondhalgh's criticism as follows:[2055]

> *"Again, Dr Hesmondhalgh has not provided any evidence to support this instruction. I am instructed that this is contradicted by VE's EA usage reports, which state precise amounts of EA Profits which were allocated to certain investments. However, even if this were true and specific investments could not be identified, it does not mean that the profits were not reinvested and that there should be no deduction for EA-financed investments. Notwithstanding this, I note that from (at least) 2009 to 2017, VE was obligated to track any investments made using EA Profits, as these were not considered part of the RAB and had to be excluded when calculating its heat tariffs. Therefore, as above, I am instructed to continue relying on the same list of investments*

[2054] **CEX-003:** Rebuttal Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 23 January 2019, para. 252.

[2055] **REX-003:** Second FTI Expert Report, dated 13 October 2019, para. 5.20 with reference to **SoD - Annex 5:** Annex 5 - List of investments financed from EAa, dated 19 February 2018 (emphasis added); see also **REX-003:** Second FTI Expert Report, dated 13 October 2019, para. 5.21 with reference to

from VE's annual 'Reports on the usage of EAs' that was provided by counsel to Mr Harman in First FTI Report."

1724. Dr. Roques was instructed that VE's annual reports on the usage of emission allowances (*i. e.* "*VE's EA usage reports*") contain the precise amount of EA Profits that were allocated to certain investments. In his report, Dr. Roques refers to Exhibit R-280,[2056] Exhibit R-283[2057] and a demonstrative exhibit submitted as Annex 5 of the Statement of Defence and Counterclaims[2058] as a basis for his calculation of EA-financed investments.[2059]

1725. The Arbitral Tribunal observes that VE's annual reports on the usage of emission allowances exhibited by Respondents as Exhibit R-280 and Exhibit R-283 are not explanatory, and that the Parties did not describe the report in their submissions. The Arbitral Tribunal further notes that Annex 5 of the Statement of Defence and Counterclaims does not constitute contemporaneous evidence of how VE apportioned profits of emission allowance trades, and thus, has limited evidentiary value.

1726. Dr. Hesmondhalgh explains that "*VST has misunderstood the information provided in the reports on the usage of emission allowances. These do not show what investments were funded by the profits from the trading of emission allowances; rather they show the investments that were made to reduce VE's emissions so as to enable it to continue as a net seller of emission allowances*."[2060]

1727. The Arbitral Tribunal notes that Dr. Hesmondhalgh's explanation that VE would not have earmarked its profits is plausible, as money is fungible, and it seems dubious that a company would be able to precisely trace the use of revenues having entered its accounts.

[2056] **R-280:** Vilnius Energy Report on usage of emission allowances, 2010, dated 01 January 2011.

[2057] **R-283:** Vilnius Energy Report on usage of emission allowances, 2012, dated 01 January 2013.

[2058] **SoD - Annex 5:** Annex 5 - List of investments financed from EAa, dated 19 February 2018.

[2059] **REX-003:** Second FTI Expert Report, dated 13 October 2019, pars. 5.20-5.21 and references there.

[2060] **CEX-003:** Rebuttal Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 23 January 2019, para. 45 (emphasis added).

1728. Against this background, the Arbitral Tribunal is not in a position to determine whether the investments indicated by Respondents in Annex of 5 the Statement of Defence and Counterclaims as EA-financed were made from profits generated by VE's trade of freely allocated EAs (which the Tribunal has decided were owned by VST).

1729. The Arbitral Tribunal concludes that the burden of proof regarding Counterclaim 5 lies with Respondents, who have failed to establish the amount they allege should not count towards Claimants' Investment Obligation as EA-financed. In consequence, the amount of EUR 7.2 million claimed by Respondents to be EA-funded investments shall count toward Claimants' Investment Obligation.

2.4 *Conclusion*

1730. The Parties agree that VE had an Investment Obligation to invest a minimum amount of EUR 167.7 million. The Parties also agree that, according to VE's Quarterly Report of 2017 (first quarter), VE invested EUR 168.7 million throughout the Lease excluding assets funded by EU subsidies.

1731. The Arbitral Tribunal has rejected Respondents' claim that the amounts of EUR 7.2 million for EA-financed investments, and EUR 34.2 million for the Rubicon premium be deducted from VE's total investment under the Lease. In these circumstances, Claimants met their Investment Obligation as per the (amended) Investment Plan. VE invested EUR 168.7 million throughout the Lease, and thus, fulfilled its obligation under the Lease to invest a minimum amount of EUR 167.7 million. Therefore, the Arbitral Tribunal rejects Counterclaim 5.

N. CLAIM 6/COUNTERCLAIM 12: TOTAL AGGREGATE VALUE

1732. The Total Aggregate Value (sometimes also referred to as the "Returned Value") Claim and Counterclaim concerns the Parties' dispute as to whether VE complied with Article 12(v) of the Lease, which provides that "*the Lessee will be required to re-deliver to the*

Lessor the Facilities and the Units at the sum total of the aggregate residual value of such re-delivered Facilities being no less than their value at the date of Closing".[2061]

1733. Claimants seek in this respect a declaration that it did comply with that obligation (Claim 6).[2062]

1734. Respondents for their part contend that Claimants have failed to fulfill that obligation, and claim compensation between EUR 20,278,013 (if VE-3 was returned on 1 January 2016) and EUR 21,578,013 (if VE-3 was returned at the end of the Lease) for the alleged difference between the Baseline Value and the Returned Value, with annual interest at 6% from 30 March 2017 until full payment of the amount awarded (Counterclaim 12).[2063]

1. The Parties' Positions

1.1 Claimants' Position

1735. Claimants explain that, under Article 12(v) of the Lease, the Parties agreed that the value of the Facilities and Units to be returned to VST at the end of the Lease would be at least equal to the Baseline Value of the Facilities which VST leased to VE at the start of the Lease in 2002.[2064] Claimants further explain that the Parties' respective calculations of the Baseline and of the Returned Values differ as to the following points.

1736. Regarding the Baseline Value, Claimants state that the Parties disagree on the question whether assets funded through public subsidies must be included therein. Claimants consider that these assets should be excluded from the Baseline Value as they are also to be deducted from the Returned Value.[2065]

[2061] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 12(iv) (emphasis added).

[2062] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1335.

[2063] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1138.

[2064] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 400.

[2065] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 403, **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 30.

1737. The Parties further disagree on whether Lease Fee No. 1 should be included in the Baseline Value. Claimants' position is that it should be excluded from the Baseline Value because there is no reason that payments under Lease Fee No. 1 be treated differently from other investments made by Veolia under the Investment Plan.[2066] "*This is evident from Annex 10 which provides that payments of Lease Fee No. 1 would offset the accumulated depreciation of Lease Fee No. 4 just as the other investments under the Investment Plan would*."[2067] This is also confirmed by Respondents' conduct during the Lease, since Respondents themselves routinely offset the amount of depreciation of existing assets by the amount of new investments and by the amount of Lease Fee No. 1 payments.[2068]

1738. Finally, the Parties disagree as to whether the Baseline Value should account for the residual value of the VE-3 plant at 1st January 2016 (Claimant's position) or at the end of the Lease (Respondents' position). This question depends on whether the Tribunal considers that VE-3 was validly returned by VE to VST during the Lease or at the end thereof.[2069]

1739. Regarding the Returned Value, Claimants point to the following disagreements. First, the Parties disagree as to the valuation of the Units at the end of the Lease. Claimants' position is that the Units should be valued at the residual value of Lease Fee No. 4 as provided for in paragraphs 2.6 and 3.6 of Annex 10 to the Lease.[2070] Claimants emphasize the language of Article 12(v) of the Lease which leaves no doubt as to the fact that the calculation of the Total Aggregate Value should be examined in light of Annex 10. According to Annex 10, 1) "[i]*nvestments completed during the term of the Lease were to offset the Lease Fee No. 4 monthly invoices at their cost, in accordance with Item 4.3 of Annex 10"* and 2) "[w]*orks that had been made but not yet transferred to VŠT at the end of the Lease (i.e., the Units) were to offset in full any outstanding*

[2066] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 403, **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 30.

[2067] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 419, see also **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 30.

[2068] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 420, see also **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 30.

[2069] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 403.

[2070] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 404.

amount of Lease Fee No. 4 invoices to be paid by Vilnius Energy, as per items 2.6 and 3.6 of Annex 10".[2071] Valuating the Units at the outstanding amount of Lease Fee No. 4 is also consistent with the Lease' overall structure, "*as confirmed both by Mr Husty at the ICSID hearing, and by the Respondents' position in respect of Counterclaim 8 (Disputed Assets)*".[2072]

1740. Second, the Parties disagree as to the inclusion or not of the EU subsidies received by VE in the Returned Value. Claimants state that "*the Parties agree that the deduction is to take place*" although they disagree slightly on the amount.[2073] According to Claimants, in consequence the same deduction should apply to the Baseline Value.[2074] Claimants submit that this approach would also be in line with Respondents' conduct during and at the Term of the Lease.[2075] During the Lease, VST issued Lease Fee 4 invoices to VE that excluded the depreciation of the subsidized part of the assets from their balance.[2076] At the end of the Lease, when VST sent its "final numbers" for the calculation of the total residual value of the assets under the Lease to Vilnius Energy, VST deducted EUR 1.6 million related to "*share of support that was in the property leased from 2002*" from the Baseline Value because "*VŠT did not experience any costs (and respectively did not get income) on the depreciation of part of the assets*".[2077] In addition, Claimants point out that, in the first FTI report, Mr. Harman had clearly agreed with Claimants' interpretation.[2078] According to Claimants, "[i]*t is only later that FTI adopted their current contradictory position as it was more advantageous to them*".[2079]

1741. Third, the Parties disagree as to whether the proceeds of EA trades should count as VE's own funds for the purpose of calculating the Returned Value.[2080]

[2071] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 423.

[2072] **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 30, **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, paras. 425 ff.

[2073] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 406.

[2074] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 404.

[2075] **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 30.

[2076] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 407.

[2077] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 408.

[2078] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 410.

[2079] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 410.

[2080] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 404.

