INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

VEOLIA PROPRETÉ SAS

Claimant

and

ITALIAN REPUBLIC

Respondent

ICSID Case No. ARB/18/20

AWARD

Members of the Tribunal
Prof. Eduardo Zuleta, President
Ms. Judith Gill, KC, Arbitrator
Prof. Laurence Boisson de Chazournes, Arbitrator

Secretary of the Tribunal
Ms. Natalí Sequeira

Date of dispatch to the Parties: 26 September 2025

REPRESENTATION OF THE PARTIES

Representing Veolia Propreté SAS:

Mr. Dany Khayat
Mr. José Caicedo
Mr. Jawad Ahmad
Ms. Isabela Lacreta
Mr. Aslan Boucobza
Ms. Nawal Jallabi

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10 avenue Hoche
75008 Paris, France

Representing the Italian Republic:

Mr. Giacomo Aiello
Mr. Pietro Garofoli
Ms. Laura Delbono
Ms. Adele Berti Suman
Ms. Gaia Iappelli
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Via dei Portoghesi 12
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External Consultant for Ministry for Foreign Affairs and International Cooperation
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External Consultant for Avvocatura dello Stato
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DEFINED TERMS

Defined Term	Definition
2007 Settlement Proposal	The settlement agreement proposed by TEC to the *Commissario* on 17 December 2007
2009 Lisbon Treaty	Treaty of Lisbon Amending the Treaty of the European Union and the Treaty Establishing the European Community, entered into force on 1 December 2009
2010 Agreement	Agreement signed between the parties to the TEV Concession on 19 February 2010 to fix the gate fees
2011 Notice	Formal notice from TEC to the *Commissario* to comply dated 28 December 2011
2012 Notice	TEC's notice of termination of the TEC Concession dated 31 January 2012
2019 First Declaration	Declaration of the Representatives of the Governments of the Member States of 15 January 2019 on the legal consequences of the judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union
2019 Second Declaration	Declaration of the Representatives of the Governments of the Member States of 16 January 2019 on the enforcement of the judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union
Accuracy First Expert Report	Assessment on VP's losses by Accuracy, attached to Claimant's Memorial
Accuracy Second Expert Report	Assessment on VP's losses by Accuracy, attached to Claimant's Reply
Actual *Tonnes*	Waste quantities effectively delivered
Agreed *Tonnes*	Waste quantities defined in the Concessions
ARPAT	Regional Agency for Environmental Protection Tuscany (*Agenzia Regionale di Protezione Ambientale Toscana*)
ATO	Optimal Territorial Area of the Tuscan Coast (*Ambito Territoriale Ottimale Toscana Costa*)
Atto di Sottomissione	Second amendment to the TEC Concession dated 31 October 2003
Atto Integrativo	First amendment to the TEC Concession dated 31 August 2001
C-[#]	Claimant's Exhibit

CapEx	Capital Expenditures
CAV	Consorzio Ambiente Versilia
Charter	European Energy Charter
CIP	Interministerial Price Committee (*Comitato Interministeriale dei Prezzi*)
CIP6	Italian *Provvedimento* No. 6 of the CIP
CL-[#]	Claimant's Legal Authority
Claimant or VP or Veolia	Veolia Propreté SAS
Claimant's Memorial	Claimant's Memorial dated 31 July 2020
Claimant's Memorial	Claimant's Memorial dated 31 July 2020
Claimant's PHB1	Claimant's Post-Hearing Brief dated 20 October 2023
Claimant's PHB2	Claimant's Reply Post-Hearing Brief dated 1 December 2023
Claimant's Reply	Claimant's Reply dated 3 September 2021
Commissario of Calabria	Delegated commissioner for the environmental emergency in the Calabria Region
Commissario of Tuscany	Delegated commissioner for the environmental emergency in Tuscany
Committee's Report	Report issued by the Parliamentary Inquiry acknowledging the *Commissario*'s failure to observe its obligations within the TEC Concession
Company Value	The discounted value of the FCFF less Net Debt (Defined as "Enterprise Value" in the Accuracy First Expert Report, ¶ 6.73)
Concessionaire	As defined in Article 1 of the TEC Concession, referring specifically to TEC
Concessions or Concession Agreements	The TEC and TEV Concessions
Conguagli	Additional costs for processing non-compliant quality of waste delivered by the Region to TEC
Construction Arbitration	TEC proceeding disputing claims for extra costs and damages caused during the construction of the plants

Construction Award	The Award dated 13 October 2010 rendered in the Construction Arbitration
Contributo	Public contribution for the Calabria Sud integrated system
CSC	Contamination Threshold Concentrations
CTU	Prof. Lacchini, independent technical expert appointed by the arbitral tribunal in the Construction and the Management Arbitrations (*Consulente Tecnico d'Ufficio*)
CTU Report	Report issued by the CTU during the Management Arbitration
Date of Assessment	31 December 2011
DCF	Discounted Cash Flow
Decision	Annex 2 to the Final Act of the European Energy Charter Conference
Declaration	Declaration made by European Communities and their Member States to Article 25 of the ECT
DL	Directorate of Works
EC	European Community
ECT	Energy Charter Treaty
EIA	Economic Integration Agreement
EPPA	15-year Electricity Power Purchase Agreement between TEC and GSE dated 4 October 2005
ESM	Emissions System Monitoring
EU	European Union
EU Treaties	TFEU and TEU
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FIR clause	Fork-in-the-Road clause
FOS or SOF	Stabilized organic fractions
GA	Gestioni Ambientali SNC
GSE	Gestore dei Servizi Enegetici
Hearing	The hearing on jurisdiction and merits that took place from 15 to 19 May 2023
Historical Losses	Losses arising before the Date of Assessment
Historical Period	The period between 1 January 2007 and 31 December 2011

ICJ	International Court of Justice
ICSID Arbitration Rules	2006 ICSID Rules of Procedure for Arbitration Proceedings
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
ILC Articles	International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts
Insolvency Report	Insolvency Receivers Report issued in the *Concordato preventivo di gruppo* dated 1 February 2013
ISDS	Intra-EU Investor State Dispute Settlement
ISTAT	Referring to the "*Istituto Nazionale di Statistica*" or National Statistics Institute, and the ISTAT index mentioned in the TEC Concession (Exhibit C-10). Italian National Institute of Statistics
Legal Due Diligence Report	Report dated 24 January 2007 conducted by the Italian legal studio Macci di Cellere Gangemi
Management Arbitration	TEC proceeding concerning damages resulting from the Commissario's alleged failure to cover the contractual obligations in the Concession
Management Award	Award dated 26 July 2010 rendered in the Management Arbitration
MBT	Mechanical Biological Treatment plant, also referred to as a selection and treatment plant for urban solid waste
MOU	Memorandum of Understanding signed by the *Commissario* and TEC
MSA	Master Settlement Agreement
Municipalities or Municipalities of Versilia	Municipalities of Camairoe, Forte dei Mami, Massarossa, Pietrasanta, Serravezza and Viareggio
Net Debt	Value of external debt as at the Date of Assessment
OpEx	Operational Expenditures

Parliamentary Inquiry	Inquiry committee created by the Italian Senate to investigate "Alleged illicit activities related to the waste disposal systems in the Region of Calabria"
PoliMi First Expert Report	Expert Report issued by Politecnico Milano to estimate Claimant's suffered damages
PoliMi Second Expert Report	Second Expert Report issued by Politecnico Milano
POR	Calabria 2000 – 2006 Regional Operational Programme (*Programma Operativo Regionale Calabria*)
Prorogatio	Extended period for the *de facto* continuation of the services under the TEC Concession
Prospective Losses	Losses arising after the Date of Assessment
R-[#]	Respondent's Exhibit
RDF or CDR	Refuse Derived Fuel (*combustibile derivato dai rifiuti*)
Receiver	The Receiver of TEC
Receiver's Action	Lawsuit filed by the Receiver of TEC against the Calabria Region and the Presidency of the Council of Ministers before the Tribunal of La Spezia on 2 February 2015
REIO	Regional Economic Integration Organisation
Respondent or Italy	Republic of Italy
Respondent's Counter-Memorial	Respondent's Counter-Memorial dated 29 January 2021
Respondent's PHB1	Respondent's Post-Hearing Brief dated 20 October 2023
Respondent's PHB2	Respondent's Reply Post-Hearing Brief dated 1 December 2023
Respondent's Rejoinder	Respondent's Rejoinder dated 21 February 2022
RfA	Request for Arbitration submitted by Veolia Propreté SAS against the Italian Republic dated 25 May 2018
RL-[#]	Respondent's Legal Authority
Sambatello 1	An MBT plant located at Sambatello, the management and operation of which was assumed by TEC under the *Atto Integrativo*

Sambatello 2	The Reggio Calabria MBT plant to be built under TEC1 which was relocated to Sambatello
SPA	Share Purchase Agreement dated 29 May 2007 signed by VP and VSA with TM.E and its mother company with VSA acquiring 75% of the equity in TMT
SW	Sorted Waste
TEC Concession	15-year concession agreement between TM.E and the *Commissario* of Calabria dated 17 October 2000
TEC1	TEC1 Project comprising five MBT Plants
TEC2	A proposed second WtE line 2 in Gioia Tauro
Tecnoborgo	Italian company Tecnoborgo S.p.A
TEU	Treaty of the European Union
TEV Concession	19-year concession agreement between TM.E and the *Commissario* of Tuscany dated 31 July 1997
TFEU	Treaty on the Functioning of the European Union
TM.E	Termomeccanica Ecologia S.p.A
TMT	TMT Tecnitalia S.p.A, TM.E's wholly owned subsidiary for the management of the TEC and TEV Concessions
Tr. Day [#], [page:line]	Transcript of the Hearing
Tribunal	Arbitral tribunal constituted on 15 January 2019 and composed of Prof. Eduardo Zuleta, a national of Colombia, President, appointed by agreement of the Parties; Ms. Judith Gill, a national of Britain, appointed by Claimant; and Prof. Laurence Boisson de Chazournes, a national of Switzerland and France, appointed by Respondent
USW or MSW	Urban solid waste or municipal solid waste
VCLT	1969 Vienna Convention on the Law of Treaties
VE	Vercelli Energia
Vendor	TM.E, as "Seller" of TMT under the SPA
VSA	Veolia Servizi Ambientali S.p.A, Veolia's Italian subsidiary
VSAT	Veolia Servizi Ambientali Tecnitalia S.p.A
WtE	Waste-to-energy plant

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Energy Charter Treaty ratified by Italy on December 5, 1997, and France on September 1, 1999, and entered into force on April 16, 1998, and December 27, 1999, respectively (the "**ECT**" or "**Treaty**") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (the "**ICSID Convention**").

2. Claimant is Veolia Propreté SAS ("**Veolia**", "**VP**" or "**Claimant**"), a French company incorporated under Register No. 572 221 034, with its headquarters located at 21, rue La Boétie, 75008 Paris, France. VP is an affiliate of the French group Veolia Environnement.[1]

3. Respondent is the Italian Republic ("**Italy**" or "**Respondent**").

4. Claimant and Respondent are collectively referred to as the "**Parties**." The Parties' representatives and their addresses are listed above on page (i).

5. This dispute relates to a series of measures implemented by the Italian authorities that allegedly resulted in the insolvency of Veolia's subsidiary and the complete loss of Claimant's investments in the construction, operation, and maintenance of integrated waste-to-energy systems.

II. PROCEDURAL HISTORY

6. On 30 May 2018, ICSID received a request for arbitration dated 25 May 2018 from Veolia Propreté SAS against the Italian Republic (the "**Request for Arbitration**").

7. On 20 June 2018, the Secretary-General of ICSID registered the Request for Arbitration in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

8. The Parties agreed to constitute the tribunal in accordance with Article 37(2)(a) of the ICSID Convention as follows: the tribunal would consist of three arbitrators, one to be appointed by each Party and the third, presiding arbitrator to be appointed by the two co-arbitrators.

9. The Tribunal is composed of Prof. Eduardo Zuleta, a national of Colombia, President, appointed by agreement of the Parties; Ms. Judith Gill, a national of Britain, appointed by Claimant; and Prof. Laurence Boisson de Chazournes, a national of Switzerland and France, appointed by Respondent (the "**Tribunal**").

10. On 15 January 2019, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**ICSID Arbitration Rules**"), notified the Parties that all

[1] Claimant's Memorial, ¶ 16.

three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Natalí Sequeira, ICSID Senior Legal Counsel, was designated to serve as Secretary of the Tribunal.

11. On 29 January 2019, Respondent filed a request for the Tribunal to terminate the proceedings in light of the Declaration of the Representatives of the Governments of the Member States on the legal consequences of the judgment of the Court of Justice in *Achmea* and on investment protection in the European Union ("**EU**") which was signed by 22 EU Member States, including Italy and France, on 15-16 January 2019.

12. Following an invitation from the Tribunal, on 4 February 2019, Claimant submitted a letter raising doubts regarding the accuracy of the Italy's conclusions and requested that the Tribunal order Italy to clarify the purpose and basis of its letter.

13. By correspondence dated 7 February 2019, the Tribunal invited the Parties to confer and discuss the matter of the Declaration of the EU Members and inform the Tribunal during the first session whether, and if so, how, it should be addressed in this arbitration.

14. On 18 February 2019, the Parties informed the Tribunal of their agreement to stay this arbitration until further notice.

15. The Tribunal confirmed the Parties' agreement on 20 February 2019 and invited them to report back to the Tribunal by 3 April 2019, as to whether the arbitration was to proceed.

16. On 6 March 2019, the European Commission (the "**Commission**") filed an Application for Leave to Intervene as a Non-Disputing Party pursuant to ICSID Arbitration Rule 37(2).

17. On 12 March 2019, the Tribunal informed the Parties that considering that the Parties had agreed on the suspension of the arbitration until 3 April 2019, and that at that stage they had not fixed a procedural calendar nor filed submissions on jurisdiction and merits, the Commission's application was premature. Therefore, the Tribunal did not accept the Commission's application, without prejudice of reviewing a new application submitted at the appropriate time.

18. On 2 and 3 April 2019, the Parties informed the Tribunal of their agreement to stay the arbitration until 3 June 2019.

19. By letter dated 4 April 2019, the Tribunal granted the stay for the period agreed by the Parties and invited them to report back to the Tribunal by 3 June 2019, as to whether the arbitration was to proceed.

20. On 3 June 2019, the Parties informed the Tribunal of their agreement to stay the arbitration until 2 December 2019.

21. By letter dated 5 June 2019, the Tribunal granted the stay for the period agreed by the Parties and invited them to report back to the Tribunal by 2 December 2019, as to whether the arbitration is to proceed.

22. On 19 November 2019, Claimant informed the Tribunal of its intention to resume the proceeding and pay its share of the advance payment to ICSID. By letter of 27 November 2019, Claimant confirmed that it had made the corresponding payment. By letter of 5 December 2019, ICSID confirmed that Claimant's share of the advance payment was received on 2 December 2019.

23. By letter dated 6 December 2019, the Tribunal confirmed that the proceedings had resumed and that it would be soon contacting the Parties concerning the arrangements of the first session. It further invited Respondent to provide an update regarding its payment of the first advance requested by the Centre on 22 January 2019.

24. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 10 February 2020 by video conference.

25. Following the first session, on 6 March 2020, the Tribunal issued Procedural Order No. ("**PO**") 1 recording the agreement of the Parties on procedural matters and the decision of the Tribunal on other issues. PO1 provides, *inter alia*, that the applicable ICSID Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English, and that the place of proceeding would be Paris, France. PO1 also sets out the schedule for the jurisdictional and merits phase of the proceedings.

26. In accordance with PO1, on 31 July 2020, Claimant filed its Memorial on the Merits and Jurisdiction (the "**Memorial**"), together with the Accuracy Expert Report for the determination of Claimant's Quantum attached to Claimant's Memorial ("**Accuracy First Expert Report**").

27. On 29 January 2021, Respondent filed its Counter-Memorial on the Merits and Jurisdiction ("**Counter-Memorial**"). Respondent submitted an expert report issued by Politecnico Milano ("**PoliMi First Expert Report**"), which assessed the estimate for damages suffered by Claimant, if due.

28. On 24 February 2021, the Commission Application for Leave to Intervene as a Non-Disputing Party pursuant to ICSID Arbitration Rule 37(2) (the "**Commission's Application**").

29. On 26 February 2021, the Tribunal invited the Parties to submit their comments on the Commission's Application.

30. On 3 March 2021, each Party filed its observations to the Commission's Application. Claimant objected to the Commission's Application, raising doubts as to whether its intervention would bring a new perspective, particular knowledge or insight different from that of the Parties, since the allegations made by the Commission on the matters at stake in this arbitration were publicly available, rendering its intervention in these proceedings repetitive and thus unnecessary. Respondent requested the Tribunal accept the Commission's Application on the ground that the Commission's position was inherently different from that of either of the Parties and its intervention in addressing the issue of jurisdiction should represent, for Claimant and Respondent, a common interest, since the applicability of the ECT to intra-EU disputes would affect a correct implementation of any award by the Tribunal within the EU.

31. On 24 March 2021, the Tribunal issued PO2 on the Commission's Application. The Tribunal granted the Commission's Application, ruling that it could help illustrate and complement some of the points raised by Respondent in its objections to the jurisdiction of the Tribunal. The Tribunal limited the Commission's intervention to a written submission and further ordered it to provide an undertaking to the effect that it would comply with any decision by the Tribunal on costs that resulted from the Commission's intervention in these proceedings.

32. By letter dated 26 March 2021, the Commission requested that the Tribunal alter its decision by removing the condition of providing the cost undertaking for Tribunal and Parties' costs, as determined by the Tribunal at the appropriate stage. In support of its request, the Commission argued that that it cannot issue a cost undertaking of legal expenses arising from a proceeding to which it is not party.

33. On 8 April 2021, in order to avoid a situation where the intervention of the Commission would generate unreasonable additional costs for either party or both, which would be unfair and prejudicial for the Parties, the Tribunal decided not to alter its decision contained in PO2 and renewed its invitation for the Commission to submit the undertaking on costs by 22 April 2021. The Tribunal further advised that if the undertaking were not received by such date, the Commission's Application would be disallowed.

34. On 1 June 2021, Claimant requested the Commission's Application be disallowed in light of its failure to submit an undertaking on costs, as ordered by the Tribunal.

35. On 3 June 2021, the Tribunal advised the Parties that in light of the Commission's failure to comply with the undertaking on costs ordered by the Tribunal, the Commission's Application had been disallowed.

36. In accordance with Section 15 of PO1, on 28 May 2021, the Parties submitted their document production requests including: (i) requests for production to which a Party had initially objected, but finally agreed to produce; and (ii) requests for production that required a decision from the Tribunal.

37. On 11 June 2021, the Tribunal issued PO3 deciding on the production of documents.

38. Pursuant to the Procedural Calendar, as amended, each party produced the documents ordered under PO3 on 2 July 2021.

39. Also on 2 July 2021, Respondent submitted a Final Update on Claimant's Requests and Document Production.

40. By letter dated 13 July 2021, Claimant raised a number of issues to the Tribunal's attention in relation to Respondent's conduct in complying with document production.

41. Following an invitation for the Tribunal, on 19 July 2021, Respondent filed a response to Claimant's letter, confirming that it had produced all the documents at its disposal and all those that it could find, in good faith.

42. On 22 July 2021, the Tribunal issued PO4 concerning the production of documents in light of the updated requests.

43. On 3 September 2021, Claimant filed its Reply on the Merits and Jurisdiction (the "**Reply**"), together with the Second Expert Report of Accuracy ("**Accuracy Second Expert Report**").

44. On 21 February 2022, Respondent filed its Rejoinder on the Merits and Jurisdiction (the "**Rejoinder**"). Respondent submitted a second expert report issued by Politecnico Milano ("**PoliMi Second Expert Report**").

45. On 13 April 2023, pursuant to Section 19.1 of PO1 and Annex B of PO1, a pre-hearing organizational meeting was held between the Parties and the Tribunal by videoconference. The matters discussed were procedural, administrative and logistical issues in preparation for the upcoming Hearing.

46. On 22 April 2023, the Tribunal issued PO5 regarding the Organization of the Hearing.

47. On 9 May 2023, Respondent filed a request for the Tribunal to decide on the admissibility of new evidence. On that same day, Claimant informed the Tribunal that the Parties had agreed to the introduction of the new evidence requested by Respondent and additional evidence requested by Claimant.

48. On 10 May 2023, the Tribunal, pursuant to the Parties' agreement, authorized the inclusion into the record of the evidence requested by the Parties.

49. From 15-19 May 2023, the Tribunal and the Parties held a Hearing on the Merits and Jurisdiction at the facilities of the Madrid Court of Arbitration. The following persons were present:

Tribunal:	
Prof. Eduardo Zuleta	President of the Tribunal
Ms. Judith Gill	Co-arbitrator
Prof. Laurence Boisson de Chazournes	Co-arbitrator
ICSID Secretariat:	
Ms. Natalí Sequeira	Secretary of the Tribunal
For Claimant:	
Mr. Dany Khayat	Counsel for Claimant
Mr. José Caicedo	Counsel for Claimant
Ms. Isabela Lacreta	Counsel for Claimant
Mr. Jawad Ahmad	Counsel for Claimant
Ms. Nawal Jallabi	Counsel for Claimant
Mr. Aslan Boucobza	Counsel for Claimant
Mr. Kinan Dalla (remotely)	Trainee
Ms. Hortense Kropp (remotely)	Trainee
Mr. Eric Haza	Claimant's representative
Ms. Charlotte Gaussel	Claimant's representative

Mr. Vicenzo Bozzetto	Claimant's representative also serving as witness
Mr. Bruno Masson	Claimant's representative also serving as witness
Ms. Marina Karvatska	Claimant's representative
Mr. Jean-Marc Janailhac	Claimant's witness
Mr. Anthony Theau-Laurent (Accuracy)	Claimant's expert
Mr. Louis Osman (Accuracy)	Claimant's expert
Mr. Pranshu Agarwal (Accuracy)	Claimant's expert

For Respondent:

Mr. Sergio Fiorentino	Counsel for Respondent
Mr. Pietro Garofoli	Counsel for Respondent
Ms. Laura Delbono	Counsel for Respondent
Mr. Elio Cucchiara	Counsel for Respondent
Ms. Gaia Iappelli	Counsel for Respondent
Ms. Adele Berti Suman	Counsel for Respondent
Prof. Maria Chiara Malaguti	Minister of Foreign Affairs
Prof. Ludovica Chiussi Curzi	Counsel for Respondent Avvocatura dello Stato
Ms. Linda Paglierani	Trainee
Ms. Eleonora Vita	Trainee
Mr. Walter Bresciani Gatti	Respondent's witness
Mr. Vincenzo De Matteis	Respondent's witness
Mr. Andrea Adelchi Ottaviano	Respondent's witness
Prof. Stefano Consonni	Respondent's expert
Prof. Federico Viganò	Respondent's expert
Prof. Stefano Pedrini	Respondent's expert

Court Reporter:

Ms. Laurie Carlisle	English Court Reporter

Interpreters:

Ms. Francesca Geddes	Italian-English Interpreter
Ms. Daniela Ascoldi	Italian-English Interpreter
Ms. Monica Robiglio	Italian-English Interpreter
Ms. Sarah Ross	French-English Interpreter
Ms. Gabrielle Baudry	French-English Interpreter
Ms. Christine Victorin	French-English Interpreter

50. During the Hearing, the following persons were examined:

On behalf of Claimant:

Mr. Vicenzo Bozzetto	Claimant's representative also serving as witness
Mr. Bruno Masson	Claimant's representative also serving as witness
Mr. Jean-Marc Janailhac	Claimant's witness

On behalf of Respondent:

Mr. Walter Bresciani Gatti	Respondent's witness
Mr. Vicenzo de Matteis	Respondent's witness
Mr. Andrea Adelchi Ottaviano	Respondent's witness

51. On the last day of the Hearing, and later on 7 June 2023, the Tribunal invited the Parties to agree on (i) the deadline to review the hearing transcripts; (ii) whether they intended to submit post-hearing briefs, and accordingly the deadline for their submissions, as well as the format, page limit, and the number of rounds; and (iii) whether the Parties agreed to the Tribunal's proposal for the Tribunal to prepare a skeleton of the Positions of the Parties in the Award, send the skeleton to the Parties and have the Parties draft the sections corresponding to their respective positions (the "**Skeleton Summaries**"), without prejudice to the Tribunal adjusting or redrafting the Skeleton Summaries as it saw fit.

52. On 14 June 2023, the Parties submitted their respective responses to the Tribunal's request.

53. On 30 June 2023, the Tribunal issued PO6 fixing the dates and specifications for the submission of the Tribunal's draft Skeleton, the two rounds of post-hearing briefs, and the Parties' Skeleton Summaries.

54. Pursuant to that timetable, the Tribunal circulated its Skeleton as an indicative document containing a checklist to guide the Parties in summarizing their positions.

55. On 20 October 2023, Claimant submitted its Post-Hearing-Brief ("**Claimant's PHB**"). On the same date, Respondent submitted its Post-Hearing-Brief ("**Respondent's PHB**").

56. On 1 December 2023, Claimant submitted its reply to Italy's Post-Hearing-Brief dated 20 October 2023 ("**Claimant's Reply PHB**"). On the same date, Italy submitted its reply to Claimant's Post-Hearing-Brief ("**Respondent's Reply PHB**"). Each party also submitted its respective Skeleton Summaries

57. On 12 January 2024, the Parties filed their Statements on Costs. On 11 September 2025, the proceeding was declared closed, in accordance with Rule 38(1) of the ICSID Arbitration Rules.

III. REQUESTS FOR RELIEF

A. CLAIMANT

1. Claimant's Memorial

58. "The Arbitral Tribunal is requested to:

- declare that the dispute is within the jurisdiction and competence of the ICSID and the Tribunal;
- declare that Respondent has breached the Energy Charter Treaty:

- by failing to observe contractual obligations entered into with respect to Claimant's investments as required by Article 10(1) of the ECT;

- by failing to accord fair and equitable treatment to Claimant as required by Article 10(1) of the ECT;

- by indirectly expropriating Claimant's investment in violation of Article 13 of the ECT; and

- order Respondent to indemnify Claimant for the loss of its investment in the amount of € 411.3M as of 31 July 2020 plus interest until payment at a 3.6% interest rate, compounded annually;

- order Respondent to pay all costs and expenses of this arbitration, including Veolia Propreté's legal and expert fees and expenses of any experts appointed by the Tribunal, the fees and expenses of the Tribunal and ICSID's other costs and fees;

59. grant Claimant with such other or additional relief as may be appropriate under the applicable law or may otherwise be just and proper."[2]

2. Claimant's Reply

60. "[T]he Arbitral Tribunal is respectfully requested to:

- Dismiss Italy's counterclaim for lack of jurisdiction and/or admissibility;

- Dismiss all of Italy's jurisdictional objections;

- Declare that the dispute is within the jurisdiction and competence of the ICSID and the Tribunal;

- Declare that Italy has breached the Energy Charter Treaty:

- By failing to observe contractual obligations entered into with respect to Veolia's investments as required by Article 10(1) of the ECT;

- By failing to accord fair and equitable treatment to Veolia as required by Article 10(1) of the ECT; and/or

- By indirectly expropriating Veolia's investment in violation of Article 13 of the ECT.

- Order Italy to pay Veolia for the loss of its investment in the amount € 417.3 million or alternatively € 406.5 million, as of 3 September 2021 plus interest until payment at a 3.6% interest rate, compounded annually;

[2] Claimant's Memorial, p. 133.

- Order Italy to pay all costs and expenses of this arbitration, including Veolia's legal and expert fees and expenses of any experts appointed by the Tribunal, the fees and expenses of the Tribunal and ICSID's other costs and fees;

61. Grant Veolia with such other or additional relief as may be appropriate under the applicable law or may otherwise be just and proper."[3]

3. Claimant's PHB

62. "[T]he Tribunal is respectfully requested to:

- Dismiss all of Italy's jurisdictional objections;

- Declare that the dispute is within the jurisdiction of the Tribunal;

- Declare that Italy has breached the Energy Charter Treaty:

- By failing to observe contractual obligations entered into with respect to Veolia's investments, as required by Article 10(1) of the ECT;

- By failing to accord fair and equitable treatment to Veolia, as required by Article 10(1) of the ECT and;

- By indirectly expropriating Veolia's investment, in violation of Article 13 of the ECT

- Order Italy to pay Veolia for the loss of its investment the amount EUR 438 million or, alternatively, EUR 425.7 million (to be updated at the date of the Award), plus post-Award interests until payment at a 3.6% rate, compounded annually;

- Order Italy to pay all costs and expenses of this Arbitration, including Veolia's legal and expert fees and expenses of any experts appointed by the Tribunal, the fees and expenses of the Tribunal and ICSID's other costs and fees;

63. Grant Veolia with such other or additional relief as may be appropriate under the applicable law or may otherwise be just and proper."[4]

B. RESPONDENT

1. Respondent's Counter-Memorial

64. "676. [T]he Respondent respectfully requests the Tribunal to:

(a) Decline jurisdiction since the Claimant is not an Investor of '*Another Contracting Party*'

[3] Claimant's Reply, ¶ 1103.
[4] Claimant's PHB1, ¶ 168.

(b) Alternatively, decline jurisdiction over the claims since the ECT does not cover intra-EU disputes.

(c) Decline jurisdiction over the claims since the Claimant's activity does not qualify as an investment, and

(d) Decline jurisdiction because the object of the alleged investment does not fall within the scope of the ECT

(e) Decline jurisdiction because the dispute has been submitted elsewhere

677. Should the Tribunal retain to have jurisdiction over the case,

(a) Declare, on the merits, that the Respondent did not violate Article 10(1) ECT last sentence (the so-called 'umbrella clause').

(b) Declare, on the merits, that the Respondent did not violate Article 10(1) ECT, since it did not fail to grant fair and equitable treatment to the Claimant's investment, and to ensure them stable, equitable, favorable and transparent conditions.

(c) Further, declare that Italy did not violate Article 13 ECT either, since its behaviors did not amount to indirect expropriation of the Claimant's alleged investment.

(d) Consequently, declare that no compensation is due.

678. In the unfortunate event that the Tribunal were to recognize legitimacy to one of the Claimant's grievances,

(e) declare that damages were not adequately proved.

(f) In addition, declare that both the methods for calculation and the calculation itself of damages proposed by the Claimant are inappropriate and erroneous.

(g) Order the Claimant to pay the expenses incurred by the Italian Republic in connection with these proceedings, including professional fees and disbursements."[5]

2. Respondent's Rejoinder

65. "[T]he Respondent respectfully confirms its request that the Tribunal:

A. Decline jurisdiction given that

- the Claimant is not an Investor of 'Another Contracting Party';
- ECT does not cover intra-EU disputes;

[5] Respondent's Counter-Memorial, ¶¶ 676-678 (some emphasis omitted).

- Claimant's activity does not qualify as an investment;

- alleged investment does not fall within the scope of the ECT;

- dispute has been submitted elsewhere.

B. Should the Tribunal retain to have jurisdiction over the case, declare that the Respondent

- did not violate Article 10(1) ECT last sentence (the so-called 'umbrella clause');

- did not violate Article 10(1) ECT, since it did not fail to grant fair and equitable treatment to the Claimant's investment, and to ensure them stable, equitable, favorable and transparent conditions;

- did not violate Article 13 ECT either, since its behaviors did not amount to indirect expropriation of the Claimant's alleged investment;

- has no obligation to compensate the Claimant.

C. In the unfortunate event that the Tribunal were to recognize legitimacy to one of the Claimant's grievances,

- declare that damages were not adequately proved;

- declare that both the methods for calculation and the calculation itself of damages proposed by the Claimant are inappropriate and erroneous;

- subtract the amount of € 62,9M, paid by the Respondent in execution of Construction and Management Arbitral Awards, from the sum eventually recognized as compensation for damage;

(a) order the Claimant to pay the expenses incurred by the Italian Republic in connection with these proceedings, including professional fees and disbursements."[6]

IV. FACTUAL BACKGROUND[7]

66. In the 1990s, Italy was facing waste collection and disposal difficulties in the regions of Calabria and Tuscany, posing significant risks to the environment and health of the resident population.[8] In 1993, the region of Tuscany was the first to declare a state of emergency due to the waste management crisis. Launching "extraordinary interventions," the State appointed a governmental envoy to solve

[6] Respondent's Rejoinder, ¶ 574.
[7] This section includes summaries of the facts and positions of the Parties underlying the present dispute. Such summaries are not an exhaustive narrative of all the matters that have been discussed in this proceeding. Nevertheless, the Tribunal has considered the entirety of the Parties' factual and legal arguments made in their written and oral submissions, whether or not they are expressly referenced in the text of this section.
[8] Claimant's Memorial, ¶¶ 21, 44.

the environmental and waste management crisis: a *Commissario* (or Commissioner) for Tuscany ("***Commissario* of Tuscany**").[9]

67. The Veolia Group was initially present in Italy through its local subsidiaries operating in the water treatment and heating system sectors.[10] Veolia Propreté was constituted as a company for waste management,[11] and in 1997 it entered the Italian waste management market, acquiring 49% of the Italian company Tecnoborgo S.p.A. ("**Tecnoborgo**"). Tecnoborgo managed a waste-to-energy ("**WtE**") plant, treating 120,000 tons of waste per year and producing 72,000 GWh of electricity for the province of Piacenza.[12]

68. In July 1997, as part of his plan to address the crisis, in accordance with Law No. 109/1994,[13] *Commissario* of Tuscany entered into a 19-year concession agreement with Termomeccanica Ecologia S.p.A. ("**TM.E**") (later replaced by Termomeccanica Energia Versilia ("**TEV**") as of 16 December 1997) and Consorzio Etruria Soc. Coop. A.R.L. (the "**TEV Concession**").[14] Their task, as planned by *Commissario* of Tuscany, was to set up an integrated waste management system composed of a selection and treatment plant for urban solid waste ("**USW**"), known as a Mechanical-Biological Treatment ("**MBT**") plant in Pioppogatto (Massarosa municipality) and a WtE plant in Falascaia (Pietrasanta municipality).[15] These two plants were constructed in 2001 and 2002, respectively, after the TEV Concession was amended twice, once in May 2000 and later in July 2002.[16]

69. On 30 September 1997, the President of the Region of Tuscany terminated the state of emergency in the region of Tuscany and the municipalities of Camaiore, Forte dei Marmi, Massarosa, Pietrasanta, Seravezza, and Viareggio (the "**Municipalities of Versilia**" or "**Municipalities**").[17] The Municipalities of Versilia took over the TEV Concession, replacing the *Commissario* of Tuscany.[18]

70. Under the TEV Concession, TEV generated revenues from gate fees charged to the municipalities per tonne of treated waste and from the sale of electricity generated by the WtE plant and sold to Gestore dei Servizi Energetici ("**GSE**"), Italy's publicly-owned energy company.[19] The price of energy sold was determined based on the Italian *Provvedimento* No. 6 of the *Comitato*

[9] C-16, Decree of the President of the Region of Tuscany No. 468 cited in the Decree of the President of the Region of Tuscany No. 289, 30 September 1997; R-16, Decree of appointment of the Commissario, 21 July 1993; Respondent's Counter-Memorial, ¶ 28.
[10] Claimant's Memorial, ¶ 19.
[11] C-2, Veolia Information.
[12] Claimant's Memorial, ¶ 23.
[13] Claimant's Reply, ¶ 50; C-259, Call for tender for the TEC Concession published in the Official Gazette on 18 August 1998.
[14] Claimant's Memorial, ¶ 61; C-17, Agreement 31 July 1997.
[15] Claimant's Memorial, ¶ 60; Claimant's Reply, ¶ 73.
[16] Claimant's Memorial, ¶ 65; C-79, *I Atto di Sottomissione*, 30 May 2000; C-80, *II Atto di Sottomissione*, 23 July 2002.
[17] C-16, Decree of the President of the Regional Government No. 289, 30 September 1997.
[18] Claimant's Memorial, ¶ 62; C-16, Decree of the President of the Region of Tuscany No. 289, 30 September 1997; Second Witness Statement of Mr. Vincenzo Bozzetto, 1 September 2021, ¶ 7.
[19] Claimant's Reply ¶ 74; C-17, Concession Agreement between TEV and Tuscany's *Commissario*, 31 July 1997, Art. 6; C-19, Electricity Agreement between TEV and GSE, 15 April 2002.

Interministeriale dei Prezzi ("**CIP6**" and "**CIP**"), an economic incentive provided by law to the production of renewable energy that allowed it to be sold above-market prices.[20]

71. Around the same time, the Italian Presidency of the Council of Ministers declared a state of emergency due to the waste management crisis in the region of Calabria, pointing out that the "situation presents unpreventable environmental risks which […] degenerate into an emergency situation that could not otherwise be dealt with ordinary means and powers."[21] In October 1997, the Minister of Interior appointed a *Commissario* of Calabria (the "***Commissario***") as special authority to guarantee a better coordination among local and regional administration and handle the waste crisis.[22] The *Commissario* was vested with extraordinary powers[23] to make the "interventions necessary" to deal with the emergency, including making use of "local entities and consortium."[24] To handle the waste management crisis, the Calabria Region was divided into three systems: "*Calabria Centro*", the only waste management integrated system that had been successfully executed, "*Calabria Sud*" and "*Calabria Nord*."[25]

72. In August 1998, the Official Gazette of the Italian Republic published a call for tenders for "the construction and management of an integrated system of [waste] disposal of municipal solid waste in 'Calabria Sud'.[26] In October 2000, in accordance with Law No. 109/1994,[27] the *Commissario* entered into a 15-year concession agreement with TM.E (later replaced by TEC), and four other companies (the "**Concessionaire**") (the "**TEC Concession**" and, together with the TEV Concession, the "**Concessions**" or "**Concession Agreements**").[28]

73. The TEC Concession required the construction and operation of five MBT plants and one WtE plant. The MBT plants were to be located in Siderno, Reggio Calabria,[29] Crotone, Rossano, and Gioia Tauro. The Gioia Tauro plant was to be integrated with a WtE incinerator (line 1) which would generate energy from the treated waste received from the five MBT plants.[30] These five plants, including the WtE line 1, were known as the TEC1 project ("**TEC1**").[31] TEC was to generate revenues from gate fees charged to the municipalities per tonne of treated waste and from the sale of electricity generated. The electricity price was also to be determined based on CIP6 as mentioned in the 4 October 2005 Electricity Power Purchase Agreement with GSE.[32] The TEC Concession provided that, at the end of the state of emergency, the Calabria Region would replace the

[20] C-6, *Provvedimento* of the Minister of Industry No. 6, 29 April 1992; C-7, Decree of the Presidency of the Republic No. 79, 16 March 1999; Claimant's Memorial, ¶ 53.
[21] C-8, Decree of the Presidency of the Council of Ministers No. 217, 12 September 1997.
[22] Respondent's Counter-Memorial, ¶ 26; C-9, Minister of Interior's Ordinance No. 2696, 21 October 1997.
[23] Claimant's Reply, ¶ 30.
[24] C-9, Minister of Interior's Ordinance No. 2696, 21 October 1997, Art. 1(1) and Article 1(4).
[25] C-51, Parliamentary Committee Report (Extract), 19 May 2011, p. 98.
[26] C-259, Call for tenders for the TEC Concession published in the Official Gazette, 18 August 1998. The Tribunal will refer to municipal solid waste or "MSW" as Urban Solid Waste or "USW", which it understands to be essentially the same.
[27] Claimant's Reply, ¶ 50.
[28] C-10, TEC Concession, 17 October 2000. The other companies were (i) Lurgi Energie Und Entsorgung GmbH; (ii) Pianimpianti S.p.A; (iii) Saarberg Oekotechnik GmbH; (iv) Consorzio Cooperative Costruzioni; and (v) Ing. Nino Ferrari Impressa Costruzioni Generali SRL.
[29] Defined below as "**Sambatello 2**."
[30] Claimant's Memorial, ¶ 52; Respondent's Counter-Memorial, ¶ 30
[31] Claimant's Memorial, ¶ 52; Respondent's Counter-Memorial, ¶ 30.
[32] Claimant's Memorial, ¶ 53; C-18, Electricity Agreement between TEC and GSE, 4 October 2005.

Commissario as the Grantor of the TEC Concession.[33] On 14 March 2013, through Ordinance No. 57, the Italian Department of Civil Protection declared that, as of 1 January 2013, the Calabria Region had taken over the powers of the *Commissario* and the state of emergency had ended.[34]

74. In December 2000, Veolia incorporated Veolia Servizi Ambientali S.p.A. ("**VSA**") as its own Italian subsidiary "to further develop its waste management services in Italy."[35]

75. The TEC Concession was amended twice to include further works in the sites, first in August 2001 and secondly in October 2003.[36]

76. First, on 31 August 2001, TEC and the *Commissario* signed a first amendment to the TEC Concession (the "***Atto Integrativo***"). Under the *Atto Integrativo*, TEC agreed to take over the management and operation of an existing MBT plant for USW located at Sambatello in the province of Reggio Calabria ("**Sambatello 1**"), and to undertake the management for a period of 15 years of the overall technological structure consisting of both the Sambatello 1 plant and the planned new Reggio Calabria plant provided for under the TEC Concession which was to be built at Pettogallico ("**Sambatello 2**").[37]

77. On 9 July 2003, Ordinance of the *Commissario* No. 2633 authorized the construction of a second incineration line 2 in the WtE plant at Gioia Tauro, known as the **TEC2** project ("**TEC2**"). This was subject to the need for a specific environmental impact study, despite acknowledging its environmental sustainability.[38] The Ordinance also provided for the *Commissario* to pay additional costs to TEC due to changes to the economic framework of TEC1 and costs associated with changes in the location of the sites.[39] It also established the granting of a public contribution "intended exclusively to reduce the disposal tariffs for users of the 'Calabria Sud' integrated system" (the "***Contributo***").[40]

78. Accordingly, on 31 October 2003, TEC and the *Commissario* signed a second amendment to the TEC Concession ("***Atto di Sottomissione***"), to incorporate the construction of the WtE line 2 in the Gioia Tauro plant[41] and the steps for environmental mitigation on the Gioia Tauro site.[42] They also agreed on the joint identification of landfill sites to serve the plants for the disposal of processed waste and entrusted TEC with the construction and management of the landfill sites.[43] Finally, Article

[33] C-10, TEC Concession, 17 October 2000, Art. 11.
[34] Claimant's Memorial, ¶ 58; C-78, Department of Civil Protection's Ordinance No. 57, 14 March 2013.
[35] Claimant's Memorial, ¶ 24.
[36] Claimant's Reply, ¶ 55.
[37] C-11, *Atto Integrativo* between TEC and the *Commissario*, 31 August 2001. As discussed further below, the new plant was subsequently relocated to Sambatello and, as the Parties have done, the Tribunal will where appropriate refer to the relocated plant as "**Sambatello 2**."
[38] C-12, Ordinance of the *Commissario* No. 2633, 9 July 2003, p. 7, ¶ 4.
[39] C-12, Ordinance of the *Commissario* No. 2633, 9 July 2003, pp. 4, and 7, ¶¶ 1 and 3.
[40] C-12, Ordinance of the *Commissario* No. 2633, 9 July 2003, p. 7, ¶ 2.
[41] C-14, *Atto di Sottomissione* between TEC and the *Commissario*, 31 October 2003, Art. 2(a).
[42] C-14, *Atto di Sottomissione* between TEC and the *Commissario*, 31 October 2003, Art. 2(c).
[43] C-14, *Atto di Sottomissione* between TEC and the *Commissario*, 31 October 2003, Art. 6.

8-bis of the *Atto di Sottomissione* recognized the ***Contributo***,[44] amounting to € 41,316,551.92, and its funding sources.[45]

79. On 10 May 2004, the *Commissario* paid TEC € 7,727,815.10 towards the *Contributo* and authorized a further amount of € 1,142,848.60 to be paid.[46] That further amount was paid on 21 July 2005. These payments amounted to 20% of the total owed by the *Commissario* to the TEC under Article 8-bis of the *Atto di Sottomissione*. No further amount was paid on account of the *Contributo* after that.[47]

80. On 17 August 2005, the Regional Council of Calabria issued Law No. 13/2005,[48] Article 33(2) of which suspended the construction of TEC2 and the new Reggio Calabria MBT plant (Sambatello 2) due to opposition and protests by the local population, the Mayor of Reggio Calabria, two district presidents, and the chief of the local *Carabinieri*.[49] The municipality of Reggio Calabria also started administrative proceedings against the project.[50] On 3 July 2006, the Italian Constitutional Court declared the unconstitutionality of Article 33(2) of Law No. 13/2005.[51] The works were due to resume by 2006, but, by March 2007, they had not resumed.[52]

81. In 2006, Claimant expanded its presence in Italy, acquiring 60% of Energonut S.p.A., an Italian company located in the municipality of Pozzilli, in central Italy. The company was treating 100,000 tons of waste a year and producing 104,000 GWh of electricity.[53]

82. In 2007, Claimant started to consider the acquisition of shares in TMT Tecnitalia S.p.A. ("**TMT**"), TM.E's wholly owned subsidiary responsible for the management of TEC and TEV,[54] after having been approached by Banca Intesa, one of Italy's largest banks, and Mr. Enzo Papi, an Italian businessman. Both Banca Intesa and Mr. Papi's Group CIPI held shares in TM.E: 33.3% and 32.4% respectively.[55] As described above, TEC and TEV were each in charge of a concession agreement for the management of waste; TEC operated in Calabria while TEV operated in Tuscany.[56] At the time of Veolia's investment, all TEC1 plants, with the exception of the Reggio Calabria MBT plant (Sambatello 2), were operational.[57]

83. For the share acquisition in TMT, Claimant requested the Italian legal studio Macchi di Cellere Gangemi to conduct legal due diligence, resulting in a report dated 24 January 2007 (the "**Legal Due**

[44] C-14, *Atto di Sottomissione* between TEC and the *Commissario*, 31 October 2003, Art. 8-bis.
[45] Claimant's Memorial ¶¶ 239-241, 392; C-13, Register of Decrees of the Directors of the Calabria Region No. 13021, 16 September 2013; C-172, Commission of the European Communities Decision No. 2345, 8 August 2000.
[46] C-15, *Commissario*'s Ordinance No. 3619, 21 July 2005, p. 6.
[47] Claimant's Memorial, ¶¶ 242-243.
[48] C-36, Law No. 13/2005 of the Calabria Region, 17 August 2005, Art. 33.2.
[49] C-36, Law No. 13/2005 of the Calabria Region, 17 August 2005; C-89, Construction Award between TEC and the *Commissario*, 13 October 2010, pp. 40-41.
[50] C-43, Decision of the *Direzione dei Lavori*, 22 September 2009, p. 1.
[51] C-37, Decision of the Constitutional Court No. 284/2006, 3 July 2006; Claimant's Memorial, ¶ 454.
[52] C-269, Minutes of resumption of work, 27 July 2006; C-89, Construction Arbitration Award dated 13 October 2010; C-203, Letters from the *Commissario* to TEC and Letter from TEC to the *Commissario*, 6-9 November 2006; C-204, Letter from TEC to the *Commissario* and DL, 5 March 2007; C-205, Letter from TEC to the *Commissario* and DL, 11 April 2007; Claimant's Memorial, ¶ 454; Claimant's Reply, ¶ 104.
[53] Claimant's Memorial, ¶ 24.
[54] Claimant's Memorial, ¶ 4.
[55] C-76, Presentation Acquisition Termomeccanica, 29 March 2007, p. 3.
[56] Claimant's Memorial, ¶ 32.
[57] Claimant's Reply, ¶ 117.

Diligence Report").[58] Claimant also conducted financial and environmental due diligence for both TEC and TEV.

84. Even before Claimant's investment was made, TEC and the *Commissario* had already had disagreements regarding the adjustments of the gate fee to be paid to TEC. For instance, on 10 January 2007, the *Commissario* rejected the invoices sent by TEC requesting the application of the Italian National Institute of Statistics ("**ISTAT**") adjustment as "they were not included in the contractual conditions."[59] In turn, TEC sent letters rejecting the *Commissario*'s return of invoices, reserving the right to take legal action and, if necessary, "use the conditions against managers for non-fulfillment."[60] In fact, the Legal Due Diligence Report flagged the existence of claims filed by TEC for the collection of outstanding amounts that had not been paid by the *Commissario*.[61] The Legal Due Diligence Report also warned Veolia that the adjustment of the tariffs had not yet been made effective, as the *Commissario* had not agreed TEC's proposals for tariff adjustments:

> "Comments: […]
>
> 6) The mechanism of adjustment of the tariffs has not been make (sic.) effective yet, indeed the Commissario has not yet agreed the proposals of TEC for the adjustments of the tariffs that is because of due to indexation and of lower contribution of wastes. There are not therefore clear references about the way in which this mechanism shall be applied. Currently the Commissario pays only the initial amount forecast in the Concessione without any adjustments and reserves to pay the adjustments. The Commissario shall pay only when he will have agreed the related mechanism."[62]

85. The Legal Due Diligence Report also flagged, in relation to the TEV Concession, the disagreements with the indexation mechanism and the "reset" of the tariffs structure due to a judgment of an administrative court.[63]

86. On 2 March 2007, TEC and the *Commissario* held a meeting where senior managers of TEC addressed "the serious company's crisis" and indicated that "payment of the workers' salaries could not be guaranteed."[64] Also, they claimed that:

> "[t]he reasons for financial difficulties were attributed, firstly, to the failure to honour the contractual deadlines in the deed of the concession for the construction and management of the integrated facility referred to as 'Calabria Sud' which provided for a non-refundable public contribution for the benefit of the concessionaire company of approximately € 41M to be calculated as [Measure]

[58] C-20, Preliminary Legal Due Diligence Report of Macchi di Cellere Gangemi, 24 January 2007.
[59] C-113, Letter from *Commissario* to TEC returning invoices, 10 January 2007.
[60] C-109, Letter from TEC to the *Commissario* on tariff, 2 March 2007.
[61] Second Witness Statement of Mr. Bruno Masson, 3 September 2021, ¶ 6.
[62] C-20, Preliminary Legal Due Diligence Report of Macchi di Cellere Gangemi, 24 January 2007, p. 12, ¶ 6.
[63] C-20, Preliminary Legal Due Diligence Report of Macchi di Cellere Gangemi, 24 January 2007, p. 18, ¶ 2. The judgment was not provided by the parties to these arbitration proceedings.
[64] C-22, Minutes of the meeting between TEC and the *Commissario*, 28 February 2007 (with a letter of the Prefecture of Calabria Region, 3 March 2007), p. 2.

1.7 of the investment programme for the Calabria 2000 – 2006 Regional Operational Programme ['**POR'** in the Italian acronym[65]]."[66]

87. The letter went on to state that TEC "had received only an advance payment equivalent to 20% of the full amount [of the *Contributo*] and that it had no guarantee of the time-scales for payment of the funds assigned to it, pre-warning that if the delay persisted, not only would it be impossible to pay the amounts due to the labourers, but also the company would enter a state of imminent bankruptcy."[67]

88. On 21 March 2007, the *Commissario* of Calabria sent a letter to TEC recognizing the total amount of € 41,316,551.92 to be paid on account of the *Contributo*. The letter set out the amount due for each of the TEC1 facilities provided in the PE Financial Plan, including € 5,509,485.46 for the new Reggio Calabria MBT plant (Sambatello 2).[68] That same month, the *Commissario* rejected other sums claimed for the additional costs for the processing of waste of non-compliant quality delivered by the Region to TEC (the "***Conguagli***").[69]

89. On 24 April 2007, the *Commissario* of Calabria was replaced. The newly-appointed *Commissario* had to restructure the regional waste plan, supervize the payment of the grants necessary for the construction of the WtE line 2 at the Gioia Tauro plant, and identify landfill sites to dispose of rejected waste.[70] On 15 May 2007, the new *Commissario* reiterated the rejection of the sums corresponding to the *Conguagli* claimed by TEC.[71]

90. On 29 May 2007, VP, and VSA signed a Share Purchase Agreement ("**SPA**") with TM.E and its mother company with VSA acquiring 75% of the equity in TMT. Under the SPA, TM.E was the "Seller" of TMT (the "**Vendor**"), and VSA the "Purchaser." The purchase price of 75% of shares was calculated at € 108 M to be paid in two installments: (i) € 82.5 M by the closing date; and (ii) € 25.5 M deferred for up to 24 months after the closing date[72] pending the conclusion of an Electricity Power Purchase Agreement (the "**EPPA**") with GSE for the sale of electricity produced by TEC2 and the full payment of the remaining sums of the *Contributo*.[73]

91. On the same day as the SPA was signed, the *Commissario* of Calabria and TEC held a meeting in which the Concessionaire claimed that: (a) it was missing approximately € 28 M of the *Contributo*; (b) it was unable to collect the gate fees regularly; and (c) the adjustment of the fees was pending. Additionally, TEC claimed there were no available landfills, causing higher costs for the removal of waste.[74] This situation was also exposed through a letter to the *Commissario* regarding the financial

[65] The Calabria Regional Operational Programme or *Programma Operativo Regionale* ("**POR**") implements EU funding - First Witness Statement of Mr. Jean-Marc Janailhac, ¶ 62.
[66] C-22, Minutes of the meeting between TEC and the *Commissario*, 28 February 2007 (with a letter of the Prefecture of Calabria Region, 3 March 2007), p. 2.
[67] C-22, Minutes of the meeting between TEC and the *Commissario*, 28 February 2007 (with a letter of the Prefecture of Calabria Region, 3 March 2007).
[68] C-23, Letter from the *Commissario* to the Calabria Region, 20 March 2007.
[69] C-131, Letter from *Commissario* to TEC No. 4690, 29 March 2007.
[70] C-139, O.P.C.M. 3585, 24 April 2007, p. 3.
[71] C-278, Letter from the *Commissario* to TEC No. 7139, 15 May 2007.
[72] Claimant's Memorial, ¶ 40.
[73] C-25, Share Purchase Agreement between TM, TME and VSA, VP, 29 May 2007, Art. 2.4 (ii)
[74] C-81, Minutes of the meeting between TEC and the *Commissario*, 29 May 2007, p. 3.

status of TEC on 12 June 2007. TEC claimed that the *Commissario* was overdue with payment of receivables by about € 50 M and that, to avoid impacting the continuity of the service, the issue was to be resolved with utmost urgency.[75]

92. In June 2007, TEC notified the Commissario of the suspension of its activities, alleging causes external to the company.[76] Nonetheless, said causes were rejected by the *Commissario* who imposed penalties for the suspension.[77] TEC insisted that the causes of the suspension, as contemplated by Article 15.2 of the TEC Concession, were the *Commissario*'s failure to pay and meet its contractual obligations. In turn, the *Commissario* alleged that none of the causes in TEC's correspondence justified the company's failure to act.[78]

93. On 30 August 2007, TEC and the *Commissario* held a meeting in which the latter alleged that the *Conguagli* was offset by TEC's lower costs given the lack of investment in landfills.[79] At a meeting on 4 September 2007, TEC claimed additional transportation costs, as it was obliged to transport the rejected waste to the only existing landfills at the time, Rossano and Marella.[80]

94. On 3 October 2007, VSAT and TM.E signed the Closing Record of the SPA.[81] The document was signed by TMT, TM.E, VP, and VSA representatives.[82] TMT changed its name to Veolia Servizi Ambientali Tecnitalia S.p.A. ("**VSAT**") in October 2007.[83]

95. On 31 October 2007, the *Commissario* issued Ordinance No. 6294 with a new waste management plan for the Calabria Region.[84] The plan noted that the TEC1 Reggio Calabria MBT plant was under construction at Pettogallico but advanced an "alternative hypothesis", in the event it could not be completed, of adapting the Sambatello 1 plant to install a new USW selection line.[85] Further, Claimant argues that the plan reaffirmed the construction of TEC2, which was later objected to by the Calabria Regional Council requesting the revocation of Ordinance No. 6294 and opposing a second WtE incineration line at Gioia Tauro.[86] In late 2007, Regional Law No. 27 ordered the temporary suspension of the works on TEC2 to "allow the verification of the environmental, economic and technological compatibility of the plant, taking into account the concentration of further industrial settlements in the area."[87]

96. On 17 December 2007, TEC proposed a settlement agreement to the *Commissario* seeking to "initiate a renewed relationship with its key partner" ("**2007 Settlement Proposal**").[88] TEC proposed a

[75] C-146, Letter from *Commissario* to TEC, 12 June 2007.
[76] C-141, Letter from *Commissario* to TEC, 28 June 2007, pp. 2-4.
[77] C-141, Letter from *Commissario* to TEC, 28 June 2007, p. 1; Claimant's Reply, ¶ 251; Claimant's Memorial, ¶ 288.
[78] C-143, Letter from *Commissario* to TEC, 2 July 2007.
[79] C-82, Minutes of the meeting between TEC and the *Commissario*, 30 August 2007.
[80] C-83, Minutes of the meeting between TEC and the *Commissario*, 4 September 2007.
[81] C-26, SPA Closing Record, 3 October 2007.
[82] C-26, SPA Closing Record, 3 October 2007.
[83] Witness Statement of Mr. Jean-Marc Janailhac, ¶ 7.
[84] C-174, Ordinance No. 6294 of the *Commissario*, 30 October 2007, and Waste Disposal Management Plan 2007.
[85] C-174, Ordinance No. 6294 of the *Commissario*, 30 October 2007, and Waste Disposal Management Plan 2007, PDF p.9.
[86] Claimant's Memorial, ¶ 444; C-38, Deliberation of the Calabria Region No. 122, 10 March 2009.
[87] C-72, Regional Law No. 27, 28 December 2007, Art. 1.
[88] Claimant's Memorial, ¶ 84; C-84 Proposal of Settlement Agreement from TEC to the *Commissario*, 17 December 2007.

settlement of € 21 M for claims estimated at € 204 M.[89] On 11 January 2008, the *Commissario* sent the 2007 Settlement Proposal to the Presidency of the Council of Ministers and the Italian Department of Civil Protection for approval.[90] In turn, the Department of Civil Protection requested approval of the State Attorney of the Catanzaro district.[91] Even though the State Attorney issued a favorable opinion on 29 April 2008, the *Commissario* forwarded the 2007 Settlement Proposal to the Calabria Region for final verification and the Region did not respond.[92]

97. On 31 January 2008, the Municipalities of Versilia set up a public consortium named Consorzio Ambiente Versilia ("**CAV**"),[93] which had the power to represent them before the Concessionaire. According to Respondent, CAV "took over the Concession Agreement as Grantor."[94] However, Claimant maintains that CAV was a "non-contracting party."[95] Nevertheless, Claimant agrees that CAV acted on behalf of the Municipalities of Versilia from the "end of 2006 [sic] until the termination of the TEV Concession."[96]

98. On 15 April 2008, TEC filed *Ricorso* No. 377/2008 before a regional administrative tribunal, seeking payment of the amounts due on account of the *Contributo*.[97] Given the failed attempt to settle amicably, TEC initiated two arbitration proceedings against the *Commissario* of Calabria and the Presidency of the Council of Ministers:[98]

    a. On 6 May 2008, it initiated an arbitration claiming extra costs and damages caused during the construction of the plants and recorded as reserves in the accounting register for works (the "**Construction Arbitration**"); and

    b. On 16 May 2008, it initiated an arbitration that concerned the damages resulting from the *Commissario*'s alleged failure to meet its contractual obligations in the Concession (the "**Management Arbitration**"). In the Management Arbitration, TEC specifically claimed the payment of the outstanding gate fee, the adjustment of the gate fee, the *Conguagli*, and the right to obtain a revision of the contract due to economic and financial disequilibrium.

99. In the Construction Arbitration, the award was rendered on 13 October 2010, recognizing € 30 M[99] in favor of TEC ("**Construction Award**"), and the award delivered in the Management Arbitration, rendered on 26 July 2010, awarded € 32 M in favor of TEC (the "**Management Award**."[100]

100. During inspections of TEV in mid-April 2008, the former plant manager in Falascaia revealed that the Emissions System Monitoring ("**ESM**") was being misused in breach of the relevant regulation. In this regard, CO data was being manipulated to show compliance with environmental limits.[101] In

[89] Claimant's Memorial, ¶ 84
[90] C-85, Letter from the *Commissario* to the Presidency of the Council of Ministers, 11 January 2008.
[91] C-86, Letter from the Presidency of the Council of Ministers (Department of Civil Protection) to TEC, 21 February 2008.
[92] C-88, Letter of the *Commissario* forwarding the Opinion of the State Lawyers of Catanzaro, 29 April 2008.
[93] Claimant's Memorial, ¶ 63.
[94] Respondent's Counter-Memorial, ¶ 132.
[95] Claimant's Memorial, ¶ 74.
[96] Claimant's Memorial, ¶ 74, footnote 68.
[97] C-30, *Ricorso* No. 377/2008, 15 April 2008 (cited in Judgment of the Administrative Tribunal No. 1126, 29 July 2008.
[98] Claimant's Memorial, ¶ 88.
[99] Claimant's Memorial ¶ 89; C-89, Construction Award, 13 October 2010.
[100] C-90 Management Award, 26 July 2010.
[101] C-245, Internal Memorandum (Explanation and chronology of TEV's events in late 2008 and early 2009), 21 August 2009.

May 2008, TEV informed the prosecutorial authorities in the Province of Lucca that they had started an internal investigation concerning irregularities in the control of CO emissions and in the ESM at the Falascaia WtE plant.[102] The investigations discovered that:

> "The facility began experiencing CO production issues as soon as it started burning [refuse derived fuel ('**RDF**' or '**CDR**')[103]], which was basically in 2003.
>
> Data started being manipulated at the same time (already by the previous management team).
>
> Data were systematically manipulated every day by all operations staff at the facility."[104]

101. Between May and June of 2008, Veolia adopted "precautionary and mitigating" steps in the Falascaia facilities. It instructed PoliMi (now Italy's damages expert) to assess the risks to human health and the environment of the plant. Veolia alleges that it implemented the necessary solutions and launched disciplinary actions against the responsible employees that had manipulated the CO emissions data,[105] including the suspension of the factory manager.[106]

102. On 9 July 2008, the Italian Constitutional Court declared Regional Law No. 27 of 2007 as unconstitutional.[107] Hence, on 27 August 2008, the works at TEC2 were ordered to be resumed, having an estimated completion date of 18 July 2010.[108]

103. In July 2008, another environmental breach was discovered. The Baccatoio stream, into which the Falascaia plant discharged flows, showed levels of heavy metals higher than the contamination threshold concentrations ("**CSC**") allowed under Legislative Decree No. 152/2006.[109] As a result of a new test and inspection of the control authorities, the Province issued Decision No. 69/2008 supplementing the authorization for the discharge of wastewater.[110]

104. On 29 July 2008, the Regional Administrative Court for Calabria decided *Ricorso* No. 377/2008, ordering the Calabria Region to conclude, within 90 days of the notification of the decision, "the administrative procedure relating to the granting of public contributions, under Measure 1.7 - action 1.7 of the POR [Regional Operating Plan] Calabria 2000 – 2006, in favour of the Deputy Commissioner for the environmental emergency, regarding the execution of a construction and

[102] Claimant's Reply, ¶ 586; Second Witness Statement of Mr. Jean-Marc Janailhac, ¶ 14(i)-(vi); C-245, Internal Memorandum (Explanation and chronology of TEV's events in late 2008 and early 2009), 21 August 2009.
[103] Refuse derived fuel ("**RDF**") or Combustibile derivato dai rifiuti ("**CDR**").
[104] C-245, Internal Memorandum (Explanation and chronology of TEV's events in late 2008 and early 2009), 21 August 2009, p. 2.
[105] Claimant's Reply, ¶ 587; Second Witness Statement of Mr. Jean-Marc Janailhac, ¶ 14(v), (ix); C-245, Internal Memorandum (Explanation and chronology of TEV's events in late 2008 and early 2009), 21 August 2009, pp. 1-3.
[106] C-245, Internal Memorandum (Explanation and chronology of TEV's events in late 2008 and early 2009), 21 August 2009, p. 1.
[107] C-35, Decision of the Constitutional Court No. 277/2008, 9 July 2008.
[108] C-177, Decision of the Directorate of Works ("**DL**"), 27 August 2008.
[109] Second Witness Statement of Mr. Jean-Marc Janailhac ¶ 15(i).
[110] Second Witness Statement of Mr. Jean-Marc Janailhac, ¶ 15(ii).

management concession of the waste treatment plants comprising the 'Calabria Sud' Solid Urban Waste integrated disposal system."[111]

105. On 24 September 2008, TEC sent a letter to the *Commissario* containing the calculations for the 2008 tariff update and pointing out the delay in such adjustments.[112] According to Mr. Janailhac's witness statement, TEC repeatedly requested meetings with the Italian authorities to reinstate the economic and financial equilibrium of the TEC Concession in order to reach an agreement on: (i) the tariff applicable to TEC1; (ii) the allocation of funds from a European subsidy program called *Programma Operativo Regionale Calabria*; and (iii) determining the location of the TEC2 incinerator. During the "three-year negotiation period" between July 2008 and June 2011, he claims to have had over 120 meetings,[113] which concluded with the Third Amendment" (discussed below).[114]

106. Following a proposal by the Calabria Region, on 1 October 2010 the Commissario ordered the relocation of the Reggio Calabria MBT plant to the site of the Sambatello 1 plant, *i.e.* to proceed as Sambatello 2.[115]

107. On 21 November 2008, the Calabria Region issued Decree No. 18830/2008, where it rejected the *Commissario*'s request to make further payment of the € 41,316,551.92 *Contributo*.[116]

108. Throughout the rest of 2008, TEC, the Commissario and the Region kept disagreeing on the payment of the *Contributo*,[117] the gate fees[118] and the *Conguagli*.[119] There was also a growing concern over the possible closure of the Marella landfill, as it was overloaded and could not receive more waste.[120] Additionally, they kept discussing the suspension and resumption of works on TEC2 and finally agreed to resume them by 12 February 2009,[121] which was then extended to 31 May 2009.[122]

109. On 16 January 2009, the Presidency of the Council of Ministers issued Ordinance No. 3731/09, appointing a new *Commissario* and instructing him "subject to verification of the debtor situations of the municipalities or consortia for the payment of tariffs for the disposal of urban waste" to "undertake in [a] timely fashion to recover the due amounts, using forcible collection procedures […]."[123] The order further provided that "[t]he expenses arising from the execution of the initiatives described in this order shall be drawn from the resources in the special accounts in the name of the Deputy Commissioner, described in Civil Protection Order No. 2696/1997 and subsequent amendments and additions, as well as through the use of the financial resources to be identified by

[111] C-30, *Ricorso* No. 377/2008, 15 April 2008 (cited in Judgment of the Administrative Tribunal No. 1126, 29 July 2008), PDF pp. 3, 21.
[112] C-111, Letter from TEC to *Commissario* re ISTAT 2008, 24 September 2008.
[113] Witness Statement of Mr. Jean-Marc Janailhac, ¶¶ 62-63.
[114] Claimant's Memorial, ¶¶ 311-312.
[115] C-45, Ordinance of the *Commissario* No. 9224, 1 October 2010.
[116] C-24, Decree of the Region of Calabria No. 18830, 21 November 2008.
[117] C-184, Letter from TEC to the *Commissario* and DL, 7 November 2008; C-24, Decree of the Calabria Region No. 18830, 21 November 2008.
[118] C-117, Minutes of the Meeting between TEC and the *Commissario*, 10 December 2008.
[119] C-117, Minutes of the Meeting between TEC and the *Commissario*, 10 December 2008.
[120] C-136, Minutes of Meeting between TEC and the *Commissario*, 25 September 2008.
[121] C-290, Letter from the *Commissario* to TEC No. 18890, 4 December 2008; C-291, Minutes of the Verification Roundtable between TEC, the *Commissario* and the Calabria Region, 24 November 2008.
[122] Claimant's Reply ¶ 233; C-292, Letter from the *Commissario* to DL No. 2288 dated 25 February 2009.
[123] C-50, O.P.C.M. No. 3731/09, 16 January 2009, Art. 1(4).

the Region within the context of the sources of municipal, state and regional financing allocated to the Regional Government itself."[124]

110. On 26 January 2009, the *Commissario* reported an excess of waste of about 25% on the quantities of waste transferred to the Rossano service landfill. The *Commissario* claimed that:

> "[s]ince the reasons for these operation irregularities are attributable exclusively to the Concessionaire, […] any damage to the operations of the *Calabria Sud* system that this situation may cause, as well as any extra costs resulting from future measures to be taken by this Office to address any related emergency situations, shall be charged to the Concessionaire.
>
> Lastly, the Concessionaire is requested to indicate a new potential site for the construction of the landfill serving the Rossano plant."[125]

111. In February 2009, the Italian Senate created an inquiry committee to investigate "alleged illicit activities related to the waste disposal systems in the Region of Calabria" (the "**Parliamentary Inquiry**"). TEC, being one of the concessionaires of the Calabria Region, participated in the hearings. Mr. Janailhac, President of Veolia S.p.A. at the time, was heard by the Senate on 5 February 2009.[126] On 23 September 2010, the Parliamentary Inquiry held another session in which the President of the Calabria Region was heard.[127] The last session of the Parliamentary Inquiry was held on 6 October 2010.[128]

112. On 10 March 2009, TEC appealed Decree No. 18830/2008 before the Administrative Tribunal of Calabria and sent a letter to the *Commissario* requesting the payment of the remaining € 26,936,403 of the *Contributo* with accrued interest.[129] On the same date, the Calabria Region issued Decision No. 122, requesting the *Commissario* to relocate TEC2 outside the municipality of Gioia Tauro.[130]

113. On 28 May 2009, the *Commissario* requested TEC to consider another suspension period for the TEC2 works in light of "all the problems relating to the concession," pursuant to the specific contractual clause stipulating that the "suspension of the works shall in no way entail additional associated charges and/or costs, whether direct or indirect."[131] TEC replied on 4 June 2009, rejecting further delays in the construction of TEC2 which would expose it to "a series of unsustainable risks" and claiming that any change to the execution or location of previously authorized works can only be made if "management continuity is ensured to the concessionaire TEC, in accordance with legal procedures."[132] Subsequently, on 9 June 2009, the *Commissario* notified the decision to resume work

[124] C-50, O.P.C.M. No. 3731/09, 16 January 2009, Art. 6.
[125] C-137, Letter from the *Commissario* to TEC, 26 January 2009.
[126] C-92, Transcript of the Audition before the Italian Senate in relation to the Inquiry on Issues Relating to Waste Management, 5 February 2009, p. 3.
[127] C-93, Hearing of the President of the Calabria Region, of the Councillor for the Environment of the Calabria Region, and the Director General of the Environment Department of the Calabria Region, 23 September 2010.
[128] C-94, Examination of the former Deputy Commissioner for resolving the emergency situation in the municipal waste sector in the Calabria Region and representatives of the Calabria Region, 6 October 2010.
[129] C-125, Letter from TEC to *Commissario*, 10 March 2009.
[130] C-38, Deliberation of the Calabria Region No. 122, 10 March 2009.
[131] C-39, Letter from the *Commissario* to TEC, 28 May 2009.
[132] C-40, Letter from TEC to the *Commissario*, 4 June 2009.

on TEC2 from that same month.[133] TEC sought confirmation of the project's definitive location on 22 June 2009.[134]

114. On 7 July 2009, TEC provided the *Commissario* with an updated timetable for the TEC2 works, and indicated that it "nevertheless remain[ed] strictly contingent on the possible persistence of the failures by the Granting Authority to comply with its contractual obligations."[135]

115. On 23 July 2009, TEC concluded a preliminary EPPA with GSE to sell the future energy to be produced by TEC2.[136]

116. On 6 September 2009, TEC and the *Commissario* met to discuss the implementation of landfills for each of the MBT plants in the region, reviewing projects in Rossano, Rosarno, Serrata, Crotone, Siderno, Motta San Giovanni, Gioia Tauro, and Melicuccà.[137] However, the issue of the lack of landfills persisted, and in February 2010 the Concessionaire highlighted in a letter addressed to the *Commissario* "the extremely critical situation which is about to affect the 'Calabria Sud' system due to the total lack of any service landfill" and that design approval from the Commissario was needed for the continued availability of Rossano, and for the sites at Melicuccà, and Motta San Giovanni.[138]

117. On 15 October 2009, the municipality of San Lorenzo del Vallo expressed its willingness to be the site of the TEC2 project.[139] Subsequently, in December of that same year, TEC sent a letter to the *Commissario*, who in turn requested the opinion of the Italian Council of State on the relocation of TEC2 to the municipality of San Lorenzo del Vallo.[140] The Italian Council of State issued its opinion on 20 January 2010, stating that the relocation of the TEC WtE plant would require the *Commissario* to "issue a new tender, as this relocation would have been considered a new project."[141] The Italian Council of State reminded the *Commissario* of his powers under Ordinance No. 3731/09, which included the authority to determine the relocation of the plant.

118. On 19 February 2010, the parties to the TEV Concession signed an agreement ("**2010 Agreement**")[142] whereby they fixed the gate fees at € 177,0 per tonne of waste for 2006 to 2009 and € 167,04 per tonne of waste for 2010.[143] According to Claimant, the Municipalities of Versilia actually paid a gate fee of € 159 per tonne of waste starting in July 2010;[144] hence, contravening the 2010 Agreement. The text of the agreement states that:

> "[t]he parties agree -without so necessitating an amendment or novation of the concession arrangement-, that, until the completion of the agreements mentioned

[133] C-175, Decision from the DL to TEC, 9 June 2009.
[134] C-41, Letter from TEC to the *Commissario* and the Calabria Region, 22 June 2009.
[135] C-186, Letter from TEC to the Commissario and DL, 7 July 2009.
[136] C-195, Preliminary EPPA, 23 July 2009.
[137] C-138-IT, Meeting between TEC and the *Commissario*, 6 September 2009.
[138] C-207, Letter from TEC to the *Commissario*, 17 February 2010.
[139] C-42, Opinion of the Council of State, 20 January 2010.
[140] C-42, Opinion of the Council of State, 20 January 2010; Claimant's Memorial, ¶ 430.
[141] Claimant's Memorial, ¶ 432; C-42, Opinion of the Council of State, 20 January 2010.
[142] Respondent's Counter-Memorial, ¶ 141; R-19, Agreement, 19 February 2010; C-56, Letter from CAV to TEV, 3 December 2011.
[143] Respondent's Counter-Memorial, ¶ 141.
[144] Claimant's Memorial, ¶ 78; C-55, CAV Notification, 30 September 2010.

> above, it is paid to TEV, with effect from 1/01/2010, a fee for the services rendered equal to 167,04 € / t .. (sic.) This rate is determined by (i) assuming a monthly flow of injections to the plant of Pioppogatto (see Annex a), such as to obtain the achievement of an annual quantity of 125,000 tons, (ii) starting from the base rate identified by the working group at 177.0 '€ / t (iii) taking into account the recognition by the GSE of an extension that moves the effective validity of the CIP 6 concession to 23 May 2010, as a result of which determining an estimated increase in revenues of € 9.96 for the whole year 2010. In a determination of an annual quantity of 125,000 tons, the parties agree that the municipalities of Versilia shall generate 80,000 t / year, while those of outside - Versilia, shall generate 45,000 / year."[145]

119. In February 2010, TEC sent a letter to the Commissario expressing concern that the amount of the incoming waste being received by the plants of the Calabria Sud system exceeded the authorized quantities and design values and further that its composition did not comply with the contractual provisions.[146] TEC notified the *Commissario* that they would not receive more waste than the limits fixed for each plant starting 1 March.[147] Later that month, after the *Commissario* gave TEC a formal notice to restore the incoming flows of waste,[148] TEC informed the *Commissario* that the Municipalities had already exceeded the amount of waste that could be received by the plants with the waste provided in January and February of the same year,[149] and needed express authorization to treat waste in excess of the design capacity.[150]

120. On 6 April 2010, the Calabria Region issued Decree No. 4760 "containing 'POR Calabria 2000-2006 Measure 1.7 – Grounded measure of revocation of the [*Contributo*]", thus requesting the Commissario to refund the sums paid for the *Contributo* equivalent to 20% of the total amount in Article 8-bis of the *Atto di Sottomissione*.[151] The annulment of Decree No. 4760 was ordered by the Regional Administrative Court of Calabria on 28 February 2011 and the Council of State in October 2012.[152]

121. On 8 July 2010, the Public Prosecutor of Lucca ordered the seizure of the Falascaia WtE plant as the Beccatoio Creek –the destination of WtE discharge flows– contained levels of contamination higher than the lawful threshold.[153] That same day, the police seized the WtE plant.[154]

122. On 30 September 2010, CAV informed TEV of the approved fee of € 159 to be paid to the consortium per tonne of waste treated "during the downtime of the Falascaia waste-to-energy plant."[155] In a letter of 4 October 2010 addressed to CAV, TEV maintained that the seizure of the Falascaia plant could

[145] R-19, Agreement, 19 February 2010.
[146] C-207, Letter from TEC to the *Commissario*, 17 February 2010; C-208 Letter from TEC to the Commissario, 23 February 2010; Claimant's Memorial, ¶ 489.
[147] C-209 Letter of TEC to the *Commissario* and the Municipalities, 26 February 2010.
[148] Claimant's Memorial, ¶ 491; C-210, Notice from the *Commissario* to TEC, 4 March 2010.
[149] C-211, Letter of TEC to the *Commissario*, 5 March 2010.
[150] C-212, Letter of TEC to the *Commissario*, 9 March 2010.
[151] C-31, Decree No. 4760, 6 April 2010, pp. 2, and 9.
[152] Claimant's Memorial, ¶ 254; C-32, Judgment of the Regional Administrative Court of Calabria No. 226, 28 February 2011; C-33, Judgment of the Council of State, 23 October 2012.
[153] Respondent's Counter-Memorial, ¶ 414; Second Witness Statement of Mr. Jean-Marc Janailhac, 3 September 2021, ¶ 15.
[154] Claimant's Reply, ¶ 589.
[155] C-156, Resolution approved by the Municipality of Seravezza, 7 October 2010, p. 5, ¶ 2.

not entail any tariff reduction "given that the payment of the tariff is linked to the performance of the waste disposal service," this service is regularly and constantly provided by TEV, also pending the seizure of one of the plants despite incurring into higher costs than those provided in the definition of the tariff."[156]

123. On 29 October 2010, TEC directed a letter to the *Commissario* pointing out the renegotiation matters to be discussed in relation to TEC1 in the meeting scheduled for 5 November of that year. TEC listed the following issues:

- gate fee adjustment;
- access to funding to support investments (POR 2007-2015);
- quantities of waste disposed of at the Calabria Sud system (guaranteed minimum);
- waste composition;
- waste management and schedule for the completion of new service landfills;
- access to third-party landfills;
- separate waste collection processing; and
- duration of the proposed third amendment of the TEC Concession (the "**Third Amendment**").[157]

124. On 27 January 2011, the *Commissario* and TEC signed a Memorandum of Understanding ("**MOU**"), which committed both parties to restoring the economic and financial balance of the TEC Concession for the integrated waste disposal system and to achieve its full functionality.[158] The MOU outlined a shared method for adjusting the disposal tariff starting in 2011 and continuing for the duration of the TEC Concession, which would be 15 years from the start of operation of Sambatello 2.[159] In the MOU, the parties agreed to finalize the economic and financial rebalancing of the agreement by 28 February 2011.[160]

125. On 19 May 2011, the Parliamentary Committee of Inquiry issued a report (the "**Committee's Report**"), acknowledging the *Commissario*'s failure to observe its obligations under the TEC Concession, and the inconsistent approaches of different Italian administrative bodies which had led to the breaches. Particularly, the Committee's Report pointed out the *Commissario*'s failure to open new landfills, the failure to build Sambatello 2, and the failure to restore and maintain the financial equilibrium of the TEC Concession.[161]

126. On 7 June 2011, another meeting was held between TEC and the *Commissario*, where they discussed their intention to reach an agreement. During this meeting, the *Commissario* acknowledged the existence of "expired receivables", *i.e.*, debt owed in favor of TEC. Both parties recognized the work

[156] C-55, Letter from CAV to TEV, 30 September 2010.
[157] C-217, Letter from VSA to the *Commissario* Scopelliti re Negotiation Third Amendment TEC, 29 October 2010.
[158] C-219, Memorandum of Understanding between TEC and the *Commissario*, 27 January 2011.
[159] C-219, Memorandum of Understanding between TEC and the *Commissario*, 27 January 2011, Art. 2.
[160] C-219, Memorandum of Understanding between TEC and the *Commissario*, 27 January 2011, Art. 3.
[161] C-51, Parliamentary Committee Report (Extract), 19 May 2011.

done by their respective delegations, which led to the formulation of a new model for defining the Service Tariff, setting it at € 110.60. Furthermore, both parties expressed a desire to reach an agreement on the new tariff as soon as possible, to be applied as of 1 June 2011. Finally, they agreed that the *Commissario* would propose a payment plan for the expired, current, and maturing receivables as a result of the new tariff.[162]

127. On 21 June 2011, the *Commissario* and TEC signed the Third Amendment or *Secondo Atto Integrativo*.[163] The Third Amendment provides that it is not a definitive agreement on the economic-financial equilibrium of the TEC Concession and the pending and potential dispute between the Parties. However, it envisaged the obligation to apply the gate fee agreed for 2011 and to adopt it as a base for the following four years.[164] It also sought a resolution to the waste volume adjustments and the tariffs issues, moving forward. The parties to the Third Amendment agreed that, *inter alia*, (i) the gate fee would be revised for 2011 and updated; (ii) the plant system would be reorganized to treat a greater quantity of waste; and (iii) the TEC Concession would be extended for a further 15 years starting from July 2011.[165] As discussed further below, the Third Amendment was never implemented.

128. On 30 June 2011,Claimant acquired the remaining 25% of VSAT from TM.E for the purchase price of € 19 M through an amendment to the SPA and by entering into a Master Settlement Agreement ("**MSA**") with Mr. Papi, in which it waived all claims against the seller.[166] This transaction was financed through a shareholder loan from Veolia to VSAT, through VSA.[167]

129. On 27 July 2011, the Province of Lucca obtained the report on the criminal investigation for emissions at the Falascaia plant drafted by the consultants to the Public Prosecutor's Office of Lucca.[168] Based on such information, on 12 August 2011, the Province informed TEV of the start of the annulment *ex officio* in "self-defense" proceedings of the authorization issued through Decree No. 125/2006 for the operation of the Falascaia plant.[169] While the results of the procedure were rendered in 2011, the investigation refers to events in 2004 and 2006.[170]

130. On 19 October 2011, the Judge for Preliminary Investigation of the Tribunal of Lucca ordered the release of the plant to TEV. The following month, the Province of Lucca issued the annulment of the authorization of the Falascaia plant through the Order for Annulent No. 6034, concluding that there were "reasons of public interest" for the removal of Decree No. 125/2006, as Technical Consultants of the Public Prosecutor's Office confirmed the falsification of data of CO emissions.[171] TEV

[162] C-221, Minutes of Meeting between *Commissario* and TEC, 7 June 2011.
[163] C-46, Third Amendment or *Secondo Atto Integrativo* between TEC and the *Commissario*, 21 June 2011.
[164] C-46, Third Amendment or *Secondo Atto Integrativo* between TEC and the *Commissario*, 21 June 2011, ¶ 21, Art. 2.
[165] Claimant's Reply, ¶ 304.
[166] AC-013, Master Settlement Agreement, 30 June 2011, Art. II.
[167] Claimant's Memorial, ¶ 112.
[168] Respondent's Counter-Memorial, ¶ 158.
[169] R-27, Order for Annulment No. 6034, 10 November 2011.
[170] R-26, Communication of starting proceedings by the administration ('*in autotutela*'), 12 August 2011.
[171] Respondent's Counter-Memorial, ¶¶ 159-161; R-27, Order for Annulment No. 6034, 10 November 2011.

appealed the decision before the Administrative Regional Tribunal, however the Concession was terminated before the ruling rejecting the appeal was made.[172]

131. On 3 December 2011, CAV addressed a letter to TEV in which it redetermined the tariffs for 2006 and 2009, concluding that TEV should waive the amount of € 5,107,090. CAV also confirmed the value of the gate fees for 2010 and, subject to proposed possible tariff reductions, CAV further proposed that, for 2012 onwards, the parties agree to a new management contract with a tariff that would not exceed € 155 per tonne of waste delivered to TEV.[173]

132. On 23 December 2011, the Calabria Region addressed the Third Amendment recognizing that the tariff adjustment was suitable and useful, limited to the "management aspects of the concession" but noting that the Third Amendment referred to a "concession relationship which does not concern the Regional Government of Calabria" and therefore, any reinterpretation of the tariff was an exclusive competence of the *Commissario* "who assumes full liability for the same."[174]

133. On 28 December 2011, in view of the lack of payment to TEC, the Concessionaire filed a formal notice to the *Commissario*, claiming the payment of an overall amount of € 139,816,263, to be made before 31 January 2012 (the "**2011 Notice**"). The 2011 Notice also stated that if the payment was not made, the TEC Concession was to be terminated *ipso jure* pursuant to Italian law.[175] In turn, TEV sent a similar notice to the Municipalities of Versilia, CAV and the *Ambito Territoriale Ottimale Toscana Costa* (a public authority with several functions related to waste disposal in the Province of Lucca, "**ATO**") on 21 March 2012, claiming the payment of € 68,199,000, to be made before 15 May 2012 or else the TEV Concession would also be terminated.[176]

134. On 31 January 2012, TEC filed its notice of termination of the TEC Concession ("**2012 Notice**").[177] Meanwhile, TEV filed its notice of termination on 16 May 2012.[178] To avoid a sudden cessation of activities, in the case of TEC, the *Commissario* agreed to a "*Prorogatio*" or extension period on 9 February 2012 (the "***Prorogatio***").[179] The *Prorogatio* lasted for about ten months.[180] In TEV's case, CAV allegedly refused to sign the agreement that would implement such a *Prorogatio* period.[181] Respondent rebuts this assertion and claims that CAV warned the Concessionaire that interrupting the public service would represent a contractual breach.[182]

[172] Second Witness Statement of Mr. Jean-Marc Janailhac, 3 September 2021, ¶ 15; Respondent's Counter-Memorial, ¶ 162; R-28, Administrative Regional Tribunal of Tuscany, Decision No. 1695.
[173] C-56, Letter from CAV to TEV, 3 December 2011.
[174] C-49, Deliberation of the Calabria Region No. 625, 23 December 2011.
[175] C-57, TEC's 2011 Notice to the *Commissario*, 28 December 2011.
[176] C-63, Letter from TEV to the Municipalities of Versilia, ATO, CAV, and the Province of Lucca, 21 March 2012; Second Witness Statement of Mr. Vincenzo Bozzetto, 1 September 2021, ¶ 42.
[177] C-58, TEC's 2012 Notice to the Commissario, 31 January 2012.
[178] Claimant's Memorial, ¶ 129; C-64, Letter from VSA to the Municipalities of Versilia, 27 April 2012; C-98, Termination of Agreement, 16 May 2012.
[179] C-59, Commissario's Ordinance No. 10826, 9 February 2012.
[180] Second Witness Statement of Mr. Bruno Masson, 3 September 2021, ¶ 39.
[181] Claimant's Reply, ¶ 352.
[182] Respondent's Counter-Memorial, ¶ 149.

