IN THE MATTER OF AN ARBITRATION
BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH
THE AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF LITHUANIA AND THE GOVERNMENT OF THE ITALIAN REPUBLIC
ON THE PROMOTION AND PROTECTION OF INVESTMENTS
DATED 1 DECEMBER 1994

- and -

THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW 1976

PCA CASE NO. 2011-05

- between -

LUIGITERZO BOSCA

(the "Claimant")

- and -

THE REPUBLIC OF LITHUANIA

(the "Respondent," and together with the Claimant, the "Parties")

AWARD

Arbitral Tribunal

Hon. Marc Lalonde (Presiding Arbitrator)
Mr. Daniel Price
Prof. Brigitte Stern

17 May 2013

TABLE OF CONTENTS

LIST OF DEFINED TERMS

Agreement	Agreement Between the Government of the Republic of Lithuania and the Government of the Italian Republic on the Promotion and Protection of Investments dated 1 December 1994
Alita	AB Alita, a Lithuanian alcoholic beverage production company privatized in 2004
Alita Commission	Commission formed at the direction of the Seimas (Parliament of Lithuania) to investigate possible corruption in the privatization of Alita
Amended Notice of Arbitration/Statement of Claim	Claimant's Amended Notice of Arbitration/Statement of Claim dated 21 February 2012
Annulment Order or **Order**	The SPF's 14 October 2003 Order annulling the tender results and cancelling the Claimant's alleged investment
Bosca SpA	Bosca Società per Azioni, an Italian wine production company of which the Claimant formerly served as president
Boslita	UAB Boslita ir Ko, a company incorporated in Lithuania in 1998 as the vehicle for development of the Bosca brand in the region
Claimant	Mr. Luigiterzo Bosca
Claimant's Brief	Claimant's Post-Hearing Brief dated 16 November 2012
Claimant's Costs Application	Claimant's Costs Application dated 16 November 2012
Claimant's Counter-memorial/Reply	Claimant's Counter-memorial on Jurisdiction, Reply on Merits and Damages dated 4 May 2012
Claimant's Memorial	Claimant's Memorial on Jurisdiction, Merits and Damages dated 29 July 2011
Claimant's Rejoinder	Claimant's Rejoinder on Jurisdiction dated 16 July 2012
Executive Consortium (or **Consortium**)	Fourth-place bidder for Alita, a consortium comprised of a group of directors of Alita when it was a State-owned company; it was awarded the tender after the Claimant's win was annulled
DCF	Discounted cash flow
Decision on Bifurcation	The Tribunal's Decision on Respondent's Request for Bifurcation dated 9 January 2012
FET	Fair and equitable treatment
Hearing	Hearing on Jurisdiction, Merits, and Damages, held from 3 September to 7 September 2012
IBA Rules	International Bar Association Rules on the Taking of Evidence in International Arbitration
ICSID	International Centre for Settlement of Investment Disputes

ILC Articles on State Responsibility	International Law Commission Articles on State Responsibility
License Agreement	License Agreement between Bosca SpA and Boslita dated 18 December 1997 (disputed)
LTL	Lithuanian litas
MFN	Most-favored-nation
Notice of Arbitration/Statement of Claim	Claimant's Notice of Arbitration/Statement of Claim dated 19 March 2010
Option Agreement	Option Agreement between Loreta Skorupskienė and the Claimant dated 2 July 2002 (disputed)
Parties	The Claimant and the Respondent in this arbitration
PCA	Permanent Court of Arbitration
Privatization Law	Law on Privatization of the State-Owned and Municipal Property of the Republic of Lithuania, adopted on 4 November 1997, as last amended on 5 May 2002
Protocol	Protocol to the Agreement
PTC	Public Tender Commission
Respondent	The Republic of Lithuania
Respondent's Amended Statement on Costs	Respondent's Amended Statement on Costs dated 18 January 2013
Respondent's Brief	Respondent's Post-Hearing Brief dated 16 November 2012
Respondent's Comments	Respondent's Comments on the Claimant's Costs Application dated 28 November 2012
Respondent's Counter-memorial	Respondent's Counter-memorial on Merits and Damages dated 23 March 2012
Respondent's Memorial	Respondent's Memorial on Jurisdiction dated 30 October 2011
Respondent's Reply/Rejoinder	Respondent's Reply on Jurisdiction, Rejoinder on Merits and Damages dated 15 June 2012
Respondent's Request to Exclude	Respondent's Request to Exclude from Evidence Certain Documents Submitted by the Claimant dated 12 December 2011
Respondent's Statement on Costs	Respondent's Statement on Costs dated 16 November 2012
Seimas	Lithuanian Parliament
Service Agreement	Service Providing Agreement between the Claimant and Boslita dated 11 September 1999 (disputed)

SPA	Share Purchase Agreement for purchase of Alita, negotiated, but not signed, between the Claimant and the SPF
SPF	Lithuanian State Property Fund responsible for overseeing privatizations
Tender Regulations	Regulations for the Privatization of State-Owned and Municipal Property by Public Tender, adopted on 31 December 1997, as amended on 12 December 2002
TIC	Temporary Investigation Commission set up by the Seimas to investigate the circumstances surrounding the Alita privatization
UNCITRAL Rules or **Rules**	Arbitration Rules of the United Nations Commission on International Trade Law, 15 December 1976
US-Lithuania BIT	Treaty Between the Government of the United States of America and the Government of the Republic of Lithuania for the Encouragement and Reciprocal Protection of Investment, with Annex and Protocol, signed at Washington on 14 January 1998

LIST OF DRAMATIS PERSONAE

Dr. Alberro	Dr. José Alberro, expert witness on damages for the Claimant
Mr. Brazauskas	Mr. Algirdas Brazauskas, Lithuanian prime minister at the time of Alita tender
The Claimant	Mr. Luigiterzo Bosca, natural person of Italy and alcoholic beverage entrepreneur
Mr. Čėsna	Mr. Arvydas Čėsna, fact witness for the Claimant, shareholder of Boslita
Dr. Cohen	Dr. Ariel Cohen, expert witness for the Claimant
Prof. Dolzer	Professor Rudolf Dolzer, expert witness for the Claimant
Mr. Facchin	Mr. Flavio Facchin, representative of Banca del Gottardo on which the Claimant relied for certain financial guarantees and representations in the tender process
Mr. Feiferas	Mr. Artūras Feiferas, financial advisor to the Claimant's legal team
Mr. Kaczmarek	Mr. Brent Kaczmarek, expert witness on damages for the Respondent
Mr. Malikėnas	Mr. Antanas Malikėnas, fact witness for the Respondent, former Chairman of the PTC
Prof. Mikelėnas	Professor Valentinas Mikelėnas, expert witness for the Claimant
Mr. Milašauskas	Mr. Povilas Milašauskas, fact witness for the Respondent, former Director General of the SPF
Mr. Nosevič	Mr. Miroslav Nosevič, fact witness for the Respondent, former in-house lawyer of the SPF
Mr. Saladžius	Mr. Jonas Saladžius, Lithuanian lawyer representing the Claimant in the Alita tender
Dr. Skorupskas	Dr. Gintaras Skorupskas, fact witness for the Claimant, the Claimant's representative in the Alita tender and the Managing Director of Boslita
Mrs. Skorupskienė	Mrs. Loreta Skorupskienė, spouse of Dr. Skorupskas and shareholder of Boslita who, according to the Claimant, allegedly concluded the Option Agreement with the Claimant
Dr. Smaliukas	Dr. Andrius Smaliukas, expert witness for the Respondent
Prof. Stanikūnas	Professor Rimantas Stanikūnas, expert witness for the Claimant
Prof. Volterra	Professor Robert Volterra, expert witness for the Respondent

I. INTRODUCTION

A. THE PARTIES

1. The Claimant

1. The Claimant in this matter is Mr. Luigiterzo Bosca, a natural person of Italy. The Claimant brings his claims under the Agreement between the Government of the Republic of Lithuania and the Government of the Italian Republic on the Promotion and Protection of Investments dated 1 December 1994 (the "Agreement").

2. The Claimant is represented in this arbitration by Mr. Stuart H. Newberger and Mr. Ian A. Laird of Crowell & Moring LLP, 1001 Pennsylvania Avenue NW, Washington, DC 20004, United States of America, by Mr. Ramūnas Audzevičius of Motieka & Audzevičius, Gynėjų str. 4, LT – 01109 Vilnius, Lithuania, by Mr. Allan Gerson of AG International Law, PLLC, 2131 S St. NW, Washington, DC 20008, United States of America, and formerly by Dr. Pieter Bekker also of Crowell & Moring LLP.

2. The Respondent

3. The Respondent is the Republic of Lithuania.

4. The Respondent is represented by Mrs. Vilija Vaitkutė Pavan and Mrs. Inga Martinkutė of LAWIN, Jogailos 9/1, LT – 01116 Vilnius, Lithuania, and by Mr. José Rosell, Hughes Hubbard & Reed LLP, 8 Rue de Presbourg, 75116 Paris, France.

B. BACKGROUND OF THE DISPUTE

5. The dispute between the Parties arises from the Claimant's participation in the privatization of one of Lithuania's leading beverage producers, AB Alita ("Alita"), in 2003.

6. The Claimant maintains that, in contravention of the Agreement, the Respondent "unilaterally, unjustifiably and unlawfully annulled the tender" that had been awarded to the Claimant in October 2003.[1]

7. The Respondent denies liability on both jurisdictional and substantive grounds. According to the Respondent, the Claimant made no qualifying investment, depriving the Tribunal of jurisdiction over the Claimant's claim. Should the Tribunal conclude that it has jurisdiction, the Respondent contends that the Respondent acted in accordance with the Agreement.

II. PROCEDURAL HISTORY

A. COMMENCEMENT OF THE PROCEEDINGS

8. By a Notice of Arbitration dated 19 March 2010, the Claimant commenced arbitral proceedings against the Respondent. The Notice of Arbitration also contains the Claimant's Statement of Claim in which the Claimant alleges that the Respondent "caused substantial losses to [the Claimant] through expropriatory, unlawful, unfair, and discriminatory treatment in relation to the privatization process and illegal annulment of [the Claimant's] successful bid for [Alita], a leading Lithuanian beverage producer."[2]

[1] Notice of Arbitration/Statement of Claim, para. 12.

[2] Notice of Arbitration/Statement of Claim, para. 1.

9. The Claimant brings his claim pursuant to Article 9 of the Agreement and in accordance with Articles 3 and 18 of the Arbitration Rules of the United Nations Commission on International Trade Law, 15 December 1976 ("UNCITRAL Rules" or "Rules").

10. Article 9 of the Agreement provides a mechanism for dispute resolution:

> 1. Any dispute which may arise between one of the Contracting Parties and the investors of the other Contracting Party on investments, including disputes relating to the amount of compensation, shall be settled amicably, as far as possible.
>
> (. . .)
>
> 3. In the event that such dispute cannot be settled amicably within six months of the date of the written application for settlement, the investor in question may submit at his choice the dispute for settlement to:
>
> (. . .)
>
> b) an ad hoc Arbitration Tribunal, in compliance with the Arbitration Regulations of the UN Commission on International Trade Law (UNCITRAL). The host Contracting Party undertakes hereby to accept the reference to said arbitration.

B. CONSTITUTION OF THE TRIBUNAL

11. By letter dated 18 October 2010, the Claimant appointed Mr. Daniel M. Price, a national of the United States of America, as arbitrator in the dispute.