1742. Fourth, the Parties disagree as to the inclusion (Respondents' position) or exclusion (Claimants' position) of the Disputed Assets in the Total Aggregate Value calculation.[2081]

1743. Fifth, the Parties disagree as to whether the alleged "Rubicon premium" paid by VE for overpriced goods and services purchased from Rubicon compagnies should be excluded (Respondents' position) or included (Claimants' position) from the calculation of the Returned Value. Claimants argue that, by rejecting Counterclaim 13 based on Veolia's alleged collusion with Rubicon, "*the Tribunal will also be called to order the deduction of the alleged (and absolutely false) Rubicon premium from the calculation of the* [Total Aggregate Value]".[2082]

1744. With respect to Respondents' allegation that Veolia's internal documents (in particular its draft Internal Audit Report dated 12 April 2017) acknowledged a "gap" between the Baseline and the Returned Values as calculated by Veolia, Claimants have answered that Mr. Husty convincingly "*explained that the purpose of internal budgets and internal audit reports is to identify and assess potential risks for internal purposes only, and not to set out a considered legal position on the satisfaction of Veolia's Lease obligations*." [2083] Similarly, Ms. Hesmondhalgh's oral testimony confirmed that the authors of the internal document took the net book value analysis without consideration for the Lease provisions.[2084]

1.2 Respondents' Position

1745. Respondents contend that Claimants failed to fulfill their obligation to return the value of EUR 116.5 million in leased assets that Veolia received at the beginning and over the course of the Lease.[2085] Respondents insist that this is acknowledged by Veolia itself: "*on 12 April 2017 (i.e., after the return of the Facilities), Veolia's Internal Audit Department acknowledged that Veolia had failed to comply with Article 12(v). This audit*

[2081] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 404.
[2082] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 404.
[2083] **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 33.
[2084] **CRPHB:** Claimants' Reply Post-Hearing Brief, dated 16 December 2023, para. 34.
[2085] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2904, **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1075.

can be presumed to have already taken into account legitimate accounting adjustments (if any) that had taken place during the Lease. Veolia's auditors concluded that the "gap should be paid by [Vilnius Energy] to VŠT."[2086]

1746. Regarding the Baseline Value, Respondents consider that it should include the value of VST's assets funded by the EU, and consequently reject Claimants' deduction of EUR 1.6 million.[2087] Respondents point to the fact that Veolia's position is contradicted by its internal documents.[2088] In its internal calculations Veolia does not deduct the EU subsidies from the Baseline Value.[2089] In any event, according to Respondents, "*there is no basis on which to remove any EU subsidies from the Baseline Value (i.e., from VST's assets in 2002). VST leased assets that VST owned to Veolia. How VST came to own the assets* […] *is irrelevant*."[2090]

1747. Respondents further disagree with Claimants' deduction of EUR 1.7 million from the Returned Value in relation to payments of Lease Fee No. 1. Respondents first point to the fact that Claimants have not substantiated the amount of deduction they seek.[2091] They further refer to the fact that the deduction sought does not appear anywhere in Veolia's most recent internal calculation of the Baseline Value.[2092] According to Respondents, "*the assets returned in the course of the Lease should not be deducted from the Baseline Value but instead added to the Return Value*" and this is exactly what is reflected in Veolia's contemporaneous calculations of the Baseline Value at the end of the Lease.[2093] More generally, Respondents argue that Veolia's reference to Annex 10 in support of its interpretation of the Lease is inapposite, because "*Annex 10 is irrelevant for calculations under Article 12(v)*."[2094]

[2086] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1080.
[2087] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2920.
[2088] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2922.
[2089] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1080.
[2090] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2923.
[2091] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2910.
[2092] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1080.
[2093] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2912.
[2094] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2918.

1748. With respect to the date of return of VE-3, Respondents note that it accounts for a difference of EUR 1.3 million in the Baseline Value depending on the date of return under the Lease.[2095]

1749. Regarding the Returned Value, as stated above, the Parties disagree as to the methodology for valuating the Units. Respondents oppose Claimants' position that the *Units* should be valued at the residual value of Lease Fee No. 4 as per Annex 10 to the Lease.[2096] As seen above, Respondents consider that Annex 10 is irrelevant to calculations under Article 12(v) of the Lease.[2097] According to Respondents, "[t]*he reference to Annex 10 in Article 12(v) is limited and specific. Annex 10 is only referred to where Vilnius Energy returns assets 'throughout the duration' of the Lease. Items 2.5 and 3.4 of Annex 10 provide for cases where Vilnius Energy can return assets during the course of the Lease. The reference to Annex 10, however, is not made in relation to the redelivery of assets at the end of the Lease (i.e., 'thereafter'), which is the situation here, given that the Transferred Units were returned when the Lease Agreement came to its end*."[2098] In consequence, Respondents argue that Article 12(v) calls for a comparison between the residual values of the assets at the beginning of the Lease and the residual values of the assets at the end of the Lease, not any other values that these assets may have in other contexts.[2099] Respondents also point out the absence of any mention of the outstanding balance of Lease Fee No. 4 in the calculation of the Return Value in Veolia's April 2017 Audit Report.[2100] According to Respondents, Veolia's approach to the valuation of Units (*i.e.* at the outstanding balance of Lease Fee No. 4 inflates the Units' value to EUR 16 million, whereas their net-book value is EUR 7.3 million.[2101] Veolia's interpretation admittedly leads to the situation where Veolia would comply with its Total Aggregate Value obligation in every case provided

[2095] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1076.

[2096] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 2934-2937.

[2097] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 2918, see also para. 2939.

[2098] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2939.

[2099] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2940.

[2100] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 2934-2938, **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1080.

[2101] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1078.

"*only that it returned a single unit (whatever its value)*."[2102] According to Respondents, following Veolia's position would "*turn Article 12(v) into empty text*."[2103]

1750. Regarding the second point of disagreement between the Parties on the calculation of the Returned Value, Respondents confirm that the Parties agree that it should exclude EU subsidies.[2104] Respondents value these subsidies at EUR 0.535 million, whereas Claimants' value them at EUR 0.42 million.[2105]

1751. Regarding the third disagreement of the Parties regarding the inclusion or not of investments funded by EA proceeds in the Returned Value, Respondents consider that they should be excluded, because EAs are in their opinion "*a type of subsidy*"[2106]. Respondents note that the residual value of the investments funded by consumers or through emission allowances is EUR 5.8 million.[2107]

1752. Regarding the fourth point of disagreement between the Parties about the calculation of the Returned Value (*i.e*. the Disputed Assets), Respondents request the Arbitral Tribunal to award them to Respondents at the outstanding balance of Lease Fee No. 4 (Counterclaim 8). Respondents argue that, contrary to Claimants' allegations, no inconsistency arises because "*different obligations under the Lease Agreement expressly require using different values*" [2108]. While Article 12(v) calls for a comparison between the residual values of the assets transferred to and returned from the Lease, "*Respondents consistently indicate that they should receive both the Disputed Assets and the Transferred Units at the outstanding balance of Lease Fee No. 4*".[2109] This is so, according to Respondents, because "[t]*he Disputed Assets are to be returned in exchange for the outstanding balance of Lease Fee No. 4 for reasons that benefit both*

[2102] **RRPHB:** Respondents' Reply Post-Hearing Brief, dated 16 December 2022, para. 299.

[2103] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 2943-2948.

[2104] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1076, **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, paras. 2924 ff.

[2105] **RPHB:** Respondents' Post-Hearing Brief, dated 18 October 2022, para. 1076, **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2926.

[2106] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2927.

[2107] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2927.

[2108] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2950.

[2109] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2950.

sides: (i) VST pays no cash for any investments under the Lease; and (ii) it allows Vilnius Energy not to have any Lease Fee outstanding at the end of the Lease."[2110]

1753. Finally, with regard to the Parties' fifth point of disagreement on the calculation of the Returned Value, Respondents' position is that it should exclude the Rubicon Premium valued by FTI at EUR 17.6 million. Respondents contend that "[n]*ot removing the inflated component of the assets' residual value would defeat the purpose of Article 12(v) and would enable Veolia and Rubicon to benefit from their own collusive dealings*."[2111]

2. The Arbitral Tribunal's Analysis and Decision

1754. The Parties both refer to Article 12(v) of the Lease, which reads as follows:[2112]

> *"ARTICLE 12. COMMITMENTS BY THE LESSEE, THE FUND*
>
> *The Lessee undertakes to:*
>
> […]
>
> *(v) manage and maintain the Facilities and the Units strictly in accordance with the applicable rules and other standards and make improvements to them so as to keep them in appropriate condition for heat and hot water supply, as well as for electric energy and heat production. Throughout the duration of the Term (as per Annex 10) and thereafter the Lessee will be required to re-deliver to the Lessor the Facilities and the Units in the condition suitable to ensure reliable heat and hot water supply and power and heat production at the sum total of the aggregate residual value of such redelivered Facilities being no less than their value at the date of Closing;*"

1755. Article 12(v) sets VE's obligation to maintain the Facilities and return them to VST at a value equal or above the value of the Facilities at the beginning of the Lease. The Parties agree on this interpretation and the language in Article 12(v) is clear.

[2110] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2950.

[2111] **Rejoinder:** Respondents' Rejoinder and Reply on the Counterclaim, dated 14 October 2019, para. 2952.

[2112] **C-001:** Lease Agreement between SP AB Vilniaus Šilumos Tinklai, Vilnius City Municipality, UAB Vilniaus Energija, and Dalkia S.A.S., dated 01 February 2002, Article 12(v) (emphasis added).

1756. VE requests the Arbitral Tribunal to declare that it met this obligation. In response, VST alleges that VE has not fulfilled its Total Aggregate Value obligation and raises Counterclaim 12 claiming compensation for the alleged shortfall in assets returned.

1757. As reflected in the Parties' positions summarized above, their disagreement relates to their respective calculations of the value of the Facilities when they were taken over by VE at the beginning of the Lease ("Baseline Value") and the value of the Facilities when they were returned by VE to VST at the end of the Lease ("Returned Value"). Some of their disagreements related to the Returned Value have already been decided by the Arbitral Tribunal in relation to other Claims and Counterclaims. The Arbitral Tribunal therefore starts its analysis with these issues.

3. Rubicon premium

1758. Dr. Roques bases his calculations on a Baseline Value of EUR 116.5 million,[2113] and a Returned value of EUR 89.7 million.[2114] Dr. Roques excludes EUR 17.6 million from the Returned Value he considers, to account for "*the residual value of the investment premiums*".[2115]

1759. Accounting for the full dismissal of Counterclaim 13, the "Rubicon premium residual value" must be added to Dr. Roques' Returned Value, which leads to a Returned Value of EUR 107.3 million (EUR 89.7 million plus EUR 17.6 million).

1760. This leaves a shortfall/Counterclaim 12 of EUR 9.2 million (EUR 116.5 million minus EUR 107.3 million) between the Baseline Value considered by Dr. Roques and the Returned Value considered by Dr. Roques reduced by his estimation of the value of the Rubicon premium.

[2113] **REX-003 :** Second Addendum to the Second FTI Expert Report, dated 19 May 2023, para. 7.44.
[2114] **REX-003 :** Second Addendum to the Second FTI Expert Report, dated 19 May 2023, para. 7.45.
[2115] **REX-003 :** Second Addendum to the Second FTI Expert Report, dated 19 May 2023, para. 7.42.

4. Disputed Assets

1761. Dr. Roques states that "[i]*f the Tribunal finds that the Disputed Assets are Transferred Assets, the value of the Total Aggregate Value counterclaim will decrease by the total residual value of the Disputed Assets after adjusting for the premiums paid on the hot water meters* […]"[2116]

1762. The Arbitral Tribunal has decided that, except for the Hot Water Meters, the Disputed Assets were "cashed transferred assets", to be paid for by VST outside the Lease transfer mechanism. Conversely, the Hot Water Meters are not detachable and therefore fall within the scope of Article 16.6 of the Lease and the transfer mechanism of Annex 10.

1763. In consequence, following Respondents' expert' calculation, "the total residual value" of the Hot Water Meters should be deducted from Counterclaim 12 (as already reduced by the deduction of the Rubicon premium from the Returned Value).

1764. Since Respondents' allegation of overpricing has been rejected by the Arbitral Tribunal under Counterclaim 13, the Arbitral Tribunal will consider the residual value of the Hot Water Meters before adjustment for the alleged premium paid on it. Dr. Hesmondhalgh, who does not account for the Rubicon premium, considers the net book value of the Hot Water Meters at EUR 10.3 million. She finds the net book value of the Hot Waters Meters in the Sales-Purchase Agreement of 29 March 2017 whereby VST agreed to purchase the Hot Water Meters.[2117] The net book value is also the measure according to which Dr. Roques was instructed to assess the Total Aggregate Value.[2118]

1765. Reducing Counterclaim 12 as already decreased to EUR 9.2 million (EUR 116.5 million minus EUR 107.3 million corresponding to the alleged Rubicon premium) by EUR 10.3

[2116] **REX-003 :** Second Addendum to the Second FTI Expert Report, dated 19 May 2023, para. 7.48.

[2117] **CEX-010:** Expert Report of Dr. Serena Hesmondhalgh of The Brattle Group, dated 29 May 2020, Tables VII – Total Aggregate Value, Worksheet "Table VII.4".