135. On 10 February 2012, TEC initiated insolvency proceedings before the Tribunal of La Spezia filing a proposal for a "*Concordato Preventivo*" or protective agreement.[183]

136. In April 2012, both TEV and TEC transferred their assets and liabilities to Gestioni Ambientali SNC ("**GA**"), a company created to handle VSAT's insolvency.[184] On 18 April 2012, together with VSAT, VE and VSA, they requested a "*Concordato Preventivo di Gruppo*", to handle the insolvency proceedings before a single judge.[185] Through a decree, the Tribunal of La Spezia admitted the *Concordato Preventivo di Gruppo* and opened the Procedure of Composition of Creditors.[186]

137. On 27 April 2012, TEV confirmed to the Municipalities of Versilia that notwithstanding the termination of the TEV Concession, the continuation of the service by TEV "may occur for the sole purpose of avoiding the immediate cessation of the public service and for avoiding the compromising of employment, solely under an extension regime, i.e.[,] on the basis of a *de facto* continuation of the relationship with the competent Public Authority."[187] Nevertheless, on 16 May 2012, CAV stated that the "warnings not to interrupt the public service [were] without effect, given the illegality of the contractual termination and in any case, the illegality and seriously detrimental nature of halting the collection and disposal of waste," and subsequently demanded the restitution of the Pioppogatto plant.[188]

138. In June 2012, GA and CAV started negotiations to restitute the plants to the Municipalities of Versilia. Around that time, TEV requested from the Tribunal of La Spezia to authorize their return of the plants.[189] On 15 June 2012, the Tribunal of La Spezia granted TEV's request and their return was completed on 29 June 2012, through an acceptance report signed by CAV, TEV and GA.[190]

139. On 19 June 2012, the Pioppogatto plant resumed its activities. It is now administered by the company ERSU S.p.A., on the basis of a concession agreement signed in 2017.[191]

140. On 24 August 2012, Respondent made a partial payment in respect of the Management and Construction Awards for € 65,063,496.99 (€ 34,029,268.19 plus € 31,034,632.4)[192] following their enforcement before the Civil Court of Rome in late 2011.[193] Nonetheless, both awards were annulled by the Court of Appeals of Rome on 1 July 2014. That Court found that both arbitral tribunals lacked

[183] R-4, Proposal for "*concordato preventivo*", 10 February 2012; Second Witness Statement of Mr. Vincenzo Bozzetto, 1 September 2021, ¶ 40.
[184] C-322, Appeal for admission to an arrangement with creditors, 18 April 2012
[185] C-322, Appeal for admission to an arrangement with creditors, 18 April 2012.
[186] C-66, Decision from the Tribunal of La Spezia, 23 February 2012; C-99, Decree of the Court of La Spezia for the Opening of the Procedure of Composition with Creditors, 20 April 2012.
[187] C-64, Letter from VSA to the Municipalities of Versilia, 27 April 2012.
[188] C-65, Letter from CAV to TEV and the Municipalities of Versilia, 16 May 2012.
[189] Respondent's Counter-Memorial, ¶ 150.
[190] Respondent's Counter-Memorial, ¶ 150; Claimant's Reply, ¶¶ 353-354; R-22, Acceptance Report, 29 June 2012.
[191] Respondent's Counter-Memorial, ¶ 163.
[192] Respondent's Counter-Memorial, ¶ 105; R-3, Payment in force of the Awards n. 101/2010 and 121/2010 and documents referred to the enforcement proceedings, 24 August 2012.
[193] C-91, Decision of the *Giudice dell'Esecuzione*, 19 July 2012; Claimant's Reply ¶ 289.

jurisdiction to render such awards, as was alleged by Respondent.[194] Nonetheless, the partial payment was never returned despite the annulment of both awards.[195]

141. On 29 August 2012, the *Commissario* commenced a "progress report" to assess the status of the TEC1 plants. Based on the results, the Concessionaire was requested to adopt adequate measures to address the issues identified. After this request, TEC filed a lawsuit before the Tribunal of Genoa against the Calabria Region, GA, and TEC in liquidation.[196]

142. On 24 October 2012, GA obtained authorization for the dissolution of the TEC Concession from 23 November 2012.[197] On 21 November 2012, the *Commissario* issued Note No. 12167 ordering the termination of the TEC Concession in accordance with Article 136 of Legislative Decree No. 163/2006 and its subsequent amendments.[198] On 23 November 2012, the TEC1 plants were handed over to the *Commissario*, ending the *Prorogatio*.[199]

143. On 1 February 2013, the judicial receivers in charge of the *Concordato Preventivo di Gruppo* filed a report affirming that the insolvency was a direct consequence of the Italian authorities' lack of payment under the Concession Agreements.[200]

144. On 19 May 2014, GA filed a request of bankruptcy proceedings before the Tribunal of La Spezia.[201] In said proceedings, Veolia and VSA filed requests to include their financial claims listed as debts of VSAT, TEC, TEV and GA.[202] On 26 June 2014, GA and VSAT were declared bankrupt by Judgment No. 31, and the claims of Veolia and VSA to be listed as creditors were accepted.[203]

145. In September 2015, TEV, GA, and CAV entered into a settlement agreement that solved TEV's claims relating to the construction phase of the TEV Concession for € 40 M.[204] Furthermore, the dispute relating to the management of the Pioppogatto plant was settled on 13 September 2016, when CAV agreed to pay the sum of € 9 M to TEV and GA.[205] Both parties to the TEV Concession waived all future claims, with the exception of one judgment that TEV was only willing to reduce.[206]

146. On 25 October 2017, VP submitted a Request for amicable settlement under Article 26 of the ECT against the Italian Republic.[207]

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[194] C-52, Judgment No. 438 of the Rome Court of Appeal, 1 July 2014; C-53, Judgment No. 1000 of the Rome Court of Appeal, 1 July 2014.
[195] Respondent's Counter-Memorial, ¶ 84.
[196] Respondent's Counter-Memorial, ¶¶ 100-103; R-9, Note No. 8853 of the CD to TEC.
[197] C-68, Insolvency Receivers Report of the judicial receivers (Extract), 1 February 2013, p. 19.
[198] Respondent's Counter-Memorial, ¶ 104; R-12, *Commissario*'s Note No. 12167, 21 November 2012.
[199] C-68, Insolvency Receivers Report of the judicial receivers, 1 February 2013, p. 20.
[200] C-68, Insolvency Receivers Report of the judicial receivers, 1 February 2013
[201] C-69, Request of GA to open bankruptcy proceedings, 19 May 2014.
[202] Respondent's Counter-Memorial, ¶ 352.
[203] R-23, Settlement Agreement, 13 September 2016, ¶ 1; Reply, ¶ 375.
[204] Claimant's Reply, ¶ 386, R-23, Settlement Agreement, 13 September 2016.
[205] Claimant's Reply, ¶ 387; R-23, Settlement Agreement, 13 September 2016.
[206] Claimant's Reply, ¶ 387, R-23, Settlement Agreement, 13 September 2016.
[207] C-5, Request for amicable settlement under Article 26 of the Energy Charter Treaty, 25 October 2017.

147. On 20 June 2018, Claimant initiated this arbitration against Respondent. By 1 March 2019, Veolia had collected € 1.4 M from the ongoing bankruptcy proceedings, after paying the creditors in the order determined by the Italian Bankruptcy Law.[208]

148. In 2019, the receivers on behalf of GA filed a suit against the Calabria Region and the Prime Minister's Office before the Tribunal of Genoa claiming damages for the alleged contractual breaches of the obligations stemming from the TEC Concession.[209]

V. JURISDICTION[210]

A. *RATIONE PERSONAE*

1. Respondent's position

149. Respondent argues that the Tribunal lacks jurisdiction to decide the present dispute given that, for the purposes of Article 26 of the ECT and of Article 25 of the ICSID Convention, both Claimant and Respondent are nationals of the same contracting party, *i.e.*, the EU.

150. According to Respondent, "diversity of nationality among the disputing parties is a *sine qua non* for the jurisdiction of an arbitral tribunal under Article 26 of the ECT."[211] Moreover, Article 1(7) of the ECT requires the investment to be made by a foreign investor, and Article 25(2)(a) of the ICSID Convention excludes "investors who hold the nationality of the Host State, in addition to the nationality of another Contracting State" from the treaty's protection.[212] This inevitably implies the exclusion of any case where an investor of an EU State has a dispute with an investor of another EU State, in relation to an investment in said State.

151. Respondent considers that the EU is itself a "contracting party" as per Article 1(2) of the ECT, and that the nationals of EU Member States are all EU nationals under the ECT. Respondent refers to the definition of EU citizenship set forth in Article 20 of the Treaty of the Functioning of the European Union ("**TFEU**"), providing that "[e]very person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship." Veolia is a French company incorporated under the laws of France. Both France and Italy are members of the EU. Thus, Veolia belongs to the same contracting party as Respondent, Italy.

152. According to Respondent, a correct interpretation of the ECT cannot ignore that such States share membership in a Regional Economic Integration Organisation ("**REIO**") recognized by the ECT itself under Article 1(3) of the ECT. Such membership implies a common EU citizenship.

[208] AC-017, VSA bank statement extract, 1 March 2019.
[209] Respondent's Counter-Memorial, ¶ 113; Claimant's Reply, ¶ 381; R-35, Writ of Summons Tribunal of Genoa.
[210] This section includes summaries of the facts and positions of the Parties underlying the present dispute. Such summaries are not an exhaustive narrative of all the matters that have been discussed in this proceeding. Nevertheless, the Tribunal has considered the entirety of the Parties' factual and legal arguments made in their written and oral submissions, whether or not they are expressly referenced in the text of this section.
[211] Respondent's Rejoinder, ¶ 296.
[212] Respondent's Rejoinder, ¶ 296.

Considering that both Claimant and Respondent are EU citizens, sharing their "co-existing nationalities", there is no protected investor under Article 26(2) of the ECT. Consequently, this Tribunal lacks jurisdiction to hear the dispute.[213]

2. Claimant's position

153. Claimant holds that France (the State of which Veolia, Claimant in this arbitration, is a national) and Italy are different Contracting Parties, and that the Tribunal has jurisdiction *ratione personae* under both the ECT and the ICSID Convention.[214]

154. France and Italy are different Contracting Parties for the purposes of Article 26(1) of the ECT, which requires the dispute to be "between a Contracting Party and an Investor of another Contracting Party." Italy is, indeed, a "Contracting Party" and Veolia is, indeed, an "Investor of another Contracting Party" for the purposes of the ECT, and the ICSID Convention. Article 1(2) defines Contracting Party as "State or Regional Economic Integration Organization which has consented to be bound by this Treaty." Both Italy and France are States that consented to the ECT.[215] France and Italy did not cease to be, in their own capacity, each a "Contracting Party" within the meaning of the ECT because the EU is also, separately, a "Contracting Party." The 1969 Vienna Convention on the Law of Treaties ("**VCLT**") does not provide that a State cannot be simultaneously a contracting party to a treaty and a member of an international organization.[216]

3. Analysis of the Tribunal

155. Article 26 of the ECT is the source of respondent State's irrevocable consent to arbitrate. Paragraph 1 of said Article provides that the ECT applies to

> "Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III […]."

156. Respondent contends that Claimant is not "an Investor of another Contracting Party" because both Italy and France are EU Member States and, since the EU is a Contracting Party to the ECT, then Claimant, a company constituted under the laws of France, shares the same nationality as the respondent State. The Tribunal is not persuaded by Respondent's interpretation for the following reasons.

157. First, Article 1(2) of the ECT defines "Contracting Party" as a "state or Regional Economic Integration Organisation which has consented to be bound by this Treaty and for which the Treaty is in force." While it is true that the EU, as a REIO, is a Contracting Party, this circumstance in itself does not change the fact that Italy and France are also Contracting Parties. Each state individually gave its consent to be bound by the ECT without reservation or limitation. Such consent was given

[213] Respondent's Counter-Memorial, ¶¶ 171-178; Respondent's Rejoinder ¶¶ 293-298.
[214] Claimant's Reply, ¶¶ 395-401.
[215] Claimant's Reply, ¶ 396; Claimant's Reply, Section 4.1; Claimant's PHB1, Section 2.1.
[216] Claimant's Reply, ¶ 399.

in their capacity as subjects of international law, independently of their condition as EU Member States.

158. Second, the definition of Contracting Party explicitly encompasses both REIOs and States, and does not establish an exception for those States who are simultaneously Contracting Parties to the ECT and parties to REIOs. Such an exception is also not found in the definition of an REIO under Article 1(3) of the ECT as "an organisation constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters." There is also no evidence of a "transfer" of competence specifically over the consent given by the EU Member States –Italy and France in this case– to arbitrate under Article 26 of the ECT.

159. Third, when adhering to the ECT, the EU made no reservation as to the individual capacity of its Member States who were also Contracting Parties. As other investment tribunals have also noted, the limitation to the states' consent to arbitrate resulting from their EU membership is not a trivial exclusion, and if such was the intention of the EU, Italy and/or France, they would have explicitly stated so, but they did not.[217]

160. In sum, the Tribunal concludes that both the EU and its Member States can have independent legal standing in ECT claims, and therefore, it cannot uphold Respondent's *ratione personae* objection against its jurisdiction under the ECT.

B. *RATIONE MATERIAE*

1. Respondent's position

a. The ECT does not apply to intra-EU disputes

161. Respondent asserts that the ECT must be interpreted in accordance with the VCLT. According to Respondent, interpreting the ECT under the rules of Articles 31 and 32 of the VCLT leads to the conclusion that the ECT was never intended to apply to intra-EU situations.

162. First, the European Community ("**EC**"), as the EU was then known, existed at the time of the adoption of the ECT. This circumstance, when interpreted in good faith as mandated by Article 31(1) of the VCLT, leads to the conclusion that the Contracting Parties recognized the EC/EU as a preexisting and prevalent legal system regarding intra-EC (today intra-EU) relationships, insofar as it provides "more favorable and articulated" protection to the investor.[218] Accordingly, the countries involved agreed to be bound by the ECT on the understanding that it only applied to relations of EU Member States with non-EU States.

163. Second, the ECT's context, as well as the statements and actions of the countries involved during the ECT's creation confirm that the intention of the Contracting Parties was for the ECT to regulate only

[217] See CL-93, *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Termination Request and Intra-EU Objection, 7 May 2019, ¶¶ 81-93.
[218] Respondent's Counter-Memorial, ¶ 196.

the external, not the internal relationships of the Economic Integration Agreements ("**EIA**"), and the "free-trade area or customs union," referred to in Articles 25 and 24(4)(a) of the ECT respectively.[219] According to Respondent, the Contracting Parties' Decision addressing Articles 24(4)(a) and 25, adopted in Annex 2 to the "*Final Act of the European Energy Charter Conference*"[220] (the "**Decision**").[221] The Decision confirms this intention by establishing the conditions for an investor of a Contracting Party that is not an EU Member, to rely on EU rules, and restricting the possibility of invoking Article 26 of the ECT if said investor is already protected by EU laws. The Contracting Parties' intention is also confirmed by the Declaration with respect to Article 25 of the ECT made by "European Communities and their Member States" (the "**Declaration**"), which expressly prioritizes the "preferential treatment resulting from the wider process of economic integration resulting from the Treaties establishing the European Communities" as a derogation from Article 25 of the ECT.[222]

164. Third, the object and purpose of the ECT was not to regulate the EU internal market, as reflected in its text, its circumstances of adoption, and its preparatory works. According to Article 2 of the ECT, the treaty aims to "establish[] a legal framework in order to promote long-term cooperation in the energy field […] in accordance with the objectives and principles of the Charter." The "**Charter**", *i.e.*, the European Energy Charter, is mentioned as a precedent of an effort to integrate the Soviet Union and Eastern European countries in the energy sector after the end of the Cold War, not to create an intra-EU market.[223] This was also crystalized in the "*Concluding Document of the Hague Conference on the European Energy Charter Treaty of 1991*" and confirmed in the recitals of the Charter.[224] Lastly, the content of the EU Directives in the energy sector that were adopted before and during the drafting of the ECT, further confirms that the ECT did not aim to regulate the intra-EU market.[225]

165. Fourth, the subsequent practice of EU Member States and the Contracting Parties confirms the understanding that the TFEU and the Treaty of the European Union ("**TEU**") (jointly the "**EU Treaties**") have precedence over investment agreements that overlap with EU laws. Since the first purely intra-EU Investor-State Dispute Settlement ("**ISDS**") case was introduced in 2007, *i.e.*, the *Electrabel v. Hungary* case, Hungary as the respondent State raised the intra-EU jurisdictional objection. Thereafter, EU Member States have consistently objected on the same grounds and the Commission has requested to intervene in support of this objection as *amicus curiae.* None of the Contracting Parties have attempted to argue the opposite. Moreover, the *15 January 2019 Declaration* of 22 EU Member States made in connection with the *Achmea* decision (the "**2019 First Declaration**") is a subsequent agreement on the interpretation and application of the EU Treaties and the ECT as per Article 31(3)(a) of the VCLT. The Member States confirmed that the ECT is an integral part of the EU legal order and that interpreting the ECT as containing an ISDS arbitration clause applicable between Member States is incompatible with the EU Treaties. Considering the

[219] Respondent's Counter-Memorial, ¶¶ 197-198.
[220] Respondent's Counter-Memorial, ¶¶ 198-199.
[221] Respondent's Counter-Memorial, ¶ 198; RL-2, Decision with respect to Articles 24(4)(a) and 25 ECT.
[222] Respondent's Counter-Memorial, ¶ 197-202; RL-2, Declaration with respect to Article 25 ECT.
[223] Respondent's Rejoinder, ¶¶ 300-301.
[224] Respondent's Counter-Memorial, ¶¶ 203-205.
[225] Respondent's Counter-Memorial, ¶ 206.

above, the practice of EU Member States clearly shows that their position is that the ECT does not cover intra-EU disputes.

166. Thus, the ECT does not apply to intra-EU situations because this is not and has never been the intention of the Contracting Parties. Hence, Article 26 of the ECT cannot be invoked as a valid legal basis for the present dispute.[226]

b. Intra-EU situations are governed by the 2009 Lisbon Treaty as a successive treaty

167. Even if the Tribunal considered that the Contracting Parties did not intend to exclude intra-EU disputes from the scope of the ECT *ab initio*, this exclusion is confirmed *ex-post* with the adoption of the Treaty of Lisbon Amending the Treaty on the European Union and the Treaty Establishing the European Community ("**2009 Lisbon Treaty**"). Under Articles 30 and 41 of the VCLT, the 2009 Lisbon Treaty prevails over the ECT as a subsequent treaty.

168. First, the 2009 Lisbon Treaty is a subsequent agreement that modified the application of the ECT between States that are both EU Member States and Contracting Parties. The 2009 Lisbon Treaty added foreign direct investment ("**FDI**") to the EU Common Commercial Policy under Articles 3(1)(e) and 207(1) of the TFEU. This removed the competence of EU Member States to undertake international investment agreements *inter se*.[227] Therefore, even assuming that EU Member States had not initially excluded the application of the ECT to FDI intra-EU, they subsequently modified such obligations by adhering to the 2009 Lisbon Treaty, which established the exclusive application of EU law in the field of FDI.

169. Article 30 of the VCLT refers to the relationship between two successive treaties, binding the same parties and relating to the same subject matter. In the present case, Article 30(2) applies to the interplay between the 2009 Lisbon Treaty and the ECT. Therefore, "[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail."[228]

170. Second, the 2009 Lisbon Treaty as an *inter se* modification agreement is "perfectly legitimate" under Article 16 of the ECT, which establishes that when two or more Contracting Parties enter into a subsequent international agreement, whose terms concern the subject matter of Part III or V of the ECT, "nothing in Part III or V of [the ECT] shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement […] where any such provision is more favourable to the Investor or Investment." [229]

[226] Respondent's Counter-Memorial, ¶¶ 186-212; Respondent's Rejoinder, ¶¶ 299-304.
[227] In this regard, as acknowledged by the Council and European Parliament in Regulation No. 1219/2012 "establishing transitional arrangements for bilateral investment agreement between Member States and third countries," "the [EU] has exclusive competence with respect to the common commercial policy [and] only the [EU] may legislate and adopt legally binding acts within that area. The Member States are able to do so themselves only if so empowered by the [EU]."; RL-7, Regulation (EU) No 1219/2012, 20 December 2012.
[228] Respondent's Counter-Memorial, ¶ 234; RL-1, VCLT, Art. 30(2).
[229] Respondent's Counter-Memorial, ¶ 241; CL-1, ECT, Article 16.

Therefore, the notification requirement set out in Article 41, paragraph 2, of the VCLT would not be applicable.[230]

171. Third, the 2009 Lisbon Treaty does not affect the enjoyment by the other non-EU Contracting Parties of their rights under the ECT or the performance of their obligations, as required by Article 41 of the VCLT. It only intensifies economic integration within the EU area, and the ECT remains fully applicable for investors from non-EU Contracting Parties.[231]

172. For these reasons, Respondent argues that if EU Member States had not excluded the applicability of the ECT to intra-EU FDI *ab initio*, they legitimately did so *ex-post* under the rules of Article 41 of the VCLT, by adhering to the 2009 Lisbon Treaty.

173. At the same time, outside the EU, the ECT is fully applicable, and investors of non-EU Contracting Parties "have no obstacle in invoking the application of the ECT" through Article 26 of the ECT.[232]

c. Claimant's commercial operation is not an investment under Article 1(6) of the ECT and Article 25(1) of the ICSID Convention

174. Respondent argues that Claimant's economic activity is purely commercial and cannot qualify as an investment, considering the definition of investment in both the ECT Article 1(6) and Article 25(1) of the ICSID Convention (the so-called double barrel test).

175. Article 1(6) of the ECT provides that an "Investment" means "every kind of asset" that is "owned or controlled", "directly or indirectly" by an "Investor", and then provides a list of possible investments. While "Investment" is a defined term for the purposes of the ECT, it also "has a meaning in itself that cannot be ignored."[233]

176. Claimant's "investment" must also fit within the definition of Article 25(1) of the ICSID Convention. The term investment under the ICSID Convention has usually been defined by applying the "Salini test", which requires evidence of: (i) significant commitment of resources to the relevant project; (ii) a certain duration; (iii) an element of risk; and (iv) a contribution to the host state development.[234]

177. According to Respondent, these requirements are interdependent. The element of risk must be that of an investment, not a purely commercial risk. This may also depend on the duration of the investment, or on whether it promotes the host State's development to qualify as an investment. Respondent submits that Claimant's operation was merely commercial, involving no investment risk or contribution to the State's economic development.[235]

178. The acquisition of TEC and TEV's mother company VSAT, (then called TMT), was a financial operation that, *per se*, does not qualify as a protected investment. Veolia's profits did not depend on

[230] Respondent's Counter-Memorial, 235, ¶ 242.
[231] Respondent's Counter-Memorial, ¶ 244.
[232] Respondent's Counter-Memorial, ¶ 245.
[233] Respondent's Counter-Memorial, ¶ 300, citing; RL-28, *Romak S.A. v. Republic of Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009, ¶ 180.
[234] Respondent's Counter-Memorial, ¶ 305.
[235] Respondent's Counter-Memorial, ¶¶ 306-312.

the success of TEC and TEV's operations, but rather on the gate fees and public subsidies, which are precisely the core of the claims.[236] The development of the operation which involved construction, development, and management risks had already been done by other companies when Veolia acquired TEC and TEV.[237] Claimant did not contribute to the enhancement of existing plants nor to the construction of new ones.[238] Respondent concludes that pouring money into a completed project does not equal a long-term contribution to Italy's development. Consequently, Veolia's activity cannot be considered an investment, and the Tribunal must deny its jurisdiction.[239]

2. Claimant's position

a. The ECT does apply to intra-EU disputes

179. Claimant submits that under a proper interpretation of the ECT, the treaty is applicable to disputes involving Contracting Parties that are also EU Member States.

180. First, EU law is not an autonomous legal order at the level of public international law that can prevent the application of the ECT to the present dispute. Under Article 27 of the VCLT, a State and an international organization that are parties to a treaty cannot invoke domestic law or the rules of the organization to excuse their failure to comply with the treaty. Invoking EU law to defeat the application of the ECT is equivalent to defeating international law by applying domestic Italian law.[240]

181. Second, to establish jurisdiction under the ECT the Tribunal must resort to the treaty itself, not to EU law. The jurisdiction of an international tribunal is determined by the international instruments that created it. Claimant argues that EU law cannot be applied as the law governing the Tribunal's jurisdiction via Article 42(1) of the ICSID Convention. Under this provision, the law of the Contracting Party is only applied to determine the law applicable to decide a dispute, absent an agreement between the parties in this regard. EU law is not applicable in this case because Article 26(1) and (6) of the ECT already provide that the Tribunal shall decide the "issues in dispute" in accordance with Part III of the Treaty. Since Part III of the Treaty refers to the substantive protections applicable to the merits, the Tribunal should refer to Part V of the ECT, governing the arbitration agreement, not to EU law, to determine its jurisdiction.[241]

182. Third, to determine the Tribunal's jurisdiction, the ECT must be interpreted in accordance with the treaty interpretation principles set forth in the VCLT. Based on these principles, Claimant concludes that: (i) the Contracting Parties to the ECT did not exclude the applicability of the ECT to EU investments; and (ii) the 2009 Lisbon Treaty cannot affect the competence of the EU Member States to undertake international investment agreements *inter se*.[242]

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[236] Respondent's Rejoinder, ¶ 333.
[237] Respondent's Rejoinder, ¶ 334.
[238] Respondent's Rejoinder, ¶ 334.
[239] Respondent's Counter-Memorial, ¶¶ 315-316.
[240] Claimant's Reply, ¶ 404.
[241] Claimant's Reply, ¶¶ 408-415.
[242] Claimant's Reply, ¶¶ 403-404.

183. Lastly, Claimant maintains that *Achmea*, *Komstroy*, and *Green Power* are of no relevance: they were not brought under the ICSID Convention were all seated in EU Member States.[243] Moreover, ECT tribunals have consistently rejected these decisions.[244]

b. The 2009 Lisbon Treaty did not modify the ECT

184. Claimant contends that the 2009 Lisbon Treaty did not alter the application of the ECT between States that are both EU Member States and Contracting Parties.[245]

185. The ECT and the 2009 Lisbon Treaty do not concern the same subject matter and hence, pursuant to basic principles of the law of treaties, the 2009 Lisbon Treaty could under no circumstances modify the ECT.[246]

186. Article 16 of the ECT, as *lex specialis*, governs the relationship between the ECT and other treaties if such treaties "concern the subject matter of Part III or V" of the ECT.[247] As Respondent admits, EU provisions "do not technically deal with promotion and protection of investment."[248] But even if this Tribunal were to consider that both treaties concern similar subject matters, the 2009 Lisbon Treaty's provisions cannot be recognized as "more favorable to the Investor or the Investment" than the ECT, which is a condition for the application of the former, by way of derogation, pursuant to Article 16 of the ECT.[249]

187. Alternatively, relying on *Eskosol v. Hungary*, Claimant proposes that Article 16 of the ECT can be read as containing two separate sub-provisions, allowing the investor to benefit from whichever treaty it finds "more favourable", as a subjective and personal decision depending on the circumstances.[250]

188. Consequently, Claimant maintains that the adoption of the 2009 Lisbon Treaty does not render the ECT inapplicable, nor does it deprive this Tribunal of jurisdiction.

c. Veolia has a protected investment under Article 1(6) of the ECT

189. Claimant argues that it holds a protected investment under subsections (a), (b), (c) and (f) of Article 1(6) of the ECT, as follows:[251]

> (a) (1) Intangible and tangible, movable and immovable property: MBT and WtE plants in Calabria and Tuscany. Also associated offices and land are included in this concept; and (2)

[243] Claimant's PHB1, ¶ 14.
[244] Tr. Hearing Day 1, 88:20-23 (Claimant's Opening Statement); Claimant's Opening Presentation, slide 143.
[245] Claimant's Reply, ¶¶ 403, 458.
[246] Claimant's Reply, ¶ 469.
[247] Tr. Hearing Day 1, 86:14-87:22 (Claimant's Opening Statement); Claimant's Opening Presentation, pp. 140-141; Claimant's Reply, ¶¶ 469-481.
[248] Tr. Hearing Day 1, 143:1-2 (Respondent's Opening Statement).
[249] Claimant's Reply, ¶¶ 463-468.
[250] Claimant's Reply, ¶ 467; CL-93, *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Termination Request and Intra-EU Objection, 7 May 2019, ¶ 102.
[251] Claimant's Reply, ¶ 482.

Property rights such as leases, mortgages, liens and pledges: € 210 M loans extended to TEC and TEV operations during Veolia's presence in Italy,

(b) Company or business enterprise, shares, stock or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise: Veolia's affiliated companies in Italy, *i.e.*, VSA, VSAT, TEC, TEV and VSAI.

(c) Claims to money and performance with economic value and associated with an Investment: TEC and TEV's pre-acquisition contractual clams and receivables (defined by Claimant as "Legacy Claims"[252]).

(f) Any right conferred by law, contract, licenses and permits to undertake Economic Activity in the Energy Sector: TEC and TEV's electricity sale contracts with GSE.

190. Claimant maintains that Article 1(6) of the ECT broadly defines the term "Investment" by providing a non-exhaustive list of assets, affording maximum protection to investors. The term "Investment" is sufficiently defined, and the provision is even further developed in the accompanying Understanding No. 3 of Article 1(6).[253]

191. Claimant rejects Respondent's argument that a literal interpretation of the term "Investment" would be senseless if applied to other provisions of the ECT, such as Article 10(1). Moreover, the reference in Understanding No. 3 to other "relevant factors" pertains only to factual elements used to interpret the aspect of "control" of the investment by the investor, not to define an "Investment." In any case, under Article 31 of the VCLT, the term "Investment" should be assigned the ordinary meaning derived from the text of the Treaty.[254]

192. Furthermore, Claimant argues that the "Salini test" does not contain mandatory criteria to determine the existence of an investment under the ECT and the ICSID Convention. Nevertheless, even if applicable, Veolia's operation was not an ordinary transaction or a mere financial operation, but a long-term investment involving "well-known risks."[255]

193. Through the acquisition of the TEC and TEV projects, Veolia became an operator of long-term concession agreements to treat and convert waste, a public service where the *Commissario* as counterparty represented the State. Although Veolia had not entered the market during the construction phase, it was present during operation and assumed risks. Therefore, its investments may not be excluded from qualifying as such under the ECT.[256]

194. Moreover, the profits from Veolia's investment relied on TEC and TEV's profitability, which in turn depended on the performance of the operation, and "a continuous supply of quality waste." According to Claimant the amount and quality of waste treated determined the amount of gate fees

[252] Claimant's Reply, ¶ 82.
[253] Claimant's Reply, ¶ 488, referring to Article IV.3 the Final Act of the European Energy Charter Conference.
[254] Claimant's Reply, ¶¶ 489-492.
[255] Claimant's Reply, ¶¶ 494-497.
[256] Claimant's Reply, ¶¶ 496-497, 526.

and the electricity produced and sold.[257] Claimant adds that "TEC and TEV had to finance the construction of the plants and recoup such costs with the gate fees and the sale of electricity," and notes that gate fees had to be adjusted annually to account for the costs borne by TEC and TEV.[258]

195. Lastly, Veolia's investment did contribute to Respondent's development, pumping capital into the operations to provide a public service during a waste crisis.[259]

d. Veolia's investment is an economic activity in the energy sector covered by Article 1(5) of the ECT

196. Claimant asserts that its investment is "associated with an Economic Activity in the Energy Sector" as required by the ECT.[260]

197. Pursuant to Article 1(6) of the ECT, the term "Investment" refers to "any activity associated with an Economic Activity in the Energy Sector." The ECT Contracting Parties intended to broaden the protection of the ECT to investments that were linked or had a functional relationship with the energy sector.[261] Moreover, the Charter provides the goal of maximizing "the efficiency of production, conversion, transport, distribution and use of energy, to enhance safety and to minimise environmental problems."[262]

198. The definition of "Economic Activity in the Energy Sector" is broad and aims to extend to the protection of investments in the energy sector. As confirmed by the Energy Charter Secretariat, it encompasses "investments indirectly linked to economic activity in the energy sector."[263] Also, the *AMTO v. Ukraine* tribunal held that the definition was open-textured and "refers primarily to the factual rather than the legal association between the alleged investment and an Economic Activity in the Energy Sector."[264] In *AMTO v. Ukraine*, the tribunal focused on the "functional relationship" of the activity with the energy facility, which in that case was a nuclear power plant, rather than on the revenue or profits from the services provided.[265]

199. Considering the above, Claimant maintains that its investment is encompassed in the activities outlined in paragraph (b)(ii) and (vi) of Understanding No. 2 of Article 1(5).[266]

200. Veolia's investment comprised the "construction and operation of power generation facilities, including those powered by wind and other renewable energy sources." Veolia's MBT plants treated waste for onward conversion at WtE plants after which electricity was to be sold to GSE, an Italian

[257] Claimant's Reply, ¶¶ 498-499.
[258] Claimant's Reply, ¶¶ 498-499.
[259] Claimant's Reply, ¶ 500.
[260] Claimant's Reply, ¶ 501.
[261] Claimant's Reply, ¶¶ 503-511.
[262] Claimant's Reply, ¶ 506.
[263] CL-8, The Energy Charter Treaty – A Reader's Guide, The Energy Charter Secretariat, p. 21.
[264] Claimant's Reply, ¶¶ 509-511; CL-22, *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, ¶ 42.
[265] Claimant's Reply, ¶¶ 510-511; CL-22, *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, ¶ 42.
[266] Claimant's Reply, ¶¶ 516, 518, referring to Article IV.2 the Final Act of the European Energy Charter Conference.

State-owned entity. Without MBT plants, there simply would be no energy produced by a WtE plant. This functional relationship was confirmed by Italy's experts at the Hearing.[267]

201. Second, Veolia's investment included the "sale of, and trade in Energy Materials and Products." As Italy acknowledges, TEC's revenue from energy generated by the WtEs and sold to GSE amounted to € 204,810,000 and TEV's revenue amounted to € 15,854,000.[268]

202. Third, the functional relationship between waste management and energy production was also confirmed by Italy's own expert Prof. Consonni confirmed that waste management and energy production were not ancillary in terms of connection or interdependence.[269] Prof. Viganò explained that "the TEC2 project was a project for conversion of **RDF** produced elsewhere into energy."[270] Prof. Consonni also acknowledged that "energy was part of the picture because the whole system included waste management but also energy production."[271]

203. Claimant also argues that the Concession Agreements did refer to the production and sale of energy, as part of the "integrated solid urban waste disposal system."[272] Moreover, TEV explicitly included this activity as its objective.[273]

3. Analysis of the Tribunal

204. Respondent has raised the following *ratione materiae* objections to the jurisdiction of the Tribunal in this arbitration: (i) intra-EU disputes are not arbitrable matters under the ECT, pursuant to the rules of interpretation of treaties under international law; (ii) Claimant's activity is of an exclusively commercial nature and does not qualify as an investment under the ECT; and (iii) Claimant's investment does not fall within the scope of the ECT, because it is within the waste management and not the energy sector.

a. Whether intra-EU disputes are arbitrable under the ECT

205. Respondent argues that under the rules of interpretation established in the VCLT, the ECT was never intended to apply to intra-EU disputes.

206. In particular, Respondent relies on Articles 31 and 32 of the VCLT to argue that **(i)** the context of the ECT; **(ii)** the interpretation of EU Member States subsequent to the adoption of the ECT; and **(iii)** the circumstances of the adoption of the Treaty, support the interpretation that intra-EU disputes are not arbitrable matters under the ECT. In addition, Respondent relies on Articles 30 and 41 of the VCLT to argue that the adoption of the 2009 Lisbon Treaty **(iv)** renders the ECT inapplicable to intra-EU disputes, in accordance with the rules on the succession of treaties; and **(v)** modified the

[267] See Claimant's PHB1, Section 2.2.2; Tr. Hearing Day 5, 1006: 22- 1107:15; 1000:18-1001:2 (PoliMi's Presentation).
[268] Respondent's Counter-Memorial, ¶ 334.
[269] Tr. Hearing Day 5, 1007:8-15 (PoliMi's Presentation).
[270] Tr. Hearing Day 5, 1007:24-25 (PoliMi's Presentation).
[271] Tr. Hearing Day 5, 1000:18-1001:2 (PoliMi's Presentation).
[272] C-10, TEC Concession, 17 October 2000, Art. 2.
[273] Claimant's Reply, ¶¶ 521-523.

ECT as a multilateral treaty, but only between the EU and its Member States, to exclude intra-EU disputes.

(i) Article 31(1) and 31(2) of the VCLT

207. Article 31 of the VCLT establishes the general rules of interpretation of treaties, as follows:

> "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended."

208. The Tribunal is of the view that there is nothing in the object and purpose nor in the context of the ECT —including the text, preamble, and annexes of the treaty— that supports the conclusion that the ECT intended to exclude the arbitrability of intra-EU disputes, as argued by Respondent.

209. Article 26 of the ECT provides that:

> "SETTLEMENT OF DISPUTES BETWEEN AN INVESTOR AND A CONTRACTING PARTY
>
> (1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.
>
> (2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute

requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:

(a) to the courts or administrative tribunals of the Contracting Party to the dispute;

(b) in accordance with any applicable, previously agreed dispute settlement procedure; or

(c) in accordance with the following paragraphs of this Article.

(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article. …

(b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b). (ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.

(c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).

(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to: (a) (i) The International Centre for Settlement of Investment Disputes […]; or […]

(6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."

210. First, from a plain reading of the text of Article 26, it unambiguously provides that each Contracting Party has given its "unconditional consent" to arbitrate "[d]isputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former" and that such consent is "only subject" to the conditions set forth in sub-paragraphs (b) and (c) of Article 26(3).

211. The exclusions to the consent to arbitrate specifically set forth in Article 26(3), do not refer to intra-REIO nor intra-EU disputes. If the EU and/or its Member States had intended to exclude intra-EU disputes from such "unconditional consent", they could have recorded such exclusion in the text of Article 26, but they did not.

212. Not only is the text of Article 26(3) silent about the exclusion of intra-REIO disputes, but also the Tribunal finds that intra-EU disputes do not fall outside the scope of Article 26(1) under the defined terms section of the ECT, as argued by Respondent.

213. The definition of "Contracting Parties" in Article 1(2) of the ECT, as noted in the previous section, encompasses both REIOs and Member States of REIOs, and does not exclude the possibility of both simultaneously being Contracting Parties.

214. The definition of an REIO in Article 1(3) recognizes that its Member States may have transferred powers to the REIO over "certain matters" also governed by the ECT, including the power "to take decisions binding on them in respect of those matters." Respondent argues that the EU has "exclusive competence with respect to the conclusion of agreements concerning foreign direct investments,"[274] and therefore intra-EU investment disputes cannot be subject to arbitration under the ECT.

215. However, Article 1(3) does not specify whether the "certain matters" over which REIOs may have power, include procedural matters, such as the unconditional consent to arbitrate given in Article 26. Most importantly, Article 1(3) does not establish that an REIO's exclusive powers over its Member State that is simultaneously a Contracting Party under Article 1(2), can override the latter's "consent to be bound by this Treaty" at an international level.

216. The definition of "Area" in Article 1(10) of the ECT, provides that, "[w]ith respect to a Regional Economic Integration Organisation which is a Contracting Party, Area means the Areas of the member states of such Organisation, under the provisions contained in the agreement establishing that Organisation." According to such definition, Respondent maintains that the Areas of REIOs and their Member States are a "unified territory."[275]

217. However, in the Tribunal's view, Article 1(10) only provides that the territories of Member States jointly conform the "Area" of an REIO for the purposes of the ECT. The text of this provision does not allow to infer that those States that are both a Contracting Party to the ECT and a member of an REIO, do not have an Area of their own under the ECT. Therefore, the definition of Area in Article 1(10) does not exclude the possibility that an investor of a Contracting Party that is a Member State of a REIO, makes an investment in the Area of another Contracting Party that is also a Member State of that REIO.

218. Second, the Tribunal is not persuaded that the text of Articles 25 and 16 of the ECT can be construed as establishing an exclusion of intra-EU disputes or "intra-EU relations" from the ECT in general, nor from the dispute settlement mechanism in Article 26 of the ECT, in particular.

219. Article 25 of the ECT reads as follows:

> "(1) The provisions of this Treaty shall not be so construed as to oblige a Contracting Party which is party to an [EIA] to extend, by means of most favoured nation treatment, to another Contracting Party which is not a party to that EIA, any preferential treatment applicable between the parties to that EIA as a result of their being parties thereto.
>
> (2) For the purposes of paragraph 'EIA' means an agreement substantially liberalizing, *inter alia*, trade and investment, by providing for the absence or

[274] Respondent's Counter-Memorial, ¶ 183.
[275] Respondent's Counter-Memorial, ¶ 181.

> elimination of substantially all discrimination between or among parties thereto through elimination of existing discriminatory measures and/or the prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time frame.
>
> (3) This Article shall not affect the application of the WTO Agreement according to Article 29."

220. Article 25 of the ECT merely limits the extension of benefits or "preferential treatment" granted under an EIA to the ECT Contracting Parties that are not parties to that EIA. In no manner does this provision establish a general exclusion of the benefits granted under the ECT. Moreover, Article 25 specifically focuses on the regulation of most favoured nation ("**MFN**") treatment. Again, if the intention was to exclude intra-EU disputes from the mechanism in Article 26 of the ECT, such matter could have been specifically addressed, as was done with the MFN standard.

221. Article 16 of the ECT reads as follows:

> "Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty,
>
> (1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and
>
> (2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty,
>
> where any such provision is more favourable to the Investor or Investment."

222. Article 16 of the ECT governs the relation of the Treaty with other agreements, either prior or subsequent, which concern Parts III and V of the ECT. This provision is integrated by subsection (1) "and" subsection (2). This means that the latter is not an alternative to the former, but complementary. Under subsection (1), the "other agreement" —such as the EU Treaties and the 2009 Lisbon Treaty concluded between Contracting Parties— is not derogated from by Parts III and IV of the ECT. In turn, subsection (2) provides that Parts III and V of the ECT are not derogated from by the other agreement insofar as such provisions are "more favourable" to the investor or the investment.

223. Respondent argues that the EU Treaties and "EU law" –the 2009 Lisbon Treaty– covering investment promotion and protection and dispute settlement mechanisms offer "more developed", "favourable and articulated forms of protection" than the ECT.[276] Therefore, under Article 16 of the ECT, the latter is "derogated" from with regard to EU Member States.

224. The Tribunal is of the view that the text of Article 16 of the ECT is clear in that whether there is a derogation from either Parts III and V of the ECT, or the concurrent provisions of "other agreements",

[276] Respondent's Counter-Memorial, ¶ 195.

depends on which instrument affords the highest level of protection to "the Investor or the Investment." Therefore, the determination is not based on the provisions of the treaties nor the circumstances of the Contracting Parties, but on the circumstances of the investor or the investment.

225. In this case, under Article 16(2), applying the EU Treaties and the 2009 Lisbon Treaty as "other agreement(s)" to derogate from the ECT is not possible for two reasons. First, as will be further developed in paragraphs 262 to 269 below, the EU Treaties, and in particular the 2009 Lisbon Treaty, do not govern the same subject matter as Parts III or V of the ECT. Second, even if they did, these "other agreement(s)" are not "more favourable" to the position of the investor or the investment in this case.

226. Part V of the ECT governs a specialized dispute settlement mechanism at the level of international law, designed to protect the investor's investments in the energy sector as part of the ECT's purpose. The general dispute resolution mechanisms within the EU system under the 2009 Lisbon Treaty are focused on achieving integration, not the specific protection and promotion of a global energy market. Therefore, recognizing that the EU Treaties and the 2009 Lisbon Treaty can derogate from the ECT, would mean depriving the investor and the investment of the specialized protections in Parts III and V.[277]

227. In sum, nowhere in the plain text of the ECT is it found that intra-EU disputes are non-arbitrable matters, nor that the EU Treaties or subsequent treaties such as the 2009 Lisbon Treaty derogate from the ECT.

228. Third, the Tribunal does not find that the object and purpose, nor the preamble of the ECT, support the conclusion that this Treaty intended to exclude intra-EU disputes.

229. The preamble of the ECT states that it is the result of the undertaking made by the signatories of the Charter to implement the latter's principles and objectives.[278] In this vein, Article 2 of the ECT states that the purpose of the treaty is to establish "a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the **objectives and principles of the Charter**."[279] According to Respondent, the reference to the Charter in this provision is indicative of the lack of intention to regulate the intra-EU market because its "core original goal" was focused on integrating Eastern Europe and the Soviet Union into the energy market, and guaranteeing "peaceful dispute settlement with third Countries" not within the EU.[280] However, no such specific core goal is stated in the Charter. Its recitals state only that the signatories were "aware that account must be taken of the problems of reconstruction and restructuring in the countries of Central and Eastern Europe and in the USSR."[281]

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[277] See CL-93, *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Termination Request and Intra-EU Objection, 7 May 2019, ¶ 100.
[278] CL-1, ECT, preamble, considerations 1 and 2: "Recalling that all signatories to the Concluding Document of the Hague Conference undertook to pursue the objectives and principles of the European Energy Charter and implement and broaden their cooperation as soon as possible by negotiating in good faith an Energy Charter Treaty and Protocols […]." and "Desiring also to establish the structural framework required to implement the principles enunciated in the European Energy Charter."
[279] CL-1, ECT, Art. 2 (emphasis added).
[280] Respondent's Rejoinder, ¶¶ 300-302; Respondent's Counter-Memorial, ¶¶ 203-205.
[281] CL-1, European Energy Charter, recital 9.

230. More importantly, even if there was such a "core original goal," there is nothing in the Charter establishing that it is exclusive, or that it excludes other goals, and in particular, the regulation of intra-EU situations. Quite the opposite, the text of the Charter indicates that both extra-EU and intra-EU situations were simultaneously part of its "principles and objectives."

231. Its recitals state that the signatories were "[r]esolved to promote a new model for energy cooperation in the long term **in** Europe **and** globally."[282] The objectives of the Charter are set forth in Title I and include "[w]ithin the framework of State sovereignty and sovereign rights over energy resources and in a spirit of political and economic cooperation, they undertake to promote the development of an efficient energy market **throughout** Europe, **and** a better functioning global market."[283]

232. Moreover, in section 4 of Title II, regulating the implementation of the objectives, it is stated that signatory States will take measures "at national level" to promote and protect foreign investment "in conformity with the relevant international laws and rules on investment and trade."[284] There is no specification that measures will be taken at the EC (now EU) level. Also, if the signatories had intended to make an exclusion or clarification in connection with intra-EU situations, they would have done so, in the way they did record in Title IV the understanding that "in the context of the European Energy Charter, the principle of non-discrimination means Most Favoured-Nation Treatment as a minimum standard."[285] But no such understanding, clarification, or exclusion is found for intra-EU situations.

233. Overall, no clear intention to exclude intra-EU situations is found in the "principles or objectives" of the European Energy Charter, as referred to in Article 2 of the ECT, defining the purpose of the Treaty.

234. Fourth, the Tribunal is not persuaded that an exclusion of intra-EU situations and disputes is found in the Annexes and the Declarations of the ECT. Respondent's contention is that such exclusion is supported by the contents of the Decision, which relates to Articles 24(4)(a) and 25 of the ECT, and the Declaration, made in relation to Article 25 of the ECT.

235. Article 48 of the ECT provides that the decisions set out in Annex 2 are an "integral part" of the ECT. In turn, Article 33 of the ECT recognizes that "[t]he Charter Conference may authorise the negotiation of a number of Energy Charter Protocols or Declarations in order to pursue the objectives and principles of the Charter." Therefore, under Article 31(2) of the VCLT, the Decision and the Declaration made in connection with the conclusion of the ECT, are to be considered when interpreting the provisions of the Treaty as part of its context.

236. The Decision on Articles 24(4)(a) and 25 of the ECT reads as follows:[286]

> "An Investment of an Investor referred to in Article 1(7)(a)(ii), of a Contracting Party which is not party to an EIA or a member of a free-trade area or a customs

[282] CL-1, European Energy Charter, recital 8 (emphasis added).
[283] CL-1, European Energy Charter, Title I, paragraph 2.
[284] CL-1, European Energy Charter, Title II, section 4.
[285] CL-1, European Energy Charter, Title IV.
[286] RL-2, Decision with respect to Articles 24(4)(a) and 25 ECT.

union, shall be entitled to treatment accorded under such EIA, free-trade area or customs union, provided that the Investment:

(a) has its registered office, central administration or principal place of business in the Area of a party to that EIA or member of that free-trade area or customs union; or

(b) in case it only has its registered office in that Area, has an effective and continuous link with the economy of one of the parties to that EIA or member of that free-trade area or customs union."

237. The Declaration on Article 25 of the ECT reads as follows:[287]

> "The European Communities and their Member States recall that, in accordance with article 58 of the Treaty establishing the European Community:
>
> a) companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the right of establishment pursuant to Part Three, Title III, Chapter 2 of the Treaty establishing the European Community, be treated in the same way as natural persons who are nationals of Member States; companies or firms which only have their registered office within the Community must, for this purpose, have an effective and continuous link with the economy of one of the Member States;
>
> (b) 'companies and firms' means companies or firms constituted under civil or commercial law, including co-operative societies, and other legal persons governed by public or private law, save for those which are non-profitmaking.
>
> The European Communities and their Member States further recall that: Community law provides for the possibility to extend the treatment described above to branches and agencies of companies or firms not established in one of the Member States; and that, the application of Article 25 of the Energy Charter Treaty will allow only those derogations necessary to safeguard the preferential treatment resulting from the wider process of economic integration resulting from the Treaties establishing the European Communities."

238. Respondent is right that the Decision regulates the situation of investors whose home state is not a member of an EIA, and how their investments can benefit from the "preferential treatment" afforded under the EIA. That stems from the plain reading of the instrument. However, this premise does not carry the additional and independent conclusion that an investor whose home state is a member of an EIA must be deprived of the protection afforded under Article 26 of the ECT. There is no evidence that the Decision is seeking to "avoid double protection" for intra-EU investors and investments.[288]

239. The Decision is merely establishing an exception to the prohibition set out in Article 25 of the ECT, by extending the benefits derived from an EIA to a non-EIA investor in certain circumstances. Moreover, such exception was specifically envisaged in connection with the MFN standard of

[287] RL-2, Declaration with respect to Article 25 ECT.
[288] Respondent's Counter-Memorial, ¶ 200.

treatment, not in general, and no reference was made to the benefits or protection provided for in Article 26 of the ECT. The same can be said about the Declaration.

240. In sum, neither Article 25 of the ECT nor the Decision regulates the criteria for a non-EU entity to "rely on EU rules" in general, but rather addresses a specific entitlement to receive "preferential treatment" afforded under such rules, contrary to Respondent assertion.[289]Access to such "preferential treatment" does not lead to the conclusion that the dispute resolution mechanism in Article 26 of the ECT is excluded for intra-EU disputes.

241. The Tribunal observes that the same conclusions derive from the Declaration, which merely regulates the conditions for the establishment of a company in the EU and makes no reference to the dispute settlement mechanism in Article 26 of the ECT. In addition, the safeguarding of "the preferential treatment resulting from the wider process of economic integration" of the EU is not in itself incompatible with, nor does it imply an exclusion of, the benefits of Article 26 of the ECT. As noted above, if such specific exclusion had been the intent of the EU and its Member States, they would have stated so in the Declaration, especially considering that declarations are instruments aimed at developing rules in more specific areas.

(ii) Article 31(3) of the VCLT

242. Respondent contends that the practice of EU Member States subsequent to the adoption of the ECT, has been consistent in interpreting that the ECT does not apply to intra-EU disputes, and therefore such position "should at least 'be taken into account.'"[290]

243. Article 31(3) of the VCLT requires an "agreement between the parties" of a treaty. The Tribunal does not agree with Respondent that there is a "practice" of EU Member States that qualifies as an "agreement" or that "establishes the agreement of the parties" to interpret the ECT as not covering intra-EU disputes.

244. First, the position adopted by EU Member States in the *Electrabel v. Hungary,*[291] *Komstroy*,[292] and *Achmea*[293] cases, as well as in the **2019 First Declaration** invoked by Respondent,[294] do not involve all the ECT's Contracting Parties but only EU Member States. There is no evidence of the acceptance of such a position by non-EU member Contracting Parties.

245. Second, the *Komstroy,* and *Achmea* decisions are not binding on this Tribunal. These are judgments rendered by the Court of Justice of the European Union concerning intra-EU BITs in the European

[289] Respondent's Counter-Memorial, ¶ 199.
[290] Respondent's Counter-Memorial, ¶¶ 207, 211.
[291] RL-4, *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, ¶ 4.158.
[292] RL-91, *Republic of Moldova v. Komstroy LLC*, C-741/19, Judgment of the Court, 2 September 2021.
[293] RL-24, *Slovak Republic v. Achmea BV*, C-284/16, Judgment of the Court, 6 March 2018.
[294] Respondent's Counter-Memorial, ¶¶ 208, 210; Respondent's Rejoinder, ¶¶ 318-319, 326; RL-26, Declaration of the Member States of 15 January 2019 on the Legal Consequences of the *Achmea* Judgment and on Investment Protection, 15 January 2019.

legal order which do not affect the tribunal's jurisdiction to decide a dispute in the international legal order of the ECT.[295]

246. Third, the *Electrabel v. Hungary* decision is not contrary to the position that Article 26 of the ECT encompasses intra-EU disputes. The tribunal in that case concluded that "the important legal fact is that the European Commission itself, in signing the ECT, accepted the possibility of international arbitrations under the ECT."[296] The tribunal did not specifically rule out the application of Article 26 of the ECT to intra-EU disputes, considering that, as Respondent itself recognized, it was faced with a circumstance different from the one in this arbitration.[297] Also, after *Electrabel,* recent decisions from other investment tribunals —particularly involving Italy— have addressed the same issue that is before this Tribunal, and have reached the conclusion that Article 26 of the ECT does apply to intra-EU disputes.[298]

247. Fourth, the 2019 First Declaration provides that:

> "[…] all investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to Union law and thus inapplicable. […]
>
> An arbitral tribunal established on the basis of investor-State arbitration clauses lacks jurisdiction, due to a lack of a valid offer to arbitrate by the Member State party to the underlying bilateral investment Treaty. Furthermore, international agreements concluded by the Union, including the Energy Charter Treaty, are an integral part of the EU legal order and must therefore be compatible with the Treaties. Arbitral tribunals have interpreted the Energy Charter Treaty as also containing an investor-State arbitration clause applicable between Member States. Interpreted in such a manner, that clause would be incompatible with the Treaties and thus would have to be disapplied."[299]

248. The 2019 First Declaration was issued in connection with *Achmea,* where a bilateral investment treaty was analyzed. While, as Respondent states,[300] it is true that the *Komstroy* decision later indicated that "the grounds for the *Achmea* Judgment are not limited to the bilateral nature of the applicable treaty,"[301] it is also true that there is no consensus in the 2019 First Declaration regarding its application to the ECT. At least six states, *i.e.*, Hungary, Finland, Luxembourg, Malta, Slovenia and Sweden have divergent views regarding the scope of the 2019 First Declaration in connection with the ECT, and in particular, the latter five states, (except for Hungary), signed a second declaration on 16 January 2019 on the enforcement of the *Achmea* judgment (the "**2019 Second**

[295] CL-93, *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Termination Request and Intra-EU Objection, 7 May 2019, ¶ 181.
[296] RL-4, *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, ¶ 4.158.
[297] See Respondent's Counter-Memorial, ¶ 208, footnote 66.
[298] See, e.g., CL-93, *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Termination Request and Intra-EU Objection, 7 May 2019.
[299] RL-26, Declaration of the Member States of 15 January 2019 on the Legal Consequences of the Achmea Judgment and on Investment Protection, 17 January 2019. 210
[300] Respondent's Rejoinder, ¶ 317; RL-91, *Republic of Moldova v. Komstroy* LLC, ECLI:EU:C:2021:655, C-941/19, 2.09.2021.
[301] Respondent's Rejoinder, ¶¶ 317, 319, 326; RL-91, *Republic of Moldova v. Komstroy* LLC, ECLI:EU:C:2021:655, C-941/19, 2.09.2021.

Declaration").[302] In this regard, Respondent has conceded that it does not "intend to say that no debate was ever raised within the EU or Member States, or that there are no differing views on this point. However, the general understanding as shown by the judicial practice of the majority of Member States and the EU on the ECT is in Italy's view incontrovertible as excluding its application to intra-EU disputes of the kind that are at stake."[303]

249. To conclude, considering the evidence and submissions filed in this arbitration, the Tribunal is not satisfied that for the purposes of Article 31(3)(a) or (b) of the VCLT, the *Electrabel v. Hungary* and *Achmea* decisions, as well as the 2019 First Declaration, unequivocally support the existence of an agreement over an interpretation of the ECT that is contrary to that clearly derived from the text and context of the ECT itself.

(iii) Article 32 of the VCLT

250. Article 32 of the VCLT sets forth the supplementary means of interpretation of treaties, as follows

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable."

251. For the Tribunal, there is neither ambiguity as to the interpretation of the ECT under Article 31 of the VCLT, nor evidence that the conclusion that Article 26 of the ECT encompasses intra-EU disputes is a "manifestly absurd or unreasonable result." Even under the subsidiary rule of interpretation in Article 32 of the VCLT, the Tribunal is not persuaded that the preparatory works or the circumstances of adoption of the Treaty support the conclusion that the ECT was not intended to cover intra-EU disputes.

252. Regarding the circumstances of adoption of the ECT and its preparatory works, Respondent refers to the recitals of the Charter, the Concluding Document of the Hague Conference on the European Energy Charter Treaty of 1991, the EU Directives in the energy sector adopted prior to and during the drafting of the ECT (EU Directives No. 90/547/EEC and 91/296/EEC), and the Commission

[302] Claimant's Reply, ¶ 451, footnote 605 ("The Achmea case concerns the interpretation of EU law in relation to an investor-state arbitration clause in a bilateral investment treaty between Member States. The Member States note that the *Achmea* judgment is silent on the investor-state arbitration clause in the Energy Charter Treaty. A number of international arbitration tribunals post the *Achmea* judgment have concluded that the Energy Charter Treaty contains an investor-State arbitration clause applicable between EU Member States. This interpretation is currently contested before a national court in a Member State. Against this background, the Member States underline the importance of allowing for due process and consider that it would be inappropriate, in the absence of a specific judgment on this matter, to express views as regards the compatibility with Union law of the intra EU application of the Energy Charter Treaty." Declaration of the Representative of the Government of Hungary of 16 January 2019, p. 3) The Tribunal observes that while Claimant references exhibit RL-26, Declaration of the Representatives of the Governments of the Member States of 15 January 2019 on the legal consequences of the judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, p. 3., the text cited corresponds with the Declaration of the Representatives of the Governments of the Member States of 16 January 2019 on the enforcement of the judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, p. 3, which Claimant identifies as the "Second Declaration."

[303] Respondent's Counter-Memorial, ¶ 209, footnote 67.

Proposal for a Council Directive.[304] Respondent also argues that the ECT's preparatory works "indicate that its core original goal was to enhance energy security and to facilitate investment and cooperation in the energy sector after the dissolution of the Soviet Union and the independence of the former Soviet Republics."[305]

253. The Tribunal does not observe in any of these instruments that there was a clear understanding among EU Member States, the EU, and/or ECT Contracting Parties in general, that disputes arising between EU Member States were not subject to the provisions of the ECT and, in particular, to Article 26 of the ECT.

254. As noted above in connection with the recitals of the Charter, whether or not a "core original goal" of the ECT was to integrate the former Soviet Republics into the energy market, does not in itself imply an exclusion of the individual participation of EU Member States in the energy market under the ECT, and even less, the removal of the benefits of Article 26 of the ECT for intra-EU investors and investments.[306]

255. As for the EU Directives and the Commission Proposal for a Council Directive in 1992, while they did envisage the creation of a single market and a dispute resolution mechanism for it,[307] this was only a proposal and, in any case, it did not address the interaction of any intra-EU dispute resolution mechanism with those resulting from multilateral treaties such as the ECT, under public international law.

(iv) Whether intra-EU situations are governed by the 2009 Lisbon Treaty under Article 30 of the VCLT

256. The Tribunal is not persuaded that, under the rules on succession of treaties, the 2009 Lisbon Treaty renders the ECT inapplicable to intra-EU disputes.

257. Article 30 of the VCLT governs the application of successive treaties relating to the same subject matter, as follows:

> "1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.
>
> 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

[304] Respondent's Counter-Memorial, ¶¶ 203-206; CL-105, Council Directive 90/547/EEC on the transit of electricity through transmission grids, 29 October 1990; CL-106, Council Directive 91/296/EEC on the transit of natural gas through grids, 31 May 1991; RL-3, COM (91)548 final, OJ No C65 of 14 March 1992.
[305] Respondent's Rejoinder, ¶ 300.
[306] CL-93, *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Termination Request and Intra-EU Objection, ¶ 103; CL-91, *Vattenfall AB* and Others, *et al. v. Federal Republic of Germany* (II), ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018 ¶ 200.
[307] Respondent's Counter-Memorial, ¶ 206; RL-3, COM (91)548 final, OJ No C65 of 14 March 1992, pp. 1-2.

> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
>
> 4. When the parties to the later treaty do not include all the parties to the earlier one:
>
> (a) as between States Parties to both treaties the same rule applies as in paragraph 3;
>
> (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.
>
> 5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty."

258. Respondent argues that, pursuant to the rule of interpretation in Article 30 of the VCLT, the 2009 Lisbon Treaty should prevail over the ECT. The ECT and EU laws cover the same subject matter given that "both level the playing field, ensure development, and factually cover the same situation of an investor entering a foreign market in the hope of not being unduly discriminated or frustrated in its investment, as well as being duly protected against misuse of power."[308] Therefore, under Article 30(2) of the VCLT, "when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other later treaty prevail."[309]

259. Moreover, Respondent submits that the conflict rule in Article 16 of the ECT prioritizes a subsequent international agreement, whose terms concern Part III or V of the ECT where any provision is more favorable to the investor or investment. Therefore, the provisions of the 2009 Lisbon Treaty, as a later treaty, "prevail" over those of the ECT as EU law is "doubtless" more favorable to investors and investments than the ECT.[310] Respondent further submits that Article 30(4)(a) of the VCLT leads to the same conclusion. Under said provision "[w]hen the parties to the later treaty do not include all the parties to the earlier one […] as between States Parties to both treaties the same rule applies as in paragraph 3," thus the dispute settlement mechanisms of Article 26 of the ECT as the "earlier treaty" in paragraph 3 of Article 30 of the VCLT, are not applicable between EU Member States insofar as they are incompatible with EU law under the 2009 Lisbon Treaty, as the "later" and prevalent treaty.[311]

260. The Tribunal does not agree with this interpretation. First, Article 30(2) of the VCLT governs the scenario where a treaty provision indicates that other treaties may "prevail" over it. As explained

[308] Respondent's Counter-Memorial, ¶ 233.
[309] Respondent's Counter-Memorial, ¶¶ 228-233.
[310] Respondent's Counter-Memorial, ¶¶ 234-237.
[311] Respondent's Counter-Memorial, ¶¶ 238-239.

above, Article 16 of the ECT does not establish the prevalence of other treaties but provides an investor with an opportunity to invoke whichever treaty is "more favourable" to it or its investment. Ultimately, it is a decision for the investor to make on the basis of "favorability", which is different from the "prevalence" or "priority" between treaties that is defined by the state parties to them, as envisaged in Article 30(2) of the VCLT.

261. Second, under Article 30(3) and 30(4)(a) of the VCLT, those "provisions" from the earlier treaty that "are compatible with those of the later treaty" remain applicable. This means that the earlier treaty as a whole does not cease its application, but only those provisions that are incompatible with specific provisions of the later treaty.

262. Third, in any case, the rule in Article 30 of the VCLT remains inapplicable in this case insofar as the 2009 Lisbon Treaty and the ECT relate to different matters.

263. Article 30(1) of the VCLT indicates that it applies to "successive treaties relating to the same subject matter."

264. Respondent relies on the International Law Commission ("**ILC**") Report on Fragmentation to argue that for treaties to concern the same subject matter they need not be identical.[312] Instead, "the question one should ask is whether 'the fulfillment of the obligation under one treaty affects the fulfillment of the obligation of another. This 'affecting' might then take place either as strictly preventing the fulfillment of the other obligation or undermining its object and purpose in one or another way.'"[313] According to Respondent, the ECT and the 2009 Lisbon Treaty share the same subject-matters, *i.e.*, the liberalization of energy markets, investment protection, and dispute resolution, and "factually cover the same situation of an investor entering a foreign market" and seeking the protection of its investment.[314]

265. The Tribunal observes that a treaty is not "successive" to another merely because of its position in time. There must also be an intention of the Contracting Parties to replace or supersede the original treaty.[315] This is why subsection (4)(b) of the VCLT excludes the application of the later treaty to those states that are only parties to the earlier treaty; there is no consent from such states to change the earlier treaty. Conversely, where there is evidence of an intention to change the obligations between the parties in an original treaty by way of a subsequent treaty, consent exists. Consent is what allows the later treaty to prevail as a "successive", and not merely a subsequent treaty.

266. Defining the "subject matter" of a treaty for the purposes of this provision, entails a complex comparative task between different treaties to define whether they pertain to the same category. For this purpose, the ILC Report on Fragmentation provides guidance to the Tribunal. In addition to the criteria referenced by Respondent, the Tribunal observes that the ILC Report on Fragmentation

[312] Respondent's Counter-Memorial, ¶ 230; RL-10, Report of the Study Group of the International Law Commission, Fragmentation of International Law. Difficulties arising from the diversification and expansion of international law, CAN/4/L.682, 13 April 2006.
[313] Respondent's Counter-Memorial, ¶ 231.
[314] Respondent's Counter-Memorial, ¶¶ 232-233.
[315] See CL-93, *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Termination Request and Intra-EU Objection, ¶ 141.

recognizes the importance of both the *lex specialis* and *lex posterioris* principles in determining the subject matter of treaties.

267. The Tribunal finds that both principles are equally relevant. Thus, mere chronology may not be sufficient to answer the question of the subject matter of successive treaties. Also, the Tribunal recognizes the need for a balance between too broad or too narrow categorization of the respective subject-matters. In line with the findings of the ILC Report on Fragmentation, looking into the institutional connection between treaties[316] can help to strike a balance between the scope of the subject matter of different treaties, and their position in time.

268. The foregoing means that for the purposes of Article 30 of the VCLT, successive treaties relating to the same subject matter can be identified when they not only are chronologically subsequent but also regulate the same —not identical— activities and factual circumstances, with a shared perspective and approach,[317] and are conceived within the same institutional context, regime or cluster, sharing an institutional purpose or effort.

269. The 2009 Lisbon Treaty refers, to a limited extent, to energy matters. But the main purpose behind the 2009 Lisbon Treaty is integration, in general, as such is the institutional purpose of the EU (and previously the EC). By contrast, the ECT is a multilateral treaty, not limited to the EU and its integration purpose, which seeks to regulate, enhance, and promote global investment in the energy sector. While EU integration may be relevant to this endeavor, ultimately the ECT has a different and specialized cluster, which is energy. Part V of the ECT governs a specialized dispute settlement mechanism at the level of international law, designed to implement and materialize the purpose of the ECT. The general dispute resolution mechanisms within the EU system under the 2009 Lisbon Treaty are focused on achieving integration, not the protection and promotion of a global energy market.

270. In light of the foregoing, the Tribunal is not convinced that the rule in Article 30 of the VCLT is applicable to the ECT in connection with the 2009 Lisbon Treaty, as both treaties refer to different subject matters.

(v) Whether intra-EU situations are governed by the 2009 Lisbon Treaty under Article 41 of the VCLT

271. The Tribunal further considers that the 2009 Lisbon Treaty did not modify the ECT as a multilateral treaty to exclude intra-EU disputes.

272. Article 41 of the VCLT governs agreements to modify multilateral treaties between certain of the parties only, as follows:

[316] RL-10, Report of the Study Group of the International Law Commission, Fragmentation of International Law. Difficulties arising from the diversification and expansion of international law, 13 April 2006, CAN/4/L.682, ¶ 255.
[317] CL-110, *European American Investment Bank AG (Austria) v. Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012, ¶¶ 168-170; Claimant's Reply, ¶ 477.

> "1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
>
> (a) the possibility of such a modification is provided for by the treaty; or
>
> (b) the modification in question is not prohibited by the treaty and:
>
> (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
>
> (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.
>
> 2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides."

273. Respondent argues that Article 16 of the ECT is a provision that allows for the possibility of modifying the treaty by two or more parties to a multilateral treaty as indicated in Article 41(1)(a) of the VCLT. Thus, EU Member States could enter into the 2009 Lisbon Treaty as a second treaty that modified the ECT, without having to "notify the other parties of their intention to conclude the agreement and of the modification to the treaty," pursuant to Article 41(2) of the VCLT.[318]

274. The Tribunal considers that there is nothing in the text of the 2009 Lisbon Treaty that refers to a modification of the ECT between EU Member States. The interplay between both treaties is an *ex-post* debate for the purposes of this arbitration. There is no evidence that the 2009 Lisbon Treaty was concluded "to modify" the ECT, and as noted above, such a treaty was concluded for other independent purposes.

275. Consequently, the rule in Article 41 of the VCLT is not applicable in this case, since no treaty was concluded "to modify" or with the purpose of modifying the ECT.

b. Whether Claimant's operation is an investment under Article 1(6) of the ECT and the ICSID Convention

276. Respondent argues that Claimant's economic activity is purely commercial and cannot qualify as an investment, considering the definition of investment in both the ECT Article 1(6) and Article 25(1) of the ICSID Convention, as well as the "Salini test." Claimant contends that its commercial activity falls within the definition of investment in Article 1(6) of the ECT, its accompanying Understanding No. 3, and the definition in Article 25 of the ICSID Convention. Claimant also contends that the "Salini test" is not mandatory.

[318] Respondent's Counter-Memorial, ¶ 242.

277. Article 1(6) of the ECT defines "Investment" for purposes of the ECT.[319] As indicated above in paragraph 189, Claimant has identified its investments under each category listed in subsections (a), (b), (c) and (f) of Article 1(6) of the ECT.[320]

278. Article 1(6) is accompanied by an understanding, which reads:

> "For greater clarity as to whether an Investment made in the Area of one Contracting Party is controlled, directly or indirectly, by an Investor of any other Contracting Party, control of an Investment means control in fact, determined after an examination of the actual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor's (a) financial interest, including equity interest, in the Investment; (b) ability to exercise substantial influence over the management and operation of the Investment; and
>
> (c) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body.
>
> Where there is doubt as to whether an Investor controls, directly or indirectly, an Investment, an Investor claiming such control has the burden of proof that such control exists."

279. From the foregoing, the Tribunal observes that Article 1(6) of the ECT provides a broad definition of the term "investment" with a non-exhaustive list of examples of assets that may satisfy such definition. The definition of investment appears to be sufficiently clear and detailed in itself, and Claimant has identified the category in which each asset falls, satisfying the definition of investment in Article 1(6) of the ECT. Moreover, Respondent does not appear to dispute that the assets identified by Claimant fall within the categories listed in Article 1(6) of the ECT.

280. Accordingly, the Tribunal is of the view that under Article 31 of the VCLT it would not need to analyze the term "investment" outside of the literal terms of Article 1(6) of the ECT. Nevertheless, Respondent contends that in light of Article 10(1) of the ECT, its ordinary meaning and Article 25

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[319] CL-1, ECT, Art. 1(6): "'Investment' means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:
(a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
(b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;
(c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
(d) Intellectual Property;
(e) Returns;
(f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.
A change in the form in which assets are invested does not affect their character as investments and the term 'Investment' includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the 'Effective Date') provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.
'Investment' refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as "Charter efficiency projects" and so notified to the Secretariat."
[320] Claimant's Reply, ¶ 482.

of the ICSID Convention, the term "investment" under the ECT should also satisfy the criteria found in the "Salini test", which requires demonstration of (i) a significant commitment of resources to the relevant project; (ii) a 'certain duration' of that commitment; (iii) an element of risk; and (iv) a contribution to the host State's development.[321]

281. The Tribunal is not persuaded by the approach proposed by Respondent. First, the understanding on Article 1(6) of the ECT refers to the element of "control" in the definition of the investment, a matter that is unrelated to the criteria of the "Salini test", as identified by Respondent. Second, the definition of the term "investment" in Article 1(6) of the ECT is not incompatible with Article 10(1) of the ECT. A good faith interpretation of the provision allows for the conclusion that the expression "to make an Investment" does not mean "to make an asset" but to "make" the necessary arrangements to "own or control" an asset. Third, neither the ECT nor the ICSID Convention in its Article 25 provide for the criterion of the "Salini test" to define an investment. Investment tribunals have found, on the one hand, that applying such additional criteria may exclude assets that have been internationally recognized as protected investments;[322] and on the other, that the "Salini test" is not to be applied as a general criterion or as an additional requirement but as a means to find whether there is an "investment" when there are gaps in the definition of the given investment treaty.[323]

282. But even if the Tribunal were to apply the criteria of the "Salini test", the conclusion would remain that the assets identified by Claimant constitute an investment within the meaning of Article 1(6) of the Treaty.

283. Respondent contends that the last two criteria of the "Salini test" are not met by Claimant's investment, *i.e*., the assumption of risk and a contribution to the development of the host State. According to Respondent, the assumption of risk must be that of an "Investment risk" which must "be distinguished from ordinary commercial risks that every company faces in carrying out economic activities."[324] Respondent also claims that Claimant's investment is a purely financial operation, involving only ordinary commercial risks, since the profits were derived "mainly on the gate fees and on public subsidies," and which does not contribute to the host State's development since the project had already been planned and completed when Claimant acquired it.[325]

284. The Tribunal does not consider that Veolia's investment is merely an "ordinary commercial transaction" or that it fails to contribute to the host State's development. The investment, as identified by Claimant, comprises in general the operation of the MBT and WtE plants in Calabria and Tuscany, the TEC and TEV Concessions, and the electricity sale contracts with GSE. Concessions for the provision of basic public utilities —including energy and/or waste management— or of related services, have been typically deemed to be more than commercial activities. The fact that profits are to be derived from the payment of public fees or subsidies does not in itself mean that there is no risk or investment. Also, insofar as the investment relates to a public service, it can also be regarded as

[321] Respondent's Counter-Memorial, ¶ 305.
[322] See, e.g., CL-212, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 317.
[323] See, e.g., CL-116, *Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013, ¶ 206.
[324] Respondent's Counter-Memorial, ¶ 306.
[325] Respondent's Counter-Memorial, ¶¶ 311-316.

contributing to the host State's development, particularly in this case, where it is undisputed that Claimant operated its investment throughout a waste management crisis.

285. In conclusion, the Tribunal finds that Claimant's investment would satisfy the "Salini test" criteria, which, in this arbitration, can at most provide an interpretative guideline but not modify the terms of Article 1(6) of the ECT.

c. Whether Claimant's investment is covered by Article 1(5) of the ECT

286. Respondent argues that Claimant's investment is not an activity in or associated with the energy sector as required by Article 1(5) of the ECT, but rather an autonomous activity in the waste management sector, which is neither covered by the economic activities listed in Article 1(5) nor by the "illustrative" list of Understanding No. 2.[326]

287. The last paragraph in Article 1(6) of the ECT provides that:

> "'Investment' refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as 'Charter efficiency projects' and so notified to the Secretariat."

288. Article 1(5) of the ECT states:

> "'Economic Activity in the Energy Sector' means an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products except those included in Annex NI, or concerning the distribution of heat to multiple premises."

289. The understanding on Article 1(5) of the ECT states:

> "(a) It is understood that the Treaty confers no rights to engage in economic activities other than Economic Activities in the Energy Sector.
>
> (b) The following activities are illustrative of Economic Activity in the Energy Sector:
>
> (i) prospecting and exploration for, and extraction of, e.g., oil, gas, coal and uranium;
>
> (ii) construction and operation of power generation facilities, including those powered by wind and other renewable energy sources;
>
> (iii) land transportation, distribution, storage and supply of Energy Materials and Products, e.g., by way of transmission and distribution grids and pipelines or dedicated rail lines, and construction of facilities for such, including the laying of oil, gas, and coal-slurry pipelines;

[326] Respondent's Rejoinder, ¶ 340.

(iv) removal and disposal of wastes from energy related facilities such as power stations, including radioactive wastes from nuclear power stations;

(v) decommissioning of energy related facilities, including oil rigs, oil refineries and power generating plants;

(vi) marketing and sale of, and trade in Energy Materials and Products, e.g., retail sales of gasoline; and

(vii) research, consulting, planning, management and design activities related to the activities mentioned above, including those aimed at Improving Energy Efficiency."

290. Claimant maintains that its investment falls within the scope of subsections (ii) "construction and operation of power generation facilities, including those powered by wind and other renewable energy sources," and (vi) "marketing and sale of, and trade in Energy Materials and Products," of the understanding on Article 1(5) of the ECT.[327]

291. The Tribunal observes that Article 1(6) refers to investments "associated with" an Economic Activity in the Energy Sector. Article 1(5) of the ECT broadly defines "Economic Activity in the Energy Sector" as an economic activity "concerning" a wide array of actions, including the production and sale of energy materials. The understanding on Article 1(5) provides an "illustrative", thus non-exhaustive, list of examples.

292. Taken altogether, under the broad scope of these provisions, a protected investment need not be an Economic Activity in the Energy Sector in itself. Having a link with such an activity would be sufficient to satisfy the requirement in Article 1(6) of the ECT. The question is, therefore, the required extent of that "link" or the degree of association with an Economic Activity in the Energy Sector. In answering this question, the *AMTO v. Ukraine* tribunal held that the term "associated with" in Article 1(6) of the ECT refers primarily to the factual rather than the legal association between the alleged investment and an Economic Activity in the Energy Sector. A mere contractual relationship with an energy producer is insufficient to attract ECT protection where the subject matter of the contract has no functional relationship with the energy sector. The open-textured phrase 'associated with' must be interpreted in accordance with the object and purpose of the ECT, as expressed in Article 2. The associated activity of any alleged investment must be energy related, without itself needing to satisfy the definition in Article 1(5) of an Economic Activity in the Energy Sector.[328]

293. The Tribunal is of the view that Claimant's investment has a sufficient link with an Economic Activity in the Energy Sector, as required by Article 1(6) and (5) of the ECT.

294. In particular, Claimant's investment is associated with the activities identified in subsections (ii) and (iv) of the understanding on Article 1(5), *i.e.*, the construction and operation of power generation facilities, including those powered by wind and other renewable energy sources, and the marketing and sale of, and trade in Energy Materials and Products.

[327] Claimant's Reply, ¶¶ 504-506.
[328] RL-33, Limited Liability Company AMTO v. Ukraine, SCC Case No. 080/2005, Final Award, 26 March 2008, ¶ 42.

295. It is undisputed that the MBT plants treated waste that was sent to WtE plants with the purpose of generating energy that would later be sold to GSE. The waste management and treatment operation of Claimant was clearly tied to the production of energy, and in fact, part of the dispute before this Tribunal focuses on the alleged impact that the quality of waste had on its treatment and the production of energy. In this sense, the operation of Claimant was undoubtedly more than "a mere contractual relationship with an energy producer." The structure of the operation had a "functional relationship" with an Economic Activity in the Energy Sector, which was further underlined –but not contingent on– the amount of revenues associated specifically with the sale of energy.

296. Therefore, the Tribunal finds no grounds to uphold Respondent's *ratione materiae* jurisdictional objection on the basis of Article 1(6) and (5) of the ECT.

C. THE FORK-IN-THE-ROAD CLAUSE

1. Respondent's position

297. Given that Claimant already chose to litigate its dispute before Italian courts, Respondent requests this Tribunal to conclude that it lacks jurisdiction to hear the present dispute under Article 26(2) and (3) of the ECT, reinforced by the general principle of abuse of process and considering the "fundamental basis test."[329]

298. Article 26(2) of the ECT allows the investor to submit the dispute either to national courts of the Contracting Party, or to any agreed (contractual) dispute resolution process, or to ECT arbitration in accordance with Articles 26(3) to (8). If the investor has submitted the dispute to the national courts of the host State, it may not pursue international arbitration in respect of the same dispute.

299. Furthermore, Article 26(3) of the ECT provides that:

> "(3)(a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.
>
> (b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b)."

300. According to Respondent, since Italy is listed in Annex ID of the ECT, the fork-in-the-road ("**FIR**") clause in Article 26(3)(b) ECT obliges investors in Italy to irrevocably choose between bringing the "same dispute" before the courts of the Contracting Party or before an international arbitration tribunal under the ECT. This precludes Claimant from resorting to arbitration if the same dispute has already been submitted to the court or administrative tribunals of the Contracting Party.

301. The ECT does not define the term "same dispute", thus, it must be interpreted under Article 31 of the VCLT, in view of its ordinary meaning and the object and purpose of the Treaty.

[329] Respondent's Counter-Memorial, ¶¶ 349, 356-351.

302. Considering the purpose of this clause, tribunals must assess whether the dispute brought before them and the dispute brought to other fora are "equivalent in substance" and if Claimant is seeking "to vindicate the same underlying right."[330] According to Respondent, tribunals must avoid excessively mechanical assessments or strict applications of the triple identity test, and instead apply the "fundamental basis test." In *Pantechniki v. Albania*, the tribunal applied this test to analyze whether the disputes have the same "subject matter" regardless of the formal cause of action and concluded that "it is no longer sufficient merely to assert that a claim is founded on the Treaty. The Tribunal must determine whether the claim truly does have an autonomous existence outside the contract."[331]

303. Moreover, Respondent maintains that the "fundamental basis test" is aligned with the *effet utile* principle, which requires giving an effective meaning to the provisions of a treaty, avoiding a result that is "manifestly absurd or unreasonable" as provided in Article 32(b) of the VCLT.[332] This interpretation is particularly relevant in cases –as the present– where Claimant relies on "umbrella clauses" to elevate contractual claims to international law.[333]

304. Applying the "fundamental basis test" Respondent concludes that Claimant has already submitted the present dispute to Italian courts.

305. GA filed a request to open bankruptcy proceedings before the Tribunal of La Spezia on 19 May 2014. In such proceedings, Veolia and VSA filed their requests to have their financial claims listed as debts of VSAT, TEC, TEV, and GA before the Tribunal of La Spezia on 2 February 2015.[334] On 30 July 2019, the Receiver of TEC (the "**Receiver**") filed a lawsuit against the Region of Calabria and the Presidency of the Council of Ministers before the tribunal of Genoa, "also in the interest of Veolia and VSA" (the "**Receiver's Action**").[335] Furthermore, Respondent maintains that the proceedings regarding the *Contributo* should also be taken into account for the same purpose.[336]

306. According to Respondent, these two claims share the same "fundamental cause" as the present claim, *i.e.*, Respondent's alleged breach of its contractual obligations under the concession agreement, which is brought in this arbitration under Article 10(1) ECT's umbrella clause.[337]

307. Respondent is of the view that the claim brought in the bankruptcy proceedings "fully overlaps with the sum claimed by VP in the present proceedings,"[338] since the process is not administrative but judicial in nature. Consequently, filing a debt in insolvency proceedings is the same as pursuing debt-collecting judicial proceedings, especially since the latter cannot be pursued outside the bankruptcy proceedings once they have been initiated.[339] Regarding the Receiver's Action before the Tribunal

[330] Respondent's Counter-Memorial, ¶ 346.
[331] Respondent's Counter-Memorial, ¶¶ 347-348; RL-35, *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, ¶ 64.
[332] Respondent's Counter-Memorial, ¶ 350.
[333] Respondent's Counter-Memorial, ¶ 351.
[334] Respondent's Counter-Memorial, ¶ 352.
[335] Respondent's Counter-Memorial, ¶ 353.
[336] Respondent's Reply PHB2, ¶ 19.
[337] Respondent's Counter-Memorial, ¶ 354.
[338] Respondent's Rejoinder, ¶ 350 (emphasis omitted).
[339] Respondent's Rejoinder, ¶ 356; C-240, Royal Decree No. 267, 16 March 1942, Art. 51.

of Genoa, despite not being brought by Veolia, it attempts to collect the same sums claimed by Veolia in the bankruptcy proceedings, as well as in this arbitration.[340]

308. Under the principle "*electa una via non datur recursus ad alteram,*" enshrined in Article 26 of the ECT, once a choice is made between litigation at the domestic level and international arbitration, the investor is estopped from re-litigating the dispute in other fora. This is further reinforced by the general principle of prohibition of abuse of process, which mandates tribunals to dismiss abusive claims.[341]

309. At the time Claimant filed its Request for Arbitration, it had already chosen to pursue the same dispute before Italian domestic courts. Hence, Respondent requests this Tribunal to conclude that it lacks jurisdiction to hear the present dispute under Article 26(3) of the ECT.

2. Claimant's position

310. Claimant argues that it has neither settled nor submitted the present dispute to any Italian court or tribunal, therefore, the FIR clause in Article 26 of the ECT does not apply in this case.[342]

311. Respondent refers to two specific actions allegedly initiated by Claimant: (i) the bankruptcy proceeding; and (ii) the Receiver's Action. For the first time at the Hearing, Respondent also alleged that: (iii) the administrative proceedings regarding the *Contributo* triggered the FIR objection.[343]

312. According to Claimant, under the "triple identity test," the legal actions referred to by Respondent are not the "same dispute" as that brought in this arbitration concerning a breach of an obligation under Part III of the ECT.[344]

313. As regards the bankruptcy proceedings, the fact that Veolia registered its debt claims is not the same as Veolia submitting a dispute before the Italian courts against the Republic of Italy for the breach of its substantive obligations under the ECT in connection with Veolia's "investment." The latter may trigger the FIR provision but registering a debt claim does not.[345]

314. With respect to the Receiver's Action, leaving aside that Veolia did not bring that action, in any case, it falls outside the scope of this Tribunal's consideration for present purposes. The Receiver's Action commenced on 30 July 2019, more than a year after the commencement of this arbitration. Accordingly, the Receiver's Action cannot be considered a "previously submitted […] dispute" for the purposes of Article 26(3)(b)(i) of the ECT.[346]

315. The allegation of Respondent related to the administrative proceedings initiated in connection with the *Contributo* should be rejected, according to Claimant, given the late stage at which this new point was advanced. In any event, such actions fail to engage the FIR test for the same reasons explained

[340] Respondent's Rejoinder, ¶ 359.
[341] Respondent's Counter-Memorial, ¶¶ 338-358; Respondent's Rejoinder, ¶¶ 344-370; Respondent's Reply PHB2, ¶¶ 16-18.
[342] Claimant's Reply, ¶¶ 527-528; Tr. Hearing Day 1, 93:13-95:4 (Claimant's Opening Statement).
[343] Tr. Hearing Day 1, 151:18-152:8 (Respondent's Opening Statement).
[344] Claimant's Reply, ¶¶ 528-530, Section 4.3.3.
[345] Claimant's Reply, ¶¶ 538-539.
[346] Claimant's Reply, ¶ 540.

above: the causes of actions are entirely different, and they are nowhere near close to being on the scale of an ECT arbitration concerning a breach of Italy's investment protection obligations.[347]

316. Claimant further contends that the "fundamental basis test" as set out in *Pantechniki v. Albania*, is an isolated decision of a sole arbitrator, inapposite for the present dispute. Even if the Tribunal were to apply such a test, the subject matters of the bankruptcy proceeding and the Receiver's Action are completely different from that of the present ICSID dispute.[348] This Tribunal decides on international law and determines international responsibility for ECT breaches, while no similar grounds are applicable in the bankruptcy proceedings or the Receiver's Action.[349]

3. Analysis of the Tribunal

317. Respondent argues that Claimant already chose to litigate its dispute before Italian courts, and therefore, this Tribunal lacks jurisdiction to hear the present dispute under Article 26(2) and (3) of the ECT. The effect of these provisions in Article 26 of the ECT is to create a so-called Fork-in the-Road clause (the "**FIR clause**").