12. By letter dated 16 November 2010, the Respondent appointed Professor Brigitte Stern, a national of France, as arbitrator in the dispute.

13. The two Party-appointed arbitrators selected the Honorable Marc Lalonde, a national of Canada, to serve as Presiding Arbitrator. The Presiding Arbitrator confirmed his acceptance of the appointment by e-mail to the Parties dated 17 January 2011.

C. PROCEDURAL ORDER NO. 1

14. On 27 January 2011, the Tribunal held a teleconference with the Parties on procedural matters.

15. By letter dated 7 February 2011, the Presiding Arbitrator summarized the matters discussed during the 27 January teleconference, noting the Respondent's intention to request bifurcation of the proceedings, deciding certain procedural matters such as the seat of arbitration, and inviting the Parties to confer on the topic of a submissions schedule.

16. By letter dated 15 March 2011, the Parties circulated a letter and draft Procedural Order No. 1 reflecting the terms on which they agreed and others to be left to the determination of the Tribunal.

17. On 6 April 2011, the Presiding Arbitrator held a teleconference with the Parties on outstanding matters surrounding the draft Procedural Order.

18. After a further exchange of views, the Tribunal issued Procedural Order No. 1 on 14 April 2011. Procedural Order No. 1 confirmed Stockholm, Sweden as the legal place of arbitration and English as the language of the arbitration. It also provided for a preliminary phase of pleadings to allow the Tribunal to consider a possible bifurcation of the proceedings. Further, Procedural Order No. 1 set alternative timetables with or without bifurcation for the submission of written pleadings, document requests, witness statements and expert reports, and for a hearing on merits and damages to be held at the Peace Palace in The Hague should one be necessary. It specified that the International Bar

Association Rules on the Taking of Evidence in International Arbitration ("IBA Rules") would be followed "as a guideline" in the proceedings.

19. By e-mails exchanged in April 2011, the Parties and the Tribunal agreed that deposits payable in respect of this arbitration would be administered by the Permanent Court of Arbitration ("PCA"). By letter dated 18 April 2011, the Presiding Arbitrator confirmed the use of the PCA as Registry.

20. On 28 April and 2 May 2011, the PCA acknowledged receipt of initial deposits of EUR 150,000 each from the Claimant and the Respondent.

D. BIFURCATION PROCEEDINGS

21. On 7 March 2011, the Respondent submitted its Request for Bifurcation and Summary of Objections to Jurisdiction.

22. On 29 July 2011, the Claimant submitted his Memorial on Jurisdiction, Merits and Damages ("Claimant's Memorial"), accompanied by witness statements from the Claimant and Gintaras Skorupskas, as well as expert reports from Rudolf Dolzer, Valentinas Mikelėnas, Ariel Cohen, and José Alberro.

23. On 30 October 2011, the Respondent filed its Memorial on Objections to Jurisdiction ("Respondent's Memorial"), accompanied by witness statements from Miroslav Nosevič and Antanas Malikėnas, and expert reports from Robert Volterra and Andrius Smaliukas.

24. By letter dated 3 November 2011, the Claimant argued that there were "a number of serious irregularities in Respondent's filing of 30 October 2011." The Claimant contended that "it is clear from this submission that Respondent's counsel, the LAWIN firm, has put itself in the untenable position of necessitating that it resign from this arbitration, and that Respondent will need to withdraw three of the four expert and witness statements provided in its filing." In light of what he alleged as a lack of impartiality on the part of the Respondent's witnesses and a conflict of interest on the part of the LAWIN firm, the Claimant requested the Tribunal to (1) strike from the record of the case the expert reports submitted by Dr. Smaliukas and Prof. Volterra; (2) strike from the record the witness statement of Mr. Nosevič; and (3) ask the LAWIN law firm to withdraw from the arbitration as co-counsel to the Respondent.

25. By letter dated 10 November 2011, the Respondent commented on the Claimant's letter of 3 November. It argued that the expert reports submitted by Dr. Smaliukas and Prof. Volterra and the witness statement of Mr. Nosevič complied with the applicable procedural rules and therefore should be considered by the Tribunal. It also contended that LAWIN properly exercised its duties as counsel.

26. By letter dated 11 November 2011, the Claimant remarked on the Respondent's letter of the previous day, reiterating his objections.

27. By e-mail dated 12 November 2011, the Respondent requested that the Tribunal strike from the record the Claimant's letter of 11 November and order the Claimant not to make any further submission without the Tribunal's prior permission.

28. On 18 November 2011, the Tribunal issued Procedural Order No. 2 addressing the matters in the Claimant's letter of 3 November 2011, stating:

> III. The Tribunal has given careful consideration to the views of each party on these matters and rules as follows:
>
> (a) The Experts' Reports
>
> (i) As to Professor Volterra, the fact that, for a few months in 2010, he was called upon to advise the Government of Lithuania in connection with a completely unrelated matter

cannot be a circumstance which would justify rejecting consideration of his expert's opinion in the present case. Claimant's request in this regard is dismissed.

(ii) As to Dr. Smaliukas, Claimant's request concerning his expert's opinion is dismissed. However, the Tribunal points out that, taking into account the fact that Dr. Smaliukas is a partner in LAWIN, his appearance as expert, rather than counsel, in this case constitutes a highly unusual circumstance and his particular situation will be one which the Tribunal will very much bear in mind when considering his opinion.

(b) The Fact Witness

The Tribunal dismisses Claimant's request concerning Mr. Miroslav Nosevič's testimony. Although it is not unheard of that a lawyer who is a member of a law firm acting in a case would appear as a fact witness in that case, it is equally highly unusual. Consequently, all the facts mentioned by Claimant and by Mr. Nosevič himself concerning his relationship with LAWIN and with Respondent will be borne in mind by the Tribunal when determining the weight it should attach to his written statement and his oral testimony before the Tribunal.

(c) LAWIN

Claimant's request concerning LAWIN is dismissed. The Tribunal does not believe that it has the authority to rule on the interpretation to be given to the ethical rules applicable to Lithuanian attorneys under Lithuanian law. The Tribunal does not believe either that the UNCITRAL Rules grant it the authority to challenge the choice of counsel by a party.

29. On 28 November 2011, the Claimant submitted his Reply to Respondent's Request for Bifurcation and Summary of Objections to Jurisdiction.

30. The Tribunal issued its Decision on Respondent's Request for Bifurcation ("Decision on Bifurcation") on 9 January 2012, denying the Respondent's request for bifurcation.

E. RESPONDENT'S OCTOBER 2011 DOCUMENT PRODUCTION REQUEST

31. On 10 October 2011, the Respondent submitted a Request for Production of Original Documents and Appointment of Independent Expert for Forensic Examination, in which it requested that the Tribunal order the Claimant:

(1) (. . .) to present the evidences listed below, not later than 17 October 2011:

a) original of the Option Agreement, dated 2 July 2002, a copy of which is provided by the Claimant as Exhibit C-59 to its Memorial on Jurisdiction, Merits and Damages;

b) original of the Contract of Buying-Selling Shares, dated 25 September 1997, a copy of which is provided by the Claimant as Exhibit C-57 to his Memorial on Jurisdiction, Merits and Damages;

c) original of the Stock Purchase Agreement, dated 2 July 2002, a copy of which is provided by the Claimant as Exhibit C-58 to his Memorial on Jurisdiction, Merits and Damages;

d) original of the Service Providing Agreement, dated 11 September 1999, together with the Act of Provided Services, dated 31 December 2009, copies of which are provided by the Claimant as Exhibit C-24 to his Memorial on Jurisdiction, Merits and Damages; and

(2) to appoint the Swedish National Laboratory of Forensic Science (or other independent forensic examination body, competent to report on the age of documents) as an independent Tribunal-appointed expert to report on the question whether the original contracts requested

to produce were signed more than two years ago by the Claimant and whether the signatures are genuine.

32. By letter dated 20 October 2011, the Claimant commented on the Respondent's Request for Production of 10 October 2011, stating that he was unable to locate the original documents requested by the Respondent and therefore it was unnecessary for the Tribunal to address the matter further. The Claimant also asked that the Respondent be directed to "make all future requests for documents in accordance with the Tribunal's Procedural Order No. 1."

F. RESPONDENT'S DECEMBER 2011 REQUEST TO EXCLUDE DOCUMENTS

33. By letter dated 12 December 2011, the Respondent submitted a Request to Exclude from Evidence Certain Documents submitted by the Claimant ("Respondent's Request to Exclude"), in which it asked the Tribunal to exclude the following four documents from evidence, arguing that a refusal by the Tribunal to do so would constitute a breach of fair and equitable treatment under the UNCITRAL Rules: an Option Agreement dated 2 July 2002; a Contract of Buying-Selling Shares dated 25 September 1995; a Stock Purchase Agreement dated 2 July 2002; and a Service Providing Agreement dated 11 September 1999, together with an Act of Provided Services dated 31 December 1999.

34. By letter dated 19 December 2011, the Claimant commented on the Respondent's Request to Exclude, contending that the Respondent failed to establish grounds for exclusion and that it would be "premature to respond" to the Request. The Claimant also argued that the Request to Exclude was made in bad faith since the Respondent had recently relied on the same documents in a Lithuanian court.

35. On 23 December 2011, the Respondent submitted a reply to the Claimant's letter of 19 December 2011.

36. The Tribunal issued Procedural Order No. 3 on 3 January 2012 concerning the Respondent's Request to Exclude. That Order provides in part as follows:

> 6. In accordance with Clause 1 of Procedural Order No. 1 the arbitration is conducted under the UNCITRAL Rules, and the IBA Rules serve as a guideline.
>
> 7. Both the UNCITRAL Rules and the IBA Rules grant to the Tribunal considerable discretion in addressing issues relating to evidence.
>
> 8. As mentioned by Respondent, Article 15(1) of the UNCITRAL Rules (Article 17(1) of the 2010 revised text) requires the Tribunal to treat the parties with equality and to ensure that each party is given a reasonable opportunity to present its case. Moreover, Article 25(6) of those Rules (Article 27(4) of the 2010 revised text) provides that "[t]he arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered."
>
> 9. As to Article 9 of the IBA Rules, paragraph 1 repeats the same text as the UNCITRAL Rules just quoted concerning the admissibility and assessment of evidence and, in paragraph 2, it enumerates the reasons that a tribunal may invoke to exclude documents from evidence, production or inspection.
>
> 10. In answer to a previous Request for Production of Documents by Respondent, Claimant produced photocopies of the documents in question and indicated that it could not find the originals of such documents. The Tribunal instructed Claimant to pursue its search for the originals.
>
> 11. After a careful review of the arguments submitted by the Parties and exercising the authority granted to it under the UNCITRAL Rules, the Tribunal is of the view that it would be premature to rule on the admissibility and, if admissible, on the weight to be attached to photocopies of the four documents mentioned above, in the absence of originals. This is a matter that the Tribunal should decide, once it has had an evidentiary

hearing and a full briefing, including Respondent's rebuttal evidence and its cross-examination of Claimant's witnesses.

12. The Tribunal is also of the view that there is no need, at this stage, to address the issue of the reference to those documents by Respondent in parallel proceedings before Lithuanian courts.

THEREFORE:
The Tribunal dismisses as premature Respondent's Request to Exclude from Evidence Certain Documents Submitted by Claimant, dated 12 December 2011.