[2118] **FTI Slides:** Hearing Presentation of FTI (Dr. Fabien Roques), dated 08 June 2022, slide 24, **REX-003:** Second FTI Expert Report, dated 13 October 2019, para. 7.40.

million leaves no Counterclaim 12, *i.e.* no gap in the value received one the one hand, and re-delivered on the other hand, by Claimants.

5. Conclusion

1766. By application of its previous decisions on Respondents' figures, the Arbitral Tribunal finds that there is no shortfall between the "*the sum total of the aggregate residual value of* [the] *redelivered Facilities*" and "*their value at the date of Closing*".

1767. In consequence, the Arbitral Tribunal grants Claimants' Claim 6 for a declaration "*that the value of the assets Veolia returned to VŠT satisfies the obligation to return assets equal in value to the Facilities it received at the beginning of the Lease term.*"[2119]

1768. For the sake of clarity, the Arbitral Tribunal does not adopt all of Respondents' figures, but acknowledges that, even on their own *quantum* case, Respondents' Counterclaim 12 fails in light of the Arbitral Tribunal's decisions on Claim 1 and Counterclaim 8 and Counterclaim 13. This alone suffices to dismiss Counterclaim 12.

1769. The Arbitral Tribunal nevertheless notes that Dr. Roques also removed the residual value of "EA-financed investments" from the Returned Value. Had the Arbitral Tribunal had to examine further elements of Counterclaim 12, it would have necessarily found that such investments are in fact to be counted in the Returned Value, in line with the Arbitral Tribunal's findings with respect to the same issue under Counterclaim 5 above. This would have increased the Returned Value even further.

[2119] **CPHB:** Claimants' Post-Hearing Brief, dated 18 October 2022, para. 1335.

O. ALLOCATION OF COSTS AND RESPONDENTS' APPLICATION FOR WASTED COSTS

1. Respondents' application for wasted costs

1.1 The Parties' Positions

1.1.1 Respondents' Position

1770. On 3 November 2021, Respondents submitted a wasted costs application for the compensation of their wasted costs due to the sudden termination of Sidley Austin's engagement, as Claimants' counsel in the present arbitration, on the eve of the hearing that had been scheduled to take place in August-September 2021.[2120]

1771. With regard to Respondent's application, the Tribunal informed the Parties on 13 December 2021, that Respondents are entitled to the reimbursement of their wasted costs which are to be qualified as damages, "*because they are costs which would not have been incurred and wasted but for the cancellation of the hearing of August-September 2021*".[2121]

1772. The Tribunal deferred a decision to a later stage regarding other categories of wasted costs claimed by Respondents:[2122]

> "*except for Respondents' application to be immediately reimbursed the cancellation fees and other costs charged by third party service providers, the rest of Respondents' application for wasted costs is not ripe for decision at this stage of the proceedings*."

1773. Upon the Tribunal's guidance given in its letter dated 13 December 2021,[2123] Respondents submitted a revised application for the following categories of wasted costs:[2124]

[2120] Respondents' Application for Wasted Costs, dated 3 November 2021.

[2121] AT Letter to Parties re wasted costs, dated 13 December 2021, para. 6 (emphasis in original).

[2122] AT Letter to Parties re wasted costs, dated 13 December 2021, para. 7.

[2123] See AT Letter to Parties re wasted costs, dated 13 December 2021, paras. 7-12.

[2124] **Wasted Costs Application:** Respondents' Wasted Costs Application, dated 31 January 2023, p. 2.

"(i) Costs for repetitive hearing preparation of the work performed by counsel and experts following the postponement of the August/September 2021 hearing;

(ii) Difference between the costs of the in-person April/May 2022 hearing in London and the costs Respondents would have sustained had the virtual hearing of August/September 2021 taken place;

(iii) Costs for the preparation and delivery of the new in-person opening statements which would not have been incurred had the virtual hearing of August/September 2021 not been postponed;

(iv) Costs for the Relativity document management database for the services rendered for the additional time between the 2021 and 2022 hearings;

(v) Costs arising out of the preparation of the present application for wasted costs; and

(vi) VAT at 21% of the above amounts applicable under the laws of the Republic of Lithuania."

1774. Respondents further requested that 6% interest should be paid by Claimants from the date of the Tribunal's decision on the updated wasted costs application until full payment of the awarded amount. Respondents maintain that under Article 6.210(2) of the Lithuanian Civil Code, the 6% interest rate was correctly applied.[2125]

1775. Respondents submit that the above categories of costs fall under the definition of "*costs which would not have been incurred and wasted but for the cancellation of the hearing of August-September 2021*", as Respondents' application refers to the costs that they incurred due to the postponement of the hearing of August-September 2021 and the costs of the repeated activities which would not have occurred if the hearing was not postponed.[2126] Respondents argue that the unexpected costs that they incurred due the rescheduling of the hearing should be reimbursed by Claimants jointly and severally

[2125] **Wasted Costs Application:** Respondents' Wasted Costs Application, dated 31 January 2023, p. 6.
[2126] **Wasted Costs Application:** Respondents' Wasted Costs Application, dated 31 January 2023, p. 3.

together with the 6% interest on the amounts awarded.[2127] Respondents presented their wasted costs as follows:[2128]

Fees for repetitive hearing preparation

GBS Disputes	EUR 587,275.00
TGS Baltic	EUR 138,840.00
Sweco	EUR 60,725.00
FTI	EUR 22,587.84
Interpreter fees for the repetition of the preparation of the hearing (meetings with witnesses)	EUR 12,733.96
TOTAL	**EUR 822,161.80**

In-person hearing costs related to the hearing taking place in London in April 2022 (rather than a virtual hearing in August-September 2021)

Accommodation in London (counsel, experts, and client)	EUR 183,299.40
Transport to, from and in London (GBS Disputes)	EUR 6,216.26
Transport to, from and in London (TGS Baltic)	EUR 11,103.65
Transport to, from and in London (Sweco)	EUR 2,115.00
Transport to, from and in London (Dr. Smaliukas)	EUR 688.21
50% of costs for meals in London (GBS Disputes)	EUR 5,160.85
50% of costs for meals in London (TGS Baltic)	EUR 8,454.29
IDRC in-person facilities[21]	EUR 31,853.52
Interpreter costs: travel cost and time, and subsistence allowance, for hearing (excluding fees for interpreter services during hearing)	EUR 7,694.05
50% of printing costs (GBS Disputes)	EUR 2,748.35
50% of printing costs (TGS Baltic)	EUR 2,383.42
Courier services (GBS Disputes)	EUR 389.55
TOTAL	**EUR 262,106.55**

[2127] **Wasted Costs Application:** Respondents' Wasted Costs Application, dated 31 January 2023, p. 6.

[2128] **Wasted Costs Application:** Respondents' Wasted Costs Application, dated 31 January 2023, Annex A.

Fees for preparing and delivering in-person opening statements during the in-person hearing of April 2022

GBS Disputes	EUR 67,125.00
TGS Baltic	EUR 15,000.00
TOTAL	**EUR 82,125.00**

Services retained for additional time

Relativity software platform from October 2021 until May 2022	EUR 10,130.00
TOTAL	**EUR 10,130.00**

Fees for preparation of the present application, including calculation of repeated work

GBS Disputes	EUR 29,400.00
TGS Baltic	EUR 3,800.00
FTI/CompassLexecon	EUR 2,571.75
Sweco	EUR 700.00
TOTAL	**EUR 36,471.75**

The Municipality's VAT liability in respect to wasted fees and disbursements

VAT on the Municipality's share of the above amounts (at 21%, as applicable under the laws of the Republic of Lithuania)	EUR 140,100.93
TOTAL	**EUR 140,100.93**

TOTAL CLAIMED BY THE RESPONDENTS (including VAT):	**EUR 1,353,096.03**

1.1.2 Claimants' Position

1776. In response to Respondents' revised application for wasted costs, Claimants maintained their position that they are not responsible for the postponement of the hearing, as they did not commit any wrongdoing, rather Claimants themselves also suffered the consequences of the unilateral withdrawal of their former counsel.[2129]

[2129] **Claimants' Comments on Wasted Costs Application:** Cs' Response to Rs' Revised Wasted Costs Application, dated 24 February 2023, p. 1.

Furthermore, Claimants maintained that no partial award on wasted costs should be rendered by the Arbitral Tribunal.[2130]

1777. Without prejudice to their primary position, Claimants stated that they are prepared to cover the "*costs for retaining the Relativity document management database from August-September 2021 until the April-May hearing*". Furthermore, Veolia is prepared to cover the "*costs incurred to prepare Respondents' revised application* […] *which is not misplaced and which can be assessed to be about 40 % of the total amount claimed under this category*".[2131] Claimants argue that Respondents should bear the costs of their initial application given that it was premature and highly inflated.[2132]

1778. With regard to the first category of costs claimed by Respondents, *i.e.,* reimbursement of repetitive hearing preparation fees, Claimants argue that Respondents did not discharge their burden of proof, as they did not break down the claimed fees and they did not indicate how many hours of counsel and expert work the claimed amount includes, and Claimants have no means of verifying if the alleged amount has been prudently incurred. Furthermore, Claimants contend that it is untenable that two-thirds of the work done in preparation of the August-September 2021 must be repeated. Rather, Claimants submit that it is more plausible that the second preparation required less time as a significant part of the work has already been done before.[2133]

1779. Concerning the counsel fees incurred for repeated organization of the hearing, Claimants provide that a significant part of the time devoted to organizational matters should not be considered as wasted costs as the August-September 2021 hearing had not been fully organized, also some organizational work which had been done for the postponed hearing also served for the April-May 2022 hearing, furthermore, many of the time-consuming tasks related to the organization of the hearing are attributable to

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[2130] **Claimants' Comments on Wasted Costs Application:** Cs' Response to Rs' Revised Wasted Costs Application, dated 24 February 2023, p. 2.

[2131] **Claimants' Comments on Wasted Costs Application:** Cs' Response to Rs' Revised Wasted Costs Application, dated 24 February 2023, p. 2.

[2132] **Claimants' Comments on Wasted Costs Application:** Cs' Response to Rs' Revised Wasted Costs Application, dated 24 February 2023, p. 2.

[2133] **Claimants' Comments on Wasted Costs Application:** Cs' Response to Rs' Revised Wasted Costs Application, dated 24 February 2023, p. 2.

Respondents and, lastly, Claimants should not bear the costs of the new in-person format as the Arbitral Tribunal indicated that this was their preference, which was not contested by Respondents.[2134]

1780. Finally, Claimants note that Respondents have not provided any evidence of interpreter fees. The fact that Respondents engaged Lithuanian interpreters shows the unreasonableness of Respondents' claims and expenses.[2135] According to Claimants, interpreter fees cannot be considered as wasted as they have not been incurred, because of the cancellation of the August-September 2021 hearing. For the above reasons, Claimants contend that the Arbitral Tribunal should reject, or at least substantially reduce, Respondents' request for reimbursement of the repetitive hearing preparation fees.[2136]

1781. As for the second category of costs, *i.e.,* "*higher in-person hearing costs*", Claimants argue that it should not be responsible for the decision to hold in-person hearings instead of a remote hearing, as Respondents have not demonstrated that the decision was caused by Claimants. According to Claimants, the Parties had always expressed their preference to hold in-person hearings. The fact that the Parties agreed to hold virtual hearings in August-September 2021 was because there was no other option due to the pandemic. After the withdrawal of Claimants' former counsel, the Arbitral Tribunal indicated to the Parties a preference to hold in-person hearings. Therefore, it was under the Tribunal's direction that the Parties organized in-person hearings in April-May 2022. Furthermore, Veolia points to the fact that Respondents did not argue against in-person hearings to save costs. By doing so, Respondents have waived their claim for the difference between the costs of a virtual hearing and an in-person hearing.[2137]

[2134] **Claimants' Comments on Wasted Costs Application:** Cs' Response to Rs' Revised Wasted Costs Application, dated 24 February 2023, p. 3.