318. Article 26 of the ECT states in its relevant parts that:

> "(2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:
>
> (a) to the courts or administrative tribunals of the Contracting Party to the dispute;
>
> (b) in accordance with any applicable, previously agreed dispute settlement procedure; or
>
> (c) in accordance with the following paragraphs of this Article.
>
> (3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.
>
> (b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b).
>
> (ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.

[347] Claimant's PHB1, ¶ 19.
[348] Claimant's Reply, ¶¶ 556-557.
[349] Claimant's Reply, ¶ 558.

(c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1)."

319. Respondent is one of the Contracting Parties listed in Annex ID that do not give their unconditional consent where the Investor has previously submitted the dispute either to the courts or administrative tribunals of the Contracting Party or in accordance with any applicable, previously agreed dispute settlement procedure.

320. In order to determine whether the FIR clause applies to this arbitration, the Tribunal must analyze whether: (i) the administrative proceedings before the Regional Administrative Court of Calabria over the *Contributo*;[350] (ii) the submission of Veolia's and VSA's claims for their listing as debts in the bankruptcy proceedings initiated by GA before the Tribunal of La Spezia; and/or (iii) the Receiver's Action brought against the Calabria Region before the Tribunal of Genoa, can be considered to be the same dispute as the one brought before this Tribunal.[351]

321. Under public international law, a "dispute" has been defined as "a disagreement on a point of law or fact, a conflict of legal views or of the interests between two persons," [352] and as "a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations."[353]

322. There appears to be no disagreement between the Parties as to the general definition of dispute, but rather as to the applicable standard to compare two disputes for the purposes of the FIR clause.

323. The Tribunal is of the view that the triple identity test invoked by Claimant is an appropriate baseline method to compare two disputes to determine whether they are the same for the purposes of the FIR clause. Under the ECT's FIR clause, consent to arbitrate is only excluded for "disputes" that have been "previously submitted" to local courts by an "Investor." The triple identity test covers all the elements found in the ECT FIR clause since it involves a comparative analysis of (i) the identity of the parties; (ii) the object in dispute; and (iii) the cause of action.

324. Regarding the identity of the parties, the ECT's FIR clause requires the dispute to be submitted to local courts by an "Investor", as defined in Article 1(7) of the ECT. The Tribunal does not observe any ambiguity regarding the definition of "Investor" in this provision that would justify a different interpretation or a more flexible approach, than simply applying its literal terms.

325. The Tribunal observes that if the Contracting Parties identified in Annex ID, including Italy, had intended to exclude from their consent to arbitrate any dispute indirectly brought by the Investor, connected to the Investor, or related to the "Investment", instead of a dispute brought by "the Investor party to the dispute," they would have made such limitation explicit either in subsection (3) of Article 26 of the ECT, or in Annex ID itself. But they did not.

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[350] Tr. Hearing Day 1, 151:18-152:38 (Respondent's Opening Statement).
[351] Claimant's Reply, ¶ 528.
[352] CL-121, *The Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, Judgment of 30 August 1924, P.C.I.J. Series A No. 2, p. 11.
[353] CL-120, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950, I.C.J. Reports 65 (1950), p. 74.

326. The prevalence of the literal terms of the ECT's FIR clause was also the approach adopted by the *Greentech v. Italy* tribunal, in finding that:

> "Having reviewed the Parties' arguments, the Tribunal has not been persuaded to adopt a non-literal interpretation of ECT Article 26(3)(b)(i), which provides, '[t]he Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b).' The term, 'Investor', is unambiguous. In the context of Article 26, sub-paragraph (1) of which refers to '[d]isputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former', the Italian subsidiaries of the Claimant in this arbitration cannot be understood to be 'Investors' but are, instead, to be treated as 'Investments' which are located 'in the Area of' Italy."[354]

327. With the foregoing clarification in mind, the Tribunal notes that Veolia – the "Investor" in this arbitration – does not appear to be a party to any of the proceedings invoked by Respondent.

328. In 2009 and 2010, TEC filed appeals Nos. 1, 83 and 788 before the Regional Administrative Court of Calabria, seeking the annulment of Decrees Nos. 18830 of 21 November 2008 and 4760 of 6 April 2010, by which the Calabria Region rejected a request for the disbursement of the *Contributo*,[355] and revoked the advance of approximately € 8 M of the *Contributo* already allocated by the *Commissario*.[356] On 10 February 2011, the Regional Administrative Court of Calabria granted the appeals and annulled Decrees Nos. 18830 and 4760 through judgment No. 226.[357]

329. Judgment No. 226 clearly states that the two appeals were "lodged by T.E.C. […] against the Region of Calabria."[358] Veolia as the Investor and Claimant in this arbitration was never identified as a party to such proceedings. Therefore, the first tier of the triple identity test fails regarding the administrative proceedings initiated in connection with the *Contributo*.

330. In connection with the bankruptcy proceedings, on 19 May 2014, GA filed a "Petition for declaration of insolvency pursuant to Art.14, Insolvency Law" before the Insolvency Section of the Tribunal of La Spezia.[359] On 25 May 2014, the Tribunal of La Spezia issued judgment No. 31, declaring the insolvency of GA and of the shareholders with unlimited liability: TEC, TEV, VSAT, VSAI, and Vercelli Energia.[360]

331. The bankruptcy proceedings were filed and initiated by GA, and Veolia was not a "party" to such filing. There is no mention of Claimant in judgment No. 31 of the Tribunal of La Spezia.

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[354] CL-108, *Greentech Energy Systems A/S, et al. v. Italian Republic*, SCC Arbitration V (2015/095), Final Award, 23 December 2018, ¶ 204.
[355] C-125, Letter from TEC to the *Commissario*, 10 March 2009, p. .2; C-32, Judgment of the Administrative Tribunal no. 226.
[356] C-32, Judgment of the Administrative Tribunal No. 226, 28 February 2011, pp. 2-3.
[357] C-32, Judgment of the Administrative Tribunal No. 226, 28 February 2011, p. 17.
[358] C-32, Judgment of the Administrative Tribunal No. 226, 28 February 2011, pp. 1-5.
[359] C-69, Request of GA to open bankruptcy proceedings dated, 19 May 2014.
[360] C-70, Bankruptcy Judgment of the Tribunal of La Spezia, 25 June 2014, p. 3.

332. On 2 February 2015, Veolia directly filed an "application to be listed in the body of creditors" of TEC.[361] However, this does not mean that Veolia is a party to a dispute involving Respondent. As noted above, a "dispute" involves an adversarial scenario with a "conflict of legal views or of the interests between two persons,"[362] and, in the bankruptcy proceedings of GA and TEC, Veolia and Respondent are not adversaries. If anything, the adversary of Veolia as a creditor in the bankruptcy proceedings would be the insolvent company, TEC, as the debtor, but not Respondent. Consequently, given that Veolia's filing of credits in the bankruptcy proceedings does not involve the same parties to the dispute that it brought as an Investor in this arbitration against Respondent, the conditions for the application of the ECT's FIR clause are not met.

333. Finally, on 30 July 2019, the Receiver of GA on behalf of TEC filed the Receiver's Action against the Calabria Region and the Prime Minister's Office before the Tribunal of Genoa, seeking damages arising out of breaches to the TEC Concession (Procedure No. 9545/2019).[363] There is no evidence that Veolia –the Investor in this arbitration– is a party to those proceedings. Rather, they were initiated by the Receivers of GA and TEC, which Veolia claims to be part of its Investment. Thus, as noted above, the requirement that a dispute is brought by the "Investor" so as to apply the ECT's FIR Clause, is also not met by the Receiver's Action.

334. In sum, the lack of identity between the Parties to this dispute —that is, the Investor as defined in Article 1(7) of the ECT and Respondent— and the parties to those domestic disputes referred to by Respondent is sufficient to dismiss the objection brought on the basis of the FIR clause.

335. However, for the sake of completeness, the Tribunal finds that there are additional elements further confirming that the disputes invoked by Respondent do not meet the threshold of the ECT's FIR clause.

336. The exclusion of the unconditional consent to arbitrate a dispute under Article 26(3)(b) of the ECT is subject to a temporal condition, that is, that the dispute has been "previously submitted" to local courts before being brought to an international investment tribunal or, as the title of ECT's Annex ID clearly provides, where the dispute is "resubmitted" to international arbitration "at a later stage." This means that the exclusion does not apply to the scenario where the dispute is first submitted to international arbitration and at a later stage is resubmitted to domestic courts. Such would be the case with the Receiver's Action –assuming, *quod non*, that the triple identity test was met— since it was initiated a year after the filing of the Request for Arbitration in 2018, and therefore, would not fall within the scope of the ECT's FIR clause.

337. The proceedings before the Regional Administrative Court of Calabria regarding the *Contributo*, and the bankruptcy proceedings, each have a different cause of action and object from those of the dispute before this Tribunal. The claims brought by Claimant in this arbitration are not based exclusively on contract claims or credits but on the breach of treaty obligations by the respondent State. By contrast,

[361] C-103, Request to include VP's financial claims in TEC's debt, 2 February 2015, pp. 1, 6.
[362] CL-121, *The Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, Judgment of 30 August 1924, P.C.I.J. Series A No. 2, p. 11.
[363] Respondent's Rejoinder, ¶ 349; Respondent's Counter-Memorial, ¶ 113; R-35, Writ of summons of the Tribunal of Genoa, 30 July 2019.

the proceedings before the Regional Administrative Court, and the bankruptcy proceedings were based on administrative, procedural, and bankruptcy laws of Italy, and had a different and limited object, *i.e*., the annulment of administrative acts to oblige the Calabria Region to pay the *Contributo* to the *Commissario*, or the collection of a debt from a subsidiary or affiliated company, in the case of the Bankruptcy Proceedings. The fact that these proceedings and the present dispute overlap in certain factual and legal matters is not sufficient to conclude that they share the same cause of action and object.

338. Lastly, the Tribunal observes that Respondent has referred to the principle of prohibition of abuse of process in connection with the prohibition of re-litigating the same dispute under Article 26 of the ECT.[364] The Tribunal has established that there is no re-litigation of the same dispute by Claimant bringing this arbitration, and the existence of other proceedings overlapping in certain factual and legal matters with this arbitration does not, in itself, lead to the conclusion that there is an abuse of process.[365] It is well established that the finding of abuse of process in international law demands a high threshold,[366] and the bare allegations of an abuse of process made by Respondent do not meet such a threshold.

339. Nonetheless, the Tribunal is aware that while two disputes may not be identical or "the same", the relief requested under each of them could indirectly create a scenario of double recovery. However, this circumstance by itself does not support a finding of abuse of process or bad faith or change the conclusion that the requirements to apply the FIR clause, in this case, have not been met. The Tribunal will consider this issue in connection with the damages and *quantum*, subject to the principle of full reparation.[367]

D. THE TRIBUNAL HAS NO JURISDICTION OVER ITALY'S COUNTERCLAIM

1. Claimant's position

340. Claimant asserts that Respondent introduced a counterclaim in relation to costs for the full restoration of the plants transferred after the termination of the TEC Concession, estimated at € 19.5 M, by excluding this amount from the pre-tax additional cash flows in the valuation of historical losses.[368]

341. Claimant submits that the Tribunal has no jurisdiction under the applicable treaties to entertain a counterclaim filed by Italy and, in any event, Claimant argues that the counterclaim would be inadmissible.[369]

[364] Respondent's Counter-Memorial, ¶ 356.
[365] CL-242, *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, ¶¶ 90-92.
[366] CL-174, *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, PCA Case No. 34877, Partial Award, 30 March 2010, ¶ 354.
[367] *See* below in this Award, ¶ 1069.
[368] Claimant's Reply, ¶ 389.
[369] Claimant's Reply, ¶ 390.

342. Despite introducing a counterclaim against Veolia in its Counter-Memorial, Italy conceded that it could not advance one.[370] As the matter seems to be undisputed, Claimant simply maintains that any counterclaim is inadmissible.[371]

2. Respondent's position

343. Respondent argues that it has not introduced a counterclaim in the present arbitration proceedings.[372]

344. Respondent considered that the amount of € 19.5 M was not due to Veolia because it failed to comply with its contractual obligation by not delivering plants in a proper operational status upon termination of the concession. However, Italy submits that a consideration of a failure to comply with a contractual obligation, does not constitute a counterclaim.[373]

3. Analysis of the Tribunal

345. Claimant asserts that Respondent introduced a counterclaim by deducting the costs to restore the plants transferred after the termination of the TEC Concession, estimated at € 19.5 M, from the pre-tax additional cash flows in the valuation of historical losses.

346. Respondent argues that it has not introduced a counterclaim. In its Rejoinder, Respondent clarified that it did "not propose a counterclaim, but only considered that the amount of € 19,5 M is not due to Veolia because it had a contractual obligation to deliver plants in a proper operational status upon termination of the concession."[374]

347. The Tribunal notes that no counterclaim was pursued.

VI. MERITS[375]

348. Claimant argues in this arbitration that Respondent breached three standards of protection under the ECT: (A) the umbrella clause found in Article 10(1), last sentence, by violating its obligations under the TEC and TEV Concessions and the EPPA; (B) the Fair and Equitable Treatment ("**FET**") standard in Article 10(1) by taking arbitrary or unreasonable measures against Claimant and its investment under the TEC and TEV Concessions; and (C) the protection against indirect expropriation in Article 13 by "breaching its obligations under the TEC and TEV Concessions and by creating unstable, unequitable and unfavorable conditions for Claimant's investment."[376]

349. Claimant brings three sets of claims based on the acts and omissions of the *Commissario* and CAV toward the TEC and TEV Concessions, which are at the core of Claimant's investment. The

[370] Respondent's Counter-Memorial, ¶ 19.
[371] Claimant's Reply, ¶ 390.
[372] Respondent's Rejoinder, ¶ 11 (iii).
[373] Respondent's Rejoinder, ¶ 510.
[374] Respondent's Rejoinder, ¶ 510.
[375] This section includes summaries of the facts and positions of the Parties underlying the present dispute. Such summaries are not an exhaustive narrative of all the matters that have been discussed in this proceeding. Nevertheless, the Tribunal has considered the entirety of the Parties' factual and legal arguments made in their written and oral submissions, whether or not they are expressly referenced in the text of this section.
[376] Claimant's Memorial, Sections 5.1., 5.2., and 5.3, ¶ 589.

Concessions were public utility contracts that were granted under Respondent's legal framework to address a public waste-management crisis, by building waste treatment and WtE plants.[377] The contractual counterparty to the TEC Concession was the Commissario. As noted above in paragraph 97, the parties describe the role of CAV in different ways, but it is common ground that CAV was constituted by the Municipalities of Versilia and represented their interests in the TEV Concession. The Tribunal does not consider that it makes any material difference whether CAV actually replaced the Municipalities of Versilia or merely acted on their behalf in its dealings with TEV. As organs recognized to be part of, or controlled by, the State, the *Commissario* and CAV had broad powers, sovereign in their nature and different from those typically held by ordinary commercial counterparties, to fulfill their mandate to overcome the waste-management crisis.

350. The Minister of Interior appointed the President of the Calabria Region as the *Commissario* "for the preparation of an emergency intervention plan in the urban and similar solid waste removal sector and undertakes to make the interventions necessary for dealing with such an emergency situation."[378] The *Commissario* had extraordinary powers that allowed him to secure the construction and operation of the plants. His approval replaced "for all purposes, endorsements, opinions, authorisations and concessions by regional, provincial and municipal entities."[379] Most importantly, the regulation in place recognized that the extent of his powers was justified based on "the public utility, urgency and non-deferrable nature of the works."[380]

351. Veolia, through VSA, entered into the SPA on 29 May 2007 to acquire 75% of TMT, and therefore, the TEC and TEV Concessions, and implemented the closing on 3 October 2007.[381] Before entering into the SPA, Veolia conducted due diligence on the transaction.[382] The Legal Due Diligence Report of January 2007 and contemporary correspondence demonstrate that the investor knew that it was

[377] C-8, Decree of the Presidency of the Council of Ministers No. 217, 12 September 1997, "Considering that it is necessary to launch extraordinary interventions immediately, for the purpose of protecting human life from the danger of damages deriving from the absence of disposal, pursuant to the law, of the enormous mass of waste produced on a daily basis within the territory of the Region of Calabria"; C-9, Minister of Interior's Ordinance No. 2696, 21 October 1997, Preamble PDF pp. 1-2, "Considering that the few plants with complex technology in operation are not appropriate to the more recent technical requirements […]. Given that the management of the collection and removal of waste has been immediately brought under control again, preventing the introduction of waste deriving from other regions, conducting structural reforms in the sector of collection, transport, recycling and the recovery of materials and energy […]. Given that the emergency may be overcome through the development of containment actions for the production of waste, differentiated collection, selection, processing and recovery, including of energy, within the industrial system through the application of the best available technologies, ensuring the best energy and environmental performances", Art. 1.4 "The deputy commissioner may make use for executing the interventions described in the preceding points, of local entities and consortium."

[378] C-9, Minister of Interior's Ordinance No. 2696, 21 October 1997, Art. 1.1.

[379] C-9, Minister of Interior's Ordinance No. 2696, 21 October 1997, Art. 1.5.

[380] C-9, Minister of Interior's Ordinance No. 2696, 21 October 1997, Art. 1.5. See also C-174, PDF p. 2 "HAVING REGARD TO paragraph 2 of Art. 1 of the cited O.P.C.M. no. 3585 of 24 April 2007, published in the Official Gazette of the Italian Republic issue no. 105 of 8/5/2007, which states that the Delegated Commissioner, in particular, shall carry out, inter alia, the following activities: a) updating and reshaping of the Regional Waste Plan; b) implementation of Articles 148 and 149 of Legislative Decree no. 152/2006, by means of the establishment of local authorities for the subsequent preparation and/or updating of local plans."

[381] C-25, Share Purchase Agreement between TM, TME and VSA, VP, 29 May 2007, -Arts. 1 and 6; C-26, Closing Record, 3 October 2007.

[382] PoliMi Second Expert Report, Section 1.3, p. 8.

making a high-risk investment by acquiring concessions that had major financing issues and faced the opposition of local Italian authorities, as well as questioning from the *Commissario*.[383]

352. It is undisputed that in entering into the SPA in 2007, Claimant relied on the "assurances" made by the seller, Mr. Papi, and Banca Intesa, regarding the status of the TEC and TEV Concessions and the relationship with Italian authorities, the *Comisssario* included.[384] While this reliance by itself does not preclude the investor's right to bring a claim under the ECT, nor exclude Respondent's obligations, it may have an impact at the damages phase. It is trite that investment arbitration is not an insurance policy against bad business decisions.[385]

A. UMBRELLA CLAUSE

1. Scope of the umbrella clause

a. Claimant's position

353. Claimant submits that by failing to observe the obligations it undertook under the TEC and TEV Concessions, Respondent breached the umbrella clause in Article 10(1) of the ECT.[386]

354. The last sentence of Article 10(1) ECT requires Italy to "observe any obligation" that it may have "entered into" with regard to "Investments of an Investor."[387] According to Claimant, this means that any violation of a contract entered into by a Contracting State (Respondent), with a protected foreign investor (Claimant) that relates to its investments (the TEC and TEV Concessions) constitutes a breach of the ECT.[388] The plain meaning of the ECT's umbrella clause is broad enough to cover all of Italy's breaches of the TEC and TEV Concessions and Respondent should be held accountable for those breaches under international law.[389]

355. Claimant notes that Respondent rejects the plain meaning of Article 10(1) and proposes a three-tier test to determine if a contractual obligation is covered by the umbrella clause, under which the Tribunal must verify if: (i) an obligation between the State and the Investor exists under domestic law; (ii) the obligation was breached by the State; and finally, (iii) the breached obligation is covered by the umbrella clause.[390] According to Claimant, even under Respondent's three-tiered analysis, the

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[383] C-20, Preliminary Legal Due Diligence Report of Macchi di Cellere Gangemi, 24 January 2007; Claimant's Memorial, ¶ 309; C-146, Letter from TEC to *Commissario*, 12 June 2007, pp. 1-2. On 12 June 2007, TEC sent a letter to the *Commissario* regarding the "serious" and "unsustainable" financial situation of the company due to unpaid receivables totaling approximately € 50 million, which included "28 million euro in subsidies […] largely overdue by more than two years." TEC further noted that "the Shareholder considers that it should not make any further extension on its direct investment that has reached financial levels far beyond what was set out in the Project," leaving no doubt that Claimant knew that continuing with its investment was high risk.
[384] Tr. Hearing Day 2, 395:11-396:22, 399:25-400:15 (Examination of Mr. Cucchiara).
[385] See RL-51, *MTD Equity Sdn, Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶ 178.
[386] Claimant's Memorial, ¶ 193.
[387] Claimant's Reply, ¶¶ 597-598.
[388] Tr. Hearing Day 1, 38:10-15 (Claimant's Opening Presentation).
[389] Claimant's Reply, ¶ 601.
[390] Claimant's Reply, ¶ 608; Respondent's Counter-Memorial, ¶¶ 363-376; Respondent's Rejoinder, ¶¶ 395-406; Respondent's PHB1, ¶¶ 17-44.

conclusion is that the State's breaches of the TEC and TEV Concessions are covered by the umbrella clause.[391]

356. First, there were valid obligations existing between Italy and Veolia under the Concessions.[392] Second, the obligations under the Concessions were breached by Respondent, in violation of Italian law.[393] It has been extensively proven that such breaches have occurred, are attributable to Respondent and fall under its liability.[394]

357. In particular, Claimant alleges that Respondent breached the following obligations under the TEC Concession: (i) Articles 6 and 7 of the TEC Concession, by unlawfully refusing to pay gate fees and to annually adjust the gate fees; (ii) Article 8-bis of the *Atto di Sottomissione*, by unlawfully refusing to pay the outstanding *Contributo*; (iii) Article 5 and Annex F of the TEC Concession and Articles 6 and 7 of the *Atto di Sottomissione,* by refusing to pay the *Conguagli*; (iv) Article 15 of the TEC Concession by unlawfully applying undue penalties; and (v) Article 6.3 of the TEC Concession, by unlawfully refusing to ensure the financial and economic equilibrium of the Concession.[395] As regards the TEV Concession, Claimant invokes the breach of the obligations in (i) Article 6.2 of the TEV Concession, by unlawfully applying unjustified unilateral annual adjustments of gate fees; and (ii) Article 5.1 of the TEV Concession, by unlawfully delivering non-compliant waste to the MBT plant.[396]

358. Third, Veolia argues that the plain meaning of the ECT's umbrella clause interpreted under Articles 31 and 32 of the VCLT offers investors broad protection.[397] Moreover, concession agreements granted to foreign investors "generally fall within the protection of umbrella clauses."[398] Claimant further argues that it is not necessary for the State to be acting in the exercise of its sovereign powers when committing breaches covered by the umbrella clause. Thus, breaches resulting from the exercise of commercial activities are covered by the ECT's umbrella clause, as the tribunal in *Eureko v. Poland* has found.[399] Many other tribunals adopted the same approach.[400]

359. In any case, Claimant argues that Respondent's breaches "impacted the very essence of the investment rights,"[401] and that its claims in this arbitration are not limited to commercial risks

[391] Claimant's Reply, ¶ 608.
[392] Claimant's Reply, ¶ 609.
[393] Claimant's Reply, ¶¶ 612-613.
[394] Claimant's Reply, ¶ 610; Claimant's PHB1, Section 4.1.2; Tr. Hearing Day 1, 42:14-44:16; 58:23-59:10 (Claimant's Opening Presentation).
[395] Claimant's PHB, Section 3; Claimant's Reply, ¶ 610.
[396] Claimant's PHB, Section 3; Claimant's Reply, ¶ 611.
[397] Claimant's Reply, ¶¶ 601, 617.
[398] Claimant's Reply, ¶ 618.
[399] Tr. Hearing Day 1, 40:14-19 (Claimant's Opening Presentation: "[the umbrella clauses] are of particular importance because they protect the investor's contractual rights against any interference which might be caused by either a simple breach of contract or by administrative or legislative acts."); CL-17, *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award, 19 August 2005, ¶ 251.
[400] Tr. Hearing Day 1, 41:12-15 (Claimant's Opening Presentation); CL-145, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 498 ("any violation of the private law agreement becomes *ipso iure* a violation of the international law BIT.").
[401] Claimant's Reply, ¶ 621.

associated with the investment but are the direct consequence of acts by the State which had the effect of defeating the specific undertakings that Italy gave to Veolia.[402]

360. Fourth, Claimant contends that it has not duplicated its claims under the umbrella clause, because the treaty avenue is the only one available to Veolia,[403] considering that" (i) it no longer retains control over the investment and, thus, has no standing to claim damages before Italian courts; and (ii) the Italian courts have declared that the arbitration agreement contained in both the TEC and TEV Concessions are void pursuant to Article 15.3 of Decree Law No. 195/2009.[404] A refusal to give effect to the umbrella clause would thus amount to a denial of justice, or in the alternative, a breach of the effective means provision in Article 10(1) of the ECT.[405]

b. Respondent's position

361. According to Respondent, the first requirement to apply Article 10(1) last sentence, is the existence of an obligation entered into with the investor concerning its investment. Thus, Claimant must prove the existence of a binding commitment under Italian laws regarding its investment.[406]

362. The second requirement is the existence of a breach of the obligation, which must be proven "to satisfaction", and is therefore subject to a high standard, in line with the findings of the *Mohammad Al-Bahloul v. Tajikistan* tribunal.[407] Respondent relies on the *Mohammad Al-Bahloul* decision brought forth by Claimant, however it submits that rather than establishing a low standard, as Claimant submits, the award sets a higher threshold which requires the contractual claim to be "uncontroverted."[408] However, in this arbitration the scope of the obligations under the Concessions, the relationship between the Parties, and their behavior, are all being controverted.[409]

363. Third, Respondent contends that the broad interpretation of the umbrella clause proposed in *Eureko v. Poland*, is not applicable to the ECT. Although the underlying treaty in that case also includes the term "any obligation", Article 10(1) last sentence must be interpreted in light of the ECT, not other treaties, as per Article 31(1) of the VCLT.[410] Accordingly, Respondent proposes a narrower interpretation of the ECT's umbrella clause, and argues that it does not cover "any supposed infringement of a contractual obligation under domestic law"[411] and rather is limited to "investment protections contractually agreed by the State as a sovereign additional to those directly contained in the ECT."[412]

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[402] Claimant's Reply, ¶¶ 625-626; Claimant's PHB2, Section 3.1.2.
[403] Claimant's Reply, ¶ 627.
[404] C-52, Judgment No. 438 of the Rome Court of Appeal, 1 July 2014; C-53, Judgment No. 1000 of the Rome Court of Appeal, 1 July 2014.
[405] Claimant's Reply, ¶ 627.
[406] Respondent's Counter-Memorial, ¶ 363.
[407] Respondent's Counter-Memorial, ¶¶ 364-365.
[408] Respondent's Counter-Memorial, ¶¶ 364-365; CL-16, *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability, 2 September 2009.
[409] Respondent's Counter-Memorial, ¶¶ 365-366.
[410] Respondent's Counter-Memorial, ¶ 367.
[411] Respondent's Counter-Memorial, ¶ 368.
[412] Respondent's Counter-Memorial, ¶ 377.

364. As acknowledged by several tribunals,[413] umbrella clauses only sanction violations of international law, which do not automatically result from violations of contractual obligations under domestic law.[414] Respondent notes that even in *EDF v. Argentina*, cited by Claimant, the tribunal found that, while the umbrella clause covered concession agreements granted to investors, not "all contractual breaches necessarily rise to the level of treaty violation."[415]

365. Only contractual breaches of investment protections "deriving from the sovereign nature of the counterparty" amount to a violation of international law under the ECT.[416] Not "any obligation of a commercial nature" is covered by Article 10(1) last sentence,[417] since the ECT intends to create a "level playing field" for energy sector investment, reducing "the non-commercial risks."[418]

366. Respondent adds that only contract breaches involving "gross responsibility" can be understood as a breach of international law.[419] In this vein, Respondent notes that the *CMS v. Argentina* tribunal found that "[p]urely commercial aspects of a contract might not be protected by the treaty in some situations, but the protection is likely to be available when there is significant interference by governments or public agencies with the rights of the investor."[420] In Respondent's view, a significant interference requires an "arbitrary or tortious element" affecting the "very essence" of the investor's rights.[421]

367. Respondent contends that the contractual breaches at stake in this arbitration do not meet the threshold of a violation of the ECT's umbrella clause. On the one hand, the breaches are of a purely commercial nature, since both parties were "*operating in a level playing field*" and the State did not use its sovereign powers to violate the Concessionaire's rights under the TEC and TEV Concession Agreements.[422] On the other hand, there is no evidence that said breaches significantly interfered with Claimant's rights under the ECT.[423] Disagreements on the understanding of the Concessions, construction delays, and the powers attributed to the *Commissario* did not cause serious interference with Claimant's rights. Moreover, it was Claimant who unilaterally terminated the TEC Concession, despite the *Commissario*'s efforts to negotiate, causing serious damages to Respondent.[424]

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[413] See Respondent's Rejoinder, ¶¶ 401, 402, 404. Respondent references, among others: RL-36, *Compañia de Aguas del Aconquija S.A. & Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, ¶¶ 95-96; RL-71, *SGS v. Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on the Objections to Jurisdiction, 6 August 2003, ¶ 172; RL-72, *Hassan Awdi, et al. v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015, ¶ 213.
[414] Respondent's Rejoinder, ¶ 401.
[415] Respondent's Counter-Memorial, ¶ 372; Claimant's Memorial, ¶ 203; CL-20, *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, ¶ 940.
[416] Respondent's Counter-Memorial, ¶ 376; Respondent's Rejoinder, ¶ 403.
[417] Respondent's Rejoinder; ¶ 403.
[418] Respondent's Counter-Memorial, ¶ 375, citing CL-1, ECT, Introduction, p. 14.
[419] Respondent's Counter-Memorial, ¶ 379.
[420] Respondent's Counter-Memorial, ¶ 380; RL-42, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶ 299.
[421] Respondent's Counter-Memorial, ¶¶ 381-382.
[422] Respondent's Rejoinder, ¶ 408.
[423] Respondent's Rejoinder, ¶ 407.
[424] Respondent's Rejoinder, ¶¶ 411-414.

c. Analysis of the Tribunal

368. Claimant avers that Respondent has breached the umbrella clause in Article 10(1) of the ECT because it failed to meet its obligations under the TEC and TEV Concessions. In particular, Claimant affirms that Respondent breached the following obligations under the TEC Concession:[425]

> Articles 6 and 7 of the TEC Concession, by refusing to timely pay[426] and annually adjust the gate fees.[427]
>
> Article 6.3 of the TEC Concession, by refusing to ensure the financial and economic equilibrium of that Concession.[428]
>
> Article 8-bis of the *Atto di Sottomissione*, by refusing to pay the outstanding *Contributo*.[429]
>
> Article 5 and Annex F of the TEC Concession and Articles 6 and 7 of the *Atto di Sottomissione*, by refusing to pay the *Conguagli*.[430]
>
> Article 15 of the TEC Concession by applying unjustified penalties.[431]

369. With respect to the TEV Concession, Claimant affirms that Respondent breached:

> Article 6.2 of the TEV Concession and the 2010 Agreement by applying unjustified unilateral annual adjustments of gate fees.[432]
>
> Article 5.1 of the TEV Concession, by delivering non-compliant waste to the MBT plant.[433]

370. According to Claimant, the language in Article 10(1), last sentence, of the ECT is "broad" and therefore "any contractual obligations Italy has entered into with Veolia's [sic] or its local affiliates also amount to obligations under the ECT."[434]

371. Respondent submits that the ECT's umbrella clause is limited to "investment protections contractually agreed by the State as a sovereign additional to those directly contained in the ECT,"[435] and "cannot extend to any obligation of a commercial nature but should be linked to the frustration of rights specifically pertaining to foreign investors."[436] Therefore, "only infringements leading to a significant interference with Claimant's investment" can breach the ECT's umbrella clause.[437]

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[425] Claimant's Memorial, ¶ 221.
[426] Claimant's Memorial, ¶¶ 294-296.
[427] Claimant's Memorial, ¶ 223.
[428] Claimant's Memorial, ¶ 306.
[429] Claimant's Memorial, ¶ 238.
[430] Claimant's Memorial, ¶ 258.
[431] Claimant's Memorial, ¶ 287.
[432] Claimant's Memorial, ¶¶ 319-323.
[433] Claimant's Memorial, ¶ 331.
[434] Claimant's Reply, ¶¶ 600, 603.
[435] Respondent's Counter-Memorial, ¶ 377.
[436] Respondent's Counter-Memorial, ¶ 376.
[437] Respondent's Counter-Memorial, ¶ 382.

372. According to Respondent, the obligations identified by Claimant under the umbrella clause claim "were commercial in kind, and did not produce any significant interference with the rights of Claimant under the ECT."[438] Respondent adds that "infringements of contractual obligations can only be imputed to the contractual party to the relevant agreement."[439]

373. Although the Parties recognize that obligations derived from contracts may be covered by the ECT's umbrella clause, they disagree on whether an umbrella clause covers breaches of "any" contract obligation, or whether more than "simple commercial breaches" are required, and specifically, whether the State must be acting in a sovereign capacity in order to be internationally liable under an umbrella clause.[440]

374. The last sentence of Article 10(1) of the ECT, states that:

> "[e]ach Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party."

375. Respondent has proposed a narrow interpretation of the ECT's umbrella clause, citing the dissenting opinion issued in the *Gardabani v. Georgia* case –which did not apply the ECT– as follows:

> "[T]he umbrella clause is not 'directed to regulating the infinite number of contractual relationships entered into between executive organs of the State and private parties; it is rather directed to regulating the conduct of a State as a sovereign, just like every other obligation of protection in an investment treaty.'
>
> The State must certainly abstain from encroaching upon the contractual obligations assumed by one of its organs and a private party. In fact, the purpose of the umbrella clause is precisely to avoid extracontractual (sovereign) interference resulting in an alteration of the synallagmatic relationship between the contracting parties."[441]

376. The understanding of the Energy Charter Secretariat seems contrary to Respondent's narrow reading of the ECT's umbrella clause. The Secretariat has read this provision in rather broad terms, as encompassing contract obligations entered into by the host State with the foreign investor, including any contract concluded with either a subsidiary of the foreign investor or the parent company, considering that "[r]espect of the international principle of 'pacta sunt servanda' is of particular relevance in the energy sector where most major investments are made on the basis of an individual contract between the investor and the state."[442]

377. The Tribunal observes that there is no established rule that an abuse of sovereign powers is necessary to find a breach of an umbrella clause[443] as Respondent suggests. Rather it remains a debated matter

[438] Respondent's Counter-Memorial, ¶ 420.
[439] Respondent's Counter-Memorial, ¶ 422.
[440] Respondent's Rejoinder, ¶¶ 395-408; Respondent's PHB1, ¶ 22.
[441] Respondent's PHB1, ¶¶ 23-24; RL-95, *Gardabani Holdings B.V. and Silk Road Holdings B.V. v. Georgia*, ICSID Case No. ARB/17/29, Dissenting Opinion of Professor Zachary Douglas KS, 27 October 2022, ¶ 29.
[442] CL-8, The Energy Charter Treaty: A Reader's Guide, The Energy Charter Secretariat, 2002, p. 26.
[443] See CL-20, *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, ¶ 941; RL-40, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, ¶¶ 79-81.

under international investment law. While some tribunals have taken the view that "it is necessary to distinguish the State as merchant from the State as a sovereign",[444] other tribunals have followed the opposite interpretation, considering that an umbrella clause applies even in the absence of the exercise of sovereign powers.[445]

378. Further, the evidence on the record does not support Respondent's allegation that the TEC and TEV Concessions are contracts of a "purely private nature," in which the State and the investor were on "equal footing", so as to exclude them from the scope of Article 10(1) of the ECT. [446]

379. First, the TEC and TEV Concessions were not ordinary commercial contracts. They involved the supply to the population of basic public utilities such as energy and/or waste management, which has been typically deemed to be more than a commercial activity.

380. The TEC and TEV Concessions were contracts that aimed to ensure the "continuity of the public service" in the context of a "state of emergency."[447] In particular, Article 13 of the TEC Concession stated that "[t]he construction and management concession governed by this agreement shall be considered for all purposes as an essential public service and may not be suspended or abandoned for any reason, except in cases of force majeure."[448] Precisely due to the public and essential nature of the services provided under these concessions, the *Prorogatio* was required to avoid a service interruption.[449] Also, the *Commissario* subsequently issued an "ordinance" to acknowledge the termination of the TEC Concession.[450] These are not typical features of an ordinary commercial contract.

381. Second, "the contractual party to the relevant agreement" were entities that in the performance of the contracts acted as organs of the State or in the exercise of governmental authority as per Articles 4 and 5 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (the "**ILC Articles**").[451] In the TEC Concession, the contractual party was the *Commissario* and the evidence indicates that different organs of Respondent recognized that the *Commissario* and CAV were representing the State. During the Parliamentary Inquiry, Italian senators recognized that the *Commissario*'s work in the Calabria Region was done in representation of "the Government."[452]

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[444] CL-126, *Pan American Energy LLC, and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, ¶ 108; CL-38, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 531.
[445] CL-251, *Strabag SE v. Libya*, ICSID Case No. ARB(AF)/15/1, Award, 29 June 2020, ¶ 164; CL-29, *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Award, 10 February 2012, ¶ 91.
[446] Respondent's PHB1, ¶¶ 16, 43.
[447] C-46, Third Amendment or *Secondo Atto Integrativo* between TEC and the *Commissario*, 21 June 2011, ¶ 14.
[448] C-10, TEC Concession, 17 October 2000, Art. 13.
[449] Claimant's Memorial, ¶ 122; C-58, TEC's 2012 Notice to the Commissario, 31 January 2012.
[450] C-59, Ordinance of the *Commissario* No. 10826, 9 February 2012.
[451] CL-11, ILC Articles, Article 4: "1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State." Article 5 ": "The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."
[452] C-92, Transcript of the Audition before the Italian Senate in relation to the Inquiry on Issues Relating to Waste Management, 5 February 2009, pp. 25-26: "[T]he management of the service in that Region is in the hands of the Commissioner, and thus the Government."

Likewise, a former *Commissario* stated that such a role implied "act[ing] as part of the State" or as "a representative of the State."[453] In TEV's case CAV, far from being a mere commercial enterprise, was a consortium composed of and controlled directly by the Municipalities of Versilia,[454] which, in turn, are State organs.

382. Third, in order to meet their obligations under the TEV and TEC Concessions, CAV and the *Commissario* had to exert powers typically reserved for the State and not usually found in ordinary commercial contracts. Under the TEV Concession, the Municipalities of Versilia had to exert their governmental authority as part of the State, for CAV to meet its obligations regarding the payment[455] –and debated adjustment– of the gate fees, and the delivery of "compliant" waste. Similarly, under the TEC Concession, the *Commissario* had to be conferred with extraordinary powers,[456] which involved elements of governmental authority that are typically reserved for the State, to satisfy the obligations related to the gate fees, the *Contributo*, the *Conguagli*, and the penalties, as will be further developed in the following subsections referring to each of these elements.

383. Fourth, the breaches invoked by Claimant not only involved acts of the *Commissario* and CAV, but also the alleged intervention of other organs of Respondent, such as the Calabria and Tuscany Regions, the Province of Lucca, and the Municipalities of Versilia.[457]

384. Respondent contends that only the conduct of CAV or the *Commissario* as the contractual parties of the TEC and TEV Concessions could cause the State to be liable under the ECT's umbrella clause. Therefore, according to Respondent, "behaviors of the Region of Calabria, or of municipalities, or even the population opposing the construction of a specific dump, cannot be challenged under the Umbrella Clause,"[458] and "the State cannot be held liable for not having taken measures that were not mandated under the Contract."[459]

385. This distinction seems artificial in the specific context of the TEC and the TEV Concessions. Both contracts were entered into by organs of the State, for the performance of public services, to solve a state of emergency and requiring the cooperation of the State as a whole, not only of the State entities that signed the contracts.

386. Article 23 of the ECT confirms that Respondent "is fully responsible" for the observance of all provisions of the ECT by regional and local governments and authorities within its area, and therefore

[453] C-94, Examination of the former Deputy Commissioner for resolving the emergency situation in the municipal waste sector in the Calabria Region and representatives of the Calabria Region, 6 October 2010, p. 12.
[454] Tr. Hearing Day 2, 289:20-25 (Examination of Mr. Bozzetto: "So CAV had to put together the willingness of all the municipalities and deal with the contract counterparty in order to simplify -- in order not to discuss with each individual municipality. This was the structure and the scope of CAV […].").
[455] Tr. Hearing Day 2, 289:18-20 (Examination of Mr. Bozzetto).
[456] C-50, O.P.C.M. No. 3731/09, 16 January 2009, Art. 4, regarding the *Commissario*'s authorization "representing the imposing of the constraint prior to expropriation and a declaration of public utility of the works, thereby waiving article 98, clause 2 of Legislative Decree No. 163 of 12 April 2006, with the application of art. 11 of Presidential Decree No. 327 of 2001 and subsequent amendments and additions, even before the execution of the expropriation procedures, which shall be carried out under the terms of the law reduced by half."
[457] Tr. Hearing Day 2, 288:6-18 (Examination of Mr. Bozzetto); Claimant's Memorial, ¶ 98; C-94, Examination of the former Deputy Commissioner for resolving the emergency situation in the municipal waste sector in the Calabria Region and representatives of the Calabria Region, 6 October 2010, p. 11.
[458] Respondent's Counter-Memorial, ¶ 422.
[459] Respondent's Counter-Memorial, ¶ 422.

"[t]he dispute settlement provisions in Parts II, IV and V of this Treaty may be invoked in respect of measures affecting the observance of the Treaty by a Contracting Party which have been taken by regional or local governments or authorities."

387. Even under Respondent's interpretation, it was the responsibility of the *Commissario* in relation to TEC, and of CAV in relation to TEV, to not only perform their obligations under the contract but to exercise their powers so that the other State entities that had a role in the performance of the contracts complied with their obligations and allowed the proper rendering of the public services involved.

388. Claimant has invoked contract obligations that are at the very essence of the investment because they involve the main sources of revenue under the TEC and TEV Concessions, and their alleged breach impacts the operation of the MBT and WtE plants in Calabria and Tuscany, and ultimately the electricity sale contracts with GSE. Such obligations under the TEC and TEV Concessions were "entered into" by Respondent with Veolia.[460]

389. Notably, when TME and VSA informed the State of Veolia's participation in the TEC and TEV Concessions,[461] as the SPA had been signed and closed,[462] no reservations or statements were made by Respondent as regards its obligations towards Veolia as "a French company"[463] under the ECT. This despite the TEC and TEV Concessions having emerged in a context where energy was a key element to address the waste management crisis in the Calabria and Versilia regions,[464] which is why, as noted above in section **c**, the waste management service was articulated with the production of energy.

390. In sum, whether the standard for the application of the umbrella clause is the one proposed by Claimant –through the umbrella clause, a contractual breach results in a treaty breach– or the one claimed by Respondent –more than a "simple commercial breach" is required and acts of the State as a sovereign must be present– the result in the particular case of TEV and TEC is the same. This is not a case where a claimant has brought allegations of mere commercial contract breaches.

391. As noted above, Veolia's claims involve breaches of the key contractual obligations of public utility concessions by State organs. Such obligations are at the core of the investment. Thus, the breach of such obligations is capable of causing significant interference with Claimant's rights. The alleged

[460] As confirmed by a former *Commissario* during the Parliamentary Inquiry, Respondent knew that Veolia was its counterparty, *see* C-92, Transcript of the Audition before the Italian Senate in relation to the Inquiry on Issues Relating to Waste Management, 5 February 2009, p. 21: "SOTILLE: […] I must repeat, without a doubt, the situation is complex. However, I feel that at the institutional level, no one can deny what VEOLIA S.p.A. is owed: we are a state party, and we shall thus meet our commitments. As for VEOLIA, I cannot vouch for the past period: this is an indication I received from this latest order. However, we are paying the current amounts, and the figures are significant: in 2008 we paid 21 million for the services provided."
[461] C-51, Parliamentary Committee Report, 19 May 2011, p. 104.
[462] C-25, Share Purchase Agreement between VSA and TME, 29 May 2007, -Arts. 1 and 6.
[463] C-51, Parliamentary Committee Report, 19 May 2011, p. 104.
[464] As recognized in contemporary regulations. See C-9, Minister of Interior's Ordinance No. 2696, 21 October 1997, which appointed the *Commissario* for the Calabria Region in October 1997, and stated that the waste emergency "may be overcome through the development of containment actions for the production of waste, differentiated collection, selection, processing and recovery, **including of energy**, within the industrial system through the application of the best available technologies, ensuring the best energy and environmental performances." (emphasis added). See also C-337, Ordinance of the Minister of Interior No. 2856, 1 October 1998, which adopted "[f]urther urgent interventions to deal with the emergency situation in the waste disposal sector in the Calabria region" and referenced the "financial incentives provided for by legislative provisions for the for the recovery of energy from waste with particular interest in energy recovery through the use of fuel derived waste."

breaches derive from actions or omissions of the *Commissario* and CAV as or on behalf of State organs with powers directed at solving a public emergency, and who were not performing mere commercial activities. Those powers were sovereign in their nature and purpose and different from those typically held by ordinary commercial counterparties. Consequently, the obligations invoked by Claimant fall within the scope of the ECT's umbrella clause, and the Tribunal must determine whether there is sufficient evidence to conclude that Respondent breached the obligations it entered into with regard to Claimant's investments under the TEC and TEV Concessions.

2. TEC's gate fees

a. Claimant's position

392. Claimant submits that, pursuant to Article 6 of the TEC Concession, Respondent made three separate undertakings: (i) to pay a monthly base gate fee on the basis of quantity of waste delivered (Article 6.1); (ii) to update the base gate fee on a yearly basis (Article 6.2); and (iii) to maintain the economic and financial equilibrium of the concession (Article 6.3).[465]

393. Article 6 of the TEC Concession provided two mechanisms for the gate fee's revision: (i) an automatic yearly-based revision to compensate modification of operation costs during the performance of the TEC Concession, on the basis of the base flat fee set forth for the first year of operation; and (ii) a revision based on the delivery of non-compliant waste, as TEC had a contractual right to an adjustment of the fee in the event of an imbalance of the underlying economic and financial equilibrium of the Concession.[466]

394. However, according to Claimant, the *Commissario* repeatedly refused to pay, or paid late, the annually updated gate fees, alleging that the invoices did not "meet the contractual conditions," without any further explanation.[467] Thus, Veolia assumed the entire financing of the public services, causing historical losses of € 7,9 M. Claimant maintains that, as of 2005, the *Commissario* refused to act within its powers under the Ordinance No. 3731/09 to ensure payment of the gate fees because it was politically inconvenient to force municipalities to comply.[468]

395. It was only in the context of the Management Arbitration, years after Veolia's investment, that the *Commissario* provided the explanation that the update would only apply after the entire Calabria Sud system became operational.[469] Therefore, it is "simply wrong" that "the Commissario had always rejected its request under this basis […]. [T]he issue of gate fees adjustments arose before the acquisition of TEC by Veolia," as argued by Respondent.[470]

396. Claimant asserts that the annual adjustment of the tariff had to be implemented after the completion of each plant, not the entire system as Respondent proposes. Instead, the plants were treated

[465] C-10, TEC Concession*,* 17 October 2000, Art. 6.
[466] Claimant's Reply, ¶ 68.
[467] Claimant's Memorial ¶ 226; Claimant's Reply, ¶ 110; C-112, Letter from the *Commissario* to TEC, 2 October 2006; C-112: Letter from the Commissario to TEC returning invoices, 2 October 2006); C-109, Letter by TEC to the COMM on tariff dated 2 March 2007; C-110, Letter by TEC to the COMM on tariff dated 14 May 2007.
[468] Claimant's Reply, ¶ 647.
[469] Tr. Hearing Day 2, 309:18-310:15 (Examination of Mr. Bozzetto).
[470] Tr. Hearing Day 1, 161:2-10 (Respondent's Opening Statement); Claimant's Reply, ¶ 112.

individually for management and operation purposes.[471] Under Article 15 of the *Atto di Sottomissione* each plant was to be tested immediately after the completion of its works, not when all plants were completed.[472] Moreover, the gate fee was adjusted before the completion of the Calabria Sud system in 2003 through the *Atto di Sottomissione*, and between 2004 and 2005, by TEC with the *Commissario*'s acceptance.[473] Also, the tribunal in the Management Award rejected Respondent's interpretation for being irrational and contrary to good faith.[474] Lastly, the lack of payment of the gate fees forced Veolia to inject capital to finance the Concession.[475]

397. Overall, Claimant argues that Respondent's allegations are contradicted by both the evidence in the record, and that obtained at the Hearing: (i) the *Atto di Sottomissione* shows the parties' intention to treat the plants individually, as each plant is dealt with separately;[476] (ii) in the Management Award, the tribunal found that waiting for the entire system to be operational to adjust the fees would lead to an irrational result, contrary to the principles of honesty and good faith;[477] (iii) Mr. Bozzetto testified that this had always been Veolia's understanding of the applicable provisions.[478]

398. Claimant maintains that Respondent's allegation that Veolia over-invoiced by "unilaterally" calculating the updated tariff is at odds with the terms and economic rationale of the TEC Concession itself.[479] Veolia did not act "unilaterally" because all the adjustment parameters were set out in the contract and were precisely intended to be applied automatically by TEC on a yearly basis.[480] Mr. Theau-Laurent confirmed that Veolia's understanding and behavior was consistent with his experience with similar contracts.[481] Therefore, the *Commissario* breached Articles 6.1 and 6.2 of the TEC Concession, by refusing to apply the mechanism for the yearly adjustment of the gate fees.

399. Moreover, and according to Article 7.1 of the TEC Concession, the gate fee, as adjusted by the *Atto di Sottomissione*, was to be paid within 60 days from issuance of the corresponding invoice. However, according to Claimant, the *Commissario* commonly paid with delay and without including interest or did not pay the gate fees at all.[482] By July 2007, the *Commissario* still owed the payment for TEC's waste disposal services performed between March 2004 and July 2007.[483] Mr. Ottaviano confirmed that the *Commissario* failed to comply with its payment obligations under the TEC Concession,[484] and even acknowledged that the *Commissario* systematically refused to pay the interest due for late payments.[485] In 2011, the *Commissario* simply stopped paying gate fees, which

[471] Claimant's Reply, ¶ 658.
[472] Claimant's Reply, ¶ 657.
[473] Claimant's Reply, ¶¶ 655-656.
[474] Claimant's Reply, ¶ 660; C-90, Management Award, 26 July 2010, p. 85.
[475] Claimant's Reply, ¶ 663.
[476] C-14, *Atto di Sottomissione* between TEC and the *Commissario*, 31 October 2003.
[477] C-90, Management Award, 26 July 2010, p. 85.
[478] Tr. Hearing Day 2, 308:9-15 (Examination of Mr. Bozzetto).
[479] Tr. Hearing Day 1, 161:16-21, 200:5-10 (Respondent's Opening Statement); Tr. Hearing Day 2, 310:19-22 (Examination of Mr. Bozzetto).
[480] Tr. Hearing Day 2, 310:19-22 (Examination of Mr. Bozzetto, "I wouldn't say unilaterally. They had been established on the basis of the contract by applying contractual clauses.").
[481] Tr. Hearing Day 4, 789:7-11 and 790:2-22 (Examination of Accuracy).
[482] Claimant's Memorial, ¶¶ 296-298; Claimant's Reply, ¶¶ 274-275, 365; Claimant's PHB1, Section 3.2.1. ¶ 53.
[483] C-270, Letter from TEC to the *Commissario* No. TEC/99-07/EP-nm, 16 July 2007.
[484] Tr. Hearing Day 4, 709:23-710:2 (Examination of Mr. Ottaviano, "MS LACRETA: And you confirm that the payments were in an average six months delayed, correct? MR OTTAVIANO: Compared to the date of issuance of the invoice, it's correct.").
[485] Tr. Hearing Day 4, 710:8-13 (Examination of Mr. Ottaviano).

led to the 2011 Notice sent by TEC in December of that year, and ultimately to the termination of the Concession.[486]

400. Respondent's allegation that the delay in the payments was related to public authorities' internal procedures is unwarranted[487] because Respondent made no reservation whatsoever to condition the payment of TEC's invoices on internal procedures and checks.[488] In any event, Italy's reliance on internal administrative proceedings and laws of public administration to excuse the late payment of due invoices is "very telling."[489]

b. Respondent's position

401. The adjustment of gate fees, contrary to Claimant's argument, could only be achieved after the completion of all the plants servicing the system since it was meant to work as an integrated system.[490] The gate fee adjustment required a "full-scale evaluation of the overall performance," which is consistent with the fact that the "duration of the management" began "from the date of the report of the conclusion of the experimental exercise of all CDR[491] plants and the start of the management" as per Article 4(4) of the TEC Concession.[492] The tariff was "unitary" to safeguard the balance of the system.[493] The 2003 *Atto di Sottomissione* confirms this understanding by establishing that "the Grantor agreed to the rate readjustment following the major works executed and/or to be executed by the Concessionaire."[494]

402. The adjustment of the tariff was discussed at length by the parties to the TEC Concession.[495] The failure to update the tariffs, as confirmed by Mr. Bozzetto, resulted from a misunderstanding on the terms of the adjustment, since the mechanism provided for in Article 6(2) of the Concession had been interpreted differently by TEC and the *Commissario*.[496] However, TEC insisted on issuing invoices that unilaterally took into consideration the adjustment of such fees, under criteria that it had unilaterally established, despite Respondent's efforts to negotiate.[497] In this sense, the *Commissario*'s rejection of the invoices does not equal failure to pay.[498] If anything, Claimant was paid for the works outlined in the financial plan, including the "post-management charges," which guarantee the remediation and safety of disused plants after termination of the TEC Concession. These charges were paid but never used due to the unilateral termination of TEC. [499]

403. Finally, after painstaking negotiations, the Third Amendment was finally reached on the tariff adjustment, but Veolia inexplicably decided to warn the *Commissario* to pay all due sums within 15

[486] Claimant's Reply, ¶ 646; C-57, TEC's 2011 Notice to the *Commissario*, 28 December 2011.
[487] Tr. Hearing Day 2, 311:1-316:16 (Examination of Mr. Bozzetto).
[488] Tr. Hearing Day 2, 316:5-16 (Examination of Mr. Bozzetto); Tr. Hearing Day 1, 161:22-25 (Respondent's Opening Statement) (referring to internal checks, and "checks required by public accounting").
[489] Claimant's PHB2, ¶ 37.
[490] Respondent's Counter-Memorial, ¶ 425.
[491] Combustibile derivato dai rifiuti (CDR) or refuse derived fuel (RDF)
[492] Respondent's Counter-Memorial, ¶¶ 425-426.
[493] Respondent's Counter-Memorial, ¶ 427.
[494] Respondent's Counter-Memorial, ¶ 428.
[495] Respondent's Rejoinder, ¶¶ 95-96.
[496] Respondent's PHB1, ¶ 113.
[497] Respondent's PHB1, ¶ 115; Respondent's Counter-Memorial, ¶¶ 431-432; Respondent's Rejoinder, ¶ 93.
[498] Respondent's Counter-Memorial, ¶ 432.
[499] Respondent's Counter-Memorial, ¶ 433.

days (across the Christmas holidays), threatening to otherwise withdraw from the TEC Concession. That was a clear sign that Veolia had already made the decision to withdraw from the contract and walk away.[500]

c. Analysis of the Tribunal

404. Claimant avers that Respondent breached its obligations to timely update and pay the gate fee under the TEC Concession and therefore breached the ECT's umbrella clause. On the one hand, Claimant submits that Respondent failed to update and pay the updated annual gate fee as per Article 6.2 of the TEC Concession, for a total sum of € 18,9 M.[501] On the other hand, Claimant submits that Respondent failed to timely pay the gate fee established in Article 6.1. of the TEC Concession within 60 days after the issuance of the corresponding invoice, as per Article 7.1, for a total amount of € 8.1 M.[502]

405. Respondent disputes Claimant's interpretation of its obligations under Article 6.2 of the TEC Concession. According to Respondent, it did not have an obligation to annually update the gate fee because "it is in fact undisputed" that the condition for the adjustment was that all the plants of the system were completed and in their operational phase, and they were not.[503] Respondent further contends that, since Claimant did not have a right to the annual update, it also could not implement such an update unilaterally. Thus, no delay exists in the "over-invoice[d]" amounts submitted by Claimant.[504] Respondent claims that it regularly paid the gate fees without the adjustment, and therefore there were no late payments.[505] Additionally, Respondent claims that the breach of "its maintenance and conservation duties of the plants" and the bad faith unilateral termination of the TEC Concession, preclude Claimant's umbrella clause claims.[506]

406. There is no dispute in this arbitration regarding the fact that TEC provided the service that is the subject matter of the TEC Concession, that such service was to be remunerated under Article 6.1 of the TEC Concession, and that Respondent refused to pay the updated remuneration provided for under Article 6.2. of the TEC Concession, arguing that this obligation did not exist or that Claimant's invoices were "not covered by the terms of the agreement."[507] It is also undisputed that prior to Claimant's investment there were fees due under the TEC and TEV Concessions and that Claimant was aware of the existence of such debt.

407. The Tribunal must therefore determine: (i) if Claimant had a right to claim the gate fee update provided for in Article 6.2 of the TEC Concession; and (ii) if so, whether a prior agreement with the *Commissario* was required for the update; (iii) whether there were delays from Respondent in paying the gate fee under Article 7 of the TEC Concession; and (iv) whether Respondent can be responsible for the lack of payment of pre-2007 gate fee receivables under the TEC Concession.

[500] Respondent's PHB1, ¶¶ 134-135.
[501] Accuracy First Expert Report, ¶¶ 6.14-6.17 (Accuracy rounds up values, in this case to € 19 M).
[502] Accuracy First Expert Report, ¶¶ 6.26, 6.41 (Table 6.3).
[503] Respondent's Counter-Memorial, ¶ 425.
[504] Respondent's Counter-Memorial, ¶¶ 430-432.
[505] Respondent's Counter-Memorial, ¶¶ 432-433.
[506] Respondent's Counter-Memorial, ¶¶ 386, 394.
[507] C-119, Letter from *Commissario* to TEC, 5 March 2010.

(i) Whether Claimant had a right to claim the gate fee update provided for in Article 6.2 of the TEC Concession

408. Article 6 of the TEC Concession provides as follows:

> "6.1 The fee for the disposal of the waste, valid for one year beginning from the launch is Lit. 134.95 (one hundred and thirty-four Lire and ninety-five *centesimi*) for each kg of waste, as per the offer by the Concessionaire, established with reference to the quantities of waste described in the preceding art. 5.
>
> 6.2. The fee shall be updated by the end of January of each year of the duration of the management on the basis of the following parameters:

COST ITEM	INDICATOR
1. Labour	Ausitra Agreement
2. Electricity	Enel Bill
3. Transport	Istat Indices
4. Miscellaneous maintenance materials and consumables	Istat Indices
5. Diesel and lubricants	Chamber of Commerce Bulletin

> 6.2. Where it is not possible to locate the cost indicator for certain items, reference shall be made to the Istat indices comparable to the associated items.
>
> 6.3. Where the effective assignment of waste is greater than 102% or less than 98% of the minimum guaranteed quantity described in art. 5 of this agreement, the fee shall be modified on the basis of the financial plan proposed in the tender by the Concessionaire, so as to maintain the economic and financial equilibrium of the concession.
>
> In the case of assignments of less than 80% of the foreseen quantities, the parties shall jointly evaluate the measures to be adopted in order to guarantee the economic and financial equilibrium of the concession.
>
> 6.4 As a consequence of the change in the quantity of assigned waste described in the preceding clause, the Grantor shall pay the amended fee with regard to the quantity of waste effectively assigned.
>
> The overall quantity of assigned waste shall be calculated on an annual basis. At the end of each year, a comprehensive calculation shall be made regarding the quantity of waste and any resulting upward or downward adjustments.
>
> 6.5 The fee may change on the basis of the Special Tender Specifications if, subsequent to the stipulation of the agreement, the Grantor makes further capital account contributions (as clarified with a letter of clarification of the

> Commissioner's office on 3/5/1999) within the limits and following the procedures described in [ar]t. 19, 2nd clause, of Law No. 109 of 11/2/1994."[508]

409. The Parties disagree on whether the update of the gate fees as per Article 6.2 was to take place for each plant once it entered into the management phase or only when all the plants of the Calabria Sud integrated system were completed and in operation, in which case the right to claim the gate fee update never arose given that not all plants were completed.

410. Article 6.1 of the TEC Concession created the gate fee as a remuneration for the disposal of "each kg of waste." Article 6.1 fixed a provisional or basic gate fee that was "valid" for the first year after "the launch." Article 6.2 provided for the annual "update" of that basic gate fee "for the duration of the management," subject to the parameters listed therein, which were the operating costs of a plant, *i.e.*, labor, electricity, transport, maintenance materials, diesel, and lubricants.

411. Article 4 governs the duration of the TEC Concession and provides that "[t]he management of the installations shall last for 15 (fifteen) years, as of the date of the report of conclusion of the trial operation of all the CDR plants and the start of management."[509]

412. The Tribunal is not persuaded by Respondent's argument that these provisions mean that the update of the gate fee under the TEC Concession was only applicable once all the plants entered into operation.

413. First, the gate fee created by Article 6.1 was a "remuneration" for the waste disposal service,[510] which was to be updated yearly in the face of annual variations in the costs of operation under Article 6.2. These provisions do not state that the gate fee was a unitary tariff for all plants or that the adjustment had to be calculated collectively for all plants once they were in operation. Rather, the cost of labor, electricity, transport, maintenance materials, diesel, and lubricants listed in Article 6.2. are values that pertain to the operation of each plant. In this regard, the *Atto Integrativo* refers to the gate fee as "a rate that takes into account the management costs, general operating expenses, company profits, and management revenues, with the exclusion of the investment expenses,"[511] which coincides with the operating costs of a plant applicable to the annual update. As such, the gate fee update had to be calculated for each plant, not the whole system.

414. Moreover, from a commercial perspective, Respondent's position is unconvincing. The purpose of the gate fee is to remunerate for the service provided by the Concessionaire. Under Respondent's theory, the Concessionaire would have to perform the service once each plant has been completed and assume the burden of the increase in the annual operating costs of each plant until all plants were completed. This is contrary to the basic principle that the parties incorporated in the TEC and the TEV Concessions of maintaining the economic equilibrium of the contract through the gate fee, with its updates and adjustment mechanisms.

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[508] C-10, TEC Concession, 17 October 2000, Art. 6; Claimant's Reply, ¶ 68.
[509] C-10-IT, TEC Concession, 17 October 2000, Art. 4 "*4.4 La gestione degli impianti avrà la durata di anni 15 (quindici), decorrenti dalla data del verbale di conclusione* dell*'esercizio sperimentale di tutti gli impianti CDR e inizio della gestione*."
[510] C-14, *Atto di Sottomissione* between TEC and the *Commissario*, 31 October 2003, p. 7.
[511] C-11, *Atto integrativo* between TEC and the *Commissario*, 31 August 2001, pp. 8-9, ¶ (k)

415. Second, Article 4.4 of the TEC Concession does not refer to "a" management phase for "all plants." It only states that the duration of "[t]he management of installations" runs from "the date of the report of conclusion of the trial operation of all of the fuel derived from waste installations." The report of conclusion of the trial operation was issued for each plant after it completed a technical procedure (see paragraph 421 below). Respondent's interpretation would require the existence of a single report of conclusion of trial operation for all plants and would lead to the arguable conclusion that if one plant successfully completed its works and trial period, it would not have been able to enter into the "management" phase and begin operations until all other plants were also completed. This would have been contrary to the purpose of the TEC Concession since it would have delayed an urgently needed solution to the waste management crisis in the Calabria Region, and, in fact, it did not occur. Rather, each plant began operating individually once it was completed.

416. In sum, Article 4.4 does not state, expressly or implicitly, that the management of a completed plant would only start after the last plant obtained its report of conclusion of the trial operations. Rather, Article 4.4, interpreted jointly with Article 4.1, provides that the cessation of the term of management, understood as the moment of termination of the overall concession, occurs after the 15-year management period of the last plant concludes, while each plant could still reach the phase of the report of conclusion of the trial operation of all the CDR plants and the **start of the management**,[512] at different moments in time.

417. Third, a reading of the "Special Specifications" of the TEC Concession confirms that, while the plants were part of one project and were interconnected to the extent that the Calabria Sud system was an "integrated" waste disposal system, the assessment of the times for their construction and management was individual for each plant.

418. Under Article 14 of the Special Specifications of the TEC Concession, the penalty for late completion of the works was established "for each day of delay, for each plant."[513] Along these lines, Article 15 of the Special Specifications distinguishes between "the management of the plants" and "the system as a whole."[514]

419. Moreover, the Special Specifications describe the process to reach the management phase, which was conceived individually for each plant.

420. When the works in a plant were completed, within the following six months "functional tests" had to be conducted in "individual parts of the plant,"[515] to issue a "blank tests report."[516] This blank tests report would trigger the experimental operation phase, which had the purpose of "develop[ing] and monitor[ing] the operation of the various sections of **the plant**, individually and the process as a whole, as well as whether performances and outputs comply with the contractual agreements."[517]

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[512] C-10-IT, TEC Concession, 17 October 2000, Art. 4 "*4.4 La gestione degli impianti avrà la durata di anni 15 (quindici), decorrenti dalla data del verbale di conclusione* dell*'esercizio sperimentale di tutti gli impianti CDR e inizio della gestione*."
[513] C-10, TEC Concession, 17 October 2000, Special Specifications, Art. 14.
[514] C-10, TEC Concession, 17 October 2000, Special Specifications, Art. 15.
[515] C-10, TEC Concession, 17 October 2000, Special Specifications, Art. 19.
[516] C-10, TEC Concession, 17 October 2000, Special Specifications, Art. 20.
[517] C-10, TEC Concession, Special Specifications, Article 21 (emphasis added).

421. The experimental operation period was intended to last between one and three months until the results were satisfactory for each plant. If the experimental operation phase was successful, "a special report [was] drawn up by the Works Directorate for the conclusion of the experimental operation and the start of management," and such a special report "enable[d] the plant to start uninterrupted operations and [would] be preparatory to the final testing phase of the plant."[518]

422. The Tribunal observes that this process does not mention the testing or operations of other plants and rather has a staggered structure of timings and technicalities which could follow different courses for each plant. Also, the wording of the Special Specifications leaves no doubt that "the plant" not "all plants" could start operations and enter into the management phase upon the issuance of the special report.

423. Article 27 of the Special Specifications further confirms that not only could each plant enter the management phase individually but also that the update mechanism in Article 6.2 was for "the plant", not "all plants", once they "have started up" after the independent and articulated process that each plant had to complete to reach the start of management:

> "[T]he price revision is not due during the execution of the work and until **the plant** is started.
>
> Once the plants have started up, the tariff will be revised as specified in the management specifications and the outline of the agreement."[519]

424. If the intention had been to subject the gate fee's update to the completion and management of all plants, such a condition could and would have been included in the TEC Concession and/or its annexes, for instance, in a provision similar to Article 27, but it was not.

425. Fourth, the *Atto Integrativo* of 2001 that amended the TEC Concession to assign TEC the management and operation of the existing plant in Sambatello, also recognized that the management period was for each plant, rather than a single term for the whole Calabria Sud system. In particular, the *Atto Integrativo* referred to "the management for a period of 15 years of the overall technological structure consisting of **two plants**," *i.e.*, Sambatello 1 and Sambatello 2.[520]

426. Fifth, the *Atto di Sottomissione* that supplemented the TEC Concession to include TEC2, the joint identification of landfills, and the *Contributo*,[521] did not recognize a unified management phase for all plants of the Calabria Sud system. Rather, it referred to the management of "the plants", not of the "system" and recognized that the experimental operation phase leading to the management phase was for each plant.

427. Specifically, the *Atto di Sottomissione* referred to "the conclusion of the experimental operation of **the same plant**" and to the "'work completion report' provided for **each plant**,"[522] and allowed the start of separate testing operations "described in arts. 20 and 21 of the Special Specifications, **as soon**

[518] C-10, TEC Concession, 17 October 2000, Special Specifications, Art. 21 (emphasis omitted).
[519] C-10, TEC Concession, 17 October 2000, Special Specifications, Art. 27 (emphasis added).
[520] C-11, Atto integrativo between TEC and the Commissario, 31 August 2001, p. 4, ¶ (a) and (b)
[521] C-14, *Atto di Sottomissione* between TEC and the *Commissario*, 31 October 2003, Arts. 2(b), 6, 8-bis.
[522] C-14, *Atto di Sottomissione* between TEC and the *Commissario*, 31 October 2003, Arts. 8 and 10 (emphasis added).

as the works strictly connected with the start of such activities have been completed."[523] If the completion of works and the trial period were for each plant, then the management period also had to commence individually for each plant.

428. Lastly, Article 9 of the *Atto di Sottomissione* does not support Respondent's position that the gate fee, the annual update, and the management phase were for the entire system. While this provision refers to "the rate relating to the 'Calabria Sud' integrated system," such a reference is made in connection with an "amendment" that is not the same as the "update" mechanism in Article 6.2 of the TEC Concession.

429. Such an "amendment" depends on parameters different from those listed in Article 6.2, that is, "the increases in supplies, described in art. 2, of the financing relating to the available amounts, described in art. 3, and of the management costs, described in art. 4 and of the public contribution described in art. 8 bis [of the *Atto di Sottomissione*]." Moreover, Article 9 of the *Atto di Sottomisione* leaves no doubt about the difference between the annual update in Article 6.2. and other revision mechanisms, stating that "the new rates shall be understood as **subject to all of the mechanisms for updating**, **revision**, **etc**., established by the Agreement without exclusion, with the same procedures, reference times, etc. as the fee of the award."[524]

430. In sum, the text of the TEC Concession, the Special Specifications annexed thereto, the *Atto Integrativo*, and the *Atto di Sottomissione* go clearly against Respondent's argument that the commencement of the management period was one joint milestone for all the plants, and that, in turn, the moment to adjust the gate fees was the same for all plants of the Calabria Sud system and arose only once all the plants entered into operation. Therefore, the Tribunal finds that Claimant had a right to claim payment of the annual gate fee adjustment under Article 6.2 of the TEC Concession, for each plant that entered into management.

(ii) Whether the Gate fee annual adjustment was automatic

431. Since the right to claim the gate fee update under Article 6.2 of the TEC Concession was for each plant that entered into management, the Tribunal must next assess whether such an update was automatic or if it had to be agreed with or accepted by the *Commissario*.

432. Claimant considers that the adjustment is automatic and that it is merely a matter of applying the agreed-upon parameters.[525] Respondent contends that Claimant could not "unilaterally" invoice the update, and since the *Commissario* opposed the gate fee update, there was no late payment nor breach of the TEC Concession.[526]

433. The plain wording of Article 6 of the TEC Concession does not stipulate that the parties to the contract had to reach an agreement to implement each annual update. Rather, elements such as the determination of a specific period (end of January), and parameters to adjust the fee, as well as an

[523] C-14, *Atto di Sottomissione* between TEC and the *Commissario*, 31 October 2003, Art. 15 (emphasis added).
[524] C-14, *Atto di Sottomissione* between TEC and the *Commissario*, 31 October 2003, Art. 9 (emphasis added).
[525] Tr. Hearing Day 2, 310:19-22 (Examination of Mr. Bozzetto) ("I wouldn't say unilaterally. They had been established on the basis of the contract by applying contractual clauses.").
[526] Respondent's Counter-Memorial, ¶¶ 430-432.

alternative costs reference, are indicative of the automatic implementation of the gate fee annual update.

434. This reading is further confirmed by the different wording used in Article 6.3 when referring to the "modification" or "amendment" of the gate fee. As opposed to the gate fee update, there is no list of specific parameters that can be directly applied for the amendment of the gate fee, but a general reference to the financial plan as the basis for the modification, and the economic and financial equilibrium as its goal. Also, Article 6.3 refers to the "joint" evaluation of measures to guarantee economic and financial equilibrium. There is no reference to such a joint assessment of the annual update in Article 6.2.

435. The Third Amendment of 2011 also confirms that the "update" as opposed to the "review" or amendment was automatic. Under the Third Amendment, the "tariff update" would be implemented by TEC merely providing a "notice" of the update.[527] By contrast, the "tariff revision" demanded a joint procedure beyond a simple notice, precisely because it involved more than a mechanistic implementation of agreed parameters.[528]

436. In this regard, the Tribunal notes that after 2010 the debate regarding the gate fee update under the TEC Concession boiled down to the applicable ISTAT indices,[529] but the adjustment parameters in Article 6.2 remained the same.[530] If anything, the Third Amendment demonstrates that even to apply different indices, a modification of the TEC Concession with the consent of the Concessionaire was required, insofar as it altered the predetermined mechanism envisaged in Article 6.2.

437. The aforementioned reading of Article 6.2 is also consistent with the explanation provided by Accuracy at the Hearing. As Mr. Theau-Laurent explained, under the mechanism in Article 6.2. of the TEC Concession, "you have a base gate fee and that you adopt it indeed by -- you update it by applying the coefficients by reference to the indices that are set out in the contract," and it was therefore "[t]he application of indices to gate fees or to tariffs," a practice he had seen in "other contracts."[531]

438. Lastly, the Tribunal observes that there is no evidence that Respondent successfully pursued proceedings before Italian courts to vacate or nullify the invoices issued by TEC on the grounds that a prior agreement was required to implement the update in Article 6.2 of the TEC Concession.

439. Overall, the Tribunal is not persuaded by Respondent's interpretation of the TEC Concession that the annual update of the gate fees was a measure that had to be agreed upon and accepted by the *Commissario*.

440. In addition, as will be further developed in subsection (iv) below, the Tribunal notes that the *Commissario* did not provide TEC with clear reasons for the refusal to adjust the gate fee, at least

[527] C-46, Third Amendment or *Secondo Atto Integrativo* between TEC and the *Commissario*, 21 June 2011, Art. 3.
[528] C-46, Third Amendment or *Secondo Atto Integrativo* between TEC and the *Commissario*, 21 June 2011, Art. 4.
[529] C-217, Letter from TEC to the *Commissario*, 29 October 2010; C-219, Memorandum of Understanding between TEC and the *Commissario*, 27 January 2011.
[530] C-120, Minutes Conciliation Round Table between TEC, the Commissario and the Calabria Region, 27 January 2011.
[531] Tr. Hearing Day 4, 789:7-11, 790:2-22 (Examination of Accuracy).

until the Management Arbitration. The *Commissario* merely refused the adjustment claiming that it was not in accordance with the contract, but did not explain why. Only on the occasion of the Management Arbitration did the *Commissario* first develop his theory for the refusal to adjust the gate fee, which has been further developed in this arbitration.

441. The Tribunal finds that Respondent's refusal to recognize and pay for the annual update of the gate fees amounts to a breach of the obligations toward Claimant's investment under the TEC Concession. In sum, there are no grounds for Respondent's refusal to comply with its obligations regarding the gate fee payment and update and the Tribunal considers that the *Commissario* acted arbitrarily by rejecting the adjustment with no reasons and then relying, in the arbitrations, on a theory that was never put to Claimant.

(iii) The delay in paying the gate fees

442. In addition to opposing the gate fee adjustment, Respondent argues that no delays existed concerning the payment of the gate fee as "[e]xperts of the POLIMI confirm the substantial regularity of the *Commissario*'s payments of fees."[532]

443. PoliMi's expert reports include a "[c]alculation of the interests on the alleged late payments to TEC in the historical period" which it is said "shows that, on average, **payments were approximately on time. Therefore, no interest appears to be due**. The negative results are used later to partially compensate the interests accrued on the effective due amounts."[533]

Table 5.12. Calculation of the interests on the alleged late payments to TEC in the historical period.

Interests for late payments Year	2005	2006	2007	2008	2009	2010	2011
Due amounts to be invoiced for service provided (k€)	13,174	18,140	23,025	22,095	26,433	24,728	23,634
Revenues from other operations (electricity sale, etc.) (k€)	9,879	18,281	16,741	15,811	20,772	22,000	13,548
Total due amounts to be invoiced (k€)	23,053	36,421	39,766	37,907	47,204	46,727	37,182
Total revenues effectively cashed in (k€)	13,920	31,883	40,609	31,714	37,163	40,853	25,271
Receivable Days - Actual	143	45	-8	59	77	45	115
Receivable Days - Contractual	60	60	60	60	60	60	60
Interest rate (Euribor 12m, source CEB)	*2.334%*	*3.436%*	*4.450%*	*4.814%*	*1.617%*	*1.350%*	*2.006%*
Interests (k€)	**123**	**-53**	**-332**	**-6**	**35**	**-26**	**115**
Overall interests (k€)							*-144*

444. Article 7 of the TEC Concession states:

> "7.1 The fees, as determined in articles 5 and 6, shall be paid by the Grantor to the Concessionaire in monthly installments upon the submission of invoices, which shall be settled 60 (sixty) days after the date of issuance of the same.
>
> 7.2 In the event of a delayed payment, the Grantor shall also pay the Concessionaire late payment interest, starting from the day projected for the

[532] Respondent's Counter-Memorial, ¶ 433.

[533] PoliMi First Expert Report, p. 62, Section 5.6 (emphasis in the original); PoliMi Second Expert Report, pp. 37-38, Section 2.7.8; p. 48, Table 4.4 updates the values, which remain the same for the late payments:

Table 4.4. Updated calculation of the net, after-tax cash flows due to TEC for the waste management service provided in the historical period and evaluation of their impacts on the overall economic performance of TEC.

Values in k€	2005	2006	2007	2008	2009	2010	2011	Total
Extra-amounts due to TEC for the waste management service	17,961	5,543	4,326	13,373	13,106	15,660	33,008	102,977
Interests for late payments	123	-53	-332	-6	35	-26	115	-144

payment and until the day the payment is in fact made, calculated at the nominal annual rate equal to the ABI Prime Rate valid during the overdue period."

445. As a preliminary matter, the Tribunal observes that Respondent does not dispute the obligation to pay the gate fees within the 60-day term established in Article 7.1 of the TEC Concession. Respondent's experts recognize that there were individual delays in payments but attempt to controvert the existence of a delay "on average."[534] This argument is unconvincing.

446. On the one hand, PoliMi's finding of a negative interest for the payment of receivables before the 60-day deadline has no grounds. There is nothing in the TEC Concession providing that if the *Commissario* made certain payments before the expiration of the 60-day term he could use such early payments to compensate for any delays in other payments. On the other hand, even if such an approach were to be accepted, it may impact the calculation of damages and particularly default interest but does not excuse the existence of a breach. In this sense, for the purposes of finding a breach of the obligation to timely pay the gate fees, there is no "average" or "substantial regularity"; either the payment was made on time or it was not.

447. The evidence in the record indicates that the *Commissario* had acknowledged the existence of a delay in the payment of the gate fee. In early 2008, in a communication sent from the *Commissario* to the Presidency of the Council of Ministers, he explicitly recognized the "interest for the late payment of the current management fees (transferred over time given late payment by the municipalities to the Commissioner's Office, the charges for waste disposal and the known delinquency of the payment by the defaulting municipalities)."[535] The *Commissario* even noted that "the facts complained of by [sic] the Concessionaire have an objective and historical value in view of the consolidated case law, which is now largely 'favourable' to the positions of the enterprises."[536] Also, Ordinance No. 3731/09, recognized that certain debts existed regarding the gate fees.[537]

448. Despite being aware of this delay, the *Commissario* did not cure it, as evidenced in a letter of March 2009, where TEC demanded payment of outstanding gate fees amounting to € 13,2 M from 2008 to 2010 and highlighted the *Commissario*'s lack of action in recovering sums owed by the Municipalities for payment of the waste disposal service.[538]

449. Moreover, the *Commissario* cannot validly excuse its delays, for purposes of this arbitration, by pointing to the "late payment by the municipalities." The *Commissario* had a broad set of powers to secure compliance with this obligation despite the alleged delays of the municipalities. Ordinance No. 3731/09 stated that the *Commissario* had the power to compel Municipalities to pay such debts

[534] PoliMi First Expert Report, p. 62, Section 5.6; PoliMi Second Expert Report, pp. 37-38, Section 2.7.8, p. 48, Table 4.4.
[535] C-85, Letter from the *Commissario* to the Presidency of the Council of Ministers, 11 January 2008, Supplementary Report, p. 3. See also C-86, Letter from the Department of Civil Protection, 21 February 2008; (p. 1, referring to the letter of 11 January 2008 and acknowledging the existence of receivables); C-87, Letter from the *Commissario* to the State lawyers of Catanzaro, 28 February 2008 (referring to potential settlement that included "prior receivables").
[536] Claimant's Memorial ¶ 506; C-85, Letter from the *Commissario* to the Presidency of the Council of Ministers, 11 January 2008, p. 3. C-86, Letter from the Department of Civil Protection, 21 February 2008 (Presidency of the Council of Ministers issuing recommendations to the Commissario and noting that that he was obliged entity).
[537] C-50, O.P.C.M. No. 3731/09, 16 January 2009, Art. 1.4.
[538] C-104, Letter from TEC to *Commissario*, 2 March 2009.

regarding the gate fees through compulsory collection instruments pursuant to Legislative Decree No. 46 of 1999, and even to substitute them as debtors:

> "The Deputy Commissioner, subject to verification of the debtor situations of the municipalities or consortia for the payment of tariffs for the disposal of urban waste, shall undertake in timely fashion to recover the due amounts, using forcible collection procedures pursuant to Legislative Decree No. 46 of 26 February 1999 and adopting, where necessary, measures of a substitute character at the liability of the debtors, also making use of acting commissioners appointed for the purpose."[539]

450. Moreover, Ordinance No. 3764 instructed the *Commissario* to "manage any pending disputes at all stages and levels and, where the conditions are met, reach settlements."[540]

451. These "broad powers" of the *Commissario*,[541] were recognized at the sessions of the Parliamentary Inquiry by the *Commissarios*, Mr. Sottile and Mr. Scopeliti, and members of the Italian Senate.[542] In particular, it was recognized that the *Commissario* could, in relation to the Municipalities "appoint *ad acta* Commissioners to forcibly intervene for the payment of the amounts due,"[543] and reach settlements with the Calabria Region.[544]

452. There is no evidence that the *Commissario* exercised its powers to initiate forcible collection proceedings or to take actions to avoid delays in the payment of the gate fees to the Concessionaire.

453. To conclude, despite being aware of the delayed payment of the gate fees and having the powers to cure such a delay by obtaining the resources from the Municipalities, the *Commissario* did not cure his delay. He simply omitted the most basic duty of payment of the gate fees and attempted to blame other organs of Respondent. Accordingly, in addition to not updating the gate fee and paying the updated amount, Respondent failed, without any justifiable reason, to comply with its obligation to pay the gate fee within the 60-day term provided for in Article 7.1 of the TEC Concession.

Conclusion on the gate fees under the TEC Concession

454. In sum, the Tribunal finds that: (i) the TEC Concession is a public utilities contract with provisions that exceed the typical rights and obligations conferred under commercial contracts; (ii) the State entered into the TEC Concession through the *Commissario*, an entity endowed with extraordinary powers to comply with its obligations, including to pay and update the gate fee under the TEC Concession; (iii) the gate fee was the basic remuneration of the TEC Concession and therefore was

[539] C-50, O.P.C.M. No. 3731/09, 16 January 2009, Art. 1.4.
[540] C-140, O.P.C.M. No. 3764/09, 6 May 2009, Art. 5.
[541] Claimant's Memorial ¶ 475.
[542] C-92, Transcript of the Audition before the Italian Senate in relation to the Inquiry on Issues Relating to Waste Management, 5 February 2009, p. 29.
[543] C-92, Transcript of the Audition before the Italian Senate in relation to the Inquiry on Issues Relating to Waste Management, 5 February 2009, p. 29.
[544] C-92, Transcript of the Audition before the Italian Senate in relation to the Inquiry on Issues Relating to Waste Management, 5 February 2009, p. 29: "We are already making the payment deferrals, and we have actually obtained all the data, which we can provide as well. We have already achieved good results. In fact, **I have done a transaction with the Municipality of Reggio Calabria.** After all, this is the area I covered prior as a liquidator in Naples" (emphasis added).

of the essence of Claimant's investment; and (iv) under either of the umbrella clause standards submitted by the Parties, Respondent breached its obligations entered into with Claimant by arbitrarily rejecting the gate fee update and failing to timely pay it.

455. Respondent provided no valid reason for the *Commissario*'s actions and omissions. The *Commissario*, despite his broad powers, failed to exercise them or to provide a full and clear motivation for refusing the gate fee update and timely payment until the Management Arbitration. Ultimately, the breach of the TEC Concession resulted from the refusal to apply clear contract provisions by the State, thus breaching the ECT's umbrella clause.

(iv) Whether Claimant may claim pre-2007 gate fees

456. Claimant has identified as part of its investment in this arbitration, receivables under the TEC Concession for the lack of payment and update of the gate fees.[545] As noted above, the definition of investment under the ECT is broad, and the gate fees receivables, as the right to receive remuneration for the disposal of waste that would then be transformed into energy, would fall within the scope of Article 1(6)(c) of the ECT as "claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment."