37. At the Hearing on Jurisdiction, Merits, and Damages, held from 3 September to 7 September 2012 ("Hearing"), the Tribunal informed the Parties that it would admit the documents in question, while bearing in mind that those in the record are copies only.[3]

G. RESPONDENT'S MAY 2012 DOCUMENT PRODUCTION REQUEST

38. On 18 May 2012, the Respondent submitted a Request for Production in which it requested that the Tribunal order that the Claimant "and/or Mr. Gintaras Skorupskas, as a witness," produce the following documents related to the shares' accounting documentation of UAB Boslita ir Ko ("Boslita"), a company incorporated in Lithuania by the Claimant and Dr. Skorupskas in 1998 as the vehicle for development of the Bosca brand in the region:

1. in case of material shares - a copy of the shareholders' registration journal of Boslita for the period of the registration of the company until now;

2. in case of dematerialized shares - a copy of the journal of transactions with Boslita shares together with the copies of shareholders' securities accounts for the period of the registration of the company until now;

3. [a] copy of the shareholders' lists (for the period of the registration of the company until now) of Boslita;

4. [a] list of the shareholders who attended the shareholders' meeting of Boslita held on 5 November 2001 (signed by the shareholders who then were present);

5. [a] list of the shareholders who attended the shareholders' meeting of Boslita held on 30 June 2002 (signed by the shareholders who then were present).

39. After the Parties' exchanged views in the form of a Redfern Schedule, the Tribunal issued Procedural Order No. 4 dated 4 June 2012 in which it dismissed the Respondent's Request. The Tribunal concluded that "UAB Boslita ir Ko is not a party to this case and the documents are not within the Claimant's control. Moreover, the Claimant has stated that, at his request, Mr. Skorupskas and his staff have carried out extensive searches for the Original Documents at Boslita's premises."

40. By letter dated 7 June 2012, the Respondent asked the Tribunal to reconsider its decisions regarding the Respondent's Request for Production of Documents 1, 2 and 3 in Procedural Order No. 4. The Claimant commented on the Respondent's 7 June 2012 letter on 11 June 2012.

41. On 13 June 2012, the Tribunal transmitted the following to the Parties:

The Tribunal, having considered the views of both Parties, finds that there has been no misunderstanding of the Respondent's Request.

As noted by the Parties and the Tribunal, the IBA Rules on the Taking of Evidence in International Arbitration serve as guidelines in this arbitration. Article 3(7) of these Rules

[3] Hearing Transcript 1329: 2-11.

provides that the Tribunal "may order the Party to whom [a Request for Document Production] is addressed to produce any requested Document in its possession, custody or control as to which the Arbitral Tribunal determines that (i) the issues that the requesting Party wishes to prove are relevant to the case and material to its outcome (. . .) ."

In the Tribunal's view, as stated in Procedural Order No. 4, there is no point in the present instance to asking the Claimant to again undertake a search for documents which are outside his control at the UAB Boslita ir Ko premises where Boslita is not a party to this dispute. The Respondent has not demonstrated how these documents are related to the "alleged conclusion of the Option Agreement" or the Claimant's "[alleged] plans and possibility to make any decisions regarding the Boslita's merger with Alita" nor has it stated why "only diligent investigation of the data" found in Requested Documents 1, 2, or 3 may "confirm or deny Claimant's allegations." The Tribunal finds that Requested Documents 1, 2, and 3 lack sufficient relevance or materiality to warrant an additional request to Dr. Skorupskas as the Respondent has not shown what facts or allegations each document would establish, maintaining only that the documents are "of crucial importance."

For these reasons, the Tribunal dismisses the Respondent's request for reconsideration with respect to Requested Documents 1, 2, and 3.

H. ADDITIONAL PRE-HEARING MATTERS

42. On 21 February 2012, the Claimant submitted an Amended Notice of Arbitration/Statement of Claim and explanatory letter. The Amended Notice of Arbitration/Statement of Claim included four amendments: (1) an updated date; (2) the inclusion of the Claimant's residences; (3) the removal of Dr. Bekker as counsel; and (4) an update to the quantum to be consistent with the amount in the Claimant's Memorial dated 29 July 2011.

43. On 26 March 2012, the Respondent submitted its Counter-memorial on Merits and Damages ("Respondent's Counter-memorial"), accompanied by an expert report by Brent Kaczmarek and a second expert report by Robert Volterra.

44. On 4 May 2012, the Claimant submitted his Counter-memorial on Jurisdiction, Reply on Merits and Damages ("Claimant's Counter-memorial/Reply"), accompanied by further witness statements from the Claimant and Gintaras Skorupskas, as well as expert reports by José Alberro, Rudolf Dolzer, Valentinas Mikelėnas, and Rimantas Stanikūnas.

45. On 15 June 2012, the Respondent submitted its Reply on Jurisdiction, Rejoinder on Merits and Damages ("Respondent's Reply/Rejoinder"), accompanied by witness statements from Antanas Malikėnas and Povilas Milašauskas, as well as a second expert report by Brent Kaczmarek.

46. On 5 July 2012, the PCA, on behalf of the Tribunal, requested an additional deposit of EUR 150,000 from each Party. The Claimant's supplemental deposit was received on 31 July 2012. The Respondent's supplemental deposit was received on 5 August 2012.

47. The Claimant submitted his Rejoinder on Jurisdiction ("Claimant's Rejoinder") on 16 July 2012, accompanied by witness statements from the Claimant, Gintaras Skorupskas, and Arvydas Čėsna.

48. In accordance with Paragraph 6.2 of Procedural Order No. 1, the Respondent submitted its Witnesses and Experts Notification for the Hearing on 19 July 2012. In its Notification, the Respondent stated:

> Since these proceedings have not been bifurcated, the Respondent considers that the place of the hearing should be Stockholm (*i.e.*, the place of arbitration as agreed in [Paragraph] 5(a) of the Protocol of the [Agreement] entered into by the Contracting Parties) for the reasons indicated during the telephone conference on April 6, 2011 and notwithstanding the conclusions reached by the Swedish Supreme Court in the RosInvest case of 2010.

49. At the Tribunal's invitation, the Claimant responded to the Respondent's Notification by letter dated 23 July 2012, objecting to the Respondent's suggestion that the hearing be held in Stockholm and referencing Paragraph 9.1 of Procedural Order No. 1 in which the Tribunal stated that the hearing on the merits, if any, would be held at the Peace Palace in The Hague. The Claimant subsequently submitted his Witnesses and Experts Notification on 30 July 2012.

50. On 8 August 2012, the Tribunal issued Procedural Order No. 5, stating:

> 1. The Tribunal has had an opportunity to review the Respondent's Witnesses and Experts Notification dated 19 July 2012 in which the Respondent requested that the forthcoming hearing take place in Stockholm.
>
> 2. It is recognized by the Parties and the Tribunal that the seat of arbitration is Stockholm.
>
> 3. The Tribunal notes that, in its Procedural Order No. 1 of 14 April 2011, it has already ruled, after having heard the Parties on the matter, that the hearing, if any, on Merits and Damages would take place at the Peace Palace in The Hague, but that, if there were bifurcation of the case, it would consider the Respondent's request that the hearing on jurisdiction be held in Stockholm. By its Decision of 9 January 2012 on the Respondent's Request for Bifurcation, the Tribunal has ruled that there should be no bifurcation.
>
> 4. In light of the above mentioned recent request by the Respondent, the Tribunal has once again examined the situation. It has come to the conclusion that, at this stage of the process and taking into account a number of logistical difficulties, it would not be appropriate to modify its previous decision.
>
> THEREFORE:
> As previously decided, the forthcoming hearing shall take place at the Peace Palace, in The Hague, from 3 to 8 September 2012.

I. HEARING

51. Pursuant to Paragraph 9.3 of Procedural Order No. 1, the Tribunal held a pre-hearing teleconference with the Parties on 17 August 2012 to discuss organizational matters relating to the Hearing in The Hague.

52. Following the teleconference, the Tribunal issued Procedural Order No. 6 on 22 August 2012 in which it set out the agenda and schedule for the Hearing, the treatment of witnesses and experts as well as the nature of their examination (in particular, that the experts would be examined in "conference" fashion), and other logistical arrangements. The Tribunal also asked that the Respondent present Mr. Milašauskas in person, rather than by video-conference as requested by the Respondent in its Witnesses and Experts Notification.

53. By e-mail dated 23 August 2012, the Respondent asked that the Tribunal clarify its decision that experts Dr. Cohen and Prof. Stanikūnas were not required to be present at the hearing, and that the Tribunal give the Parties instructions with respect to the order of topics to be addressed in the "expert witness conferences."

54. By e-mail dated 24 August 2012, the Claimant commented on the Respondent's 23 August 2012 communication, noting that Dr. Cohen and Prof. Stanikūnas had cancelled their plans to participate in the Hearing and rejecting the Respondent's suggested progression of topics for questioning the experts.

55. By letter dated 24 August 2012, the Tribunal informed the Parties as follows:

> With respect to Paragraph 4.1 [of Procedural Order No. 6], the Tribunal clarifies that it will not infer from the Respondent's decision not to cross-examine Dr. Ariel Cohen and Prof. Rimantas Stanikūnas that the Respondent accepts their statements or reports as accurate, nor will the Tribunal infer that the Respondent does not contest their statements or reports.

With respect to Paragraph 5.4 [of Procedural Order No. 6], the Tribunal finds that expert conferencing need not follow a pre-determined subject-matter progression and leaves the substantive structure of the experts' cross examination to counsel. The Tribunal finds the Claimant's suggested format appropriate:

- Presentation from Claimant's expert
- Presentation from Respondent's expert
- Respondent's cross-examination of Claimant's expert, with flexibility to enable "conferencing"
- Claimant's cross-examination of Respondent's expert, with flexibility to enable "conferencing"

This general format does not preclude the possibility for counsel for the Party that has produced an expert to subsequently address questions to that expert, nor for the Tribunal to do so at any time.

56. By e-mail dated 26 August 2012, the Claimant informed the Tribunal that his fact witness, Mr. Čėsna would not attend the Hearing.

57. By e-mail dated 27 August 2012, the Respondent requested that the Tribunal disregard the witness statement issued by Mr. Čėsna in accordance with Article 7.4 of the IBA Rules.

58. Following a teleconference held on 28 August 2012 between the Presiding Arbitrator and the Parties, the Tribunal issued Procedural Order No. 7 dated 28 August 2012, providing an amended schedule of examination of witnesses as follows:

1. Attendance of Mr. Artūras Feiferas

1.1 The Claimant having clarified the reason for Mr. Feiferas' attendance as a financial advisor to the Claimant's legal team and the Respondent having stated that it had no objection to his presence in that role, the presence of Mr. Feiferas at the Hearing is authorized in accordance with the agreement of the Parties.

2. Statement of Mr. Arvydas Čėsna

2.1 In view of the Claimant's notification that Mr. Arvydas Čėsna will not take part in the forthcoming Hearing on Jurisdiction, Merits and Damages, and in accordance with Rule 4.7 of the IBA Rules on the Taking of Evidence in International Arbitration which serve as guidelines in this arbitration, the Tribunal has determined to not take into account Mr. Čėsna's witness statement tendered by the Claimant.

2.2 The Tribunal has noted the Claimant's request to make a submission regarding Mr. Čėsna's witness statement at the Hearing.