[2135] **Claimants' Comments on Wasted Costs Application:** Cs' Response to Rs' Revised Wasted Costs Application, dated 24 February 2023, p. 3.

[2136] **Claimants' Comments on Wasted Costs Application:** Cs' Response to Rs' Revised Wasted Costs Application, dated 24 February 2023, p. 3 to 4.

[2137] **Claimants' Comments on Wasted Costs Application:** Cs' Response to Rs' Revised Wasted Costs Application, dated 24 February 2023, p. 4.

1782. Regarding the third category of costs*, i.e.,* costs of in-person opening statements, Claimants argue that the in-person opening statements were requested by Respondents only a few weeks before the start of the hearing. Claimants objected to this request, as it was burdensome and resulted in unnecessary costs. Thus, Claimants argue that the in-person opening statements were not caused by the re-scheduling of the hearing but by Respondents' request, Claimants cannot, thus, be liable for the ensuing costs.[2138] In any event, in Claimants' submission, the in-person opening statements delivered by Respondents' counsel were "*virtually identical*" to the recorded opening statements.[2139]

1783. Lastly, with regard to Respondents' request to reimburse a VAT of 21% on all amounts they claim as wasted in relation to services provided, Claimants argue that under the provisions of the Lithuanian Law on VAT both Respondents are entitled to deduct and obtain refund of VAT amounts when the expenditure is directly related to their VAT-taxable economic activities. According to Claimants, this is possible both in case of services provided locally and by foreign entities.[2140]

1784. For the above reasons, Claimants request the Arbitral Tribunal to reject, or alternatively, to reduce Respondents' request for reimbursement of the amounts set out at Annex A of Respondents' revised application for wasted costs.[2141]

1.2 The Arbitral Tribunal's Analysis and Decision

1785. On the matter of wasted costs, the Arbitral Tribunal notes that both sides have raised a number of arguments about wasted costs following the cancellation of the August-September 2021 evidentiary hearing.

[2138] **Claimants' Comments on Wasted Costs Application:** Cs' Response to Rs' Revised Wasted Costs Application, dated 24 February 2023, p. 4 to 5.

[2139] **Claimants' Comments on Wasted Costs Application:** Cs' Response to Rs' Revised Wasted Costs Application, dated 24 February 2023, p. 5.

[2140] **Claimants' Comments on Wasted Costs Application:** Cs' Response to Rs' Revised Wasted Costs Application, dated 24 February 2023, p. 5.

[2141] **Claimants' Comments on Wasted Costs Application:** Cs' Response to Rs' Revised Wasted Costs Application, dated 24 February 2023, p. 6.

1786. Although Claimants also point out that the cancellation caused them prejudice, it is clear that Respondents suffered from the event without any responsibility on their part. Wasted costs would not have been incurred by Respondents but for the cancellation of the August-September 2021 hearing. Consequently, Respondents are entitled to the financial damages caused by the cancellation, irrespective of whether Claimants were at fault or not.

1787. Respondents submitted a Statement of Wasted Costs on 31 January 2023 which provided that the total amount claimed as wasted costs, including VAT, is EUR 1,353,096.03.[2142]

1788. Under the principle that those costs are to be reimbursed by Claimants "*which would not have been incurred and wasted but for the cancellation of the hearing of August – September 2021*",[2143] Respondents have listed in their Wasted Costs Application, dated 31 January 2023, six categories of wasted costs and developed them in some detail.

1789. On 24 February 2023, Claimants provided comments on four of the six categories in Respondents' Wasted Costs Application. Claimants criticize the first three categories, *i.e.*, (1) repetitive hearing preparation fees, (2) higher in-person hearing costs and (3) costs related to the in-person opening statements, as well as category (6), *i.e.,* VAT liability.

1790. The Arbitral Tribunal has examined these wasted costs categories, as advanced by Respondents, and observes and decides the following.

1.2.1 Category (1): Fees for repetitive hearing preparation

1791. The first category of wasted costs requested by Respondents is criticized by Claimants as unreasonable and unproven.[2144] In light of all circumstances, including the fact that

[2142] **Wasted Costs Application:** Respondents' Wasted Costs Application, dated 31 January 2023, Annex A.

[2143] **Wasted Costs Application:** Respondents' Wasted Costs Application, dated 31 January 2023, Annex A, citing AT Letter to Parties re wasted costs, dated 13 December 2021, para. 6 (emphasis in original).

[2144] **Claimants' Comments on Wasted Costs Application:** Cs' Response to Rs' Revised Wasted Costs Application, dated 24 February 2023, pp. 2-3.

Respondents were not by any means at fault for the cancellation of the hearing, the Arbitral Tribunal is satisfied that the amount of EUR 822,161.80 appears reasonable and is hereby granted.

1.2.2 Category (2): In-person hearing costs related to the hearing taking place in London in April 2022

1792. Claimants consider that Respondents waived their claim for the difference between the costs of a virtual hearing and an in-person hearing, because they did not argue against an in-person hearing to save costs. Therefore, Respondents cannot qualify the difference as wasted costs.[2145]

1793. While it is correct that all Parties and the Arbitral Tribunal had a clear preference for a rescheduled in-person hearing, the Arbitral Tribunal considers that the higher costs would not have been incurred if the August-September 2021 remote hearing had not been abruptly cancelled. In the opinion of the Arbitral Tribunal, this aspect has more weight than the subsequent agreement by Respondents to an in-person hearing. Consequently, category (2) of the wasted costs claim is admitted.

1.2.3 Category (3): Fees for preparing and delivering in-person opening statements during the in-person hearing of April 2022

1794. While the recorded opening statements did exist and would have been used for the in-person hearing, it was Respondents who, against Claimants objection, requested in-person opening statements. Therefore, the Arbitral Tribunal agrees with Claimants that the "*in-person opening statements were not* caused *by the re-scheduling of the hearing but by the Respondents' specific request*".[2146] Consequently, this fact alone is sufficient for the Arbitral Tribunal to decide that category (3) of wasted costs is rejected.

1.2.4 Category (6): The Municipality's VAT liability in respect to wasted fees and disbursements

[2145] **Claimants' Comments on Wasted Costs Application:** Cs' Response to Rs' Revised Wasted Costs Application, dated 24 February 2023, p. 4.

[2146] **Claimants' Comments on Wasted Costs Application:** Cs' Response to Rs' Revised Wasted Costs Application, dated 24 February 2023, p. 5.

1795. According to Respondents, they are both obliged under Lithuanian law to pay VAT at the standard Lithuanian rate of 21% on services supplied, including the services to which wasted costs relate. Further, Respondents argue that the Municipality cannot, under Lithuanian law, recover any VAT if such VAT was paid in relation to the services the Municipality was provided, because Lithuanian law only allows for VAT deduction on services if such services are intended for use in other taxable economic activities. As the Municipality does not carry out taxable economic activities, it cannot deduct VAT.[2147]

1796. In response, Claimants have pointed out that the Municipality is registered as a VAT payer in Lithuania.[2148] Claimants refer to the Municipality carrying out VAT-taxable activities as part of their *juri gestionii* activities.[2149] Consequently, the Arbitral Tribunal is not persuaded by Respondents' argument. Rather, it considers that the Municipality, as a registered VAT payer, would have a right to recover VAT paid on *juri gestionii* activities, which are VAT taxable. Therefore, the claim regarding the VAT liability in respect to wasted fees and disbursements is denied.

1797. Finally, categories (4), costs for the Relativity document management database, and (5), costs incurred for the preparation of the Wasted Costs Application, including calculation of repeated work, are partially challenged by Claimants. Indeed, the Arbitral Tribunal notes Claimants willingness to cover categories (4) and (5) of wasted costs, with the limitation that for category (5), Claimants submit they are willing to cover the costs "*only to the extent that it concerns costs incurred for preparing the part of the revised applications which is not misplaced and which can be assessed to be about 40% of the total amount claimed under this category.*"[2150] The Arbitral Tribunal is satisfied that the costs incurred by Respondents for categories (4) and (5) are justified and reasonable and these costs are thus granted.

[2147] **Wasted Costs Application:** Respondents' Wasted Costs Application, dated 31 January 2023, p. 5.

[2148] **CC-13:** Vilnius Municipality taxpayers website page.

[2149] **Claimants' Comments on Wasted Costs Application:** Cs' Response to Rs' Revised Wasted Costs Application, dated 24 February 2023, p. 5.

[2150] **Claimants' Comments on Wasted Costs Application:** Cs' Response to Rs' Revised Wasted Costs Application, dated 24 February 2023, p. 2.

1798. In conclusion, Respondent's claims for wasted costs are granted, except for categories (3) and (6), fees incurred for preparing and delivering in-person opening statements during the in-person hearing of April 2022 (EUR 82,125) and the Municipality's VAT liability in respect of wasted fees and disbursements, respectively (EUR 140,100.93).

1799. The total amount awarded to Respondents for wasted costs is EUR 1,130,870.1.

1800. Further, as Respondents point out, "[t]*o avoid double recovery, any amounts actually awarded to the Respondents as wasted costs should be deducted from the amounts claimed here*."[2151] Accordingly, the amount of EUR 1,130,870.1 shall be deducted from Respondents' total costs,[2152] to the extent awarded in the Final Award.

2. The allocation of costs

2.1 The Parties' Positions

2.1.1 Claimants' Position

a. *Claimants' costs*

1801. Claimants have presented their costs as follows:[2153]

[2151] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 59.
[2152] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 5.
[2153] **CSOC:** Claimants' Statement of Costs, dated 31 January 2023, para. 5.

Veolia's Total Costs and Expenses			
	Total amount (USD)	**Total amount (EUR)**	**Total amount (GBP)**
Legal fees	8,056,245.69	6,276,172.85	
Experts' and Witnesses' fees	195,289.80	4,172,290.61	2,868.75
Expenses	450,891.94	512,444.02	113,630.47
SCC Advance on Costs paid by Veolia (to be updated following the SCC's decision on Costs of the Arbitration)		774,300.00	
Total	**8,702,427.43**	**11,735,207.48**	**116,499.22**

b. *Allocation of costs*

1802. Claimants argue that the Arbitral Tribunal enjoys a wide discretion on the issue of allocation of costs as confirmed by Articles 43(5), 44 of the SCC Rules and Article 48(4) of the Lithuanian Law on Commercial Arbitration. [2154]

1803. Claimants maintain that in the event that Claimants succeed on all or a majority of their Claims and the Tribunal dismisses all or a majority of Respondents' Counterclaim, it is appropriate for the Tribunal to award Claimants all of their costs in line with the "*costs follow the event*" principle.[2155] According to Claimants, when assessing the relative success of the Parties, the Arbitral Tribunal must take into account "*Respondents' tactic to inflate, artificially, the quantum of their Counterclaims*." [2156] Claimants contend that as Respondents secured third-party funding "*in exchange for proceeds of any winnings arising from their Counterclaims, the Respondents had an economic incentive to inflate their Counterclaim as this would maximize the returns for the funder*."[2157]

[2154] **CSOC:** Claimants' Statement of Costs, dated 31 January 2023, para. 8.
[2155] **CSOC:** Claimants' Statement of Costs, dated 31 January 2023, para. 10.
[2156] **CSOC:** Claimants' Statement of Costs, dated 31 January 2023, para. 11.
[2157] **CSOC:** Claimants' Statement of Costs, dated 31 January 2023, para. 11.