457. Respondent recognizes that "the investment of the Claimant consisted in the acquisition of VSAT" and that "the acquisition of the Italian company included its receivables." However, in its Rejoinder, Respondent contends that this does not mean that the "Tribunal could rule on the facts prior to the investment as they relate to such receivables" because it would lack *ratione temporis* jurisdiction over the violations allegedly committed before the making of the investment.[546]

458. In this vein, Respondent adds that "everything that occurred before the investment is relevant to assess the quality of the target and the awareness of the investor, not any subsequent eventual responsibility of the State […]. [T]he State party's obligations to any given investor only arise after the date of the 'investment' by a qualified 'investor' within the meaning of the BIT,"[547] and "[t]he only reason why the Respondent referred to facts prior to 2007 has been to demonstrate that VP's due diligence was superficial and inadequate." [548]

459. The Tribunal observes that the Parties do not dispute its *ratione temporis* jurisdiction for events that occurred after the investment was made. This is confirmed by the fact that Respondent did not raise a general *ratione temporis* objection against the Tribunal's jurisdiction over Claimant's claims.

460. Respondent is right in that, as a general rule, the State is only liable for acts or omissions committed after the making of the investment. Article 13 of the ILC Articles states that "[a]n act of a State does

[545] Claimant's Reply, ¶ 188, "At the time of Veolia's investment, TEC's receivables on account of unpaid services invoiced to the *Commissario* amounted to € 16,3 million. TEC was seeking, *inter alia*, this amount at the Management Arbitration"
[546] Respondent's Rejoinder, ¶¶ 19-21.
[547] Respondent's Rejoinder, ¶ 22.
[548] Respondent's Rejoinder, ¶ 19.

not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs."[549]

461. However, in this case, the pre-2007 gate fees receivables are part of the investment under Article 1(6) of the ECT, and the obligation to pay for them arises from a contractual provision, *i.e.,* Articles 6 and 7 of the TEC Concession, under which the State "entered into" obligations with a French national, Veolia, as per the terms of Article 10(1) of the ECT.

462. The obligation to pay remains a valid and binding obligation before and at the time that Claimant made the investment and is part of the obligations that the State "entered into" with the investment of the investor by way of the TEC Concession, as required by the ECT's umbrella clause.

463. There is evidence in the record indicating that the investor knew that it was making a high-risk investment,[550] acquiring a business with major financing issues, and that the State was late in payments and opposed the update of the gate fees.[551] However, this does not preclude the existence of Respondent's obligations under the TEC Concession, and under Article 10(1) of the ECT and the liability derived from its conduct after the making of the investment.

464. The diligence or negligence of a party in investing may be a relevant element to assessing the expectations of the investor,[552] or the damages claimed,[553] but does not preclude liability or render a claim inadmissible. Respondent has submitted in this arbitration that diligence before the investment is relevant to assess "the quality of the target and the awareness of the investor" and that "any damages can only be blamed on Veolia itself, since the due diligence had warned the investor about the legal issues involved, that Veolia has deliberately chosen to disregard."[554]

465. The alleged lack of due diligence of an investor does not in itself prove that an investment was made in bad faith or solely "to transform a pre-existing domestic dispute into an international dispute subject to ICSID arbitration."[555] On the contrary, in this case, there is evidence that Veolia made its investment with the intention of implementing and operating the TEC and TEV Concessions,[556] not merely to purchase or create a claim under the ECT.

466. It is true that Claimant knew at the time of the investment that there were outstanding payments for the gate fees under the TEC Concession, but such knowledge does not affect the investment or the claims of Claimant in this arbitration. Claimant could legitimately expect that the payments under

[549] CL-9, ILC Articles, Art. 13.
[550] Claimant's Memorial, ¶ 309; C-146, Letter from TEC to *Commissario*, 12 June 2007, pp. 1-2.
[551] Claimant's Reply, ¶ 337. According to Claimant "[t]hese sums had been due before Veolia acquired the investments in May 2007. At acquisition, TEC's Legacy Claims concerned the same breaches stated in the notice of termination, *i.e.*, inefficient quality and quantities of waste and a failure to adjust gate fees, among others."
[552] Tr. Hearing Day 1, 247: 9-16 (Respondent's Opening Statement).
[553] Respondent's Rejoinder ¶ 441; RL-78, *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, ¶ 64.
[554] Respondent's Rejoinder, ¶ 22; Respondent's PHB1, ¶ 61.
[555] *Phoenix Action, Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 142, cited in RL-52, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, ¶ 152.
[556] Tr. Hearing Day 2, 439-440 (Examination of Mr. Masson); Tr. Hearing Day 3, 480:20-25 (Examination of Mr. Janailhac).

the TEC Concession that had not been made but were not disputed would be made by the *Commissario* in accordance with the provisions of the TEC Concession.

467. As for the gate fee adjustments, although Claimant knew that the *Commissario* had objected to the implementation of the gate fee update as invoiced by TEC, at the time of the investment no clear reasons had been provided for refusing the adjustment. Claimant was only fully aware of the *Commissario*'s position and arguments after having entered into the SPA on 27 May 2007.[557] At the time of the investment, a reasonable interpretation of the TEC Concession and the lack of clear reasons for refusing the update could lead a reasonable investor to believe that it was legitimately entitled to obtain the payment of the updated gate fee.

468. Before May 2007, Veolia knew that "[t]he mechanism of adjustment of the tariffs has not been make [sic] effective yet, indeed the Commissario has not yet agreed the proposals of TEC for the adjustments of the tariffs that is because of due to [sic] indexation and of lower contribution of wastes."[558] However, by that moment, the *Commissario* had not provided a clear explanation for his decision to return TEC's invoices, despite TEC's request for "comments or proposals."[559] The *Commissario* would only state that the "invoices, […] referring to the application of the ISTAT adjustment […] are not included in the contractual conditions."[560]

469. Also, the *Commissario* had been paying the basic gate fee (without the update), and the same day Veolia entered into the SPA, he stated during a meeting that "the tariff adjustment, where due, will be reviewed as per the agreement, and commit[ted] to promptly convening a dedicated technical meeting to discuss the adjustment invoices issued in previous years as well."[561]

470. From the evidence in the record, it appears that on 26 June 2007, the *Commissario* referenced for the first time the argument that the update of the gate fee was due only upon completion of the system.[562] TEC replied to the *Commissario* that the management started for each plant not for all the plants, noting that "under the Commissioner's Resolution no. 214 of 8 March 2004 the start date of the definitive management of Rossano is affirmed; under the Commissioner's Resolution no. 213 of 8 March 2004, the start date of the definitive management of Gioia Tauro is affirmed; under O.C. 3 November 2006 no. 5023 the definitive management of Siderno is authorised; with O.C. 21 January 2005, no. 3318 the definitive management of Crotone is authorized."[563] The *Commissario* replied to TEC, indicating that its claims were "generic and incomprehensible" to which TEC replied with further explanations on the amounts due.[564]

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[557] C-25, Share Purchase Agreement between VSA and TME, 29 May 2007.
[558] C-20, Preliminary Legal Due Diligence Report of Macchi di Cellere Gangemi, 24 January 2007, section 6 of page 12 that "Currently the Commissario pays only the initial amount forecast in the Concessione without any adjustments and reserves to pay the adjustments. The Commissario shall pay only when he will have agreed the related mechanism."
[559] C-108, Letter from TEC to the *Commissario*, 16 October 2006; C-107, Letter from TEC to *Commissario*, 18 January 2007; C-109, Letter from TEC to the *Commissario*, 2 March 2007; C-110, Letter from TEC to the *Commissario*, 14 May 2007.
[560] C-112, Letter from *Commissario* to TEC, 2 October 2006; C-113, Letter from *Commissario* to TEC, 10 January 2007.
[561] C-81, Minutes of Meeting between *Commissario* and TEC, 29 May 2007, p. 2.
[562] C-105, Letter from TEC to *Commissario*, 4 July 2007, p. 1. TEC replied to a letter from *Commissario* of 26 June 2007, in which the *Commissario* raised the argument that the adjustment of the tariff under Article 6.2. of the Concession, was only due when all the plants entered into the management period.
[563] C-105, Letter from TEC to *Commissario*, 4 July 2007.
[564] C-270, Letter from TEC to *Commissario*, 16 July 2007.

471. Moreover, the *Commissario* only fully explained his argument to refuse the annual gate fee update under the TEC Concession, and most importantly, defined his position, after the closing of the transaction took place in October 2007,[565] when TEC and the *Commissario* first entered into settlement negotiations,[566] and participated in the Management Arbitration. Notably, it was in 2008, during the Management Arbitration, that the *Commissario*'s position changed concerning the value and effect of the payments he had made for the gate fees so far, qualifying them as "provisional."[567]

472. Overall, Respondent's failure to pay and update the gate fees, before 2007, and Claimant's knowledge thereof, do not change the fact that there was a contractual obligation entered into with the investor under the ECT's umbrella clause. This contractual obligation includes monetary claims and thus, the pre-2007 receivables derived from the gate fees.

3. TEC's termination

a. Claimant's position

473. Claimant argues that it is a good faith investor, and, in any event, that Respondent's allegations of bad faith conduct do not make its claims inadmissible as they do not relate to the making of the investment, but to "circumstances" concerning events "subsequent" to the making of the investment in 2007.[568]

474. Claimant argues that Italy has failed to identify any ECT provisions restricting the protection available to investors based on the lack of good faith during the investment. As a matter of general international law, Claimant's alleged bad faith does not prevent it from claiming the protections offered by the ECT. Indeed, the International Court of Justice ("**ICJ**") has repeatedly rejected inadmissibility requests based on the alleged improper conduct of the claimant State or its nationals,[569] as particularly highlighted in the *Barcelona Traction* case. Relying on that case, Claimant asserted that "the alleged bad faith of the investor does not excuse the host State from respecting international law."[570]

475. In any case, Claimant asserts that it is a good faith investor, and that there is no evidence of its alleged bad-faith conduct. Respondent has merely asserted that Veolia infringed its maintenance and conservation duties and terminated the concession in bad faith, without providing "clear and

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[565] C-25, Share Purchase Agreement between VSA and TME, 29 May 2007, - Arts. 1 and 6; Respondent's Counter-Memorial, ¶¶ 60-61; C-51, Parliamentary Committee of Inquiry Report, 19 May 2011, p. 18. On 3 October 2007, the transaction was closed and on 22 October 2007, VSA informed the Grantor that it owned 88,98% of TEC.
[566] C-84, Proposal of Settlement Agreement from TEC to the *Commissario*, 17 December 2007.
[567] C-90, Management Award, 26 July 2010, pp. 17-18. Although the Management Award was subsequently annulled on the grounds of lack of jurisdiction, the Tribunal finds that it reflects contemporaneous representations that are relevant to understanding the issues in dispute in this arbitration, in particular, the moment when the *Commissario* made a clear and complete stance on his position regarding the gate fee's update and payment. Also, such representations have not been disproven by Respondent.
[568] Claimant's Reply, ¶¶ 560, 562, 563.
[569] See CL-135, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 240 (1992), p. 255, ¶¶ 37-38; CL-136, *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Dissenting Opinion of Judge Van den Wyngaert, ¶ 35 (Judge Van den Wyngaert dissented from the Court's decision because it failed to accept that "the Congo acts in bad faith.").
[570] Claimant's Reply, ¶¶ 566-568; CL-134, *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 3 (1970), pp. 50-51.

convincing evidence" of Veolia's alleged "intention to harm."[571] By contrast, Claimant's termination of the Concessions was a measure taken in good faith, and the lack of maintenance was justified.

476. First, Claimant submits that the termination of the TEC Concession was "forced by Italy given that due to its acts and omissions Veolia's investment had lost all its value" leaving Veolia with "no other choice."[572] According to Claimant, to avoid the risk of a criminal lawsuit for the cessation of all services that would follow the termination of the TEC Concession, it proposed the *Prorogatio* regime, which was acknowledged by the Commissario in Ordinance No. 10826 of 9 February 2012 "for the exclusive purpose of guaranteeing the continuation of the essential public service."[573]

477. Second, Claimant contends that the termination was valid under Italian law because, as required by Article 1454 of the Italian Civil Code, the breaches of the TEC Concession were "so serious that they caused Veolia to completely lose its investment", and this is a right that has been confirmed by Italian courts.[574]

478. Third, Claimant argues that it gave "sufficient notice", that the 30-day term given in the notice of performance was an additional deadline to make payments that had been delayed for a long time, and that Respondent did not demonstrate that it needed more than 15 days as required by Italian law.[575] Also, Veolia's collection of the Construction and Management Awards, pending annulment proceedings, are not bad faith acts, since Italian laws provide that they remain enforceable unless suspended by the competent court.[576] Moreover, Veolia's restructuring plan after the termination of the Concessions, was not the "real reason" behind this decision, but the effect.[577]

479. Fourth, there is no evidence that the alleged lack of maintenance of the plants caused damage, or that Respondent assumed the costs of their reparation.[578] The *Commissario*'s "survey" of the maintenance of the TEC plants does not prove the alleged reparation costs, and it was made during the *Prorogatio* phase when TEC was no longer responsible for the maintenance of the plants.[579] Moreover, assuming that the plants deteriorated, this could only be attributed to Respondent's failure to pay its dues to Claimant, depriving it of the required cash flow to perform the maintenance.[580]

480. Fifth, Claimant contends that Respondent failed to prove the supposed additional charges allegedly caused until 2019 for the improper disposal of fuel in landfills, due to the reduced WtE capacity of Gioia Tauro, and the alleged irregularities of the Melicuccà landfill.[581] In any case, these alleged facts occurred after termination of the TEC Concession and it cannot be assumed that they were the result of bad faith management.[582]

[571] Claimant's Reply, ¶¶ 571-573.
[572] Claimant's PHB1, ¶¶ 122, 153; Claimant's Memorial, ¶¶ 118-119; Claimant's Reply, ¶¶ 332, 577.
[573] Claimant's Reply, ¶¶ 355, 357; C-59, *Commissario*'s Ordinance No. 10826, 9 February 2012, p. 4.
[574] Claimant's Reply, ¶¶ 576-577.
[575] Claimant's Reply, ¶¶ 335, 337, 578.
[576] Claimant's Reply, ¶ 579.
[577] Claimant's Reply, ¶ 580.
[578] Claimant's Reply, ¶ 582.
[579] Claimant's Reply, ¶ 583.
[580] Claimant's Reply, ¶ 583.
[581] Claimant's Reply, ¶¶ 594-595.
[582] Claimant's Reply, ¶ 596.

481. Lastly, Claimant explains that before terminating the TEC Concession it had made attempts to negotiate an amicable solution with the *Commissario*. After signing the MOU,[583] on 21 June 2011, Veolia and the *Commissario* signed the Third Amendment, and on 30 June 2011, complying with its end of the bargain, Veolia purchased the 25% remaining shares of VSAT, and with it the power to abandon all claims against Respondent.[584]

482. As per Article 12 of the Third Amendment, the *Commissario* had to submit the Third Amendment to the Court of Auditors. This was the only formality needed for the Third Amendment to come into effect. However, the *Commissario* never transmitted the Third Amendment to the Court of Auditors, as required, and rather submitted it to the Calabria Region for approval,[585] frustrating this agreement.

483. On 23 December 2011, the Calabria Region acknowledged the Third Amendment but stated the agreed tariff was "provisional" pending "a new expert study",[586] despite having been present during the negotiations and never raising any objections.[587] This brought back a high level of uncertainty and put at risk the operation of the TEC Concession.

484. Contrary to Respondent's allegation, there was no justification for the re-examination of the tariff by the Region simply because it would take over the TEC Concession at the end of the state of emergency. Article 13.2 of the Third Amendment provides that "[t]he Commissioner shall forward the present deed to the Calabria Region, which, pursuant to article 11 of the Convention shall take over the management."[588] There is no single mention in the Third Amendment of its validity expiring at the end of the state of emergency.[589]

485. Moreover, the *Commissario* had the power to conclude contracts or amend the Concession without the Calabria Region's agreement. That is precisely why the TEC Concession was entered into by the *Commissario* for 15 years, *i.e.*, much longer than the planned duration of the state of emergency at the time. There was no question that the Calabria Region would take over the Concession, and be bound to its terms, after the emergency ended.[590]

b. Respondent's position

486. Respondent argues that only a good faith and compliant investor can legitimately claim compliance with the State's obligations under the Concessions, which was not Claimant's case.[591] According to

[583] Claimant's Memorial, ¶ 312; C-120, Minutes of the Conciliation Round Table (Tavolo di Verifica) between TEC and the Commissario and MOU, 27 January 2011; C-219, Letter of the Commissario to TEC, attaching the MOU, 27 January 2011.
[584] C-46, Third Amendment or *Secondo Atto Integrativo* between TEC and the Commissario, 21 June 2011; AC-13, Master Settlement Agreement, 30 June 2011.
[585] Claimant's PHB1, ¶ 115; Claimant's Reply, ¶ 331, bullet point 1; Tr. Hearing Day 1, 77:11-22 (Claimant's Opening Statement).
[586] C-49, Deliberation of the Calabria Region No.625, 23 December 2011.
[587] C-218, Minutes of Meeting (Round Table) - Third Amendment between the *Commissario*, the Calabria Region and TEC, 23 December 2010; C-120, Minutes of the Conciliation Round Table (*Tavolo di Verifica*) between TEC and the *Commissario* and Memorandum of Understanding, 27 January 2011; C-291, Minutes of the Verification Roundtable between TEC, the *Commissario* and the Calabria Region, 24 November 2008; C-117, Minutes of the meeting between TEC and the *Commissario*, 10 December 2008.
[588] C-46, Third Amendment or *Secondo Atto Integrativo* between TEC and the Commissario, 21 June 2011, Art. 13.2.
[589] Tr. Hearing Day 2, 348:19-25 (Examination of Mr. Bozzetto) 349:6-350:1; Tr. Hearing Day 2, 351:2-10 (Examination of Mr. Bozzetto).
[590] C-33, Judgment of Council of State, 23 October 2012, p. 17.
[591] Respondent's Counter-Memorial, ¶ 384.

Respondent, Claimant acted in bad faith when it unilaterally terminated the TEC Concession and violated its maintenance and conservation duties towards the plants.[592]

487. First, as a result of the termination, Veolia "abandoned" the management of an essential public service without the existence of *force majeure*, thus violating Article 13 of the TEC Concession (and Article 15 of the TEV Concession).[593] Veolia was therefore the one in default and not Respondent. Also, the "sudden" termination, despite the *Commissario*'s attempt to reach an agreement, discontinued the waste management activity, causing "serious damage to Italy" "not only in economic terms but also damaging its image, the health of its citizens and its public order, and also causing further indirect damage through the loss of further opportunities."[594] According to Respondent, this is supported by the report of March 2012 issued at the request of GE and VSAT pursuant to Article 161(3) of the Bankruptcy Law, which flagged a "probable" risk of actions for damages derived from the interruption.[595]

488. Respondent adds that, through Ordinances Nos. 10826/12 and 2789/2012, the *Commissario* flagged the lack of grounds for the termination of the TEC Concession and noted that it was an interruption of public service with a "concrete risk of the collapse of the disposal system for solid urban waste, for which detrimental consequences were foreseeable for public health and the environment."[596]

489. Second, Respondent argues that the 2011 Notice, which announced the termination as of 31 January 2012, did not meet the legal requirements set forth in the Italian Civil Code, Article 1454.[597] To issue a notice to perform "a serious breach must occur," yet there were no serious breaches, and the contract did not include a specific unilateral termination clause.[598] Also, Respondent notes that TEC's request for payment of the Management and Construction Awards in the 2011 Notice was baseless because they were undergoing challenges before Italian courts.[599]

490. Third, the timing of the termination shows bad faith. Respondent argues that the 30-day term to perform the obligations was unreasonable, considering the substantial amount to be paid and that the contract originally granted 60 days to pay the tariff.[600]

491. Respondent adds that the bankruptcy proceedings that followed the termination, and other contemporaneous circumstances, further show that the termination of the concession was unjustified and done in bad faith. On the one hand, Respondent argues that the termination was done to avoid the effects of Article 18 of the TEC Concession, under which, a declaration of bankruptcy would cause it to expire immediately, and the Grantor could request compensation for the losses derived from such expiration.[601] On the other hand, Respondent argues that near the termination of the TEC Concession, the Melicuccà landfill, and the two additional lines of Gioia Tauro's WtE, were close to

[592] Respondent's Counter-Memorial, ¶ 386.
[593] Respondent's Rejoinder, ¶¶ 276 (citing R-37, Report Pursuant to Article 161, paragraph 3, R.D. 267/1942), 278.
[594] Respondent's Rejoinder, ¶¶ 278-279.
[595] Respondent's Rejoinder, ¶ 280.
[596] Respondent's Counter-Memorial, ¶ 390; C-59, Ordinance of the *Commissario* No. 10826, 9 February 2012, p. 4.
[597] Respondent's Counter-Memorial, ¶¶ 388-389.
[598] Respondent's Counter-Memorial, ¶ 389.
[599] Respondent's Counter-Memorial, ¶ 392.
[600] Respondent's Counter-Memorial, ¶ 389.
[601] Respondent's PHB1, ¶¶ 159-161; Respondent's PHB Second Round ¶ 124.

being completed but Veolia chose to terminate the TEC Concession and made no attempt to transfer the assets to another qualified entity that could effectively complete the works, and obligations of the Concessionaire.[602] Also, the moment of the termination coincided with Claimant's corporate restructuring plan.[603]

492. Fourth, Respondent submits that Claimant was the one in breach of its contractual obligations at the moment of termination, considering that TEC returned the plants with "serious maintenance deficits" which "costed several million euro, both for the restoration of deteriorated areas," and the indirect damage of being unable to guarantee the service.[604] Respondent adds that also after termination, certain irregularities in the construction of the Melicuccà landfill led to "the seizure of the plant."[605]

c. Analysis of the Tribunal

493. It is undisputed that TEC provided services under the TEC Concession and that Respondent delayed the payment of the gate fee and refused to update the gate fee under Article 6.2 of the TEC Concession. The Tribunal has found that the *Commissario* breached the obligation to timely pay the gate fees and their annual adjustment as per Articles 6.2 and 7.1 of the TEC Concession. Further, the Tribunal found that the delay in the payment of the gate fee was unjustified.

494. Such actions not only amount to a breach of the TEC Concession but, whatever the standard to be applied to the umbrella clause, they amount to a breach of the ECT. The *Commissario*, as an entity acting on behalf of the State, refused with no justification to pay the gate fee on time, refused to adjust the gate fee, initially with no justification, and then, when Claimant brought the Management Arbitration, and later on in this arbitration, with an interpretation of the TEC Concession that the Tribunal has found was without merit and had never been put before Claimant.

495. Respondent alleges that Claimant cannot "legitimately" bring its claims in this arbitration, because it is not "a good faith and compliant investor,"[606] since it (i) was in default in the first place by breaching "its maintenance and conservation duties of the plants"; and (ii) acted in bad faith when unilaterally terminating the TEC Concession.[607] According to Respondent "[t]he relevance of good faith is not limited to the way the investment is acquired, it extends to the way the investment is carried out, and even to the dispute settlement phase."[608]

496. As a threshold matter, Respondent failed to substantiate a clear rule under international law, applicable to this case, that would preclude its responsibility or bar Claimant's claims under the ECT's umbrella clause, due to its alleged bad faith conduct by terminating the TEC and TEV Concessions, contract breaches, and/or lack of due diligence.

[602] Respondent's Counter-Memorial, ¶¶ 405-408.
[603] Respondent's Counter-Memorial, ¶¶ 399-400.
[604] Respondent's Counter-Memorial, ¶ 409.
[605] Respondent's Counter-Memorial, ¶ 410; Respondent's Rejoinder, ¶ 380
[606] Respondent's Counter-Memorial, Section IV.A.37.
[607] Respondent's Counter-Memorial, ¶¶ 386, 394.
[608] Respondent's Rejoinder, ¶ 382.

497. Respondent rejected "Claimant's statement that the negligence of the investor would only be relevant for limiting compensation" and argued in general terms that:

> "[c]ontributory negligence is certainly a defence to the State's duty to fully repair the damage caused by the alleged breach, but good faith and due diligence must be the basis of any behavior of the investor and substantiate a relationship of trust between the latter and the territory in which it invests. Good faith then acquires a **specific connotation** when the investor is linked by a contractual relationship (in this case a concession agreement for a public service) with the host State."[609]

498. Respondent failed to argue or even explain what that "specific connotation" was, and how this countered Claimant's allegation that good faith and due diligence were elements only relevant for the damages phase. Although good faith is indeed a relevant principle under international law that is not necessarily limited to the inception of the investment and may in certain circumstances extend to its performance, a general reference to such a principle is insufficient to constitute a valid defense against a finding of a breach of international obligations and/or the admissibility of Claimant's claims. It is not for the Tribunal to assume Respondent's legal and evidential burden.

499. Moreover, even if Respondent's theory were correct, the evidence in the record does not support the allegation that the services under the TEC Concession were suspended or that Claimant acted in bad faith when terminating the TEC Concession.

(i) The continuity of the service

500. Respondent claims that the services provided under the TEC Concession were interrupted causing severe damage, but the Tribunal finds no evidence of such an interruption or the alleged harm caused to a public service provided to the community.

501. The "interruption of the contractual relationship"[610] is not the same as the interruption of the service, which was precisely avoided through the *Prorogatio*.[611] When TEC issued the termination letter on 31 January 2012,[612] it agreed not to suspend waste management disposal activities subject to a "*de facto* continuation of the relationship with an adequate and prompt supply of the corresponding financial resources."[613] The *Prorogatio* sought to avoid the immediate cessation of the public service on the basis of specific conditions for funding the operation.[614] In Ordinance No. 10826 of 9 February 2012, the *Commissario* recognized the "**continuation of the public service under an extension regime**, imposing a series of related conditions, such as the timely payment of management, according to a table of costs attached to the said note and the replacement for a number of debit items."[615] The *Prorogatio*'s purpose was seemingly achieved as there is no evidence that Claimant

[609] Respondent's Rejoinder, ¶ 384 (emphasis added).
[610] C-59, Ordinance of the *Commissario* No. 10826, 9 February 2012, p. 4.
[611] C-59, Ordinance of the *Commissario* No. 10826, 9 February 2012, p. 4, ¶ 1.
[612] C-58, TEC's 2012 Notice to the Commissario, 31 January 2012.
[613] Claimant's Memorial, ¶ 122.
[614] C-58, TEC's Formal Notice of Termination, 31 January 2012, p. 3, ¶ 1. During the *Prorogatio*, the *Commissario* had to pay: 1) 80% of the monthly requirements within the first 15 days of the month; and 2) the balance of the monthly operational costs, within 15 days of the receipt of the accounting documentation.
[615] C-59, Ordinance of the *Commissario* No. 10826, 9 February 2012, p. 3 (emphasis added).

or TEC were declared liable for the termination, or any damages stemming from it, and Respondent did not prove in this arbitration the damages it claims (see below).

(ii) Legal grounds for unilateral termination

502. Respondent claims that "[n]o specific clause existed in the Agreement permitting the concessionaire to unilaterally terminate the agreement under the circumstance."[616] However, Article 14 of the TEC Concession does reference Article 37-octies of Law No. 109 of 1994,[617] which governs the scenario where the concession may be terminated in case of default of the Grantor.[618]

503. Respondent also claims that Claimant's termination was not "validly executed under the law,"[619] because the legal grounds invoked by Claimant do not apply.

504. As a preliminary matter, there is no evidence of a successful challenge before Italian courts against the "validity" of the termination by Claimant. Instead, there is only a note unilaterally issued by the *Commissario*, almost a year after TEC's 2011 and 2012 Notices, which declares the termination of the TEC Concession for Claimant's supposed breaches.[620]

505. In any case, the Tribunal finds no evidence of the alleged "blatant illegitimacy" in the termination of the TEC Concession.[621] To the contrary, the evidence in the record indicates that there were valid reasons for TEC to terminate the TEC Concession, which counters Respondent's allegations that Claimant acted unreasonably or in bad faith.

506. In the 2011 Notice, TEC argued that if the outstanding sums were not paid within 30 days, it would terminate the TEC Concession, invoking Articles 1564 and 1454 of the Italian Civil Code, Article 14 of the TEC Concession, and Article 37-*octies* of Law 109 of 1994.[622] Respondent alleges that the legal grounds under which Claimant invoked the unilateral termination were not applicable because Article 1454 of the Italian Civil Code required a "serious breach" which "was not the case under the circumstances."[623]

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[616] Respondent's Counter-Memorial, ¶ 389.
[617] C-10, TEC Concession, 17 October 2000, Art. 14: "**The parties shall give each other reciprocal notice of the applicability** under the agreement relationship of the following articles of Law No. 109 of 11/2/1994 and subsequent amendments and additions, with the exclusion of the provisions that are waived or which are in any case incompatible with this agreement and/or with the instruments forming the basis of the tender: **Arts. 19, 35, 37-quinquies, 37-sexies, 37-septies, 37-octies and 37-nonies**" (emphasis added).
[618] C-57, TEC's 2011 Notice to the *Commissario*, 28 December 2011, p. 3, citing Article 158 of Legislative Decree No. 163 of 2006 (which replaced Article 37-octies of Law No. 109 of 1994); C-68, Insolvency Receivers Report of the judicial receivers, 1 February 2013, p. 16 "[t]he same formal notice indicated that, in the absence of timely compliance, the Calabria Convention would be terminated due to the action and fault of the Grantor, with the automatic effect of rendering the amounts described in art. 37-octies of Law 109/94 (as replaced by the art. 158 of Legislative Decree 163/2006) due to TEC spa, expressly recalled by the Calabria Convention at the end of art. 14."
[619] Respondent's Counter-Memorial, ¶ 387.
[620] R-12, Commissario's Note No. 12167, 21 November 2012.
[621] Respondent's Counter-Memorial, ¶ 389.
[622] C-57, TEC's 2011 Notice to the *Commissario*, 28 December 2011.
[623] Respondent's Counter-Memorial, ¶ 389.

507. Respondent is right in that, under Articles 1454 and 1564 of the Italian Civil Code, a party may request the termination of a contract if there is a breach "of considerable importance and is such as to impair confidence in the accurate fulfillment of subsequent obligations."[624]

508. The Tribunal finds that the breaches claimed by TEC clearly met the standard of the aforementioned articles of the Italian Civil Code. The breaches relate to the payment of the main source of remuneration under the TEC Concession and the main source of funding for the development of Claimant's investment: the gate fee. At the Parliamentary Inquiry, Italian Senators recognized that, in light of the financial logic of the operation, the lack of payment by municipalities of the gate fee could cause the bankruptcy of the companies. Senator Bruno acknowledged the mass debt of local authorities[625] and Senator Fluttero recognized the financial logic of the system and need for the recovery of the company's investment.[626] Mr. Scopelliti, President of the Calabria Region, and Mr. Gualtieri even recognized that "damages" had been caused to Veolia during the performance of the TEC Concession.[627]

509. Also, the circumstances of the breaches claimed by TEC, in particular, the delay in the payment and the lack of adjustment of the gate fee, were sufficient "to impair confidence in the accurate fulfillment of subsequent obligations."[628] By the time of the 2011 and 2012 Notices, the lack of payment of the gate fee had been repetitive over the years, had even been recognized by the *Commissario*,[629] and in fact, TEC had unsuccessfully attempted to negotiate and settle its claims with the *Commissario* three times: *i.e.*, the 2007 Settlement Proposal, the MOU negotiations, and the Third Amendment.[630]

510. The evidence in the record suggests that the binding offer made by TEC in the 2007 Settlement Proposal, which covered all receivables up to 2007 and waived all interest accrued until then,[631] was frustrated by the *Commissario*'s decision to send it to the Calabria Region, despite the fact that the *Commissario* himself could have implemented the agreement.

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[624] C-309, Italian Civil Code, Art. 1564.
[625] C-92, Transcript of the Audition before the Italian Senate in relation to the Inquiry on Issues Relating to Waste Management, 5 February 2009, p. 26: "the mass debt of local authorities and the inability to properly meet the commitments to operators," p. 27: suggested a proposal "to defer (not to make reductions, so that those who have to pay, pay)."
[626] C-92, Transcript of the Audition before the Italian Senate in relation to the Inquiry on Issues Relating to Waste Management, 5 February 2009, p. 27: "I am also interested in knowing who currently manages the collection. As for the private companies we heard in the previous hearing, those that built the plants and must recover the investment made through a financial plan, when they accept the waste deposits, do they only deal with the disposal to landfill or treatment, or have they also taken on the management of the collection, thereby amortising, through the overall waste fee, the investment plan of the plants too?"
[627] C-93, Parliamentary Inquiry Committee, 23 September 2010, p. 13: "[W]e are in a position to carry out a plan, the work will probably already be finished because Veolia has already thought of buying everything, even the buttons on the shirt. The question is, then, **if we want to pay the damages**. That has to be assessed. Like the president said, we need to restart discussions to work it out. There will probably be a first meeting this week, at least to see what the damages might really amount to. Damages in the accounting ledger exceed € 200 million. Most of them are commission failures" (emphasis added).
[628] C-309, Italian Civil Code, Art. 1564.
[629] C-221, Minutes of Meeting between *Commissario* and TEC, 7 June 2011. The *Commissario* acknowledged the existence of "expired receivables", *i.e.*, debt owed in favor of TEC.
[630] Tr. Hearing Day 2, p. 273: 2-6 (Tribunal's questions). Claimant alleges that the lack of cashflow was not the issue that gave rise to the termination of the concession, but rather, the compilation of Italy's contractual misconduct together with the *Commissario*'s inability to ensure the effectiveness of the Third Amendment.
[631] C-84, Proposal of Settlement Agreement from TEC to the *Commissario*, 17 December 2007.

511. During the Parliamentary Inquiry, Mr. Sottile as the *Commissario*, acknowledged that a settlement agreement involving the State had been reached in 2007, but the Region had "opted out" of it.[632] In this regard, the President of the Senate Committee held the view that it was not for the Region to pay so its disagreement with the settlement was irrelevant.[633] Also, the Senate Committee agreed that it was the *Commissario*'s responsibility to implement the 2007 Settlement Proposal that was in place, concluding that "[a]n agreement was made without having the money to pay for it."[634] In this sense, the Senate Committee recognized that the lack of coordination between the relevant entities frustrated the 2007 Settlement Proposal, because it was unclear who had to pay, without directly involving the Region.[635]

512. The Parliamentary Inquiry Report of 2011 then concluded that:

> "**the adhesion to the settlement by the Region of Calabria had to be excluded,** given that this party had emphasised its own opposition to the doubling of the waste-to-energy plant of Gioia Tauro, including with a successive Regional Law, the No. 27 of 2007 (which was also declared unconstitutional with decision No. 277 of 9/16 July 2008, published in the Official Gazette No. 31 of 23 July 2008). […]
>
> At this point, it is worth recalling the statements of *Dottor* Franco Gabrielli, Head of the civil protection department, during his hearing on 15 December 2010, regarding relations between the department of civil protection and the Deputy Commissioner, who, as already clarified in the note, held the institutional role of **'Deputy Commissioner of the Government', or of the party who receives the powers deriving from the declaration of the state of emergency and the representative of the Government, in the name and on behalf of which he holds all operational powers.**
>
> In this way, *Dottor* Gabrielli continued, the dialogue occurs between the Prime Minister, the Council of Ministers and the Deputy Commissioner, while in such cases, the department of civil protection 'does not serve only a notarial function or, as may be described in a derogatory manner, that of a cashpoint machine for the orders of the Prime Minister, but an activity of support, guidance, and

[632] C-94, Parliamentary Inquiry Committee, 6 October 2010, p. 11 "PRESIDENT. Excuse me, but an agreement was reached and all parties approved it, right? GOFFREDO SOTTILE, *Former commissioner for emergencies in the waste disposal sector in the Calabria region*. The agreement was conceived by the Department of the Civil Protection, then by the Office of the Commissario, and Veolia. The Region has not signed this agreement, it signed it for review. It opted out of this...
PRESIDENT. Excuse me, I don't think it's possible for a public body to 'opt out': there is an agreement or there is not.
GOFFREDO SOTTILE, *Former commissioner for emergencies in the waste disposal sector in the Calabria region*. That is what happened."; p. 12, PRESIDENT. "Yes, but an agreement had been reached, this concerned the parties who had to respond."
[633] C-94, Parliamentary Inquiry Committee, 6 October 2010, p. 12. PRESIDENT noted that "it was not the region that had to pay, so whether or not it agreed or not changed little" and GOFFREDO SOTTILE replied "But the Civil Protection Department wanted the region to adhere to it."
[634] C-94, Parliamentary Inquiry Committee, 6 October 2010, pp. 13-14.
[635] C-94, Parliamentary Inquiry Committee, 6 October 2010, p. 12. PRESIDENT "Yes, but an agreement had been reached, this concerned the parties who had to respond So, we do not have a clear picture of the dynamics: an agreement is made without knowing who has to pay; an agreement is made between the parties and the region is not directly involved and then the agreement is not implemented because the region has rightly taken note of it but it is not part of the negotiation; a situation is created in which, however, the claims become exorbitant, and therefore the amount of public money that will be spent will be different from what could have been spent by closing the situation at the time. You, as Commissioner, can certainly explain this development to us."

consultancy', as it had indeed done in 2008, regarding the above settlement proposal.

Indeed, on the occasion, in complying with this institutional obligation**, the department of civil protection had limited itself to making several observations,** notably, considering that it is appropriate to acquire the opinion of the State Legal Advisory Service on the settlement activity carried out by the Deputy Commissioner, **but that the party entitled to stipulate the settlement agreement was the Commissioner, insofar as he was the Government delegate.**

In this way, once the Deputy Commissioner at the time (the Prefect Salvatore Montanaro) had acquired the aforementioned opinion of the State Legal Advisory Service and had noticed the absence of a reply by the Region of Calabria regarding the proposed settlement, **he held all of the powers necessary for signing the settlement agreement with TEC – Veolia**.

This was all the more true, since the district State Legal Advisory Service, in the opinion submitted to the records of the proceedings, highlighted both the procedure followed by the Deputy Commissioner, with the introduction of the special committee, which witnessed the participation of qualified professionals (Avv. Francesco Attanasio, Prof. Pasquale Versace, *Ingegnere* Loris Zanella), and the convenience of the settlement proposal, **whereas the request for signing by the Region of Calabria, was merely on the grounds of expediency, since it was intended to involve this latter party in the associated economic liabilities of the settlement.**

In conclusion, **the Government's Deputy Commissioner for the waste emergency in Calabria had the power/duty to sign the settlement agreement with TEC SpA, without any need to have obtained the associated departmental authorisation**, in the light of the correctness of the procedure followed with the introduction of a suitable committee and of the opinion of the State Legal Advisory Service, evidently notwithstanding the reservation of the right to bring a compensation action against the Region of Calabria for its defaults."[636]

513. Further, on 27 January 2011, the *Commissario* and TEC signed the MOU, which, among other things, outlined a shared method for adjusting the disposal tariff starting in 2011.[637] Following the signing of the MOU, a conciliation roundtable was held on 27 January 2011, where it was confirmed that there was an agreement for a shared method for the ISTAT update of the tariff to be applied from 1 January 2011.[638] On 15 February 2011, TEC sent the *Commissario* invoices reflecting the gate fee for 2011 agreed upon during the conciliation roundtable.[639] Throughout April and May, negotiations continued between TEC and the *Commissario* to modify the TEC Concession from 2011 onwards and to settle all past disputes up until 31 December 2010, including the gate fee.[640] In May 2011, a

[636] C-51, Report of the Parliamentary Inquiry, 19 May 2011, pp. 22-23 (emphasis added).
[637] C-219, Memorandum of Understanding between TEC and the *Commissario*, 27 January 2011, Art. 2.
[638] C-120, Minutes of the Conciliation Round Table between TEC, the *Commissario* and the Calabria Region, 27 January 2011.
[639] C-121, Letter from TEC to *Commissario*, 15 February 2011.
[640] C-220, Internal Minutes on Negotiation of the Third Amendment, 22 April 2011.

payment plan for the gate fees was allegedly agreed upon, but the *Commissario* failed to comply with such payment plan during 2011.[641]

514. Lastly, on 21 June 2011, the *Commissario* and TEC signed the Third Amendment.[642] The parties to the Third Amendment agreed on, *inter alia,* (i) an update and an adjustment mechanism for the gate fee; (ii) a reorganization of the plants' system to treat a greater quantity of waste; and (iii) a 15-year extension of the TEC Concession, starting from July 2011.[643]

515. These obligations would become effective subject to "prior inspection of legality by the Court of Auditors, pursuant to the terms of article 3, clause 1, item c bis of Law No. 20 of 1994 and shall become effective pursuant to the law."[644] This was the only "condition" for the Third Amendment's entry into force.[645] The "final clause" in Article 13 of the Third Amendment ordered the *Commissario* to "forward the present deed to the Region of Calabria" –which would eventually take over the management by the Commissioner– but unlike Article 3, it did not condition the effectiveness of the Third Amendment on approval from the Calabria Region.

516. However, the *Commissario* did not submit the Third Amendment to the Court of Auditors, and instead sent it to the Region, the Presidency of the Council of Ministers, and the *Avvocatura dello Stato*, on 20 July 2011[646] invoking Article 3 of Law No. 20 of 1994.[647] The State Attorney did not oppose the Third Amendment and noted that it was an additional technical agreement to the TEC Concession, without a transactional character.[648] However, the Presidency of the Council of Ministers objected to the contents of the Third Amendment insofar as it "cannot involve obligations imposed on you for periods that do not exceed the date of the 31st December, unless the region of Calabria is also involved."[649] The *Commissario* adopted the position of the Presidency of the Council of Ministers as "instructions" and forwarded the Third Amendment to the Calabria Region for comments before implementing the agreement.[650]

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[641] Claimant's Reply, ¶ 274; C-57, TEC's 2011 Notice to the *Commissario*, 28 December 2011, p. 3 "The Commissioner is likewise in breach for the lack of payment of the tariff due for the financial year 2011, notwithstanding the rescheduling agreed upon in May 2011, with the overall amount of € 2,877,272 remaining payable by 30 November 2011, while a further € 3,200,000 will expire on 31/12/2011"; First Witness Statement Vincenzo Bozzetto, ¶ 46.
[642] C-46, Third Amendment or *Secondo Atto Integrativo* between TEC and the *Commissario*, 21 June 2011.
[643] Claimant's Reply, ¶ 304.
[644] C-46, Third Amendment or *Secondo Atto Integrativo* between TEC and the *Commissario*, 21 June 2011, Art. 12.
[645] Tr. Hearing Day 1, 261-263 (Tribunal's questions).
[646] C-239, Letter from *Commissario* to the Presidency of the Council of Ministers, 20 July 2011, p. 13.
[647] C-47, Law No. 20 of 1994, Article 3(1)(c-bis) "1. The prior audit of legality of the Court of Auditors shall be carried out exclusively on the following actions which do not have the force of law: […] c-*bis*) [T]he Commission measures adopted in implementation of the orders of the President of the Council of Ministers […]."
[648] C-239, Letter from State District Attorney to *Commissario*, 9 September 2011, p. 22.
[649] C-339, Note No. DPC/CG/52178 from the Civil Protection Department of the Presidency of the Council of Ministers to the *Commissario*, 9 September 2011.
[650] C-48, Letter from *Commissario* to TEC, 9 September 2011, such instructions involved "Regarding the first point, the draft must be supplemented by further details of the reasons resulting in the undersigned office recalculating the waste disposal tariff. Regarding the second point, the economic and financial plan – by instructions of the Department of Civil Protection – was sent to a competent third-party entity required to express an opinion on the adequacy of the agreed price. Finally, regarding the third point, the draft will be submitted for attention of the Environmental Policies Department of the Calabria Region – as this being the competent entity at the end of the emergency phase – which will assess the possibility of any commitment after the expiration of the state of emergency period, in relation to the obligations incumbent on this commissioner regarding said draft."

517. Almost six months after the adoption of the Third Amendment, the Calabria Region addressed it, recognizing that the tariff adjustment was suitable and useful, limited to the "management aspects of the concession" and noting that the Third Amendment referred to a "concession relationship which does not concern the Regional Government of Calabria" and therefore, any reinterpretation of the tariff was an exclusive competence of the *Commissario* "who assumes full liability for the same."[651] Additionally, the Calabria Region stated that the agreed tariff was "provisional" pending a "new expert study."[652]

518. Notably, there is no evidence that the Calabria Region recognized that its adherence or acceptance was needed to implement the Third Amendment. The Calabria Region only "acknowledge[d] the agreement reached to adjust the disposal tariff, from 1/7/2011 onwards and until 31/12/2015, equal to € 110.00/t, on the basis of the Concession named 'Calabria Sud', between the Deputy Commissioner and T.E.C. s.p.a.-Veolia S.A.; [and] acknowledge[d] that this tariff is regarded as provisional."[653] This approach was similar to that of the Parliamentary Committee Inquiry as regards the 2007 Settlement Proposal, which concluded that the adherence of the Calabria Region was not a condition for its implementation, contrary to the *Commissario*'s conduct.

519. In sum, under the clear texts of Law No. 20 of 1994 and the Third Amendment, the implementation of this agreement did not require the approval of the Council of Ministers or the Calabria Region. The *Commissario* may have been prudent or reasonable when informing such authorities about the Third Amendment, but that does not excuse the failure to implement it. Sending the Third Amendment to the Region may have been intended to secure its smooth implementation after December 2012, as Respondent pointed out at the Hearing.[654] Still, such a requirement was never contained in the agreement of the parties. Therefore, the *Commissario*'s conduct caused an unjustified delay of almost six months in the implementation of the Third Amendment, waiting for a non-required opinion on an already agreed-upon text. When the Calabria Region replied on 23 December 2011 –indicating that the adjustment of the tariff was the exclusive competence of the *Commissario*– Claimant sent the notice to comply on 28 December 2011 and given that there was no compliance from the *Commissario*, Claimant proceeded to the termination. During the almost six months that elapsed between the adoption of the Third Amendment and the Calabria Region's reply, there is no evidence that the *Commissario* used his powers to meet his obligations toward TEC.

520. All of these circumstances could, in the Tribunal's view, reasonably "impair confidence in the accurate fulfillment of subsequent obligations," as per the terms stated in Article 1564 of the Italian Civil Code.

(iii) Claimant's alleged default

521. Respondent further alleges that, since Claimant was in default, "the termination of the contract claimed by TEC had no valid legal foundation."[655] However, the evidence in the record shows that Respondent's default in paying the gate fees in any case preceded –and may have even contributed

[651] C-49, Deliberation of the Calabria Region No. 625, 23 December 2011.
[652] C-49, Deliberation of the Calabria Region No. 625, 23 December 2011.
[653] C-49, Deliberation of the Region of Calabria Region No. 625, 23 December 2011.
[654] Tr. Hearing Day 1, 263:9-264:9 (Examination of Mr. Bozzetto).
[655] Respondent's Counter-Memorial, ¶ 394.

to– Claimant's alleged breaches, *i.e.*, "the harmful performance of the **management** as well as of the **works** carried out by the contracting company."[656]

522. The 2011 Notice sent by TEC to the *Commissario*, was a notice to comply under Article 1454 of the Italian Civil Code,[657] requesting the satisfaction of various obligations, including the gate fee payment. When the 30-day term to comply expired, Claimant sent the 2012 Notice, a formal termination notice. Days later, the *Commissario* agreed to the *Prorogatio* and ordered "[t]he formalisation of the challenges following the outcome of the activities of verification and control of the status of the plants relating to the system forming the object of the concession and of its development."[658] In this sense, the claims over TEC's alleged defaults were only "formalised" after the 2011 and 2012 Notices.

523. Moreover, in March 2012, when the *Commissario* accepted the *Prorogatio*, he noted that the credits that the *Commissario* had allegedly "accumulated" over the years towards TEC were "in the process of being calculated."[659] Until that moment, the *Commissario* had not estimated nor claimed the allegedly "accumulated" breaches by Claimant. This creates doubts as to whether such alleged breaches were raised as a reaction to the 2012 termination.

524. In November 2012 the *Commissario* issued Note No. 12167, invoking Article 136 of Legislative Decree No. 163/ 2006, as a ground to "resolve the contract" due to TEC's alleged failure to solve multiple "deficiencies" –like poor maintenance of certain equipment, lack of functionalities, safety conditions of workers, and non-completion of certain "interventions."[660] There is no evidence that such "deficiencies" –if any– preceded Respondent's lack of payment of the gate fees under the TEC Concession. Moreover, the Tribunal observes that Article 136 refers to the resolution of the contract for serious non-performance, irregularities, and delays in "the works." It is not clear that Article 136 would encompass all the mismanagement allegations identified by Respondent. Also, Article 136 refers to an extensive procedure before resolving the contract for delays or non-performance of works, and there is no evidence that such a procedure had been implemented before Claimant's 2011 Notice.[661]

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[656] R-12, *Commissario*'s Note No. 12167, 21 November 2012 (emphasis added).
[657] Respondent's Counter-Memorial, ¶ 388.
[658] C-59, Ordinance of the *Commissario* No. 10826, 9 February 2012, p. 4, ¶ 2.
[659] R-5, *Commissario*'s Note No. 2789, 8 March 2012, p. 2.
[660] Respondent's Countermemorial, ¶ 104; Claimant's Reply, ¶ 359; R-12-IT, *Commissario*'s Note No. 12167, 21 November 2012.
[661] Article 136 of Legislative Decree No. 163 of 2006 "Art. 136. Termination of contract for serious non-performance serious irregularities and serious delay (Art. 119, Presidential Decree No. 554/1999 Articles 340, 341 Law No. 2248/1865)
1. When the director of works ascertains that conduct of the contractor concretes serious non-performance of contractual obligations such as to jeopardize the successful completion of the work, he shall send a detailed report to the person in charge of the procedure, accompanied by the necessary documents, indicating the estimate of the work duly performed and to be credited to the contractor. 2. At the direction of the head of the procedure, the director of works shall formulate the statement of objections to the contractor, assigning a time limit of not less than fifteen days for the submission of his counter-arguments to the head of the procedure. 3. Upon acquisition and negative evaluation of the aforementioned counter-deductions, or upon expiration of the time limit without the contractor's response, the contracting station on the proposal of the procedure manager shall order the termination of the contract. If, outside the preceding cases, the execution of the work is delayed due to the contractor's negligence with respect to the forecasts of the program, the director of works shall assign him a time limit, which, except in cases of urgency, may not be less than ten days, to carry out the delayed work, and shall also give such prescriptions as he deems necessary. The deadline shall run

525. In sum, Respondent's allegations of Claimant's default are not supported and do not defeat Claimant's claims for the purposes of Article 1454 of the Italian Civil Code, and even less, prove Claimant's bad faith in pursuing the termination of the TEC Concession, for the purposes of this arbitration. Rather, the *Commissario*'s conduct towards TEC's alleged breaches indicates that such breaches –even if proven– were "of little importance, having regard to the interest of [the *Commissario*],"[662] until they were invoked in response to the 2012 termination.

(iv) The timing and circumstances of the 2011 and 2012 Notices

526. The Tribunal does not find sufficient evidence to conclude that the 30-day term in the 2011 Notice was unreasonable as per Italian laws, nor that it proves Claimant's alleged bad faith, under the specific circumstances of this case.

527. Respondent claims that such a term was unreasonable and unsuitable "in the light of the agreement (which the parties must comply with under the law when considering the period of notice). 60 days was the term indicated for the payment of the tariff (Art. 7.1.), against an amount to be paid that was extremely high, of more than € 139 M."[663]

528. Nevertheless, the 30-day term of the 2011 Notice already doubled the 15-day term found in Article 1454 of the Italian Civil Code.[664] Moreover, the fairness or unfairness of the notice period must be demonstrated by the debtor and justified for instance by reference to "nature of the service, or the circumstances of the case ("*in relazione alla natura della prestazione e alle circostanze del caso*"),[665] and such an assessment "cannot be unilateral and exclusively concern the situation of the debtor, but must also take into consideration the creditor's interest in compliance and the sacrifice that the latter makes in waiting for the service."[666]

529. In this case, the circumstances of TEC as "the creditor" concerned repeated breaches over the years that involved –among other things– the main sources of income under the TEC Concession, and frustrated attempts to reach settlements, *i.e.,* the 2007 Settlement Proposal and the Third Agreement. Also, the 2011 Notice was not unexpected for Respondent. The intervention of Mr. Scopelliti, President of the Calabria Region during the Parliamentary Inquiry, showed that the termination of

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from the day of receipt of the notice. 4. After the expiration of the allotted time limit, the director of works shall verify, in cross-examination with the contractor, or, in his absence, with the assistance of two witnesses, the effects of the intimation given, and shall compile the minutes to be forwarded to the person in charge of the procedure. 5. On the basis of the minutes, if the non-compliance persists, the contracting station, upon the proposal of the head of the procedure, shall resolve the termination of the contract."

[662] Respondent's Counter-Memorial ¶¶ 388-389; C-309, Italian Civil Code, Art. 1455 (translation of the Tribunal).

[663] Respondent's Counter-Memorial ¶ 389.

[664] Italian Civil Code, Art. 1454: "*Alla parte inadempiente* l'altra puo'*può intimare per iscritto di adempiere in un congruo termine, con dichiarazione che, decorso inutilmente detto termine, il contratto às*'intendera' senz'altro *risoluto. Il termine non può' essere inferiore a quindici giorni, salvo diversa pattuizione delle parti o salvo che, per la natura del contratto o secondo gli usi, risulti congruo un termine minore. Decorso il termine senza che il contratto sia stato adempiuto, questo è*e' *risoluto di diritto*."; Respondent's Counter-Memorial, ¶ 388: "where a party fails to perform an obligation, the other party may serve on it written notice to do so within a reasonable time, stating that if, at the end of that period, the notice has not been complied with, the contract shall simply be considered terminated."

[665] C-316 - IT, Italian Supreme Court No. 8250 of 6 April 2009, p. 6, ¶ 2.1 (Tribunal's translation from the original) "*la dimostrazione della necessità di una maggiore lunghezza del termine (e quindi della insufficienza di quello concesso) grava sull'intimato, il quale ben può dare la prova che il termine di quindici giorni è in concreto, in relazione alla natura della prestazione e alle circostanze del caso, troppo ristretto per consentirgli di eseguire la prestazione*."

[666] C-315, Italian Supreme Court No. 11493 of 23 May 2014.

the TEC Concession did not come as a surprise.[667] Being aware of these circumstances, Respondent should not have been "completely inert - in this case for several years - until the time of the formal notice, then claim that he must be allowed all the time necessary to begin and complete the preparation of the service."[668]

530. Lastly, the bankruptcy that followed the termination does not prove that Claimant made this decision in bad faith, and, if anything, shows that Claimant was placed in an untenable situation. Similarly, circumstances contemporaneous to the termination such as plants being near completion, or Claimant's alleged corporate restructuring plans do not excuse Respondent's breaches, and therefore, do not demonstrate bad faith in Claimant's termination.

531. To conclude, the Tribunal does not find that Respondent has discharged its burden of proving that Claimant acted in bad faith when terminating the TEC Concession. Contrary to Respondent's allegations, there is no evidence that the termination harmed the continuity of the service. There are no findings by Italian courts that Claimant's termination was invalid or violated Italian laws. Rather, the termination appears to be properly grounded on Italian laws. There is also no sufficient evidence demonstrating Claimant's alleged breaches, or that such breaches –if any– precluded its right to terminate the TEC Concession under Italian laws. Respondent further failed to demonstrate Claimant's bad faith in the timing of the 2011 and 2012 Notices. In sum, the fact that Respondent disagrees with the legal and factual circumstances of the termination by Claimant does not of itself make it an act in bad faith under international law that could preclude Claimant's right to bring a claim before this Tribunal.

4. TEC's financial and economic equilibrium

a. Claimant's position

532. Claimant argues that under the TEC Concession Respondent had the duty to act in good faith, which entails an obligation to re-establish the economic equilibrium pursuant to Italian and international law.[669] In addition, Article 6(3) of the TEC Concession provided that the gate fees had to be revised if the waste delivered was greater than 102% or less than 98% of the agreed annual quantity. Moreover, when the assignment of waste was less than 80% of the foreseen quantities, the economic and financial equilibrium of the TEC Concession had to be restored.[670]

533. At the time of Veolia's investment, a negotiation between TEC and the *Commissario* was underway.[671] The negotiation continued until December 2007, when a final settlement proposal was sent by TEC, and which was valid until the end of January 2008.[672] However, as testified by Mr. De

[667] C-93, Parliamentary Inquiry Committee, 23 September 2010, p. 7: Due to the suspension of the construction of the Gioia Tauro plant, "it was assumed, in some meetings, that the contract would be terminated, given that part of the works had already been started and that, in the company's opinion, the damages sustained could amount to nearly € 100 million."
[668] C-315, Italian Supreme Court No. 11493 of 23 May 2014.
[669] Claimant's Reply, Section 5.2.2.5.
[670] Claimant's Reply, ¶ 727.
[671] Tr. Hearing Day 3, 606:25-607:2 (Examination of Mr. De Matteis).
[672] Claimant's Reply, Section 2.4.1; C-84, Proposal of Settlement Agreement from TEC to the *Commissario*, 17 December 2007.

Matteis, the *Commissario* requested a series of opinions and approvals from various organs, leaving the proposal to lapse.[673]

534. Contrary to Respondent's allegation that these attempts supposedly evidenced an inadequate assessment by Veolia of TEC's economic and financial sustainability,[674] seeking a lasting solution via the re-establishment of the economic equilibrium of the TEC Concession was not only a legal and contractual right that Veolia could claim, but also the most reasonable approach to mitigate the *Commissario*'s breaches.[675]

535. The gate fee provided in the TEC Concession was subject, and tailored, to the specific quantity and quality of waste stipulated in the contract. Thus, TEC's operating costs increased because the *Commissario* failed to deliver waste in the agreed quantity and quality, and the fee revision mechanism kicked in.[676]

536. Negotiations for a permanent solution lasted for more than three years,[677] and on 27 January 2011, Veolia and the *Commissario* signed the MOU (which was acknowledged by the Calabria Region), defining the terms of what would become the Third Amendment.[678] The *Commissario* recognized the economic and financial imbalance of the TEC Concession and undertook to restore it by adjusting the tariff starting from 2011 and for the remaining term based on the ISTAT index.[679]

537. On 21 June 2011, Veolia and the *Commissario* finally signed the Third Amendment, which was frustrated by the *Commissario*'s actions, and therefore, affected the possibility of ensuring the financial and economic equilibrium of the TEC Concession.[680]

538. Finally, Claimant disagrees with Respondent that the original configuration of the TEC Concession, its management, and objective difficulties in the "structural set of the region", are the cause of the economic and financial imbalance.[681] There is no clear nexus between these circumstances and the imbalance, there is no evidence of a limit on the profitability of the Concessions, and in any case, it would not excuse Respondent from its obligation to ensure their economic viability.[682]

b. Respondent's position

539. Respondent denies that the alleged failure to adjust the gate tariffs, pay the *Contributo*, and compensate additional costs, affected the economic and financial balance of the concession, making

[673] Tr. Hearing Day 3, 608:7-616:23 (Examination of Mr. De Matteis).
[674] Tr. Hearing Day 1, 173:1-9 (Respondent's Opening Statement).
[675] Tr. Hearing Day 2, 371:23-373:16 (Examination of Mr. Bozzetto).
[676] Tr. Hearing Day 3, 485:22-486:13 (Examination of Mr. Janailhac).
[677] Tr. Hearing Day 3, 505:25-506:5 (Examination of Mr. Janailhac).
[678] Claimant's Memorial, ¶ 312; C-120, Minutes of the Conciliation Round Table (*Tavolo di Verifica*) between TEC and the *Commissario* and MOU, 27 January 2011; C-219, Letter from *Commissario* to TEC, attaching the MOU, 27 January 2011.
[679] C-219, Letter from *Commissario* to TEC, attaching the MOU, 27 January 2011, p. 5.
[680] Claimant's Memorial, ¶¶ 315-316, Sections 5.2.2.6-5.2.2.7; C-46, Third Amendment or *Secondo Atto Integrativo* between TEC and the *Commissario*, 21 June 2011.
[681] Claimant's Reply, ¶¶ 731-733.
[682] Claimant's Reply, ¶¶ 733-735.

Claimant's business unsustainable.[683] The economic and financial imbalance of the concession is attributable to TEC's infringements, and the objective difficulties in the region known by Veolia.[684]

540. According to Respondent, Claimant's financial plan and operation were one of the causes of the economic unsustainability, considering the conclusions reached by the PoliMi experts.[685] In this sense, the damages claimed by Veolia are the result of its business choices and misconduct that affected the profitability of the project, *i.e.*, construction delays, interruption in the provision of the service, lack of maintenance of the plants, non-execution of mandatory works, and non-fulfillment of the post-operational management obligations of the Calabria Sud landfills.[686] Specifically, the report produced within Order No. 11050 of 2012 after the termination of the TEC Concession estimated the sum of € 6,500,000 as the cost of remediating the "structural criticalities" of the plants and landfills of Calabria Sud resulting from the lack of maintenance.[687]

541. Moreover, Respondent argues that if the imbalance in the concession had been attributable solely to the abusive conduct of the Italian authorities, as Claimant alleges, there would have been no room for any renegotiation or conciliatory intent.[688] Yet, the record shows that the Parties attempted to negotiate "following a series of events that had altered the economic-legal balance of the agreement."[689]

542. Lastly, Respondent alleges that Claimant entered into a *concessione* (concession) not an *appalto* (procurement), and that under the Italian system, the concessionaire in a concession bears the "financial risks of running the service," unlike the case of the procurement.[690]

c. Analysis of the Tribunal

543. Claimant argues that under Italian and international law, Respondent had an obligation to maintain and re-establish the economic equilibrium of the TEC Concession.[691] On the one hand, Claimant invokes: (i) Articles 1374 and 1375 of the Italian Civil Code, which provide that contractual obligations must be fulfilled following "everything which by law, equity, good faith or custom must follow from the nature of the particular contract"; (ii) the principle of good faith under international law, which creates a "natural implicit obligation" to re-establish the economic equilibrium of the TEC Concession; and (iii) Law No. 109/1994, which "regulates the mechanism for the revision of the Concession Agreements under Italian law and provides that the revision must take place through a redetermination of the conditions that affect the economic and financial balance."[692]

544. On the other hand, Claimant relies on Article 6.3 of the TEC Concession, which allowed the revision of the TEC Concession under two scenarios: first, through a modification of the gate fee if the waste

[683] Respondent's Counter-Memorial, ¶¶ 468-469.
[684] Respondent's Counter-Memorial, ¶ 469.
[685] Respondent's Counter-Memorial, ¶¶ 470-471; PoliMi First Expert Report, pp. 10-11.
[686] Respondent's Counter-Memorial, ¶¶ 473-474.
[687] Respondent's Counter-Memorial, ¶¶ 476, 480; R-36, Order of the *Commissario* No. 11050, 20 June 2012.
[688] Respondent's Rejoinder, ¶ 56.
[689] Respondent's Rejoinder, ¶ 54.
[690] Respondent's Rejoinder, ¶¶ 48-49.
[691] Claimant's Memorial, ¶¶ 307-308.
[692] Claimant's Reply, ¶¶ 718-722.

delivered exceeded 102% or was less than 98% of the specified annual quantity and the second, if such quantity of waste was less than 80% of the total agreed, in which case, the whole concession could be rebalanced.[693]

545. Respondent contends that the financial and economic equilibrium "has never been abusively altered. As well as operational risk inherent in the concession itself, the *Commissario* has always tried to deal with contingencies that, inevitably, may occur in carrying out a long-term concession."[694] Respondent adds that any disequilibrium was derived from Claimant's own breaches of its obligations (lack of maintenance, delays in the works, the termination of the TEC Concession, environmental breaches),[695] added to "objective difficulties in the structural set of the region," and to the fact that the TEC Concession was unsustainable from its outset.[696]

546. The Tribunal observes that while Claimant identifies the obligation "to ensure the maintenance and restoration" of the economic and financial equilibrium as having both "contractual and legal" sources, the conduct that is alleged to breach such obligation is, in either case, the breach of other obligations under the TEC Concession.[697]

547. In particular, Claimant submits that Respondent breached its obligation to maintain the economic and financial equilibrium by failing to modify the gate fee under Article 6.3 of the TEC Concession given that "the quantities of waste were different from those provided […] in Article 5."[698] Additionally, Claimant argues that the financial situation of TEC "became increasingly unsustainable due to the cumulative effect" of the other breaches of the TEC Concession, that is, the lack of payment of the *Contributo* and the *Conguagli*, the imposition of penalties, the lack of gate fee update and the late payments.[699]

548. Under Claimant's reasoning, a breach of the alleged obligation to maintain the economic and financial equilibrium requires, first and foremost, a breach of the obligation in Article 6.3 of the TEC Concession. This means that the claim of breach of the obligation to maintain the economic and financial equilibrium is not a self-standing claim in this arbitration. It merely replicates "the case"[700] advanced in respect of the *Conguagli* under Articles 6 and 5 of the TEC Concession and depends on the finding of a breach of the latter to succeed. Notably, in the damages section, Claimant did not identify a specific loss corresponding with this claim. Accuracy refers to the *Conguagli* as "equalisation adjustments (*conguagli*) to be applied to tariffs in order for Claimant to maintain the financial equilibrium of the TEC Concession," and cites Article 6.3 of the TEC Concession.[701]

549. In sum, the Tribunal is not persuaded that Respondent entered into an obligation to maintain the economic and financial equilibrium of the TEC Concession that was independent or different from

[693] Claimant's Reply, ¶ 727.
[694] Respondent's Rejoinder, ¶ 421.
[695] Respondent's Counter-Memorial, ¶¶ 477-491.
[696] Respondent's Counter-Memorial, ¶¶ 469-470.
[697] Claimant's Reply, ¶ 718.
[698] Claimant's Memorial, ¶ 307; Claimant's PHB1, p. 18.
[699] Claimant's Memorial, ¶ 308.
[700] Claimant's Memorial, ¶ 307.
[701] Accuracy First Expert Report, ¶ 6.18. This is also the case of the TEV Concession in *ibid*., ¶ 6.45.

the obligation in Article 6.3 of the TEC Concession that will be analyzed in the following section of this Award dealing with the *Conguagli* claim.

5. TEC's *Conguagli*

a. Claimant's position

550. Claimant argues that Respondent breached its obligations under Article 5 of the TEC Concession and Article 6 of the *Atto di Sottomissione* by delivering waste that was non-compliant in quantity and quality, and by failing to ensure the availability of landfills near the treatment plants. It did so without any valid reason and without compensating the extra costs derived from it *i.e.*, *Conguagli*, to the detriment of Veolia's investment, thus breaching the ECT's umbrella clause.[702]

551. According to Claimant, the TEC Concession specified an annual quantity and quality of waste for the plants that the *Commissario* had to observe, *i.e.*, "276,000 tons of solid urban waste and 135,000 tons of recycled or [sorted waste "**SW**"]" for a total of 411,000 tons of waste per year.[703] This was confirmed in Annex F of the TEC Concession,[704] and by the fact that the separate collection of SW was mandatory in the Calabria Region since 1999.[705] However, Claimant received more amounts of USW that was a lower quality of waste and could not be used to produce electricity because it was wet waste that generated more stabilized organic fractions ("**FOS**").[706] The waste was wet due to mishandling during the collection procedures.[707] Moreover, this generated additional costs and forced TEC to assume the costly transport of non-treatable waste to distant landfills.[708] Also, Claimant did not have the right to refuse non-compliant waste, since it was forced to accept it, subject to criminal sanctions.[709]

552. Respondent also breached Article 6 of the *Atto di Sottomissione* by not ensuring the availability of nearby landfills. Veolia presented potential sites for the landfills but the *Commissario* never approved them, or took any step to build them.[710] TEC even attempted direct negotiations with the Municipalities, which were unsuccessful.[711] According to Claimant, reluctance to build the landfills was a political decisions, which proves that the breaches were not merely of commercial nature.[712] Ultimately, the lack of landfills forced Veolia to assume additional costs because it had to "create a complex and costly system to transport the waste that could not be treated and residues of treatment to other existing landfills located further away in Calabria."[713]

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[702] Claimant's Memorial, ¶ 258; Claimant's Opening Presentation, pp. 73-81.
[703] Claimant's Memorial, ¶ 261.
[704] Tr. Hearing Day 2, 324:11-325:7 (Examination of Mr. Bozzetto); C-10, TEC Concession, 17 October 2000, Annex F, Special Chapter.
[705] Claimant's Memorial, ¶ 262; C-129, General waste management plan for separate collection, approved by Commission Order No. 573, 16 March 1999.
[706] Claimant's Memorial, ¶ 263; Claimant's Reply, ¶ 695.
[707] Claimant's Memorial, ¶ 264.
[708] Claimant's Memorial, ¶ 266.
[709] Claimant's Reply, ¶ 697.
[710] Claimant's Reply, ¶ 702.
[711] Claimant's Reply, ¶ 703.
[712] Claimant's Reply, ¶ 704.
[713] Claimant's Reply, ¶ 705.

b. Respondent's position

553. According to Respondent, during the contractual relationship, Claimant never complained about the quality of the waste,[714] and prior to the investment, the data on the waste quality was widely known.[715] With regard to Article 5 of the TEC Concession, Respondent contends that the quality-of-waste ratios were only indicatively stated in this provision.[716]

554. Moreover, Respondent argues that Claimant has, without any basis, pursued the thesis that the waste delivered negatively affected the production of CDR. However, the management system of the Calabria Region was originally designed to be "resilient to possible quality/quantitative variations of the source separation."[717] In particular, Respondent contends that there is no evidence that better source separation of packaging waste (which mainly consists of plastics and paper) would have resulted in a better operation of the MBT plants and in a higher yield of CDR.[718]

555. As to the absence of landfills, Respondent argues that while each plant was meant to have its own landfill, only the Marella landfill (Gioia Tauro) was built and the Melicuccà landfill (Reggio Calabria) was almost complete before the termination of the TEC Concession.[719] Moreover, Respondent contends that the obligation to identify landfills was jointly imposed on TEC and the *Commissario* pursuant to Articles 6 and 7 of the *Atto di Sottomissione*, and that it was Claimant who failed to prove that it had rightly applied for permits for the construction of the landfills. Despite the efforts of the *Commissario*, who made several inspections to identify sites, the plans submitted by Veolia proved to be almost always inadequate.[720]

c. Analysis of the Tribunal

556. Claimant submits that Respondent breached (i) Article 5, and Annex F of the TEC Concession, by failing "to deliver quantity and quality-compliant waste";[721] and (ii) Articles 6 and 7 of the *Atto di Sottomissione* regarding the set-up of landfills near the five MBT plants,[722] and claims that such breaches generated additional costs (*Conguagli*) in the amount of € 41,7 M.[723] According to Claimant, since it could not refuse to receive waste, the only available remedy is compensation.[724]

557. Respondent does not dispute that the total input of waste delivered to the MBT plants never complied with quantity and quality ratios of waste set out in Article 5,[725] and that it delivered USW in excess

[714] Respondent's Rejoinder, ¶¶ 97-98; Respondent's PHB1, ¶ 105.
[715] Respondent's Rejoinder, ¶ 98.
[716] Respondent's Rejoinder, ¶ 418.
[717] Respondent's PHB1, ¶ 100.
[718] Respondent's PHB1, ¶ 100.
[719] Respondent's PHB1, ¶¶ 129-130.
[720] Respondent's PHB1, ¶¶ 131-133.
[721] Claimant's Reply, ¶ 693. See also, *ibid.*, ¶ 64, footnote 73: "The Municipalities and authorities delivered a significantly lower amounts of SC waste than the specified target of 135,000 t/a (*i.e.*, 9,024 to 20,769 t/a in the years 2007 to 2011), and the tonnage of SUW provided was higher than 276,000 t/a (at circa 317,813 to 372,751 t/a in the years 2007 to 2011)."
[722] Claimant's Memorial, ¶ 258.
[723] Claimant's Reply, ¶¶ 120, 706; Accuracy First Expert Report, ¶¶ 6.18-6.23.
[724] Claimant's Reply, ¶ 697.
[725] PoliMi First Expert Report, Section 5.4.1; Accuracy First Expert Report, ¶ A7.20 "TEC should be compensated for the quantity

of such ratios.[726] Respondent objects to Claimant's claims on the grounds that (a) its obligation to deliver waste was only subject to the " indicative" ratios of Article 5; and (b) that it had no obligation to cover the extra costs derived from the quantity and quality assignments of waste.[727] Moreover, Respondent contends that the "surplus consignments" of USW or MSW had actually "increased profit" for TEC by € 761,860, which was higher than the lost profits from the sale of recycled products. Therefore, there are no grounds for Claimant's claims of extra costs due to the greater quantity of USW delivered to the plants and the excessive humidity.[728]

558. Respondent also contends that there was no obligation to ensure the availability of nearby landfills under Articles 6 and 7 of the *Atto di Sottomissione,* and Article 9 of the TEC Concession, but only to jointly identify the sites.[729]

559. Considering the foregoing, the Tribunal must determine (i) with regard to the provision of waste (a) whether Respondent entered into an obligation with Claimant to deliver specific ratios and quantities of the different types of waste under Article 5, and (b) whether Respondent had an obligation to assume the extra costs derived from the provision of waste below the total annual quantities of waste stated in Article 5. Regarding Respondent's obligations under Articles 6 and 7 of the *Atto di Sottomissione,* and Article 9 of the TEC Concession, the Tribunal must determine (ii) whether Respondent entered into an obligation to ensure the availability of nearby landfills and whether it breached such an obligation.

(i) Whether there was an obligation to deliver specific quality and quantity of waste

(a) <u>The waste quality</u>

560. Article 5 of the TEC Concession provides that:

> "The Grantor undertakes to assign to the installation, and hence to pay, for the amounts and procedures established by this agreement and the attachments, an annual **amount** of 411,000 (four hundred and eleven thousand) tonnes of waste.
>
> On a merely indicative basis, this quantity could be subdivided as follows:
>
> 276,000 tonnes/year of Solid Urban Waste as-is;
>
> 135,000 tonnes/year **of various materials** to be recycled, deriving from the collection system, separated (dry [packaging, bulky items, etc.], wet and green). The characteristics of the waste are reported in the project documents **as an indication**.

of waste actually delivered to the operational plants being lower than initially forecast"; p. 104, ¶ A7.41 "Overall, the adjustment is higher than that using the Management CTU's methodology, reflecting the (a) fact that actual USW tonnes provided were higher than expected USW tonnes per the TEC Concession, even though total tonnes were lower; and (b) the impact of inflation" (emphasis omitted).

[726] PoliMi First Expert Report, Appendix A.

[727] Respondent's Counter-Memorial, ¶ 458.

[728] Respondent's Counter-Memorial, ¶ 458 (a).

[729] Respondent's Counter-Memorial, ¶ 458 (b).

> 5.2 The assignment procedures shall be regulated by the Management Regulations proposed in the tender.
>
> 5.3 In determining the assignments of waste, the Grantor shall take account of the potential of the installations, as indicated in the definitive design and specified in greater detail in the executive project to be drawn up."[730]

561. Claimant submits that when the first paragraph of Article 5 of the TEC Concession is read jointly with Article 5.3 and the *Atto Integrativo*, it leads to the conclusion that the "potential of the installations" understood as the capacity of the plants, not only referred to the quantity but also to the distribution of the quality of the waste because the plant's capacity, as approved by the project set up by the *Commissario*, was of "276,000 tons of solid urban waste and 135,000 tons of sorted waste."[731]

562. The Tribunal is not persuaded that under Article 5 of the TEC Concession the *Commissario* "had the obligation to observe" both the annual quantity of waste and its quality distribution.

563. Article 5 explicitly states that the subdivision of waste quality was "merely indicative", that the waste characteristics were "an indication" and that "various materials" could be part of such subdivision. The language in Article 5 is clear and unambiguous in that the quality distribution was only a reference or indication, but not an obligation.

564. Moreover, there is nothing in Article 5.3 supporting the conclusion that the "potential of the installations" –a criterion for waste assignment– was related to the different qualities of waste that a plant can process rather than the overall quantity of waste. By contrast, the financial plan measured the "potentiality per year in tonnes" by the total annual quantity of waste defined in Article 5 (411,000 tonnes of waste per year).

565. Similarly, Article 1 of Annex F (waste production subsection), measured the "potentiality" of a plant by reference to the "determined **quantities** of [USW]."[732] This provision does not mention waste quality ratios[733] and only references USW, which, at best, indicates that the potential of a plant was relevant insofar as it could process certain amounts of USW. This further confirms that the amount of SW and the ratios defined in Article 5 were merely indicative.

566. Annex F does not define specific quality ratios. It only contains a list of examples of the products that fit in the "typology of waste" that could be treated in the MBT plants, and the type of waste that "may not be accepted at the plant." Article 1 of Annex F (Contributions Data subsection) refers to the 276,000 tonnes of SUW and 135,000 tonnes of SW as an "**estimated** sequence of contributions" (emphasis added). Hence, the text in Annex F is consistent with the position explicitly stated in Article 5 as to the "indicative" or "estimated" nature of the waste quality distribution referred to therein.

[730] C-10, TEC Concession, 17 October 2000, Art. 5 (emphasis added).
[731] Claimant's PHB, ¶ 71; Tr. Hearing Day 2, 325:1-23 (Examination of Mr. Bozzetto). The transcript refers to "tons" but the quantities in the TEC and TEV Concessions were expressed in "tonnes" or "tonellatas" in Italian.
[732] C-10, TEC Concession, 17 October 2000, Annex F, p. 37 (emphasis added).
[733] C-10, TEC Concession, 17 October 2000, Annex F, p. 35.

567. In addition, Article 6 of the TEC Concession provides that the gate fee is established "with reference to the quantities of waste" in Article 5, not the quality of waste. Also, Article 6.3 provides that the gate fee may be modified only when the waste assigned is above or below a "minimum guaranteed quantity described in art. 5" or below 80% of the "foreseen quantities." There is no reference to a minimum, guaranteed, or foreseen quality of waste.

568. The clear terms of Articles 5 and 6.3 of the TEC Concession as regards the waste quality ratios are confirmed by the substantially different language used in the TEV Concession. Article 6.3 of the TEV Concession does not refer to the "quantity" of waste and explicitly refers to the gate fee amendment for changes in "the composition of the assigned waste." In turn, Article 5 of the TEV Concession does not define waste quality ratios and instead refers to a total annual quantity of waste that must be of the "characteristics of the categories of goods indicated in the project documents,"[734] without making any clarification on the indicative nature of such characteristics. If the intention of the parties to the TEC Concession had been to use the waste quality distribution as a parameter to adjust the gate fee, they could have done so in clear terms, as in the case of the TEV Concession. But they did not.

569. Also, it is worth noting that in the financial plan of the TEC Concession the gate fee was calculated over the total quantity of waste, *i.e.*, 411,000 tonnes of waste per year, not based on the specific waste quality ratios in Article 5 of the TEC Concession,[735] an element that is also found in the *Atto Integrativo*'s financial plan for Sambatello 1.[736]

MANAGEMENT COSTS - MANAGEMENT REVENUES + FINANCIAL CHARGES			*55,466,265,524*
[redacted]			
G.1 TARIFF			*123.95*
(Related to treated waste input *411,000* t/year) L/kg input			[redacted]
L. 55,466,265,524 L.0 divided by 411,000 tonnes.			
PERCENTAGE REDUCTION IN RELATION TO THE BID-BASED TARIFF			*0.3659%*
[redacted]			
for investment charges	*48.92 %*		*66.01*
[redacted]			
for pure operating costs	*33.82 %*		*45.64*
[redacted]			
for overheads and profit	*17.26 %*		*23.30*
Totals	*100.00 %*	[Stamp & *signatures*]	*134.95*

570. TEC's correspondence indicates that selective collection was not considered as they thought it was almost non-existent, conversely, the company's economic and financial assumptions were made on the basis of 385,000 tonnes per year of "OM" or the total quantity of USW but not SW. Thus, it does not appear that the quality of waste was determinative criterion for the capacity of TEC's plants, but rather the total USW:

> "Our partners, based on their own regional projections for the territory considered, asked TEC to receive 450,000 tonnes (OM + selective collection).

[734] C-17, TEV Concession, 31 July 1997.
[735] C-10, TEC Concession, 17 October 2000, Annex 1 (G), Financial Plan, Annex "B".
[736] C-11, *Atto Integrativo* concluded between TEC and the *Commissario*, 31 August 2001, p. 14.

> The put-or-pay issue will be a crucial point in the drafting of the 'Variant Appraisal'."[737]

571. Overall, the Tribunal does not see a reason to depart from the clear and unambiguous text of the TEC Concession that the contemplated waste quality distribution was merely an indication and rejects Claimant's position that the "quality of waste parameters" included in Article 5 of the TEC Concession were binding.[738]

572. This conclusion is not altered by the fact that Italian laws imposed a goal on the *Commissario* to "attain the minimum objective of 35% of separated collection of waste."[739] While the overall purpose of the waste disposal system was to "reduc[e] recourse to dedicated plants and the associated implementation costs, as well as to overcome recourse to landfills on a definitive basis" by mandatorily implementing "differentiated collection",[740] such a legal purpose or goal was not necessarily an obligation "entered into" nor modified the terms on which the State "entered into" an obligation under the TEC Concession to guarantee only an annual quantity of waste, with a quality distribution merely "indicated by way of example."[741] The fact that Article 5.3 "provided a percentage of separated collection waste **in line with the programs and with the legal objectives** (Legislative Decree No. 152 of 2006, Law No. 296 of 27 December 2006), insofar as they were equal to 32.8%,"[742] does not make it an obligation assumed towards the investor.

573. Accordingly, in the absence of an obligation entered into by the State with the investor to deliver waste in the quality ratios "merely indicated" in Article 5.3 of the TEC Concession, the Tribunal cannot conclude that Respondent breached the TEC Concession as a result of not delivering certain qualities of waste and therefore, the Tribunal finds no violation of the ECT's umbrella clause in this regard.

(b) Whether Claimant is entitled to the extra costs for the quality and quantity of waste

574. Respondent does not dispute that it had an obligation to deliver a total quantity of waste of 411,000 tonnes per year and that such amount was never met.[743] However, Respondent contends that it did not have an obligation to cover the extra costs of the operation because the TEC Concession was not a "put-or-pay" contract,[744] and if there were differences in "the total quantity" of waste because it

[737] C-220, Internal Minutes on Negotiation of the Third Amendment, 22 April 2011, p. 2 (emphasis omitted).
[738] Claimant's PHB1, ¶ 71.
[739] C-51, Report of the Parliamentary Inquiry, 19 May 2011, p. 6 "a state of emergency was declared within the territory of the Region of Calabria for the management of urban solid waste; thus, with Prime Ministerial Order No. 2969 of 21 October 1997, the Deputy Commissioner of the Government for waste emergencies was appointed, to whom precise objectives were assigned, in particular, among other things, that of ensuring 20% separated waste collection 'by 30 June 1999' and the planning of further interventions 'in order to attain the minimum objective of 35% of separated collection of waste over the following two years, as well as...' (art. 3.1)."
[740] C-9, Minister of Interior's Ordinance No. 2696, 21 October 1997, p. 1.
[741] C-51, Report of the Parliamentary Inquiry, 19 May 2011, p. 26.
[742] C-51, Report of the Parliamentary Inquiry, 19 May 2011, p. 26 (emphasis added).
[743] Respondent's Counter-Memorial, ¶ 34; PoliMi First Expert Report, Appendix A. (PoliMi's first expert report records the quantities of waste effectively delivered)
[744] Respondent's Rejoinder, ¶ 536.

either "exceeds 102% […] or is less than 98%," the TEC Concession only envisaged the tariff adjustment mechanism under Article 6.3.[745]

575. As for the quantity of waste, Claimant mainly disputes the excessive quantity of USW and the insufficient quantity of SW, arguing that "the MBT plants received more waste, and in lesser quality, than the designed capacity and that TEC could not refuse such excessive amounts, which, pursuant to the rationale of the TEC Concession, should have given rise to a revision of the gate fees."[746] However, Claimant also requests payment of compensation for "insufficient quantities of waste" given "the quantity of waste actually delivered to the operational plants being lower than initially forecast."[747]

576. Despite the fact that the *Commissario* had no obligation to meet specific waste ratios in terms of quality, he did have an obligation under Article 5 to meet the total annual quantity of waste. Article 5 provides that the Grantor had an "undertaking" to assign "and hence to pay […] an annual **amount** of 411,000 tonnes of waste."[748] In contrast with the language in Article 5.3, this provision clearly states in mandatory terms an obligation to supply a specific annual quantity of waste.

577. However, there is no specific provision in the TEC Concession mandating the *Commissario* to assume the "extra costs" for the operation derived from the lack of compliance with the annual quantities stated in Article 5. Rather, the consequence of not complying with the "minimum guaranteed quantity" of waste in Article 5 of the TEC Concession was the "modification" of the gate fee, when the quantity of waste fell below 98% or exceeded 102%, or if the "foreseen quantities" fell below 80%, the joint evaluation of "measures to be adopted in order to guarantee the economic and financial equilibrium of the concession," as envisaged in Article 6.3.

578. As found in subsection **(ii)** above, unlike the automatic update provided for in Article 6.2, the mechanism provided for in Article 6.3 was not an automatic adjustment, but required negotiation with the *Commissario*. Respondent only had an obligation to negotiate in good faith with Claimant to agree on an adjustment of the gate fee, and only when such an adjustment was adopted would the Commissario have an obligation to pay the "amended fee", as stated in Article 6.4 of the TEC Concession.

579. This means that the *Commissario* did not breach the TEC Concession by persistently rejecting the *Conguagli* invoiced by TEC, insofar as it included claims for extra costs derived from the excessive quantities of USW –and correlative lesser quantities of SW– which were not mandatory. However, the *Commissario* did fail to meet the "minimum guaranteed quantity" or the total annual "contractual tonnes" for the Gioia Tauro, Crotone, Rossano, and Siderno MBT plants.

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[745] Respondent's Rejoinder, ¶ 537; Respondent's Counter-Memorial, ¶ 458 (a).
[746] Claimant's PHB2, ¶ 68.
[747] PoliMi First Expert Report, p. 55, § 5.4.1; Accuracy First Expert Report, ¶ A7.20: "TEC should be compensated for the quantity of waste actually delivered to the operational plants being lower than initially forecast"; p. 104, ¶ A7.41: "Overall, the adjustment is higher than that using the Management CTU's methodology, reflecting the (a) fact that actual USW tonnes provided were higher than expected USW tonnes per the TEC Concession, even though total tonnes were lower; and (b) the impact of inflation" (emphasis omitted).
[748] C-10, TEC Concession, 17 October 2000, Art. 5 (emphasis added).

580. Respondent does not dispute that it did not deliver the 411,000 tonnes of waste set out in Article 5 of the TEC Concession, nor that the actual quantities of waste were below 98%, as the threshold defined in Article 6.3 to activate the adjustment mechanism. PoliMi's first expert report records the quantities of waste delivered, as follows:

Appendix A: Input/Output of TEC plants

Overall operational data of the TEC MBT plants (in tonnes per year) derived from the annual "Rapporto rifiuti" compiled by ISPRA.