59. From 3 September to 7 September 2012, the Hearing on Jurisdiction, Merits and Damages was held at the Peace Palace in The Hague. The following persons were present:

The Tribunal

Hon. Marc Lalonde
Mr. Daniel Price
Prof. Brigitte Stern

The Claimant

Mr. Luigiterzo Bosca
(Claimant)
Ms. Pia Bosca
(Claimant Representative)

Mr. Stuart H. Newberger
Mr. Ian A. Laird
Ms. Claire Stockford
Ms. Ashley Riveira
Ms. Julia Cayre
Ms. Arlen Pyenson
Ms. Staci Gellman
(Crowell & Moring)

Mr. Ramūnas Audzevičius
Mr. Tomas Samulevičius
Mr. Rimantas Daujotas
(Motieka & Audzevičius)

Mr. Artūras Feiferas
(Financial Advisor)

The Respondent

Mrs. Vilija Vaitkutė Pavan
Mrs. Inga Martinkutė
Mr. Giedrius Stasevičius
Mrs. Giedrė Černiauskė
Mr. Rapolas Kasparavičius
(LAWIN)

Mr. José Rosell
(Hughes Hubbard & Reed LLP)

The Permanent Court of Arbitration

Ms. Kathleen Claussen
Ms. Yuka Fukunaga
Ms. Sarah Grimmer

Court reporters

Ms. Diana Burden
Ms. Susan McIntyre

60. During the Hearing, the fact witnesses were examined in the following order:

For the Claimant

Mr. Luigiterzo Bosca
Dr. Gintaras Skorupskas

For the Respondent

Mr. Miroslav Nosevič
Mr. Antanas Malikėnas
Mr. Povilas Milašauskas

61. The experts made presentations and were cross-examined in a "conference" method in the following order of pairs:

Prof. Valentinas Mikelėnas
Dr. Andrius Smaliukas

Prof. Rudolf Dolzer
Prof. Robert Volterra

Dr. José Alberro
Mr. Brent Kaczmarek

J. POST-HEARING SUBMISSIONS

62. In response to an invitation made by the Tribunal during the Hearing, on 13 September 2012, the Claimant submitted evidence to show that Boslita paid the Claimant approximately EUR 470,000 for services provided by the Claimant under an alleged agreement the Claimant signed with Boslita in 1999.[4]

63. On 4 October 2012, the Claimant submitted an Update to Dr. Alberro's Second Expert Report as requested by the Tribunal at the Hearing.

64. On the same day, the Parties jointly proposed that their costs submissions would "be submitted as separate documents, simultaneously with the submission of the post-hearing briefs, on 16 November 2012" and that the costs would include: fees of the Tribunal; administrative costs; legal representation fees; experts' fees; and travel and accommodation expenses.

65. By letter dated 5 October 2012, the Tribunal approved the Parties' joint proposal for their costs submissions.

66. By e-mail dated 12 October 2012, the Parties submitted supplementary translations of the Lithuanian and Italian versions of Articles 1(2), 3(2) and 12(2) of the Agreement, with comments, as requested by the Tribunal at the Hearing.

67. On 18 October 2012, the PCA, on behalf of the Tribunal, requested an additional deposit of EUR 100,000 from each Party. On 13 December 2012 and 20 December 2012, the PCA acknowledged receipt of supplemental deposits of EUR 100,000 from the Respondent and the Claimant respectively.

68. On 16 November 2012, the Parties transmitted to the Tribunal their respective post-hearing briefs and costs submissions.

69. By e-mail dated 21 November 2012, the Respondent requested and was granted permission to comment on the Claimant's Costs Application of 16 November 2012.

70. The Respondent subsequently submitted its comments on the Claimant's Costs Application on 28 November 2012.

71. By letter dated 10 December 2012, the Claimant submitted a copy of a Decision of the Supreme Court of Lithuania dated 5 December 2012 concerning the re-opening of the civil proceedings between the State Property Fund of Lithuania and the Claimant in the Lithuanian courts.

72. On 7 January 2013, the Tribunal invited the Parties to amend their cost submissions to reflect the December 2012 deposits that post-dated those submissions. On 18 January and 21 January 2013, the Respondent and the Claimant transmitted to the Tribunal their respective amended cost submissions.

73. By letter dated 14 April 2013, the Claimant submitted a copy of a Ruling of the Constitutional Court of Lithuania dated 2 April 2013 concerning the "compliance of Resolution No. 903 of the [Lithuanian Government] 'on consent to the agreement regarding the draft amendment to the purchase and sale contract of the shares owned by the State in [Alita]' of 16 July 2004 with the [Lithuanian Constitution] and the [Law on Privatization of State-Owned and Municipal Property]."

[4] See paragraph 80, *infra*.

III. FACTUAL & LEGAL BACKGROUNDS

74. The following summary is drawn from the Parties' pleadings and is presented to give context to the Claimant's alleged investment as well as the Respondent's alleged violations of the Agreement. The Parties differ, however, with respect to the characterization of certain factual developments and their positions as to the relevance of those developments. The Parties' competing interpretations of the record are noted where applicable.

A. FACTUAL HISTORY & BACKGROUND

75. From 1988 to 2005, the Claimant served as president of his family's Italian wine company known as Bosca Società per Azioni ("Bosca SpA"), a well-known producer of *spumante*, Italian sparkling wine.[5] The Claimant claims that the Bosca brand was popular in the Soviet Union until certain policy changes in the mid-1980s prevented its import behind the Iron Curtain.[6]

76. In his pleadings and in his witness statements, the Claimant describes how, following the break-up of the Soviet Union, Bosca SpA sought new avenues to bring its products to the region. The company encountered difficulties after a period of initial success as the newly independent states developed strict policies inhibiting imports.[7]

77. By 1996 and 1997, the Claimant, together with his local business partner, Dr. Gintaras Skorupskas, focused on potential opportunities for Bosca SpA in Lithuania. They created the Lithuanian company known as Boslita, producing almost exclusively Bosca SpA products.[8]

78. The Claimant maintains that he was personally involved in Boslita at several points in the company's history as detailed in the paragraphs that follow.[9] Moreover, he argues that his transactions in the Baltic States throughout this period were part of a plan to produce Bosca-branded sparkling wine in the region and production capacity in Lithuania "as a launch pad" to regain prominence in other former Soviet markets, including principally Russia.[10]

79. Boslita, the first private alcohol company in Lithuania to be granted permission to produce alcohol up to 22 degrees, went into operation in 1997, prompting the Claimant to negotiate a License Agreement on 18 December 1997 ("License Agreement"), on behalf of Bosca SpA, to promote and sell the Bosca brand in the region.[11] Under the License Agreement, Boslita was licensed to produce Bosca products in return for a five percent (5%) royalty.[12]

80. According to the Claimant, from the time of Boslita's inception, he worked closely with Dr. Skorupskas to ensure its success. This relationship was "formalized" on 11 September 1999 when the Claimant personally signed a Service Providing Agreement with Boslita ("Service Agreement").[13] In accordance with the Service Agreement terms, the Claimant maintains he provided extensive and valuable "know-how" to Boslita between 2000 and 2009.[14] The Claimant submits he also entered into an Option Agreement with Mrs. Loreta Skorupskienė on 2 July 2002 ("Option Agreement") to purchase Mrs.

[5] Bosca First Witness Statement, paras. 5, 6, 27.

[6] Claimant's Memorial, para. 40.

[7] Claimant's Memorial, para. 41.

[8] Claimant's Memorial, para. 45. Bosca First Witness Statement, para. 36.

[9] Notice of Arbitration/Statement of Claim, para. 4.

[10] Claimant's Brief, para. 23.

[11] Claimant's Memorial, para. 127.

[12] License Agreement, Exh. C-22, p. 3.

[13] Service Agreement, Exhs. C-24/R-72.

[14] Claimant's Memorial, paras. 45, 131. Service Agreement, Exhs. C-24/R-72, Item 3.

Skorupskienė's thirty percent (30%) shareholding in Boslita as of 25 September 1997.[15] The Respondent disputes the authenticity of the License Agreement, Service Agreement and the Option Agreement.[16]

81. In early February 2003, the Government of Lithuania announced that it would privatize four State-owned alcoholic beverage production companies, one of which was Alita – a sparkling wine producer established in 1963.[17] At the time, Alita was the market leader in the Lithuanian sparkling wine sector with an eighty percent (80%) market share.[18]

82. The State Property Fund ("SPF") was the State entity responsible for carrying out all Lithuanian privatizations at that time.[19] Once the SPF's company-specific privatization program would be approved by the State's Privatization Commission,[20] the SPF would make available for purchase a package of public tender documents, as provided in the applicable Regulations for the Privatization of State-Owned and Municipal Property by Public Tender ("Tender Regulations").[21] Potential bidders would purchase the package, and submit to the SPF a bid for participation in the public tender together with supporting documents.[22] The Public Tender Commission ("PTC"), a body established by the SPF, would evaluate the submissions by the bidders in a closed meeting and select a winning bidder.[23] After the SPF approved the PTC's selection, the winning bidder would be invited to negotiate the terms of a draft share purchase agreement with the PTC.[24] After the draft share purchase agreement was agreed between the PTC and the buyer, it had to be approved by the Privatization Commission and, if not approved by the Privatization Commission, the SPF could call upon the Government of Lithuania to make a final decision on the matter.[25] Upon approval, the winning bidder would be invited to sign the agreement.[26]

83. The Claimant was among the prospective bidders to obtain the tender informational documentation for Alita, paying the requisite fee of LTL 5,000 in April 2003.[27]

84. On 7 May 2003, the Claimant submitted his bid to the SPF, which included his application for participation in the tender, proposals related to a draft Share Purchase Agreement ("SPA"), along with the tender deposit fee of LTL 200,000.[28] Three other bids were submitted.[29] The PTC evaluated the four

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[15] Claimant's Memorial, para. 133. Option Agreement, Exhs. C-59/R-55.

[16] Respondent's Memorial, paras. 24, 27-31, 42, 54-57.

[17] Privatization Information Bulletin No. 4(276), Exhs. C-25/R-3. See also Claimant's Memorial, para. 47. Respondent's Counter-memorial, para. 13.

[18] Skorupskas First Witness Statement, p. 10. Respondent's Counter-memorial, para. 324.

[19] Notice of Arbitration/Statement of Claim, para. 20. Claimant's Counter-memorial, paras. 277-279. The Parties dispute whether the SPF acted in a commercial capacity or as a state entity. See *infra* paras. 123-127. Respondent's Counter-memorial, paras. 125-138. Respondent's Reply/Rejoinder, paras. 222-234. Hearing Transcript 111: 7 – 112: 9.

[20] Notice of Arbitration/Statement of Claim, para. 20. Privatization Law, Exh. R-1, Art. 4.

[21] Notice of Arbitration/Statement of Claim, paras. 21-22. Tender Regulations, Exh. R-2.

[22] Notice of Arbitration/Statement of Claim, para. 23. Tender Regulations, Exh. R-2, Art. 13.

[23] Notice of Arbitration/Statement of Claim, paras. 24, 26. Tender Regulations, Exh. R-2, Arts. 32, 36.

[24] Notice of Arbitration/Statement of Claim, para. 26. Tender Regulations, Exh. R-2, Art. 38.

[25] Tender Regulations, Exh. R-2, Art. 46.

[26] Notice of Arbitration/Statement of Claim, para. 27. Tender Regulations, Exh. R-2, Art. 45.