1804. Furthermore, Claimants argue that due to Respondents' refusal to account for the significant overlap between the Counterclaims, "*the Tribunal should calculate the percentages of the Parties' success and failures considering the full nominal amount advanced as a basis*".[2158]

1805. In addition to the above, Claimants argue that the Arbitral Tribunal should consider the Parties' respective behaviour throughout this Arbitration.[2159] Accordingly, Claimants request that the Arbitral Tribunal awards all of Claimants' costs given Respondents' disruptive and abusive behaviour throughout this Arbitration.[2160] Claimants argue that "*Respondents have acted in bad faith, manipulating and disrupting the proceedings at every available opportunity*", including, among others, refusal to follow the agreed procedure to jointly appoint an independent expert to assess the Complete State of the Facilities and refusal to accept GOPA's findings.[2161]

1806. Among Respondents' bad faith and obstructive behaviour, Claimants further point to Respondents' application for "*further instructions*" and "*reconsideration*" of the Arbitral Tribunal's decision on document production, which "*wasted Claimants' and the Tribunal's time, generating unnecessary expenses*".[2162] Furthermore, Claimants note that the Tribunal rejected Respondents' request to exclude ARFY's expert report dated 30 May 2020 on the basis of conflict of interest.[2163] In addition, the Arbitral Tribunal needed to direct Respondents to abide by their confidentiality obligations.[2164]

1807. Claimants further argue that they must be reimbursed for costs in relation to Respondents' repeated disruptions, including the fact that Respondents disregarded GOPA's findings on Complete State and waived in their post-hearing brief their counterclaim on Complete State.[2165] Moreover, *inter alia* "*Respondents have raised illegality as their main defence to their contractual breaches in the absence of any viable*

[2158] **CSOC:** Claimants' Statement of Costs, dated 31 January 2023, para. 12.
[2159] **CSOC:** Claimants' Statement of Costs, dated 31 January 2023, paras. 13-14.
[2160] **CSOC:** Claimants' Statement of Costs, dated 31 January 2023, para. 15.
[2161] **CSOC:** Claimants' Statement of Costs, dated 31 January 2023, para. 16.
[2162] **CSOC:** Claimants' Statement of Costs, dated 31 January 2023, paras. 18-19.
[2163] **CSOC:** Claimants' Statement of Costs, dated 31 January 2023, para. 20.
[2164] **CSOC:** Claimants' Statement of Costs, dated 31 January 2023, para. 21.
[2165] **CSOC:** Claimants' Statement of Costs, dated 31 January 2023, para. 23(a).

commercial defence" [2166] and disrupted the procedural timetable multiple times as well as the hearing schedule.[2167] Furthermore, Claimants contend that Respondents must bear the costs of their belated waiver of Counterclaims and defences to Claimants' claims.[2168] Finally, Claimants note that "*Respondents repeatedly adopted a contentious behaviour, systematically refusing to reach simple procedural agreements and seeking the Tribunal's assistance on matters that would normally be resolved between Counsel*".[2169]

1808. With regard to Respondents' VAT claim related to their wasted costs application, Claimants argue that Respondents are entitled to seek reimbursement of VAT sums under Lithuanian tax law, therefore they "*would be seeking double recovery of those amounts*".[2170] Claimants also highlight that they had been reimbursed their VAT costs through their tax filings and are not claiming any VAT amounts, arguing that "*it is only logical that the same would be true for the Respondents*."[2171] Consequently, Claimants claim that the Arbitral Tribunal should dismiss Respondents' claim for reimbursement of VAT amounts.[2172]

1809. Claimants lastly address Respondents' intention to seek the recovery of their third-party funding costs. Claimants argue that as a matter of principle, they cannot be liable for Respondents' third-party funding costs for three main reasons. First, Respondents' need for funding is due to their own conduct, as it was their decision to submit "*a myriad of unsubstantiated and meritless Counterclaims, quantification of which was highly inflated*."[2173] Second, Veolia handed back the Facilities to VST in Complete State. Third, Respondents did not act transparently, as Claimants only became aware of the funding terms because the agreement became publicly available due to the investigations of

[2166] **CSOC:** Claimants' Statement of Costs, dated 31 January 2023, para. 23(b).
[2167] **CSOC:** Claimants' Statement of Costs, dated 31 January 2023, para. 23.
[2168] **CSOC:** Claimants' Statement of Costs, dated 31 January 2023, para. 24.
[2169] **CSOC:** Claimants' Statement of Costs, dated 31 January 2023, para. 26, see also paras. 27-29.
[2170] **CSOC:** Claimants' Statement of Costs, dated 31 January 2023, para. 31.
[2171] **CSOC:** Claimants' Statement of Costs, dated 31 January 2023, para. 33.
[2172] **CSOC:** Claimants' Statement of Costs, dated 31 January 2023, paras. 30-34.
[2173] **CSOC:** Claimants' Statement of Costs, dated 31 January 2023, para. 38.

the Lithuanian authorities.[2174] For these reasons, Claimants claim that the Arbitral Tribunal should reject Respondents' request to recover third-party funding costs.[2175]

1810. For the reasons stated above, Claimants request the Tribunal to order Respondents to pay Claimants the total costs and expenses identified in its submission: [2176]

> *"For the reasons stated above, the Arbitral Tribunal is requested to order the Respondents to pay* in solidum *to Veolia the Total Costs and Expenses identified in this submission, which amount to* ***USD 8,702,427.43, EUR 11,735,207.48*** *(including SCC Advance on Costs paid by Veolia) and* ***GBP 116,499.22,*** *plus post-award interest at the default interest rate equal to 8% per year plus the European Central Bank refinancing rate from the date of the Award through the date of full and effective payment of the amounts described herein."*

c. *Comments on Respondents' costs*

1811. Claimants' comments on Respondents' submission on costs relate to Mayer Brown's fees and Respondents' request to recover third-party funding costs.[2177]

1812. Claimants argue that they are entitled to recover the totality of the legal fees incurred, as they are "*reasonable, comparable to those claimed by the Respondents, and compatible with the practice in similar cases of this complexity and magnitude*".[2178] Claimants further contend that the high costs of these proceedings are due to Respondents' counterclaims and procedural disruptions, and Claimants should not be penalized for incurring legal fees to defend themselves from those counterclaims.[2179]

1813. Claimants confirm that the claimed amounts have been paid to Sidley Austin and that there will be no reimbursement or repayment of any of those amounts and therefore

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[2174] **CSOC:** Claimants' Statement of Costs, dated 31 January 2023, para. 38.

[2175] **CSOC:** Claimants' Statement of Costs, dated 31 January 2023, para. 39.

[2176] **CSOC:** Claimants' Statement of Costs, dated 31 January 2023, para. 40.

[2177] **Claimants' Comments on RSOC:** Claimants' Comments on Respondents' Costs Submission, dated 24 February 2023, para. 1.

[2178] **Claimants' Comments on RSOC:** Claimants' Comments on Respondents' Costs Submission, dated 24 February 2023, para. 2.

[2179] **Claimants' Comments on RSOC:** Claimants' Comments on Respondents' Costs Submission, dated 24 February 2023, para. 3.

Claimants' claims could not lead to double-recovery.[2180] Claimants further assert that the fees of Mayer Brown are lower than Sidley Austin's fees would have been if they would not have withdrawn from the representation of Claimants. Even though Claimants incurred additional costs due to the change of counsel, Claimants would have incurred even greater fees had Sidley Austin not withdrawn. Thus, Claimants did not incur higher fees as a result of the change in counsel, rather the result was a reduction of costs.[2181]

1814. According to Claimants, Mayer Brown managed the case efficiently, particularly in light of the complexity of the case.[2182] Furthermore, Mayer Brown benefitted from Sidley Austin's hearing preparation, thereby avoiding repeated work. Therefore, there is no reason for the Arbitral Tribunal to reject Claimants' claim for reimbursement of their legal and expert fees.[2183]

1815. Should the Arbitral Tribunal award costs to Respondents, Claimants maintain that Respondents are not entitled to third-party funding costs, because Respondents' request is unreasonable, and in any event, the funder's success fees are not recoverable costs.[2184]

1816. First, Claimants argue that Respondents have not demonstrated that it is reasonable for the Tribunal to award them their third-party finding costs. According to Claimants funding costs are reasonable when (i) the opposing party's conduct caused the impecuniosity of the seeking party, (ii) the seeking party had no other option but to seek funding from a third-party funder in order to pursue its arbitration claim, (iii) and the opposing party knew that the requesting party was being funded.[2185] Claimants argue

[2180] **Claimants' Comments on RSOC:** Claimants' Comments on Respondents' Costs Submission, dated 24 February 2023, para. 4.

[2181] **Claimants' Comments on RSOC:** Claimants' Comments on Respondents' Costs Submission, dated 24 February 2023, para. 5.

[2182] **Claimants' Comments on RSOC:** Claimants' Comments on Respondents' Costs Submission, dated 24 February 2023, para. 7.

[2183] **Claimants' Comments on RSOC:** Claimants' Comments on Respondents' Costs Submission, dated 24 February 2023, paras. 8-10.

[2184] **Claimants' Comments on RSOC:** Claimants' Comments on Respondents' Costs Submission, dated 24 February 2023, para. 11

[2185] **Claimants' Comments on RSOC:** Claimants' Comments on Respondents' Costs Submission, dated 24 February 2023, paras. 12-15.

that none of these factors are present in this case.[2186] Absent these requirements for awarding funding costs, Claimants should not be liable to pay any of the costs associated with Respondents' third-party funding.[2187] In response to the case law invoked by Respondents*, i.e., Tenke* and *Essar*, Claimants submit that the specific facts and circumstances of these cases are very different from the ones at hand.[2188] Based on the above, Respondents recourse to third-party funding is unreasonable and Claimants should not bear the costs associated with it.[2189]

1817. In any event, Claimants argue that Respondents are not entitled to claim recovery of the success fees, as under Article 44 of the SCC Rules, "*success fees or premiums fall outside the definition of costs, and should thus not be considered as recoverable costs*."[2190] Claimants submit that scholars have criticized the *Essar* decision for its failure to differentiate between funds made available by the third-party funder to cover costs and the success fee or premium payable pursuant to the third-party funding agreements.[2191]

1818. Claimants state that in the present case, Respondents claim up to EUR 15 million success fee calculated on the basis of a percentage of the awarded damages and twice the amount actually disbursed by Profile Investment. Claimants argue that this amount was not incurred by Respondents and are not needed to cover any costs related to these proceedings, "they *would be the pure profit of the funder, as consideration for having made funds available to Respondents. Therefore, the Respondents are not entitled to claim them as part of its incurred costs of arbitration*".[2192]

[2186] **Claimants' Comments on RSOC:** Claimants' Comments on Respondents' Costs Submission, dated 24 February 2023, paras. 16-25.

[2187] **Claimants' Comments on RSOC:** Claimants' Comments on Respondents' Costs Submission, dated 24 February 2023, para. 26.

[2188] **Claimants' Comments on RSOC:** Claimants' Comments on Respondents' Costs Submission, dated 24 February 2023, paras. 27-30.

[2189] **Claimants' Comments on RSOC:** Claimants' Comments on Respondents' Costs Submission, dated 24 February 2023, para. 31.

[2190] **Claimants' Comments on RSOC:** Claimants' Comments on Respondents' Costs Submission, dated 24 February 2023, paras. 32-33.

[2191] **Claimants' Comments on RSOC:** Claimants' Comments on Respondents' Costs Submission, dated 24 February 2023, para. 34.

[2192] **Claimants' Comments on RSOC:** Claimants' Comments on Respondents' Costs Submission, dated 24 February 2023, paras. 35-36.