	Total INPUT to MBT plants	Total output CDR to energy recovery		Total output to landfill	
2005	219.887	50.909	23%	155.955	71%
2006	281.060	94.061	33%	164.536	59%
2007	336.757	121.119	36%	206.185	61%
2008	318.391	89.691	28%	220.241	69%
2009	372.885	94.257	25%	268.009	72%
2010	336.370	101.642	30%	189.057	56%
2011	331.300	72.942	22%	190.911	58%
2012					
2013	184.578	38.012	21%	126.346	68%
2014	170.722	48.072	28%	105.276	62%
2015	269.553	29.176	11%	218.454	81%
2016	276.275	30.132	11%	228.648	83%
2017	262.916	43.661	17%	185.980	71%
2018	241.380	36.688	15%	165.343	68%

581. Accordingly, the Tribunal finds that Respondent breached its obligation in Article 5 of the TEC Concession, and therefore, that under Article 6.3 Claimant had a right to claim the adjustment of the gate fee such that it "maintains the economic and financial equilibrium." However, such an adjustment was never made, and there was no payment of an "amended fee with regard to the quantity of waste effectively assigned," as required by Article 6.4.

582. Accordingly, in the damages section, the Tribunal will consider whether the damages claimed by Claimant duly compensate it for the payments in respect of the missing tonnes of waste it was entitled to receive, in the terms set out in the TEC Concession.

(ii) Whether Respondent is liable for the deficit in the location and construction of the landfills

583. By 2011, there was a critical landfill deficit with only one site completed[749] and another one in the process of being completed.[750] The Commissario had recognized that securing the landfills was "necessary for the operation of the system to avoid the cost and environmental impact of unnecessary waste transfers, in line with the contractual agreements,"[751] and that the nearby location of the landfills to the plants was required to "minimise transport of waste within the regional territory and the consequent environmental impact."[752] In this sense, there seemed to be no disagreement as to the

[749] C-136, Minutes of meeting between TEC and *Commissario*, 25 September 2008. "the meeting dealt with the problem connected with the now imminent closure of the only service dump of the Calabria Sud system located in Marrella in the municipality of Gioia Tauro (RC)."
[750] Tr. Hearing Day 3, 595:11-22 (Examination of Mr. De Matteis).
[751] C-219, Memorandum of Understanding between TEC and the *Commissario*, 27 January 2011, Art. 2.
[752] C-46, Third Amendment or *Secondo Atto Integrativo* between TEC and the Commissario, 21 June 2011, Art. 5.1(d).

existence of extra costs derived from the lack of nearby landfills, as it "may cause difficulties in the recovery of the costs for the disposal of such wastes in other landfills."[753]

584. However, Respondent relies on the arguments of the *Commissario* that the *Conguagli* were not caused by its actions, that these costs were in the financial plan and therefore were to be assumed by the Concessionaire, and that, in any case, they were being offset by TEC's lower costs due to the lack of investment in landfills.[754] Accordingly, the disagreement between the Parties lies in who or what caused the landfills crisis and whether Claimant had a right to claim compensation for the extra costs derived from such a crisis.

585. Regarding the construction of the landfills, Articles 6 and 7 of the *Atto di Sottomissione* provide that:[755]

> "Art. 6 - The Concessionaire and the Grantor shall jointly identify **areas sufficiently close to the locations of the plants**, in which they may locate the landfill sites serving the plants themselves, for the disposal of process waste. The Concessionaire shall undertake to present the associated projects to the Grantor.
>
> The Grantor likewise undertakes, where the legal conditions hold, to authorize the construction and management of the aforementioned landfill sites by the Concessionaire as a priority for the uses associated with the operation, within the Concession, of the plants in question, as specified in greater detail in the Chapter 'General grounds for the variants' (relating to the 'Calabria Sud integrated system) and in Chapter 6 (referring to the extension of the Gioia Tauro waste-to-energy plant) of the Technical Report.
>
> Art. 7 - The Grantor hereby entrusts to the Concessionaire, who hereby accepts, the construction and management of the landfill sites described in the preceding art. 6."

586. The wording of the foregoing provisions unambiguously provides that the Concessionaire had an obligation to cooperate with the *Commissario* in the identification of sites for the landfills with the specific characteristic that they were "sufficiently close to the locations of the plants." For purposes thereof, the Concessionaire would present projects to the *Commissario*, but the latter gave an "undertaking" to authorize the landfill's construction. Such an undertaking under Article 6 of the *Atto di Sottomissione* is aligned with the *Commissario*'s obligations under Article 9 of the TEC Concession to support TEC "through the specific performance of the administrative practices […] falling within its area of authority," to obtain the authorizations needed, and to "adopt the measures and ensure the acts of compliance" within his competence.[756]

587. Moreover, the *Commissario*'s powers granted under the Italian Prime Minister's Ordinance No. 3731/09,[757] confirm that not only did he have an obligation under the TEC Concession and the *Atto*

[753] C-20, Preliminary Legal Due Diligence Report of Macchi di Cellere Gangemi, 24 January 2007, p. 12.
[754] C-82, Minutes of the meeting between TEC and *Commissario*, 30 August 2007, p. 4; C-83, Minutes of meeting between TEC and the *Commissario*, 4 September 2007 p. 2.
[755] C-14, *Atto di Sottomissione* between TEC and the *Commissario*, 31 October 2003, Arts. 6-7 (emphasis added).
[756] C-10, TEC Concession, 17 October 2000, Art. 99 (c) and (d).
[757] C-50, O.P.C.M. No. 3731/09, 16 January 2009.

di Sottomissione to approve the construction of the landfills, but he also had sufficient authority to do it.

588. The *Commissario* had broad and extraordinary powers.[758] Among others, the *Commissario* could "in cases of absolute urgency, […] order the requisition for use of private landfills, authorised for the processing of non-hazardous waste, even if managed or owned by entities lacking the certification described in Presidential Decree No. 252 of 3 June 1998, as well as of the associated company assets necessary for the operation of the plants."[759] His approval of a project would replace "inspections, opinions, authorizations and concessions by state, regional, provincial and municipal entities, and establish a variant to the general urban planning instruments, where necessary," waiving ordinary legal conditions and reducing legal deadlines.[760]

589. The *Commissario*'s broad powers, particularly in connection with the use of landfills, were recognized as early as the Minister of Interior's Ordinance No. 2696/1997, which provided that:

> "[s]olely for the purpose of dealing with the management of urban solid waste, while awaiting the implementation of the measures and interventions and for the execution of the plants described in the preceding paragraph 3 and within the strictly necessary volumetric limits, the deputy commissioner may use the legal instruments provided in this order to use a number of existing public landfills, subject to the adaptation of the same in observance of the current legal provisions."[761]

[758] C-50, O.P.C.M. No. 3731/09, 16 January 2009, Art. 4: "4. For the intervention and works plans, for which the current regulations provide for the state or regional environmental impact assessment procedure or for plans relating to works impacting assets placed under protection pursuant to Legislative Decree No. 42 of 22 January 2004, the same procedure must be concluded within 30 days of activation. In the event of failure to express an opinion or grounded express dissent, the valuation itself shall be carried out in an appropriate services conference, to be concluded within 15 days of calling. In the event of failure by the authorities responsible for the protection of environmental, landscape/territorial and historical and artistic heritage to express an opinion or grounded express dissent, regarding planned interventions and works which are the preserve of the state, within the context of the services conference, the decision shall be referred to the Prime Minister, waving the procedures stipulated by article 14 *quater* of the Law No. 241 of 7 August 1990 and subsequent amendments and additions, the terms of which shall be reduced by half. If the failure to express an opinion or dissent refers to planned interventions or works which are the preserve of the regional government, the decision shall be submitted to the Regional Government of Calabria, which shall mandatorily express an opinion within 30 days of the Deputy Commissioner's request.
5. The Deputy Commissioner shall provide for emergency occupations and for any expropriations of the areas necessary for the execution of the works and interventions described in this order, with the terms of the law reduced by half. Once the emergency occupation decree has been issued, the same Deputy Commissioner shall ensure a drawing up of the consistency status and report on taking possession of the land, even in the presence of only two witnesses."

[759] C-50, O.P.C.M. No. 3731/09, 16 January 2009, Art. 3.1.

[760] C-50, O.P.C.M. No. 3731/09, 16 January 2009, Art. 4.2.

[761] C-9, Minister of Interior's Ordinance No. 2696, 21 October 1997, ¶ 7. See also, C-139, O.P.C.M. No. 3585, 24 April 2007: the *Commissario* was granted the specific power to identify "after consulting the provincial authorities" the landfill for the disposal of rejected material from the waste treating process.

590. Additionally, the Third Amendment of 2011 confirms that the *Commissario* had always had the power to "authorise" the construction of the landfills,[762] which is consistent with TEC's repeated communications requesting the *Commissario*'s authorizations for the landfill projects.[763]

591. The Tribunal therefore finds that the *Commissario* had an obligation to authorize the construction of the landfills, and the powers to do so. However, such an obligation or undertaking was only applicable "where the legal conditions hold." This meant that TEC had to submit projects that complied with legal and technical requirements for the *Commissario* to approve them. As explained by Mr. De Matteis at "[t]he project in itself, the submission of the project was not enough. All the legal checks had to be carried out." [764]

592. TEC identified various landfills and submitted their projects for the *Commissario*'s approval, but the *Commissario* did not approve such projects.[765] Claimant relies on the Management Award and the Parliamentary Inquiry Report to argue that the lack of approval of such projects was unjustified and was related to the opposition of the local populations.[766]

593. While it may be true that certain landfill projects faced "claims of the local people where the localization was forecast,"[767] the evidence in the record does not allow the Tribunal to conclude that the landfills were not built due to the interference of the local population or "due to the Commissario and not to TEC."[768] The Tribunal cannot conclude that the projects proposed by TEC complied with technical or legal requirements, as Claimant has not met the burden of proof on this matter.

594. First, there is Mr. De Matteis's uncontested testimony at the Hearing[769] on how the *Commissario* had fulfilled his obligations with regard to the landfill projects. In line with the wording in Article 6 of the *Atto di Sottomisione*, the *Commissario* could only approve projects when they met the legal and

[762] C-46, Secondo Atto Integrativo between TEC and the Commissario, 21 June 2011. Art. 5.1(d) ("authorize, exercising the powers attributed to it by the cited Prime Ministerial Order and lastly by article 15 of Prime Ministerial Order No. 3925 of 23/2/2011, the construction and operation of dumps of the TEC1 Complex, within the deadline of 31/12/2012. The dumps shall be located at sites close to the plants, both in the southern zone and in the northern zone of Calabria, so as to minimise transport of waste within the regional territory and the consequent environmental impact. TEC gives note that with regard to the capacity of 2,000,000 cubic metres of dumps by the service indicated in article 2.2, item b), this includes 450,000.00 cubic metres of volume of the dump from the Melicucca service, for which the Commissioner has already authorised the construction and management, in the Municipality of Meliccuca"); Claimant's Memorial ¶ 272, 282; C-14, Atto di Sotomissione 31 October 2003; Vicenzo Bozzetto Witness Statement ¶ 66.
[763] C-206, Letter from TEC to the *Commissario*, 13 January 2010; C-207, Letter from TEC to the *Commissario*, 17 February 2010.
[764] Tr. Hearing Day 3, 597:16-19.
[765] Tr. Hearing Day 3, 595:11-22, 596; Claimant's PHB1, ¶ 73.
[766] Tr. Hearing Day 3, 598:8-599:3.
[767] C-20, Preliminary Legal Due Diligence Report of Macchi di Cellere Gangemi, 24 January 2007, p. 11.
[768] C-20, Preliminary Legal Due Diligence Report of Macchi di Cellere Gangemi, 24 January 2007, p. 358.
[769] Tr. Hearing Day 3, 600:11-601:6, question from Mr. Ahmad to Mr. De Matteis: "MR AHMAD: […] Both documents confirm that TEC cannot be held responsible for the failure to build landfills. […] Do you agree with that? MR DE MATTEIS: No, not really. May I go on? May I explain why?.MR AHMAD: I'm happy for your colleagues on the other side to take you up on redirect […]."; Tr. Hearing Day 3, 619:14-620:8, Tribunal's questions: "MS GILL: Good afternoon, Mr De Matteis. I have just one follow-up question, which was invited by counsel for the Claimant and not taken up by counsel for the Respondent, but I would like to know the answer. You will recall you were taken to the 2011 Parliamentary Committee of Inquiry report and also to the management arbitration award, and it was put to you by counsel in this way […]. He suggested that these documents indicated that TEC was not responsible for the failure to build landfills and that the Commissario had failed to do what was necessary to bring the landfills about and asked you if you agreed, and you said no. Can you explain to the Tribunal why you disagree, in light of the comments that are made in those documents?"

technical specifications, as was the case of the Marella and Melicuccà landfills.[770] The *Commissario* could not merely "go and have a look at the site and decide it was potentially suitable" because "a number of investigations were needed, as required by European law," and a "project had to be prepared."[771] While the *Commissario*'s powers did involve certain "derogations", they "were not technical derogations." So, all the technical regulations had to be complied with, and the time frame or the requests for opinions or other elements of this kind were derogated from."[772]

595. In this sense, if a project was rejected or pending approval, it was not on arbitrary or unreasonable grounds, but after a "technical examination" was conducted.[773] In addition, Mr. De Matteis underscored that the *Commissario* would always secure a place to dispose of the waste when the landfills were unavailable,[774] a matter that has not been rebutted by Claimant.

596. Second, it is not disputed that Claimant submitted landfill projects for the *Commissario*'s approval, but there is no evidence that such projects were "viable proposals"[775] that were inexplicably delayed or denied by the *Commissario*. Despite alleging that it "requested the necessary authorizations" and that it "submitted all the required plans," Claimant failed to submit such requests and plans in this arbitration.[776] The Tribunal cannot conclude that Claimant's landfill projects were "viable" without assessing their contents. While the findings of other entities, *i.e.*, the tribunal in the Management Arbitration, or the Parliamentary Inquiry Committee, can provide guidance, the Tribunal cannot simply adopt their conclusions as its own. There is also no evidence of the *Commissario*'s alleged "dilatory intent, an unjustified burdening of procedures and failure to exercise those extraordinary powers."[777]

597. By contrast, there is evidence that, regardless of the actual or potential opposition by the Municipalities or local population, the *Commissario* was conducting assessments on TEC's submitted projects, ordering the implementation of "instructions", and that the "procedure [was] moving forward."[778] Also, there is evidence that the projects pending approvals were subject to "adaptation[s]", "survey[s]", "clarifications and specifications from the designers," and "impact assessment[s]" among others.[779]

598. In sum, Claimant has not met the burden of proof for the Tribunal to conclude that TEC's projects were, as claimed by Claimant, "viable proposals" that the *Commissario* unjustifiably frustrated with a "dilatory intent." On the contrary, the *Commissario* processed TEC's proposals, and the landfill projects were still subject to studies and adjustments to meet technical and legal requirements.[780]

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[770] Tr. Hearing Day 3, 622:17-21 (Examination of Mr. De Matteis).
[771] Tr. Hearing Day 3, 622: 7-17 (Examination of Mr. De Matteis).
[772] Tr. Hearing Day 3, 626:16-21 (Examination of Mr. De Matteis).
[773] Tr. Hearing Day 3, 622: 24-25, 623: 1, 14-25 (Examination of Mr. De Matteis).
[774] Tr. Hearing Day 3, 624: 4-8 (Examination of Mr. De Matteis).
[775] Claimant's PHB2, ¶ 70.
[776] Claimant's PHB1, ¶ 73; Tr. Hearing Day 2, 340:9–25, 341:1–5. (Examination of Mr. Bozzetto). Mr. Bozzetto was unable to identify the landfill projects' requests in the record, a matter that Claimant did not rebut at the Hearing or in its post-hearing briefs.
[777] C-130, Minutes of TEC Board of Director's meeting, 25 February 2010, p. 22.
[778] C-138, Appraisal Report, 12 February 2010, including a chart reporting the "Landfill situation in Calabria as of 11/02/2010", p. 4.
[779] C-138, Minutes of meeting between TEC and Commissario, 6 September 2009, and Appraisal Report, 12 February 2010.
[780] C-138, Minutes of meeting between TEC and Commissario, 6 September 2009, and Appraisal Report, 12 February 2010.

Hence, the Tribunal can only conclude, with the information available to it, that the *Commissario* fulfilled its obligations.

599. Third, the Tribunal observes that Claimant only "activated authorisation processes (AIA) for all plants and submitted projects related to the Melicucc[à] landfill and the elevation of the Rossano landfill" by mid-late 2009.[781] This was after the adoption in 2005 of regulations that limited the amount of FOS in landfills, which entered into force in July 2009, through a Decree of 2008.[782] This shows that Claimant knew –or at least should have known– of the existence of this regulation for months[783] if not years, but only presented the landfill projects by the time it entered into force. The timing of Claimant's requests does not support its argument that the landfill crisis was created by the *Commissario*.

600. Lastly, between January and April 2011, the *Commissario* inquired about the construction of the Melicuccà landfill, which was approved on 29 June 2010, and urged on the delivery of the final works.[784] Ultimately, this was the only landfill completed from those submitted by TEC to the *Commissario* in 2009 for discussion, after the imminent closure of the Marella landfill and the saturation limit reached by the Rossano landfill.[785] Although the Melicuccà landfill was completed, it never came into operation because it was initially placed under criminal seizure, delaying the works. During this period, the *Commissario*,[786] and TEC independently, continued their efforts regarding other landfill sites.[787]

601. The Tribunal therefore finds no breach of the TEC Concession for the alleged failures of the *Commissario* in connection with the location and construction of the landfills.

Conclusion

602. Based on the aforementioned, the Tribunal reaches the following conclusions on the *Conguagli* under the TEC Concession:

(a) Waste quality: There was no obligation under Article 5 of the TEC Concession to observe a waste-quality-ratio as the wording of Article 5 was "merely indicative". This reading is confirmed by the wording of Annex F and Article 6 of the TEC Concession which refers to the quantities of waste rather than the quality.

(b) Waste quantity: the Commissario had an obligation under Article 5 to meet the total annual quantity of waste, regardless of the quality distribution, and he failed to comply with such an obligation.

[781] C-130, Minutes of TEC Board of Director's meeting, 25 February 2010, p. 22.
[782] C-127, Law-Decree no. 208, 30 December 2008, regarding the admissibility criteria of waste entering landfills; C-230, Ministerial Decree of definition of the criteria for admissibility of waste, 3 August 2005.
[783] C-130, Minutes of TEC Board of Director's meeting, 25 February 2010, p. 2.
[784] C-213, Letter from the *Commissario* to TEC, 11 January 2011; C-214, Letter from the *Commissario* to TEC, 16 February 2011; C-215, Letter from the *Commissario* to TEC, 5 April 2011.
[785] Claimant's Memorial ¶¶ 275-277.
[786] C-120, Minutes Conciliation Round Table between TEC, the Commissario and the Calabria Region, 27 January 2011.
[787] First Witness Statement Vincenzo Bozzetto Witness Statement, ¶ 68,

(c) Landfills deficit: while the authorization to build the landfills was on Respondent, it was subject to the filing of projects that complied with the applicable legal and technical requirements. However, Claimant did not prove in this arbitration that it had satisfied this burden, thus, the Tribunal cannot conclude that the landfills' deficit was attributable to the Commissario.

6. TEC's *Contributo*

a. Claimant's position

603. Claimant maintains that, by refusing to pay the outstanding share of the *Contributo*, Respondent breached the Concession, and hence, the ECT's umbrella clause.

604. Under Article 8-bis *Atto di Sottomissione*, Respondent undertook to pay the amount of € 41,3 M on a *pro rata* basis, 30 days after each of the TEC1 system's plants became operational.[788] But TEC only received € 8,9 M out of the total amount of the *Contributo*, notwithstanding that all of the TEC1 plants (save for Sambatello 2) were put into operation.[789] Despite the *Commissario*'s payment requests to the Calabria Region, the latter refused to pay the amounts due.[790]

605. Claimant argues that it was entitled to the corresponding share of the *Contributo* for those completed plants, as acknowledged by the *Commissario* at the time.[791] In this vein, Claimant alleges that the Calabria Region recognized TEC's entitlement to the remaining amount of € 26,9 M;[792] and that, as acknowledged by Mr. Ottaviano, the *Commissario* was fully aware that the outstanding amounts of the *Contributo* were due to Veolia.[793] Also, Claimant submits that Respondent has conceded that the *Contributo* was to be paid on a *pro rata* basis, *i.e.*, before completion of the entire system.[794]

606. Moreover, Claimant submits that, as testified by Mr. Ottaviano, the failure to pay the *Contributo* was caused by internal in-fighting.[795] The Calabria Region refused to abide by its obligation to pay the *Contributo,* and the Commissario failed to use his powers to remedy this situation, yet these internal inconsistencies do not justify Respondent's lack of payment.[796]

607. Claimant further submits that decisions favorable to Veolia, TEC or TEV with respect to the *Contributo*, were either ignored by Respondent or rendered after the investment had been lost.[797]

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[788] Claimant's Memorial, ¶¶ 238-240; C-14, *Atto di Sottomissione* between TEC and the *Commissario*, 31 October 2003.
[789] Claimant's Memorial, ¶¶ 242-243; Respondent's Counter-Memorial, ¶¶ 454-455, Claimant's Reply, ¶ 116.
[790] Claimant's Reply, ¶ 119; C-122, Determination of the *Commissario* No. 2076, 17 February 2006; C-23, Determination of the *Commissario*, No. 4237, 20 March 2007.
[791] Claimant's Reply, ¶ 118; C-271, Certificate from the *Commissario* in respect of the Contributo, 8 March 2005, p. 10; C-15, Determination of the *Commissario* No. 9414, 22 June 2005 attached to Commissario's Ordinance No. 3619, 21 July 2005; C-124, Letter from TEC to the *Commissario*, 3 March 2008, p. 7; C-23, Determination of the *Commissario* No. 4237, 20 March 2007.
[792] C-124, Letter from TEC to the *Commissario*, 3 March 2008, p. 9.
[793] Tr. Hearing Day 3, 656:24-657:9 (Examination of Mr. Ottaviano).
[794] Claimant's PHB, ¶ 6; Tr. Hearing Day 3, 657-658 (Examination of Mr. Ottaviano); Respondent's Counter-Memorial, Section IV.A.4.1.2. ¶¶ 448, 452, 537.
[795] Claimant's PHB1, ¶ 65; Tr. Hearing Day 3, 658:19-659:6 (Examination of Mr. Ottaviano).
[796] Claimant's PHB1, ¶¶ 65-66.
[797] Claimant's Reply, ¶¶ 684, 822; Claimant's PHB, ¶ 651.

608. Also, the lack of payment of the deferred purchase price in the SPA is immaterial for the purpose of establishing a breach of the ECT. The *Contributo* was not paid and, therefore, the ECT was breached, and this is independent of whether Veolia had to pay the deferred portion to the Vendor.[798] In any case, the deferred price became ineffective with the MSA which was concluded to allow Veolia to comply with the *Commissario*'s demands for the execution of the Third Amendment.[799]

609. Lastly, Italy's argument that the payment of the outstanding *Contributo* was not due given that TEC2 and Sambatello 2 were not completed is flawed. With respect to TEC2, Italy's argument was ruled out by the Calabria Regional Administrative Court, considering that TEC2 was not part of the financial plan, and thus, the *Contributo* mentioned in the *Atto di Sottomissione* concerned solely "the plants belonging to the original system Calabria Sud."[800] As regards Sambatello 2, Veolia maintains a pro-rata amount is fully discounted from its claim and is therefore irrelevant.[801]

610. Claimant also rejects, as "barely explained," Respondent's suggestion that the delay in construction "could also cause" the POR to be withdrawn for failure to meet the required timeline.[802] Claimant reiterates that contemporaneous correspondence shows that the *Contributo* was due for the Rossano MBT, the Gioia Tauro MBT, the Crotone MBT, the Sambatello 2, the Siderno MBT and the Gioia Tauro WtE line 1; TEC2 was never mentioned.[803] Taking the plants one by one, the construction of Rossano was completed on 5 April 2001, the construction of Gioia Tauro MBT was completed before 1 February 2004, the construction of Crotone was completed on 21 September 2004, the construction of the Gioia Tauro WtE line 1 was completed on 24 November 2004 and the construction of Siderno was completed before 25 October 2006.[804] In sum, other than Sambatello 2, all of the plants of TEC1 were completed in the period covered by the POR.[805]

b. Respondent's position

611. Regarding the *Contributo*,Respondent asserts that this matter is under dispute before the Court of Genoa, where the administrator of TEC's liquidation is in a proceeding against the Office of the *Commissario* for failing to pay the *Contributo* as per Article 8-bis of the *Atto di Sottomissione*.[806]

612. In any case, under the *Atto di Sottomissione*, the *Contributo* was envisaged as depending on the timely completion of the entire Calabria Sud system. Article 8-bis of the *Atto di Sottomissione* indeed clarifies that the sum of € 41,316,551.92 would not be disbursed in a single instalment, but only when the works on the installations were going to be completed.[807] Respondent adds that the initial payment of the *Contributo* was in no manner a recognition that the full amount was due.[808]

[798] Claimant's PHB2, ¶ 59.
[799] Tr. Hearing Day 1, 233:13-237:15 (Tribunal's Questions); Claimant's Reply, ¶ 688.
[800] C-32, Judgment of the Calabria Regional Administrative Tribunal, Claim No. 183/2009, Judgment, 28 February 2011, pp. 7-11.
[801] Claimant's Reply Post-Hearing Brief, ¶ 52; C-32, Judgment of the Calabria Regional Administrative Court, Claim No. 183/2009, Judgment, 28 February 2011, pp. 7-11.
[802] Tr. Hearing Day 3, 655:5-656:1 (Examination of Mr. Ottaviano); Respondent's Post-Hearing Brief, ¶ 123.
[803] C-23, Letter from the *Commissario* to the Calabria Region, 20 March 2007.
[804] Claimant's Reply, Section 2.2.1.1.a.
[805] Respondent's PHB1, ¶ 123.
[806] Respondent's Counter-Memorial, ¶¶ 434-435; Respondent's Rejoinder, ¶ 106.
[807] Respondent's Counter-Memorial, ¶ 454.
[808] Respondent's Rejoinder, ¶ 108.

613. Moreover, Respondent contends that the judgment of the Council of State in the dispute between the Calabria Region and TEC, only recognized that the *Contributo* was "in principle legit," but did not address terms of payment and the conditions defined in Article 8-bis of the *Atto di Sottomissione*. It follows that such a judgment does not demonstrate "the failure of the Concessionaire to fulfil the obligations arising from the deed of submission, as Claimant would pretend."[809]

614. In conclusion, the *Contributo* was not paid in full due to the non-completion of the plants. Nonetheless, Respondent argues that the non-payment of the *Contributo* could not and did not cause any damage to Claimant since, under the SPA, it could omit the payment of the second installment if the *Contributo* was not paid.[810]

c. Analysis of the Tribunal

615. Claimant is requesting payment of € 26,9 M due to the lack of payment of the *Contributo* under Article 8 of the *Atto di Sottomissione* for the Siderno MBT and the WtE line 1 of TEC1.[811]

616. According to Claimant, the *Contributo* had the purpose of reducing the tariff for consumers, but was also to act as a partial compensation to the Concessionaire for the reduction of the gate fee in the *Atto di Sottomissione*.[812] Moreover, Claimant argues that the deferred price of the VSAT acquisition does not compensate or off-set the *Contributo* because the acquisition was not part of the equilibrium of the TEC Concession and when the MSA was signed for Veolia to purchase the additional 25% of shares, "the deferred price entered into that balance of that second agreement. So Veolia had a full right to the *Contributo* under that agreement as well."[813]

617. Respondent does not dispute that it did not pay the total amount of the *Contributo*, and rather argues that it never became due because only the Siderno, Rossano, Crotone, and Gioia Tauro MBT plants, as well as line 1 of the WtE plant, were completed and put into operation by TEC.[814] Under Respondent's reading of Article 8 of the *Atto di Sottomissione*, the entire Calabria Sud system had to be completed for the *Contributo* to be due, because this payment was only contemplated as a result of the enlargement of the Calabria Sud system.[815] Therefore, the non-completion of TEC2, which was meant to serve the Calabria Nord system, meant that Veolia did not have a right to the *Contributo*.[816] Respondent adds that, in any case, it did pay a total of € 8,870,663.70 "in compliance with the Agreement," which must be taken into account to reduce "the total amount."[817] In this regard, Claimant notes that such a payment "confirms [the *Contributo*'s] validity."[818]

618. It is undisputed that the sum envisaged in the *Atto di Sottomissione* was not paid in its entirety. By 2008, the Rossano, Gioia Tauro, Crotone, and Siderno MBT plants, as well as the Gioia Tauro WtE

[809] Respondent's Rejoinder, ¶ 109; C-33, Judgment of the Council of State, 23 October 2012.
[810] Respondent's PHB1, ¶¶ 124-126; Respondent's Counter-Memorial, ¶ 457.
[811] Tr. Hearing Day 1, 50:3-4 (Claimant's Opening Statement).
[812] Tr. Hearing Day 1, 236:8-13 (Tribunal's Questions) ("[T]he Contributo would not compensate fully the reduction rate").
[813] Tr. Hearing Day 1, 237:3-15 (Tribunal's Questions).
[814] Respondent's Counter-Memorial, ¶ 455.
[815] Respondent's Rejoinder, ¶ 419.
[816] Tr. Hearing Day 1, 49:9-13 (Claimant's Opening Statement).
[817] Respondent's Counter-Memorial, ¶¶ 454; Memorial, ¶ 456.
[818] Tr. Hearing Day 1, 49:22-24 (Claimant's Opening Statement).

line 1 plant had concluded experimental operation and started management,[819] and TEC had attempted numerous times to obtain payment of the *Contributo*.[820]

619. However, the Calabria Region and the *Commissario* expressly refused to pay the outstanding share of the *Contributo*, by way of Decree No. 18830 of 2008,[821] on the grounds of the lack of completion of TEC2. In particular, the Calabria Region argued that such a payment was subject to the completion of TEC2 because this project represented "at least 90% of the additional investment" and the real purpose of the *Contributo* was to reduce the tariff given the increase in construction costs that would have arisen from TEC2 if it had been completed.[822]

620. The Tribunal must therefore determine whether Respondent had a valid reason to refuse payment of the *Contributo* or if it breached the obligations under Article 8-bis of the *Atto di Sottomissione*, and if so, whether Claimant has a right to claim compensation for such a breach. For purposes hereof, the Tribunal will consider the terms of the *Atto di Sottomissione*, and Respondent's conduct, including the *Commissario*'s powers and the decisions of local courts. The Tribunal will also consider Claimant's conduct with regard to the *Contributo*.

(i) The scope of the obligations under Article 8 of the *Atto di Sottomissione*

621. Article 8-bis of the *Atto di Sottomissione*, states that:

> "The Grantor shall establish the payment of a public sinking fund contribution, due on the investment programme relating to the 'Calabria Sud' integrated solid urban waste disposal system, equal to Lit. 80,000,000,000 (€ 41,316,551.92), intended to reduce disposal fees for the users of this 'Calabria Sud' integrated system (see the attached PE financial plan).
>
> This contribution shall be paid **pro rata** (with regard to the investments) within 30 days of the commissioning of each plant of the Calabria Sud system, starting from the date of the report, for the conclusion of the experimental operation of the same plant.
>
> In the event that payment is delayed, interest shall accrue from this date, at the nominal rate provided in art. 7.2 of the Agreement, payable to the Concessionaire on the relevant unpaid quota."[823]

622. From the plain reading of the text of this provision, it is clear that the *Contributo* was to be paid "within 30 days of the commissioning **of each plant** of the Calabria Sud system"[824] . Notably, the accrual of interest would occur individually after the 30-day deadline expired for each plant.

[819] C-30, Judgment of the Administrative Tribunal No. 1126, 29 July 2008, p. 18.
[820] C-124, Letter from TEC to Commissario, 3 March 2008, p. 1.
[821] C-24, Decree of the Calabria Region No. 18830, 21 November 2008, p. 7.
[822] C-24, Decree of the Calabria Region No. 18830, 21 November 2008, p. 6 (emphasis omitted).
[823] C-14, *Atto di Sottomissione* between TEC and the *Commissario*, 31 October 2003, Art. 8-bis (emphasis added).
[824] C-14, *Atto di Sottomissione* between TEC and the *Commissario*, 31 October 2003, Art. 8-bis (emphasis added).

623. The *Contributo* was intended exclusively[825] "to reduce the disposal fees for the users of the Calabria South system,"[826] and compensate the transfer of the "environmental discomfort" to the Reggio Calabria population.[827] While it may not have been a source of profit for Veolia,[828] the *Contributo* was a key part of the agreement to reduce the gate fee from Lit. 134,95/kg to Lit. 132,45/kg (or 68.4047 € /tonne).[829] This meant that Veolia accepted to apply a reduced tariff for each operating plant on the account of the *Contributo*.[830] Thus, if Claimant were to apply a reduced tariff for each operating plant on the account of the *Contributo*,[831] it should have equally received the *Contributo* at the same time, not wait until the completion of the Calabria Sud system for its payment.

624. Considering that the *Contributo* was to be paid on a "*pro rata*" basis, the Tribunal finds no grounds to conclude that the completion and operation of one plant was a condition for the payment of the *Contributo* for the other plants that had undergoing operations. There is no such requirement in the text of the *Atto di Sottomissione*, and the gate fee reduction applied to each operating plant was simply not being offset if the *Contributo* was not paid. In this sense, while it is undisputed that TEC2 and Sambatello 2 were not completed,[832] the lack of operation of such plants was not a justification to refuse payment of the Contributo.

625. In this regard, the Tribunal observes that, consistent with the literal terms of the Atto di Sottomisione, Claimant is not requesting in this arbitration the "pro rata" [833] payment of Sambatello 2, insofar as it never entered into operation and there was no gate fee reduction to be compensated.[834]

626. Respondent also argues that the *Contributo* procured "the reduction in the overall investment that the private party had to sustain," including TEC2.[835] However, such an investment was not limited to the TEC2 works and included works in other plants that were part of the overall "need to pay the additional costs to the concessionaire, deriving from an explicit request by the Grantor, as well as those strictly associated with the changes in location of the interventions, as indicated in the expert

[825] C-12, Ordinance of the Commissario No. 2633, p. 7, ¶ 2.
[826] Memorial, ¶ 442(b); C-14, Atto di Sottomissione, 31 October 2003, Article 8-bis.
[827] Respondent's Counter-Memorial, ¶ 441.
[828] Tr. Hearing Day 1, 236:1-2 (Tribunal's Questions).
[829] C-14, *Atto di Sottomissione* between TEC and the *Commissario*, 31 October 2003, Art. 9 "Following the increases in supplies, described in art. 2, of the financing relating to the available amounts, described in art. 3, and of the management costs, described in art. 4 and of the public contribution described in art. 8 bis, the rate relating to the 'Calabria Sud' integrated system shall be amended […]."
[830] C-124, Letter from TEC to the *Commissario*, 3 March 2008, p. 6: "However, although the tariff was immediately reduced in full, the Commissioner only paid TEC an initial instalment of the subsidy amounting to approximately 8 million euro, using the sum provided by the Region as mentioned in point h) above" (emphasis omitted).
[831] C-124, Letter from TEC to the *Commissario*, 3 March 2008, p. 6: "However, although the tariff was immediately reduced in full, the Commissioner only paid TEC an initial instalment of the subsidy amounting to approximately 8 million euro, using the sum provided by the Region as mentioned in point h) above" (emphasis omitted).
[832] R-1, Report 21, 21 March 2012, The Gioia Tauro second WtE plant, *i.e.* TEC2, was never completed.
[833] C-14, Atto di Sottomissione between TEC and the *Commissario*, 31 October 2003, Article 8-bis.
[834] Claimant's PHB2, ¶ 52.
[835] Respondent's Counter-Memorial, ¶ 443.

report."[836] While "reduc[ing] the costs relating to the execution of [TEC2],"[837] was among the considerations for implementing the Contributo,]," the costs related to the other plants as part of the "programme of investments" "[t]o establish the granting of a public contribution," also were taken into consideration.[838] In any case, such investments were considerations but not the "exclusive" purpose of the *Contributo*, which was to reduce gate fees.

627. More importantly, with respect to TEC2, the Tribunal notes that Article 8-bis of the Atto di Sottomissione references only the financial plan of the TEC Concession, identified as "PE" not the "PD2" financial plan of TEC2,[839] and the latter did not consider a public contribution. This was confirmed by Italian courts, as further developed in the following subsection.[840]

628. Respondent further argues that a *pro-rata* payment of the *Contributo* for each plant would violate the conditions of the public bid for the TEC Concession.[841] The Tribunal does not agree with Respondent's interpretation.

629. The public bid provided that:

> "[t]he granting authority reserves the right to provide a public contribution, not exceeding 20% of the starting price, pursuant to Article 19, second Subsection, of the Law No. 109 of 1994, which will be provided upon final approval of the works.
>
> In this case, the final tariff will be reduced proportionally, according to the arithmetic formula, which will be indicated in the invitation letter."[842]

630. In the Tribunal's view, the public bid merely states that the *Contributo* was to be calculated over the total price and was to be paid upon final approval of "the works." This provision does not specify that it required the completion of all the works of the whole Calabria Sud system, and as explained in section (i) above, the final approval of works was individual for each plant. There was not one final approval of works for the whole system. This is consistent with the link that the public bid

[836] C-12, Ordinance of the *Commissario* No. 2633, pp. 4: The other plants increased their investments in the following sums:

[PLANT]	Basic project: Calabria Sud Integrated System	Overall final amounts for the Calabria Sud Integrated System
Crotone	37.439.641.856	37.606.476.122.
Siderno	32.303.372.395	36.607.578.629
Reggio Calabria	30.086.507.425	34.006.508.063
Rossano	14.079.641.367	17.335.262.870
Gioia Tauro Selection/Composting	-	-
Gioia Tauro Waste-to-Energy Line 1	128.003.287176	128.432.217.123

[837] C-12, Ordinance of the *Commissario* No. 2633, p. 6 ("Whereas" section).
[838] C-12, Ordinance of the *Commissario* No. 2633, p. 7, ¶ 2: "To establish the granting of a public contribution, valid on the programme of investments described at point 1, equal to Lit. 80 billion (equal to € 41,316,551.92), intended exclusively to reduce the disposal tariffs for users of the "Calabria Sud", integrated system, committing the equivalent amount on measure 1.7.a of the POR Calabria Agenda 2000 - 2006 for this purpose (…)."
[839] AC-068-IT, Second TEC Amendment - Calabria Sud financial plan PE; AC-069-IT, Second TEC Amendment - Calabria Sud financial plan PD2.
[840] C-32, Judgment of the Calabria Regional Administrative Tribunal, Claim No. 183/2009, Judgment, 28 February 2011, pp. 10-11.
[841] Respondent's Counter-Memorial, ¶ 451.
[842] C-259, Call for tender for the TEC Concession published in the Official Gazette, 18 August 1998, p. 5.

makes between the "final approval of the works" and the "proportional" reduction of the tariff, since the latter was only paid once each plant not the whole system– entered into operation.

631. The foregoing means that the pro-rata payment of the *Contributo* for the operating plants was not contingent on the completion of TEC2 or Sambatello 2. The only limitation envisaged in the public bid was that the total amount of the *Contributo* could not exceed 20% over the total amount of the investment, and there is no evidence that the *Atto di Sottomissione* exceeded such a limit. In sum, the Tribunal observes that the reasons invoked by the *Commissario* not to pay the *Contributo* for the plants that were in operation have no support under the terms of the *Atto de Sottomissione*.

(ii) The conduct of the *Commissario*, the Calabria Region and Italian courts

632. As analyzed in paragraph 381 above, the contractual counterparty to the TEC Concession was the *Commissario*, who was acting on behalf of the State. As such, the *Commissario* had special powers, and a mandate to "take any action necessary to recover the outstanding claims [and] manage any pending disputes at all stages and levels and, where the conditions are met, reach settlements."[843] Under Article 8-bis of the *Atto di Sottomissione*, the *Commissario* was responsible for payment of the *Contributo*. However, when it came to the funds to cover the *Contributo*, the *Commissario*'s powers were, to some extent, limited.

633. The funds to pay the *Contributo* flowed from the EU and were subject to the approval and supervision of the Commission of the ECs.[844] As such, the funds first had to be requested through the Calabria Region. Subsequently, the Calabria Region had to put such funds at the *Commissario*'s disposal.[845] Yet, the obligation to make the payments to TEC –even in the eyes of the Italian authorities– was still on the *Commissario*.[846] A former *Commissario* claimed he did not receive the funds because they "transited some through the Region and others through the Ministry of the Environment."[847]

634. Therefore, the *Commissario*'s ability to comply with the obligation entered into with Claimant under Article 8-bis of the *Atto di Sottomissione*, was also dependent on the Calabria Region, as part of the State. While the lack of payment of the *Contributo* may not have been exclusively the result of the *Commissario*'s actions, but also those of the Calabria Region, this does not change the conclusion that there was a breach, and that it was attributable to the State.

635. It is undisputed that the *Commissario*'s initial conduct confirmed an understanding that the *Contributo* was to be paid *pro-rata* for each plant and not subject to the completion of the whole system.

636. Just before the *Atto di Sottomissione* was signed, the *Commissario* had already requested the Environment Department of the Calabria Region to authorize the "advance of the funds provided for

[843] C-140, O.P.C.M. No. 3764/09, 6 May 2009, Art. 5.
[844] C-172, Regional Decision No. 2345, 8 August 2000, Art. 3.
[845] C-92, Transcript of the Audition before the Italian Senate in relation to the Inquiry on Issues Relating to Waste Management, 5 February 2009, p. 29.
[846] C-94, Parliamentary Inquiry Committee, 6 October 2010, p. 12: The President of the Committee noted that "it was not the region that had to pay, so whether or not it agreed or not changed little."
[847] C-94, Parliamentary Inquiry Committee, 6 October 2010, p. 16.

Action 1.7a of Measure 1.7 of the POR Calabria 2000-2006" in the amount of 20% of the total *Contributo*.[848] Such an advance of funds was authorized by way of Decree No. 13021 of 16 September 2003, which expressly indicated that "the same party may pay, with separate and successive instruments, the amounts relating to the activity in the object, concerning the availability of the commitment to be assumed," recognizing the possibility of payments by installments.[849]

637. With this advance, on 10 May 2004, the *Commissario* paid € 7,7 M for the *Contributo*, and € 1,1 M on 21 July 2005, for a total € 8,9 M, equivalent to 20% of the € 41,3 M total amount due to TEC for the *Contributo*.[850] When these payments were made, it was recognized that they responded to a "matured quota" of the *Contributo* for "the installations under management," which at the time were only the Rossano, Gioia Tauro, and Crotone MBT plants.[851] The *Commissario* had acknowledged the "enforceability of the receivable owed to TEC,"[852] and that "the contribution [was] due for facilities provided in the PE Financial Plan" indicating individual final payment dates for each operative plant.[853]

638. The *Commissario*'s conduct, which had been consistent with the plain terms of the *Atto di Sottomissione*, first changed when the Calabria Region expressed its doubts on whether the pro-rata payment of the *Contributo* "was permissible."[854] Contemporary correspondence indicates that the decision to reject payment of the outstanding share of the *Contributo* was triggered by differences at a regional level,[855] which was later confirmed by the Commissario's rejection of TEC's payment request as a result of the Calabria Region's Decree No. 18830,[856] and the Calabria Region's Decree No. 4760, ordering the reimbursement of the 20% of the *Contributo* that was paid in light of the non-completion of TEC2.[857]

639. The foregoing actions of the Calabria Region and the Commissario, added to the subsequent decisions of Italian courts, only strengthen the conclusion that the State breached the obligation it entered into with the investor and its investment to pay the *Contributo* as per the *Atto di Sottomissione*, due to an internal conflict between the different entities acting on behalf of, or as organs of, the State.[858]

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[848] C-13, Decree of the Calabria Region No. 13021, 16 September 2003, p. 2.
[849] C-13, Decree of the Calabria Region No. 13021, 16 September 2003, p. 7.
[850] C-15, Determination of the *Commissario* No. 9414, 22 June 2005 attached to *Commissario*'s Ordinance No. 3619, 21 July 2005.
[851] C-15, Declaration of the Department of Works office of 14 June 2005 attached to Commissario's Ordinance No. 3619, 21 July 2005.
[852] C-124, Letter from TEC to *Commissario*, 3 March 2008, p. 7 (emphasis omitted).
[853] C-23, Letter from the *Commissario* to the Calabria Region, 20 March 2007.
[854] C-122, Letter from *Commissario* to TEC, 17 February 2006.
[855] C-124, Letter from TEC to *Commissario*, 3 March 2008, p. 8., referring to letter, 21 April 2007, ref. no. 24921/Gab.
[856] Claimant's Memorial, ¶ 250; Claimant's Reply, ¶¶ 200-201; C-24, Decree of the Calabria Region No. 18830, 21 November 2008.
[857] C-31, Decree No. 4760, 6 April 2010, pp. 7-9.
[858] C-31, Decree No. 4760, 6 April 2010, pp. 7-8. This Decree recognizes the lack of (i) "**a suitable administrative planning instrument** of the Regional Government of Calabria and of the Department of Environmental Policies, which included in the financing of the POR the public contribution to be paid for the 'Calabria Sud' Integrated System for Waste Disposal" and of (ii) "**an agreement governing the relations between the Regional Department for Environment Policies and the Deputy Commissioner's Office** for the Environmental Emergency for the plan in question" (emphasis added).

640. The Tribunal observes that there are two decisions of Italian courts –one at first instance, and another one on appeal– rejecting the interpretation of the Calabria Region with regard to the *Contributo* and Article 8-bis of the *Atto di Sottomisione*. Despite such decisions, the *Contributo* was never paid.

641. In February 2011, the Regional Administrative Court of Calabria annulled Decrees Nos. 18830 and 4760 through Judgment No. 226,[859] finding that the Calabria Region's interpretation of Article 8-bis was "totally unreasonable", and "contrary to the literal meaning of the words and the overall logical rule of interpretation of Article 1363." The regional tribunal clarified that "the purpose of the public contribution […] is to be found in the reduction of tariffs for users,"[860] and found that the Region was "precluded from non-applying administrative measures which are not promptly disputed, and their disapplication [sic] is not even permitted to the administrative judge."[861]

642. On 23 October 2012, the Council of State dismissed the Calabria Region's appeal of Judgment No. 226. The Council of State found that "the contribution in question has the aim of reducing the tariffs of the Calabria Sud system and is in no way connected to line 2 of Gioia Tauro", with the state of progress of this project being "*irrilevante*."[862] The judgment also found that it "makes no sense for the Regional Government to assert its own third-party status to the relationship with the concessionaire."[863]

643. Overall, the plain text of the *Atto di Sottomissione*, the conduct of the *Commissario* and the Calabria Region, and the interpretation of the Italian courts leave no doubt that the *Contributo* was due for each plant that entered into management and operations and that the refusal to pay this emolument breached the State's obligations toward Claimant's investments.

(iii) Claimant's conduct

644. In June 2011, Claimant entered into the MSA and acquired the remaining 25% of VSAT from TM.E for a purchase price of € 19 M.[864] At the time it entered into the MSA, Claimant knew that there was a dispute related to the *Contributo* and that the risk of non-payment of the *Contributo* had been assumed by the seller of the shares in the SPA dated 29 May 2007. The MSA, however, "amended" the SPA entered into in 2007, under which, the payment of the deferred portion of the purchase price was conditional upon the payment of the *Contributo*.[865] This means that before the MSA, Claimant had no obligation to fund the deferred portion of the price for the shares and could have retained the funds it spent under the MSA, considering the lack of payment of the *Contributo*. However, under the MSA, Veolia paid the deferred portion of the share price even though the *Contributo* had not been paid.

[859] C-32, Judgment of the Administrative Tribunal No. 226, 28 February 2011.
[860] C-32, Judgment of the Administrative Tribunal No. 226, 28 February 2011, pp. 8-9.
[861] C-32, Judgment of the Administrative Tribunal No. 226, 28 February 2011, p. 7.
[862] C-33, Judgment of the Council of State, 23 October 2012, ¶ 5.
[863] C-33, Judgment of the Council of State, 23 October 2012, ¶ 4.1.
[864] Claimant's Reply, ¶¶ 308-309.
[865] Claimant's Reply, ¶ 688; C-25, Share Purchase Agreement, 29 May 2007, Art. 2.4(ii).

645. While the MSA does not change the fact that Respondent had an obligation to pay the *Contributo* and unjustifiably failed to comply with it, the Tribunal will consider the impact of this decision by Claimant on the damages it claims in this arbitration for the lack of payment of the *Contributo*.

7. TEC's Penalties

a. Claimant's position

646. Claimant submits that, by imposing undue penalties for the 2007 and 2008 management suspensions, Respondent breached Article 15.2 of the TEC Concession, and therefore, the ECT's umbrella clause.

647. Pursuant to Article 15.1 of the TEC Concession, penalties could be imposed if the plants' operations were suspended for 24 consecutive hours due to an action attributable to TEC, but subsection (2) provides that if the suspension is attributable to third parties, TEC should be exempted from such penalties.[866]

648. According to Claimant, between 2007 and 2008, the *Commissario* applied penalties to TEC because of suspensions caused by third parties.[867] For instance, the *Commissario*'s failure to pay the fees to TEC led to the suspension, in June 2007, of many waste suppliers' services to the plants of the Calabria Sud system.[868] Claimant tried to explain this to the *Commissario*, yet, the latter unjustifiably applied the penalties,[869] causing a contractual breach with losses amounting to € 12,2 M.[870] Claimant notes that the tribunal in the Management Arbitration ordered the *Commissario* to pay € 2,5 M to TEC for unjustified penalties.[871]

649. Lastly, Claimant notes that Respondent has "deviate[d] from Veolia's case," trying to justify the penalties under categories that are unrelated to the shutdown of the system, such as the alleged construction delays.[872] As established by the independent expert appointed in the Construction Arbitration, none of the construction delays were attributable to TEC, save for those of the Siderno and Crotone plants, and for a limited amount of € 2,055,889.[873]

b. Respondent's position

650. The penalties imposed on Claimant referred not only to the case of interruption of services, but also to the construction delays.[874] Respondent argues that both sets of penalties were duly applied.[875] In particular, with respect to the interruption of services, pursuant to Article 15 of the TEC Concession,

[866] C-10, TEC Concession, 17 October 2000.
[867] Claimant's Memorial, ¶ 288.
[868] Claimant's Memorial, ¶ 288; Claimant's Reply, Section 2.4.2.7; Claimant's PHB1, Section 3.2.5.
[869] Claimant's Memorial, ¶¶ 289-291.
[870] Claimant's Reply, ¶ 713.
[871] Claimant's Reply, ¶ 711.
[872] Claimant's Reply, ¶ 714.
[873] Claimant's Reply, ¶ 715.
[874] Respondent's Rejoinder, ¶ 133.
[875] Respondent's Counter-Memorial, ¶ 467.

the *Commissario* had the power to ascertain whether the suspension was attributable to TEC, third parties or *force majeure*[876] but TEC failed to prove the existence of either exception.[877]

c. Analysis of the Tribunal

651. From the evidence in the record, the Tribunal observes that between 2007 and 2008, certain transport and supply companies announced to TEC that they would suspend their services and supplies due to TEC's inability to make payments, and then proceeded to do so.[878] The *Commissario* registered the suspension of plant operations that followed, indicating there were no grounds to apply the exemption in Article 15.2 of the TEC Concession, and announced the imposition of penalties.[879] Afterwards, the *Commissario* issued multiple orders between 2007 and 2008, imposing penalties for the suspension of operations.[880] TEC opposed the *Commissario*'s decisions, alleging that under Article 15.2 of the TEC Concession it could not be charged with penalties if there was no "deliberate intention to suspend the service."[881] TEC maintained that the suspensions had been created "by decisions of third parties," and TEC's default was ultimately attributable to the *Commissario*'s failure to pay the amounts due under the TEC Concession, which was "the root of the force majeure" affecting the continuity of the service.[882]

652. Throughout its submissions in this arbitration, and at the Hearing, Claimant argued that the penalties applied between 2007 and 2008[883] amounted to a breach of Respondent's obligations entered into with its investment under Article 15.2 of the TEC Concession. But Claimant did not address each penalty imposed by the *Commissario* between 2007 and 2008. Instead, Claimant simply relied on the findings of the Management Award and argued that under Article 15.2 of the TEC Concession, TEC was exempted from such penalties (in general) because the suspensions had been allegedly caused by third-party companies, *i.e.*, the suppliers and transporters,[884] and in some instances the underlying reason for the decision of such companies was the lack of payment "which in turn was due to the

[876] Respondent's Rejoinder, ¶¶ 134-136.
[877] Respondent's Rejoinder, ¶ 137.
[878] C-141, Letter from TEC No. GT/07/450, 28 June 2007.
[879] C-143, Letter from *Commissario* to TEC No. 10845, 2 July 2007. See also C-141, Letter from *Commissario* to TEC No. 10558, 28 June 2007; C-145, Letter from *Commissario* to TEC, 4 July 2007.
[880] C-90, Management Award, 26 July 2010, PDF p. 30 (Penalties amounting to € 185,924.34, for the suspension of services by suppliers due to default in payments, imposed by Order 7.11.2007 No. 6306/07 for € 10,329.13; Order 12.12.2007 No. 6397/07 for € 20,658.26; Order 12.12.2007 No. 6398/07 for € 30,987.39; Order 11.11.2008 No. 6467/08 for € 30,987.39; Order 11.1.2008 No. 6468/08 for € 41,316.52; Order 11.1.2008 No. 6469/08 for € 41,316.52; and Order 25.7.2008 No. 7212/08 for € 10,329.13), ¶ 11.4.4 (Order No. 7650 of 28 January 2009, imposing a € 10,329.13 penalty for the stoppage of the Rossano plant. In the Management Arbitration it was found that it was unclear why the penalty was imposed, thus, "the Tribunal has no facts on which to consider it illegitimate"), PDF p. 31 (Order No. 17927 of 20 November 2008, imposing a penalty for the stoppage of the Sambatello 1 plant that was later reduced to € 423,494.30 by way of Decision No. 2201 of 24 February 2009, and which was not claimed in the Management Arbitration), PDF p. 37 (Ordinance No. 7548/08 of 15 December 2008, imposing a penalty of € 41,361.52**,** because of the lack of extraordinary maintenance of the Sambatello plant. TEC argued that the suspension was due to the breakage of a conveyor belt, which was a work of "extraordinary maintenance" but the financial plan of *Atto Integrativo* of 31 August 2001 only covered "ordinary maintenance" costs, and that the Sambatello 1 plant was processing more waste than that envisaged in the agreement), PDF p. 31 (In 2010, the Management Award ordered payment of € 2,5 M for unduly imposed penalties under Article 15 of the TEC Concession, plus interests and VAT).
[881] C-144, Letter from TEC No. TEC/95-07/EP-nm, 3 July 2007.
[882] C-144, Letter from TEC No. TEC/95-07/EP-nm, 3 July 2007.
[883] Claimant's PHB1, ¶ 92 "Between 2007 and 2008, the *Commissario* applied penalties to TEC because of management suspensions that were caused by third parties"; Claimant's Memorial, ¶ 288; Tr. Hearing Day 1, 56:2-12, 57:1-4 (Claimant's Opening Statement).
[884] Claimant's Memorial, ¶ 290.

Commissario's lack of payment to TEC." [885] On those grounds, Claimant requests in this arbitration the amount of € 12.2 M, which corresponds to the penalties imposed on TEC and the cash flow that was not received as a result of their imposition.[886]

653. Respondent does not dispute the existence of the 2007-2008 penalties and rather contends that they were legitimately imposed in accordance with Article 15 of the TEC Concession.[887] According to Respondent, Claimant failed to demonstrate that the suspensions were due to third parties given that the mere intervention of a third party does not mean that the suspension is attributable to it, rather than to the Concessionaire.[888]

654. Considering that the Parties do not dispute the existence of the suspensions or the 2007–2008 penalties, but rather the grounds to apply the exception in Article 15.2 of the TEC Concession, the Tribunal must determine whether the suspensions that triggered the penalties were not attributable to TEC but to third parties.

655. Article 15 of the TEC Concession provides that:

> "15.1 In the event of the suspension of management for 24 consecutive hours due to an action attributable to the Concessionaire, the Grantor may apply an administrative penalty against the same party equal to Lit. 20,000,000 (Twenty million lire) for each day of disruption for each installation, unless the event does not cause further damage.
>
> The Concessionaire undertakes, in any case, to ensure the treatment or disposal of uncollected waste.
>
> 15.2 If the Concessionaire considers that the failure defined in the preceding clause results from a cause of force majeure or is attributable to third parties, it shall make a declaration of this within 24 hours of the formal challenge. The definitive ascertainment and recognition of such elements by the Grantor shall entail exemption from payment of the penalty itself."

656. The suppliers and transporters are indeed third parties to the TEC Concession, and they made the decision to suspend their services due to TEC's default. While this decision ultimately led TEC to make temporary suspensions of plant operations, TEC always held control over its operations and the decision to suspend. There is no evidence that TEC, as the entity responsible for the operation of the plants, could not take alternative measures to avoid the suspension, especially considering that it was well aware that such actions by the suppliers could take place at any moment.

657. The Tribunal recognizes the importance of the suppliers and transporters for TEC's operations, but, in this arbitration, Claimant has failed to prove that the decision to suspend was not within its remit, and that it was attributable exclusively to the third parties. The alleged influence that the acts of third parties may have on a decision to suspend operations does not make the suspension an act attributable

[885] Claimant's Reply, ¶ 713.
[886] Claimant's Reply, ¶ 251; Accuracy's First Expert Report, ¶ A7.60 (The sum corresponded to € 3,095 M in 2007, brought to present value and taking into account the additional cash-flow in a but-for scenario).
[887] Respondent's Rejoinder, ¶ 420.
[888] Respondent's PHB2, ¶¶ 102-103.

to that party. Notably, Article 15.2 does not refer to suspensions "related to" or "influenced by" the acts of third parties and rather demands a higher threshold to apply the exemptions from penalties.

658. In sum, the Tribunal finds no evidence to conclude the *Commissario* abusively applied penalties "[a]s of 2007 and up to 2008"[889] in breach of Article 15.2 of the TEC Concession, and thus, that Respondent breached an obligation entered into with Claimant's investment.

659. In addition to the foregoing, the Tribunal observes that the amount of € 12,2 M that Claimant claimed for this alleged breach is not limited to the penalties applied between 2007 and 2008. As per Accuracy's Expert Report, the € 12,2 M claimed in this arbitration corresponds to € 3,095 M in 2007, updated to the year 2011, and includes the amounts recognized in the Management Award and the Report issued by Prof. Lacchini, the independent technical expert appointed by the arbitral tribunal in the Construction and the Management Arbitrations (*Consulente Tecnico d'Ufficio*, "**CTU**" and "**CTU Report**").[890]

660. The Tribunal observes that the penalties recognized in the Management Arbitration include those imposed between 2005 and 2006, for a total amount of € 2.365 M.[891] Those penalties are part of the € 12,2 M claim brought in this arbitration but are not based on the same facts as those underlying the penalties imposed "[a]s of 2007 and up to 2008."[892]

661. The 2005 and 2006 penalties were related to the suspensions of the FOS refining sections of the Sambatello, Rossano, Gioia Tauro, and Crotone plants. In the Management Arbitration, TEC opposed such penalties because there were no total stoppages of the plants, but only of certain machines or sections.[893] However, Claimant did not debate this point in this arbitration and even asserted that the penalties related to the "deduction for the alleged failure to refine FOS in all of the plants" are "totally unrelated with the penalties claimed by Veolia."[894]

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[889] Claimant's Memorial, ¶ 288.

[890] Accuracy's First Expert Report, ¶ 6.24-6.25, "The TEC Concession Contract stipulated the application of penalties in the event of suspensions of management of the plants attributable solely to the concessionaire. Claimant alleges that penalties were wrongly applied to TEC, resulting in sums owed to TEC being illegitimately retained by Respondent. **In his report, the Management CTU analysed penalties applied up to 2008** and concluded that the arguments put forward by TEC were correct and '*consequently [considered] the Concession Holder exempt from payment of the Penalty*' (emphasis added); A7.56-A7.60 "We understand that, in the course of the Management Arbitration, it was found that the interruptions were not fully attributable to TEC. Consequently, the Commissario was ordered to compensate Claimant for the penalties which it wrongly applied. […] We compute the payments due for penalties assuming that these should not have been applied in the first place. The question of technical responsibility for the interruptions to works is outside the scope of our expertise and we do not opine on this matter."

[891] AC-032, Management Arbitration – CTU Report of Prof. Dott. Marco Lacchini, 22 December 2009, submitted as an annex of Accuracy's First Expert Report.

[892] Claimant's Memorial, ¶ 288.

[893] C-90, Management Award, 26 July 2010, PDF p. 31: "With the first group of penalties applied by the Commissioner Delegate (referred to in Orders 6.9.2006 No. 4845/06 for € 98,557.21; Order 6.9.2006 No. 4847/06 for € 98,557.21, Order 10.10.2006 No. 4948/06 for € 689,900.77, Order 1.12.2006 No. 5155/06 for € 689,900.77, Order 1.12.2006 No. 5156/06 for € 394,228.84, Order 23.1.2007 No. 5274/07 for € 394,228.84) totalling € 2,365,373.64, the court-appointed expert considered that these do not appear to be legitimately applied as the shut-down of a processing line in a plant which nevertheless disposed of the USW delivered, does not appear to be covered by Art. 15 of the Agreement (*Convenzione*). The Grantor's Supervisory and Control Body, in a communication of 16.12.2005, complained to the Concessionaire about the failure to operate of the section for treatment/refining of the FOS (stabilised organic fraction), with reference to the Sambatello, Rossano and Gioia Tauro plants, so it declared the penalties applicable in accordance with Art. 15.1. of the Agreement (*Convenzione*)."

[894] Claimant's Reply, ¶ 716.

662. Also, the penalty issued under Ordinance No. 7548/08 was for the suspension of the operation of the Sambatello plant due to maintenance issues, in particular, the breakage of a conveyor belt which triggered the suspension. In the Management Arbitration, TEC opposed such penalties, arguing that the suspension had been caused by this breakage, which was a work of "extraordinary maintenance" not covered by the financial plan of the *Atto Integrativo*, and that the Sambatello plant was processing more waste than that envisaged in the TEC Concession.[895] However, this argument was never discussed nor substantiated in this arbitration. Strikingly, in the Management Arbitration it was also found that there were certain penalties that had not been substantiated before that tribunal.[896]

663. While TEC may have disputed these various penalties in the Management Arbitration, in this arbitration, Claimant did not argue or even explain how they can amount to a violation of Article 15 of the TEC Concession and of the ECT's umbrella clause. As a threshold matter, the Parties have the burden of proving their claims and defenses in this arbitration. A general reference to the findings of another tribunal is insufficient to discharge such a burden.

664. The Tribunal finds that there are no sufficient arguments nor evidence in the record to conclude that the penalties that Claimant invoked in addition to the 2007–2008 penalties, as part of its € 12,2 M (€ 3 M) umbrella clause claim, were attributable to third parties or to *force majeure* events, nor arguments for why they would breach Article 15 of the TEC Concession. Therefore, the Tribunal cannot make a finding that such penalties constitute a violation of Respondent's obligations entered into with the investment under the ECT's umbrella clause.

8. TEV Concession

a. Claimant's position

665. Claimant argues that Italy breached its contractual obligations in relation to the TEV Concession's (i) gate fees (Article 6); and (ii) the agreed waste quantities (Article 5).

666. With regard to the gate fees, Claimant submits that, through the arbitrary conduct of the Municipalities of Versilia, Respondent violated its obligations towards Claimant's investment by: (i) failing to adjust and pay the gate fees between 2006 and 2009;[897] and (ii) unilaterally reducing the gate fees after the 2010 Agreement which provided for their readjustment.[898] This, allegedly, led to a loss of € 25,4 M for TEV.[899]

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[895] C-90, Management Award, 26 July 2010, PDF p. 37 **(**Ordinance No. 7548/08 of 15 December 2008, imposing a penalty of € 41,361.52**,** because of the lack of extraordinary maintenance of the Sambatello 1 plant. TEC argued that the suspension was due to the breakage of a conveyor belt, which was a work of "extraordinary maintenance" but the financial plan of Atto Integrativo of 31 August 2001 only covered "ordinary maintenance" costs, and that the Sambatello 1 plant was processing more waste than that envisaged in the agreement.)

[896] C-90, Management Award, 26 July 2010, ¶ 11.4.4 (As is the case of the € 10,329.13 penalty imposed by Order No. 7650 for the stoppage of the Rossano plant).

[897] Claimant's Reply, ¶ 142.

[898] Claimant's Memorial, ¶ 318; Claimant's PHB1, ¶ 57.

[899] Claimant's Memorial, ¶ 77.

667. Claimant submits that, up until 2011, TEV had issued invoices following the Concession's parameters[900] but from 2006 to 2009 CAV failed to pay € 4,2 million[901] for the gate fees under the TEV Concession,[902] despite that the Municipalities of Versilia recognized they owed the gate fee in December 2011.[903]

668. Claimant alleges that from July 2010, the Municipalities of Versilia imposed a unilateral fee of € 159 per tonne of waste, contravening the 2010 Agreement and hence, Article 6.2 of the TEV Concession.[904] This action entailed a sudden and arbitrary decision by CAV to reduce the gate fee agreed for 2010.[905] Additionally, Claimant submits that CAV had undertaken a commitment to pay € 182.20 per tonne of waste for 2011 but later breached its commitment.[906] The same amount was to be paid for 2012 but such a commitment was also breached.[907] Claimant's expert on damages, Accuracy, further asserts that Respondent paid late the receivables for this period, causing historical losses for Claimant in the amount of € 18,8 M.[908]

669. With regard to the waste quantities, Claimant submits that from 2009 to 2011, the Municipalities of Versilia failed to provide the Pioppogatto MBT plant with an adequate quantity of waste,[909] as mandated by Article 5.1 of the TEV Concession, and the 2010 Agreement.[910] Claimant asserts that, in TEV's case, a breach of Article 5.1 relates to the quantity of the waste and not the quality.[911]

670. Claimant argues that Article 5.1 is a "put or pay" clause, under which Respondent had to either meet the annual quantity of waste of 110,000 tons, later increased to 125,000 tons by way of the 2010 Agreement, or pay the equivalent.[912] Claimant is of the view that since Respondent failed to provide the agreed quantities of waste, or to pay in accordance with the "put or pay" clause, the Municipalities of Versilia, through CAV, owed "an additional € 5.2m to TEV in relation to the years 2009 to 2011."[913]

b. Respondent's position

671. Respondent contends that Claimant's claims are outside the scope of the ECT, as they exclusively involve contractual disputes, which already existed at the time of the acquisition of TEV,[914] and to

[900] Claimant's Reply, ¶ 668.
[901] Claimant's Reply, ¶ 665.
[902] Claimant's Memorial, ¶ 127; Claimant's Reply, ¶ 348, 665, 911.
[903] C-56, Letter from CAV to TEV, 3 December 2011.
[904] Claimant's Memorial, ¶ 78.
[905] Claimant's Memorial, ¶ 324.
[906] Claimant's Memorial, ¶ 325; Claimant's Reply, ¶¶ 670-671.
[907] Claimant's Memorial, ¶ 327.
[908] Claimant's Reply, ¶ 675; Accuracy First Expert Report, Table 6.5.
[909] Claimant's Memorial, ¶ 80; C-168, Letter of TEV to CAV, 28 September 2009; C-169 Letter of TEV to CAV, 30 March 2009.
[910] Claimant's Memorial, ¶¶ 332-334.
[911] Claimant's Reply PHB, ¶ 69; Tr. Hearing Day 2, 383:2-16 (Mr. Bozzeto's Examination): "All the discussions with TEV, if you read the documents – and in particular the agreement signed in February 2010 – concern this issue of the quantity of waste delivered. The municipalities of Versilia – we had the opposite problem to Calabria – the waste was sorted, the waste was well differentiated, so there was a distinction between organic waste and sorted waste. But the municipalities were unable to supply the quantity of waste requested by the contract."
[912] Tr. Hearing Day 1 (Claimant's Opening Statement), 55:2-4.
[913] Accuracy First Expert Report, ¶ 6.47.
[914] Respondent's Counter-Memorial, ¶¶ 420, 527-530, 534; Respondent's Rejoinder, ¶¶ 12-14, 21, 26, 138-145.

which Claimant became a party, blindly trusting the assurances offered by the Vendor.[915] In this regard, Respondent observes that Claimant has voluntarily waived its actions against the Vendor[916] and, in effect, is seeking to pass on to the State the contractual defaults attributable to the former, especially in connection with the Falascaia plant.[917]

672. Respondent further observes that Claimant became part of a concession that was already in place and, in respect of which, there were already grounds for dispute, including the preexisting environmental irregularities.[918] This confirms that its claims arise, in fact, from the acquisition of a contractual position in dispute and not from the State's action *per se.*

673. On this matter, Respondent notes that it cannot be accepted that the ECT serves as a means of avoiding a risk that already existed in an investment and to which the party deliberately exposed itself, being aware of the situation at hand.[919]

674. Respondent argues that the termination of the Falascaia plant's operational permit was legitimate given the environmental violations found.[920] The termination of the operational permit occurred in simple application of the law, which requires compliance with certain environmental standards for waste management.

675. Respondent claims that, most importantly, this termination was not the result of the exercise of an extraordinary power that intruded into what would otherwise have been the ordinary contractual balance, but occurred in simple application of the law which would have operated in exactly the same way even if the concession had been entirely between private parties.

676. In any case, with respect to the gate fees adjustment, Respondent submits that TEV's proposed adjustment disregards the parameters set out in Article 6.2 of the TEV Concession, and does not take into account the adjustment in the price of electricity.[921] Respondent further submits that the 2010 Agreement to adjust the gate fee "was completely nullified by the subsequent seizure of the Falascaia WtE plant, due to the negligence of TEV's management." [922]

677. With respect to the waste quantities, Respondent argues that the 2010 Agreement (later "nullified") was negotiated precisely to "overcome the dispute" and the "controversial issues related to the amount of waste actually provided to the plants by the Municipalities of Versilia" that was lower than the one fixed in the TEV Concession of 110.000 tons of USW.[923]

[915] Respondent's Rejoinder, ¶¶ 130, 544.
[916] Respondent's Rejoinder, ¶¶ 110-123, 211.
[917] Respondent's Rejoinder, ¶¶ 214-220.
[918] Respondent's Rejoinder, ¶¶ 182-209.
[919] Respondent's Rejoinder, ¶¶ 440-443, 458-460.
[920] Respondent's Counter-Memorial, ¶ 162.
[921] Respondent's Counter-Memorial, ¶¶ 500-502.
[922] Respondent's Counter-Memorial, ¶¶ 506-509.
[923] Respondent's Counter-Memorial, ¶¶ 139-141.

c. Analysis of the Tribunal

678. Claimant submits that Respondent, through the Municipalities of Versilia that are organs of the Italian State, has breached the following obligations under the TEV Concession: (i) Article 6.2 of the TEV Concession, by both failing to adjust the gate fees between 2006 and 2010 and unlawfully applying unjustified adjustments to the gate fees after 2010; and (ii) Article 5.1 of the TEV Concession, by failing to provide an adequate quantity of waste to the MBT plant. According to Claimant, the breach of these obligations led to a violation of the umbrella clause in Article 10.1 of the ECT, last sentence, requiring the observation of "any obligations" that the State has entered into with the investor.

679. In response, Respondent submits that Claimant cannot be granted any protection under the ECT for alleged TEV Concession breaches as it committed serious violations of environmental law under the TEV Concession, and "unilaterally took the decision to abandon the Concession" "in breach of the principle of contractual good faith."[924] This subsection addresses items (i) to (ii), and the termination is addressed in section 9 below.

(i) Whether Respondent breached the obligation to update the gate fee under Article 6.2

680. Claimant argues that Italy breached its contractual obligations through the alleged arbitrary conduct of the Municipalities of Versilia when they (i) failed to adjust and pay the gate fees between 2006 and 2009;[925] and (ii) unilaterally reduced the gate fee after the which provided for their readjustment.[926] This, allegedly led to a loss of € 25,4 M for TEV.[927] Respondent denies such claims because, in its view (i) the parties never agreed on a tariff between 2006 and 2009;[928] and (ii) the 2010 Agreement was completely nullified due to the subsequent seizure of the WtE plant.[929]

681. Hence, the Tribunal must determine if, under Article 6.2 of the TEV Concession, Claimant had a right to claim the payment of the 2006-2009 adjusted gate fee receivables, and the gate fee adjustment under the 2010 Agreement.[930]

(a) The gate fees for 2006-2009

682. Claimant submits that in the period 2006-2009, CAV did not pay € 4.2 million[931] for the gate fees owed under the TEV Concession.[932] Claimant also submits that the Municipalities of Versilia further recognized they owed the gate fee through CAV's letter of 3 December 2011[933] and claims that "[u]p

[924] Respondent's Rejoinder, ¶¶ 256-257.
[925] Claimant's Reply, ¶ 142.
[926] Claimant's Memorial, ¶ 318; Claimant's PHB1, ¶ 57.
[927] Claimant's Memorial, ¶ 77.
[928] Respondent's Rejoinder, ¶¶ 149-150.
[929] Respondent's Counter-Memorial, ¶ 506.
[930] C-63, Letter from TEV to the Municipalities of Versilia, ATO, CAV, and the Province of Lucca, 21 March 2012, pp. 3-4.
[931] Claimant's Reply, ¶ 665.
[932] Claimant's Memorial, ¶ 127; Claimant's Reply ¶¶ 665, 911.
[933] C-56, Letter from CAV to TEV, 3 December 2011.

until then, TEV had invoiced CAV strictly following the TEV Concession's provisions regarding the adjustment of gate fees."[934]

683. Respondent avers that Claimant invoiced self-determined gate fees to CAV, which were higher than the amount required to guarantee "the financial equilibrium of the Project Financing."[935] Respondent disagrees with Claimant's methodology to update the gate fee, and claims it should have been exclusively based on the cost items contractually provided for and the revenues generated by the sale of electricity.[936] Respondent does not dispute that it did not pay the 2006-2009 receivables, but Respondent's expert PoliMi mentions that, as Claimant has not documented such receivables, "it appears very likely that such receivables were also undue."[937]

684. Respondent also asserts that it did not adopt TEV's suggestions regarding the gate fee update because, in its view, they were "inflated" due to the

> "1) updating of financial charges; 2) updating of direct costs, indirect costs and taxes that are not part of operations; 3) double updating of amounts related to general expenses and business profits[;] 4) updating of revenues from the sale of energy only in terms of ISTAT and not on actual revenues; 5) updating of royalties that, instead, are paid to municipalities with the amount not revalued; 6) updating of the cost of CIP 6 not provided for in the purchase agreement present in the first act of submission."[938]

685. Article 6.1 of the TEV Concession contains the obligation to pay a tariff or the gate fee for the disposal of waste. Article 6.2 of the TEV Concession mandates that such a tariff be adjusted on the following terms:[939]

> 6.2) The tariff shall be updated by the end of January of each month of the management period, on the basis of the following parameters:
>
> - Indicators to be used for the annual updating of the tariff.

Cost item	Indicator
1. Labour	Ausitra Agreement
2. Electricity	Enel Bill
3. Transport	Istat Indices
4. Miscellaneous maintenance materials and consumables	Istat Indices
5. Diesel and lubricants	Chamber of Commerce Bulletin
6. Tariff the disposal of discharged scrap	Effective Cost Documented
7. Royalties	According to the effective change

[934] Claimant's Reply, ¶ 668.
[935] Respondent's Counter-Memorial, ¶ 499
[936] Respondent's Counter-Memorial, ¶ 504.
[937] PoliMi First Expert Report, p. 50.
[938] Respondent's Counter-Memorial, ¶ 501.
[939] C-17, TEV Concession, 31 July 1997, Art. 6.2.

686. Also, in accordance with Article 8.1 of the TEV Concession, the tariff provided for in Article 6 "shall be paid by the Grantor to the Concessionaire in monthly instalments, against submission of invoices which shall be paid 60 (sixty) days after the date of issuance of the same."[940]

687. The disagreement between the parties concerning the TEV Concession refers to the determination of the gate fee,[941] in particular, whether TEV was complying with the criteria under Articles 6.2 and 6.3 of the Concession up until the 2010 Agreement.[942] Additionally, they dispute the applicability of a unilaterally revised tariff by TEV, without CAV's agreement.[943]

688. The evidence in the record indicates that, unlike in the case of the TEC Concession, the gate fees invoiced by Claimant under the TEV Concession between 2005-2009 did not meet the criteria of Article 6.2 of the TEV Concession and reflected an adjustment that exceeded the one resulting from the application of such criteria.[944]

689. As shown in communications of 30 March 2007 and 29 March 2006, TEV was not only applying the seven parameters listed in Article 6.2 but was also requesting the CIP6 tariff, which was not included in such provision:

> "Pursuant to Article 6.2 of the Agreement, concluded on 31.07.1977, this is the calculation used to determine the 2007 tariff (for the share of MSW delivery up to 110,000 tonnes/year), based on the 2006 tariff then determined and as indicated in our document number SBR-nm/46-06 dated 29.03.2006 and the subsequent modification referred to in our letter number TEV/68-07/FS-nm:
>
> | | |
> |---|---|
> | -Base tariff | 139.05 L/kg at € 71.81/t |
> | -Final tariff + testing+ increase in royalties | 207.71 L/kg at € 107.27/t |
> | -2006 tariff | 235.78 L/kg at € 121.77/t |
> | -2006 tariff (net of royalties and CIP6 share) | 202.78 L/kg equal to € 104.73/t |
> | -Tariff revision index (12/04 - 12/05) | 202.78 L/kg equal to € 104.73/t |

[940] C-17, TEV Concession, 31 July 1997, Art. 8.1.
[941] Claimant's Memorial, ¶¶ 321-322; Respondent's Counter-Memorial, ¶ 497.
[942] Respondent's Counter-Memorial, ¶ 504.
[943] Claimant's Reply, ¶ 667.
[944] C-10, TEC Concession; C-17, TEV Concession, 31 July 1997. The Tribunal further observes that the criteria listed in Articles 6.2 of each the TEC and TEV Concessions are different as shown in the following charts:

COST ITEM	INDICATOR
1. Labour	Ausitra Agreement
2. Electricity	Enel Bill
3. Transport	Istat Indices
4. Miscellaneous maintenance materials and consumables	Istat Indices
5. Diesel and lubricants	Chamber of Commerce Bulletin

Cost item	Indicator
1. Labour	Ausitra Agreement
2. Electricity	Enel Bill
3. Transport	Istat Indices
4. Miscellaneous maintenance materials and consumables	Istat Indices
5. Diesel and lubricants	Chamber of Commerce Bulletin
6. Tariff the disposal of discharged scrap	Effective Cost
	Documented
7. Royalties	According to the effective change

-2007 tariff (net of royalties and CIP6 share) 211.72 L/kg equal to € 109.34/t

-**2007 tariff (including royalties and CIP6 share) 244.72 L/kg equal to € 126.39/t.**"[945]

"Pursuant to Article 6.2 of the Agreement, concluded on 31.07.1977, this is the calculation used to determine the 2006 tariff (for the share of municipal solid waste delivery up to 110,000 tonnes/year), based on the 2005 tariff then determined and as indicated in our document number TEV/50/CG.nm dated 18.04.2005:

-Base tariff 139.05 L/kg

-Final tariff + testing+ increase in royalties 207.71 L/kg

-2005 tariff 224.06 L/kg

-2005 tariff (net of royalties and CIP6 share) 191.06 L/kg

-Tariff revision index (12/04 - 12/05) 1.0544

-2006 tariff (net of royalties and CIP6 share) 201.46 L/kg

-**2006 tariff (including royalties and CIP6 share)** 234.46 L/kg

2006 tariff € 121.09/t."[946]

690. The CIP6 emerged from Italy's green energy policy[947] as an economic incentive created by Resolution No. 6 of 29 April 1992 of the Interministerial Price Committee or *Comitato Interministeriale dei Prezzi*,[948] under which energy was produced from plants fed by renewable or assimilated sources,[949] and could be sold at a tariff above market prices.[950] This higher price made the Italian market for renewable energy particularly attractive, as economic incentives were envisaged.[951] GSE included said benefit in its electricity agreement with TEV, in which, according to Article 4, the remuneration for the sale of energy was to be paid in accordance with CIP6.[952] This regulatory framework was even pointed out by Veolia prior to the making of the investment.[953]

691. Even though Claimant's investment in TEV has benefited from the CIP6 because it included energy plants "fueled by a renewable energy source" there is nothing in the TEV Concession recording an agreement to automatically apply the CIP6 as a criterion to update the gate fee annually.

[945] C-149, Letter from TEV to the Municipalities (including previous letters from TEC to the Municipalities related to the tariffs for the years 2005, 2006, 2007 and 2008), 9 February 2009, pp. 4-5 (emphasis added).
[946] C-149, Letter from TEV to the Municipalities (including previous letters from TEC to the Municipalities related to the tariffs for the years 2005, 2006, 2007 and 2008), 9 February 2009, pp. 11-12. (emphasis added).
[947] First Witness Statement of Mr. Jean-Marc Janailhac, ¶ 36.
[948] C-6, *Provvedimento* of the Minister of Industry No. 6, 29 April 1992; C-7, Decree of the Presidency of the Republic No. 79, 16 March 1999; First Witness Statement of Mr. Jean-Marc Janailhac, footnote 9.
[949] Claimant's Memorial, ¶ 27, footnote 9.
[950] Claimant's Memorial, ¶ 64. See also C-19, Electricity Agreement between TEV and GSE, 15 April 2002, Art. 4.
[951] Claimant's Memorial, ¶ 27.
[952] C-19, Electricity Agreement between TEV and GSE, 15 April 2002, Art. 4.
[953] C-76, Presentation Acquisition Termomeccanica, 19 March 2007, p. 6.

Contractually, Respondent did not have the obligation to accept such calculations. In fact, Respondent's expert, PoliMi, categorizes CIP6 rights as "additional costs."[954] Also, this incentive was variable and dependent on whether the plants met "specific calorific values,"[955] an element that fell outside the scope of the parameters contained in Article 6.2. The Tribunal therefore agrees with Respondent in that the update of the tariff under the TEV Concession had to be limited to the cost items and the revenues generated by the sale of electricity.[956]

692. Hence, the gate fee update claimed by Claimant until 2009 implied a modification of the literal terms of the TEV Concession by introducing external criteria to an update that was exclusively subject to the contractually predetermined parameters.

693. Such an adjustment or modification would have required Respondent's consent. This is confirmed by the terms in which TEV requested such an adjustment from CAV. In contemporaneous correspondence, TEV mentioned that it calculated the adjustment on a "provisional" basis and proposed the final determination to be done "jointly or by a third party."[957] It further mentioned that it awaited CAV's "validation" to issue the invoices charging the proposed sum.[958] The provisional character of Claimant's proposed tariff is also confirmed by Claimant's expert, Accuracy, when it makes a comparison between "applied" and "provisionally recognized tariffs",[959] the latter corresponding to TEV's adjustment proposals.

694. The evidence in the record also shows that CAV rejected the proposed 2008 gate fee update claiming that the update methodology was "totally unacceptable." CAV also indicated that "the claims made by the Concession Holder against the municipalities, either for compensation or for recognition of higher rates, should be completely set aside."[960]

695. Accordingly, the gate fee adjustment proposed by Claimant between 2007-2009 was not in accordance with Article 6.2 of the TEV Concession and was not an automatic update that Respondent chose to disregard. On the contrary, Respondent rejected the update, as it was entitled to do, and this led to the negotiation of the 2010 Agreement from August 2009 to February 2010. As noted in a communication issued by CAV in 2011 –on which Claimant relies in this arbitration– the 2010 Agreement redefined the gate fee in Article 6.2 and established a new "tariff revision model",[961] as opposed to an update under the original terms of Article 6.2.

696. In sum, the Tribunal finds that, for the gate fees preceding the 2010 Agreement, Respondent was not obliged to accept Claimant's invoices as they involved adjustments that fell outside the scope of the criteria in Article 6.2 of the TEV Concession. In the face of an adjustment, as opposed to the basic

[954] PoliMi First Expert Report, 27 January 2021, p. 49.
[955] Witness Statement of Mr. Jean-Marc Janailhac, ¶ 36.
[956] Respondent's Counter-Memorial, ¶ 504.
[957] C-149, Letter from TEV to the Municipalities (including previous letters from TEC to the Municipalities related to the tariffs for the years 2005, 2006, 2007 and 2008), 9 February 2009, pp. 3, 7, 10, 13.
[958] C-149, Letter from TEV to the Municipalities (including previous letters from TEC to the Municipalities related to the tariffs for the years 2005, 2006, 2007 and 2008), 9 February 2009, pp. 12, 17.
[959] AC-049, TEV tariff adjustment analysis, p. Tariffe_rev2011_YTD, Tariffe_rev2010_civ_Area, Tariffe rev2010_report 12_2009, Tariffe_rev2010_report, *"Raffronto fra tariffe applicate a quelle riconosciute in via provvisoria"*
[960] C-150, Letter from CAV to TEV, 7 January 20019, p. 3; 13 August 2009.
[961] C-56-IT, Letter from CAV to TEV, 3 December 2011, ¶ c. "*in applicazione del modelo di revisione tariffaria prevista dall'accordo*."

gate fee update, Respondent had no obligation to automatically implement it, but only to negotiate in good faith, and there is no specific claim of a breach of such obligation. Consequently, there were no "late payments" of the gate fee by Respondent before 2010, as alleged by Claimant and as submitted by Accuracy in its damages report.[962]

(b) The 2010 Agreement

697. Claimant alleges that from July 2010, the Municipalities of Versilia imposed a unilateral fee of € 159 per tonne of waste, contravening the 2010 Agreement and hence, Article 6.2 of the TEV Concession.[963] Thus, according to Claimant, CAV suddenly and arbitrarily decided to reduce the gate fee agreed for 2010.[964] Additionally, Claimant submits that CAV had undertaken a commitment to pay € 182.20 per tonne of waste for 2011 but later breached its commitment,[965] and that the same amount was to be paid for 2012 but such a commitment was also breached.[966] Claimant's expert on damages, Accuracy, further asserts that Respondent paid late the receivables for this period, causing historical losses for Claimant in the amount of € 18.8 M.[967]

698. Respondent contends that "reading the text of the agreement", the parties did not fix "a flat gate fee" and that the 2010 Agreement was "completely nullified" due to the seizure of the Falascaia WtE plant on 8 July 2010 for the violation of Claimant's environmental obligations.[968] However, Respondent did not dispute the existence of the 2011 and 2012 tariff adjustments made on the basis of the 2010 Agreement. On the contrary, CAV recognized the 2011 gate fee through a letter addressed to TEV on December 2011.[969]

699. The Tribunal observes that, in addition to the update mechanism in Article 6.2 of the TEV Concession –which is similar to that found in Article 6.2 of the TEC Concession, analyzed in section (a) above– Article 6.3 provides a mechanism for the adjustment of the gate fee. In Respondent's words, this mechanism "takes into account the adjustment in the price of electricity sales when calculating the tariff."[970]

700. Article 6.3 of the TEV Concession regulates the gate fee adjustment mechanism as follows:

> "6.3) The tariff shall be amended whenever the composition of the assigned waste is such that it does not permit the generation of electricity taken as a basis for the definition of the Financial Plan. In particular, the new applicable tariff shall be calculated with reference to the following formula:
>
> T1 = T + (E* - Ee) * Pe/N

[962] Accuracy First Expert Report, 31 July 2020, Table A8.5. and Table 6.5.
[963] Claimant's Memorial, ¶ 78.
[964] Claimant's Memorial, ¶ 324.
[965] Claimant's Memorial, ¶ 325; Claimant's Reply, ¶¶ 670-671.
[966] Claimant's Memorial, ¶ 327.
[967] Claimant's Reply, ¶ 675.
[968] Respondent's Counter-Memorial, ¶¶ 142, 506.
[969] C-56, Letter from CAV to TEV, 3 December 2011, p. 3 (b) "confirmed that the tariff for the year 2010 was equal to € 167.04/t, as established in the agreement of 19/02/2010."
[970] Respondent's Counter-Memorial, ¶ 502.