[27] Claimant's Memorial, para. 48.

[28] Claimant's Memorial, para. 48.

[29] Claimant's Memorial, para. 72. Respondent's Counter-memorial, para. 13. Malikėnas Witness Statement, para. 9.

bids[30] and thereafter selected the Claimant as the winning bidder.[31] On 30 June 2003, the SPF approved the Claimant's selection as the winning bidder.[32]

85. The Claimant's representative, Dr. Skorupskas, met with the SPF to negotiate certain terms of the SPA on three occasions in July and August 2003.[33] The Parties dispute the nature and content of the negotiations over those weeks, including the extent of the Claimant's disclosures.

86. According to the Claimant, three matters remained outstanding in the substance of the draft SPA by the end of September 2003: (1) whether there was to be a single payment or two installments; (2) whether the dispute settlement clause would name Stockholm or Paris as the place of arbitration; and (3) the level of fines.[34] The Claimant contends that he was not willing to sign an agreement regarding which negotiations were incomplete.[35] The Claimant also insists that he answered the enquiries of the SPF during the course of the tender process and did not provide false statements about his business activities in Lithuania.[36]

87. In the Respondent's view, all essential terms of the draft SPA were already agreed at that time and only a few technical points were left to be clarified at the time of initialing.[37] The SPF repeatedly invited the Claimant to initial the SPA, but the Claimant did not do so.[38] The Respondent also maintains that the Claimant failed to disclose to the SPF his past commercial activities in Lithuania.[39] According to the Respondent, these issues explain the SPF's understanding that the Claimant had no serious intention to finalize the SPA.[40]

88. By letter dated 30 September 2003, the SPF notified the Claimant that if he did not initial the SPA by 10 October 2003, it would annul the results of the tender.[41] Dr. Skorupskas replied to the SPF's correspondence, saying that the Claimant would not yet sign the SPA because (1) the Claimant believed there were still outstanding issues to be agreed upon; (2) he was travelling on business; and (3) he was in the process of reviewing the PTC's suggestions as to those issues.[42] On 10 October 2003, the SPF annulled the results of the tender.[43]

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[30] Notice of Arbitration/Statement of Claim, para. 24.

[31] Notice of Arbitration/Statement of Claim, para. 31.

[32] Notice of Arbitration/Statement of Claim, para. 31. Respondent's Counter-memorial, para. 15. Minutes No. 6 of the PTC, Exhs. C-31/R-25.

[33] Notice of Arbitration/Statement of Claim, para. 32. Respondent's Counter-memorial, para. 16.

[34] Claimant's Memorial, para. 93. Hearing Transcript 48: 9 – 49: 15.

[35] Claimant's Counter-memorial, para. 48.

[36] Claimant's Counter-memorial, para. 15.

[37] Respondent's Memorial, para. 100. Hearing Transcript 114: 13 – 116: 19.

[38] See, *e.g.*, Letter from the member of the Public Tender Commission Judita Barkauskienė to Gintaras Skorupskas, Exh. R-35. Respondent's Memorial, paras. 126-127.

[39] Respondent's Memorial, para. 55.

[40] Respondent's Memorial, para. 111.

[41] Notice of Arbitration/Statement of Claim, para. 34. Respondent's Counter-memorial, para. 59. Copy of the Letter from PTC Chairman Antanas Malikėnas to Gintaras Skorupskas, dated 30 September 2003, Malikėnas Exh. 18. Letter from PTC Chairman Antanas Malikėnas to Luigiterzo Bosca, dated 30 September 2003, Exh. R-36.

[42] Notice of Arbitration/Statement of Claim, para. 34.

[43] Notice of Arbitration/Statement of Claim, para. 34. Respondent's Counter-memorial, para. 59. Minutes No. 24 of the PTC, Exhs. C-48/R-38.

89. Following the cancellation of the tender results, the second- and third-place bidders removed their bids from consideration.[44] Consequently, on 22 September 2003, the SPF proceeded to commence negotiations with the fourth-place bidder, a consortium of directors and executives of Alita ("Executive Consortium" or "Consortium").[45] After the Privatization Commission approved the award of the tender to the Executive Consortium, the award was finalized on 6 January 2004.[46]

90. On 1 December 2003, the Lithuanian Prosecutor General's Office sent a letter to the Anti-Corruption Commission of the Lithuanian Parliament ("Seimas"), and to the Prime Minister's Office, "warning of the illegality of the actions of the Privatisation Commission (. . .) and the SPF with respect to the Alita tender."[47] On 2 December 2003, the Anti-Corruption Commission presented its opinion on the Alita tender process to the then Prime Minister Mr. Algirdas Brazauskas who asked the SPF to review the opinion and give the SPF's own view to the Government.[48] In reply, the SPF denied the allegations raised concerning its unlawfulness in the Alita matter.[49]

91. The Claimant filed a civil claim against the SPF in the Vilnius District Court on 17 November 2003, alleging that the SPF had "illegally terminated the negotiations for his purchase of the company under Lithuanian law, and requesting payment of the losses he had sustained in connection with the tender process."[50] On 28 April 2005, the District Court found that the SPF's actions in its negotiations had been "ungrounded and unfair," and awarded the Claimant his out-of-pocket expenses in connection with the tender process.[51]

92. The SPF appealed the decision of the Vilnius District Court to the Court of Appeals.[52] On 28 December 2005, the Court of Appeals reversed the District Court's holding.[53]

93. The Claimant requested the Supreme Court of Lithuania to review the Court of Appeals' decision.[54] On 10 October 2006, the Supreme Court reversed the decision of the Court of Appeals and reinstated the decision of the District Court.[55]

94. Shortly after the decision of the District Court was issued, the Seimas formed a Temporary Investigation Commission ("TIC") to review the circumstances surrounding the Alita privatization. After a year, the TIC issued its conclusions, determining that the decision to eliminate the Claimant from the tender had been illegal and had caused damage to the Claimant. The TIC also concluded that the decision to award the tender to the Executive Consortium was unlawful and cost the State "at least

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[44] Notice of Arbitration/Statement of Claim, para. 37. Respondent's Counter-memorial, paras. 79-80. Letter of the consortium of UAB Eugesta and UAB Vinvesta to the SPF, dated 14 October 2003, Exh. R-41.

[45] Notice of Arbitration/Statement of Claim, para. 37. Respondent's Counter-memorial, para. 83.

[46] Notice of Arbitration/Statement of Claim, para. 38. Respondent's Counter-memorial, para. 96. Protocol of the PTC No. 29, Exh. R-116.

[47] Claimant's Memorial, paras. 72, 89.

[48] Claimant's Memorial, para. 72.

[49] Claimant's Memorial, para. 72.

[50] Notice of Arbitration/Statement of Claim, para. 41. Claimant's Claim Application with Vilnius District Court, Exh. R-91.

[51] Notice of Arbitration/Statement of Claim, para. 41. Judgment of the Vilnius District Court, Civil Case No. 2-673-43/05, Exh. C-1B.

[52] Notice of Arbitration/Statement of Claim, para. 45.

[53] Judgment of the Court of Appeals, Civil Case No. 2A-366/2005, Exh. C-1D.

[54] Notice of Arbitration/Statement of Claim, para. 45.

[55] Notice of Arbitration/Statement of Claim, para. 45. Judgment of the Supreme Court, Civil Case No. 3K-7-470/2006, Exh. C-1E.

LTL 34,150,000."[56] The TIC recommended that the Seimas petition the Constitutional Court to examine whether the tender award had violated the Constitution and other laws of Lithuania.

95. By letter dated 21 February 2007, the Claimant notified the Respondent of his intent to commence arbitral proceedings if the Parties were unable to resolve their dispute amicably.

96. On 23 May 2007, the Constitutional Court ruled that the Government's approval of the sale of Alita to the Executive Consortium was in violation of Article 16(1) of the Law on Privatization of State-Owned and Municipal Property and Article 94(2) of the Lithuanian Constitution.[57]

97. According to the Claimant, around this time, the Lithuanian press reported that the former Prime Minister and other Ministers were under scrutiny by the Attorney General for conduct surrounding the Alita privatization.[58]

98. On 24 August 2009, a Lithuanian court pronounced Mr. Povilas Milašauskas, former Director General of the SPF, guilty under Article 228(1) of the Criminal Code of abusing his official position by illegally eliminating the Claimant from the Alita tender process.[59] On 22 December 2010, a Panel of Judges of the Vilnius Regional Court reversed that decision and, on 7 June 2011, the Criminal Division of the Supreme Court of Lithuania confirmed the decision of the Panel to the effect that Mr. Milašauskas had not committed a criminal act with the characteristics of crime or misdemeanor.[60]

99. On 1 March 2012, a Panel of Judges of the Civil Division of the Lithuanian Court of Appeal dismissed a petition by the Respondent to reopen the civil court proceedings initiated by the Claimant against the SPF.[61] The Supreme Court of Lithuania upheld the Panel's dismissal on 5 December 2012.[62]

B. RELEVANT PROVISIONS FROM THE AGREEMENT

100. Article 1 of the Agreement, entitled "Definitions," states, in relevant part:

> For the purposes of this Agreement:
>
> 1. The term "investment" shall be construed to mean any kind of property invested, before or after the entry into force of this Agreement, by a natural or legal person of a Contracting Party in the territory of the other Contracting Party, in conformity with the laws and regulations of that Party, irrespective of the legal form chosen, as well as of the legal framework. Without limiting the generality of the foregoing, the term "investment" comprises in particular, but not exclusively:
>
> a) movable and immovable property (. . .) ;

[56] Notice of Arbitration/Statement of Claim, para. 52. Seimas of the Republic of Lithuania, "Resolution no. X-922 regarding the conclusions of the ad hoc investigation commission of the Seimas formed for the investigation of the circumstances of the privatization of Alita AB," Exh. C-2.

[57] Notice of Arbitration/Statement of Claim, para. 53. Article 16(1) provides that "negotiations on how to improve the bids may be entered into with the potential buyer or potential buyers who have submitted the highest bids and whose bids do not differ from each other by more than 15 percent." Article 94(2) of the Constitution requires the Government to execute the laws of Lithuania in accordance with their terms. *Id.*

[58] Notice of Arbitration/Statement of Claim, para. 55.

[59] Judgment of the Supreme Court, Criminal Case No.2K-292/2011, Exhs. C-47/C-62/R-85.

[60] Judgment of the Supreme Court, Criminal Case No.2K-292/2011, Exhs. C-47/C-62/R-85.

[61] Claimant's Counter-memorial, paras. 201-202, quoting Ruling of the Court of Appeal, Case No. 2-561/2012 on request of renewal of the civil procedure (1 March 2012).

[62] Claimant's Letter to the Tribunal dated 10 December 2012, enclosing the Decision of the Supreme Court of Lithuania of 5 December 2012.

b) shares, debentures, equity holdings and any instruments of credit (. . .) ;

c) credits for sums of money or any financial service right (. . .) ;

d) copyright, commercial trade marks, patents, industrial designs and other intellectual and industrial property rights, know-how, trade secrets, trade names and goodwill;

e) any economic rights accruing by law or by contract and any license and franchise granted in accordance with the provisions in force on economic activities, including the right to prospect for, extract and exploit natural resources;

f) any increase in value of the original investment.

Any modification in the form of the investment does not imply a change in the nature thereof.