2.1.2 Respondents' Position

a. *Respondents' costs*

1819. Respondents have presented their costs as follows:[2193]

Counsel's fees	
Gaillard Banifatemi Shelbaya Disputes' fees	EUR 3,296,199.00
TGS Baltic's fees	EUR 2,699,498.35
Shearman & Sterling's fees	EUR 4,078,514.00
Counsel's expenses[1]	
Gaillard Banifatemi Shelbaya Disputes' expenses[2]	EUR 372,298.21
TGS Baltic's expenses	EUR 205,351.71
Shearman & Sterling's expenses	EUR 81,349.95
Clients' direct expenses	
Vilnius City Municipality's and VŠT's direct expenses[3]	EUR 3,178.53
Expert's fees and expenses	
FTI's fees	EUR 1,263,979.55
FTI's expenses	EUR 3,453.58
Sweco's fees	EUR 873,533.51
Sweco's expenses	EUR 4,230.00
FCG's fees	EUR 172,679.17
FCG's expenses	EUR 25,730.35
Dr. Smaliukas' fees	EUR 25,000.00
Dr. Smaliukas' expenses	EUR 688.21
Arbitration costs	
Arbitration costs (SCC, Tribunal and Secretary)	EUR 726,300.00
VAT paid by Vilnius City Municipality	
VAT paid by Vilnius City Municipality	EUR 1,118,108.46
Total costs incurred	**EUR 14,950,092.58**

Third-party funding costs	
Third-party funder remuneration (up to)[4]	EUR 15,005,370.47
Total costs that will be incurred (up to)	**EUR 15,005,370.47**
TOTAL COSTS CLAIMED (up to)	**EUR 29,955,463.05**

[2193] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 5.

b. *Allocation of costs*

1820. Respondents contend that the Tribunal has a flexible discretion to apportion the costs of the arbitration pursuant to Article 43(5) and Article 44 of the SCC Rules and Article 48(1) and (3) of the Law on Commercial Arbitration of Lithuania.[2194] Respondents submit that in such a complex case the Tribunal should be "*guided principally by a high-level assessment as to which of the Parties has prevailed on the core issues in the case*". Respondents argue that there are at least three possible approaches to assess the extent to which each side has prevailed, by looking at (i) the net financial result of the award, or (ii) the Tribunal's findings on the core issues in the case, or (iii) the result on each individual claim and counterclaim.[2195] Respondents argue that there is a strong argument to use the combination of the first two approaches in this case.[2196]

1821. Respondents further assert that the Tribunal may also take into account the Parties' conduct during the arbitration in the allocation of costs in addition to the general principle that costs follow the event.[2197]

1822. First, according to Respondents, Claimants are responsible for unnecessary and unreasonable costs, as Claimants have submitted misleading and unhelpful expert evidence, especially, by Prof. Pieth, ARFY and Dr. Hesmondhalgh,[2198] while the remainder of Claimants' experts were irrelevant. Second, Respondents claim that Claimants' case rested on "*unsupported factual assertions by Veolia's current and former employees*" and that "*much of that that evidence was quite simply dishonest*".[2199] Third, Respondents argue that the lack of direct evidence from Rubicon was the responsibility of Claimants.[2200] Fourth, Respondents submit that "*the clandestine nature of Veolia's conduct during the Lease and its stonewalling of the Respondents was such that extensive document production would inevitably be required in the context of this case*" and that Claimants "*deliberately frustrated the document production process at*

[2194] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 10.
[2195] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 13.
[2196] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 13, see also paras. 14-16.
[2197] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 17.
[2198] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 19.
[2199] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 21.
[2200] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 22.

every turn."[2201] Fifth, Respondents argue Claimants' claims are made in bad faith due to "*irreconcilable inconsistency*" between Claimants' internal assessments and position put forward in the arbitration proceedings.[2202] Sixth, Respondents point out that the Tribunal may take into account that Claimants "*decided to run any possible argument in defense to Respondents' counterclaims in the hope that their quantity will overcome their lack of quality*" which resulted in direct costs consequences for Respondents.[2203]

1823. Respondents also assert that they are entitled to recover their third-party funding costs. Respondents argue that both Respondents have limited budgets, being a municipality and a municipality-owned company, tasked with the delivery of essential public services to the capital city of Lithuania. Respondents obtained external funding for this case due to the size of the financial burden associated with the representation of Respondents.[2204] Respondents, therefore, entered into a funding agreement with Profile Investment to fund part of their costs associated with this arbitration. Respondents state to have promptly informed the Tribunal about the existence of the funding agreement, the terms of which were later made public in Lithuania.[2205]

1824. According to the funding agreement, provided with Respondents' Costs Submission as Exhibit R-1939, Respondents had access to a budget of up to EUR 5 million to assist the funding of their representation in this arbitration.[2206] Respondents submit that they have used their funds almost entirely, utilizing EUR 4,994,629.53.[2207] As consideration for the external funding, Respondents will have to pay Profile Investment from any damages they are awarded (i) a percentage of the awarded damages and (ii) two times the amount actually disbursed, *i.e.,* EUR 9,989,259.06 million.[2208] Profile Investments' total recovery is capped at EUR 20 million including the recovery of the original funding

[2201] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 23.
[2202] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 24.
[2203] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 25.
[2204] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 26.
[2205] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 27.
[2206] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 28; **R-1939:** Profile Investment Bespoke Funding Agreement dated 26 February 2019, dated 26 February 2019.
[2207] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 28.
[2208] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 29; **R-1939:** Profile Investment Bespoke Funding Agreement dated 26 February 2019, dated 26 February 2019.

amount,[2209] which means that the maximum cost of the third-party funding will be EUR 15,005,370.47 (assuming a total recovery in excess of EUR 325 million).[2210] For these reasons, Respondents submit that they should be awarded their third-party funding costs in full.[2211]

1825. Respondents put forward that the SCC Rules and Lithuanian law empower the Tribunal to allocate any reasonable costs that have been incurred by the parties in connection with the proceedings. Respondents argue that the recoverability of third-party funding costs is commonly accepted in international arbitration as discussed in an ICC Commission Report on Decision on Costs in International Arbitration and in the *Essar v Norscot* case.[2212]

1826. According to Respondents, in the *Essar* case the arbitrator held that he had the power to award litigation funding costs under the applicable rules and held that Norscot was entitled to the costs of the litigation funding it had obtained to be able to bring the arbitration. The funding agreement in that case stipulated a consideration of either three times the amount of the funding or 35% of the recovery, whichever was higher.[2213] The decision was based on the understanding that under the English Arbitration Act and the ICC Rules the term "costs" was to be understood as encompassing costs that are not exclusively legal representation costs and these costs were reasonable.[2214] With regard to the reasonableness of the litigation funding costs, the arbitrator considered, as Respondents summarize "*(i) whether the funded party was forced to enter into the funding agreement to be able to pursue its claim, having no credible alternative source of funding; and (ii) whether the litigation funding costs reflected standard market rates in similar situations."*[2215] Respondents also invoked *KCS v TFM* which concluded that "other costs" under the ICC Rules and English law included funding costs. The arbitral

[2209] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 29; **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 29.

[2210] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 29.

[2211] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 30.

[2212] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 32; **RL-370:** Essar Oilfields Ltd y. Norscot Rig Management PVT Ltd [2016] EWHC 2361 (Comm), dated 15 September 2016.

[2213] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, paras. 31-33.

[2214] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 34.

[2215] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 35.

tribunal in that case awarded such costs to the claimant on the basis that they were reasonable.[2216] Respondents submit that "*there is no material distinction*" between the rules applicable in the present case and those applied in the referred cases. [2217]

1827. Applying the above cited principles, Respondents contend that their third-party funding costs are recoverable. First, Respondents argue that their third-party funding costs are reasonable and well within market range. [2218] Second, Respondents submit that it was reasonable to mitigate the financial burden of this case through resort to third-party funding due to the fact that Respondents are a municipality and a municipality-owned company with inherent budgetary restrictions, while Claimants acted as well-resourced and litigious opponents.[2219] Third, according to Respondents it would be just and fair in the circumstances of the case to allow Respondents to recover the costs of their third-party funding, as "*Veolia has corrupted and colluded its way through Lithuania to the detriment of ordinary citizens and state institutions*".[2220] Respondents further assert that "[t]*his is a rare instance of public entities obtaining third-party funding to pursue major claims through international arbitration – this is something to be encouraged given the potential of international arbitration to play an important role in the vindication of public as well as private interests*." [2221]

1828. For all the above reasons, Respondents request the Arbitral Tribunal to award them their funding costs in full up to an amount of EUR 15,005,370.47, depending on the Arbitral Tribunal's damages award. In the alternative, Respondents request the Arbitral Tribunal to order the reimbursement of Respondents' funding costs according to the conditions it finds reasonable.[2222]

1829. Respondents assert that their conditional waiver of all the financially immaterial claims and counterclaims in these proceedings in the event that they prevail on the VE-3

[2216] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 37.
[2217] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 38.
[2218] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 39.
[2219] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, paras. 40-43.
[2220] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 45.
[2221] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, paras. 46.
[2222] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 48.

counterclaim should not affect costs allocation, as this was "*a pragmatic way to narrow the issues for consideration by the Tribunal*".[2223] According to Respondents, the financially immaterial claims and counterclaims covered by the conditional waiver have not affected the development of this case and should not affect the allocation of costs resulting from it.[2224]

1830. Respondents further argue that Claimants' change of counsel gives rise to three consequences: "(*i*) *the obligation to pay the Respondents' wasted costs resulting from the change in counsel irrespective of anything else; (ii) an obligation to establish that costs claimed in respect of Sidley Austin's work have actually been paid and are not being claimed back by Veolia; and, (iii) the need to ensure that Veolia's wasted costs stemming from the postponement of the 2021 hearing are excluded from Veolia's costs claim*."[2225]

1831. As regards the first consequence, Respondents' position is set out in their Wasted Costs Application,[2226] which is analyzed in detail, along with Claimants' comments thereto, above. With respect to (ii), referred to by Respondents as "Sidley Austin Costs", Respondents submit that they have the right to know information concerning, among others, the amounts claimed to have been paid by Claimants to Sidley Austin and the amounts reimbursed from Sidley Austin (or any requests or claims for reimbursement from Claimants to Sidley Austin).[2227] Respondents assert that should Claimants be unwilling to provide such information, "*Respondents respectfully submit that any claim in respect of the alleged costs of Sidley Austin should be rejected outright*."[2228] Finally, with regards to (iii), Respondents posit that Claimants should not be allowed to recover any fees and expenses for the work of Claimants' counsel and experts in the period between 15 August 2021 and 18 April 2022, which included "*predominantly (i) time spent by Mayer Brown learning the case in order to replace Sidley Austin; (ii) time spent by Sidley Austin to handover the case to Mayer Brown; and (iii) time spent by Veolia's*

[2223] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, paras. 49-55.
[2224] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, paras. 52.
[2225] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, paras. 56-65.
[2226] **Wasted Costs Application:** Respondents' Wasted Costs Application, dated 31 January 2023.
[2227] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 60.
[2228] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 61.

counsel (both new and old) and experts to re-prepare for the hearing due to its postponement and organize the reconvened hearing."[2229] Respondents argue that but for Sidley Austin's disengagement as Claimants' counsel and the postponement of the 2021 hearing, these costs would not have been incurred by Claimants.[2230] For the same reason, Respondents submit that Claimants should not recover the costs related to travelling to and from, and attending, the physical hearing in London.[2231]

1832. In addition to the above, Respondents request an award of interest on any sums that the Tribunal awards in respect of their costs: [2232]

> *"Interest should run from the day of the Tribunal's award until full payment of outstanding amounts. For the reasons given in previous submissions, the Respondents respectfully maintain their position that the 6% simple interest rate under Article 6.210(2) of the Lithuanian Civil Code is the correct rate to apply."*

c. *Comments on Claimants' costs*

1833. Respondents commented on Claimants' costs in their emails sent to the Tribunal dated 8 February 2023 and 2 March 2023.