Where:

T = disposal tariff for one ton of waste in force;

E* = Electricity which may be produced on the basis of the composition of waste provided in the tender projects;

Ee = Electricity which may be produced on the basis of changed composition of waste;

Pe = Price recognised by ENEL;

N = Annual quantity, in tonnes, of waste assigned to the plant, pursuant to Art. 5."[971]

Under the 2010 Agreement, CAV and TEV agreed that for the year 2010, the gate fee would be € 167,04 per tonne of waste.[972]

701. The Parties dispute whether CAV had the right to reduce the agreed € 167,04 fee to the € 159 fee it started paying in July 2010, as notified to TEV four months after the application of the reduction.[973] Such a reduction was allegedly motivated by the seizure of the Falascaia WtE plant in July 2010 which, according to Respondent, "completely nullified"[974] the 2010 Agreement.

702. As a threshold matter, the Tribunal observes that the 2010 Agreement was not a mere gate fee update as per Article 6.2 of the TEV Concession, since it was not a direct application of the seven parameters listed in that provision. Rather, the agreement involved the adjustment of the quantities of waste and included different update parameters to those listed in Article 6.2.

703. In this vein, the 2010 Agreement was a new "tariff revision model" that would apply to the TEV Concession.[975] For the reasons explained below, the Tribunal is of the view that CAV did not have a right to unilaterally reduce the gate fee provided for in the 2010 Agreement, as it did in this case.

[971] C-17, TEV Concession Agreement, 31 July 1997, Art. 6.3.

[972] R-19, Agreement, 19 February 2010. This exhibit was a translation submitted by Respondent that refers to "tons" but the quantities in the TEC and TEV Concessions were expressed in "tonnes" or "*tonellatas*" in Italian: "The parties agree - without so necessitating an amendment or novation of the concession arrangement-, that, until the completion of the agreements mentioned above, it is paid to TEV, with effect from 1/01/2010, a fee for the services rendered equal to 167.04 € / t. This rate is determined by (i) assuming a monthly flow of injections to the plant of Pioppogatto (see Annex a), such as to obtain the achievement of an annual quantity of 125,000 tons [sic], (ii) starting from the base rate identified by the working group at 177.0 € / t, (iii) taking into account the recognition by the GSE of an extension that moves the effective validity of the CIP 6 concession to 23 May 2010, as a result of which determining an estimated increase in revenues of € 9.96 for the whole year 2010. In a determination of an annual quantity of 125,000 tons [sic], the parties agree that the municipalities of Versilia shall generate 80,000 t / year, while those of outside - Versilia, shall generate 45,000 / year."

[973] C-156, Resolution approved by the Municipality of Seravezza, 7 October 2010.

[974] Respondent's Counter-Memorial, ¶ 506.

[975] C-54, Minutes of the meeting between TEV, ATO, CAV, the Province of Lucca and the municipalities of Versilia, 19 February 2010: ("The parties agreed – without this constituting an amendment or novation of the existing concession agreement - that until the finalisation of the aforementioned agreement, from 1/01/2020, TEV would be paid a tariff for its services equivalent to 167.04 € /t.")

704. First, the new "tariff revision model" in the 2010 Agreement existed and was binding,[976] until Respondent unilaterally ceased to apply it in July 2010, and there is no evidence that Respondent ever pursued the "annulment" of the 2010 Agreement before the Italian courts.[977]

705. Second, neither the TEV Concession nor the 2010 Agreement contain a provision allowing CAV to terminate or modify their agreement on a tariff revision model in order to reduce the gate fee (as opposed to being allowed to terminate or modify the entire concession), either in general or in particular on the grounds of the seizure of the Falascaia facilities. Respondent unilaterally and arbitrarily selected the effects of the cessation of operations of the WtE plant, without explaining how a termination or reduction of the gate fee was related to the seizure of the plant but merely argued that such a seizure was a breach of the TEV Concession. Such an adjustment would have required the consent of Claimant to modify the 2010 Agreement.

706. Third, the 2010 Agreement did not provide that the "tariff revision model"[978] was conditional upon TEV's production of energy. In fact, under this model, the lack of production of energy due to the seizure of the Falascaia plant would mainly affect Claimant, who accepted a reduced gate fee in exchange for the CIP6 application from 2010 onwards, a benefit that it could not receive if it did not sell energy.

707. In addition, the rationale of Article 6.3 of the TEV Concession aligns with that of the 2010 Agreement and would not support Respondent's interpretation that the confiscation of a WtE plant would allow the lowering of the gate fee. Rather, Article 6.3 of the TEV Concession confirms that the lack of production of energy was an element that affected the Concessionaire, and therefore, was not envisaged as a ground to reduce the gate fee for the benefit of CAV.

708. The mechanism in Article 6.3 of the TEV Concession allows for the adjustment of the gate fee subject to two conditions, (i) that the composition of the waste delivered by the State is not adequate and (ii) that there is no energy production of a WtE plant. The formula in this provision only allows an adjustment resulting in an increase of the gate fee.[979] Essentially, it is only applicable when the State has failed to meet its obligation to deliver waste, and thus, increases the gate fee to protect the Concessionaire from the loss it would suffer from not producing energy as a result of the state's lack of compliance with its obligations.

709. The adjustment mechanism in Article 6.3 of the TEV Concession would not apply to reduce the gate fee in a scenario where the Concessionaire failed to produce energy for reasons not attributable to CAV. Respondent's allegation that Claimant failed to apply Article 6.3 when calculating the tariff

[976] Claimant's Memorial, ¶ 323; Respondent's Counter-Memorial, ¶ 141.
[977] Respondent's Counter-Memorial, ¶ 419; Respondent's Rejoinder, ¶ 288: Respondent claims that CAV sued TEV for damages before the Tribunal of Florence and by the date of the filing of both the Counter-Memorial and the Rejoinder, the issue was still under judgment.
[978] Claimant's Reply, ¶ 670.
[979] Under the formula in Article 6.3, [*T1 = T + **(E* - Ee)** * Pe/N*], the gate fee per *tonne* could only decrease if the subtraction of the variables E* and Ee resulted in a negative number. But this is not possible under the specific scenario described in Article 6.3, that is, the reduced or null production of electricity, because [E*] being the expected production of electricity, minus [Ee] being the lower or null production of electricity, would only result in a positive number, even in the most extreme scenario where the production of electricity is 0, like in this case.

and that "the failure to take into account electricity revenue resulted in a loss of income for the Administration of around € 1,800,000.00 for 2008 alone,"[980] lacks merit.

710. This understanding is further confirmed by Mr. Vincenzo Bozzetto's witness statement, in which he explained that Article 6.3 was an adjustment mechanism designed in favor of the Concessionaire as "the tariff increase is the result of a multiplier calculated as the average of the increases of some of the most important cost items indicated in the financial plan."[981] Mr. Bozzetto also points out that Claimant was already having a substantial decrease in operational revenues resulting from the non-generation of electricity.

711. Therefore, Respondent has not identified any grounds under the TEV Concession and the 2010 Agreement to reduce the gate fee alleging the Falascaia seizure as a motive, and it was still obliged to pay the agreed € 167,04 for 2010.

712. In addition to the foregoing, and most importantly, the Tribunal observes that CAV itself recognized in its 3 December 2011 letter that the right amount to be paid for that year was the € 167,04 gate fee established in the 2010 Agreement[982] despite the fact that at that stage, the situation of the Falascaia plant had not changed.[983] CAV's acknowledgement should be sufficient to disregard Respondent's contention in this matter. Respondent cannot agree to adjust and pay the gate fee in 2011, regardless of any alleged breach by Claimant associated with the Falascaia plant, and then later withdraw this unequivocal statement and take an opposite view, as it also attempted to do on 22 February 2012, and in this arbitration.[984]

713. In the same letter of 3 December 2011, CAV established that "by way of application of the tariff revision model provided by the agreement of 19/02/2010 and of 1/06/2011, the tariff for the year 2011 as (sic.) € 182,02/t."[985] In response to CAV's position stated in its 2011 letter, TEV also adopted said tariff for 2012 and properly notified its contractual counterparty.[986]

714. As to the 2011 and 2012 gate fees, the Tribunal considers that CAV's statement was unequivocal and accepted and acted upon by TEV, and hence, the Municipalities of Versilia were obliged to pay the sum that they proposed for 2011, and the sum claimed by TEV in 2012, applying the tariff revision model agreed upon in the 2010 Agreement, and following CAV's application of the model just a few months before.

715. Consequently, as CAV had an obligation to pay those gate fees for 2011 and 2012, Respondent did not comply with the 60-day term for payment required by Article 8.1 of the TEV Concession. In addition to the late payments referred to above, the 2010-2012 gate fees were also disputed by the Municipalities of Versilia. The Tribunal notes that from December 2011 until the termination of the

[980] Respondent's Counter-Memorial, ¶ 502.
[981] Second Witness Statement of Mr. Vincenzo Bozzetto, ¶ 14.
[982] C-56, Letter from CAV to TEV, 3 December 2011.
[983] Respondent's Counter-Memorial, ¶ 507.
[984] C-162, Letter from CAV to TEV, 22 February 2012.
[985] C-56, Letter from CAV to TEV, 3 December 2011.
[986] C-159, Letter from TEV to the Municipalities, CAV, ATO and the Province of Lucca, 16 February 2012.

Concession, the Municipalities that controlled CAV made unilateral determinations as to the applicability of the gate fees under the TEV Concession. To name a few examples:

- on 19 December 2011, Viareggio mentioned that it did not recognize the € 182,20 of tariff fixed by CAV;[987]

- on 24 January 2012, Seravezza and Forte dei Marmi mentioned that the applicable tariff was € 159;[988]

- on 13 February 2012, Pietrasanta also stated that € 159 was the applicable tariff;[989]

716. on 20 February 2012, Massarosa did not specify what it considered to be the applicable sum but expressed its dissatisfaction with a TEV invoice applying the € 177 applicable until 31 October 2011 and € 182,20 as "final tariff for the year 2011";[990] and

- on 12 March 2012, Camaiore "disputed in its entirety" the invoice of 25 November 2011 as it claimed the tariff to had been updated unilaterally by TEV.[991]

717. Lastly, the Tribunal's conclusion is further confirmed by the Insolvency Receivers Report issued in the *Concordato Preventivo di Gruppo.* The Insolvency Report mentions that the crisis situation concerning TEV with the seizure of half of the Concession had been worsened by the reduction of fees and failure to pay:

> "The crisis situation concerning TEV spa not only derives from the situations described above but also seems to be essentially due to the failure to pay the astronomical amounts due on the basis of the Versilia Agreement.
>
> On this point, it is useless to recall that the failure to renew the authorisation of the discharges of the Falascaia plant, entailing the disappearance of the relevant revenues deriving from the electricity produced through the waste-to-energy plant, has certainly contributed to the deterioration of the situation.
>
> The Grantor, with unilateral provisions, "has self-determined" the tariff that it considers as recognisable annually concessionaire and does not guarantee the assignment of the minimum established quantities to the Pioppogatto plant.[…]
>
> All of the situations described above had the ultimate effect of seriously compromising the economic-financial equilibrium of the "project financing" on which the execution of the Versilia Agreement is based, for which, substantially, the same considerations may be expressed as those outlined for TEC spa (see above)."[992]

[987] C-157, Letter from the Municipality of Viareggio to TEV, 29 December 2011.
[988] C-158, Letters from the Municipalities of Seravezza and Forte dei Marmi to TEV, 24 January 2012.
[989] C-160, Letter from the Municipality of Pietrasanta to TEV, 13 February 2012.
[990] C-161, Letter from the Municipality of Massarosa to TEV, 20 February 2012.
[991] C-165, Letter from the Municipality of Camaiore to TEV, 12 March 2012.
[992] C-68, Insolvency Receivers Report of the Judicial Receivers, 1 February 2013, p. 17.

718. For the foregoing reasons, the seizure of the Falascaia plant, and the resulting lack of energy production, did not entitle Respondent to unilaterally reduce the gate fee in contravention of the 2010 Agreement, and did not entail the nullification of the agreement entered into with the Concessionaire. Respondent thus breached the TEV Concession by disregarding the 2010 Agreement for the adjustment of the gate fee after 2010 and also breached Article 8.1 of the TEV Concession by failing to pay such fees on time.

(ii) Whether Respondent breached Article 5.1 of the TEV Concession as regards the quantity of waste delivered

719. Claimant submits that from 2009 to 2011, the Municipalities of Versilia failed to provide the Pioppogatto MBT plant with an adequate quantity of waste,[993] as mandated by Article 5.1 of the TEV Concession and the 2010 Agreement.[994] Claimant specifies that the breach of Article 5.1 of the TEV Concession relates to the quantity and not the quality of the waste provided; as opposed to the case of the TEC Concession. In TEV's case, there is no dispute on the quality of the waste delivered.[995]

720. Claimant maintains that Article 5.1 is a "put or pay" clause, under which Respondent had to either meet the annual quantity of waste of 110,000 tonnes, which was later increased to 125,000 tonnes by way of the 2010 Agreement, or pay the equivalent.[996] Claimant is of the view that since Respondent failed to provide the agreed quantities of waste, or to pay in accordance with the "put or pay" clause, the Municipalities of Versilia, through CAV, owed "an additional € 5.2m to TEV in relation to the years 2009 to 2011."[997]

721. Respondent does not dispute that the amount of waste provided by the Municipalities of Versilia before 2010 "was lower to the one established in the Concession ***and*** the setting of gate fees."[998]

722. Respondent only disputes the application of the waste quantities fixed in the 2010 Agreement, as it claims that CAV was only obliged to provide 110,000 tonnes as mandated by the unaltered TEV Concession. In this vein, Respondent alleges that the seizure of the Falascaia plant nullified the 2010 Agreement, reaffirming the quantity of 110,000 tonnes of waste per year defined in Article 5 of the TEC Concession.[999] Respondent's expert, PoliMi, states that the "rationale of the concession was that, should the amount of waste delivered to TEC / TEV be different from the nominal tonnage, the tariff should be adjusted to insure [sic] the concessionaire the same economic return agreed for the nominal tonnage."[1000]

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[993] Claimant's Memorial, ¶¶ 80-81; Tr. Hearing Day 2, 383:2-16 (Examination of Mr. Bozzetto).
[994] Claimant's Memorial, ¶¶ 332-334.
[995] Claimant's PHB2, ¶ 69; Tr. Hearing Day 2, 383:2-16 (Examination of Mr. Bozzetto): "All the discussions with TEV, if you read the documents – and in particular the agreement signed in February 2010 – concern this issue of the quantity of waste delivered. The municipalities of Versilia – we had the opposite problem to Calabria – the waste was sorted, the waste was well differentiated, so there was a distinction between organic waste and sorted waste. But the municipalities were unable to supply the quantity of waste requested by the contract […]."
[996] Tr. Hearing Day 1, 55:2-4 (Claimant's Opening Statement).
[997] Accuracy First Expert Report, p. 52, ¶ 6.47.
[998] Respondent's Counter-Memorial, ¶ 139. (emphasis added).
[999] Respondent's Counter-Memorial, ¶ 506.
[1000] PoliMi Second Expert Report, 9 February 2022, p. 9, ¶ 1.3.1.

723. Article 5.1 of the TEV Concession states that:

> "the Grantor commits to assign to the plan and **therefore to pay for**, an annual quantity of 110,000 […] tonnes of urban solid waste and similar material, with the characteristics of the categories of goods indicated in the project documents.[1001]

724. The 2010 Agreement provides that:

> "with effect from 1/01/2010, a fee for the services rendered equal to 167.04 € / t. This rate is determined by (i) assuming a monthly flow of injections to the plant of Pioppogatto (see Annex a), such as to obtain the achievement of an annual quantity of **125,000 tons**, […] In a determination of an annual quantity of **125,000 tons**, the parties agree that the municipalities of Versilia **shall** generate 80,000 t / year, while those of outside - Versilia, **shall** generate 45,000 / year[1002]

725. As a preliminary matter, the Tribunal already determined in section (i) above, that the 2010 Agreement could not have been nullified for the seizure of the Falascaia plant as claimed by Respondent. Hence, the terms of this agreement have been binding for CAV since February 2010. Therefore, the Tribunal must determine the scope and extent of the obligation related to the quantity of waste.

726. From the ordinary meaning of Article 5 of the TEV Concession it is clear that CAV had an obligation to "assign […] and therefore pay for"[1003] the agreed annual quantity of waste, initially 110,000 tonnes, and then modified to 125,000 tonnes under the 2010 Agreement.[1004] The 2010 Agreement only comprised an adjustment of the gate fee and the annual quantity of waste; it did not address and much less modify the nature of the obligation to deliver a specific quantity of waste, making it a merely estimated value. Rather, the parties explicitly limited the effects of the 2010 Agreement, stating that it would not constitute "an amendment or novation of the concession agreement."[1005]

727. The reference to the 80,000 tonnes of waste that the Municipalities of Versilia would contribute directly and the additional 45,000 tonnes coming from other municipalities, does not mean that the total quantity of 125,000 tonnes was merely an indicative value. From the plain texts of the 2010 Agreement and Article 5 of the TEV Concession, the Tribunal can only conclude that the parties clarified the origin of the waste, without changing the binding nature of CAV's obligation to deliver 125,000 tonnes of waste annually. In fact, the Tribunal observes that the 2010 Agreement refers to the 80,000 and 45,000 tonnes as "estimated" values, a term not used when referring to the 125,000 tonnes that had to be "achieved." In this sense, the origin of quantities could change, but not the obligation to meet the fixed annual quantity.

[1001] C-17, TEV Concession , 31 July 1997, Art. 5(1) (emphasis added).
[1002] R-19, Agreement, 19 February 2010 (emphasis added). This exhibit was a translation submitted by Respondent that refers to "tons" but the quantities in the TEC and TEV Concessions were expressed in "*tonnes*" or "*tonellatas*" in Italian.
[1003] C-17, TEV Concession, 31 July 1997, Art. 5(1).
[1004] C-54, Minutes of the meeting between TEV, ATO, CAV, the Province of Lucca and the municipalities of Versilia, 19 February 2010.
[1005] R-19, Agreement, 19 February 2010 (Respondent's translation); C-54, Minutes of the meeting between TEV, ATO, CAV, the Province of Lucca and the municipalities of Versilia, 19 February 2010.

728. The context of adoption of the 2010 Agreement confirms that its underlying rationale was to ensure higher quantities of annual waste, not to reduce them or soften the obligation to meet such quantities. Before the negotiations for the 2010 Agreement had begun, Claimant had highlighted the low volume of waste delivered to the MBT plant, with levels "considerably below both the historical and contract average," and annual deliveries below 130,000 tonnes, which affected the possibility of recovery for the plant.[1006] Such concerns extended throughout the negotiations that ultimately led to the 2010 Agreement.[1007] Given Claimant's allegations that the adequate quantity for the functioning of the MBT plant was, at least, 130,000 tonnes,[1008] the 2010 Agreement increased the annual quantities of waste to be provided by CAV from 110,000 to 125,000 tonnes.

729. According to Claimant, since 2009[1009] the Municipalities of Versilia had started to request neighboring municipalities for help to cover the 110,000 tonnes of waste required by the TEV Concession. In Claimant's words, these were other municipalities that *were not obliged to use this concession* but delivered their waste nevertheless to ensure a sufficient flow of waste for CAV to meet its obligation.[1010] This indicates that, even then, Respondent was conscious that CAV had the obligation to collect the 110,000 tonnes of waste, and that only CAV was the responsible entity for the compliance of said obligation, not the non-Versilia municipalities.

730. The Tribunal notes that this context was further confirmed in CAV's letter of 3 December 2011, in which CAV expressed its intention to form a Technical Panel to define the new tariffs going forward on the basis of several assumptions. One of them was the assignment of 135,000 tonnes of waste a year to the MBT plant "with an express guarantee of allocation of the same quantity by the Grantor."[1011]

731. The declaration of the Province of Lucca and ATO Toscana Costa that "they would do everything in their powers in good faith to ensure that the Municipalities outside Versilia continue to send the waste […]."[1012] does not, in any way, change CAV's obligation to provide the 125,000 tonnes per year under the TEV Concession and the 2010 Agreement. Notably, Respondent does not dispute the binding nature of this agreement, nor the amounts determined therein, based on the declaration of "best efforts", or on the specification of the different origins of the waste. As noted above, the agreement's binding nature is contested on the grounds that it was nullified due to the confiscation of the Falascaia Plant.

732. Lastly, Respondent does not dispute the lack of delivery of the 125,000 tonnes of waste as per the 2010 Agreement, and there is no evidence in the record to demonstrate that the Municipalities did, in fact, comply with said obligation.

[1006] C-169, Letter from TEV to CAV, 30 March 2009.
[1007] C-168, Letter from TEV to CAV, 28 September 2009, p. 2.
[1008] C-169, Letter from TEV to CAV, 30 March 2009: "It is recalled that rate comparisons are rendered yet more difficult as a result of reduced annual deliveries of less than 130,000 tonnes. Should these irregular deliveries of [USW] continue, the chances of recovery will gradually reduce, given plant limitations as to maximum daily quantities that can be treated."
[1009] Mr. Bozzetto, First Witness Statement, ¶ 24.
[1010] Tr. Hearing Day 2, 383: 13-21 (Examination of Mr. Bozzetto).
[1011] C-56, Letter from CAV to TEV, 3 December 2011, p. 4.
[1012] C-54, Minutes of meeting for review of the TEV tariff, 19 February 2010.

733. On the contrary, contemporary correspondence demonstrates that the Municipalities actively disregarded the 2010 Agreement. For instance, through a letter of 29 December 2011, the municipality of Viareggio rejected an invoice issued by TEV charging the "put or pay" for amounts not delivered in 2010. Viareggio claimed that the Municipalities delivered 82,514.28 tonnes of waste in 2010, allegedly complying with the amount to be sent by CAV by virtue of the 2010 Agreement.[1013] The Municipalities of Massarosa, Forte dei Marmi, Camaiore and Seravezza also rejected their respective invoices and argued that the "put or pay" agreement did not involve them but only the contractual party, *i.e.* CAV.[1014] Interestingly, these Municipalities acknowledged the "put or pay" clause, refuting PoliMi's conclusion on the absence of such a clause in the TEV Concession. The clause was also expressly recognized by CAV in the 3 December 2011 letter. This is proof of unpredictable and inconsistent conduct between the Municipalities, individually considered, and CAV, which affected the implementation of Respondent's obligations under the TEV Concession.

734. Claimant also submitted in the Hearing that other municipalities "simply refused to deliver the waste to [TEV's] MBT plant because nearby landfills, private landfills, had a cheaper gate fee,"[1015] which allegedly jeopardized the 45,000 tonnes that were to be provided by non-Versilia municipalities. This allegation was confirmed by Mr. Bozzetto's witness statement, in which he asserted that, for instance, ATO municipalities delivered their waste to landfills in Pisa (Belvedere Peccioli) and Rosignano (REA Scarpigliato), which applied lower treatment rates. Therefore, "the remaining ATO municipalities refused to deliver their waste to TEV."[1016] The Tribunal notes that this allegation was not disputed or rebutted by Respondent.

735. Lastly, the Tribunal observes that on 21 March 2012, Claimant calculated the amounts owed by reason of the "put or pay" clause as follows:[1017]

PUT OR PAY 2010 - 2011	
Cav Municipalities	Credit
Camaiore	1,501,954
Forte dei Marmi	499,315
Massarosa	566,949
Pietrasanta	742,145
Seravezza	114,809
Viareggio	2,058,073
Total	**5,483,244**

[1013] C-157, Letter from the Municipality of Viareggio to TEV, 29 December 2011, p. 4.
[1014] C-164, Letter from the Municipality of Camaiore to TEV, 9 March 2012; C-163, Letter from the Municipality of Seravezza to TEV, 2 March 2012; C-166, Letter from Forte dei Marmi to TEV, 14 April 2012; C-167, Letter from Massarosa to TEV, 11 July 2012.
[1015] Tr. Hearing Day 1, 55:22-56:1 (Claimant's Opening Statement).
[1016] Second Witness Statement of Mr. Vincenzo Bozzetto, ¶ 25.
[1017] C-63, Letter from TEV to the Municipalities of Versilia, ATO, CAV and the. Province of Lucca, 21 March 2012.

736. Such estimates were adopted in the Insolvency Report, where the Insolvency Receivers took into account the payment of the tariff between 2010 and 2011, "taking as a reference basis the tonnes effectively granted."[1018]

737. For the above reasons, the Tribunal finds that Respondent had an obligation to collect and provide 125,000 tonnes of waste to TEV's MBT plant pursuant to the 2010 Agreement, or to make payment in respect of that quantity. Respondent breached this obligation by disregarding its commitments and delivering lower quantities while refusing to make payment in respect of the shortfall.

738. As a final note, the Tribunal observes that although Respondent asserted that under the 2010 Agreement "the gate fee for the years 2006-2009 was fixed in the amount of 177,9 € /Ton, on the basis of a **supply of 125,000 tons of waste**,"[1019] the text of the agreement clearly states that the waste quantity, like the new fee, was to be applied henceforth:

> "The parties agree - without so necessitating an amendment or novation of the concession arrangement-, that, until the completion of the agreements mentioned above, it is paid to TEV, with effect from 1/01/2010, a fee for the services rendered equal to 167.04 € / t." [1020]

739. This means that for the years before 2010, the 110,000 tonnes, rather than the 125,000 tonnes of waste, applied. Therefore, for the purposes of the damages assessment, the former quantity will be taken into account for the years prior to 2010.

(iii) Conclusion on the gate fees and the waste quantities under the TEV Concession

740. Based on the foregoing, the Tribunal concludes that Respondent was in breach of the gate fee and waste quantities obligations under the TEV Concession which is in turn a breach of the ECT's umbrella clause. Respondent disregarded its obligations under a public utilities contract, which obligations were at the core of Claimant's investment, given that the gate fee was the basic remuneration of the TEV Concession and the provision of the agreed waste quantities were elements equally essential to its implementation.

741. Respondent failed to demonstrate that the Grantor met its undertaking of ensuring that the waste provided by the Municipalities of Versilia and non-Versilia municipalities complied with the agreed amounts of waste. Additionally, the Municipalities of Versilia took their individual stance on the gate fee, and the waste quantities, in an inconsistent and contradictory fashion. Ultimately, the breach of the TEV Concession resulted from the State's disregard of the 2010 Agreement through CAV's changing position, and the conflicting and inconsistent conduct of the Municipalities of Versilia, and CAV.

[1018] C-68, Insolvency Receivers Report of the Judicial Receivers, 1 February 2013, p. 25.
[1019] Respondent's Counter-Memorial, ¶ 141 (emphasis added). This submission refers to "tons" but the quantities in the TEC and TEV Concessions were expressed in "tonnes" or "*tonellatas*" in Italian.
[1020] R-19, Agreement, 19 February 2010.

9. TEV's termination

a. Claimant's position

742. Claimant asserts that it is a good faith investor, and that there is no evidence of its alleged bad-faith conduct in connection with the termination of the TEV Concession and the alleged breaches of environmental law.[1021] Rather, the termination of the Concession was a measure taken in good faith and the alleged environmental violations were attributable to the former management of TEV.[1022]

743. Claimant "does not dispute that TEV dumped sediments into the Beccatoio creek" but contends that they were committed by TEV's former management and owners, and that Veolia's subsequent actions show its good faith with regard to those breaches.[1023] Veolia itself identified that certain employees had manipulated the CO information of the Falascaia plant, informed the authorities, and launched a risk assessment, internal disciplinary actions, and adjustment works.[1024] Veolia also uncovered the excess in the **CSC** from the discharge of wastewater in the Beccatoio Creek, which had been authorized by Decision No. 125/2006, and submitted an adjustment plan to the Lucca Province, which issued Decision No. 69/2008.[1025]

744. Despite these efforts, in 2009 the environmental agency ("**ARPAT**") found that the CSC levels exceeded the limits set out in Decree No. 152/2006, which led to a criminal investigation, the seizure of the Falascaia plant, and the annulment in 2011 of the Falascaia plant's permit to operate, for having been issued on the grounds of false emissions reports.[1026] Although this decision was unsuccessfully challenged by TEV, the Council of State acknowledged that Veolia did not make the "misrepresentations" leading to the annulment of the authorization, rebutting any bad faith conduct.[1027]

745. In any case, Claimant argues that the termination of the TEV Concession was due to the "wrongful behavior" of Respondent regarding the payment of the gate fee and the failure to meet its obligations regarding the delivery of the agreed quantities of waste.[1028]

b. Respondent's position

746. Respondent submits that Claimant acted in bad faith -a "cornerstone of the ECT and a key issue under Italian law"- when it "almost simultaneously" terminated the TEC and TEV Concessions and committed "serious breaches of environmental law."[1029]

747. According to Respondent, the shutdown of the Falascaia plant due to the environmental breaches in its operation, shows default and negligence from Claimant, has caused "serious damages" to

[1021] Claimant's Reply, ¶¶ 571-573.
[1022] Claimant's Reply, ¶ 575.
[1023] Claimant's Reply, ¶¶ 585-586.
[1024] Claimant's Reply, ¶ 587.
[1025] Claimant's Reply, ¶ 588.
[1026] Claimant's Reply, ¶¶ 589-590.
[1027] Claimant's Reply, ¶ 591-593.
[1028] Claimant's Memorial, ¶¶ 127, 334.
[1029] Respondent's Counter-Memorial, ¶¶ 386, 413.

Respondent,[1030] and was "the real reason for the termination of the concession in Tuscany, only apparently and conveniently justified by alleged failures of the public authorities."[1031]

748. Moreover, these irregularities preclude Claimant's protection under the ECT,[1032] and it is irrelevant that they were not directly committed by Claimant, but by its Vendor, as Claimant purchased a plant that did not comply with environmental regulations.[1033] In any case, Claimant could have requested its Vendor to assume liability for the lack of compliance with environmental regulations under the SPA but it chose not to, and even waived this right under the MSA.[1034] Hence, Respondent concludes that the "non-profitability of the plant cannot be related to the actions of the Italian authorities."[1035]

c. Tribunal's analysis

749. Respondent asserts that Claimant frustrated the execution of the 2010 Agreement by the shutdown of the Falascaia plant, "due to its seizure by the judicial authority and the subsequent revocation of the authorization by the Province of Lucca"[1036] deriving from the breach of environmental obligations. Respondent alleges that these circumstances "embody bad faith and have caused serious damages to the Italian Republic by the investor."[1037] As a result, Respondent considers that, due to its alleged bad faith conduct, Claimant is not entitled to any protection as an investor under the ECT.

750. In turn, Claimant asserts that the alleged *mala fides* cannot deprive it from receiving protection under the ECT. Claimant heavily relies on ICJ case law, particularly on the *Barcelona Traction Case,* to claim that "the alleged bad faith of the investor does not excuse the host State from respecting international law."[1038] Claimant also notes that Respondent's "extremist theory" that "any alleged act of 'bad faith' supposedly committed years after the investment was made, irremediably and automatically results in Veolia losing ECT protection and access to the ICSID arbitration," has no legal basis.[1039]

751. As noted above in section **3**, similar to the case of the TEC Concession, Respondent failed to bring forward an applicable international law rule that would bar Claimant from acquiring any protection as an investor under the applicable treaty for the commission of environmental infractions under domestic laws. Furthermore, it did not substantiate the threshold to be applied to Claimant's alleged bad faith conduct. Hence, the Tribunal is unable to accept the concept of bath faith under these circumstances, and agrees with Claimant's assertion based on the *Barcelona Traction Case*: Veolia's

[1030] Respondent's Counter-Memorial, ¶ 418.
[1031] Respondent's Rejoinder, ¶ 210.
[1032] Respondent's Counter-Memorial, ¶ 419.
[1033] Respondent's PHB1, ¶ 201.
[1034] Respondent's Rejoinder, ¶¶ 212-220.
[1035] Respondent's Rejoinder, ¶ 221.
[1036] Respondent's Counter-Memorial, ¶ 418.
[1037] Respondent's Counter-Memorial, ¶ 419.
[1038] Claimant's Reply, ¶ 568; CL-134, *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 3 (1970), pp. 50-51.
[1039] Claimant's Reply, ¶ 561.

alleged wrongful conduct in no way could justify the breach of Respondent's obligations under the TEV Concession,[1040] nor absolve it from responsibility for them under the ECT.

752. Notwithstanding the foregoing, the Tribunal will analyze the circumstances that, according to Respondent, are "the culmination of a series of defaults and negligence in the execution of the concession"[1041] and result in Claimant's alleged bad faith conduct. The Tribunal will refer to Claimant's and Respondent's conducts in the making of the investment and during its development, as Italian Courts had already recognized that these environmental infringements were carried out by TEV's former owner between 2004 and 2006.[1042]

753. In the making of the investment, the Tribunal first notes that none of the Parties discovered the manipulation of CO emissions before the 2007 purchase of TEV. Between 2006 and 2007, the State had renewed the permits for the WtE plant after ARPAT visited the plant[1043] and took samples from the chimneys for dioxin analyses.[1044] Respondent did not detect TEV's environmental breaches.[1045] Likewise, Veolia's 2007 environmental due diligence report confirmed that the WtE Falascaia plant complied with the European Directive of 2000 regarding CO emissions.[1046] So Claimant's due diligence did not detect it either. These facts show the serious difficulty in discovering the CO alterations, and ultimately, weigh against a finding of bad faith in the making of the investment that would preclude Claimant's right to bring a claim for Respondent's breaches of the ECT in this arbitration.

754. As to the circumstances during the development of the investment, the evidence in the record suggests that Claimant took mitigating steps when it discovered the CO alterations. After only being in control of the plant for a few months, on 16 July 2008, TEV took the decision to shut down line 1, "since it was the most difficult line to operate […] in terms of its emissions."[1047] On 19 October 2008, TEV suspended the functioning of both lines of the Falascaia plant and only resumed activities in July 2009,[1048] when it was subjected to "monitored operations" that ended that same year.[1049] Veolia also launched disciplinary actions towards the responsible employees that had manipulated the CO emissions data.[1050] In turn, Respondent promptly displayed its sovereign powers when the

[1040] CL-134, *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 3 (1970), pp. 50-51. "It has been argued on one side that unlawful acts had been committed by the Spanish judicial and administrative authorities, and that as a result of those acts Spain has incurred international responsibility. On the other side it has been argued that the activities of Barcelona Traction and its subsidiaries were conducted in violation of Spanish law and caused damage to the Spanish economy. If both contentions were substantiated, the truth of the latter would in no way provide justification in respect of the former."
[1041] Respondent's Counter-Memorial, ¶ 419.
[1042] Respondent's Counter-Memorial, ¶ 158-161; R-26, Communication of starting proceedings by the administration ('in autotutela'), 12 August 2011; 2R-27, Order for annulment, 10 November 2011.
[1043] Tr. Hearing Day 3, 558:21-559:13 (Examination of Mr. Bresciani).
[1044] C-284, Veolia's Technical and Operational Due Diligence Report, 29 January 2007, pp. 239.
[1045] Tr. Hearing Day 3, 556:5-13 (Examination of Mr. Bresciani) (Mr. Bresciani, "What I saw at the time were correct admissible emission values in this software. The values that we saw were compatible with the thresholds in force at the time. Then whether these values that I was being shown were correct or not correct, I couldn't know that at that time. Later on then at the end of the legal proceedings it was established that these values were the result of a software manipulation.").
[1046] C-284, Veolia's Technical and Operational Due Diligence Report, 29 January 2007, p. 18.
[1047] C-245, Explanation and chronology of TEV's events in late 2008 and early 2009, 21 August 2009, p. 2.
[1048] Claimant's Reply, ¶ 587; Second Witness Statement of Mr. Jean-Marc Janailhac, ¶ 14(x); C-245, Explanation and chronology of TEV's events in late 2008 and early 2009, 21 August 2009.
[1049] Respondent's Counter-Memorial, ¶¶ 153-154.
[1050] Claimant's Reply, ¶ 587; Second Witness Statement of Mr. Jean-Marc Janailhac, ¶¶ 14(v), 14(ix); C-245, Explanation and chronology of TEV's events in late 2008 and early 2009, 21 August 2009, pp. 1-3.

Public Prosecutor of Lucca ordered the seizure of the plant,[1051] and the police raided the facilities.[1052] This shows that during the development of the investment and once the CO alterations were discovered, both parties acted as they should have, with the purpose of avoiding further breaches and environmental damage.

755. Moreover, towards the termination of the TEV Concession, the Insolvency Report mentions that, while the Falascaia plant was inoperative due to the annulment of its license that resulted from the environmental breaches described above, it also had not been able to resume its activities because "the Provincial Government ha[d] not authorised the water treatment."[1053] This element, outside of Claimant's control, may have contributed to the WtE plant being inoperative, and weighs against a finding of bad faith against Claimant.

756. In conclusion, the Tribunal cannot uphold that Claimant's alleged bad faith impairs its protection as an investor under the ECT. The Tribunal cannot rule that Claimant acted in bad faith considering the lack of legal basis and evidence brought forward by Respondent. All these circumstances do not merit barring Claimant from accessing the ICSID arbitration system as enshrined in the ECT and bringing forward the TEV Concession breaches.

757. In addition to not demonstrating bad faith, Respondent failed to demonstrate that the environmental issues which led to the seizure of the Falascaia plant prevented Claimant from terminating the TEV Concession, or that they prevented "the execution of the contract by the [C]oncessionaire."[1054] While the Falascaia plant was relevant for the TEV Concession, there is no evidence that its shutdown prevented the MBT plant from operating. Rather, any impact on the functioning of the MBT plant and the termination of the TEV Concession stems from Respondent's unjustified breach of the most paramount obligations of the contract, *i.e.*, the remuneration for the public service provided, the fee that also permitted the ongoing performance of the Concession, and the collection of the agreed quantities of waste, as the raw material for the functioning of the whole project. Notably, Respondent did not find that the Falascaia plant seizure was a ground to terminate the TEV Concession, but only to reduce the gate fee under its interpretation of the terms of the 2010 Agreement, as described above.

758. Hence, the Tribunal reiterates that it does not find that the seizure of the WtE plant and the termination of the TEV Concession, preclude Claimant's right to bring a claim under the ECT's umbrella clause in this arbitration.

[1051] Respondent's Counter-Memorial, ¶ 414.
[1052] Claimant's Reply, ¶ 589.
[1053] C-68, Insolvency Receivers Report of the Judicial Receivers, 1 February 2013, p. 23.
[1054] Respondent's Counter-Memorial, ¶ 418.

B. FAIR AND EQUITABLE TREATMENT

1. The scope of FET under the ECT

a. Claimant's position

759. Claimant submits that Article 10(1) of the ECT sets forth the obligation of the host State to accord **FET** to the investor and its investments which entails encouraging and creating favorable conditions for investors.[1055] According to Claimant, FET "depends on the interpretation of specific facts for its content," and allows tribunals the necessary flexibility to assess the unfairness of a State's conduct.[1056] Relying, among others, on *Liman Caspian Oil v. Kazakhstan*, Claimant maintains that the Article 10(1) of the ECT sets out an autonomous FET standard[1057] that provides protection beyond the minimum standard of treatment under international law.

760. Veolia is not invoking the FET standard with respect to Italy's contractual conduct only, but also the Italian organs' conduct in exercising or failing to exercise their governmental powers. All contested behaviors revolve around the Concession Agreements and their implementation or consequences.[1058]

The standards of protection encompassed within the FET clause in the ECT

761. Article 10(1), second sentence, of the ECT provides a protection which goes beyond the minimum standard of treatment under international law.[1059] Moreover, nothing from the text of Article 10(1), the context of this Article, or the object and purpose of the ECT, suggests that the FET standard refers to customary international law as this has been confirmed in several cases including against Italy.[1060]

762. The FET standard includes a series of specific duties or obligations that have been recognized by several arbitral tribunals.[1061] Veolia maintains that Italy is misinterpreting the FET standard. Veolia considers that the FET standard includes the following obligations and prohibitions:[1062]

- The host State is required to maintain a stable environment.
- The host State is required not to act arbitrarily.
- The host State is required to act with transparency and respect due process.

[1055] Claimant's Memorial, ¶¶ 341-342.
[1056] Claimant's Memorial, ¶¶ 343-345.
[1057] Claimant's Reply, ¶ 746; Claimant's Memorial, ¶ 346; CL-33, *Liman Caspian Oil and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, 22 June 2010, ¶ 263.
[1058] Claimant's Memorial, ¶ 387 *et seq*.
[1059] Claimant's Reply, Section 5.3.1, ¶¶ 739-742; Claimant's Memorial, Section 5.2.1; Tr. Hearing Day 1, 60:12-61:8 (Claimant's Opening Statement); Claimant's Opening Presentation, slide 92.
[1060] See CL-96, *Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB/15/37, Award, 26 February 2021, ¶ 401; CL-97, *SunReserve Luxco Holdings S.À.R.L., et al. v. Italian Republic*, SCC Arbitration V (2016/32), Final Award, 25 March 2020, ¶ 671 *et seq.*; CL-44, *Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, Award, 6 August 2019, ¶ 568.
[1061] Claimant's Memorial, ¶¶ 351-386.
[1062] Claimant's Memorial, ¶¶ 351-386; Tr. Hearing Day 1, 61:9-18 (Claimant's Opening Statement); Claimant's Opening Presentation, p. 93.

- The host State is required not to act negligently and inconsistently.

- The host State is required not to act in bad faith.

b. Respondent's position

763. Claimant relies on a misinterpretation of the FET standard.[1063]Respondent asserts that Article 10(1) does not define FET, and concludes that this provision must be interpreted in accordance with the minimum standard of treatment of aliens under international customary law, consistently with general international law.[1064] In this regard, Article 10(1) cannot be interpreted as a "catch-all" standard, instead, it should only be applied to manifestly arbitrary acts, denial of justice and due process, discrimination, or abusive treatment.[1065]

764. According to Respondent, FET breaches require an elevated threshold.[1066] Relying on *S.D. Myers v. Canada, Mondev v. United States, and Waste Management v. Mexico*, Respondent argues that protection against an "arbitrary, grossly unfair, unjust or idiosyncratic" conduct is covered by FET, while the repudiation of economic rights is not a violation of this standard.[1067]

765. Based on this definition, Respondent argues that it did not act arbitrarily, and that Claimant is the one responsible for the deterioration of its own investment.

c. Tribunal's analysis

766. Claimant submits that the failure to complete TEC2[1068] and Sambatello 2 (the Reggio Calabria MBT) is attributable to Respondent's arbitrary and unfair conduct towards its investment,[1069] and therefore amounts to a breach of the FET clause in Article 10(1) of the ECT. The Tribunal will first analyze the applicable FET standard and then the breaches claimed by Claimant.

767. Article 10(1) of the ECT provides that:

> "Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment, or disposal. In no case shall such Investments be accorded treatment less favourable than that required

[1063] Respondent's Rejoinder, ¶ 431 *et seq*.
[1064] Respondent's Counter-Memorial, ¶ 516; Respondent's Rejoinder, ¶ 434.
[1065] Respondent's Counter-Memorial, ¶¶ 515, 518; Respondent's Rejoinder, ¶ 433.
[1066] Respondent's Counter-Memorial, ¶¶ 519-520; Respondent's Rejoinder, ¶ 433.
[1067] Respondent's Counter-Memorial, ¶¶ 519-520; RL-45, *S.D. Myers, Inc. v. Canada*, UNCITRAL, Partial Award, 13 November 2000, ¶ 263; RL-46, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 127; RL-47, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 98.
[1068] The second line of incineration in the WtE plant in Gioia Tauro.
[1069] Claimant's Reply, ¶ 770.

> by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party."

768. According to Claimant, FET is a "fact-based" standard under which States must refrain from acting improperly, discreditably, or unfairly, which tribunals must assess under the specific circumstances of the case, and affords protection that goes beyond the minimum standard of treatment under international law.[1070] In this sense, Claimant submits that the FET standard includes protection against arbitrary, negligent, bad faith, and/or inconsistent conduct of the State, and the protection of legitimate expectations, transparency and due process.[1071] Legitimate expectations include observance of contract obligations with the host State.[1072] Protection against arbitrariness includes the State's dealing with local authorities and its population to protect the investor's investment.[1073] Transparency and due process involve securing access to a judicial system and enforcement of judicial decisions.[1074] Protection against negligent and inconsistent conduct requires the State to act free from ambiguity, transparently, and coherently.[1075] Lastly, the State must act in good faith, which includes fulfilling its contract undertakings, for which the "structure of the State" cannot be invoked as an excuse not to fulfill such undertakings.[1076]

769. Respondent submits that the FET standard is not a "catch-all" provision but the "embodiment" of the minimum standard of treatment of aliens under customary international law,[1077] and does not include the protection of rights that derive from contractual obligations because it would lack *effet utile*.[1078] Also, Respondent contends that Claimant did not provide a legal foundation for its reliance on the protection of legitimate expectations, nor did it identify its specific expectations, until the Reply.[1079] Respondent does not seem to dispute that legitimate expectations can be protected under the FET standard, but rather that the threshold to find a violation of such expectations is high and requires a finding of manifestly unfair, unreasonable, or abusive conduct by the State.[1080]

770. Under Article 31(1) of the VCLT, a treaty must be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Article 10(1) of the ECT states that Respondent had an obligation to "encourage and create stable, equitable, favourable and transparent conditions" for protected investments, and the obligation to afford them "fair and equitable treatment."

771. Article 10(1) of the ECT does not include specific definitions for the terms used within the concept of "fair and equitable" treatment, therefore the Tribunal must find their ordinary meaning, considering, *inter alia,* the ECT's object and purpose. The "conditions" of a protected investment

[1070] Claimant's Memorial, ¶¶ 345-349.
[1071] Claimant's Memorial, ¶ 351.
[1072] Claimant's Memorial, ¶ 355.
[1073] Claimant's Memorial, ¶ 369.
[1074] Claimant's Memorial, ¶ 376.
[1075] Claimant's Memorial, ¶¶ 381-383.
[1076] Claimant's Memorial, ¶ 386.
[1077] Respondent's Rejoinder, ¶ 434.
[1078] Respondent's Counter-Memorial, ¶ 529.
[1079] Respondent's Rejoinder, ¶ 437; Respondent's Counter-Memorial, ¶ 533.
[1080] Respondent's Counter-Memorial, ¶¶ 518; Respondent's Rejoinder, ¶ 433.

naturally include the respondent State's applicable legal framework. In this sense, States must issue and apply the relevant legal framework to investments covered by the ECT in a predictable, reasonable, and coherent manner.

772. Also, States have to treat investments fairly and equitably, which demands a balance of their powers and legal framework with the rights of the investor and the investment in the specific circumstances at hand to fulfill the object and purpose of the ECT.[1081]

773. Article 2 of the ECT states that its purpose is to "establish[] a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter."[1082] In turn, the Charter sought "the development of an efficient energy market throughout Europe, and a better functioning global market" and "a climate favourable to the operation of enterprises and to the flow of investments and technologies by implementing market principles in the field of energy." For these objectives, the Charter recognized that the signatory states would formulate "stable and transparent legal frameworks creating conditions for the development of energy resources."[1083]

774. In this vein, States have an obligation to apply their legal framework to investors with protected investments under the ECT in a transparent, reasonable, coherent, and balanced manner that is consistent with the ECT's purpose of promoting the development of the energy field.

775. Moreover, the Tribunal observes that nothing in the text of Article 10(1) of the ECT limits the FET standard to the minimum standard of treatment of customary international law. This provision only states that "[i]n no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations." Hence, the baseline treatment for investments is not restricted to customary international law but includes "treaty obligations." The Treaty itself in Article 10(1) imposes qualified obligations on Respondent, including an active duty to "encourage and create" "favourable" conditions for investments in the specific context of energy. These specific conditions do not support Respondent's contention that the ECT's FET standard cannot go beyond the minimum standard of treatment under customary international law.

776. In light of the foregoing, the finding of a breach of the FET standard under the ECT depends on whether, under the specific circumstances of this case, Respondent acted in an unfair, arbitrary, unreasonable, or inconsistent manner that disregarded the purposes pursued by the ECT, affecting Claimant's investment in the energy field. Those specific circumstances include the legal framework relevant to Claimant's investment, such as the decisions of Italian courts, and the orders establishing the Commissario's powers.

777. The Tribunal observes that the claims for breaches of the ECT concerning (i) the "Failure to pay and refusal to adjust the applicable gate fees"; (ii) the "Failure to pay the outstanding *Contributo*"; and (iii) the "Failure to pay the additional costs (*Conguagli*) caused by the delivery of non-compliant quantity and quality of waste and the unavailability of nearby landfills" were brought as breaches of

[1081] See CL-96, *Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB/15/37, Award, 26 February 2021, ¶ 414.
[1082] CL-1, ECT, Art. 2.
[1083] CL-1, European Energy Charter, Title I, paragraph 2.

both the umbrella clause and the FET standard.[1084] Each of these provisions enshrines a stand-alone obligation and may give rise to a different treaty breach. In this arbitration, however, the three alleged breaches mentioned above were said to arise on the same factual basis, and the claims were structured in such a way that the Tribunal's findings on the umbrella clause address the core issues of the FET claims.

FET[1085]	Umbrella Clause
The *Commissario* failed to use its extraordinary powers under Ordinances Nos. 2696/97 and 3731/09 in order to ensure the payment of the gate fees and to obtain the money from the municipalities. Thus, Italy failed to protect Veolia's investment.	The Tribunal found that Respondent breached its obligations under Articles 6.2 and 7.1 of the TEC Concession to timely pay and adjust the gate fee. The Tribunal found that Respondent also breached its obligations under the TEV Concession and the 2010 Agreement.
Italy willfully frustrated the payment of the *Contributo* through legislative measures openly inconsistent with judgments. By refusing to comply with its own court's rulings, Italy deprived Veolia's rights, breaching the FET.	The Tribunal found that Respondent breached its obligations under Article 8-bis of the *Atto di Sottomissione*, in particular, to pay the Contributo.
Despite TEC's repeated requests, the *Commissario* failed to ensure new nearby landfills, even having the powers granted to it under Ordinances Nos. 2696/97 and 2984/99. Thus, Italy failed to guarantee a stable and secure environment for Veolia's investment, breaching the FET.	The Tribunal found that there was never an obligation to pay the *Conguagli* derived from the quality of waste delivered to TEC, but found a breach for the failure to meet the agreed quantities of waste delivered to TEC and TEV. The Tribunal also found that there was no breach of Respondent's obligations toward the landfills under the TEC Concession because Claimant failed to prove that the deficit of landfills was attributable to Respondent's actions.

778. Moreover, the damages claimed for the aforesaid three breaches under both the umbrella clause and the FET standard, resulting from the failures of Respondent to fulfill its obligations, are the same. Considering the foregoing, in the interest of efficiency, the Tribunal will not revisit the claims mentioned in paragraph 777 above, under the FET standard.

[1084] Claimant's PHB1, ¶ 43, pp. 16-17.
[1085] Claimant's PHB1, ¶ 43, pp. 16-17.

779. The other three claims brought as breaches of the FET standard are (i) the "Frustration of the construction of TEC2 and the Reggio Calabria MBT by local opposition"; (ii) the "*Commissario* willfully failed to exercise extraordinary powers to protect TEC's rights and impose the conditions necessary for the success of the TEC Concession"; and (iii) "Italy lured Veolia into long-years negotiations to no avail."[1086]

780. Regarding the last two claims or "head of claims", as Claimant identifies them,[1087] the Tribunal observes that their core issues are the *Commissario*'s powers, the negotiations during the Concession's performance, and the implementation of the Third Amendment, all of which were addressed in the umbrella clause analysis,[1088] and will be further addressed in the analysis of the FET claim regarding the "Frustration of the construction of TEC2 and the Reggio Calabria MBT." Notably, these issues that Claimant flags as independent claims not only cross-cut other claims but also do not correspond to any separate damages claim.[1089]

781. Therefore, in the interest of efficiency, the Tribunal will center its analysis on FET, on the frustration of TEC2 and Sambatello 2.[1090]

2. The alleged breaches of FET

a. Claimant's position

782. Claimant argues that Respondent's conduct violated the FET standard in the following ways:

(i) *Contributo*

783. Veolia submits that the non-payment of the *Contributo* gave rise to a separate breach of the FET obligation of the ECT. By issuing Decrees Nos. 18830 and 4760, deciding that the *Contributo* was not due before the completion of TEC2 and calling for a reimbursement of past payments, Italy (via the Calabria Region) breached the FET obligation.[1091] The Decrees, which were taken in defiance of the judgment dated 29 July 2008 rendered by the Calabria Administrative Tribunal, amount to a misuse of legislative power based on unreasonable, illogical and inconsistent reasons without any basis.

784. The *Commissario*'s failure to pay coupled with the Region's acts represents a *de facto* repudiation of the legal framework upon which the TEC Concession was based. This amounts to a substantial

[1086] Claimant's PHB1, ¶ 43, pp. 18-19.
[1087] Claimant's PHB1, ¶ 43, pp. 18-19.
[1088] See in this Award, ¶¶ 510-519 above.
[1089] Claimant's Reply, ¶¶ 887-888.
[1090] On the issue of whether Claimant belatedly invoked a legitimate expectations claim, the Tribunal finds that, to the contrary, in its Memorial, Claimant explicitly relies on legitimate expectations as part of the FET standard. The fact that Claimant further developed these arguments with the Reply does not mean that it belatedly submitted it or that it was not substantiated. See Claimant's Memorial, ¶ 351, Section 5.2.1.2: (a) "FET requires a State not to defeat the investor's legitimate expectations." In any case, the Tribunal will focus its analysis on whether Respondent acted in an unfair, arbitrary, unreasonable, or inconsistent manner, rather than on the analysis of Claimant's alleged legitimate expectations.
[1091] Tr. Hearing Day 1, 63:2-12 (Claimant's Opening Statement); Claimant's Memorial, Section 5.2.2 (b); Claimant's Reply, Section 5.2.2.2.

modification of the conditions of Veolia's investment, in breach of the stability principle. The refusal to comply with court rulings further represents an extraordinary violation of the rule of law.[1092]

(ii) TEC2

785. Claimant maintains that Italy breached the FET obligation by allowing the construction of TEC2 to be frustrated by local opposition.[1093] Veolia's investment was caught in the middle of the political crossfire between the *Commissario* and the Region causing unjustifiable delay and preventing its completion.

786. TEC was being instructed by the *Commissario* to build TEC2 in the municipality of Gioia Tauro but at the same time, TEC was being prevented from completing such construction because of the Region's strong opposition to this project.

787. The construction of TEC2 was frustrated by a regional law which suspended the construction of the plant for almost 11 months.[1094] This law was later declared unconstitutional by the Italian Constitutional Court.[1095]

788. On 30 October 2007, the *Commissario* approved a new waste management plan for the Calabria Region, which included the construction of TEC2 as envisaged in October 2003.[1096] However, on 28 December 2007, the Region adopted another regional law, again ordering the suspension of the construction of TEC2.[1097] TEC had to unfairly face more than six months of suspension of works before the law was again declared unconstitutional.[1098]

789. Even if the two regional laws suspending the works for TEC2 were ruled as unconstitutional, the Region persisted in its objection and asked the *Commissario* to relocate TEC2 out of Gioia Tauro.[1099] This request was in total contradiction with the *Commissario*'s own request to resume the works on 1 June 2009.

790. Ultimately, the Council of State issued a negative opinion on this envisaged relocation which would have entailed submitting TEC2's construction and operation to a new public tender.[1100] The *Commissario* then insisted on having 7 April 2010 as the deadline for the completion of TEC2 despite TEC's multiple warnings, and without being able to ensure that TEC2 would receive the required amount of waste per year from the Calabria Nord system.[1101]

[1092] Claimant's Reply, ¶ 769; Claimant's Reply, Section 5.3.2.1; Claimant's Memorial, ¶¶ 410-417, 556-565.
[1093] Claimant's Reply, Section 2.4.2.5 and Section 2.4.2.6.
[1094] C-36, Law No. 13/2005 of the Calabria Region, 17 August 2005, Art. 14.5.
[1095] C-37, Decision of the Constitutional Court No. 284, 3 July 2006.
[1096] C-174, Order No. 6294 of the *Commissario*, 30 October 2007 and Waste Disposal Management Plan 2007; C-14, *Atto di Sottomissione* between TEC and the *Commissario*, 31 October 2003, Art. 2 b).
[1097] C-72, Regional Law No. 27, 28 December 2007.
[1098] C-35, Decision of the Constitutional Court No. 277/2008, 9 July 2008.
[1099] C-38, Deliberation of the Calabria Region No. 122, 10 March 2009.
[1100] C-42, Opinion of the Council of State, 20 January 2010.
[1101] C-194, Letter from TEC to the *Commissario* No. TEC/272-10/EF-aa, 20 April 2010; C-193, Letter from TEC to the *Commissario* No. TEC/293-10/FS-sv, 19 May 2010.

791. Italy's actions, therefore, are at the root of the frustration of the construction of TEC2. Laws enacted, and decisions taken, by the Region, the failures of the *Commissario*, the in-fighting between different State authorities, among others, ultimately prevented Veolia from concluding the construction of TEC2 as planned. As a result, Veolia suffered a loss of € 28,7 M.

(iii) The Reggio Calabria MBT: Pettogallico and Sambatello

792. The construction of the Reggio Calabria MBT plant was likewise frustrated by politically motivated acts taken by different State authorities in breach of the FET standard.

793. The *Commissario* and the Calabria Region disagreed for nine years on the location of this plant, out of which, Veolia claims to have endured three years of unjustified delays.[1102] In 2004, the population, supported by local authorities, protested against the construction of this plant in Pettogallico, resulting in the suspension of the works and the issuance of Law No. 13/2005, which was later declared unconstitutional by the Constitutional Court in 2006. According to Claimant, the Commissario's "way of giving in to the Region's heated opposition to the construction of this MBT in Pettogallico" was to include in the new waste management plan approved by the *Commissario* on 30 October 2007 an option to relocate it to Sambatello.[1103]

794. A decision to relocate the project to the site of the Sambatello 1 plant was taken by the regional authorities and the *Commissario* on 29 August 2008.[1104] TEC proposed four alternative projects for the relocation; one alternative was initially approved at the beginning of 2009 and then switched in July 2009, because the envisaged technology was unavailabe.[1105] The works were suspended in Pettogallico as of 28 July 2009, which Claimant says meant that "all the previous works performed and investments made by TEC related to the Pettogallico site were no longer relevant."[1106] Afterward, the *Commissario* took months to approve the preliminary and the definitive project for the relocation to Sambatello. Veolia's delay in adjusting the preliminary project to submit the definitive version for approval, was due to its lack of resources to pay its subcontractors, absent payment of the *Contributo*.[1107] Furthermore, a landslide occurred near the defined construction site and the *Commissario* relied on this event to suspend the project again in April 2011. TEC explained that the risk had been flagged in the preliminary project and then mitigated in the designs to ensure the plant's safety, but the *Commissario* contested this conclusion. Despite TEC's efforts, the new MBT plant was never constructed, causing losses to Veolia and violating the FET standard of the ECT.[1108]

(iv) The *Commissario* failed to exercise its extraordinary powers

795. Claimant submits that the *Commissario* failed to exercise its powers, and this absence of action led to the destruction of Veolia's investment, in breach of the FET standard.

[1102] Claimant's Memorial, ¶¶ 445-449.
[1103] Claimant's Memorial, ¶¶ 444-445; C-174, Order No. 6294 of the Commissario, 30 October 2007 and Waste Disposal Management Plan 2007, PDF p. 9.
[1104] Claimant's Memorial ¶ 446.
[1105] Claimant's Memorial ¶ 447.
[1106] Claimant's Memorial, ¶ 448.
[1107] Claimant's Memorial, ¶ 450.
[1108] Claimant's Memorial, ¶¶ 450-456.

796. Claimant argues that the *Commissario*, as a State organ entrusted with the mission of solving the waste crisis,[1109] was obliged to collect and pay the gate fees, through the extraordinary powers it was vested with by Ordinance No. 3731/09 of the President of the Council of Ministers, which provided in Articles 1 and 6: [1110]

> "Art. 1
>
> […]
>
> 4. The Deputy Commissioner, subject to verification of the debtor situations of the municipalities or consortia for the payment of tariffs for the disposal of urban waste, shall undertake in timely fashion to recover the due amounts, using forcible collection procedures pursuant to Legislative Decree No. 46 of 26 February 1999 and adopting, where necessary, measures of a substitute character at the liability of the debtors, also making use of acting commissioners appointed for the purpose.
>
> […]
>
> Art. 6
>
> The expenses arising from the execution of the initiatives described in this order shall be drawn from the resources in the special accounts in the name of the Deputy Commissioner, described in Civil Protection Order No. 2696/1997 and subsequent amendments and additions, as well as through the use of the financial resources to be identified by the Region within the context of the sources of municipal, state and regional financing allocated to the Regional Government itself."

797. However, the *Commissario* refused to exercise its coercive powers to collect the amounts due to TEC from the Calabria municipalities, despite TEC's requests and against Veolia's expectations.[1111] The Management Award cannot be deemed to have protected its investment, given that it was annulled.[1112] The *Commissario* also failed to exercise its powers by not identifying and executing the landfills required for TEC's operation. Instead, it forced TEC to receive and treat more waste than the agreed amounts, while the Gioia Tauro and Rossano landfills were saturated.[1113]

798. Thus, as the Commissario failed to exercise its powers, evading its legal obligations and acting in bad faith for no specific reason, Italy violated the ECT's FET standard.[1114]

[1109] Claimant's Reply, ¶¶ 786, 788.
[1110] Claimant's Memorial, ¶¶ 463-468.
[1111] Claimant's Memorial, ¶¶ 469-471.
[1112] Claimant's Reply, ¶¶ 791-792.
[1113] Claimant's Memorial, ¶¶ 475-496; Claimant's Reply, ¶ 793.
[1114] C-51, Parliamentary Committee Report, 19 May 2011.

(v) The economic balance of the concession and frustration of the Third Amendment

799. Veolia submits that the breaches described above in respect of the frustration by Italy of the re-establishment of the economic and financial equilibrium of the TEC Concession as part of its umbrella clause claim also constitute breaches of the FET standard. Italy's behavior in handling the negotiations with evident negligence, lack of transparency, and without providing certainty and consistency further amounts to a breach of the FET standard under the ECT.[1115]

(vi) Failure to provide a stable and secure environment for the investment

800. Claimant adds that Respondent's conduct as a whole created unstable, inequitable and unfavorable conditions for the operation of Veolia's investment in violation of its obligation to guarantee a stable, secure environment for it. Veolia summarizes the clear examples of Italy's failures to provide a stable and secure environment for its investment as follows:

- The Municipalities of Versilia acted in an arbitrary manner when they refused to pay the tariffs and adjust them despite prior agreements with TEV;[1116]
- Italy failed to protect TEC's rights with respect to the construction of the plants only because of internal political reasons;[1117]
- Italy created an environment of delays in payment or non-payment, and of inaction regarding landfills or selective collection.[1118]

801. Respondent failed to abide by its own courts' rulings, frustrating Veolia's right to justice: Italy denied Veolia effective protection by completely disregarding judicial decisions that had upheld the legal framework on the basis of which the investment was made; and adopted such contradictory behaviors that Veolia was repeatedly deceived.[1119]

802. Claimant submits that even assuming that each aspect of Italy's conduct would not individually amount to a breach of FET (*quod non*), overall, Italy's conduct ultimately resulted in the complete destruction of Veolia's investment, in breach of the FET standard within the ECT.[1120]

[1115] Claimant's Memorial, ¶¶ 381-383; CL-55, *Pseg Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, ¶¶ 246, 247, 250; CL-36, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, ¶ 154; CL-35, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶¶ 163-165.
[1116] Claimant's Memorial, ¶¶ 549-551 and 554; Claimant's Reply, ¶¶ 664-675, 806-810; Claimant's PHB1, ¶¶ 42-43.
[1117] Claimant's PHB1, ¶¶ 42-43; Claimant's Reply, ¶¶ 244-250, 806-810, 826-827; Claimant's Memorial, ¶¶ 566-574.
[1118] Claimant's PHB1, ¶¶ 42-43; Claimant's Memorial, ¶¶ 472-503; Claimant's Reply, 806-810.
[1119] Claimant's PHB1, ¶¶ 42-43; Claimant's Memorial, ¶¶ 556-565; Claimant's Reply, ¶¶ 664-675, 707-710, 806-810.
[1120] Claimant's PHB1, ¶¶ 42-43; Claimant's Reply, ¶¶ 806-810.

b. Respondent's position

803. Italy's conduct was in line with the FET standard under the ECT. Respondent rebuts Claimant's portrayal of the acts that allegedly breached the FET standard.[1121]

(i) *Contributo*

804. According to Respondent, the 2003 *Atto di Sottomissione* created the *Contributo* to reduce the tariff for the Calabria Sud municipalities in light of the construction of new plants and the adaptation of existing ones. Article 8-bis of the *Atto di Sottomissione* "connects the disbursement of the contribution to the completion of the works by providing for its *pro-quota* settlement" within 30 days after the entry into operation of each plant, when the experimental phase concluded.[1122] There was a share of the *Contributo* for each plant that was completed, which only occurred for Siderno, Rossano, Crotone and Gioia Tauro, as well as line 1 of Gioia Tauro's WtE plant. This means that any amount due would be less than that claimed by Claimant.[1123] Moreover, Respondent contends that it did not fail to comply with Decision 5412/2012 of the Italian Council of State, since it did not address the specific terms of payment of Article 8-bis, but only referred to the functioning of the system.[1124] In any event, the payment of this subsidy is still under dispute before the Court of Genoa, and if the Receiver's action succeeds, Claimant will receive the amount in dispute through the bankruptcy proceedings.[1125] Lastly, Respondent argues that Claimant could not have suffered any harm since it did not have to pay the second installment of TMT's purchase price if it did not receive payment of the *Contributo*, as per Article 2(4) of the SPA.[1126]

(ii) TEC2

805. Articles 2(b) and 8-bis of the 2003 *Atto di Sottomissione* provided for the construction of the WtE line 2 at Gioia Tauro, which was suspended as per Article 14, para. 5 of Regional Law No. 13/2005, due to the drafting of a new regional waste disposal plan. However, that provision was declared unconstitutional in 2006. When Veolia acquired TEC, the Calabria Region's opposition to the works "were widely known." In December 2007, the Calabria Region suspended the WtE line 2 for Gioia Tauro to verify its environmental compatibility. Again, this decision was set aside by the Constitutional Court. In March 2009, the *Commissario* requested TEC to consider the relocation of the WtE line 2, but this was rejected because it required a new community tender. In this context, when Veolia made its investment, it could not legitimately expect that the WtE line 2 would be constructed. Respondent acknowledges that this project would have reduced the cost of waste disposal based on the revenues from the sale of electricity. However, since the waste disposal service was compensated with the tariff paid by municipalities to TEC, the failure of the WtE line 2 did not cause any direct economic loss for TEC. The damage was borne by the community that assumed higher waste disposal costs. [1127]

[1121] Respondent's Rejoinder, 426 *et seq,* Section IV.C.2
[1122] Respondent's Counter-Memorial, ¶ 537.
[1123] Respondent's Counter-Memorial, ¶ 543.
[1124] Respondent's Counter-Memorial, ¶ 540; Respondent's Rejoinder, ¶ 451.
[1125] Respondent's Counter-Memorial, ¶ 542.
[1126] Respondent's Counter-Memorial, ¶ 457.
[1127] Respondent's Counter-Memorial, ¶¶ 549-557.

(iii) The Reggio Calabria MBT: Pettogallico and Sambatello

806. Respondent argues that Claimant has already been compensated under the Construction Award, for the suspensions in the construction site of the plant located in Pettogallico and then relocated to Sambatello, between 2004 and 2009. Respondent further argues that the additional compensation claimed both in this arbitration and before the Court of Genoa by the Receiver of GA, for the delays between November 2009 and October 2011, are not attributable to it. First, TEC delayed the presentation of the definitive and the executive design. Second, there was a landslide phenomenon at the MBT plant site that had not been reported by TEC in its project documents and created environmental and public safety risks. As a result, on 1 April 2011, the *Commissario* suspended the works, and on 8 April 2011, Claimant implicitly acknowledged the flaws in the initial design by confirming that it had appointed a designer to adjust the preliminary project.[1128] Considering the compensation already paid and Claimant's contribution to the damage it claims, there are no grounds to sustain the allegations of Italy's unfair or unjust treatment.[1129]

(iv) The powers of the *Commissario*

807. Respondent contends that the powers of the *Commissario* are not as broad as Claimant affirms: it did not enjoy general and unconditional authority and was rather a facilitator.[1130]

808. First, under Articles 2.2. and 2.3. of the TEC Concession, the *Commissario* did not have any coercive power regarding the collection of waste disposal tariffs,[1131] it could only assist public administrations in the issuance of authorizations. Accordingly, the *Commissario* had no power to conclude a transaction based on TEC's 2007 Settlement Proposal. Within its powers, the *Commissario* did set up a technical commission to review TEC's claim, which substantially reduced it from € 204 M to € 21 M.[1132] In any event, under the FET standard, Italy had no obligation to agree with TEC's proposal. Respondent further argues that the *Commissario* only acquired coercive collection powers over the *Contributo* after Veolia made its investment, in 2009. This circumstance could not have influenced the decision to invest.[1133]

809. Second, the Concessionaire was the one responsible for the construction and management of the plants, while the *Commissario* only had to pay the tariff and approve the designs submitted to it.

810. Third, the *Commissario* did not act in bad faith; rather it "did everything in its power" to comply with the payment obligations.[1134] When this was not possible, TEC was able to resort to the protection of local courts. Accordingly, TEC obtained compensation for the amounts due as of 27 July 2009 under the Management Award. The sums claimed after that date and until the termination of the TEC Concession have not been substantiated.

[1128] C-202, Letter from VSA to the *Commissario*, 8 April 2011.
[1129] Respondent's Counter-Memorial, ¶¶ 558-565.
[1130] Respondent's Rejoinder, ¶¶ 444, 449; Respondent's Counter-Memorial, ¶ 567.
[1131] Respondent's Rejoinder, ¶ 445.
[1132] Respondent's Counter-Memorial, ¶ 577.
[1133] Respondent's Rejoinder, ¶¶ 444-447.
[1134] Respondent's Counter-Memorial, ¶¶ 569, 571.

811. Fourth, the *Commissario* cannot be held liable for the opposition of civil groups to the construction of TEC2, due to their environmental concerns. The *Commissario* did not have direct powers regarding this issue, and in any case, this is a common phenomenon that should have been assessed by Veolia prior to its investment.[1135]

(v) The economic balance of the concession, the MOU, and the Third Amendment

812. First, the long negotiations to achieve the economic and financial balance of the TEC Concession began in 2008, only months after Claimant made its investment. Therefore, Respondent argues that either the imbalance was identified in the due diligence performed prior to the investment, or it emerged right after the acquisition, which appears unlikely.[1136] Moreover, Claimant's urgency to negotiate the rebalancing of the concession appears contrary to its representation that the concession was deemed profitable at the time of the investment. Respondent further asserts that the "hostile attitude of the concessionaire" made the negotiations more difficult by its pursuing litigation, failing to submit designs on time, and not proposing solutions.[1137]

813. Second, Respondent argues that the MOU sent by the *Commissario* on 27 January 2011, in the course of the negotiations, was not an acknowledgment of Claimant's position. As specified in the transmission note, the MOU was only a "provisional starting point for a subsequent complete definition of the various issues subject to dispute in connection with the execution of the concession relationship."[1138] The MOU also conditioned the *Commissario*'s commitments on several requirements, under which both parties had to make concessions and renounce certain claims.[1139]

814. Based on the MOU, the *Commissario* and TEC signed the *Secondo Atto Integrativo* or the Third Amendment, which set forth the following commitments:

a. the revision of the tariff, quantified in € 91.77 / tonne plus VAT from 1 January 2011 to 30 June 2011 and in € 110.00 / tonne plus VAT from 1 July 2011 to 31 December 2011 (Article 2);

b. the updating of the tariff (Article 3);

c. a drastic reorganization of the plant system with a view to treating greater quantities of waste (Article 5);

d. the extension of the duration of the concession for a further 15 years starting from 1 July 2011 (Article 6);

e. settlement of all pending legal actions (Article 8). [1140]

[1135] Respondent's Rejoinder, ¶¶ 455-457.
[1136] Respondent's Counter-Memorial, ¶ 582.
[1137] Respondent's Counter-Memorial, ¶ 584.
[1138] Respondent's Counter-Memorial, ¶ 589; C-219, Memorandum of Understanding between TEC and the *Commissario*, 27 January 2011, p. 1.
[1139] Respondent's Counter-Memorial, ¶ 592.
[1140] Respondent's Counter-Memorial, ¶ 593; C-46, Third Amendment or *Secondo Atto Integrativo* between TEC and the Commissario, 21 June 2011.

815. Third, Respondent argues that the Third Amendment was also not a recognition of TEC's claims.[1141] On the contrary, the Third Amendment expressly acknowledged that the pre-existing imbalance was a matter yet to be agreed.[1142] In this vein, the tariff to ensure the economic-financial balance of the concession only referred to future actions such as new investments, upgrade works to existing plants or mitigation actions.[1143]

816. Fourth, Respondent further argues that the Calabria Region did not reject the Third Amendment; it merely considered the new tariff structure to be provisional until the "variant appraisal" was approved. Thus, until 21 December 2015, the concession maintained its economic-financial balance.[1144]

817. Moreover, Respondent clarifies that the *Commissario* would have submitted the Third Amendment to the Court of Auditors for approval. However, Claimant issued the 2011 Notice on 28 December 2011, only days after Resolution No. 625 of 23 December 2011, by which the Calabria Region formally substituted the *Commissario* in the TEC Concession. After the 2011 Notice, Veolia entered the *Prorogatio* phase, where the management of contractual activities was assumed by the *Commissario*, and which was subject to the "pure cost" criterion of the service.[1145]

818. Lastly, the short time between Resolution No. 625 and the 2011 Notice, did not allow the Calabria Region to submit the Third Amendment to the competent bodies. The entry into force of the *Prorogatio* phase eliminated the conditions for the effectiveness of the Third Amendment. Therefore, the failure to implement the Third Amendment is not attributable to Respondent but to Claimant's actions.[1146]

c. Analysis of the Tribunal

819. As noted above in paragraph 781, in the interest of efficiency, the Tribunal will center its analysis on FET, on the frustration of TEC2 and Sambatello 2.

(i) TEC2

820. Claimant argues that the contradictions between the *Commissario* and the Calabria Region, and the *Commissario*'s inconsistent conduct of requesting the completion of the works while failing to pay the gate fee and the *Contributo* caused the failure to build TEC2.[1147] Respondent contends that Veolia's prior knowledge of the State's opposition to TEC2 defeats its legitimate expectations claim,[1148] and that no harm was suffered as a result of TEC2's frustration.[1149]

[1141] Respondent's Counter-Memorial, ¶ 594.
[1142] Respondent's Counter-Memorial, ¶¶ 593-597.
[1143] Respondent's Counter-Memorial, ¶ 595.
[1144] Respondent's Counter-Memorial, ¶ 599.
[1145] Respondent's Counter-Memorial, ¶¶ 601-605; C-57, Letter from TEC to the *Commissario*, 28 December 2011; C-49, Decision of the Region of Calabria No. 625, 23 December 2011.
[1146] Respondent's Counter-Memorial, ¶¶ 607-608.
[1147] Claimant's Memorial, ¶ 420.
[1148] Respondent's Counter-Memorial, ¶¶ 551-554.
[1149] Respondent's Counter-Memorial, ¶¶ 555-557.

821. As a threshold matter, and in line with the foregoing section, the core issue at stake in this case is whether, under its legal framework, Respondent acted arbitrarily, unfairly, unreasonably, and inconsistently toward Claimant's investment, rather than whether Claimant's legitimate expectations were defeated.

822. It is undisputed that, before the investment, local and regional opposition existed against TEC2. Regional Law No. 13/2005 had ordered the suspension of the construction of TEC2 due to the pending regional waste plan.[1150] However, such opposition was repealed by the Italian Constitutional Court when it declared Law No. 13 unconstitutional in July 2006,[1151] as follows:

a. The Constitutional Court first recalled that the Italian State had a specific structure of allocated powers, including those to face "natural disasters, catastrophes or other events, which, due to their intensity or extent, require extraordinary resources and powers."[1152] The powers of the Council of Ministers to address such extraordinary events "shall be with the agreement of the concerned Regional Governments" but "[f]or the implementation of the aforementioned emergency interventions, orders may also be adopted by Deputy Commissioners […] as an exception to any current provision, in observance of the general principles of the legal system."[1153] In this vein, the *Commissario*'s functions "are of national importance, given the existence of requirements of unity, coordination, and direction, excluding the possibility that the recognition of extraordinary powers, as an exception to current legislation, may occur via regional laws."[1154]

b. Having recognized the importance of the *Commissario*'s extraordinary role in extraordinary circumstances, the Constitutional Court delved into the challenged waste management plant, finding that such a measure pursued the purpose of "return[ing] to normal living conditions" as opposed to Law No. 13, referred to as "the authoritative suspension of acts issued through the exercise of a State power, linked to the existence of extraordinary emergency situations."[1155]

c. The Constitutional Court then noted that the *Commissario*'s powers were not unlimited but that this did not mean that "the regional legislator [could] use legislative powers, as occurred in the case in question, to paralyse the effects of necessary and urgent measures during the emergency period, issued by way of implementation of the state legal provisions with express fundamental principles," and thus, declared Law No. 13 to be unconstitutional.[1156]

823. In addition to this decision by the Constitutional Court, by the SPA's closing date, the *Commissario* approved the new waste management plan,[1157] which confirmed the extraordinary powers and the correlative duty of the *Commissario* to take all necessary measures to overcome the waste management crisis, for which the construction of MBT and WtE plants was key:

[1150] C-36, Law No. 13/2005 of the Region of Calabria, 17 August 2005, Art. 14.5.
[1151] Claimant's PHB1, ¶ 78.
[1152] C-37, Decision No. 284 of the Constitutional Court, 3 July 2006, p. 4.
[1153] C-37, Decision No. 284 of the Constitutional Court, 3 July 2006, p. 4.
[1154] C-37, Decision No. 284 of the Constitutional Court, 3 July 2006, pp. 4-5.
[1155] C-37, Decision No. 284 of the Constitutional Court, 3 July 2006, p. 6.
[1156] C-37, Decision No. 284 of the Constitutional Court, 3 July 2006, p. 7.
[1157] C-174, Order No. 6294 of the *Commissario*, 30 October 2007, and Waste Disposal Management Plan 2007, PDF p. 3.

> "HAVING REGARD TO paragraph 2 of Art. 1 of the cited O.P.C.M. no. 3585 of 24 April 2007, published in the Official Gazette of the Italian Republic issue no. 105 of 8/5/2007, which states that the Delegated Commissioner, in particular, shall carry out, inter alia, the following activities: a) updating and reshaping of the Regional Waste Plan; b) implementation of Articles 148 and 149 of Legislative Decree no. 152/2006, by means of the establishment of local authorities for the subsequent preparation and/or updating of local plans."[1158]

824. The waste management plan recognized the ongoing TEC2 project and its importance:

> "Indeed, the Gioia Tauro RDF waste-to-energy plant is currently being doubled, which, the work is completed, will be able to meet the entire RDF waste-to-energy requirements of all of the installations of the various ATOs."[1159]

> "In the territory of the A.T.O. the plants provided by the update of Chapter 3 of the Regional Waste Plan, drawn up in June 2004, are still under construction, *i.e*. the doubling of the Gioia Tauro waste-to-energy plant, serving the entire region, and the new [USW] bio-mechanical sorting plant located in Pettogallico, in the municipality of Reggio Calabria, with a processing capacity of 70,000 t/year of undifferentiated [USW] and 50,000 t/year of Differentiated Waste." [1160]

825. The waste management plan also generally referred to the difficulties in building the plants: "[t]he failure to execute the aforementioned plants, as well as the service landfills, has led to an anomalous management of the integrated waste cycle in this area,"[1161] but still contemplated the development and completion of TEC2:

> "The execution of the doubling of the Gioia Tauro plant should be completed during 2009. Commissioning should take place in 2010. The availability of this plant fully satisfies the regional recycling needs for RDF." [1162]

826. Yet, in December 2007, the Calabria Region issued Regional Law No. 27 objecting to the October 2007 waste management plan approved by the *Commissario* and ordering the suspension of the TEC2 works.[1163]

827. The Calabria Region's reiterated opposition and interference did not change Claimant's right to rely on the *Commissario*'s extraordinary powers, and on the consistency of Respondent's legal framework, considering that Regional Law No. 27, similar to Regional Law No. 13, was subsequently declared unconstitutional in July 2008.[1164]

828. The works for TEC2 did not resume immediately after the 2008 decision, as TEC2 was meant to receive CDR from the Calabria Nord system that was not ready, thus TEC and the *Commissario*

[1158] C-174, Order No. 6294 of the *Commissario*, 30 October 2007, and Waste Disposal Management Plan 2007, PDF p. 3.
[1159] C-174, Order No. 6294 of the *Commissario*, 30 October 2007, and Waste Disposal Management Plan 2007, PDF p. 6.
[1160] C-174, Order No. 6294 of the *Commissario*, 30 October 2007, and Waste Disposal Management Plan 2007, PDF p. 8.
[1161] C-174, Order No. 6294 of the *Commissario*, 30 October 2007, and Waste Disposal Management Plan 2007, PDF p. 8.
[1162] C-174, Order No. 6294 of the *Commissario*, 30 October 2007, and Waste Disposal Management Plan 2007, PDF p. 12.
[1163] C-72, Regional Law No. 27, 28 December 2007.
[1164] C-35, Decision No. 277 of the Italian Constitutional Court, 9 July 2008.

agreed on a suspension of the works until 31 May 2009.[1165] However, shortly before the agreed suspension was about to expire, on 10 March 2009, the Calabria Region issued Resolution No. 122, this time, requesting the relocation of TEC2.[1166] At the same time, in June 2009, the *Commissario* ordered the resumption of the works, which would take place on 5 October 2009.[1167]

829. The contradiction between the Calabria Region and the *Commissario*'s orders[1168] was such that the *Commissario* requested in November 2009 an advisory opinion on the matter from the Italian Council of State. In January 2010, the Council of State issued an advisory opinion that did not support the relocation of TEC2, since this was only possible under a new project demanding essentially a new concession.[1169] The Council of State also recognized that ultimately the decision whether to relocate was that of the *Commissario* not the Calabria Region.[1170]

830. By 2010, the *Commissario* insisted on completing TEC2, despite not having secured the required amount of waste from the Calabria Nord system.[1171] Also, the *Commissario* had failed to adjust or reject the contract terms to reflect the "technical requirements" made by the *Commissione Valutazione Impatto Ambientale* or "Commissione Via", which was the authority in charge of keeping the environmental impact of projects under control.[1172] Notably, the foregoing was added to the already critical situation experienced by Veolia due to the *Commissario*'s continued refusal to pay the gate fees, and the *Contributo*,[1173] envisaged as the base sources of income under the TEC Concession.

831. Hence, the evidence in the record suggests that Respondent's entities and authorities acted in an incoherent fashion, inconsistent with the regulations and powers in place, which unjustifiably delayed and affected the construction of the TEC2 plant.

(ii) The Reggio Calabria MBT: Pettogallico and Sambatello

832. Claimant argues that the completion of the Reggio Calabria MBT plant was frustrated by the *Commissario*'s and the Calabria Region's actions regarding the relocation of the plant.[1174]

833. Similar to TEC2's case, before the making of the investment the Reggio Calabria MBT plant had faced the interference of the Calabria Region between 2003 and 2005, with the issuance of Law No. 13/2005, which had been overcome with the 2006 decision of the Italian Constitutional Court.[1175] The 2006 decision, in combination with the *Commissario*'s extraordinary powers to fulfill his

[1165] Claimant's Reply, ¶ 233; C-290, Letter from the *Commissario* to TEC No. 18890, 4 December 2008 with Minutes of the Verification Roundtable between TEC, the *Commissario* and the Calabria Region, 2 December 2008; C-292, Letter from the *Commissario* to DL No. 2288, 25 February 2009.
[1166] C-38, Decision of the Regional Government of Calabria No. 122, 10 March 2009.
[1167] C-175, Resumption minutes, 9 June 2009. C-186, Letter from TEC to the COMM and DL dated 7 July 2009.
[1168] Claimant's Memorial, ¶ 429.
[1169] C-42, Advisory Opinion of the Italian State Council, 20 January 2010; Claimant's Memorial, ¶ 430 *et seq*.
[1170] Claimant's Memorial, ¶ 432.
[1171] C-194, Letter from TEC to the Commissario No. TEC/272-10/EF-aa, 20 April 2010; C-193, Letter from TEC to the Commissario No. TEC/293-10/FS-sv, 19 May 2010.
[1172] Claimant's Memorial, ¶¶ 437, 454; C-188, Letter from TEC to the Commissario, 12 July 2010.
[1173] Claimant's PHB1, ¶ 82; C-294, Letter from TEC to the DL and the *Commissario* No. TEC/195-09/FS-sv, 21 December 2009; Claimant's Memorial, ¶ 436.
[1174] Claimant's PHB1, ¶ 88.
[1175] Claimant's PHB1, ¶ 87.

obligations under the TEC Concession as the contractual counterparty, meant that the latter had a duty to secure the construction of the Reggio Calabria MBT plant against regional opposition.