2. The term "investor" shall be construed to mean any natural or legal person of a Contracting Party investing in the territory of the other Contracting Party as well as the foreign subsidiaries and affiliates and branches somehow controlled by the above natural and legal persons.

3. The term "natural person," in reference to either Contracting Party, shall be construed to mean any natural person holding the nationality of that State in accordance with its laws.

101. Article 2, under which the Claimant seeks recovery, states:

1. Both Contracting Parties shall encourage investors of the other Contracting Party to invest in their territory.

2. Both Contracting Parties shall at all times ensure just and fair treatment of the investments of investors of the other Contracting Party. Both Contracting Parties shall ensure that the management, maintenance, use, transformation, enjoyment or assignment of the investments effected in their territory by investors of the other Contracting Party, as well as companies and enterprises in which these investments have been effected, shall in no way be subject to unjustified or discriminatory measures.

3. Each Contracting Party shall maintain in its territory a legal framework apt to guarantee to investors the continuity of legal treatment, including the compliance, in good faith, of all undertakings assumed with regard to each specific investor.

102. The Claimant also seeks relief under Article 3, entitled "National Treatment and the Most favored Nation Clause," which provides:

1. Both Contracting Parties, within the bounds of their own territory, shall offer investments effected by, and the income accruing to, investors of the other Contracting Party no less favorable treatment than that accorded to investments effected by, and income accruing to, its own nationals or investors of Third States.

2. Should a more favorable treatment than the one foreseen in this Agreement be introduced by internal laws or international obligations, this treatment will apply to investors of the relevant Contracting Party also for the outstanding relations.

3. The provisions under, point 1 and 2 of this Article do not refer to the advantages and privileges which one Contracting Party may grant to investors of Third States by virtue of their membership of a Customs or Economic Union, of a Common Market, of a Free Trade Area, of a regional or subregional Agreement, of an international multilateral economic Agreement or under Agreements signed in order to prevent double taxation or to facilitate cross border trade.

103. Article 5, entitled "Nationalization or Expropriation," and also a ground upon which the Claimant brings his claim, states in relevant part:

> Investments of investors of one of the Contracting Parties shall not be, "de jure" or "de facto," directly or indirectly, nationalized, expropriated, requisitioned or subjected to any measures having an equivalent effect in the territory of the other Contracting Party, except for public purposes or national interest and in exchange for immediate, full and effective compensation, and on condition that these measures are taken on a non-discriminatory basis and in conformity with all legal provisions, procedures and orders handed down by Courts or Tribunals having jurisdiction.

104. The Protocol to the Agreement ("Protocol") on which the Claimant relies provides in part:

> On signing the Agreement between the Government of the Republic of Lithuania and the Government of the Italian Republic on the Promotion and Protection of Investments, the Contracting Parties also agreed to the following clauses, which shall be deemed to form an integral part of the Agreement.
>
> 1. General Provision
>
> This Agreement and all provisions thereof referred to "Investments", provided they are made in accordance with the legislation of the Contracting Party in which territory the investment is made, apply as well to the following associated activities:
>
> the organization, control, operation, maintenance and disposition of companies, branches, agencies, offices, factories – or other facilities for the conduct of business; the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds including intellectual property; the borrowing of funds; the purchase, issuance, and sale of equity shares and other securities; and the purchase of exchange for imports.
>
> "Associated activities" also include, inter alia:
>
> I) the granting of franchises or rights under licenses;
> II) the receipt of registrations, licenses, permits and other approvals necessary for the conduct of commercial activity which shall in any event be issued expeditiously, as provided for in the legislation of the Contracting Parties;
> III) (. . .) ;
> IV) (. . .) ;
> V) the importation and installation of equipment necessary for the normal conduct of business affairs, including, but not limited to, office equipment and automobiles, and the export of any equipment and automobiles so imported;
> VI) the dissemination of commercial information;
> VII) the conduct of market studies;
> VIII) the appointment of commercial representatives, including agents, consultants and distributors (. . .) ; [and]
> IX) the marketing of goods and services, including through internal distribution and marketing systems, as well as by advertising and direct contact with nationals and companies;
>
> (. . .) .
>
> 5. With reference to Article 9
>
> Under Article 9 (3)(b), arbitration shall be conducted in accordance with the arbitration standards of the United Nations Commission on International Trade Law (UNCITRAL), as

laid down in the UN General Assembly Resolution 31/98 of December 15, 1976 as well as pursuant to the following provisions:

a) The Arbitration Tribunal shall be composed of three arbitrators; if they are not nationals of either Contracting Party, they shall be nationals of States having diplomatic relations with both Contracting Parties.
The appointment of arbitrators, when necessary pursuant to the UNCITRAL Rules, will be made by the President of the Arbitration Institute of the Stockholm Chamber, in his capacity as Appointing Authority. The arbitration will take place in Stockholm, unless the two parties in the arbitration have agreed otherwise.

b) When delivering its decision, the Arbitration Tribunal shall in any case apply also the provisions contained in this Agreement, as well as the principles of international law recognized by the two Contracting Parties. (. . .)

IV. RELIEF REQUESTED

A. CLAIMANT'S REQUEST

105. The Claimant requests the Tribunal to:

(1) declare that it has jurisdiction over the dispute;

(2) declare that Lithuania has breached its obligations under the terms of the Agreement as described in the Claimant's Amended Notice of Arbitration and Statement of Claim and in the Claimant's Rejoinder;

(3) award monetary damages of not less than €207,971,000[63] in compensation for loss sustained as a result of Lithuania's measures;

(4) require Respondent to bear the costs and expenses of the arbitration, including fees and expenses of counsel, experts, consultants and witnesses, and the fees and expenses of the Tribunal, plus such further costs and expenses as the Tribunal may find are owed under applicable law;

(5) award pre- and post-award interest at a rate to be determined by the Tribunal; and

(6) award such other relief that Counsel for Claimant may advise and that the Tribunal may deem appropriate.[64]

B. RESPONDENT'S REQUEST

106. The Respondent requests the Tribunal to:

(i) declare that the Claimant has breached the mandatory provisions of Article 3 of the UNCITRAL Arbitration Rules, notwithstanding the submission of an Amended Notice of Arbitration and Statement of Claim on 21 February 2012;

(ii) declare that Claimant has breached the procedural pre-arbitral requirements provided for in Article 9 of the Agreement;

(iii) dismiss the claims of the Claimant in their entirety as time-barred;

[63] As updated in the Claimant's Brief, paras. 1, 165.

[64] Amended Notice of Arbitration/Statement of Claim, para. 80. Claimant's Rejoinder, para. 277.

(iv) declare that it has no jurisdiction over the Claimant's claim;

(v) render an award in favor of the Respondent and against the Claimant dismissing his claim in its entirety and with prejudice;

(vi) order the Claimant to bear all costs of this arbitration, including in particular the arbitrators' fees and expenses, the costs and expenses of the counsels for the Parties, witnesses' expenses and the experts' fees and costs; and

(vii) declare the Award as non-confidential and available in the public domain.[65]

V. THE TRIBUNAL'S CONSIDERATIONS

107. The following part summarizes the Parties' arguments on jurisdiction, merits and damages. The Tribunal has considered all of the Parties' submissions and details only those most relevant for its analysis here. The Tribunal's considerations that follow address the factors determinative to its decision.

108. The Tribunal refers to Article 9(3)(b) of the Agreement and Paragraph 5(b) of the Protocol which mandate that the arbitration shall be conducted under the UNCITRAL Rules and that the Tribunal shall apply the provisions contained in the Agreement as well as principles of international law recognized by the two Contracting Parties. In interpreting the Agreement, the Tribunal looks to the rules embodied in the Vienna Convention on the Law of Treaties. Reference is also made, where appropriate, to the relevant provisions of Lithuanian law relating to the privatization process. While the Tribunal will occasionally draw upon the decisions of other arbitral tribunals, it is acutely aware of the specific terms of the Agreement that must be applied in the present case.

A. THE ADMISSIBILITY OF THE CLAIMANT'S CLAIM

The Respondent's position

109. The Respondent makes three arguments that the Claimant's claim is inadmissible. First, the Respondent submits that the Claimant's Notice of Arbitration/Statement of Claim was invalid under the UNCITRAL Rules because it did not include the Claimant's address. According to the Respondent, Article 3(3)(b) of the Rules, which states that "[t]he notice of arbitration shall include (. . .) (b) [t]he names and addresses of the parties," requires that the Notice of Arbitration/Statement of Claim identify the Claimant's address to be valid.[66]

110. Second, the Respondent maintains that the Claimant's claim is time-barred under the doctrine of extinctive prescription which, according to the Respondent, provides that a claim is inadmissible when it is delayed and such delay imparts actual prejudice to the Respondent.[67] The Respondent argues that extinctive prescription dictates dismissal of a claim where, as here, (a) the Claimant's filing was "unreasonably delayed" without justification; (b) the delay was due to the Claimant's negligence; (c) a clear record of the case does not exist because of the delay; and (d) to allow the delayed claim to be tried on the merits would cause an unjust impairment of the Respondent's right to defend.[68]

111. The Respondent's position is that the Claimant's claim was unreasonably delayed because he was aware of the alleged breach as early as 2003 when the SPF decided to annul the tender results and

[65] Respondent's Brief, para. 168.

[66] Respondent's Memorial, paras. 163-166. Respondent's Reply/Rejoinder, paras. 219-221.

[67] Respondent's Reply/Rejoinder, para. 210.

[68] Respondent's Memorial, paras. 147-162.

because he did not challenge the SPF's decision while he had the right to do so under Lithuanian law.[69] Moreover, the Respondent asserts that the Claimant's claim is time-barred due to a three-year statute of limitations with respect to claims for compensation of damages under the Lithuanian Civil Code.[70] The Claimant's delay is negligent according to the Respondent because the Claimant "failed to present any valid reason for withholding his claim" until several years later.[71] The Respondent argues that there is also a lack of clear record to the Parties' dispute as there is no privatization agreement between the Claimant and the Respondent and thus the Claimant bases his claim on pre-contractual events supported only by witness statements.[72] Finally, the Respondent states that the delay creates an injustice by preventing it from preparing its defense insofar as relevant persons and related evidence are no longer available.[73]

112. Third, the Respondent argues that the Claimant failed to comply with the pre-arbitration requirements provided for in the Agreement. The Respondent maintains that the Notice of Intent dated 21 February 2007 was not a "proper written application for dispute settlement in accordance with Article 9.3 of the [Agreement]" and that the Claimant has not acted in good faith in his intention to settle the dispute amicably before resorting to arbitration.[74] In the Respondent's view, the Claimant failed to provide any information on the nature or grounds of his claims thereby preventing the commencement of amicable negotiations.[75] The Respondent identifies statements made by representatives of the Claimant that the Claimant would "make a settlement offer" though he never did so.[76]

113. Referring to Article 9(1) of the Agreement, which provides that disputes "shall be settled amicably, as far as possible," the Respondent maintains that prior amicable negotiations are mandatory before proceeding to arbitration.[77] In this respect, the Respondent cites the Award on Jurisdiction in *Murphy International v. Ecuador* and the Decision on Jurisdiction in *Burlington Resources Inc. v. Ecuador*, in which each of those tribunals concluded that non-compliance with pre-arbitration requirements set forward in the relevant treaty was sufficient to defeat the tribunal's jurisdiction.[78]

The Claimant's position

114. The Claimant objects to the Respondent's assertion that his Notice of Arbitration/Statement of Claim did not comply with Article 3(3)(b) of the UNCITRAL Rules because it allegedly omitted his address.[79] The Claimant contends that the Notice of Arbitration/Statement of Claim contained the address of his counsel, which is sufficient to meet the Rules' requirement.[80] Pointing to the Decision on Bifurcation, the Claimant states that the Tribunal has already disposed of this issue by granting the Claimant permission to amend his Notice of Arbitration/Statement of Claim, and that the Claimant has amended

[69] Respondent's Memorial, para. 151.