1834. In their email dated 8 February 2023, Respondents drew the Tribunal's attention to two issues regarding Claimants' cost submissions. [2233] First, Respondents note that Claimants made a claim in respect of Sidley Austin's fees in the amount of USD 6.5 million. Respondents submit that due to the extraordinary circumstances relating to the withdrawal of Claimants' counsel, Respondents are entitled to know (i) whether the amounts claimed have been paid, (ii) whether Claimants requested reimbursement of any amounts from Sidley Austin, (iii) whether Claimants have any other outstanding claims against Sidley Austin and (iv) whether the actual payment of any of the amounts

[2229] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 63.
[2230] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 63.
[2231] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 63.
[2232] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 66.
[2233] Respondents' email to the Arbitral Tribunal dated 8 February 2023, dated 08 February 2023.

claimed is contingent on the Tribunal's decision.[2234] Thus, Respondents requested that Claimants be ordered to produce the requested information.[2235]

1835. Second, Respondents note that Claimants did not indicate or establish whether they have excluded wasted costs arising out of Sidley Austin's sudden withdrawal, also relating to other representatives, experts, paid witnesses and hearing expenses. Therefore, the Tribunal has been given no guidance as to how it might cut out all of these wasted costs which should be borne by Claimants. [2236]

1836. In their 2 March 2023 email, Respondents put forward three points. First, although Claimants admitted having incurred additional costs due to the change of counsel, they, nevertheless, refused to identify and exclude such wasted costs from their cost submission based on the assertion that Claimants would have incurred greater fees had Sidley Austin not withdrawn from the case. Second, while Claimants argue that it is reasonable for Mayer Brown to have incurred EUR 1.5 million in fees leading up to the hearing, Claimants assert that "*it was inefficient for the Respondents' counsel to incur approximately half of that figure in re-preparing for a three-week hearing*".[2237] Lastly, Respondents note that according to Claimants, they "*may certify costs for* [their] *own claims, but* […] *Respondents should not be permitted to do the same for their wasted costs."*[2238]

2.2 The Arbitral Tribunal's Analysis and Decision

2.2.1 Guiding Principles

1837. The Arbitral Tribunal observes the Parties' agreement on the guiding principles to be followed for the allocation of costs.

1838. First, the Parties acknowledge that the Arbitral Tribunal has a wide discretionary power in deciding the allocation of costs as confirmed by Article 48(4) of the Lithuanian Law

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[2234] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 60.
[2235] Respondents' email to the Arbitral Tribunal dated 8 February 2023, dated 08 February 2023.
[2236] Respondents' email to the Arbitral Tribunal dated 8 February 2023, dated 08 February 2023.
[2237] Respondents' email to the Arbitral Tribunal dated 8 February 2023, dated 08 February 2023.
[2238] Respondents' email to the Arbitral Tribunal dated 2 March 2023, dated 02 March 2023.

on Commercial Arbitration[2239] and Articles 43(5) and 44 of the SCC Rules.[2240] Second, the Parties further agree that the principle "costs follow the event" is applicable for the allocation of costs in this arbitration.[2241]

1839. The Arbitral Tribunal has the power to consider circumstances it views as relevant, including the procedural conduct of the Parties and evaluate whether the Parties acted in an efficient and cost-effective manner or, on the contrary, had an unreasonable wasteful behavior such as excessive filings, an erratic approach of the claims and counterclaims, dilatory tactics, exaggerated claims, unjustified applications, bad faith etc.

1840. In requesting to be awarded all of their costs, Claimants, for instance, accuse Respondents of baseless counterclaims, convoluted defenses, disruption of proceedings, changed claims and advancing new claims late in the proceedings, repeated requests for extensions, futile complaints and creating procedural hurdles.[2242] At the same time, Respondents criticize in their cost submission, among other points, Claimants' alleged bad faith in presenting dishonest evidence and inundating the Arbitral Tribunal with "*misleading and unhelpful expert evidence*".[2243]

1841. The Arbitral Tribunal has noted the conduct of both Parties in the arbitration and the reciprocal accusations of abusive conduct, but in its view, it is not indispensable to conduct a detailed assessment of these arguments in terms of costs impact. Since the Arbitral Tribunal has carefully dealt with all claims and counterclaims, it considers that the principle "costs follow the event" will, to a reasonable extent, establish whether the various accusations are supported by the outcome of the claims.

[2239] Article 48(4) of the Lithuanian Law on Commercial Arbitration provides as follows: "*Where the proceedings are closed on any ground provided for by this Law, and arbitral tribunal shall have the power to use its own discretion in resolving the issue of allocation of arbitration costs.*" See **RL-081:** Law on Commercial Arbitration of the Republic of Lithuania (as amended on June 21, 2012), dated 21 June 2012.

[2240] **CSOC:** Claimants' Statement of Costs, dated 31 January 2023, para. 8; **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 10.

[2241] **CSOC:** Claimants' Statement of Costs, dated 31 January 2023, para. 10; **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 2.

[2242] **CSOC:** Claimants' Statement of Costs, dated 31 January 2023, para. 2.

[2243] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 19.

1842. The Arbitral Tribunal will deal with the result of the claims in light of the time spent, costs generated and extent of successful, respectively unsuccessful outcomes. The resulting cost allocation to a large extent takes care of the cost impact which the Parties attribute to each other by argument of procedural conduct.

2.2.2 Respondent's claim for recovery of their third-party funding costs

1843. The Arbitral Tribunal has the power to award Respondents' third-party funding costs.

1844. Respondents argue that the Municipality and the Municipality-owned company have limited budgets and "*obtained external funding to assist with meeting the costs of their representation in these proceedings*".[2244] Respondents had a budget of EUR 5 million put at their disposal by the third-party funder and have used EUR 4,994,629.53 of it in these proceedings.[2245] In case of damages awarded to Respondents, as per their Funding Agreement, Respondents will have to pay (i) a percentage of the awarded damages plus (ii) two times the amount actually used, *i.e.,* EUR 9,989,259.06.[2246] Respondents further assert that there is a general trend of recoverability of third-party funding costs in arbitration and refer to case law where the Arbitral Tribunal looked into the reasonableness of such costs.[2247] Therefore, Respondents ask the Arbitral Tribunal to award the funding costs up to an amount of EUR 15,005,370.47 depending on the outcome of this arbitration.[2248]

1845. Claimants submit that Respondents are not entitled to recover the third-party funding costs based on their assertion that none of the three factors identified by the ICAA-Queen Mary Taskforce on Third-Party Funding in International Arbitration for guiding the Arbitral Tribunals on the issue of recoverability of funding costs are met in this

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[2244] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 26.

[2245] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 28.

[2246] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, paras. 29.

[2247] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, paras. 32-37, referring to **RL-369:** ICC Commission Report, Decision on Costs in International Arbitration, ICC Dispute Resolution Bulletin 2015, Issue 2, dated 01 January 2015 and **RL-370:** Essar Oilfields Ltd y. Norscot Rig Management PVT Ltd [2016] EWHC 2361 (Comm), dated 15 September 2016.

[2248] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 48.

arbitration, *i.e.,* (i) causation, (ii) access to justice and (iii) transparency.[2249] Further, Claimants argue that Respondents' claim for recovery of the success fees is not admissible.[2250]

1846. At the outset, the Arbitral Tribunal underlines that it is not convinced that there is a general trend in international arbitration in the sense of accepting the recoverability of third-party funding and even Respondents' own reference solely mentions that "*it is feasible that in certain circumstances the cost of capital, e.g. bank borrowing specifically for the costs of arbitration or loss of use of the funds, may be recoverable*".[2251]

1847. Further, the Arbitral Tribunal has considered the three relevant criteria identified by the ICAA-Queen Mary Taskforce on Third-Party Funding in International Arbitration and does not admit Respondents' request for recovery of third-party funding costs under these criteria. First, the Arbitral Tribunal is inclined to agree that the necessity to obtain third-party funding stems in great part from Respondents' decision to advance numerous complex counterclaims. Second, it does not appear that Respondents would have been deprived from their access to justice if they would not have obtained third-party funding, in particular given that said funding covers only around a third of Respondents' total costs incurred for these proceedings. In this sense, Respondents admit that they resorted to third-party funding to "*mitigate the financial burden of this case*".[2252] Third, the Arbitral Tribunal is not convinced that full transparency was used in relation to the third-party funding by Respondents as the funding agreement first became public due to local investigations by Lithuanian authorities and was put on the record only with Respondents' cost submissions.

[2249] **Claimants' Comments on RSOC:** Claimants' Comments on Respondents' Costs Submission, dated 24 February 2023, paras. 13-31; CC-11: International Council for Commercial Arbitration and Queen Mary University of London, Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, April 2018.

[2250] **Claimants' Comments on RSOC:** Claimants' Comments on Respondents' Costs Submission, dated 24 February 2023, paras. 32-36, referring to **Exhibit CC-12**: Wolfgang Kühn and Hanneke van Oeveren, *The Full Recovery of Third-Party Funding Costs in Arbitration: To Be or Not to Be?*, Maxi Scherer (ed), Journal of International Arbitration, (Kluwer Law International 2018, Volume 35 Issue 3).

[2251] **RL-369:** ICC Commission Report, Decision on Costs in International Arbitration, ICC Dispute Resolution Bulletin 2015, Issue 2, dated 01 January 2015, paras. 92-93.

[2252] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 40.

1848. In any event, the Arbitral Tribunal also sees merit to Claimants' arguments that the *Essar* and *Tenke* cases dealt with "*specific facts and circumstances*" that "*are very different from the ones at hand*".[2253]

1849. Therefore, the Arbitral Tribunal rejects Respondents' request for the recovery of its third-party funding costs.

1850. As to the recovery of any success fees, the Arbitral Tribunal considers that the amount claimed by Respondents under the third-party funder remuneration category, *i.e.,* EUR 15,005,370.47, cannot be considered as costs of this arbitration. This amount represents the funder's remuneration depending on the outcome of the case or as Respondents' themselves describe it "*consideration for the external funding*",[2254] and was not expended in the course of these proceedings.

1851. In conclusion, the Arbitral Tribunal rejects Respondents' claim for recovery of third-party funding costs.

2.2.3 Costs consequences of change of counsel

1852. Respondents seek an important deduction from the costs claimed by Claimants as a consequence of Veolia's change of counsel. Specifically, Respondents request to know whether costs claimed in respect of Sidley Austin's work have actually been paid. Further, Respondents want to ensure that Claimants' wasted costs that are a consequence of the cancelled hearing are not being claimed back by Claimants.[2255]

1853. In reply to these points, Claimants have issued a confirmation that all claimed amounts have in fact been paid to Sidley Austin, that there will be no recoupment or

[2253] **Claimants' Comments on RSOC:** Claimants' Comments on Respondents' Costs Submission, dated 24 February 2023, paras. 27-30.

[2254] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 29.

[2255] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 57.

reimbursement of these amounts and any double recovery is consequently excluded.[2256]

1854. Furthermore, Respondents consider that Claimants should not be allowed to recover any fees and expenses incurred in respect of work performed by Claimants' counsel and experts between 15 August 2021, the date of Sidley Austin's disappearance from the case, and 18 April 2022, the first day of the hearing held in April – May 2022.[2257]

1855. In reply, Claimants confirm that Mayer Brown's fees are in fact lower than what Sidley Austin would have billed, had it not decided to withdraw immediately prior to the cancelled hearing. According to Claimants, the counsel change resulted in a reduction of costs by comparison with the Sidley Austin alternative.[2258]

1856. The Arbitral Tribunal has carefully examined the matter under these circumstances and considers that Claimants' arguments about an alleged lower costs level despite counsel change have not been concretely demonstrated with relevant facts and figures. Moreover, Claimants have indicated that the Veolia – Sidley Austin relationship is "confidential".[2259]

1857. At the same time, it appears to the Arbitral Tribunal that the argument that a counsel change would result in lower costs is counterintuitive. It is conceivable though that a change of counsel could lead to lower costs because of facts such as different hourly rates or negotiated budgets, capped at different levels. Nevertheless, this fact has not been demonstrated.