834. As noted above, the waste management plan approved on 30 October 2007, that is, one day after the closing of the SPA, acknowledged the key role of the Reggio Calabria MBT Plant:

> "It is therefore necessary for the available volumes to guarantee, on the one hand, the correct disposal of processing waste and, on the other, until the construction of the new plant planned in Reggio Calabria (Petto Gallico or the upgrading of the existing Sambatello 1 plant), the disposal of undifferentiated waste in excess of current treatment capacity." [1176]

835. However, such a plan also envisaged the alternative possibility of "revamping" and adding new "interventions" to the existing Sambatello 1 plant,[1177] if building the Reggio Calabria MBT Plant at Pettogallico was not feasible due to "insurmountable difficulties":

> "As such, an alternative hypothesis was formulated for the construction of the Petto Gallico plant, to be implemented only in the event that insurmountable difficulties arose on the site currently under construction."[1178]

836. There was no evidence that the Calabria Region's known opposition was an "insurmountable" difficulty to implementing the TEC Concession, especially, given that the contractual counterparty was the *Commissario* and not the Calabria Region, and that he had extraordinary powers to fulfill his obligations. Hence, reasonable and fair conduct from the State required securing that no further interferences would impact the construction of the Reggio Calabria MBT plant.

837. Notably, this alternative was proposed after the making of the investment with the issuance of the waste management plan. Even more, such a change took about a year to begin its implementation because in November 2007, the Calabria Region objected to the waste management plan.[1179] Despite the fact that the decision of the Constitutional Court had clarified the boundaries between the *Commissario* and the Calabria Region's powers,[1180] the internal administrative conflict between Italian authorities persisted.

838. In August 2008, the Calabria Region proposed to use the Sambatello 1 site to relocate the plant.[1181] As a result, Veolia proposed four alternative projects, and after adjustments were required,[1182] the definitive project was selected and approved between July[1183] and October 2010.[1184]

[1176] C-174, Order No. 6294 of the *Commissario*, 30 October 2007, and Waste Disposal Management Plan 2007, PDF p. 11.
[1177] C-174, Order No. 6294 of the *Commissario*, 30 October 2007, and Waste Disposal Management Plan 2007, PDF p. 9.
[1178] C-174, Order No. 6294 of the *Commissario*, 30 October 2007, and Waste Disposal Management Plan 2007, PDF p. 8.
[1179] C-38, Deliberations of the Calabria Regional Council No. 122, 10 March 2009.
[1180] C-35, Decision of the Constitutional Court of July 2008.
[1181] C-198, Letter from the *Commissario* to TEC, 14 March 2011; C-45, Ordinance of the *Commissario* No. 9224, 1 October 2010; C-38, Deliberations of the Calabria Regional Council No. 122, 10 March 2009.
[1182] C-198, Letter from the *Commissario* to TEC, 14 March 2011.
[1183] C-199, Letter from the *Commissario* to TEC, DL and the Calabria Region, 28 April 2009; C-45, Ordinance of the *Commissario* No. 9224, 1 October 2010.
[1184] C-45, Ordinance of the *Commissario* No. 9224, 1 October 2010.

839. By that time, Claimant was facing a significant change of the conditions set out in the TEC Concession as a result of the relocation of the plant, internal administrative conflicts, and financial struggles from Respondent's lack of payment of the gate fee and the *Contributo*. The State was acting in an inconsistent, incoherent and unfair manner towards the investment, affecting the base conditions for its development.

840. Ultimately, Claimant presented the new Reggio Calabria MBT project in March 2011, but in April, the *Commissario* suspended the works in light of a landslide nearby the site.[1185] The Tribunal observes that Claimant had flagged this risk,[1186] but most importantly, that the relocation of the plant to that site was the result of the *Commissario* allowing the Calabria Region's opposition to obstruct the original project. No other technical or economic rationale for the relocation has been advanced. In the Tribunal's view, this was what triggered all the delays and prompted the demise of the plant in the first place. Also, the suspension of April 2011 continued until the termination of the TEC Concession, and it was only in October 2011 that the *Commissario* engaged with local authorities to address the safety concerns at the root of such a suspension.[1187]

841. Based on the evidence in the record, the delays and suspensions of the Reggio Calabria MBT plant works that led to its frustration resulted from the plant's relocation, which in turn was caused by the *Commissario*'s failure to overcome the internal conflict with the Calabria Region. In the balance of the positions of Claimant as an investor, and Respondent's legal framework, the Tribunal finds that the *Commissario* had the authority and power to maintain the original plans of the Reggio Calabria MBT plant, as recognized by the Constitutional Court itself. Hence, the *Commissario*'s decision to instruct the relocation was an unfair and unreasonable treatment of the investor and its investment under the terms of the ECT.

C. INDIRECT EXPROPRIATION

1. Claimant's position

842. Claimant argues that Respondent's creeping measures –as acts of or attributable to Italy as sovereign– indirectly expropriated its investment.

843. Article 13 of the ECT states the Contracting Party's obligation not to indirectly expropriate investments. In assessing the alleged expropriation, the Tribunal must consider that: (i) the effect of the impugned measure is more important than the State's intention;[1188] (ii) whether the investor has

[1185] Claimant's Memorial, ¶¶ 451-453.
[1186] Claimant's 1Memorial, ¶ 452; C-198, Letter from the *Commissario* to TEC, 14 March 2011, p. 1: "In turn, the ODC ordered the suspension – with effect from 29/07/2009 – of the construction works on the plant in question, which were ongoing at the time, albeit with significant delays with respect to the planned timeframe for completion. Having acquired the preliminary project, over time the ODC formally requested some additions, specifically regarding the fact that there was *'no indication as to how the work will interact with the territorial context, and the Gallico River in particular in the upstream areas, and any issues of instability...*' (note ref. no. 1436 dated 10.02.2010). On 28/04/2010, the preliminary project implementing these provisions was presented. As required by Presidential Decree 554/99, the feasibility of the intervention was documented. In light of the foregoing, it is necessary to assess whether the feasibility conditions are still present, as set out in the project prepared and in view of the recent landslide involving the above-mentioned plant."
[1187] C-200, Letter from the *Commissario* to TEC, 4 October 2011.
[1188] Claimant's Memorial, Section 5.3.1.1, Claimant's Opening Presentation, p. 131.

been substantially deprived of its investment;[1189] and (iii) whether the cumulative effects of State measures lead to a creeping expropriation.[1190] In Claimant's view, it is clear that Italy's conduct caused Veolia to be substantially deprived of the benefit, use and enjoyment of its investment.

844. Claimant acknowledges that not just any contractual breach has the effect of triggering the State's international responsibility. However, as was found in *Eureko v. Poland* and *Alpha v. Ukraine*, the State's breach of contractual obligations can amount to an indirect expropriation when the investor is deprived of the benefits, use, and enjoyment of its contractual rights, or when the contract lost a significant part of its value.[1191]

845. In this vein, Claimant argues that Respondent's measures were not simple contractual breaches. They were continuous and significant intrusions with its investments, arising from sovereign acts that deprived Claimant of its vested contractual rights under the TEC and TEV Concessions.

846. First, the *Commissario*'s failure to pay the *Contributo*, added to the Region's recurrent reluctance to comply with orders from the Italian judiciary, and its actions to block payment of this public subsidy left no funds to pay TEC the sums due under the TEC Concession. Second, the failure to revise and adjust the gate fees to maintain the economic and financial equilibrium of the agreement due to the local authorities' reluctance are also "sovereign acts that nullified Veolia's contractual rights." Third, the infighting between State entities and their contradictory positions regarding the construction of TEC2 and the Reggio Calabria MBT plant, *i.e.,* the *Commissario*, the Calabria Region, and the Constitutional Court, prevented the fulfillment of Veolia's contractual rights. Fourth, the lack of nearby landfills due to political pressure affected Veolia's investment by impairing the proper management of the system. These measures taken together had a "devastating effect on the economic viability" of the Concession Agreement, as was also found in *Vivendi v. Argentina (I).*[1192]

847. In the alternative, Claimant maintains that, overall, Respondent's conduct indirectly impacted the value of VSAT as the owner of TEC and TEV, leading to the indirect expropriation of its investment. In this regard, Claimant maintains that its decision to terminate the Concessions does not preclude the existence of an indirect expropriation but rather confirms it. This decision was merely an act to mitigate the losses arising from Respondent's repeated breaches. Moreover, the fact that Veolia joined the bankruptcy proceedings as a creditor, does not mean that it was not deprived of its investment, since it was only able to collect "a small fraction of its outstanding debts."[1193]

848. The following contractual breaches led to Veolia's indirect expropriation: (i) TEC was denied the full *Contributo* as a result of State interference, which rendered the contractual rights with respect to the unpaid fraction of the *Contributo* worthless;[1194] (ii) Italy failed to pay the gate fees and to adjust them;[1195] (iii) Veolia was a victim to Italy's in-fighting between the various State entities which

[1189] Claimant's Memorial, Section 5.3.1.2, Claimant's Opening Presentation, p. 131.
[1190] Claimant's Memorial, Section 5.3.1.3; Claimant's Opening Presentation, p. 131.
[1191] Claimant's Reply, ¶¶ 816-820; CL-17, *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award, 19 August 2005, ¶ 241; CL-84, *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, ¶ 408.
[1192] Claimant's Reply, ¶¶ 823-835; CL-63, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶ 7.4.38.
[1193] Claimant's Reply, ¶¶ 835-838.
[1194] Claimant's Reply, ¶¶ 822-823; Claimant's Opening Presentation, pp. 133-134.
[1195] Claimant's Reply, ¶ 824; Claimant's Opening Presentation, pp. 133-134.

ultimately frustrated the construction of TEC2 and Reggio Calabria plant and generated lost works and investments;[1196] (iv) local and politically motivated opposition prevented TEC from building nearby landfills which resulted in additional costs which were not paid because of the refusal of the *Commissario*;[1197] (v) Veolia suffered the consequences of in-fighting with respect to the TEV Concession, with the municipalities and CAV unilaterally reducing gate fees, failing to provide the adequate amount of waste and the miscoordination between CAV, the ATO and the municipalities and failing to re-establish financial equilibrium, all of which depleted the TEV Concession of any value.[1198]

2. Respondent's position

849. According to Respondent, the core definition of indirect expropriation is that "the result of the equivalent measure is that of expropriation, or deprivation of the asset."[1199] Indirect expropriation requires the measure to have a serious negative interference with the investment, to substantially deprive the investor of the use and enjoyment of the investment, and an appropriate causal link between said interference and the deprivation of benefits of the investment.[1200] In this sense, not any negative interference from the State can be arbitrarily linked to the detriment of the investment.

850. Respondent asserts that not every breach of contract by a State amounts to an expropriation of contract rights. It is necessary to distinguish if the measure at stake is an act of the state as a contractual party or as sovereign.[1201] Respondent references the *Consortium RFCC v. Morocco* case, where the imposition of a contractual penalty for late performance was considered an act of the State as a contractual party, and not in its public capacity.[1202] *Waste Management v. Mexico* is also referenced as a case where the tribunal found that non-performance of a contract did not amount to an indirect expropriation, while the harm claimed was the result of "over-optimistic business assumptions."[1203] Moreover, in *SGS v. Philippines,* the tribunal found that the "mere refusal to pay a debt is not an expropriation of property, at least where remedies exist in respect of such a refusal."[1204]

851. In Respondent's view, Veolia admits that it was its own free decision to terminate the Concessions and to bankrupt the Italian subsidiaries[1205] and does not deny that it was the one terminating the Concessions, making Italy bear all the severe consequences of such an act in relation to a public service. It merely counters that it took this decision based on an economic choice, in order to mitigate consequences due to the various ongoing disputes with Italian authorities.[1206]

[1196] Claimant's Reply, ¶¶ 825-827; Claimant's Opening Presentation, pp. 133-134.
[1197] Claimant's Reply, ¶ 828; Claimant's Opening Presentation, pp. 133-134.
[1198] Claimant's Reply, ¶ 829; Claimant's Opening Presentation, pp. 133-134.
[1199] Respondent's Counter-Memorial, ¶ 614 (emphasis omitted).
[1200] Respondent's Counter-Memorial, ¶ 615.
[1201] Respondent's Counter-Memorial, ¶ 619.
[1202] Respondent's Counter-Memorial, ¶ 621; RL-32, *Consortium RFCC v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award, 22 December 2003.
[1203] Respondent's Counter-Memorial, ¶ 622; RL-46, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004.
[1204] Respondent's Counter-Memorial, ¶ 624; RL-15, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision, ¶ 161.
[1205] Respondent's Rejoinder, ¶ 474.
[1206] See Claimant's Reply, ¶ 837.

852. Respondent further claims that there is not an act of state amounting to expropriation directly or indirectly, since Claimant unilaterally terminated the Concessions and liquidated VSAT. This was "an independent, free decision of Claimant. […] Being generated by the free will of Claimant, the responsibility of Prospective Losses […] cannot be attributed to Respondent."[1207] Second, there is no evidence that Claimant was substantially deprived of its property,[1208] especially, since it joined the bankruptcy procedure as creditor of its Italian subsidiaries. Moreover, the standard of creeping expropriation is not met in this case since TEC and TEV were separate Concession Agreements, surrounded by different and unconnected circumstances, which are impossible to link under a "same purported plan."[1209] Third, there is no causal link between the allegedly expropriatory acts and the alleged deprivation, considering that the termination of the Concession Agreements and the measures taken thereafter were autonomous business choices, "not the consequence of Respondent's action."[1210]

3. Analysis of the Tribunal

853. Claimant has invoked in this arbitration the breach of the ECT's umbrella clause, the FET standard, and the protection against indirect expropriation in Article 13. Claimant's indirect expropriation case is based on the same set of facts as the umbrella clause and FET claims.[1211]

854. Claimant alleges that the breaches of the TEV and TEC Concessions, when considered together, amount to a "creeping and indirect expropriation" [1212] under Article 13 of the ECT:

> "By breaching its obligations under the TEC and TEV Concessions and by creating unstable, unequitable and unfavorable conditions for Claimant's investment, Italy has committed an indirect expropriation of VP's investment in breach of Article 13 of the ECT."
>
> "[T]he substantial deprivation of the investment can materialize through the loss of value of the investment, due to the breaches of the host State." [1213]

855. In other words, the finding of an indirect expropriation directly depends on the Tribunal's findings and analysis on the breaches of the TEV and TEC Concessions that were claimed under the umbrella clause and the FET standard. The Tribunal has already dealt with the umbrella clause and FET claims and found certain breaches of the TEC and TEV Concessions, as well as unreasonable and unfair conduct from the State regarding TEC2 and the Reggio Calabria MBT plant. But the Tribunal has dismissed other breaches that are a key part of the alleged "creeping" expropriation invoked by Claimant:

a. Claimant submits that "[t]he municipalities and the region failed to deliver compliant waste. Political opposition from the municipalities where the landfills should have been built

[1207] Respondent's Counter-Memorial, ¶ 627; PoliMi First Expert Report, p. 6.
[1208] Respondent's Rejoinder, ¶ 473.
[1209] Respondent's Rejoinder, ¶ 475.
[1210] Respondent's Counter-Memorial, ¶ 629.
[1211] Claimant's Memorial, ¶ 617.
[1212] Claimant's Memorial, Section 5.3.2.1.
[1213] Claimant's Memorial, ¶¶ 589, 619.

rendered the availability of nearby landfills impossible. The *Commissario*'s inaction harmed Veolia's investment,"[1214] leading to an indirect expropriation. In its analysis of the umbrella clause claims, the Tribunal already determined that there was never an obligation to meet a specified quality as opposed to quantity of waste under the TEC Concession, and therefore, only found a breach for the failure to meet the contractual quantities of waste under the umbrella clause. The Tribunal also found that there was no breach of Respondent's obligations regarding the landfills under the TEC Concession because Claimant failed to prove that the deficit of landfills was attributable to Respondent's actions.

b. Claimant claims that Respondent's imposition of undue penalties breaches the TEC Concession and the ECT's umbrella clause, and expropriation standards. The Tribunal has found that there was no evidence that Respondent imposed the penalties arbitrarily or in violation of the TEC Concession.

c. Claimant argues that Respondent's failure to ensure the economic and financial equilibrium of the TEC and TEV Concessions breaches Article 6.3 and thus, the ECT's umbrella clause. However, the Tribunal found that this was not a self-standing claim for the purposes of the umbrella clause and analyzed it as part of the *Conguagli* claims. Hence, the expropriation claim on the basis of Article 6.3 is also not a self-standing claim and is subject to the findings of the umbrella clause claim.

d. Claimant further argues that Respondent breached the expropriation standard as a result of the *Commissario*'s failure to exercise its powers to protect TEC's rights and impose the conditions necessary for the success of the TEC Concession. This claim is inextricably linked with Respondent's failure to meet its obligations under the TEC Concession. The Tribunal analyzed the *Commissario*'s powers for each obligation, finding breaches only for the gate fees, the *Contributo*, and the *Conguagli* for waste quantities. Therefore, it need not analyze this claim separately.

856. Claimant's indirect expropriation claim cannot succeed to the extent that it is based on a collective set of breaches, and the Tribunal already dismissed key parts of them in addressing the umbrella clause and FET claims. Notably, Claimant did not bring an independent claim for damages for this alleged breach of the expropriation standard. Also, Claimant did not present the Tribunal with evidence or arguments to conclude that the limited breaches it found under the umbrella clause and under the FET standard were sufficient in themselves to find a "taking" or "deprivation" of Claimant's investment.

857. Accordingly, the Tribunal rejects Claimant's claim for indirect expropriation.

[1214] Claimant's PHB1, ¶ 43.

VII. DAMAGES AND *QUANTUM*[1215]

A. THE DAMAGES

1. Claimant's position

858. Relying on the *Chorzów Factory* case and the ILC Articles, Claimant asserts that under the "full reparation" principle, Respondent must "wipe out" any damage arising from its internationally wrongful acts.[1216]

859. Claimant argues that it is entitled to damages beyond sunk costs, and that it has sufficiently proven the existence of its historical and prospective losses which were caused by Italy.

860. Italy's breaches of the ECT caused financial damage to Veolia and, pursuant to the principle of full reparation, the entirety of the damage shall be repaired integrally.[1217] The damage corresponds to the value of Veolia's investment as at the date of assessment (*i.e.*, 31 December 2011) (the "**Date of Assessment**") absent the breaches of the ECT.[1218] For that purpose, Accuracy used an income method, and, alternatively, a sunk costs analysis.[1219] Accuracy calculated damages (with interest included) of € 446.4 M under the principle of full reparation and € 434.9 M by reference to Claimant's sunk costs.[1220]

861. Accuracy's assessment is grounded on evidence produced in this Arbitration, namely: (i) the awards rendered in the Management Arbitration and the Construction Arbitration alongside the supporting expert evidence of the Independent technical expert appointed by the arbitral tribunal in the Construction and Management Arbitration CTU; (ii) audited financial statements showing significant receivables; (iii) cash flows prepared contemporaneously.[1221]

862. Veolia's damages under the income-based methodology were divided into: (i) historical losses, *i.e.*, losses incurred before the Date of Assessment, when the Concessions were in force ("**Historical Losses**"), which correspond to additional cash flows that Italy should have paid TEC and TEV (€ 199.7 M); and (ii) prospective losses, *i.e.*, profits that would have been received after the Date of Assessment, had Veolia not been forced to terminate the Concessions ("**Prospective Losses**"), which are assessed by using a Discounted Cash Flow ("**DCF**") model (€ 101 M).[1222]

863. Following this approach, Claimant maintains that it has sufficiently proven: (i) the existence of its Historical and Prospective Losses; (ii) that the cause of these damages is Respondent's breaches of

[1215] This section includes summaries of the facts and positions of the Parties underlying the present dispute. Such summaries are not an exhaustive narrative of all the matters that have been discussed in this proceeding. Nevertheless, the Tribunal has considered the entirety of the Parties' factual and legal arguments made in their written and oral submissions, whether or not they are expressly referenced in the text of this section.
[1216] Claimant's Reply, ¶¶ 839-841.
[1217] Tr. Hearing Day 1, 96:8-98:25 (Claimant's Opening Statement); Claimant's Opening Presentation, pp. 157-158.
[1218] Tr. Hearing Day 4, 731:17-20 (Examination of Accuracy); Accuracy's Presentation, p. 8; Claimant's Memorial, ¶ 664; PoliMi First Expert Report, p. 7.
[1219] Tr. Hearing Day 4, 750:5-16 (Examination of Accuracy, 732:6-20); Accuracy's Presentation, p. 36.
[1220] Accuracy's Presentation, p. 41; Claimant's PHB2, ¶ 92.
[1221] Tr. Hearing Day 4, 732:21-733:11 (Examination of Accuracy); Accuracy's Presentation, p. 9.
[1222] Accuracy's Presentation, p. 41.

the ECT; and (iii) that the amount due to Veolia to achieve full reparation is € 300.7 M, plus € 145.8 M for pre-award interest. In the alternative, if only sunk costs were to be recognized, the amount due to Veolia would be € 292.9 M, plus € 142 M for pre-award interest.[1223]

a. Historical losses

864. According to Claimant and its expert, it is entitled to Historical Losses, as the losses incurred in the past before the termination of the Concessions and clearly resulting from Italy's breaches between 2007 and the Date of Assessment in 2011 (the **"Historical Period**.")[1224]

865. First, the core of Italy's internationally wrongful acts is of a monetary nature (*i.e.*, breach of an obligation to pay money) or directly translated into monetary obligations (*i.e.*, occurrence of delay costs and lost profits), resulting in a loss of income for TEC and TEV.[1225]

866. Second, TEC and TEV's recorded receivables from Italy, during the Historical Period, are for subsidies, tariffs adjustment, the *Conguagli*, penalties, and gate fees which are directly resulting from Italy's breaches. As a result of non-payment by Italy, which was the "sole client" of the Concessions, Veolia was forced to inject additional funding, corresponding to the sums that should have been received but for Italy's breaches, to finance TEC and TEV's operations during the Historical Period.[1226]

867. Third, contrary to Italy's argument, the two annulled domestic awards have not been paid by Italy and therefore Veolia received no money from Italy to cure the wrongful acts that are the basis of Veolia's claim in the present arbitration.[1227]

868. Italy's breaches have undoubtedly caused the loss of Veolia's investment making Italy liable for such loss. This affirmation has been confirmed in particular by the Insolvency Report dated 1 February 2013 and the La Spezia tribunal stating that the Concessions could not be implemented due to Italy's actions.[1228]

869. Therefore, Veolia maintains that its Historical Losses are "hardly debatable": if the Tribunal holds that TEC and TEV held contractual monetary credits at the Date of Assessment, and confirms that these credits were not paid, the inescapable conclusion will be that such non-payments are damages to be repaid. Non-payment of a monetary debt is *per se* a damage given that the creditor is deprived of the monies it should have received. As a result of Italy's breaches, Veolia failed to receive € 161,2 M from TEC and € 24 M from TEV (both via VSAT) between 2007 and 2011 plus interest, *i.e.*, a total amount of € 199,7 M.[1229]

[1223] Accuracy's Presentation, p. 41; Claimant's Reply PHB, ¶ 92, fn 109, referring to accompanying Excel file titled "Veolia Updated Calculation of Pre-Award Interest."
[1224] Accuracy First Expert Report, p. 5; Claimant's Reply, ¶¶ 854-855.
[1225] Tr. Hearing Day 1, 96:8-98:15 (Claimant's Opening Statement); Claimant's Opening Presentation, pp. 160-161.
[1226] Accuracy First Expert Report ¶ 4.48.
[1227] Tr. Hearing Day 2, 299:5-10 (Examination of Mr. Bozzetto).
[1228] Claimant's Reply, ¶¶ 894-896.
[1229] Accuracy's Presentation, p. 15; Claimant's PHB1, ¶ 126.

b. Sunk Costs

870. Veolia submits that, contrary to Respondent's assertions, it suffered damage beyond sunk costs. Italy's own experts admitted at the Hearing that the proper method to evaluate the damage should not be sunk costs but an income-based approach like the one used by Accuracy.[1230]

871. Even assuming that Veolia is only entitled to sunk costs (*quod non*), Veolia has proven that its sunk costs amount to € 292,9 M. The sunk costs represent the sum of the investments made by Veolia with respect to TEV and TEC, and not only TEC's and TEV's investments, and include three elements:[1231]

a. The initial investment, *i.e.*, the price paid in 2007 by Veolia to acquire 75% interest in TEC and TEV via TMT;

b. the loans made by Veolia to VSAT, who made the loans to TEC and TEV between 2007 and 2012 to cover their losses during the Historical Period, caused by Italy's breaches. Given the bankruptcy proceedings, there is no doubt that Velia can never recoup its investment through the loans; and

c. the price paid in 2011 to acquire the remaining 25% of TEC and TEV.[1232]

872. The sums devoted to acquiring 100% of the TMT shares and the loans to VSAT have been definitely lost as a result of the bankruptcy and liquidation of VSAT which was the necessary and direct consequence of Italy's breaches.[1233]

873. The € 292,9 M corresponds to Veolia's total investment minus the sums it recovered during the liquidation proceedings (€ 1,6 M), the value of the projects that TMT intended to undertake but did not and which were part of the price paid in 2007 for the shares, and the entirety of the assessed price paid for TEV, given the fraud and misrepresentations from the Vendor with respect to the Falascaia plant (€ 46,8 M).[1234]

874. According to Claimant, Italy develops a restrictive understanding of sunk costs aimed at reducing Veolia's real sunk investment costs to less than 1% of its total investment (*i.e.*, € 3,1 M), which is based on a mistaken understanding of what sunk costs are. As established in *Vivendi v. Argentina (I)*, *SPP v. Egypt*, and *Cengiz v. Libya*, loans, too, are sunk costs, specifically, loans granted by the foreign controlling entity to the local company holding the investment to finance its activity.[1235] As explained by

[1230] Claimant's PHB, ¶ 136; Tr. Hearing Day 4, 853:17-855:11 (Examination of PoliMi, "MR CAICEDO: OK, thank you. And then you state that you agree with Accuracy that the income based approach here is an appropriate method to estimate the potential damages under consideration, correct? PROF CONSONNI: This is what we state. […] MR CAICEDO: So it is fair to say that you disagree with Italy's main position that the proper method is sunk costs as opposed to the income method you have applied, correct? […] PROF CONSONNI: We say here -- sorry. We say here that the income approach is an appropriate method, and we accept that Veolia has used an income approach and an asset based approach." (emphasis added)).

[1231] Claimant's Reply, ¶ 872.

[1232] Claimant's Opening Presentation, p. 165; Accuracy Second Expert Report, p. 85, Table 10.2.

[1233] Claimant's Reply, ¶ 866.

[1234] Claimant's Reply ¶¶ 874-876, 900, § 6.2.1.2. Tr. Hearing Day 1, 102:7-103:10 (Claimant's Opening Statement); Claimant's Opening Presentation, p. 165; Tr. Hearing Day 4, 750:5-16 (Examination of Accuracy); (rounding up the amount to € 293 M); Accuracy's Presentation, p. 36.

[1235] Claimant's Reply, § 6.1.2, ¶ 871; CL-63, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶¶ 8.3.17-8.3.20; CL-172, *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992, ¶ 198; CL-169, *Cengiz İnşaat Sanayi ve Ticaret A.S. v. State of Libya*, ICC Case No. 21537/ZF/AYZ, Final Award, 7 November 2018, ¶ 581.

Mr. Theau-Laurent, loans are assets for the Grantor and the write-off of these assets in VSAT in 2011 is the counterpart of the loans that were granted. That write-off amounts to € 267 M, which corresponds to Accuracy's assessment of sunk costs.[1236]

875. Claimant applies the Veolia Group's annual cost of debt between the year in which costs were incurred and the Date of Assessment, and therefore, concludes that Veolia's sunk costs amount to € 292,9 M.[1237]

c. Prospective Losses

876. Claimant maintains that its Prospective Losses were caused by Respondent's actions, not by its decision to terminate the Concessions.

877. First, the termination was a measure "determined or conditioned" by Respondent's prior breaches, which remain the cause of the losses suffered by Claimant.[1238] The termination of the TEC Concession was the consequence of Respondent's failure to pay the *Contributo*, the outstanding gate fees, and the arbitral awards that were enforceable at the time. Similarly, TEV's termination resulted from the non-payment of outstanding gate fees from 2006-2009 and 2010-2012, and the amounts due under the put or pay clause in 2010-2011, as well as the non-adjustment of the 2012 gate fees.[1239]

878. Second, at the moment of the termination, historical losses had already occurred, and prospective losses were already inevitable. Respondent's continued breaches had deprived Claimant of the future profits when the TEC and TEV Concessions were terminated. The operations were not viable, and Claimant had to finance them at a loss. Absent the termination of the Concessions, the prospective losses would still exist and even increase.[1240]

879. Third, according to Claimant, it is "a well settled principle of international law" that the victim of an internationally wrongful act has a duty to take reasonable measures to mitigate its damages. Claimant refers to *Achmea*, where the tribunal found that the suspension of the investment's operation was a reasonable act of mitigation.[1241] Accordingly, Claimant's termination of the Concessions was an adequate measure to mitigate its damages and should not preclude its right to full reparation.

2. <u>Respondent's position</u>

880. Respondent agrees with Claimant on the application of general international law on State responsibility, codified by the ILC Articles, as well as the *dictum* of the *Chorzów Factory* judgment, recognizing the principle of full reparation. However, it disagrees with Claimant's understanding of these rules in this case.[1242]

[1236] Claimant's Reply, ¶¶ 871, 901; Tr. Hearing Day 4, 750:23-751:10 (Examination of Accuracy).
[1237] Claimant's Reply, ¶ 901; Accuracy First Expert Report, ¶¶ 2.14, A9.19.
[1238] Claimant's Reply, ¶¶ 919-920.
[1239] Claimant's Reply, ¶¶ 910-911.
[1240] Claimant's Reply, ¶¶ 912-915.
[1241] Claimant's Reply, ¶¶ 924-926; CL-187, *Achmea B.V. v. Slovak Republic*, UNCITRAL, PCA Case No. 2008-13, Final Award, 7 December 2012, ¶ 320.
[1242] Respondent's Counter-Memorial, ¶ 632.

881. Respondent maintains that Claimant is not entitled to compensation since the failure of its operation was the consequence of its own business decisions. Yet, in the event that the Tribunal finds Respondent's actions breached its obligations under the ECT and caused the alleged damages, Respondent argues that Claimant would only be entitled to Historical Losses limited to sunk costs.[1243] Respondent argues that Claimant is not entitled to Prospective Losses, considering that it unilaterally terminated the Concession Agreements and made no effort to sell its investments.

a. Historical losses

882. PoliMi's income-based estimate of the Historical Losses, in accordance with its "Concession compliant" scenario,[1244] amounts to € 43,578 M, which becomes € 46,739 M at the Date of Assessment[1245] after actualization.

883. Such an estimate takes into consideration most of the sources of losses pointed out by Accuracy. A comparative list of the considered aspects between Accuracy's and PoliMi's evaluations is reported in PoliMi's opening presentation[1246] from which it is clearly inferable that Claimant's assertion that PoliMi's calculation did not take into account all sources of the alleged damage is completely unfounded.

884. As a result of the Construction and Management Awards, in August 2012, Respondent was forced to credit on TEC's account € 65 M, which flowed into the bankruptcy procedure to pay part of the debts left behind by Claimant. In 2014, when the arbitration awards were declared null and void, Respondent had no possibility to recover such an amount.[1247]

885. Therefore, Respondent already paid much more than the estimated Historical Losses as per the "Concession compliant" scenario.

b. Sunk Costs

886. Claimant should only be entitled to the non-recoverable costs spent in the investment or "sunk costs." According to Respondent, investment tribunals apply this methodology to investments that have no realistic prospect of ever being profitable, considering that sunk costs cover only those "sufficiently certain" damages.[1248] Respondent maintains that sunk costs apply in this case since there is little certainty as to the incremental expenditures arising from the alleged ECT breaches, and, contrary to Claimant's assessment, TEC and TEV had low profitability.[1249]

887. Respondent's valuation of the sunk costs incurred by Claimant because is limited to € 3,074 M.[1250] Such an amount corresponds to TEC's loss of assets because of the decision of the *Commissario* to

[1243] Respondent's Counter-Memorial, ¶ 635.
[1244] PoliMi First Expert Report, p. 15.
[1245] PoliMi Second Expert Report, Table 4.5, p. 49.
[1246] PoliMi's presentation, pp. 19-22.
[1247] Accuracy First Expert Report, ¶¶ 1.14-1.15.
[1248] Respondent's Rejoinder, ¶¶ 486-489.
[1249] Respondent's Rejoinder, ¶ 488.
[1250] Respondent's Counter-Memorial, ¶¶ 637-639 (Respondent rounds it up to € 3.1 M); PoliMi First Expert Report, p. 79, § 7.3.

relocate the Reggio Calabria MBT plant. Therefore, TEC lost the value of most of what had already been accomplished in the previous location.

c. Prospective Losses

888. Respondent's position is that "Prospective Losses are nil, because the termination of the Concession contracts and the liquidation of VSAT ensued from an independent, free will decision of Claimant."[1251]

889. In fact, it must be underlined that the loss Claimant admits having incurred because of conduct attributable to the Vendor is equal to € 46,3 M,[1252] comparable in amount with the Historical Losses quantified by the "Concession compliant" model. So, it is evident that the reason for the failure of Claimant's business cannot be traced back to Respondent's conduct, and the Prospective Losses cannot be recognized. In any event, Respondent submits that Veolia's Prospective Loasses would be negative.[1253]

B. THE VALUATION OF DAMAGES

1. Claimant's position

890. Claimant maintains that its Historical and Prospective Losses were estimated at € 300,7 M plus € 145,8 M for pre-award interest by its expert, Accuracy, using an income-based approach to calculate the present value of the lost cash flows. In the alternative, if only sunk costs were to be recognized, the amount due to Veolia would be € 292,9 M, plus € 142,0 M for pre-award interest.[1254] Claimant contends that PoliMi's determination of its cost of capital at 15.93%, is incorrect. Instead, Accuracy correctly calculated its cost of capital as 7.2%.[1255]

a. Claimant's valuation: Accuracy

891. Historical Losses amount to € 199,7 M before pre-award interest and cover (i) lost cash flows from the TEC Concession of € 161,2 M; (ii) lost cash flows from the TEV Concession of € 24,0 M; and (iii) interest from the date on which losses were incurred of € 14,6 M. Prospective Losses of € 101,0 M cover the estimated lost value over the remaining Concession contract term of € 165,3 M, using a discount rate of 7.29%, and considering € 17,9 M of "Lost opportunity",[1256] € 81 M of net debt adjustment as at 31 December 2011, less the actual situation cash flows of € 0.1 M.[1257] To sum up, with pre-award interest, Veolia suffered damages amounting to € 446,4 M.[1258]

892. Finally, the sunk costs have been evaluated by Accuracy as amounting to € 292,9 M before pre-award interest, which covers Claimant's investment in VSAT (€ 315,8 M) and interest to the Date of

[1251] PoliMi First Expert Report, p. 16 (emphasis omitted).
[1252] Accuracy First Expert Report, ¶ A9.13.
[1253] Respondent's Rejoinder, ¶ 573; PoliMi Second Expert Report, Appendix B (For Respondent's alternative calculation).
[1254] Claimant's PHB2, Updated Calculation of Pre-Award Interest, tab "Report Method".
[1255] Accuracy's Presentation, pp. 31, 41.
[1256] Accuracy's Presentation, pp. 15, 32, 34.
[1257] Accuracy's Presentation, pp. 33-34; Accuracy Second Expert Report, Appendix 6, tab "PL|Summary".
[1258] Claimant's PHB2, ¶ 18; Accuracy Second Expert Report, Appendix 6, tab "PL|Summary".

Assessment (€ 25,0 M) less the amount paid in respect of projects which were ultimately not realized as a result of the Vendor's actions (€ 46,3 M) and the sums received through the liquidation proceedings (€ 1,6 M).[1259] With pre-award interest included, Accuracy estimates a total € 434,9 M for sunk costs.[1260]

b. Claimant's position on Respondent's expert valuation: PoliMi

893. According to Claimant, PoliMi developed an income-based valuation that erroneously limited Veolia's damages to € 48,1 M,[1261] by using a "Concession compliant" model.

894. However, such a model is the product of PoliMi's own contractual interpretation of the Concession and was already rejected in the Management Arbitration.[1262] Even under PoliMi's incomplete and incorrect assessment of damages, it is undisputed that TEC should have received € 103 M, (pre-tax and deductions) during the Historical Period. As there is no doubt about the existence of Historical Losses, therefore, there is no reason to ignore those losses and award sunk costs instead.[1263]

895. Following Italy's instructions, PoliMi excluded several "heads" of loss, and therefore failed to fully account for the damage suffered as per its own model.[1264] Correctly applied, PoliMi's model confirms Accuracy's quantification, and their differences can be explained by PoliMi's failure to assess several of Veolia's heads of damage.[1265]

896. First, PoliMi omitted several losses suffered by Veolia in the Historical Period, demonstrating Italy's deliberate maneuvers to lower the Historical Losses:

- PoliMi deducted the unpaid portion of the *Contributo* for the Crotone, Gioia Tauro and Siderno MTB plants and therefore reduced the "total revenues effectively cashed in" by TEC and ultimately the total cash flow due to TEC.[1266] Italy's argument that Veolia did not suffer any damage because the payment of the *Contributo* would have triggered the payment of the deferred price was refuted at the Hearing.[1267]
- PoliMi wrongly excluded the damage due to the delays and frustration of TEC2 and Sambatello 2.
- PoliMi wrongly omitted to deduct the € 12.2 M of undue penalties from the calculation solely because of Italy's instruction, but for no valid valuation reasons.[1268]

[1259] Accuracy's Presentation, p. 36.
[1260] Claimant's PHB2, ¶ 92; Accuracy Second Expert Report, Appendix 6, tab "PL|Summary".
[1261] Accuracy's Presentation, p. 11.
[1262] Tr. Hearing Day 4, 867:8-16 (Examination of PoliMi); Tr. Hearing Day 4, 873:1-874:14 (Examination of PoliMi); C-90, Management Award, 26 July 2010.
[1263] Claimant's PHB1, ¶ 137; Claimant's Opening Presentation, p. 168; PoliMi Second Expert Report, p. 48.
[1264] Claimant's PHB1, Section 4.3.
[1265] Tr. Hearing Day 4, 737:5-14 (Examination of Accuracy); Accuracy's Presentation, p. 13.
[1266] PoliMi's Model for Claimant, Tab "TEC Feasible", Line 408; Tr. Hearing Day 4, 883:11-25 (Examination of PoliMi), 879:9-19
[1267] Tr. Hearing Day 1, 167:7-25 (Respondent's Opening Statement).
[1268] Tr. Hearing Day 5, Examination of PoliMi, 929:7-20.

- PoliMi admitted at the Hearing that their model deliberately omitted the receivables pre-2005 but admitted that if the Tribunal rules that those receivables were effectively due, they should indeed be included in the damages owed to Veolia.

897. Second, PoliMi omitted the Prospective Losses suffered by Veolia despite the fact that the termination of the Concession is a direct consequence of Italy's breaches, as Veolia lost all value of its investment, and that this termination cannot be considered as interrupting the causal link between the wrongful act and the damage suffered.[1269]

898. Even PoliMi admitted that its calculation of the Prospective Losses was wrong and that in fact, the TEC Concession would have been profitable but for Italy's breaches.[1270]

899. Third, Italy's deduction of the costs for the full restoration of the plants is legally and factually unsound and should be disregarded.[1271] Indeed, PoliMi further deducted € 19.5 M because restoration costs would have had to be disbursed under Article 10.3 of the TEC Concession after the termination of the concession. However, this deduction has not been justified at all.[1272]

900. Finally, Italy's limitation of Veolia's damages to sunk costs is based on a wrong premise as Italy misrepresents the status of TEC and TEV at the time of the investment and failed to prove the specific circumstances justifying the application of the sunk cost method.[1273]

901. Furthermore, Claimant contends that PoliMi's determination of the cost of capital at 15.93%, is incorrect and reduces Veolia's losses. Instead, Accuracy correctly calculated a cost of capital of 7,29%, considering the following aspects: [1274]

a. Risk-free rate: Accuracy based this on the yield of 10-year German bonds, which reflects the short-term volatility in borrowing rates better than the 2011 average of Italian bonds, used by PoliMi.

b. *Beta* coefficient: Accuracy used the 2011 average for environmental and water services, while PoliMi appear wrongly to have used Veolia's levered or company-specific *beta* in 2007-2011 from Bloomberg. The sectoral or unlevered beta used by Accuracy provides a better valuation of the Concession Assets. The company-specific or levered *beta* provides a better valuation of the company, which is not the goal of the damages assessment.

c. Equity risk premium: Accuracy relied on academic references (4.5%), while PoliMi relied on Bloomberg data (6.75%). According to the GAR Guide to Damages, the equity premium risk applies to stock markets in general not to a company, therefore Accuracy's approach is more appropriate.

d. Asset specific risk/Country risk premium: PoliMi does not use country risk premium because it is included in the risk-free rate (Italian bonds) and rather applies a market risk premium for

[1269] Tr. Hearing Day 1, 115:19-116:8 (Claimant's Opening Statement); Claimant's Opening Presentation, p. 183.
[1270] Claimant's PHB, ¶ 155; PoliMi's Presentation, p. 24.
[1271] Claimant's PHB1, Section 4.4.3.
[1272] Claimant's PHB1, ¶ 159.
[1273] *See* above in this award, ¶ 870, § b
[1274] Claimant's Reply, ¶¶ 1059-1071; Accuracy Second Expert Report, ¶ 8.24.

an asset specific risk. Claimant disagrees with this approach since (i) there is no explanation for the 1.5% rate applied by PoliMi; and (ii) no asset-specific risk could be applied to uncompleted projects, such as TEC2 and Sambatello 2. If applied, it would be a reward for Italy's own wrongdoings.

902. Veolia thus maintains that PoliMi's damages evaluation must be rejected.

2. Respondent's position

903. Respondent disagrees with Claimant's income-based approach, proposing an alternative model of valuation.

a. Respondent's valuation: PoliMi

904. Alternatively, PoliMi proposes a valuation model under a "*Concession compliant*" scenario. Under this model the historical damages for the two Concessions were quantified as € 46,7 M at the Date of Assessment. For TEV, the "effective cashed" revenues between 2007 and 2011 were taken from the income statements and reveal negative historical losses of € 2,862 M. TEC suffered a total loss of € 79,143 M between 2007 and 2011, out of which, € 46 M were lost between 2005 and 2011 due to cashflow for the waste management service being lower than expected, and the remaining € 32,2 M resulted from a highly unprofitable operation.[1275]

905. According to Respondent, PoliMi's valuation considers the financial structure of the Concession, and the impact of elements such as (i) the additional investments in the Calabria Sud system; (ii) the outstanding *Contributo*; (iii) the late payment of dues; (iv) the extra-costs of disposing of incineration residues, and of the lack of nearby landfills; (v) the penalties for unforeseen interruptions to the TEC plants; and (vi) the delay in the construction of Sambatello 2 and TEC2. The impact of inadequate waste quantities is also considered in the "annual dues of clients", as well as the effect of costs increases through the update of single Operational Expenditures ("**OpEx**") items.[1276]

906. Moreover, Respondent asserts that this model considered the annual adjustment of the tariffs in line with the reference indices, as provided in Articles 6.2 and 6.4 of the TEC Concession, and Articles 6.2 and 6.5 of the TEV Concessions.[1277] Contrary to Claimant's criticism, this annual adjustment approach is adequate and annual variations in the model are normal. The variations arise from external factors, and the lack of completion of the entire system: In TEC, the tariff was reduced when the volumes of treated waste increased, the sale of energy from the WtE plant increased revenues, and the tariff increased when the transportation and disposal cost increased, due to the lack of nearby landfills. In TEV, the fluctuations were associated with the operation and closure of the WtE plant.[1278]

907. Respondent rebuts Claimant's understanding of PoliMi's valuation. First, the compensation of shortfall in revenues through the gate fees is not a "disincentive" for generating electricity, since the

[1275] Second PoliMi Expert Report, pp. 44, 48, 49; PoliMi First Expert Report, p. 65; Respondent's Rejoinder, ¶ 572; Respondent's Counter-Memorial, ¶¶ 651-654.
[1276] Respondent's Counter-Memorial, ¶¶ 649-650; Respondent's Rejoinder, ¶ 509.
[1277] Respondent's Rejoinder, ¶¶ 499-500; C-10, TEC Concession, 17 October 2000; C-17, TEV Concession, 31 July 1997.
[1278] Respondent's Rejoinder, ¶ 506.

tariff had to be agreed upon with the Grantor. If no electricity was produced, it could not claim the Capital Expenditures ("**CapEx**") and *OpEx* of the WtE plant.[1279]

908. Second, PoliMi's valuation is not based on mistaken technical and operational assumptions. In this regard, Respondent clarifies that PoliMi's valuation: (i) neglects receivables prior to Veolia's acquisition, absent evidence of their origin; (ii) adopts a full taxation approach, since the VSA group participated in the national tax consolidation; (iii) is favorable to Claimant since it brings forward the Historical Losses to the Date of Assessment (31 December 2011) by calculating interest; and (iv) did fail to consider that ownership of TEC and TEV was slightly below 100%, yet, this only resulted in an overestimation of the Historical Losses of € 0.4M that has been adjusted.[1280]

909. Third, regarding the cost of capital, Respondent maintains that the discount rate to be applied to the prospective cash flows is 15.93% and explains that this valuation of PoliMi differs from that of Accuracy in four parameters: (i) the risk-free rate, which Respondent considers should refer to monthly average of the yield on 10-year Italian Bonds in 2011, to best reflect the market conditions at the time; (ii) the *beta* coefficient, which PoliMi confirms to be specific for VSAT, given that the industry average data is not appropriate for a company that is not a newco in the energy and environment sector financed in full by equity; (iii) the equity risk premium, which PoliMi confirms should be directly estimated and not using a proxy that is based on average data of the Italian Market, or on an outdated historical approach; and (iv) the Asset-Specific Risk, which is essential to consider the risk of the project's execution prior to its implementation.[1281]

b. Respondent's position on Claimant's expert valuation: Accuracy

910. Respondent argues that Claimant's income-based approach, although viable, is not applied correctly because Accuracy's industrial and technical assumptions are "misleading." Respondent further contends that Claimant's valuation does not correspond to a prospective approach.[1282]

911. At the Hearing, PoliMi highlighted the misleading mechanism adopted by VSAT companies to update gate fees.[1283] It was already in place before the arrival of Claimant, which kept it for the entire duration of the Concessions. Such a mechanism departs from the very basic principle laid out by the two Concession contracts: the profit of the Concessionaire must be limited because it operates under a legal monopoly.[1284]

912. Furthermore, since the agreed profit and the general expenses were linked to some operations and maintenance (O&M) costs, those costs must be limited also.

913. Most of the discrepancy between PoliMI's and Accuracy's estimates (36.85% for TEC and 100% for TEV) "are directly attributable to the different updating scheme adopted for the service tariff."[1285]

[1279] Respondent's Rejoinder, ¶ 508.
[1280] Respondent's Rejoinder, ¶¶ 515-518.
[1281] Respondent's Rejoinder, ¶¶ 519-524.
[1282] PoliMi's First Expert Report, p. 15.
[1283] PoliMi's presentation, Slides No. 16-18.
[1284] Transcript Hearing Day 4: 843:12-23:4-18. (PoliMi's Examination)
[1285] Respondent's PHB2, ¶ 150.

914. For TEC, the difference rises to 52.97% when including the missed payment of part of the subsidies, which has been taken into account by PoliMi's tariff calculation.[1286]

915. This picture contrasts with the one put forward by Claimant both through Accuracy's Second Report and during the expert's cross-examination. In fact, Claimant pointed out that the difference between Accuracy's and PoliMi's estimates of the income-based Historical Losses can be explained for about 80% by "PoliMi's failure to properly reverse the financial impact of Respondent's Alleged Breaches."[1287]

916. However, Respondent contends that "Accuracy's calculation disregards previous receivables, disregards the purchase price and the non-payment of the deferred portion for the 75%, disregards the damages attributable to Mr. Papi, disregards the fact that Veolia would have probably not purchased the remaining 25%, and disregards Veolia's negligence in the purchase and in the management."[1288]

917. Moving to the cost of capital, Accuracy and PoliMi's models differ in the following parameters: (i) risk-free rate; (ii) the *beta* coefficient; (iii) equity risk premium; and (iv) asset-specific risk.[1289]

C. CONTRIBUTORY NEGLIGENCE AND MITIGATION DUTY

1. Claimant's position

918. Claimant asserts that contributory negligence requires that the victim caused or contributed to cause its own damage, and the existence of fault or negligence. In this sense, the victim's intervention in the chain of events causing the damage does not meet the threshold of contributory negligence by itself.[1290] As explained by the ILC, it requires "actions or omissions which can be considered as wilful or negligent, i.e. which manifest a lack of due care on the part of the victim of the breach for his or her own property or rights."[1291]

919. Claimant maintains that Respondent failed to prove Veolia's alleged negligence in making and managing the investment.

920. First, Veolia conducted a comprehensive legal, technical and financial due diligence before acquiring TEC and TEV. Despite the particular difficulties faced by TEC, the financial due diligence presented an overall balanced picture of the investment, concluding that VSAT was "in a stage of strong growth" with a future "securitised by concession agreements."[1292] Also, the financial due diligence provided explanations for the negative cash flows of 2005-2006, and showed that TEC and TEV's

[1286] Respondent's PHB2, ¶ 151.
[1287] Accuracy Second Expert Report, ¶ 5.18.
[1288] Respondent's PHB1, ¶ 232.
[1289] Respondent's Rejoinder, ¶ 519.
[1290] Claimant's Reply, ¶¶ 932-935.
[1291] Claimant's Reply, ¶ 933 citing Exhibit CL-11: ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Article. 39, ¶ 5.
[1292] Claimant's Reply, ¶¶ 942-945; C-21, Financial Due Diligence Report of KPMG, 14 February 2007, p. 4.

performance had been affected by Respondent's own contractual breaches, not by any structural deficiency.[1293]

921. Moreover, the existence and identification of those breaches in the due diligence does not purport a "manifest lack of due care." By contrast, Veolia legitimately expected that Italy would comply with its ECT obligations under the umbrella clause, which differs from merely assuming a business risk.[1294] Even if Veolia had assumed such risk, it could have not assumed its aggravation by Italy's additional unlawful acts after the acquisition of TEC and TEV, which led to the bankruptcy and the loss of the investment. In sum, even if the due diligence had been faulty, it did not contribute to Veolia's losses.[1295]

922. Second, there is no evidence that Veolia mismanaged TEC and TEV, affecting their financial equilibrium and profitability. There were no shortcomings in the operational management of the Concessions between 2007 and 2011. The allegedly high OpEx in 2010 was in fact aligned with PoliMi's "Concession compliant" scenario, and in 2011, the model used by PoliMi used lower values than the actuals, giving an imperfect comparison. Furthermore, PoliMi's model disregards the impact of Italy's breaches, *i.e.*, additional costs in the construction of TEC2 and Sambatello 2, higher disposal and transportation costs, and the outstanding receivables from Italy.[1296]

923. Claimant further maintains that even if it had acted negligently, Respondent failed to prove that Veolia's actions were the cause of its own losses.

924. First, there is no evidence of how the alleged lack of due diligence or mismanagement could have caused the damage claimed by Veolia. The Historical Losses arise from the cashflows that TEC and TEV should have received but for Italy's breaches of the Concessions. The Prospective Losses were also caused by the repeated breaches of the Concessions that led to the liquidation proceedings. In any case, there is no factual nexus between Veolia's purported negligence and Italy's unlawful measures.[1297]

925. Second, even if there existed a contribution of causes, Veolia's actions would not be the proximate cause of the damage. According to Claimant "only those events that are the proximate and natural source of the damage qualify as 'cause of damage'"; thus, remote or incidental causes must be segregated from proximate causes.[1298] Claimant maintains that there is no evidence that Veolia would have suffered the Historical and Prospective Losses regardless of Italy's breaches. There is also no evidence that Claimant's allegedly negligent conduct can amount to an independent cause of the damage, capable of "breaking the causal nexus between Italy's breaches and Veolia's losses."[1299] Moreover, Claimant argues that TEC's alleged unprofitability cannot be the root cause of the damage. PoliMi artificially reduced the quantification of the lost cashflow (Historical Losses) from € 186.7 M to € 46 M under its "Concession compliant" scenario," and compared it with the actual losses to

[1293] Claimant's Reply, ¶¶ 946-951; C-21, Financial Due Diligence Report of KPMG, 14 February 2007, p. 41.
[1294] Claimant's Reply, ¶¶ 952-960.
[1295] Claimant's Reply, ¶¶ 961-964.
[1296] Claimant's Reply, ¶¶ 965-971.
[1297] Claimant's Reply, ¶¶ 978-987.
[1298] Claimant's Reply, ¶¶ 988-991.
[1299] Claimant's Reply, ¶¶ 993-994.

mistakenly conclude that TEC was not profitable. In any case, under this approach no losses should have occurred, had Italy met its obligations.[1300]

926. In sum, Respondent failed to demonstrate that Claimant acted negligently and that such conduct could be the proximate cause of the damage suffered by Veolia.[1301]

2. Respondent's position

927. Claimant's contributory fault should be considered to reduce the amount of compensation for the alleged damage, in accordance with the well-known principle and customary international rule of contributory fault, as codified in Article 39 of the ILC Articles. Respondent relies on *Maffezini v. Spain* and *MTD v. Chile*, to maintain that investors "should bear the consequences of their own actions" including their "willful or negligent conduct."[1302] In this case, Claimant's actions are the "main cause of the lack of profitability of its financial operation."[1303]

928. First, Claimant performed three due diligences in the acquisition of TEC and TEV, which had over € 10 M losses at the Date of Assessment. The legal due diligences warned that the TEC Concession was not "take or pay" and that the adjustment of the tariff was yet to be agreed with the *Commissario*.[1304] The financial due diligence was limited to the assumptions determined by Veolia, which were unrealistic –ignoring underperformances of the plants– and unreliable, based merely on assurances from the Vendor that all receivables would be paid. Thus, its conclusions are biased.[1305] The technical due diligence was performed by a group internal to Veolia, based on an overestimation of the performance of the plants.[1306] Second, Veolia was aware that the Concessions lacked financial equilibrium.[1307] Third, the operational management shortcomings affected the companies' corporate indebtedness and profitability.[1308]

929. Moreover, Respondent argues that Claimant misunderstands the role of the causal nexus when it argues that the damage would have occurred regardless of its lack of diligence. The above-mentioned actions of Veolia are not incidental, but the proximate cause of its losses, since they worsened the economic imbalance of the Concessions.[1309]

930. Respondent asserts that a further element affecting the reparation obligation is the "consolidated principle in international investment arbitration" of the victim's duty to mitigate damage, as reflected in the Commentary to Article 31 of the ILC Articles, and in the cases of *AIG v. Kazakhstan, EDF v.*

[1300] Claimant's Reply, ¶¶ 994-997.
[1301] Claimant's Reply, ¶ 998.
[1302] Respondent's Counter-Memorial, ¶¶ 657-658; CL-151, *Emilio Agustí Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, ¶ 64; RL-51, *MTD Equity Sdn, Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶ 178.
[1303] Respondent's Counter-Memorial, ¶ 659.
[1304] Respondent's Rejoinder, ¶ 540; C-20, Preliminary Legal Due Diligence Report of Macchi di Cellere Gangemi, 24 January 2007, p. 12.
[1305] Respondent's Rejoinder, ¶¶ 541-545.
[1306] Respondent's Rejoinder, ¶¶ 546-547.
[1307] Respondent's Rejoinder, ¶ 548.
[1308] Respondent's Rejoinder, ¶¶ 537, 548-549.
[1309] Respondent's Rejoinder, ¶¶ 550-554.

Argentina, and *Middle East Cement v. Egypt*.[1310] The failure to mitigate damage may affect the right to recovery.

931. Respondent argues that the unilateral termination of the Concessions cannot be considered a measure to mitigate damage. This measure was not necessary or unavoidable. According to Respondent, Claimant's experts recognized that "the outlook of VSAT was not so catastrophic to make liquidation a necessity."[1311] Moreover, the termination of the Concession Agreements nullified the possibility of future profits or selling the plants.[1312] Instead, there were other possible measures to add value to the Concessions and actually mitigate damages, *i.e.*, actions to adjust OpEx to the standards of the Concessions, negotiate concession-compliant tariffs, and increase plant performances.[1313]

D. ANALYSIS OF THE TRIBUNAL

932. In its analysis of the claims on the merits, the Tribunal has found the following breaches of Respondent's obligations under the ECT:

a. Respondent breached the umbrella clause in Article 10(1) last sentence of the ECT due to its failure to (i) timely pay and (ii) update the gate fee; (iii) pay the *Contributo*; and (iv) meet the guaranteed waste quantities, under the TEC Concession; as well as (v) timely pay and adjust the gate fee under the 2010 Agreement and the TEV Concession.

b. Respondent breached the FET standard in Article 10(1) of the ECT by (vi) frustrating the completion of the TEC2 and Sambatello 2 plants.

933. Accordingly, the Tribunal need will only analyze the damages claims raised in connection with the aforementioned breaches.

1. The standard

934. The Tribunal observes that the ECT does not regulate the reparation of damage arising from a Contracting Party's breach of the treaty, particularly, of its umbrella clause and FET standard in Article 10 of the Treaty. Accordingly, the Tribunal must resort to general international law. It is well established –and the Parties do not dispute–[1314] that under international law, a State must make full reparation for the injury caused. This rule, first recognized by the Permanent Court of International

[1310] Respondent's Rejoinder, ¶¶ 559-561. Respondent's Rejoinder, ¶¶ 559-561; CL-11, ILC Articles, Art. 31; RL-86, *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003, ¶ 10.6.4; RL-88, *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, ¶ 1302; RL-87, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶ 167.
[1311] Respondent's Rejoinder, ¶ 563; PoliMi Second Expert Report, ¶ 1.8.
[1312] Respondent's Rejoinder, ¶ 564
[1313] Respondent's Rejoinder, ¶¶ 567-568.
[1314] Claimant's Memorial, ¶ 642; Respondent's Counter-Memorial, ¶ 632.

Justice in the *Chorzów Factory* case,[1315] and later recorded in Article 31 of the ILC Articles,[1316] has been widely accepted by investment tribunals.[1317]

935. Pursuant to this rule, Claimant is entitled to full reparation of the damages arising from Respondent's breaches of the ECT's umbrella clause, and FET standard, provided that Claimant meets the burden of proving the existence of the damage, a causal link between the breaches and the damage, and their *quantum*.

936. Consequently, in the following sections, the Tribunal will analyze the damages that Claimant alleges it suffered as a result of the breaches outlined in paragraph 932 above, to determine whether Claimant has: (i) demonstrated that "it has indeed suffered a loss";[1318] (ii) met "a high standard of factual certainty to prove a causal link between breach and injury";[1319] and (iii) provided "reasonable precision" in the estimation of the amount of the damage, or a reasonable basis to quantify such damage.[1320]

2. The type of damages

937. Claimant submits that, under the "full reparation" principle of international law, it is entitled to damages beyond sunk costs. In this vein, Claimant submits that it has sufficiently proven the existence of its Historical and Prospective Losses caused by Italy.[1321] Respondent contends that Claimant is not entitled to any damages because its operation failed due to its own business decisions and, in any case, Claimant is at best entitled to sunk costs or Historical Losses (excluding Prospective Losses) because it terminated the Concessions unilaterally and made no effort to sell its investments.[1322]

938. First, the Tribunal observes that the sunk costs approach is, in principle, not adequate to compensate for Claimant's damage in this arbitration. The sunk costs approach is applicable when the assessment of future profits is too speculative, for instance, in projects that are at a very incipient stage and there is insufficient information to assess their viability and their future profitability.[1323] By contrast, tribunals have dismissed this approach of awarding only the incurred expenses in ongoing projects

[1315] CL-76, *Factory at Chorzów*, Merits, PCIJ Series A No. 17, 13 September 1928, p. 47.
[1316] CL-9, ILC Articles, Art. 31(1).
[1317] See CL-210, *Joseph Charles Lemire v. Ukraine*, ICSID Case No ARB/06/18, Award, 28 March 2011; CL-175, *William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019; CL-187, *Achmea B.V. v. Slovak Republic*, UNCITRAL, PCA Case No. 2008-13, Final Award, 7 December 2012; CL-90, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017.
[1318] CL-210, *Joseph Charles Lemire v. Ukraine*, ICSID Case No ARB/06/18, Award, 28 March 2011, ¶ 246.
[1319] CL-175, *William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019, ¶ 110.
[1320] CL-187, *Achmea B.V. v. Slovak Republic*, UNCITRAL, PCA Case No. 2008-13, Final Award, 7 December 2012, ¶ 323.
[1321] Tr. Hearing Day 1, 96:8-98:25 (Claimant's Opening Statement); Claimant's Opening Presentation, pp. 157-158.
[1322] Respondent's Counter-Memorial, ¶ 635.
[1323] See CL-166, *Antoine Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and Government of Ghana*, UNCITRAL, Award on Damages and Costs, 30 July 1990, ¶ 94.

or concessions where information on their performance, profits, and/or income is sufficiently available.[1324]

939. In this case, the TEC and TEV Concessions were ongoing projects that had been performing and generating income for years until the moment of termination. As noted in sub-sections 3 and 9 above, such termination was attributable to Respondent's breaches which severely affected Claimant's investment and precluded it from continuing into the future. Under these circumstances, the sunk costs approach would not reflect an estimation of the loss of Claimant's right to continue operating the Concessions due to Respondent's breaches, thus, frustrating the purpose of making Claimant whole.

940. Second, the evidence in the record demonstrates that a causal link exists between Respondent's breaches and Claimant's Historical and Prospective Losses.[1325] As noted above in the Merits section of this Award, Claimant has proven that it could not continue to execute the TEC and TEV Concessions due to Respondent's violations of its core obligations under the TEC and TEV Concessions. Claimant has further proven that Respondent's unfair and unreasonable conduct frustrated the completion of the TEC2 and Sambatello 2 plants. Hence, the decision to terminate the Concessions was a legitimate mitigation measure, taken in good faith by the investor to avoid further losses derived from Respondent's unjustified violations of its obligations under the ECT.

941. In turn, Respondent failed to prove that Claimant would have been able to continue implementing the Concessions, which were at the core of its investment, regardless of Respondent's breaches and, therefore, that the termination was an unreasonable or unlawful decision.[1326] Respondent merely asserts that it cannot be held liable for a unilateral decision of Claimant to terminate the Concessions and alleges "the wrongful termination of the contract."[1327] However, the Tribunal dismisses such an allegation, among other reasons, because there is no evidence of "wrongfulness" in Claimant's termination under Italian law, and, what is more, there is no evidence of such a "wrongful" finding by Italian courts.

942. For the foregoing reasons, the Tribunal concludes that Claimant is entitled to more than sunk costs, and hence to the Historical and Prospective Losses it suffered, in the terms explained below.

3. <u>The amount of the losses</u>

943. Claimant and its expert, Accuracy, calculate the damages, applying an income approach and based on a model, that is, calculating the cash flows Claimant would have received but-for Respondent's

[1324] See CL-238, *Norwegian shipowners' claims (Norway v. USA)*, Award, 13 October 1922, 1 U.N.R.I.A.A. 307, 338-339; CL-166, *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and Government of Ghana*, Award, 30 June 1990, ¶ 94.
[1325] CL-174, *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, 30 March 2010, ¶ 374.
[1326] Accuracy Second Expert Report ¶ 4.40. As Claimant's expert explained "PoliMi do not address any of the supporting analysis surrounding the facts of the liquidation presented in the First Accuracy Report, nor do they attempt to further substantiate why they believe that the decision to terminate the Concession Contracts and liquidate VSAT was not, in fact, mitigating damages, but simply a 'unilateral decision of Claimant, which caused the loss of all of its assets.'"
[1327] Respondent's Rejoinder, ¶ 489.

breaches.[1328] Under Claimant's model, Accuracy calculates Historical Losses for the TEC and TEV Concessions at € 199,7 M.[1329]

944. Accuracy's estimates of Prospective Losses include (i) the lost Company Value[1330] for the *remaining duration* of the Concessions; and (ii) the lost Company Value *beyond the term* of the Concessions, as of the Date of Assessment, for a total of € 101 M.[1331] To reach this result, Accuracy applies the DCF method,[1332] and estimates a lost Company Value for the remaining duration of the Concessions of € 165,3 M,[1333] and a total lost Company Value beyond the duration of the Concessions as the "value of the lost opportunity" of € 17,9 M,[1334] from which it then subtracts the net debt, and applies VSAT's holding.

945. Respondent and its expert, PoliMi, recognize that an income approach is a "viable method to estimate damages" but contend that the "industrial and technical assumptions indicated by Accuracy are entirely misleading" [1335] and that "the method adopted by Claimant 'was not inspired to [sic] a 'correct interpretation' of the Concession Contracts."[1336] Respondent proposes an alternative "Concession compliant" model, under which the historical damages for the two Concessions were quantified as € 46,7 M at the Date of Assessment, due to the losses suffered by the companies.[1337] PoliMi's method is based on a retrospective approach to tariffs.[1338]

946. Claimant contends that PoliMi's model is the result of its own contractual interpretation of the Concessions[1339] that excluded several heads of damage and, therefore, failed to fully account for the losses suffered by Veolia.[1340] According to Claimant, if correctly applied, PoliMi's model confirms Accuracy's quantification.[1341]

947. As a threshold matter, the Parties and their experts recognize the application of an income-based methodology[1342] but disagree on the models and calculations of the experts because they rely on their own –and different– interpretation of the Concessions.

[1328] Accuracy First Expert Report, ¶¶ 5.9, 5.10.
[1329] Accuracy's Presentation, p. 15; Claimant's PHB1, ¶ 126.
[1330] "Company Value" is defined below in this award ¶ **1030**as the discounted value of the FCFF less Net Debt, and corresponds to the "Enterprise Value" definition found in the Accuracy First Expert Report, ¶ 6.73.
[1331] Accuracy First Expert Report, ¶ 6.159.
[1332] Accuracy First Expert Report, ¶ 6.69.
[1333] Accuracy First Expert Report, ¶ 6.144.
[1334] Accuracy First Expert Report, ¶¶ 2.12, 6.151 (The TEC Concession with € 9.1 M (Pre-interest) and € 11.1 M (With interest), and the TEV Concession with € 5.6 M (Pre-interest) and € 6.8m (With interest).
[1335] Respondent's Counter-Memorial, ¶ 642.
[1336] Respondent's Rejoinder, ¶ 496; PoliMi Second Expert Report, p. 18.
[1337] Second PoliMi Expert Report, pp. 44, 48, 49; PoliMi First Expert Report, p. 65; Respondent's Rejoinder, ¶ 572; Respondent's Counter-Memorial, ¶¶ 651-654.
[1338] Respondent's Rejoinder, ¶ 499.
[1339] Tr.Hearing Day 4, 867:8-16 (Examination of PoliMi); Tr.Hearing Day 4, 873:1-874:14 (Examination of PoliMi); C-90, Management Award, 26 July 2010.
[1340] Claimant's PHB, Section 4.3.
[1341] Tr.Hearing Day 4, 737:5-14 (Examination of Accuracy); Accuracy's Presentation, p. 13.
[1342] Tr. Hearing Day 4, 732:6-20 (Examination of Accuracy), 853:17-22 (Examination of PoliMi); Accuracy's Presentation, p. 13.

948. The Parties are right in that the damages assessment model of each expert responds to the position of each party in the merits phase, and hence, to a specific reading of the obligations under the Concessions.

949. The Tribunal has already decided on the proper interpretation, extent and effect of the different contractual provisions and on the breach thereof, and thus it will assess and award damages derived from the breaches the Tribunal found in the merits phase.

4. Historical Losses

a. TEC: The failure to timely pay the gate fee

950. Claimant claims the amount of € 8,1 M[1343] for Respondent's "late payments" due to its failure to meet the 60-day payment term for gate fees set out in the TEC Concession, between 2007 and 2011.

951. Respondent submits that "[t]he calculation shows that, on average, payments were approximately on time. Therefore, no interest appears to be due."[1344] PoliMi calculates interest accrued for delayed payments but then "partially compensate[s]" for them with "negative" interest derived from early payments or payments made before the deadline provided for in the TEC Concession.[1345]

952. As noted in paragraph 447 above, there is nothing in the text of the TEC Concession providing that if the *Commissario* made certain payments before the expiration of the 60-day deadline it could use such early payments to compensate for any delays in other payments. Also, Respondent did not provide any legal or technical argument to support PoliMi's "negative" interest approach.

953. Respondent provided no evidence other than PoliMi's unsubstantiated approach to challenge Accuracy's calculations of the damages derived from the late payment of the gate fees under the TEC Concession. This includes the income base, the delay period and overall methodology used by Accuracy to calculate this specific damage, which remains uncontested.

954. The Tribunal notes that this specific calculation is not impacted by the differences between the assumptions used by Accuracy and the Tribunal's findings on the merits. Accuracy relies on TEC's income statements in the actual scenario[1346] and does not consider the adjustment for quality distribution of the waste, since the late payments refer to the actual receivables as recorded by TEC.

955. Consequently, Claimant is entitled to receive the amount of **€ 8,088,555**[1347] for Respondent's breach of its obligation to timely pay the gate fees under the TEC Concession:

[1343] Accuracy First Expert Report, ¶¶ 6.26-6.27, ¶¶ A7.61-64. (Accuracy rounds up and expresses the amount in thousands).
[1344] PoliMi First Expert Report, p. 62 (emphasis omitted); PoliMi Second Expert Report, pp. 37-38, 48.
[1345] PoliMi First Expert Report, p. 62.
[1346] Accuracy First Expert Report, Appendix 4, p. 90, ¶¶ A.4.1-2.
[1347] Accuracy First Expert Report, Appendix 13, "TEC|Late Payments." Figures in red are added by the Tribunal.

TEC - Late Payments

€k	2007	2008	2009	2010	2011
Gate-fee Revenue	28,060	25,849	30,871	28,005	27,540
Gate-fee Receivables as at 31/12 - Actual	**11,000**	**15,310**	**23,347**	**23,178**	**12,679**
Receivable Days - Actual	141	213	272	298	166
Receivable Days - Contractual	60	60	60	60	60
Gate-fee Receivables as at 31/12 - But For Situatic	**4,677**	**4,308**	**5,145**	**4,668**	**4,590**
Cash Flow Movements (WC) - Actual		(4,310)	(8,037)	169	10,499
Cash Flow Movements (WC)* - But For Situation	6,323	368	(837)	478	77
Late Payment adjustment	**6,323**	**4,679**	**7,200**	**309**	**(10,422)**
Total Additional Cash Flows to TEC					**8,089**
Total amount expressed in full					**8,088.555**

b. TEC: The failure to update the gate fee

956. Claimant claims the amount of **€ 18,9 M**[1348] for the lack of update of the gate fee under Article 6.2 of the TEC Concession.[1349] To calculate this amount Accuracy relied on (i) the CTU Report,[1350] provided by Prof. Dr. Marco Lacchini during the Management Arbitration, for the years 2005 to 2008; and (ii) Claimant's invoices issued between 2009 and 2010. Accuracy excluded the year 2011 because the 2011 invoices already incorporated an updated gate fee for that year, and are counted in the "*late payment*" claim.[1351]

957. Claimant's approach to calculating the gate fee update for each year consists of (i) calculating the total annual cost increase of the specific items listed in Article 6.2; (ii) then extracting the % increase with respect to the previous year; and (iii) finally applying that % increase to the initial base gate fee of € 68,4 per tonne.[1352] Claimant's invoices for 2009–2010 adopted a similar approach by applying the ISTAT index.[1353]

958. PoliMi notes that "the updating mechanism" in Article 6.2 of the Concessions contemplated "periodic updates of cost items, aimed at determining the updated tariff."[1354] According to PoliMi, this "basic mechanism for quickly updating the tariff [was] based on several economic indexes. Such indexes are required for the update of single OpEx items of the concession's financial plans. Therefore, the

[1348] Accuracy First Expert Report, p. 98, ¶¶ A7.13-17, Table A7.2 (Accuracy rounds up and expresses the amount in thousands).
[1349] Tribunal notes that the € 18,9 M that Accuracy estimates for the lack of gate fee update corresponds only to the tonnes of waste effectively received at the Siderno, Crotone, Rossano, and Gioia Tauro MBT plants (C-10, TEC Concession, 17 October 2000, p. 35). Using the same methodology, Accuracy estimates € 7,3 M for the lack of gate fee update that corresponded to the tonnes of waste effectively received at the Sambatello plant. However, Accuracy includes this amount in the "lost cashflows" of the Reggio Calabria MBT plant (Sambatello 2) that was never built, indicating that "[i]n the Actual Situation, ISTAT invoices were not issued for Sambatello, as a result of the new plant not being completed. […] In our But-For Situation, we calculate the tariff inflation adjustment that would have been due on volumes actually delivered to the existing Sambatello plant, using the same ISTAT inflation rate calculated in Table A7.2 above" (See Accuracy First Expert Report, ¶¶ A7.102-104, table A7.22). The Tribunal assesses this "lost cashflow" in paragraphs ¶¶ 995 *et seq* below in this Award.
[1350] "**CTU**" was the *Consulente Tecnico d'Ufficio* or court-appointed technical expert.
[1351] Accuracy First Expert Report, p. 46, ¶¶ 6.14-17, pp. 108-109, ¶¶ A7.61-64.
[1352] AC-032, Management Arbitration – CTU Report of Prof. Dott. Marco Lacchini, 22 December 2009, pp. 104-105.
[1353] AC-013, Master Settlement Agreement, 30 June 2011; AC-041, *Fatturato* TEC 2009; AC-042, *Fatturato* TEC 2010; AC-043, *Fatturato* TEC 2011.
[1354] PoliMi First Expert Report, p. 30, Section 2.8.

updating mechanism assumes the use of the financial plan scheme and not just the application of an inflation index to the tariff, as considered by Claimant."[1355]

959. PoliMi rejects Accuracy's "calculations for the yearly update of the tariff" based on the CTU Report because "the arbitrations have been declared null in a higher instance" and they are "manifestly based on a misinterpretation of the Concession's financial plan."[1356] PoliMi then proposes its own "economic model" to assess the overall amounts due to TEC. For the gate fee update, PoliMi calculates a "mean tariff" [1357] following a structure that resembles that of the financial plan found in Annex B to the TEC Concession.[1358]

960. The Tribunal observes that Article 6.2 of the TEC Concession does not describe a specific formula for updating the gate fee. However, this provision establishes a limited and specific list of the items to be updated on an annual basis with the respective indicators. As noted in section 2 above, and as recognized by Respondent's expert, this was a "basic" and "quick" update mechanism, as opposed to the gate fee "modification" of Article 6.3 and the "amendment" of Article 6.4. Notably, Articles 6.3 and 6.4 were conceived as mechanisms to re-establish the "economic and financial equilibrium," which explains why they reference the "financial plan" of the TEC Concession in Annex B and subject the gate fee "modification" or "amendment" to variations in waste quantity. By contrast, Article 6.2 includes no mention of the economic and financial equilibrium or the financial plan and only subjects the update mechanism to the passage of time.

961. In this sense, PoliMi's approach to calculating the gate fee update is inapposite under the terms of Article 6.2 of the TEC Concession. PoliMi calculates the annual gate fee update as a "mean tariff" subject to the structure of the financial plan used to set the base gate fee. This involves a reassessment of the whole formula used to define the baseline gate fee under the financial plan,[1359] rather than implementing a "quick" update limited to specific parameters. Thus, PoliMi's approach resembles more the adjustment mechanism in Article 6.3 than the update in Article 6.2.

962. Furthermore, PoliMi's calculation of the annual "mean tariff" is based on the tonnes delivered in the same year it applies the updated tariff. This would demand a retrospective calculation at the end of each year, since the information about the tonnes effectively delivered could only be obtained *ex post*. But the text of Article 6.2 provides that the update was to be made in January of "each year of the duration of management."

963. By way of example, if the management of a plant started on 15 January 2004, the gate fee applicable in year one would be € 68/t and, in year two, the gate fee would be updated in January of 2005. The only way to calculate the update "by the end of January" would be with the information available at that moment, that is, with the effective costs and tonnes delivered in 2004 and the annual update of

[1355] PoliMi First Expert Report, p. 67, Section 5.12.2.
[1356] PoliMi Second Expert Report, p. 24, Section 2.2.
[1357] PoliMi First Expert Report, p. 60, Table 5.10, item "G) Mean Tariff."
[1358] C-10, TEC Concession, Annex (PDF p. 70), p. 2; PoliMi Second Expert Report, p. 24, Section 2; C-10, TEC Concession, 17 October 2000, Annex 1 (G), Financial Plan, Annex "B".
[1359] PoliMi Second Expert Report, p. 47, Table 4.3; Accuracy Second Expert Report, Appendix 13, Tab "TEC-Feasible." PoliMi calculates the "mean tariff" based on the "Overall amounts of waste received" for the TEC Concession for the year of the update and the "Total annual cost to be paied[sic] through tariff," which captures other elements beyond the items listed in Article 6.2, such as CapEx adjustments.

the indices listed in Article 6.2. Yet, Respondent's model would use 2005 information for the gate fee update of 2005, which would not be available "by the end of January" of the same year, hence, disregarding the literal terms of the TEC Concession.[1360]

964. Additionally, Respondent has failed to explain why Accuracy's application of the CTU Report's method is inapposite to update the gate fee under the terms of Article 6.2. The Tribunal does not find that the CTU's method adopted by Accuracy is a "misinterpretation of the Concession's financial plan" or merely the application of an inflation index to the overall tariff. Rather, the method is aligned with Article 6.2. insofar as it (i) allows implementation of the annual update in January of each year, and (ii) entails a discrete assessment of the items and indicators listed in Article 6.2, singling out the annual variations for each one of them. Hence, there is no direct or general inflation adjustment to the gate fee but a specific assessment limited to the parameters agreed upon by the Parties.

965. Lastly, PoliMi's rejection of Accuracy's calculations based on the CTU Report due to the annulment of the Management Award, is baseless. On the one hand, the Management Award was set aside due to lack of jurisdiction and there is no evidence that the CTU Report or the methodology followed therein were part of the annulment decision. On the other hand, regardless of the annulment decision, Claimant's experts presented their own assessment in this arbitration, and while they relied on the CTU Report, this does not discharge Respondent's burden to prove its challenges and allegations against the damages assessments and methodologies presented in this arbitration. In sum, the set aside of the Management Award does not affect or invalidate the technical and financial assessment made in the CTU Report, relied upon by Accuracy, for the purposes of this arbitration.

966. Consequently, the Tribunal finds that Claimant is entitled to **€ 18,989,863**[1361] for the gate fee update under Article 6.2 of the TEC Concession, as per the assessment presented by Accuracy in this arbitration:

TEC - Tariff Adjustment

€k	2005	2006	2007	2008	2009	2010	2011
Tonnes Received (k)	153	193	258	254	286	250	219
ISTAT €/t	3.7	5.8	11.0	14.7	18.1	21.6	23.4
Tariff Revision Due	**560**	**1,122**	**2,824**	**3,742**	**5,191**	**5,391**	**5,106**
Interest on sums owed pre-2007	80	80	-	-	-	-	-
Additional Cash Flows to TEC	**640**	**1,202**	**2,824**	**3,742**	**5,191**	**5,391**	**-**
Total Additional Cash Flows to TEC							**18,990**
Total amount expressed in full							18,989.863

c. TEC: The failure to pay the Contributo

967. It is undisputed that the total amount due to TEC for the *Contributo* was € 41,32 M under Article 8-bis of the *Atto di Sottomissione*, of which the *Commissario* paid € 8,9 M. Claimant is requesting the

[1360] Accuracy Second Expert Report, ¶¶ 6.21-23.
[1361] Accuracy First Expert Report, Appendix 13, "TEC|Tariffs." Figures in red are added by the Tribunal.

outstanding sum of **€ 26,9 M plus € 3,2 M of interest**, for the works that were completed and in operation, excluding the Sambatello 2 plant (**€ 5,5 M**) that was not completed.[1362] The Parties disagree on the quantification of the impact of the lack of payment of the *Contributo*, including the effects of the MSA.

968. PoliMi's model deducted the unpaid portion of the *Contributo* for the Crotone, Gioia Tauro, and Siderno MTB plants, reducing the "total revenues effectively cashed in" by TEC, and ultimately, the total cash flow due to TEC.[1363] PoliMi submits that its model implicitly considers the failure to pay the *Contributo* by considering the CapEx costs "actual, net of only the subsidies effectively cashed in"[1364] because if the *Contributo* "had been paid, it would have lowered the capital invested and the corresponding CapEx. In our analysis, we consider the actual situation, by determining CapEx costs coherent with the real amount of [the Contributo] cashed in."[1365]

969. In this vein, PoliMi's calculations "started remunerating the invested capital at the time each plant started operation, as in line as possible with the Concessions' provisions (it is an extrapolation of Concessions' provisions, since they considered the entire startup of the system as a whole and not differentiated by plant). However, we considered as invested capital not only the overnight plants costs, but also the pre-amortisation interests accrued during construction, even when such constructions took much longer than expected."[1366]

970. Claimant argues that this model does not contemplate the impact of the non-payment of the *Contributo* and submits that Accuracy's model correctly reflects such an impact because it assumes that the *Contributo* was paid in 2007.[1367] On this point, Respondent contends that Accuracy's model fails to consider the payment of the "deferred portion" of the purchase price of VSAT, which was not "foregone" due to the MSA, considering that such an agreement came after the expected date of payment of the *Contributo*.[1368]

971. Claimant maintains that the payment of the deferred price was foregone as a result of the MSA, which was "primarily motivated by Respondent's Alleged Breaches and a full reconstruction of the But-For Situation would therefore be required in order to reverse the impact of the Alleged Breaches from the terms of the MSA."[1369]

972. For the reasons explained below, the Tribunal finds that, while Respondent breached its obligation to pay the *Contributo*, the damage derived from such a breach is a loss of Claimant's own making, and therefore, it is not entitled to compensation.

973. When Veolia made its investment by entering into the SPA in 2007, the payment of the *Contributo* by Respondent was not a risk that it assumed as an investor. Under the SPA, Veolia was to pay an

[1362] Claimant's Memorial, ¶¶ 243-244; Accuracy Second Expert Report, ¶ 5.24.
[1363] PoliMi's Model for Claimant, Tab "TEC Feasible", Line 408; Tr. Hearing Day 4, 879:9-19 (Examination of PoliMi).
[1364] PoliMi Second Expert Report, p. 27; PoliMi First Expert Report, p. 27.
[1365] PoliMi First Expert Report, p. 54.
[1366] PoliMi Second Expert Report, p. 27, § 2.4.1 "Subsidies."
[1367] Accuracy Second Expert Report, ¶ 5.35.
[1368] PoliMi Second Expert Report, p. 28.
[1369] Accuracy Second Expert Report, ¶ 5.34.

upfront portion of the purchase price "equal to 82.5 M€ (75% of 110.0 M€)" at the Closing Date; and a deferred portion of the purchase price "equal to 25.5 M€ (75% of 34.0 M€)."[1370]

974. The payment of the deferred portion was subject to the "full payment" of the *Contributo* equal to "26,936,403.00 € , *i.e.*[,] 41,316,551.00 € (the total amount of contribution recognized to TEC by the *Commissario Regionale per l'Emergenza Rifiuti* in Calabria) less 5,509,485.00 € (the part of contribution linked to Sambatello's plant, not yet performed and, as a consequence, not yet due to TEC) less 8,870,663.00 € (amount paid to TEC by the *Commissario Regionale per l'Emergenza Rifiuti* in Calabria before 31.12.2006)."[1371]

975. This means that under the original terms under which Claimant made its investment, there was no risk of damage associated with the *Contributo*. If Respondent paid the *Contributo*, Claimant then had to pay the deferred portion of the purchase price which was a slightly lower sum than that received for the *Contributo*. If Respondent failed to pay the *Contributo* –as happened– Claimant would not suffer any losses since it would not have to pay the deferred portion of the purchase price. In sum, the payment of the *Contributo* or lack thereof could cause no loss to Claimant as an investor, since such a risk was assumed by the Vendor under the SPA and if the *Contributo* was not paid, Claimant could retain the balance of the purchase price under the SPA.

976. However, Claimant paid the deferred portion of the purchase price without having received payment of the *Contributo*. In practice, this meant not only that the Vendor, who had assumed the risk of the *Contributo* under the SPA, was released from such a risk because it was willingly assumed by Veolia, but also that Veolia disposed of funds that would have compensated it, had the *Contributo* not been paid.

977. According to Veolia, the MSA was a consequence of Respondent's actions since this was a necessary step to enter into the Third Amendment. Claimant argues that purchasing the remaining 25% of VSAT through the MSA was necessary to comply with the requirement of Italian authorities to withdraw all pending proceedings concerning TEC, and in turn, to enter into the Third Amendment.[1372] However, Claimant has not explained why purchasing the remaining shares of VSAT - and thus releasing the funds securing the payment of the *Contributo* - was a *condition sine qua non* to withdraw all pending claims, considering that it already owned the majority of the shares.

978. More importantly, Claimant has not explained why it needed to assume the *Contributo*'s risk by fully releasing the Vendor when purchasing the remaining 25% of VSAT. While releasing the Vendor may have been an expedited route to negotiate and agree the MSA, there is no evidence that this was the only available option or even a responsible business decision, especially considering that the Third Amendment –which purportedly triggered the MSA– was not an agreement for the payment of the *Contributo*.[1373] In this sense, Claimant deliberately assumed a very specific risk that was not

[1370] C-25, Share Purchase Agreement between VSA and TME, 29 May 2007, Art. 2.1.
[1371] C-25, Share Purchase Agreement between VSA and TME, 29 May 2007, Art. 2.4.
[1372] Claimant's Reply, ¶¶ 308-309.
[1373] C-46, Third Amendment or *Secondo Atto Integrativo* between TEC and the *Commissario*, 21 June 2011.

part of its original investment by entering into a new agreement that provided no protection against such a risk.

979. Overall, despite the fact that Claimant had a right to rely on the subscription of the Third Amendment in good faith, and that this agreement was frustrated by Respondent, this does not change the fact that the harm suffered by Claimant, *i.e.,* the loss of the amount corresponding to the *Contributo*, could have been avoided but for its own decision to enter into the MSA and release the Vendor.