[70] Respondent's Memorial, para. 152.

[71] Respondent's Memorial, para. 155.

[72] Respondent's Memorial, para. 156.

[73] Respondent's Memorial, para. 160.

[74] Respondent's Reply/Rejoinder, para. 195.

[75] Respondent's Reply/Rejoinder, para. 197.

[76] Respondent's Reply/Rejoinder, paras. 199-202.

[77] Respondent's Reply/Rejoinder, paras. 203-204.

[78] Respondent's Reply/Rejoinder, para. 205, citing *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction (15 December 2010), para. 154; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (2 June 2010), para. 315.

[79] Claimant's Memorial, para. 154, referring to Notice of Arbitration/Statement of Claim, para. 4.

[80] Claimant's Memorial, para. 154.

his Notice/Statement accordingly.[81] The Claimant also argues that the Respondent has not suffered, nor is likely to suffer, any prejudice as a result of the omission or subsequent amendment.[82]

115. With respect to the Respondent's timeliness argument, although the Claimant agrees with the Respondent's articulation of the test for extinctive prescription, the Claimant disagrees that the test is satisfied here.[83] First, the Claimant argues that a delay, if any, is not "unreasonable" because it was caused by the Claimant's efforts to try to reach an amicable settlement with the Respondent.[84] Second, the Claimant argues that the Respondent has not provided evidence to substantiate that the alleged delay was due to negligence on the part of the Claimant.[85] Third, the Claimant objects to the Respondent's view that it lacks a clear record of the case, arguing that the Respondent should have been able to obtain necessary witness statements and also have access to any other necessary information.[86] Fourth, the Claimant argues that the Respondent fails to prove that it has suffered prejudice due to the delay.[87] Finally, the Claimant submits that the applicable law in these proceedings is the Agreement and principles of international law, and that statutory limitations under Lithuanian law do not apply to his claim.[88]

116. The Claimant maintains that he has met all the pre-arbitration requirements of the Agreement and objects to the Respondent's assertion that the Notice of Intent was not in compliance with Article 9 of the Agreement.[89] In the Claimant's view, Article 9 requires only filing an "application for settlement" that confirms the existence of a dispute and notifies the host State of the investor's intent to commence arbitration.[90] The Claimant contends that his Notice of Intent satisfied this requirement.[91] Even assuming that the Agreement required that a notice of intent include information about a settlement offer, the Claimant argues that the absence of a settlement offer would not defeat the admissibility of his claim.[92] The Claimant adds that, in any event, the requirement is met in this arbitration because his Notice of Intent referred to his settlement offer.[93]

The Tribunal's Decision

117. Turning first to the Respondent's argument that the Claimant's claim should be dismissed due to deficiencies in his Notice of Intent and Notice of Arbitration/Statement of Claim, the Tribunal finds that the Claimant met the necessary requirements to bring a claim before the Tribunal. The Claimant fulfilled his procedural obligations under the law applicable to this arbitration, namely, the Agreement and principles of international law recognized by the two Contracting Parties,[94] as well as the requirements of the applicable Rules. The Tribunal acknowledges the Respondent's view that Article 9 of the Agreement requires that disputes between an investor and a Contracting Party on investments "shall be settled amicably, as far as possible," but considers that the Claimant met his burden in this

[81] Claimant's Counter-memorial/Reply, paras. 190-191, 194-195.

[82] Claimant's Counter-memorial/Reply, paras. 192-193.

[83] Claimant's Counter-memorial/Reply, para. 183.

[84] Claimant's Counter-memorial/Reply, paras. 184-185.

[85] Claimant's Counter-memorial/Reply, para. 186.

[86] Claimant's Counter-memorial/Reply, paras. 187-188.

[87] Claimant's Counter-memorial/Reply, para. 189.

[88] Claimant's Memorial, paras. 159-162.

[89] Claimant's Memorial, para. 156.

[90] Claimant's Counter-memorial/Reply, paras. 170-172.

[91] Claimant's Memorial, paras. 156-157.

[92] Claimant's Counter-memorial/Reply, paras. 173-177.

[93] Claimant's Memorial, para. 158.

[94] Protocol, para. 5(b).

respect. The Claimant substantiated that he made an attempt to settle the Parties' dispute prior to commencing arbitral proceedings as evidenced by his Notice of Intent. The Tribunal is satisfied that the Claimant met his obligations to attempt to settle the dispute amicably as required by Article 9.

118. The Tribunal refers in particular to the Claimant's discussion in his Notice of Arbitration of a letter he sent to Prime Minister Algirdas Brazauskas and the Minister of Economy on 21 February 2007 in which he thanked them for informing him that they would "make a settlement offer in connection with the State Property Fund's privatization of Alita" and invited them to "attempt to amicably resolve this dispute through negotiation and consultation pursuant to Article 9 of the BIT."[95] There followed during the course of 2007 an exchange of several letters between the Parties, unsuccessful in resolving their dispute.[96] Moreover, Dr. Skorupskas testified that he had raised this matter with the Prime Minister and other officials during the course of 2007 and subsequently.[97] In the Tribunal's view, the Respondent has not demonstrated that the Claimant acted in bad faith. Finally, the Tribunal notes that the obligation to settle "amicably as far as possible" applies to both Parties and if, in the present case, the efforts at settlement appear to have been somewhat lackadaisical on each side, the Tribunal, on the basis of the evidence before it, is not inclined to put the blame on the Claimant only.

119. Neither is the Claimant's claim barred for the omission of his personal address in his original Notice of Arbitration/Statement of Claim. When appropriate, parties are afforded an opportunity to revise factual or procedural deficiencies in their pleadings. The Tribunal discussed the omitted address in its Decision on Bifurcation, following which the Claimant amended his Notice of Arbitration/Statement of Claim to include his address.

120. The Tribunal is not convinced by the Respondent's arguments that the Claimant's claim should be time-barred. Contrary to the Respondent's assertion, the Claimant's claim is not subject to the Lithuanian statute of limitations. In accordance with the Agreement, the Tribunal applies international law, not Lithuanian domestic law, to these proceedings and there is no deadline prescribed by the Agreement, Rules or general principles of international law. Moreover, there was no requirement under the Agreement for the Claimant to initiate local proceedings against the SPF following the October 2003 Order annulling the tender results which removed the Claimant from the tender process ("Annulment Order"). The Tribunal considers that the Respondent was not prejudiced in its ability to respond to the Claimant's allegations due to any delay in the Claimant's commencement of the arbitration. The Claimant notified the Respondent of his intention to commence arbitration as early as 2007 when litigation in the Lithuanian courts relating to the Alita privatization was on-going. It was not unreasonable, in the Tribunal's view, to wait for those decisions to be rendered before undertaking a separate proceeding in an international setting.

121. The Tribunal concludes therefore that the Claimant's claim is admissible.

B. THE TRIBUNAL'S JURISDICTION OVER THE CLAIMANT'S CLAIM

122. In evaluating the substance of the Parties' jurisdictional questions, the Tribunal turns to Article 9 of the Agreement which sets out the mechanism for dispute settlement between investors and the Contracting Parties. Article 9 provides that an investor, as defined in Article 1 of the Agreement, may submit a dispute "on investments" that he has with a Contracting Party to an ad hoc tribunal. The Tribunal first

[95] Notice of Arbitration/Statement of Claim, para. 58; Notice of Intent from Luigi Bosca to the Prime Minister, Exh. C-1F.

[96] Letter from the Ministry of Economy to Luigi Bosca, dated 24 April 2007, Exh. R-142; Letter from Luigi Bosca to the Ministry of Economy, dated 7 June 2007, Exh. R-47; Letter from Luigi Bosca to the Ministry of Economy, dated 20 June 2007, Exh. R-48; Letter from the SPF Director General Audrius Rudys to Motieka & Audzevičius, dated 2 August 2007, Exh. R-49; Letter from Ramūnas Audzevičius to the SPF Director General Audrius Rudys, dated 23 August 2007, Exh. R-143; Letter from the SPF Director General Audrius Rudys to Motieka & Audzevičius, dated 23 August 2007, Exh. R-50; Letter from Ramūnas Audzevičius to the SPF Director General Audrius Rudys, dated 27 September 2007, Exh. R-51; Letter from Ramūnas Audzevičius to the SPF Director General Audrius Rudys, dated 7 November 2007, Exh. R-53.

[97] Hearing Transcript 543: 6 – 545: 17, 546: 20 – 547: 10 (Dr. Skorupskas' statement).

analyzes the Respondent's contention that the actions regarding which the Claimant complains are not attributable to the Lithuanian State before evaluating the presence of the other jurisdictional elements.

1. Attribution to the State

The Respondent's position

123. The Respondent asserts that the SPF, in annulling the tender results and entering into negotiations with the Executive Consortium, acted not as an arm of the Lithuanian State but as an "ordinary commercial party conducting commercial negotiations."[98] The Respondent maintains that the privatization of State-owned property in Lithuania is a civil transaction governed by the Lithuanian Civil Code.[99] It distinguishes the circumstances here from those in *Eureko v. Poland* and *Lemire v. Ukraine* where the actions of certain individuals were attributed to the respondent State by noting that the SPF director who issued the Annulment Order was not a State official or minister of the Government, nor was he instructed by a State official as so happened in those two cases.[100] It is the Respondent's position that the SPF acted *iure gestionis* rather than *iure imperii* and its actions cannot constitute a violation of the Agreement.[101] Additionally, the Respondent submits that there was no interference by State officials with the Alita tender process, as confirmed by several witnesses.[102]

124. The Respondent argues that by bringing a claim concerning the work of the SPF, the Claimant intends to elevate national law obligations to the level of international obligations and to extend the scope of the Agreement's protections to pre-contractual obligations as if the Agreement contained an umbrella clause, which it does not.[103] Thus, according to the Respondent, without having proven all the elements of State responsibility for the actions of the SPF under the Agreement or international law more generally, the Claimant cannot sustain his allegations.[104]

The Claimant's position

125. The Claimant submits that it is clear that privatization is an inherently sovereign act and that the entities responsible for privatization of a State entity are government agencies engaged in sovereign acts.[105] The Claimant asserts that the privatization of Alita was clearly a "sovereign act" involving at least two Lithuanian State bodies: the SPF and the PTC.[106]

126. The Claimant further argues that the Respondent's distinction between commercial and sovereign acts made by entities associated with the State is misplaced.[107] First, the Claimant submits that the Respondent wrongly assumes that the distinction applies to all claims under international law; that is,

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[98] Respondent's Reply/Rejoinder, para. 233.

[99] Respondent's Counter-memorial, para. 128.

[100] Respondent's Counter-memorial, paras. 134-138, citing *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award (19 August 2005), [*hereinafter Eureko v. Poland*, Partial Award], paras. 218, 233; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award (28 March 2011) [*hereinafter Lemire v. Ukraine*, Award].