1858. Therefore, the Arbitral Tribunal decides not to admit Claimants' argument of lower global costs. The Arbitral Tribunal further considers it appropriate to reduce the claim made by Claimants for Mayer Brown's fees by the amount of EUR 1.6 million. As a

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[2256] **Claimants' Comments on RSOC:** Claimants' Comments on Respondents' Costs Submission, dated 24 February 2023, para. 4.

[2257] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 63.

[2258] **Claimants' Comments on RSOC:** Claimants' Comments on Respondents' Costs Submission, dated 24 February 2023, paras. 5-10.

[2259] **Claimants' Comments on RSOC:** Claimants' Comments on Respondents' Costs Submission, dated 24 February 2023, para. 6.

result, the claim of EUR 5,812,320.72 for Mayer Brown's fees is reduced to EUR 4,212,320.72.

1859. Such decision was already foreshadowed in Claimants' Comments on Respondents' Costs Submission, where Claimants stated "[s]*hould the Tribunal disagree, it has the discretion to grant the percentage of fees it deems appropriate in the specific circumstances*".[2260]

1860. The Arbitral Tribunal has sought to rationalize its decision and not to simply rely on its discretionary power. Between the cancellation of the hearing in 2021 and its start in April 2022 there were 8 months. Without counsel change, costs for this time period would not have been incurred by Claimants. Mayer Brown had to absorb the file and prepare the hearings, although it may be assumed that the new legal team would have been assisted by Prof. Alexandrov. Assuming, hypothetically, an average hourly team rate of EUR 500, EUR 1.6 million reduction represents 3200 hours, or 400 hours per month over the 8 months period. Given the large size of the file, this estimate does not seem excessive.

2.2.4 Apportionment of costs

1861. The Arbitral Tribunal has to apportion the costs claimed by each side.

1862. The SCC determined the costs of these arbitration proceedings in its letter of 17 November 2023 as follows:

Wolfgang Peter	
Fee	EUR 760 000
Expenses	EUR 3 462,87
Pier diem allowance	EUR 13 000
Henri Alvarez	
Fee	EUR 456 000
Expenses	EUR 19 853,92
Per diem allowance	EUR 12 500
Hugo Barbier	
Fee	EUR 294 000 (plus any VAT)

[2260] **Claimants' Comments on RSOC:** Claimants' Comments on Respondents' Costs Submission, dated 24 February 2023, para. 10.

Expenses	EUR 1 240 (plus any VAT)
Per diem allowance	EUR 9 500 (plus any VAT)
Volker Triebel	
Fee	EUR 162 000 (plus any VAT)
Nhu-Hoang Tran Thang	
Expenses	EUR 9 683,07
Per diem allowance	EUR 3 000
SCC Arbitration Institute	
Administrative fee	EUR 80 000 (plus any VAT)

1863. Claimants have presented their total costs with amounts in USD, EUR and GBP as follows: (i) USD 8,702,427.43 (equivalent of EUR 7,953,725.75); (ii) EUR 11,735,207.48 (including SCC Advance on Costs paid by Veolia) and (iii) GBP 116,499.22 (equivalent of EUR 134,219.22).[2261] To these amounts, a further advance on costs shall be added in the amount of EUR 279,400, as decided by the SCC on 11 May 2023. Therefore, Claimants have incurred a total of EUR 20,102,552.4.

1864. After the Arbitral Tribunal applied the reduction of EUR 1.6 million, Claimants' claim for costs amounts to EUR 18,502,552.4.

1865. Respondent's total costs amount to EUR 14,098,622.4, including the further advance on costs in the amount of EUR 279,400, as decided by the SCC on 11 May 2023, and taking into account the exclusion of the third-party funding costs, and the deduction of the wasted costs in the amount of EUR 1,130,870.1, awarded to Respondents.

1866. The Arbitral Tribunal will proceed to the apportionment of costs by taking into account (i) a time factor corresponding to the time spent by each side on the claims and counterclaims and (ii) the Parties' respective success rates.

1867. In order to assess the time factor, the Arbitral Tribunal considers that the respective number of claims and counterclaims provides no reliable guidance. There are six claims and 13 counterclaims, a ratio of 31% vs. 69%. This is however not an appropriate approach because Respondents presented their defenses against most of the

[2261] **CSOC:** Claimants' Statement of Costs, dated 31 January 2023, para. 8.

Claimants' claims in the form of counterclaims. Thus, counting six claims and 13 counterclaims as "detached" from each other does not reflect the reality, and it would lead to some double counting of the number of claims.

1868. Therefore, the Arbitral Tribunal regards the financial amounts of the respective claims as a further potential criterion to be taken into account. While Claimants' monetary claims amount to EUR 21,597,948, the Respondents' counterclaims amount to EUR 869,548,182. The latter amount includes both Counterclaims 1 and 13. For the purposes of costs apportionment, Counterclaims 1 and 13, which are of identical amounts, *i.e.,* EUR 238,494,598, need to be both counted as they arose from different concepts and requested different analyses and, therefore, cumulative time.

1869. The Arbitral Tribunal notes that the ratio between EUR 21,597,948 and EUR 869,548,182 is 2.4% vs. 97.6%. Apportionment on this basis in a linear manner is not realistic as the same issue of the interpenetration of claims and counterclaims arises.

1870. Therefore, using its discretion, the Arbitral Tribunal considers that the time spent by the Parties on the Claimants' claims amounted to 20% and the time spent by the Parties on the Respondents' counterclaims amounted to 80%.

1871. Consequently, after the reduction of EUR 1.6 million, Claimants have spent EUR 3,700,510.48 (20% of EUR 18,502,552.4) on their claims and EUR 14,802,041.9 (80% of EUR 18,502,552.4) on the defense against Respondents' counterclaims.

1872. In turn, Respondents spent EUR 2,819,724.4 on Claimants' claims (20% of EUR 14,098,622.4) and EUR 11,278,897.6 on their counterclaims (80% of EUR 14,098,622.4).

1873. The Arbitral Tribunal notes that while Claimants' claims amount to EUR 21,597,948, Claimants have been awarded EUR 10,899,340, which results in a success rate of 50.4% of their claims. The amount spent by Claimants on their claims is EUR 3,700,510.48 and 50.4% of these costs result in an amount of EUR 1,865,057.28.

1874. Claimants defended themselves against counterclaims which total EUR 869,548,182 and have to pay to Respondents EUR 41,712,741. Therefore, Claimants' success rate in their defense against Respondents' counterclaims is 95.2%. Claimants have expended EUR 14,802,041.9 for their defense against Respondents' counterclaims and, therefore, should be awarded EUR 14,091,543.9 of this amount in light of their success rate of 95.2%.

1875. Therefore, the total amount of the incurred costs awarded to Claimants equals EUR 15,956,601.2 (EUR 1,865,057.28 + EUR 14,091,543.9).

1876. On Respondents' side, their counterclaims amount to EUR 869,548,182 and they have been awarded EUR 41,712,741 on these counterclaims. This leads to a success rate of 4.8%. Respondents spent EUR 11,278,897.6 on the preparation of their counterclaims and are, therefore, awarded EUR 541,387.1 of their costs (4.8% of EUR 11,278,897.6).

1877. Respondents defended themselves against the Claimants' claims that total EUR 21,597,948 and have to pay Claimants EUR 10,894,340. The resulting success rate for Respondents is 49.56%. Respondents are entitled to the recovery of EUR 1,397,455.45 of the costs incurred for their defense against Claimants' claims (2,819,724.4 x 49.56%).

1878. Therefore, the total amount of the incurred costs awarded to Respondents equals EUR 1,938,842.55 (EUR 541,387.1 + EUR 1,397,455.45).

1879. Finally, with respect to allocating the costs of these arbitration proceedings, no reason justifies departing from the method applied to the Parties' costs which have been elaborated to fairly allocate every type of cost incurred in the arbitration. The Arbitral Tribunal has decided that the costs of the arbitration, as determined by the SCC in its correspondence dated 17 November 2023, follow the same calculation principles as the Parties' costs, and are included in the calculations above.

1880. The Tribunal notes that this outcome reflects the guiding principles, which Respondents indicated in their Costs Submission of 31 January 2023, when they wrote that the

Tribunal should be guided principally by a high level assessment as to which party has prevailed on the core issues.[2262] However, the Tribunal has not merely taken a high level approach but has analyzed the cost question in detail and used, *inter alia*, three criteria put forward in Respondents' Costs Submission which are (i) the net financial result of the award, (ii) the Tribunal's findings on the core issues and (iii) the result on each individual claim and counterclaim.[2263]

1881. Therefore, the Arbitral Tribunal will apply a simple interest rate of 6% from the date of the Award until full payment of the amounts awarded.

[2262] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 52.
[2263] **RSOC:** Respondents' Costs Submission, dated 31 January 2023, para. 13.

X. THE ARBITRAL TRIBUNAL'S FINAL AWARD

1882. The Arbitral Tribunal orders and declares that:

1) Claimants jointly and severally shall pay to Respondents an amount of EUR 41,726,000, with annual interest of 6 % calculated from 30 March 2017 until full payment of the amount awarded (Counterclaim 3);

2) All title, right and interest over the emissions allowances in account number EU-100-5006040-0-2 lie with and are vested in SP AB Vilniaus Silumos Tinklai (VST) (Counterclaim 3);

3) UAB Vilniaus Energija (VE) shall submit in writing a request to the Environmental Projects Agency of the Lithuanian Ministry of Environment (in its capacity as register management body) to lift the suspension over account number EU-100-5006040-0-2 so that all emissions allowances in this account be transferred to SP AB Vilniaus Silumos Tinklai (VST) (Counterclaim 3);

4) UAB Vilniaus Energija (VE) shall transfer the emissions allowances in account number EU-100-5006040-0-2 to SP AB Vilniaus Silumos Tinklai (VST) within ten (10) days of the account suspension being lifted (Counterclaim 3);

5) Respondents jointly and severally shall pay to Claimants EUR 10,894,340, with annual interest of 6 % calculated from the date of this award until full payment (Claim 1);

6) No payments should be made by Respondents to Claimants in respect of the Hot Water Meters (Counterclaim 8);

7) Veolia's interpretation of Complete State under the Lease is correct, excluding the declaration sought by Claimants that VE was not required to repair or replace assets decommissioned and put into conservation (Claim 5);

8) Claimants jointly and severally shall pay to Respondents EUR 12,741 with daily interest of 0.08% calculated from 15 March 2017 until full payment of the amount awarded (Counterclaim 11);

9) The value of the assets UAB Vilniaus Energija (VE) returned to SP AB Vilniaus Silumos Tinklai (VST) satisfies the obligation to return assets equal in value to the Facilities it received at the beginning of the Lease term (Claim 6);

10) Claimants jointly and severally shall pay to Respondents EUR 1,130,870.1 with annual interest of 6% from the date of this award until full payment (wasted costs);

11) Respondents jointly and severally shall pay to Claimants EUR 15,956,601.2 with annual interest of 6% from the date of this award until full payment (costs);

12) Claimants jointly and severally shall pay to Respondents EUR 1,938,842.55 with annual interest of 6% from the date of this award until full payment (costs).

13) All other requests are dismissed.

Place of arbitration: Vilnius

Date: 30 November 2023

The Arbitral Tribunal:

Mr. Henri Alvarez KC

Prof. Hugo Barbier

Dr. Wolfgang Peter