980. Since there is a clear causal link between the damage derived from the lack of payment of the *Contributo* and Claimant's own conduct, the Tribunal finds that it must exclude compensation for this breach.[1374]

d. The failure to meet the agreed waste quantities guaranteed under the TEC Concession

981. Claimant claims the amount of **€ 41,7 M** for the *Conguagli* or "equalization adjustments" for "the damages suffered from 2005 to 2011 by TEC due to lower quantity and quality of waste supplied by Respondent" which include damages for (i) insufficient quantities of waste delivered; (ii) lower revenue from valorized waste; (iii) higher quantities of waste being discarded; and (iv) distance to landfills.[1375]

982. Based on the Tribunal's findings on the merits, Claimant is only entitled to claim compensation for the damages derived from the lower or insufficient quantities of waste effectively delivered. As noted above in section 5, under the TEC Concession, the *Commissario* only had an obligation to meet the determined quantity –not quality– of 411,000 tonnes of waste, and the quality distribution indicated in Article 5 was merely indicative.

983. If there was no violation of the TEC Concession for the delivery of waste in qualities and ratios different from those outlined in Article 5 of the TEC Concession, there can be no compensation "for lower revenues arising from the sale of valorised waste as a result of lower quantities of SW being received compared to the quantities provided for in the TEC Concession," [1376] nor for the extra costs of disposal "incurred as a result of the delivery of higher quantities of USW in relation to SW compared to the levels provided for by the TEC Concession Contract[]."[1377] Also, there can be no compensation for the extra costs of disposal due to the distance to the landfills, considering that the Tribunal did not find that the lack of available and nearby landfills was a matter attributable to Respondent.

[1374] See CL-193, *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, ¶ 410.
[1375] Accuracy First Expert Report, ¶ A7.55, Table A7.11, ¶¶ A6.22, A7.19.
[1376] Accuracy First Expert Report, ¶ A7.26. For the lower "sales of valorised waste," Accuracy estimated additional cashflows of € 1,1 M.
[1377] Accuracy First Expert Report, ¶ A7.31; See also *ibid.*, ¶ 6.94: "We understand from Claimant that the impact of the lower quality of waste received from Respondent was a lower generation of RDF and, as a result, greater volumes of waste to be disposed of. In order to reverse the Alleged Breaches concerning the quality of the waste, we align the RDF output in our But-For Situation with Claimant's expected output at the Date of Acquisition."

984. For the damages derived from the reduction in waste quantities, Accuracy assumed a distribution of the total 411,000 tonnes of waste between the MBT plants initially considered under the TEC Concession[1378] and the existing Sambatello 1 plant incorporated through the *Atto Integrativo* while the new Sambatello 2 plant (Reggio Calabria MBT plant) was still to be built.[1379] In this sense, Accuracy assumed a "total of 261k tonnes to be provided to the plants other than Sambatello, of which 171k tonnes were to be USW and 90k to be SW,"[1380] and "the remaining 150k tonnes provided for by the Second TEC Amendment (105k tonnes of USW and 45k tonnes of SW) were to be treated at Sambatello."[1381]

985. PoliMi does not contest such a distribution and also assesses the waste quantities delivered under the TEC Concession separately for the initial TEC plants and the existing Sambatello 1 plant.[1382]

986. Based on this distribution, Accuracy estimates additional cashflows of **€ 4,2 M**[1383] for the lower quantities of waste delivered to the plants operating under the TEC Concession. Accuracy estimates additional cashflows of **€ 13,9 M**[1384] for "the additional tonnes that would have been treated by the new Sambatello MBT [Sambatello 2], assuming that the plant would be operational from 1 January 2008."[1385]

987. The Tribunal is satisfied by Accuracy's approach insofar as it rightly estimates the margin per tonne of waste and applies it to the difference between the quantities of waste expected and those effectively delivered. This allows for the calculation of the gate fees that TEC should have received if Respondent had complied with the guaranteed waste quantities.

988. By contrast, PoliMi's model does not provide a suitable alternative to calculate this damage. PoliMi assesses the damages related to the "insufficient quantities of waste delivered" through an adjustment of the tariff, specifically, through the "fixed and variable OpEx in the application of the concession financial scheme." According to PoliMi, this approach quantifies "the real cost of the service in accordance with the concession provisions and the actual quantities of waste delivered."[1386] However, this approach does not allow singling out of the calculation of the specific damages derived from the failure to deliver the guaranteed waste quantities, since such a calculation is embedded into the model as a whole. Also, PoliMi's approach of redefining or adjusting the gate fee does not reflect the scenario in this case, that is, if it had not been for Respondent's breach of its obligations, Claimant

[1378] C-10, TEC Concession, 17 October 2000, p. 35. The initial MBT plants were Siderno, Crotone, Rossano, Gioia Tauro (sorting) and Reggio Calabria (Sambatello 2) MBT plant. Through the *Atto Integrativo*, the existing Sambatello 1 plant was assigned to TEC and it was meant to be replaced by the new Sambatello 2 plant (C-11, *Atto Integrativo* between TEC and the *Commissario*, 31 August 2001, p. 5, Section c).
[1379] C-11, *Atto Integrativo* between TEC and the *Commissario*, 31 August 2001, p. 10, ¶ 4 "For anything not governed by this amendment agreement, the Parties hereby confirm, also for the Sambatello plant, the content and covenants of the Agreement, without exception." See also *ibid.*, Financial Plan, p. 14, incorporating the existing Sambatello 1 plant to the quantity determined under the TEC Concession "g.1 - Tariff referring to incoming refuse = 411,000 tonnes/year."
[1380] Accuracy First Expert Report, ¶ A7.93.
[1381] Accuracy First Expert Report, ¶ A7.94. In this context, "Sambatello" refers to the combined existing plant, Sambatello 1, and the new Reggio Calabria MBT to be built at Sambatello following its relocation (Sambatello 2): Accuracy First Expert Report, ¶ A7.95.
[1382] PoliMi First Expert Report, p. 62, Table 5.11. See also Accuracy First Expert Report, Appendix 13, tab "flussi 2008."
[1383] Accuracy First Expert Report, p. 101, Table A7.4.
[1384] Accuracy First Expert Report, ¶ A7.98.
[1385] Accuracy First Expert Report, ¶ A7.95.
[1386] PoliMi First Expert Report, Section 5.12.3 (emphasis omitted).

would have received the additional cashflows corresponding to the gate fee of the guaranteed waste quantities. Rather, it seems that PoliMi's approach attempts to implement the adjustment mechanism in Article 6.3 of the TEC Concession, which was tied to the waste quantities, but the implementation of such an adjustment is not what has been claimed in this arbitration.

989. Notwithstanding the foregoing, the Tribunal observes that Claimant is not entitled to claim the additional cashflows of **€ 13,9 M**[1387] for the tonnes that would have been treated by the new Sambatello 2 plant.[1388] As will be further explained in the following subsection, this plant was never completed and, considering the incipient stage of its development, there are no grounds to grant compensation for such lost cashflows.

990. To conclude, the Tribunal finds that Claimant is entitled to **€ 4,175,798**[1389] for the additional cashflow that TEC would have received but-for Respondent's failure to meet the "guaranteed" waste quantities, as per Articles 5 and 6.2 of the TEC Concession:

Accuracy - Lower Revenues Due To Reduction In Quantities Delivered

€k	2005	2006	2007	2008	2009	2010	2011
Tonnes Received (k)	153	193	258	254	286	250	219
Contractual Tonnes (k)	171	190	261	261	261	261	261
Difference in Tonnes	**18**	-	**3**	**7**	-	**11**	**42**
Price (€/tonne)	72	74	79	83	87	90	92
Marginal Cost (€/tonne)	(30)	(31)	(33)	(35)	(36)	(38)	(39)
Expected Margin	**42**	**43**	**46**	**48**	**50**	**52**	**53**
Adjustment Due	**741**	-	**148**	**344**	-	**579**	**2,258**
Interest on Sums Owed Pre - 2007	**106**	-	-	-	-	-	-
Additional Cash Flows to TEC	**847**	-	**148**	**344**	-	**579**	**2,258**
Total Additional Cash Flows to TEC							**4,176**
Total amount expressed in full							4,175.798

e. The delays and frustration of TEC2 and the Sambatello 2 plant

991. Claimant is requesting a total of **€ 73,6 M** as Historical Losses for the additional costs and lost cash flow related to the delays and non-completion of the construction of TEC2 and the new Sambatello 2 plant.[1390]

992. Accuracy's calculation seeks compensation for Claimant beyond "the construction delays only" to include "also the loss of any future cash flows which would have been generated upon completion of the plants."[1391] For this matter, Accuracy takes as a "reference point" the amounts awarded in the Construction Arbitration until 30 September 2009, extrapolates them to 31 December 2011, and includes lost profits.[1392] In addition, to "avoid double counting" Accuracy calculated the cost of construction delays and the lost profits until the date of acquisition of the plants,[1393] and separately

[1387] Accuracy First Expert Report, ¶ A7.98, and Appendix 13, tab "TEC|Sambatello."
[1388] Accuracy First Expert Report, ¶ A7.95.
[1389] Accuracy First Expert Report, p. 101, Table A7.4, and Appendix 13, tab "TEC|Equalisation."
[1390] Claimant's Reply, ¶ 888; Accuracy Second Expert Report, ¶ 5.49, Appendix 6, tab "HL - TEC|CF Impact".
[1391] Accuracy First Expert Report, ¶ A7.73.
[1392] Accuracy First Expert Report, ¶¶ 6.33, A7.77.
[1393] Accuracy First Expert Report, ¶¶ A7.75, A7.84; Table A7.15; Table A7.18; ¶ 6.34.

calculated the lost profits or "incremental cash flows" from the date of acquisition until the termination of the TEC Concession. [1394]

993. In this sense, Accuracy estimates € 18,1 M for the cost of the construction delays of TEC2,[1395] and € 16,2 M for the cost of the construction delays of the new Sambatello 2 plant,[1396] including lost net cashflows until the date of acquisition of the plants.

994. Accuracy further estimates € 10,5 M for the net additional cash flows that would have been generated by TEC2 if it had been completed without further delays after the acquisition by Veolia, starting operations on 1 January 2009, based on the business plan attached to the SPA and to the Atto Integrativo, with adjustments.[1397]

995. For the net additional cash flows of the new Sambatello 2 plant, starting operations on 1 January 2008,[1398] Accuracy estimates € 30,8 M which includes (i) € 14 M for the additional tonnes that would have been treated by the new Sambatello 2, assuming that the plant would be operational from 1 January 2008;[1399] (ii) € 0,4 M for the sale of valorized waste generated by the new Sambatello 2 plant in the But-For Situation;[1400] (iii) € 7,2 M for the gate fee update related to the tonnes actually delivered to Sambatello 1;[1401] (iv) € 3,5 M for the extra disposal costs derived from the quantity of USW;[1402] and (iv) € 7,2 M in relation to the increased transportation costs.[1403] These amounts are further adjusted by the CapEx to complete the plant, the remaining portion of the *Contributo*, the Sambatello 2 construction contingency, and the actual investments in the plant.[1404]

Plant	Extra construction costs: general expenses and lost profit	Lost Cashflow	Total Historical Losses
TEC2[1405]	€ 18,1 M	€ 10,5 M	€ 28,7 M
New Sambatello 2[1406]	€ 16,2 M	€ 30,8 M	€ 46,9 M

996. Respondent and PoliMi "do not recognise the loss of these investments as a consequence of the conduct of Respondent."[1407] PoliMi explained that:

> "Claimant should have been well aware of such risks, since it was already operating in Italy, and specifically also in the same field of operation of VSAT before its acquisition. We recognize that the suspensions experienced by TEC determined **various costs for the**

[1394] Accuracy First Expert Report, ¶¶ A7.75, A7.84; Table A7.15; Table A7.18; ¶ 6.34.
[1395] Accuracy Expert Report, p. 40 footnote 136, ¶ 6.35.
[1396] Accuracy First Expert Report, p. 40 footnote 136, ¶¶ 6.36-638.
[1397] Accuracy First Expert Report, ¶¶ 6.35, A7.77.
[1398] Accuracy First Expert Report, ¶ 6.32.
[1399] Accuracy First Expert Report, ¶¶ 6.38, A7.82,88-89, 98.
[1400] Accuracy First Expert Report, ¶ A7.101.
[1401] Accuracy First Expert Report, ¶¶ A7.102-104, Table A7.22.
[1402] Accuracy First Expert Report, ¶¶ A7.105-109.
[1403] Accuracy First Expert Report, ¶ A7.110.
[1404] Accuracy First Expert Report, Appendix 13, tab "TEC-Sambatello" in the "Summary" table.
[1405] Accuracy First Expert Report, ¶ 6.35.
[1406] Accuracy First Expert Report, ¶ 6.38.
[1407] PoliMi First Expert Report, p. 63 (emphasis omitted).

> **company.** However, with only one exception, such costs have always been capitalized like it results from the balance sheets of TEC provided by Claimant (AC-18 to AC-22). Therefore, such invested capital had the potential of being recovered and remunerated as far as the plants would have been completed and started. In our view this did not happen because of the unilateral decision of Claimant of breaking the Concessions."[1408]

997. While PoliMi acknowledges that "[t]he accrued investments resulting from 2011 TEC financial statement amounted respectively to 11.8 M€ and 60.8 M€ [for the new Sambatello 2 plant and TEC2],"[1409] it refuses to recognize these investments as a loss of "all pre-financing costs and other operation costs (authorisation, studies, insurances, etc.) incurred during the construction of the plants" because they were capitalized and thus "they were supposed to be recovered as CapEx once the plants had started operations," which did not occur due to Claimant's termination of the TEC Concession.[1410] PoliMi offered no alternative valuation model for the construction delays of TEC2 and the new Sambatello 2 plant, and only offered an estimation of the costs for the relocation of the Sambatello 2 plant, which, in its view, is the only sunk cost in this case.[1411]

998. As a preliminary matter, PoliMi and Accuracy do not appear to disagree on the data reflected in TEC's 2011 financial statements, and on the fact that Claimant cannot recover its investment through future cashflows because the TEC Concession was terminated. Rather, it appears that they disagree on the effects of the termination on the recognition of damages. However, this is a matter for the Tribunal to decide, and on which it already found that Claimant's termination of the TEC Concession was the consequence of the various breaches by Respondent, which reached their pinnacle with the frustration of the Third Amendment. Hence, the termination does not preclude Claimant's case on damages, nor does it release Respondent from its burden of substantiating its allegations against Claimant's estimates.[1412]

999. Claimant is entitled to compensation for the damages derived from the frustration of TEC2 and the new Sambatello 2 plant, and Respondent provided no alternative valuation for the construction delays. That said, the Tribunal is not persuaded that Claimant's entitlement to compensation includes lost profits, as calculated by Accuracy.

1000. With the evidence and facts presented in this arbitration, there is no certainty that but for Respondent's conduct, the incomplete and inoperative plants would have passed the testing phase, entered into operation, and generated income to Claimant, so as to warrant granting compensation for lost profits. TEC2 was not a completed and operative plant, and while it was at an advanced stage of construction, it was meant to receive CDR from the Calabria Nord system which was also not ready. The new Sambatello 2 plant was at an even more incipient stage, with debates as to its location. Notably, this risk is found in the due diligence performed by Claimant before the making of the

[1408] PoliMi Second Expert Report, p. 28 (emphasis added).
[1409] PoliMi First Expert Report, p. 63; AC-022, TEC financial statements for the year ended 31 December 2011.
[1410] PoliMi First Expert Report, p. 63.
[1411] PoliMi First Expert Report, p. 63.
[1412] PoliMi First Expert Report, pp. 68-69.

investment,[1413] and while it does not preclude Respondent's liability, it does weigh on the assessment of damages.

1001. In sum, the plants never reached an operative phase nor were they on the verge of starting operations, hence, any potentially lost profits would be a matter of speculation. There is only certainty that Claimant had a right to build the plants to eventually operate them, which did not occur due to Respondent's breaches.[1414] Accordingly, the lost profits corresponding to the additional net cashflows that would have been received in the historical period for TEC2 and the new Sambatello 2 plant, as calculated by Accuracy, are too speculative.

1002. To conclude, Claimant is not entitled to the "lost cashflow" item in Accuracy's estimates, either before or after the date of acquisition. This means that Claimant is only entitled to compensation of the items corresponding to "general expenses" in Accuracy's assessment, which amounts to **€ 15,565,609 M** for TEC2, as explained below:

1003. Accuracy's original calculations were as follows:[1415]

Accuracy - TEC2 (Claim 71)

€k	2004	2005	2006	2007	2008	2009	2010	2011
Daily Cost - Lost Profits	3.7	3.7	3.7	3.7	3.7	3.7	3.7	3.7
Days of Delay - Lost Profits	-	137	365	149	-	-	-	-
Avoidable Costs - Lost Profits	-	**508**	**1,355**	**553**	-	-	-	-
Daily Cost - General Expenses	6.6	6.6	6.6	6.6	6.6	6.6	6.6	6.6
Days of Delay - General Expenses	-	137	365	365	365	365	365	365
Avoidable Costs - General Expense	-	**900**	**2,398**	**2,398**	**2,398**	**2,398**	**2,398**	**2,398**
Total Avoidable Costs	-	**1,408**	**3,753**	**2,951**	**2,398**	**2,398**	**2,398**	**2,398**
Years of interest	n.a	1.7	1.0	n.a.	n.a.	n.a.	n.a.	n.a.
Interest on sums owed pre-2007	-	169	267	-	-	-	-	-
Additional Cash Flows to TEC	-	**1,577**	**4,020**	**2,951**	**2,398**	**2,398**	**2,398**	**2,398**
Total Additional Cash Flows to TEC								**18,139**

1004. The Tribunal's adjustments (in red) are as follows:

Accuracy - TEC2 (Claim 71)

€k	2004	2005	2006	2007	2008	2009	2010	2011
Daily Cost - Lost Profits	-	-	-	-	-	-	-	-
Days of Delay - Lost Profits	-	137	365	149	-	-	-	-
Avoidable Costs - Lost Profits	-	-	-	-	-	-	-	-
Daily Cost - General Expenses	6.6	6.6	6.6	6.6	6.6	6.6	6.6	6.6
Days of Delay - General Expenses	-	137	365	365	365	365	365	365
Avoidable Costs - General Expense	-	**900**	**2,398**	**2,398**	**2,398**	**2,398**	**2,398**	**2,398**
Total Avoidable Costs	-	**900**	**2,398**	**2,398**	**2,398**	**2,398**	**2,398**	**2,398**
Years of interest	n.a	1.7	1.0	n.a.	n.a.	n.a.	n.a.	n.a.
Interest on sums owed pre-2007	-	108	171	-	-	-	-	-
Additional Cash Flows to TEC	-	**1,008**	**2,569**	**2,398**	**2,398**	**2,398**	**2,398**	**2,398**
Total Additional Cash Flows to TEC								**15,566**
Total amount expressed in full								**15,565.609**

[1413] See C-20, Preliminary Legal Due Diligence Report of Macchi di Cellere Gangemi, 27 January 2007, p. 53.
[1414] C-9, Minister of Interior's Ordinance No. 2696, 21 October 1997, Article 1.5. See also C-174, PDF p. 2 "HAVING REGARD TO paragraph 2 of Art. 1 of the cited O.P.C.M. no. 3585 of 24 April 2007, published in the Official Gazette of the Italian Republic issue no. 105 of 8/5/2007, which states that the Delegated Commissioner, in particular, shall carry out, inter alia, the following activities: a) updating and reshaping of the Regional Waste Plan; b) implementation of Articles 148 and 149 of Legislative Decree no. 152/2006, by means of the establishment of local authorities for the subsequent preparation and/or updating of local plans."
[1415] Accuracy First Expert Report, ¶¶ A7.70, 81.

1005. In Sambatello's case, Claimant is only entitled to compensation of the "general expenses", "personnel expenses" and "one-off costs" items in Accuracy's assessment, which amount to **€ 13,178,585**, as explained below.

1006. Accuracy's original calculations[1416] were as follows:

Accuracy - Sambatello (Claim 50)

€k	2004	2005	2006	2007	2008	2009	2010	2011
Daily Cost - Lost Profits	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.3
Days of Delay - Lost Profits	290	365	365	149	-	-	-	-
Avoidable Costs - Lost Profits	**661**	**833**	**833**	**340**	-	-	-	-
Daily Cost - General Expenses	4.0	4.0	4.0	4.0	4.0	4.0	4.0	4.0
Days of Delay - General Expenses	290	365	365	365	365	365	365	365
Avoidable Costs - General Expense	**1,171**	**1,474**	**1,474**	**1,474**	**1,474**	**1,474**	**1,474**	**1,474**
Daily Cost - Personnel Expenses	0.4	0.4	0.4	0.4	0.4	0.4	0.4	0.4
Days of Delay - Personnel Expenses	290	365	365	365	365	365	365	365
Avoidable Costs - Personnel Expen	**107**	**134**	**134**	**134**	**134**	**134**	**134**	**134**
One-off Costs	**32**	-	-	-	-	-	-	-
Total Avoidable Costs	**1,971**	**2,440**	**2,440**	**1,948**	**1,608**	**1,608**	**1,608**	**1,608**
Years of interest	2.9	2.0	1.0	n.a.	n.a.	n.a.	n.a.	n.a.
Interest on sums owed pre-2007	406	348	174	-	-	-	-	-
Additional Cash Flows to TEC	**2,377**	**2,788**	**2,614**	**1,948**	**1,608**	**1,608**	**1,608**	**1,608**
Total Additional Cash Flows to TEC								**16,159**

1007. The Tribunal's adjustments (in red) are as follows:

Accuracy - Sambatello (Claim 50)

€k	2004	2005	2006	2007	2008	2009	2010	2011
Daily Cost - Lost Profits	-	-	-	-	-	-	-	-
Days of Delay - Lost Profits	290	365	365	149	-	-	-	-
Avoidable Costs - Lost Profits	-	-	-	-	-	-	-	-
Daily Cost - General Expenses	4.0	4.0	4.0	4.0	4.0	4.0	4.0	4.0
Days of Delay - General Expenses	290	365	365	365	365	365	365	365
Avoidable Costs - General Expense	**1,171**	**1,474**	**1,474**	**1,474**	**1,474**	**1,474**	**1,474**	**1,474**
Daily Cost - Personnel Expenses	0.4	0.4	0.4	0.4	0.4	0.4	0.4	0.4
Days of Delay - Personnel Expenses	290	365	365	365	365	365	365	365
Avoidable Costs - Personnel Expen	**107**	**134**	**134**	**134**	**134**	**134**	**134**	**134**
One-off Costs	**32**	-	-	-	-	-	-	-
Total Avoidable Costs	**1,309**	**1,608**	**1,608**	**1,608**	**1,608**	**1,608**	**1,608**	**1,608**
Years of interest	2.9	2.0	1.0	n.a.	n.a.	n.a.	n.a.	n.a.
Interest on sums owed pre-2007	270	229	115	-	-	-	-	-
Additional Cash Flows to TEC	**1,579**	**1,837**	**1,722**	**1,608**	**1,608**	**1,608**	**1,608**	**1,608**
Total Additional Cash Flows to TEC								**13,179**
Total amount expressed in full								**13,178,585**

[1416] Accuracy First Expert Report, ¶¶ A7.84; Accuracy First Expert Report, Appendix 13, tab "TEC|Construction"; AC-031, Construction Arbitration - CTU Report of Prof. Dott. Marco Lacchini, 30 September 2009, pp. 204-210, used as baseline for Accuracy's assessment. The "one-off costs" referred to by Accuracy, corresponding to the cost of the non-use of equipment in AC-031, p. 210.

1008. Accordingly, Claimant's compensation is limited to the damages arising from construction delays,[1417] that is, the increased proportion of general overheads excluding potentially lost profits.[1418]

1009. Lastly, the Tribunal observes that consistent with the findings on the *Contributo*, Claimant is not entitled to recover the portion equivalent to the amount paid in connection with the plants as part of the MSA, since this expense is a loss of its own making.

f. TEV: The failure to adjust and timely pay the gate fees and meet the agreed waste quantities guaranteed under the TEV Concession and the 2010 Agreement

1010. In TEV's case, the Tribunal only found a breach of the obligations to (i) adjust and timely pay the gate fees as per the 2010 Agreement; and (ii) meet the waste quantities defined under the TEV Concession and the 2010 Agreement.

1011. Accuracy estimates **€ 4,2 M** for the additional cashflows to TEV, had the gate fee been updated;[1419] and **€ 14,6 M** for the "late payments" or the delay in paying the base gate fees within the 60-day payment terms set out in the TEV Concession from 2007 to 2011.[1420] Regarding Respondent's failure to deliver the agreed waste quantities from 2009 to 2011, Accuracy estimates a total of **€ 5,2 M** due to Claimant.[1421]

1012. PoliMi submits that "in the historical period (2007-11), TEV experienced a cash flow for the waste management service it provided greater than the amount it was due by 0.784 M€ ."[1422] PoliMi reaches this conclusion based on the same financial model it proposed for the TEC Concession.[1423] However, the Tribunal already explained that such a model does not allow the Tribunal to specifically assess the damages that arose from Respondent's breach of its obligations to deliver the agreed waste quantities and pay the agreed gate fee under the 2010 Agreement.

1013. In addition to PoliMi not providing a suitable model, the Tribunal observes that it is satisfied with Accuracy's approach to the calculation of the damages related to TEV, subject to specific adjustments.

[1417] The Tribunal observes that in the assessment of TEC's historical losses, Claimant's experts apply an interest rate of 7.125% to bring any cash flows relating to pre-2007 receivables to 30 June 2007. Accuracy explained that under Article 7.2 of the TEC Concession, this "contractual interest rate is effectively a penalty incurred by Respondent for the non-payment of contractual sums owed as they fell due" whereas the pre-award interest was only to account for the time value of money. Respondent's expert did not specifically challenge this interest rate brought as a "contractual penalty" by Claimant in this arbitration, nor did it present an alternative and specific calculation for this point. Hence, the Tribunal recognizes this interest as part of Claimant's assessment of the historical losses granted in this Award. However, for the Tribunal, this interest or "contractual penalty" is not applicable to the frustration of TEC2 and the Reggio Calabria MBT plant because Article 7.2 of the TEC Concession refers to delayed payment of gate fees, not of construction delays. *See* Accuracy First Expert Report, ¶ 6.9 footnote 144; Accuracy Second Expert Report, ¶ 7.18 footnote 222; C-10, TEC Concession, 17 October 2000, Art. 7.

[1418] Accuracy First Expert Report, Appendix 13, tab "TEC|Construction"; AC-031, Construction Arbitration -– CTU Report of Prof. Dott. Marco Lacchini, 30 September 2009, pp. 221-222, used as baseline for Accuracy's assessment.

[1419] Accuracy First Expert Report, p. 123, Table A8.2.

[1420] Accuracy First Expert Report, ¶ A8.31.

[1421] Accuracy First Expert Report, ¶ 6.47.

[1422] PoliMi First Expert Report, p. 50.

[1423] PoliMi First Expert Report, pp. 48-50.

1014. First, regarding the gate fee update, the Tribunal already found that there was no breach of such an obligation by Respondent before 2010. Accordingly, Claimant is not entitled to the **€ 4,192,088 (€ 4,2 M)**[1424] that it claims but rather to the gate fee adjustment derived from the 2010 Agreement, corresponding to **€ 526,469**[1425] in Accuracy's calculations. Accuracy rightly takes the adjusted tariff and compares its application to the but-for and the actual scenario:

Accuracy Calculation

€k	2007	2008	2009	2010	2011
Actual Tonnes (k)	130	112	104	121	101
Less additional tonnes at agreed tariff of €100			(19)		
Tonnes to be adjusted	**130**	**112**	**85**	**121**	**101**
Tonnes <=110	*110*	*110*	*85*	*110*	*101*
Remaining Tonnes (>110)	*20*	*2*	-	*11*	-
Agreed Tariff (€/tonne)					
<= 110 tonnes	126.4	135.4	140.3	167.0	182.2
> 110 tonnes	54.9	57.0	57.0		
But For Revenue	**14,982**	**14,978**	**11,981**	**18,374**	**18,443**
Actual Tariff (€/tonne)					
<= 110 tonnes	115.7	124.4	126.0	167.0	177.0
> 110 tonnes	52.2	52.2	52.2		
Actual Revenue	**13,755**	**13,760**	**10,759**	**18,374**	**17,917**
Additional Cash Flows to TEV	**1,227**	**1,217**	**1,221**	-	**526**
Total Additional Cash Flows to TEV					**4,192**
Accuracy's total amount expressed in full					4,192.088
Amount amended by Tribunal expressed in full					526.469

1015. Second, regarding the late payments, the Tribunal notes that PoliMi opposes Accuracy's calculation "in excess of 14 M€ . Of such an amount, a total of almost 9.5 M€ originates from pre-2007 receivables. However, Claimant has not documented the origin of such receivables" and, in PoliMi's view "it appears very likely that such receivables are also undue."[1426] On this point, the Tribunal recalls that, as found is section **8** above, there could be no late payments of Claimant's invoices before 2010, given that such invoices were not issued in accordance with Article 6.2 of the TEV Concession. Hence, from the total **€ 14,570,949 (€ 14,6)**[1427] estimated by Accuracy for the years 2007 to 2011, Claimant is only entitled to claim damages derived from the late payment of the adjusted gate fee after the 2010 Agreement.

1016. Accuracy's model is based on the total invoiced as of each year and provides an individual annual estimate that reflects the variations of each year. These specific and limited amounts correspond with

[1424] Accuracy First Expert Report, p. 123, Table A8.2 (Accuracy rounds up and expresses the amount in thousands).
[1425] Accuracy First Expert Report, Appendix 13, tab "TEV|Tariffs" (also p. 123, Table A8.2). Figures and items in red are added by the Tribunal.
[1426] PoliMi First Expert Report, p. 50.
[1427] Accuracy First Expert Report, ¶ A8.31. (Accuracy rounds up and expresses the amount in thousands).

the additional cashflows TEV would have received but-for the delayed payment of the gate fees, which during 2010 and 2011 amounted to **€ 5,025,087**:[1428]

TEV - Late Payments

€k	2007	2008	2009	2010	2011
Total Invoiced	15,084	13,262	15,475	20,880	22,775
Total Municipality Receivables as at 31/12	13,312	9,991	19,120	23,157	32,153
Less: subsidy receivable	(1,140)	(1,140)	(1,140)	(1,140)	(1,140)
Less: interest receivables	-	-	(619)	(1,879)	(1,850)
Less: Amounts invoiced for equalisation	-	-	(1,728)	(2,446)	(6,778)
Less: Amounts invoiced for Tariffs adjustment	(165)	(2,444)	(3,507)	(3,507)	(4,018)
Gate-fee Receivables as at 31/12 - Actual	**12,007**	**6,406**	**12,125**	**14,184**	**18,367**
Receivable Days - Actual	287	174	282	245	290
Receivable Days - Contractual	60	60	60	60	60
Gate-fee Receivables as at 31/12 - But For Situation	**2,514**	**2,210**	**2,579**	**3,480**	**3,796**
Cash Flow Movements (WC) - Actual		5,600	(5,719)	(2,059)	(4,182)
Cash Flow Movements (WC)* - But For Situation	9,493	304	(369)	(901)	(316)
Additional Cash Flows to TEV	**9,493**	**(5,297)**	**5,350**	**1,159**	**3,866**
Total Additional Cash Flows to TEV					**14,571**
Accyracy's total amount expressed in full					14,570.949
Total for 2010-2011					5,025
Total for 2010-2011 expressed in full					5,025.087

1017. Third, regarding the failure to deliver the agreed waste quantities, Accuracy estimates a total of **€ 5,187,884 (€ 5,2 M)**[1429] due to Claimant for the years where such quantities were not met (2009 to 2011). For the years 2010 to 2011, Accuracy rightly applies the gate fee fixed under the 2010 Agreement, as recognized by CAV, to the difference between the waste quantities defined in the agreement (125 k tonnes) and those effectively delivered ("**Agreed Tonnes**" v. "**Actual Tonnes**"), and estimates additional cashflows to TEV of **€ 3,809,086:**[1430]

[1428] (€ 1,159 M for 2010 plus € 3,866 M in 2011) *See* Accuracy First Expert Report, p. 127, table A8.5, and Appendix 13, tab "TEV|Late Payments." The figures and cells in red were added by the Tribunal.
[1429] Accuracy First Expert Report, ¶ 6.47, A8.14-15. (Accuracy rounds up and expresses the amount in thousands).
[1430] Accuracy First Expert Report, Appendix 13, tab "TEV|Equalisation." Figures and items in red are added by the Tribunal.

Accuracy Calculation

€k	2007	2008	2009	2010	2011
Actual Tonnes (k)	130	112	104	121	101
Agreed Tonnes (k)	110	110	110	125	125
Additional Tonnes	-	-	**6**	**4**	**24**
Agreed Tariff (€/tonne)	126.4	135.4	140.3	167.0	182.2
Additional Revenue	-	-	**815**	**653**	**4,332**
Plus: Tonnes at tariff of 100€/t			*19*		
Additional revenue on tonnes at tariff of 100€/t			756		
Total "Put or pay" revenue per financial statements	-	-	**1,571**	**653**	**4,332**
Less Marginal Cost (€/tonne)	*(29.8)*	*(31.9)*	*(33.1)*	*(39.4)*	*(43.0)*
Marginal cost on additional tonnes	-	-	**(192)**	**(154)**	**(1,022)**
Additional Cash Flows to TEV	-	-	**1,379**	**499**	**3,310**
			1,378.798	498.887	3,310.199
Total for 2010-2011 expressed in full					3,809.086
Total Additional Cash Flows to TEV					**5,188**
Accuracy's total expressed in full					5,187.884

1018. The Tribunal also notes that Accuracy's calculations reflect "the margin which would have been generated by the additional tonnes," instead of "only to the revenue element."[1431]

1019. However, for the year 2009, Accuracy applies a gate fee that, as mentioned in the previous sections, was subject to debate since it included elements other than those listed in Article 6.2 of the TEV Concession. In this sense, to preserve consistency with the Tribunal's findings regarding the gate fee update under Article 6.2, the correct but-for scenario would have to adopt the actual gate fee applied to the tonnes actually delivered under the TEV Concession before 2010. Applying Claimant's adjusted gate fee before 2010 would be recognizing that Respondent breached its obligation to implement the update required by Article 6.2, which is a claim that the Tribunal has already dismissed.

1020. Accordingly, by applying the "actual tariff", *i.e.*, € 126 k tonnes,[1432] to Accuracy's "equalization" analysis,[1433] the outstanding amount that Claimant would have received but for Respondent's breach of its obligation to deliver the agreed waste quantities in 2009 would amount to **€ 1,046,760,** which added to the 2010-2011 sub-total of **€ 3,809,086,** amounts to a total of **€ 4,855,846** for the years 2009 to 2011.[1434]

[1431] Accuracy First Expert Report, ¶ A8.17 (b) (emphasis omitted).
[1432] Accuracy First Expert Report, Appendix 13, tab "TEV|Tariff", cell H45. The "actual tariff" applied in 2009 was € 126/k tonnes as indicated in tab "Tariffe_rev2011_YTD
[1433] Accuracy First Expert Report, Appendix 13, tab "TEV|Equalisation."
[1434] Accuracy First Expert Report, Appendix 13, tab "TEV|Equalisation." Figures and items in red are added or modified by the Tribunal.

Accuracy Calculation

€k	2007	2008	2009	2010	2011
Actual Tonnes (k)	130	112	104	121	101
Agreed Tonnes (k)	110	110	110	125	125
Additional Tonnes	-	-	**6**	**4**	**24**
Agreed Tariff (€/tonne)	126.4	135.4	126.0	167.0	182.2
Additional Revenue	-	-	**732**	**653**	**4,332**
Plus: Tonnes at tariff of 100€/t			*19*		
Additional revenue on tonnes at tariff of 100€/t			488		
Total "Put or pay" revenue per financial statements	-	-	**1,219**	**653**	**4,332**
Less Marginal Cost (€/tonne)	*(29.8)*	*(31.9)*	*(29.7)*	*(39.4)*	*(43.0)*
Marginal cost on additional tonnes	-	-	**(173)**	**(154)**	**(1,022)**
Additional Cash Flows to TEV	-	-	**1,047**	**499**	**3,310**
Total Additional Cash Flows to TEV					**4,855.8**
Sub-total amount expressed in full			**1,046.760**	**498.887**	**3,310.199**
Total amount expressed in full					**4,855.846**

g. Historical Losses adjustments

1021. Based on the foregoing, the Tribunal finds that Claimant is entitled to compensation for the damages derived from Respondent's breaches –as found in the merits stage– in the following amounts:[1435]

Claim	Amount awarded	
(i) TEC – failure to timely pay the gate fee	€ 8,088,555	
(ii) TEC – failure to update the gate fee	€ 18,989,863	
(iii) TEC – failure to pay the Contributo	€ 0	
(iv) TEC – failure to meet the agreed waste quantities	€ 4,175,798	
(v) TEC2 and Sambatello 2 plant delay & frustration	€ 15,565,609	*(TEC2)*
	€ 13,178,585	*(*Sambatello 2*)*
Total TEC historical losses	**€ 59,998,410**	
(vi) TEV		
a) 2010 Agreement's gate fee adjustment	€ 526,469	*(adjustment)*
b) failure to timely pay the gate fee	€ 5,025,087	*(late payment)*
c) failure to deliver agreed waste quantities	€ 4,855,846	*(quantities)*
Total TEV historical losses	**€ 10,407,402**	
Total historical losses (TEV + TEC) (pre-tax)	**€ 70,405,812**	

[1435] All figures used by the Tribunal in its assessment to calculate the amount of the damages are based on the information provided in this arbitration, specifically, in the Accuracy First Expert Report, Appendix 13, updated through the Accuracy Second Expert Report, Appendix 6, in which the values in were rounded up and expressed in thousands of euros. The Tribunal multiplied them by 1,000 to reflect the specific and full figures.

1022. First, the Tribunal observes Accuracy adjusts TEC's Historical Losses by deducing € 2,059 M of penalties for delays in the construction of the TEC 1 MBT plants, based on the report of the Construction CTU.[1436] The Tribunal finds no debate over this adjustment,[1437] and will therefore consider a € 2,059 M deduction from the additional cash flows that would have flowed to TEC over the Historical Period.

1023. Second, the Parties and their experts agree that the losses must be adjusted for taxes.[1438] The experts concur in removing the impact of taxes using an IRES rate of 27.5% and an IRAP rate of 3.9%, as the "applicable Italian corporate tax rates as at the Date of Assessment."[1439] The only point of disagreement seems to be the taxable profit. PoliMi applies these rates directly to the pre-tax additional cash flow in the Historical Period.[1440]

1024. Accuracy built a counterfactual scenario where it "adjusted the tax base for any amounts recognised in TEC and TEV's P&L which would not have been recognised in the But-For Situation, in order to avoid double counting for tax purposes the cash flows that would have been recognized by TEC and TEV."[1441] Specifically, Accuracy first adjusted the following three items, (i) TEC2 Lost Profits (after tax calculation); (ii) Sambatello actual investments (not depreciated); and (iii) Late Payments (after tax calculation), to calculate the "P&L impact" to be removed. Then, Accuracy calculated the "arbitration receivables recognized in financials" for each year, and subtracted this value from the annual P&L impact to obtain the "adjustment to profit recognition." Accuracy "[n]etted" this profit against the historical IRES and IRAP tax losses in each year,[1442] obtaining the "adjusted gains" to which it applied the IRES and IRAP corporate tax rates referenced above, and resulting in the post-tax cash flows.

1025. It is not clear from PoliMi's assessment that Accuracy's methodology is inapposite or fundamentally wrong. On the one hand, PoliMi's conclusion is that its methodology "appears more correct than the one proposed by Accuracy," but not that the latter is "incorrect."[1443] Similarly, Respondent submits that the "[f]ull taxation approach is more coherent with the present case" but does not dispose of Claimant's approach.[1444] On the other hand, PoliMi vaguely asserts that some corrections to Accuracy's counterfactual scenario "would be worthwhile," without explaining or specifying such corrections.[1445]

1026. Moreover, Accuracy flagged a risk of double counting in the assessment of PoliMi, based on the following premises:

[1436] Accuracy Second Expert Report, ¶¶ 9.4-9.6. This amount is rounded up by Accuracy to € 2,1 M.
[1437] PoliMi Second Expert Report, p. 48.
[1438] Accuracy Second Expert Report, ¶ 7.10; PoliMi Second Expert Report, Section 2.7.2.
[1439] Accuracy First Expert Report, ¶ 6.58 (iii).
[1440] PoliMi First Expert Report, p. 50.
[1441] Accuracy Second Expert Report, ¶ 7.11 (i).
[1442] Accuracy First Expert Report, ¶ 6.58 (ii); Accuracy Second Expert Report, ¶ 7.10-14.
[1443] PoliMi Second Expert Report, p. 36.
[1444] Respondent's Rejoinder, ¶ 516.
[1445] PoliMi Second Expert Report, pp. 35-36.

"i) As of 31 December 2011, TEC had already recognised, and included in its tax computations, net receivables from Respondent of € 82.9m; and

ii) Furthermore, TEC realised tax losses over a period of several years. In order for TEC to be liable to pay tax in any given year, incremental results would need to be higher than the amount of available tax losses." [1446]

1027. PoliMi does not seem to dispute these premises and rather addressed Accuracy's criticism by arguing that Accuracy's approach does not apply because TEV, TEC and VSAT, as part of the VSA group, can compensate tax credits with the parent company under the national tax consolidation program in Italy.[1447] However, the companies of the group that would participate in such a compensation operation are not a party to this arbitration, and, without an assessment of such potential compensation and the companies' participation, the risk of double counting under Respondent's direct methodology persists.

1028. Accuracy's methodology allows for the application of taxes in a targeted manner, avoiding these risks of double counting; a point that PoliMi and Respondent did not disprove. Nevertheless, Accuracy's assessment includes in the cashflow calculation and in the counterfactual scenario for the taxable profit adjustment, elements that were dismissed by this Tribunal, in particular, the adjustment for "TEC2 Lost Profits (after tax calculation)" for the TEC Concession, and for the TEV Concession, the exclusion of the years 2007 and 2008.

1029. Removing those items and adjusting for the minority shareholding, the Tribunal finds that Claimant is entitled to **€ 85,832,011**, as follows:

(i) **€ 74,723,946** for TEC, after tax impact and minority shareholding adjustment:

TEC - Incremental Cash Flows

	€m	Pre-2007	2007	2008	2009	2010	2011	Awarded
1	Subsidies (Dismissed)	-	-	-	-	-	-	
2	Tariff adjustments (Gate fee update)	1,842.2	2,824.2	3,741.7	5,190.7	5,391.0	-	€ 18,989,863
	Insufficient quantities of waste delivered (Granted)	846.6	148.4	343.7	-	579.1	2,257.9	
	Lower revenue from valorised waste (Dismissed)	-	-	-	-	-	-	
	Higher quantities of waste to discard (Dismissed)	-	-	-	-	-	-	
	Distance to the landfills (Dismissed)	-	-	-	-	-	-	
3	Equalisation adjustments (Waste quantities)	846.6	148.4	343.7	-	579.1	2,257.9	€ 4,175,798
4	Penalties (Dismissed)	-	-	-	-	-	-	
5	Late Payments (Granted)	-	6,323.1	4,678.5	7,200.0	308.9	(10,422)	€ 8,088,555
	Delay of TEC 2 (Granted w/adjustment)	3,576.6	2,397.8	2,397.8	2,397.8	2,397.8	2,397.8	€ 15,565,609
	Lost Profits of TEC 2 (Dismissed)	-	-	-	-	-	-	
	Delay of Sambatello 2 (Granted w/adjustment)	5,139.0	1,607.9	1,607.9	1,607.9	1,607.9	1,607.9	€ 13,178,585
	Lost profits of Sambatello 2 (Dismissed)	-	-	-	-	-	-	
	Penalties for delays in TEC 1 MBT plants		(2,055.9)					
6	Construction delay of TEC 2 and Sambatello 2 (Granted w/adjustment)	8,715.6	1,949.8	4,005.7	4,005.7	4,005.7	4,005.7	€ 26,688,304

[1446] Accuracy Second Expert Report, ¶ 7.12.
[1447] PoliMi Second Expert Report, p. 35.

TEC - Incremental Cash Flows

€m	Pre-2007	2007	2008	2009	2010	2011	Awarded
Total Adjustments - Cash Flow Impact	**11,404.4**	**11,245.6**	**12,769.7**	**16,396.3**	**10,284.8**	**(4,158.3)**	**€ 57,942,521**
TEC 2 Lost Profits (after tax calculation)	-	-	-	-	-	-	
Sambatello actual investments (not depreciated)		(2,255.3)	-	(642.0)	(2,689.1)	(1,010.5)	
Late Payments (after tax calculation)	-	(6,323.1)	(4,678.5)	(7,200.0)	(308.9)	10,422.0	
Total Adjustments - P&L Impact	**11,404.4**	**2,667.2**	**8,091.2**	**8,554.4**	**7,286.8**	**5,253.1**	**€ 43,257,050**
Tax Computation							
Arbitration receivables recognised in financials	-	39,229.6	38,184.1	43,080.9	52,298.2	68,420.5	**€ 241,213,284**
In year	**11,404.4**	**27,825.2**	**(1,045.5)**	**4,896.8**	**9,217.3**	**16,122.4**	**€ 68,420,527**
Accuracy - Adjustment to Profit Recognition	**-**	**(25,158)**	**9,136.7**	**3,657.5**	**(1,930.5)**	**(10,869.2)**	**-€ 25,163,477**
Tax Losses - IRES		(4,852.5)	(6,403.2)	(7,231.3)	(9,039.9)	-	
Tax Losses - IRAP		-	(5,051.8)	(1,110.1)	-	-	
Adjusted Gains - IRES		**(30,010.5)**	**2,733.5**	**(3,573.8)**	**(10,970.4)**	**(10,869.2)**	
Adjusted Gains - IRAP		**(25,158)**	**4,084.9**	**2,547.4**	**(1,930.5)**	**(10,869.2)**	
Applicable rate - IRES		33.0 %	27.5 %	27.5 %	27.5 %	27.5 %	
Applicable rate - IRAP		4.3 %	3.9 %	3.9 %	3.9 %	3.9 %	
IRES on adjusted base		9,903.5	(751.7)	982.8	3,016.9	2,989.0	
IREP on total taxable adjustments less loss		1,069.2	(159.3)	(99.3)	75.3	423.9	
Total Cash Flow Impact - Including Tax	**11,404.4**	**22,218.2**	**11,858.7**	**17,279.8**	**13,376.9**	**(745.4)**	**€ 75,392,697**
Adjustment - VSAT Holding	**100.0 %**	**100.0 %**	**100.0 %**	**96.7 %**	**99.2 %**	**99.7 %**	
Total - Adjusted for VSAT Holding	**11,404.4**	**22,218.2**	**11,858.7**	**16,712.3**	**13,273.5**	**(743.2)**	**€ 74,723,946**

(ii) **€ 11,108,065** for TEV, after tax impact and minority shareholding adjustment:

TEV - Incremental Cash Flows

	€m	2007	2008	2009	2010	2011	Awarded
1	Tariff adjustments (Partially granted)	-	-	-	-	526.5	**€ 526,469**
2	Equalisation adjustments (Granted w/adjustment)	-	-	1,046.8	498.9	3,310.2	**€ 4,855,846**
3	Late Payments (Partially Granted)	-	-	-	1,158.6	3,866.5	**€ 5,025,087**
	Total Adjustments - Cash Flow Impact	**-**	**-**	**1,046.8**	**1,657.5**	**7,703.1**	**€ 10,407,402**
		-	-				
	Amounts already included in P&L	-	-	(9,129.1)	(4,037.0)	(8,996.3)	
		-	-				
	Total Adjustments - P&L Impact	**-**	**-**	**(8,082.4)**	**(2,379.5)**	**(1,293.2)**	**-€ 11,755,022**
	Tax Computation						
	Write-offs on base gate-fees	-	-	(6,216.1)	(6,180.9)	(10,649.9)	
	In year	**-**	**-**	**(6,216.1)**	**35.3**	**(4,469.0)**	
	Accuracy - Adjustment to Profit Recognition	**-**	**-**	**(1,866.2)**	**(2,414.8)**	**3,175.8**	
	Tax Losses - IRES	-	(1,768.2)	-	(1,395.6)	-	
	Tax Losses - IRAP	-	(116.3)	-	(352.6)	-	
	Adjusted Gains - IRES	**-**	**(1,768.2)**	**(1,866.2)**	**(3,810.4)**	**3,175.8**	
	Adjusted Gains - IRAP	**-**	**(116.3)**	**(1,866.2)**	**(2,767.3)**	**3,175.8**	

TEV - Incremental Cash Flows

€m	2007	2008	2009	2010	2011	Awarded
Applicable rate - IRES	33.0 %	27.5 %	27.5 %	27.5 %	27.5 %	
Applicable rate - IRAP	4.3 %	3.9 %	3.9 %	3.9 %	3.9 %	
IRES on adjusted base	-	486.2	513.2	1,047.9	(873.3)	
IREP on total taxable adjustments less loss	-	4.5	72.8	107.9	(123.9)	
Total Cash Flow Impact - Including Tax	-	-	1,632.8	2,813.3	6,705.9	€ 11,151,965
Adjustment - VSAT Holding	99.3 %	100.0 %	100.0 %	100.0 %	99.3 %	
Total - Adjusted for VSAT Holding	-	-	1,632.8	2,813.3	6,662.0	€ 11,108,065

5. Prospective Losses

1030. Accuracy estimates Claimant's Prospective Losses between the Date of Assessment and the date of the report, after taxes, by using a DCF methodology.[1448] It assesses the Free Cash Flows to Firm (FCFF), as cash flows available before the servicing of external debt, to which it applies a discount rate of 7.29%, and then subtracts the value of the external debt as at the Date of Assessment (the "**Net Debt**"). This discounted value of the FCFF less Net Debt (the "**Company Value**") gives the lost value of Claimant's Investment.[1449]

1031. This scenario calculated for the remaining duration of the Concessions and beyond the duration of the Concessions is then compared with the actual scenario, updated to the Date of Assessment, with Veolia Group's yearly cost of debt as a discount rate.[1450]

1032. Respondent submits that "Prospective Losses are nil, because the termination of the Concession contracts and the liquidation of VSAT ensued from an independent, free will decision of Claimant."[1451]

1033. The Tribunal observes that Respondent does not propose an alternative valuation of Claimant's Prospective Losses but dismisses them on the grounds that Claimant is not entitled to them due to its decision to terminate the Concessions, and only submits specific criticisms of elements of Accuracy's model.[1452] However, the Tribunal has found that the termination of the Concessions, and hence its consequences, cannot be attributed to Claimant. Since the Concessions did not continue due to Respondent's conduct, their termination does not preclude Claimant's right to Prospective Losses. In other words, but for Respondent, the Concessions would have continued, and Claimant would have continued to operate the TEC and TEV plants.

1034. Nevertheless, the Tribunal finds that Claimant is only entitled to Prospective Losses for the remaining duration of the Concessions. The expectation of an extension to the terms of the Concessions estimated by Accuracy at € 17,9 M[1453] is completely speculative. There is no evidence that such

[1448] Accuracy First Expert Report, ¶ 6.69.
[1449] Accuracy First Expert Report, ¶¶ 6.73-6.74.
[1450] Accuracy First Expert Report, ¶¶ 6.75, 6.77.
[1451] PoliMi First Expert Report, p. 16 (emphasis omitted).
[1452] Respondent's Rejoinder, ¶ 525.
[1453] Accuracy First Expert Report, ¶ 6.151.

extensions would have been obtained and, therefore, that the termination of the Concessions created a loss of opportunity that should be compensated in this arbitration.

1035. In addition, the Tribunal finds that Claimant is not entitled to claim Prospective Losses for the potential operation of the TEC2 and the new Sambatello 2 plants. These were unfinished and non-operational plants at the moment of termination of the TEC Concession. The very early stages they had reached creates uncertainty as to whether TEC2 and the new Sambatello 2 plant would enter operation, let alone become profitable. This lack of "sufficient certainty"[1454] of the damage prevents this Tribunal from awarding future lost profits or Prospective Losses for these plants. The same considerations apply to the Falascaia plant in the TEV Concession, which was non-operative at the moment of termination, as recognized by Accuracy, and therefore had an uncertain future.[1455]

1036. Considering the foregoing, the Tribunal will only analyze Accuracy's assumptions to estimate the Prospective Losses for the TEC and TEV Concessions during the agreed term of the Concessions, that is, excluding TEC2, the Sambatello 2 plant, and the Falascaia plant.

1037. For the remaining term of the Concessions, Accuracy estimates a total lost Company Value of **€ 165,3 M**, of which € 28,8 M corresponds to TEC1, € 18,8 M for TEV, € 4,7 for VSAT and € 113,0 M for TEC2. Since the Tribunal found no grounds to recognize prospective losses for TEC2, it will only assess Accuracy's estimates for the remaining total of **€ 52,3 M.**

1038. As a starting point, the Tribunal is satisfied with a model applying a DCF analysis to assess Claimant's Prospective Losses for the remaining term of the Concessions for plants that were in operation at the moment of termination, a point on which the experts also appear to agree from a technical standpoint.[1456]

1039. The Tribunal is also generally satisfied with the assumptions adopted by Accuracy in its model in connection with duration,[1457] taxes, working capital, capital expenditure, external debt, costs, tariffs, and prices, which align with the Tribunal's findings on the merits.

1040. Nevertheless, the Tribunal observes that Accuracy assumes that Respondent would have delivered "411kt of incoming waste p.a., of which 276kt p.a. of urban solid waste (USW) and 135kt p.a. of sorted waste (SW), as contractually agreed in the TEC Concession Contract (and still effective according to the Second TEC Amendment)."[1458] This assumption is contrary to the Tribunal's conclusion on the merits that there were no "contractually agreed" distributions of waste quality under the TEC Concession. Insofar as there was no obligation to meet specific waste ratios, Accuracy's assumptions of "ratios of output of RDF" and "waste and evaporated material generated

[1454] CL-178, *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 1009.
[1455] Accuracy First Expert Report, ¶ 6.120.
[1456] Accuracy Second Expert Report, ¶¶ 8.3-8.6; PoliMi First Expert Report, p. 70.
[1457] Accuracy First Expert Report, ¶ 6.88. Accuracy rightly points that in a but-for scenario, the overall TEC Concession should have lasted 15 years after the completion of the new Sambatello 2 plant (as the last plant to be completed), and each plant, 15 years after its completion. Accuracy adopts a conservative approach by applying the contract and estimates that eliminating any delays, the plant should have been completed by 2007, with an expiration date of the TEC Concession on 31 December 2022.
[1458] Accuracy First Expert Report, ¶ 6.90.

by the treatment of UWS" [1459] are incorrect. These assumptions permeate Accuracy's model and impact its calculations, including the costs of disposing of greater volumes of waste[1460], its "valorisation", and energy sales.[1461]

1041. Furthermore, the Tribunal observes that Accuracy deducted the "net debt at the date of assessment" from the "lost [Company] Value" to calculate the Prospective Losses.[1462] However, Accuracy's estimates of TEC's net debt include TEC2 (a combined net debt of € 65,2 M is presented for TEC2 and TEC1). However, since the Tribunal excluded TEC2 from the Prospective Losses, an accurate calculation would also have to exclude such debt.[1463]

1042. The foregoing means that Accuracy's calculations are inextricably tied and limited to Claimant's legal assumptions, which the Tribunal rejected.

1043. Accuracy provided no alternative calculations that could allow the Tribunal to work with the proposed model and tune it to the findings on the merits.

1044. The record provided sufficient information on the Concessions' historical performance for Accuracy to perform alternative assessments of the Concession's prospective performance, and, in turn, of the Prospective Losses under its model, but it did not. Instead, Accuracy's assessment of the prospective performance was limited to Claimant's reading of the Concession.

1045. Moreover, Claimant provided no other approach or model that the Tribunal could consider as evidence of the amount it claims for its Prospective Losses, unlike in the case of the Historical Losses, in which alternative sunk costs estimates were provided.

1046. In sum, the expert evidence that Claimant submitted to prove the amount of the Prospective Losses does not provide reasonable certainty nor a reasonable basis for the Tribunal to assess such amount because it is based on the flawed assumption that the TEC Concession's waste ratios had to be met, despite the fact that they were only indicative and not binding –as the Tribunal found in its ruling on the merits– and that they were not even met during the Historical Period. Claimant simply failed to meet the burden of proving the *quantum* of the Prospective Losses it suffered.

1047. Lastly, and notwithstanding that the burden of proof falls on Claimant, the Tribunal notes that Respondent's expert also provided no suitable alternative. PoliMi first declined to present its own calculations or alternative model, based on Respondent's legal interpretation that Claimant had no

[1459] Accuracy First Expert Report, ¶ 6.93.
[1460] Accuracy First Expert Report, ¶¶ 6.94, 6.98.
[1461] Accuracy First Expert Report, ¶¶ 6.92, 95
[1462] Accuracy First Expert Report, ¶ 6.152.
[1463] Accuracy First Expert Report, Table 6.32:

Table 6.32. Summary of Prospective Losses as at the Date of Assessment:

€m	TEC 1	TEC 2	TEV	VSAT	Total
Enterprise Value as at 31/12/11	28.8	113.0	18.8	4.7	165.3
Lost Opportunities		11.1	6.8		17.9
Net Debt as at 31/12/11		(65.2)	(18.9)	3.2	(81.0)
Lost Value - 100%		**87.6**	**6.7**	**7.9**	**102.2**
VSAT Holding		**98.8 %**	**99.0 %**	**100.0 %**	
Lost Value - Date of Assessment		**86.5**	**6.6**	**7.9**	**101.1**

right to claim such losses and chose instead to criticize specific parameters used by Accuracy.[1464] With the second expert report, PoliMi provided an assessment that Prospective Losses were negative, based on Respondent's legal interpretation which does not align with the Tribunal's findings.[1465]

1048. The Tribunal notes that expert reports are meant to assist the tribunals in their task of deciding a dispute, not only support the parties' position. However, in this case, the Parties and their experts assumed extreme positions with respect to the estimation of Prospective Losses without offering alternative assessments that could adapt to the Tribunal's specific findings.

6. Deductions requested by Respondent

a. The restoration costs

1049. The Parties debate whether the Tribunal should order the deduction of **€ 19,5 M** from Claimant's compensation for the Historical Losses for its alleged obligation to deliver the plants in a proper operational status upon termination of the TEC Concession, as per Article 10.3 of the TEC Concession. According to Respondent, the *Commissario* determined "the state of the plants and the ordinary and extra-ordinary maintenance works required for their full restoration."[1466] Claimant submits that Article 10.3 of the TEC Concession is only applicable when the term of the Concession expires, which is different from the termination that took place in this case.[1467] Also, according to Claimant, any lack of maintenance occurred during the *Prorogatio* –not during the TEC Concession– and, in any event, PoliMi's calculations are unsubstantiated.[1468]

1050. The Tribunal has serious doubts concerning the calculation of the costs related to the alleged deterioration and required maintenance of the plants,[1469] if any. More importantly, the Tribunal is not persuaded that Article 10.3 is applicable in the event of a termination of the TEC Concession. The provision refers to "expiry of the concession" or "*scadenza della concessione*,"[1470] which, in the Tribunal's view, connotes that it comes to an end according to its terms, rather than being terminated for breach. This is emphasized by the need for a collaborative assessment jointly between the Parties during the last year of the Concession, which did not occur in this case, since the *Commissario*'s report was not an assessment "jointly" undertaken with the Concessionaire,[1471] as required by Article 10.3.

[1464] PoliMi First Expert Report, p. 16 "Prospective Losses are nil, because the termination of the Concession contracts and the liquidation of VSAT ensued from an independent, free will decision of Claimant" (emphasis omitted), p. 74 "Thus, the impact on Accuracy's damage estimate of the revision of the Cost of Capital, which only impacts prospective losses, would consist of a contraction of € 51.4 million."

[1465] PoliMi Second Expert Report, p. 49, and Appendix B.

[1466] PoliMi First Expert Report, p. 65; PoliMi Second Expert Report, pp. 29-30.

[1467] Tr. Hearing Day 5, 9:30:15-21, 932:24-25, 933:1-15, 9-25, 934:1-3, 935:1-20 (Mr. Caicedo interrogating Mr. Viganò); Claimant's PHB, ¶ 159 (Examination of PoliMi).

[1468] Claimant's Reply, ¶¶ 582-583.

[1469] Tr. Hearing Day 5, 931:12-17 (Prof. Vigano). Prof. Vigano and Mr. Caicedo acknowledged a difference of over € 4 M between Accuracy's and PoliMi's calculations of restoration costs.

[1470] C-10, TEC Concession, 17 October 2000, Art. 10.3; C-10-IT, Article 10.3.

[1471] C-10, Article 10.3 "the Grantor shall undertake, **jointly** with the Concessionaire, to determine the ordinary and extraordinary maintenance works, necessary for restoring the installations to a state of maintenance and of efficiency, such as to be considered suitable for the normal functioning thereof; the associated expenses shall be borne exclusively by the Concessionaire" (emphasis added); R-11-IT, Report from the Commissario, 28 August 2012, p. 3/8; R-36, OCD n. 11050, 20 June 2012.

1051. In addition, Articles 18 and 19 of the TEC Concession use specific language to reference the termination of the Concession for grounds other than the expiration of its term, *i.e.,* "lapsing" and "revocation", and envisage different obligations in each scenario.[1472] This further confirms that the obligation in Article 10.3 was specifically limited to the expiration of the TEC Concession.

1052. Accordingly, the Tribunal finds that there are no grounds in this case to deduct € 19,5 M for the failure to restore the plants from Claimant's compensation for the Historical Losses.

b. The amounts paid under the Management and Construction Awards

1053. In the Rejoinder, Respondent requests the Tribunal to "subtract the amount of € 62,9M, paid by the Respondent in execution of the Construction and Management Arbitral Awards, from the sum eventually recognized as compensation for damage."[1473] Considering that said awards were annulled, Respondent asserts that it is entitled to request the restitution of the sum it was ordered to pay on the basis of the awards.[1474] In its Reply PHB, Respondent reiterated that it "already paid to Claimant € 65.063.496,99 in execution of the two awards that were later annulled. This sum was never returned to Italy but was instead used to pay Veolia's creditors."[1475]

1054. At the Hearing, Claimant explained that the amounts paid under the Construction and Management Awards did not benefit Veolia because they were transferred to the Receiver to pay the creditors in the bankruptcy proceedings,[1476] which bankruptcy only occurred due to Respondent's breaches.[1477]

1055. The Tribunal observes, on the one hand, that there is no claim in this arbitration related to the Construction and Management Awards. Claimant has not brought a treaty claim resulting from the Construction and Management Awards or the annulment thereof and Respondent has failed to substantiate the reasons why this Tribunal, under a treaty claim, may order the restitution of sums paid under a domestic commercial arbitration resulting in awards that were later annulled.

1056. Respondent knew that the Construction and Management Awards had been annulled before the commencement of this arbitration and only decided in its Rejoinder to request from this Tribunal an order for the reimbursement of the sums paid under these awards. Whether such reimbursement can be made, under which conditions, and particularly, whether the reimbursement may be requested from Claimant even if the amounts were paid to creditors in the bankruptcy proceedings, is a matter that must be decided by Italian courts and under Italian law.

1057. This Tribunal, therefore, rejects Respondent's belated request for the deduction of the amounts paid under the Construction and Management Awards.

[1472] C-10, TEC Concession, 17 October 2000, Arts. 18 and 19.
[1473] Respondent's Rejoinder, ¶ 574.
[1474] Respondent's Rejoinder, ¶ 253.
[1475] Respondent's PHB2, ¶ 44; Respondent's PHB1, ¶ 179. See also Respondent's Counter-Memorial, ¶¶ 82, 105; C-52, Judgment No. 438 of the Rome Court of Appeal, 1 July 2014; C-53, Judgment No. 1000 of the Rome Court of Appeal, 1 July 2014.
[1476] Tr. Hearing Day 2, 294:2-7, 304:22-25, 305:1-2 (Examination of Mr. Bozzetto).
[1477] Tr. Hearing Day 1, 239:17-25, 240:1-8 (Tribunal's Questions).

VIII. INTEREST[1478]

A. CLAIMANT'S POSITION

1058. Claimant argues that it is entitled to pre-award compound interest for the Historical and Prospective Losses, estimated at € 116,6 M, or in the alternative, for the sunk costs estimated at € 113,6 M.[1479]

1059. The purpose of pre-award interest is to compensate Veolia for not having received compensation as of the date of termination of the Concessions.

1060. Contrary to Italy's argument, Veolia did not delay the filing of the arbitration and had no interest in doing so.[1480] The claim was not brought in 2020[1481] as it was raised on 25 October 2017[1482] and the Request for Arbitration filed in May 2018. Also, Veolia claims that "Italy had unequivocally been put on notice to pay its monetary obligations" when it terminated the Concessions and thus should be awarded pre-award interest as of December 2011.[1483]

1061. According to Accuracy, the proper rate to adopt is Veolia Group's cost of borrowing rate of "roughly 3.5 percent" per year between 31 December 2011 and the (then) current date –31 July 2021– as it allows to compensate exactly the amount of money Veolia would have saved if it had been compensated in due time.[1484] This rate respects the principle of full reparation as Veolia had to obtain € 200 M and assumed borrowing costs to reimburse the loans that should have been paid with what Veolia should have been compensated with in December 2011. By paying interest at Veolia's borrowing rate, Veolia is put in the financial situation it would have been in, had Italy compensated Veolia in December 2011, at the time of termination of the Concessions.[1485]

1062. PoliMi's method using a 12-month EURIBOR rate must be rejected, especially since it was negative over the relevant period. Using PoliMi's method would imply that, had Veolia received the money in due time, Veolia would have reinvested with a lower return than the return that Veolia would have received just by depositing this money in its French bank account.[1486]

1063. Thus, Veolia maintains that Accuracy's calculation of pre-award interest should prevail.

[1478] This section includes summaries of the facts and positions of the Parties underlying the present dispute. Such summaries are not an exhaustive narrative of all the matters that have been discussed in this proceeding. Nevertheless, the Tribunal has considered the entirety of the Parties' factual and legal arguments made in their written and oral submissions, whether or not they are expressly referenced in the text of this section.
[1479] Claimant's Reply, Section 6.4; Claimant's PHB1, Section 4.5.
[1480] Tr. Hearing Day 4, 827:10-18 (Examination of Accuracy).14; Claimant's Reply, ¶¶ 1081, 1085
[1481] Claimant's Reply, ¶¶ 1077-1081.
[1482] C-5, Notice of Dispute, 25 October 2017.
[1483] Claimant's Reply, ¶ 1085.
[1484] Tr. Hearing Day 4, 751: 11-16 (Examination of Accuracy); Claimant's Reply, ¶ 1103; Accuracy Second Expert Report, ¶ 8.55; Accuracy First Expert Report, paragraph 5.24 and Appendix 10.
[1485] Claimant's Opening Presentation, pp. 193-194.
[1486] Accuracy's Presentation, p. 39; Claimant's Reply, § 6.4.2.

B. RESPONDENT'S POSITION

1064. Respondent argues that no pre-award interest should be awarded to Claimant, since the latter made the deliberate choice to start this arbitration eight years after the alleged damage occurred, and Respondent should not bear the costs of such delay. Should pre-award interest be recognized in favor of Claimant, its "forced loan" approach of calculating the interest rate relying on its annual cost of debt, must be rejected given that no business risk was borne by it, Respondent being solvent. The Tribunal, in that event, should apply a risk-free interest rate, *i.e.,* EURIBOR interest rate, only to cover the opportunity cost of money, which implies "bring[ing] a hypothetical amount forward in time."[1487]

1065. In this sense, PoliMi estimates –considering the corrections identified by Accuracy –a total of € 46,739 M for Historical Losses plus € 1,377 M for pre-award interest for a total of € 48,116 M under the "Concession compliant" scenario. If the Tribunal recognized sunk costs only, the amount would be the sum of € 3,1 M, and Prospective Losses would be negative.[1488]

C. TRIBUNAL'S ANALYSIS

1066. Claimant submits that it is entitled to € 116,6 M for pre-award compound interest over the total principal amount of Historical and Prospective Losses (€ 300 M), calculated at the borrowing rate used by the Veolia Group (*i.e.*, 3.6% average annual) between 31 December 2011 and 27 August 2021, for an interest factor of 1.36.[1489] Respondent contends that Claimant is not entitled to pre-award interest due to the delay in bringing its claim, and in any case, argues that the borrowing rate used by Accuracy should be substituted by a risk-free rate, *i.e.*, the EURIBOR interest rate, that equates to an annual rate of 0.34% and an interest factor of 1.03.[1490]

1067. As a preliminary issue, the Tribunal does not find that, in this arbitration, the timing of the claim precludes Claimant's right to receive pre-award interest. There is no limitation period in this regard in the ECT, the ICSID Convention,[1491] or under general international law,[1492] that would justify "punish[ing] Claimant for failing to exercise its rights sooner,"[1493] for instance, by denying pre-award interest.

1068. Also, the notice of intent dates back to 2017, that is, five years after the termination of the Concessions in early 2012. While the claim was not brought immediately after the termination, the evidence in the record does not suggest that during those five years Claimant had the intention of

[1487] Respondent's Counter-Memorial, ¶ 671.
[1488] Respondent's Rejoinder, ¶¶ 571-573.
[1489] Claimant's Reply, ¶ 1072; Accuracy Second Expert Report, ¶ 8.55.
[1490] Respondent's Counter-Memorial, ¶¶ 671, 674; PoliMi Second Expert Report, p. 42.
[1491] CL-227, *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, 21 April 2015, ¶ 147.
[1492] CL-135, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, ICJ Reports, 26 June 1992, p. 240, ¶ 18. The ICJ recognized that there is no "specific time-limit" to bring a claim under international law, requiring a circumstance-based analysis for each case.
[1493] CL-29, *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Award, 10 February 2012, ¶ 166.

creating a delay in bad faith. Rather, as Claimant explained, it was assessing the full extent of its losses in connection with the bankruptcy proceedings.[1494] Claimant only returned the TEC facilities to the *Commissario* on 23 November 2012, throughout 2013 and 2015 the *Concordato Preventivo* was disputed before Italian courts,[1495] and the insolvency proceedings continued through 2019.[1496]

1069. While the insolvency proceedings did not bar Claimant from bringing this arbitration, they were indeed a relevant element for the assessment of the amount of the damages to be sought that explains the timing of the claim. This was also a relevant element for the avoidance of double recovery, an issue that Claimant acknowledged by deducting the amounts collected during the insolvency proceedings from the *quantum* of its claim.[1497]

1070. Moreover, the Tribunal does not find that the timing of Claimant's claim affected or impaired Respondent's defense in this arbitration. Respondent was able to substantiate its position throughout the proceedings, submit legal and factual authorities, and bring witnesses, regardless of the claim's timing.

1071. In sum, the foregoing elements weigh against any potential finding of bad faith or negligence in the claim's timing. This, added to the absence of any specific limitation period, disposes of the allegation that Claimant is precluded from requesting pre-award interest.

1072. The ECT does not specifically regulate the award of interest to compensate for breaches of Article 10. However, the absence of such regulation does not exclude the award of interest.[1498] The purpose of pre-award interest is to update the sums being awarded to their present value, in order to achieve the principle of "full reparation" and make Claimant whole.[1499] Pre-award interest is not a source of additional income but a means of putting the aggrieved party in the position it would have been in absent the breaches committed by the aggrieving party.

1073. The EURIBOR or the "Euro Interbank Offered Rate" are interest rates at which a panel of European banks borrow funds from one another, and which "provide the basis for the price or interest rate of all kinds of financial products."[1500] This means that EURIBOR is merely a baseline to award compensation for the cost of money in time, which does not necessarily reflect the specific value lost by a company that was prevented from using its own resources due to the conduct of a respondent State. This explains why tribunals award EURIBOR or similar reference rates plus a "reasonable

[1494] Claimant's Reply, ¶ 1086.
[1495] C-68, Insolvency Receivers Report of the judicial receivers, 1 February 2013; C-69, Request of GA to open bankruptcy proceedings, 19 May 2014; C-70, Bankruptcy judgement of the Tribunal of La Spezia, 25 June 2015; C-100, Decision by the Appeal Court of Genoa, 18 December 2013; C-234, Letter from JMJ to Councillor Gorelli, 26 May 2009.
[1496] AC-017, VSA bank statement extract dated, 1 March 2019 - ENG; C-71, Decree by Giudice Delegato, 20 November 2015; C-101, Request to include VSA's financial claims in GA's debt and correspondent explanatory note, 2 February 2015; C-102, Tribunal of La Spezia (Bankruptcy Section) Explanatory note, 2 April 2015; C-103, Request to include VP's financial claims in TEC'S debt, 2 February 2015.
[1497] Claimant's Memorial, ¶¶ 138-144, 702; Claimant's Reply, ¶ 1902.
[1498] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶ 9.2.1 (Claimant relies in this decision and submitted translated excerpts as exhibit CL-63-ENG).
[1499] PoliMi First Expert Report, pp. 74-75: "the purpose of adding interest is merely to bring that hypothetical amount forward in time"; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶ 9.2.3 (Claimant relies in this decision and submitted translated excerpts as exhibit CL-63-ENG); CL-11, ILC Articles, Art. 38.
[1500] *See,* Euribor Rates, "What is Euribor?", available at https://www.euribor-rates.eu/en/what-is-euribor/

premium."[1501] Additionally, EURIBOR was negative between 2016 and 2020.[1502] The foregoing is consistent with Claimant's allegation that applying EURIBOR would give a return "[f]rom 2012 onward, at a rate lower than the interest rate which they could have obtained by simply putting any award in a French bank account."[1503] Hence, applying EURIBOR, as proposed by Respondent, would be contrary to the principle of full reparation.

1074. As regards the Veolia Group borrowing rate, the Tribunal is also not persuaded by this alternative. Claimant assumed a debt and granted loans to its subsidiaries to keep the investment going, which would not have happened but for Respondent's breaches.[1504] While Claimant was prevented from using its own funds for a period of time,[1505] Veolia's annual cost of debt includes factors pertaining to other activities of the group, unrelated to Claimant's investment and Respondent's breaches, therefore, such a rate could overcompensate Claimant's losses.

1075. In this sense, the Tribunal finds that a commercial rate that accounts for Claimant's "opportunity cost of money"[1506] within the remit of the principle of full compensation is the average of the 12-month EURIBOR rate from the Date of Assessment[1507] to the date of issuance of this Award, plus a spread of 2%, considering that this rate was negative from 2016 to 2020.[1508] While some investment tribunals may have applied a benchmark rate without a spread, the specific context of this case is different, in particular, the existence of negative values of the benchmark rate.[1509]

1076. Also, other investment tribunals have found the approach of using commercial rates like EURIBOR, plus a spread, to be a "reasonable commercial rate for post-award interest."[1510] Notably, a 2% spread in addition to a benchmark rate has been a commonly referenced interest rate by tribunals.[1511] In this case, considering EURIBOR's negative results, the Tribunal finds it adequate to recognize a 2% spread to compensate Claimant's cost of being deprived of its money over time.

1077. Lastly, it shall be noted that the same legal authority invoked by PoliMi to argue that "the use of an interbank rate as a proxy for the risk-free rate is widely used by the Tribunals,"[1512] actually recognizes

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[1501] See, e.g., CL-178, *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 1271; CL-228, *Luigiterzo Bosca v. Republic of Lithuania*, PCA Case No. 2011-05, Award, 17 May 2013, ¶ 328.
[1502] CL-89, *FREIF Eurowind Holdings Ltd v. Kingdom of Spain*, SCC Case No. 2017/060, Final Award, 8 March 2021, ¶ 688; Accuracy Second Expert Report, ¶ 8.67 (iii).
[1503] Accuracy Second Expert Report, ¶ 8.67 (i).
[1504] Accuracy Second Expert Report, ¶ 8.64.
[1505] Tr. Hearing Day 4, 800:15-19 (Examination of Mr. Theau-Laurent).
[1506] Accuracy Second Expert Report, ¶¶ 8.57, 8.68.
[1507] Claimant's Memorial, ¶ 664 (31 December 2011). Respondent did not contest this date proposed by Accuracy in its submissions.
[1508] Accuracy Second Expert Report, ¶¶ 8.67, 8.77. See also AC-075, Global Arbitration Review, The Guide to Damages in International Arbitration 2016, p. 250.
[1509] Respondent's Counter-Memorial, ¶ 658, footnote 203, citing RL-51, *MTD Equity Sdn, Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶ 178. However, in ¶ 250 "Based on the rates published daily by Bloomberg, the annual LIBOR on November 5 of each year since November 5, 1998 are as follows: (i) 5.03813 % in 1998, (ii) 6.16 % in 1999, (iii) 6.71625 % in 2000, (iv) 2.24625 % in 2001, (v) 1.62 % in 2002, and (vi) 1.4925 % in 2003."
[1510] CL-250, *Gardabani Holdings B.V. and Silk Road Holdings B.V v. Georgia*, ICSID Case No. ARB/17/29, Award, 27 October 2022, p. 309, ¶ 761.
[1511] AC-075, Global Arbitration Review, The Guide to Damages in International Arbitration 2016, p. 250.
[1512] PoliMi Second Expert Report, p. 43.

that EURIBOR is a common benchmark rate, or "base rate" used in the context of pre-award interest "plus a spread."[1513]

1078. In light of the foregoing, the Tribunal orders Respondent to pay pre-award interest on the sums recognized in this Award in favor of Claimant, applying a pre-award rate of interest to be determined by reference to the average 12-month EURIBOR rate, plus a 2% spread, compounded annually,[1514] from the Date of Assessment to the date of issuance of this Award.[1515]

1079. As to the post-award interest rate, the Tribunal observes no debate on the distinction between the pre-award and post-award rate and finds no grounds, in this arbitration, to afford a different treatment to interest before and after the issuance of this Award.[1516]

IX. COSTS[1517]

A. CLAIMANT'S COSTS SUBMISSION

1080. On 12 January 2024, Veolia submitted its Statement of Costs incurred in these proceedings requesting that it be awarded the full amount of its costs.

1081. Claimant asserts that it is entitled to receive **€ 5,854,230**, which includes legal fees, expert fees, translations fees, as well as costs and expenses.[1518] Veolia's total costs and expenses are summarized as follows:

	Description	Total amount
1	Mayer Brown's legal fees	€ 2,945,000
2	Mayer Brown's total costs and expenses including the ones associated with the Hearing	€ 41,802
3	Darrois Villey Maillot Brochier's legal fees	€ 1,543,000
4	Prof. Pierre Mayer's fees	€ 104,700
5	Accuracy's fees and costs	€ 870,000
6	Legance's fees (Italian law firm)	€ 90,160
7	Translations from Italian to English	€ 253,904

[1513] AC-075, Global Arbitration Review, The Guide to Damages in International Arbitration 2016, pp. 245, 250.
[1514] Accuracy First Expert Report, ¶ 5.23; PoliMi First Expert Report, p. 75.
[1515] Accuracy Second Expert Report, Appendix 3, Tabs "RFR" and "Pre Award Interest."
[1516] CL-178, *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 1269.
[1517] This section includes summaries of the facts and positions of the Parties underlying the present dispute. Such summaries are not an exhaustive narrative of all the matters that have been discussed in this proceeding. Nevertheless, the Tribunal has considered the entirety of the Parties' factual and legal arguments made in their written and oral submissions, whether or not they are expressly referenced in the text of this section.
[1518] Claimant's Statement of Costs, 12 January 2024 ¶ 3.

8	Witnesses, Experts and Client representative travel costs and expenses for the Hearing	€ 5,664
Total		**€ 5,854,230**

1082. Claimant argues that pursuant to Article 61(2) of the ICSID Convention, tribunals have the discretion to allocate the costs of the arbitration. It references the application of the "costs follow the event" principle, under which the losing party bears the costs of the proceeding.[1519] Furthermore, in Claimant's view, this principle is supplemented by other relevant circumstances such as the behavior of the Parties throughout the proceedings and the complexities of the main issues of the case.[1520]

1083. First, Claimant argues that Respondent's behavior was "riddled with logical confusion and with a total disregard to the facts," placing Claimant in an impossible position to respond to its arguments.[1521] Second, Claimant asserts that Respondent sought to introduce a counterclaim without demonstrating how the Tribunal would have jurisdiction or could admit said counterclaim. According to Claimant, this behavior, coupled with procedural behavior that included missing exhibits and late translations, placed a "heavy burden on Veolia."[1522] Third, Claimant contends that Respondent repeatedly advanced belated and inappropriate arguments, without evidence or with belated evidence submitted without Veolia's agreement or the authorization of the Tribunal, placing a high burden for Veolia when rebutting these arguments.[1523] Lastly, Claimant submits that Italy's jurisdictional objections were meritless.[1524]

1084. Claimant submits that so far it has paid **$ 499,975** by way of advance on costs to ICSID and requests the Tribunal to consider any additional amount when ruling on costs.[1525]

B. RESPONDENT'S COSTS SUBMISSION

1085. On 12 January 2024, through its Submission of Costs, Respondent requested the Tribunal to order Claimant to bear the costs of this arbitration and Respondent's costs for legal representation in the amount of **€ 1,721,849** in accordance with Article 61(2) of the ICSID Convention.[1526]

1086. Italy's costs and expenses are summarized as follows:

Description		Total amount
1	Legal fees	€ 1,000,000.00
2	Costs paid to ICSID	€ 449,729.80

[1519] Claimant's Statement of Costs, 12 January 2024 ¶ 6.
[1520] Claimant's Statement of Costs, 12 January 2024 ¶ 7.
[1521] Claimant's Statement of Costs, 12 January 2024 ¶ 10.
[1522] Claimant's Statement of Costs, 12 January 2024 ¶ 10.
[1523] Claimant's Statement of Costs, 12 January 2024 ¶ 11.
[1524] Claimant's Statement of Costs, 12 January 2024 ¶ 12.
[1525] Claimant's Statement of Costs, 12 January 2024 ¶ 5.
[1526] Respondent's Submission of Costs, 12 January 2024.

3	Expertise	€ 239,120.00
4	Translations	€ 10,000
5	Editing and printing services	€ 5,000
6	Travelling expenses	€ 18,000
Total		**€ 1,721,849**

C. THE TRIBUNAL'S DECISION ON COSTS

1087. Pursuant to Article 61(2) of the ICSID Convention, "the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award."[1527]

1088. In the current proceedings, Claimant was successful in asserting the Tribunal's jurisdiction and all jurisdictional objections raised by Respondent were dismissed.

1089. In its analysis of the merits, the Tribunal found that Respondent breached (a) the umbrella clause in Article 10(1) last sentence of the ECT due to its failure to (i) timely pay, and (ii) update the gate fee, (iii) pay the *Contributo*, and (iv) meet the guaranteed waste quantities under the TEC Concession, as well as its failure to (v) timely pay and adjust the gate fee under the 2010 Agreement and the TEV Concession; and (b) the FET standard in Article 10(1) of the ECT by (vi) frustrating the completion of the TEC2 and Reggio Calabria MBT (Sambatello 2) plants.

1090. However, Claimant was only partially successful on the merits, considering that the Tribunal did not find violations of the ECT for the alleged failure to meet specific waste quantity distribution and alleged failure to secure landfills. Moreover, in the damages stage, Claimant failed to meet the burden of proof regarding Prospective Losses and the damage related to the lack of payment of the *Contributo* was found to be a consequence of Claimant's conduct.

1091. Given the overall outcome of the case, Claimant's favorable result was not absolute, and the amount awarded, in accordance with the analysis on the merits and damages, was significantly less than what Claimant requested from the Tribunal. Furthermore, the Tribunal does not consider that Respondent has acted in this arbitration in willful disregard of the procedural rules or has engaged in conduct of such a nature that it should impact the allocation of costs.

1092. Accordingly, the Tribunal decides that Respondent shall bear the costs of the proceeding, which include: (i) the fees and expenses of the Tribunal; and (ii) the administrative charges and direct costs of the Centre.[1528] As for the legal costs of each of the Parties, The Tribunal decides that each party shall bear its own costs related to legal fees and expenses incurred by each of them.

[1527] ICSID Convention, Art. 61(2).
[1528] ICSID Arbitration Rule 28.

1093. The costs of the proceedings, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to USD 1,161,916.20 and are summarized as follows:

Arbitrators' fees and expenses	
Eduardo Zuleta	USD 284,619.44
Laurence Boisson de Chazournes	USD 176,253.87
Judith Gill	USD 196,215.67
ICSID's administrative fees	USD 356,000.00
Direct expenses	USD 148,827.22
Total	**USD 1,161,916.20**

1094. The above costs have been paid out of the advances made by the Parties.[1529] The total amount of the advance payments received from the Parties will be reflected in ICSID's final financial statement.

1095. Therefore, the Tribunal orders Respondent to reimburse Claimant an amount of **USD 580,958.1**.

X. DECISION

1096. In light of the above, the Tribunal:

(a) Dismisses all the jurisdictional objections raised by Italy.

(b) Declares that Italy has breached the Energy Charter Treaty:

(i) By failing to observe contractual obligations entered into with respect to Veolia's investments as required by Article 10(1) of the ECT, specifically:

(1) The obligation to timely pay and update the gate fee under Article 6 of the TEC Concession.

(2) The obligation to pay the *Contributo* under Article 8-bis of the *Atto di Sottomissione* of 31 October 2003.

(3) The obligation to meet the guaranteed waste quantities under the TEC Concession.

(4) The obligation to pay and adjust the gate fee under the 2010 Agreement and the TEV Concession.

[1529] The remaining balance in the case account will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

(ii) By failing to accord fair and equitable treatment to Veolia as required by Article 10(1) of the ECT, specifically, by frustrating the completion of the TEC2 and the Reggio Calabria MBT (Sambatello 2) plants under the TEC Concession.

(c) Orders Italy to pay Veolia, for the losses derived from the breaches identified in subsection **(b)** above, the amount of **€ 85,832,011**, plus:

(i) pre-Award interest from 31 December 2011 to the date of issuance of this Award, at the average 12-month EURIBOR rate, plus a 2% spread, compounded annually, and

(ii) post-Award interest from the date of issuance of this Award until the date of payment, at the average 12-month EURIBOR rate, plus a 2% spread, compounded annually.

(d) Orders Italy to pay all the costs of the proceeding, in accordance with ICSID Arbitration Rule 50. Therefore, the Tribunal orders the Respondent to reimburse the Claimant an amount of **USD 580,958.1**

(e) Orders each Party to bear its own costs related to legal fees and expenses.

(f) Denies all other prayers for relief.

[Signed]

Ms. Judith Gill, KC
Arbitrator

Date: 11 September 2025

Prof. Laurence Boisson de Chazournes
Arbitrator

Date:

Prof. Eduardo Zuleta
President of the Tribunal

Date:

	[Signed]
Ms. Judith Gill, KC Arbitrator	Prof. Laurence Boisson de Chazournes Arbitrator
Date:	Date: 11 September 2025

Prof. Eduardo Zuleta
President of the Tribunal

Date:

Ms. Judith Gill, KC
Arbitrator

Date:

Prof. Laurence Boisson de Chazournes
Arbitrator

Date:

[Signed]

Prof. Eduardo Zuleta
President of the Tribunal

Date: 11 September 2025