[101] Respondent's Counter-memorial, para. 125.

[102] Respondent's Counter-memorial, paras. 134, 183, 277. Hearing Transcript 660: 12 – 661: 8, 662: 1-17, 813: 23 – 814: 4, 854: 5-24.

[103] Respondent's Counter-memorial, para. 139.

[104] Respondent's Counter-memorial, para. 143.

[105] Claimant's Counter-memorial/Reply, para. 282.

[106] Claimant's Counter-memorial/Reply, paras. 272, 276-279.

[107] Claimant's Counter-memorial/Reply, paras. 272, 282.

the Respondent is wrong in suggesting that, for all claims, an act of *puissance publique* is required to establish a treaty breach. Rather, this principle applies only where a breach of contract forms the basis of a claim, which is not the case in the present arbitration.[108]

127. The Claimant comments that "economic interests" on the part of State actors involved in privatization do not change the sovereign nature of their actions.[109] Moreover, many arbitral tribunals evaluating investment disputes have concluded that States can be liable for acts of their agencies or State-owned enterprises in the context of a privatization.[110]

The Tribunal's Decision

127. The Tribunal is of the view that the actions of the SPF and its related entities are attributable to the State. According to Article 3.1 of the Law on the SPF, the SPF is a state enterprise, having a separate legal personality, the object of which is to privatize State property. The Respondent relies on the Lithuanian courts' observation that the privatization process is governed by the Lithuanian Civil Code; on this basis, the Respondent asserts that the SPF acted in a commercial capacity. The Tribunal disagrees. The SPF is an entity empowered to exercise governmental authority, as described in Article 5 of the International Law Commission Articles on State Responsibility (the "ILC Articles on State Responsibility").[111] Thus, the question before the Tribunal is whether the SPF was acting in a sovereign capacity in the privatization process. While the privatization process is governed in part by the Lithuanian Civil Code, as argued by Respondent, it is also controlled through the Law on Privatization, the Regulations under it and even the Lithuanian Constitution. The evidence presented by both Parties confirms that the privatization process is a governmental process, highly regulated by a series of governmental decrees and rules, culminating in a multi-step State-approval process.[112] The applicability of the Civil Code to certain aspects of the SPF's work does not change the governmental nature of the acts adopted in the process of privatization.

128. Regardless of whether the Tribunal considers the SPF to have acted in a sovereign capacity, the SPF's actions were vetted and in this case approved by higher authorities that clearly acted in sovereign capacities. The Privatization Regulations make clear that the Privatization Commission and, in the case of its refusal, the Government itself could be called upon by the SPF to make a final decision on a proposed SPA;[113] the stamp of sovereign involvement could not be clearer. The Tribunal considers that this administrative evaluation further reflects the governmental endorsement of the process. Here, the Government acted at multiple steps, projecting its sovereign authority.[114]

129. Having established that the Claimant properly brings his claim against one of the Contracting Parties, the Tribunal now turns to a second jurisdictional element: whether there is a dispute "on investments" as set out in Article 9 of the Agreement.

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[108] Claimant's Counter-memorial/Reply, paras. 274-275.

[109] Claimant's Counter-memorial/Reply, para. 280.

[110] Claimant's Counter-memorial/Reply, para. 281.

[111] Responsibility of States for International Wrongful Acts, UN Doc. A/RES/56/83, 12 December 2001.

[112] See, *e.g.*, the Tender Regulations – a governmental decree issued as part of the Law on Privatization of State-Owned and Municipal Property, Exh. R-2. Hearing Transcript 255: 23-24, 718: 1-23, 737: 1-3, 954: 6 – 955: 20. Following the announcement of the tender winner, the Government's discretion to cancel the privatization transaction became subject to the specific limitations established in Article 63 of the Tender Regulations. Claimant's Brief, para. 34.

[113] Tender Regulations, Exh. R-2, Arts. 45, 46, 48.

[114] The Tribunal notes also that in accordance with the ILC Articles on State Responsibility, "[c]onduct which is not otherwise attributable to a State shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own." See Article 11. In other words, where the State endorses the act, as here, the State is subject to international responsibility under international law.

2. Whether the Claimant made an "investment" under the Agreement

The Respondent's position

130. It is the Respondent's position that the Claimant made no investment under the Agreement and that, therefore, there is no dispute "on investments" under Article 9. Neither the Claimant's activities prior to the Alita privatization nor his participation in the tender constitutes an "investment" as defined by Article 1 of the Agreement. The Respondent also notes that the Parties have not concluded a contract and that the Claimant has not contributed any of his own funds to the alleged investment.

(a) Activities prior to the Alita privatization

131. First, the Respondent submits that any activities of Bosca SpA and those of the Claimant with or through Boslita are irrelevant to the Alita tender.[115] Even if these business activities were relevant, the Respondent maintains that the Claimant's and Bosca SpA's alleged activities with Boslita do not qualify as "investments" under the Agreement.[116]

132. In particular, the Respondent objects to the Claimant's assertions that Bosca SpA "made a tangible and substantial financial investment" through (1) the conclusion of the License Agreement, (2) Bosca SpA's acquisition of equipment for Boslita, or (3) Bosca SpA's alleged minority shareholding.[117] The Respondent maintains that none of these constitutes "investments" under the Agreement. The Respondent further objects that any of the activities of Bosca SpA can be attributed to the Claimant.[118]

133. According to the Respondent, the License Agreement that the Claimant alleges he signed in 1997 was never registered with Lithuanian authorities as required by law, calling into question its validity.[119] Moreover, the Respondent doubts in its pleadings that the License Agreement was put into effect as the Claimant did not provide any admissible evidence that he was paid any royalties in accordance with the terms of the License Agreement.[120] In any event, the Respondent maintains that the License Agreement does not qualify as an investment under the Agreement and that the activities under the License Agreement are attributable to Bosca SpA and not to the Claimant.[121]

134. The Respondent also contends that the equipment acquisition to which the Claimant refers as a contribution of Bosca SpA to Boslita (and an investment) was a basic purchase agreement and not an investment.[122]

135. Finally, the Respondent submits that evidence regarding Bosca SpA's shareholding in Boslita is contradictory and unreliable to support the notion that Bosca SpA's activities vis-à-vis Boslita constitute an investment.[123]

136. Turning to the Claimant's activities in his personal capacity, the Respondent argues that the Option and Service Agreements cannot by themselves constitute an "investment." Beginning with the Service Agreement, the Respondent maintains that it has justifiable doubts as to whether the Service Agreement existed in 1999.[124] Moreover, the Respondent contends that the alleged "transfer of know-how" as

[115] Respondent's Memorial, paras. 22-25.

[116] Respondent's Memorial, para. 25.

[117] Respondent's Memorial, para. 32.

[118] Respondent's Memorial, paras. 27-28. Respondent's Brief, para. 10.

[119] Respondent's Memorial, para. 33.

[120] Respondent's Memorial, para. 37.

[121] Respondent's Memorial, para. 40.

[122] Respondent's Memorial, paras. 32, 40.

[123] Respondent's Memorial, paras. 29-31.

[124] Respondent's Memorial, para. 42. Respondent's Reply/Rejoinder, para. 151.

outlined in the Service Agreement does not satisfy the necessary conditions of "investment."[125] Insofar as the Claimant argues that his work under the Service Agreement constitutes "associated activities" as defined by the Protocol, the Respondent argues that "associated activities" must be connected with an already existing investment of the Claimant, and the Claimant's activities under the Service Agreement are not so connected.[126] In the Respondent's view, the Service Agreement is "an ordinary contract for the supply of services" rather than a protected investment.[127] Further, the Respondent submits that the Claimant's personal activities under the Service Agreement, if any, would not have been compatible with his fiduciary duties to Bosca SpA.[128] The Respondent also raises due process concerns with respect to the evidence of payments made under the Service Agreement, stating that it was not disclosed until the Hearing.[129] Finally, the Respondent points out that Prof. Dolzer, the Claimant's expert, agreed at the Hearing that the Respondent did not interfere with the Claimant's activities under the Service Agreement.[130]

137. With respect to the Option Agreement, the Respondent argues that it does not constitute an investment under the Agreement because, first, the Option Agreement lacks certain features that are typical to an investment, *i.e.*, "duration, regularity of profit and return, risk, substantial commitment and contribution to the host State's development."[131] Second, it does not contribute to the prosperity of both Contracting Parties, contrary to the object and purpose of the Agreement.[132] In any event, it is the Respondent's position that the Option Agreement, if it is an authentic document from 2002, is null and void under Lithuanian law.[133] The Respondent notes that the Claimant agreed at the Hearing that he had paid no consideration for rights under the Option Agreement nor had he exercised those rights.[134]

(b) Continuous investment

138. The Respondent asserts that the Claimant's participation in the Alita tender does not constitute a "continuous investment" meeting the requirements of Article 1 of the Agreement. To begin, the Respondent reasserts that the Claimant never provided any information regarding his prior commercial activities in Lithuania when prompted by the SPF on several occasions to do so.[135] Further, any link between the Claimant's participation in the Alita tender and his alleged activities prior to the tender is, according to the Respondent, "speculative and distant."[136]

(c) Participation in the privatization

139. Next, the Respondent rejects the Claimant's premise that his participation in the tender, including through the payment of fees related to the tender or any rights arising in the course of the tender negotiations, constitutes an investment under the Agreement. With respect to the fees, the Respondent states that the Claimant did not incur any costs for the Alita tender application fee of LTL 5,000 (EUR 1,448.10) nor for the deposit of LTL 200,000 (EUR 57,924) as these were paid by third parties outside

[125] Respondent's Memorial, paras. 43-44, 46.

[126] Respondent's Memorial, para. 43.

[127] Respondent's Memorial, para. 46. Respondent's Brief, para. 16.

[128] Respondent's Memorial, para. 45. Respondent's Brief, para. 26.

[129] Respondent's Brief, para. 22.

[130] Respondent's Brief, para. 85. Hearing Transcript 1104: 16 – 1105: 17.

[131] Respondent's Memorial, para. 58, citing *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001), [*hereinafter Salini v. Morocco*, Decision on Jurisdiction], para. 52.

[132] Respondent's Memorial, paras. 55-59.

[133] Respondent's Memorial, para. 54.

[134] Respondent's Brief, para. 11, citing Hearing Transcript 142: 14-20, 294: 2-4.

[135] Respondent's Memorial, paras. 65-67.

[136] Respondent's Memorial, para. 70.

the control of the Claimant and have been reimbursed by the Respondent.[137] The Respondent argues that these expenses do not entail contribution, risk or duration, characteristics usually attributable to an investment, and do not result in "economic rights accruing by law" as provided for in Article 1(1)(e) of the Agreement.[138] Likewise, the Respondent submits that the Claimant has not shown why the fee paid to receive informational documents should be considered an investment.[139]

140. The Respondent also argues that the Claimant's transfer of his initial deposit constitutes neither "shares" nor the "making of [a] contract[]" as defined by the Agreement.[140] In this regard, the Respondent objects to the Claimant's allegation that the deposit "form[s] part of the total price to be paid for shares," arguing that under the Tender Regulations, the deposit could be set-off against the price of the SPA only after the closure of the SPA.[141] Additionally, the Respondent maintains that under Lithuanian law, the deposit paid by the Claimant was not a "payment" for Alita shares but rather "security" in favor of the SPF.[142] The Respondent disputes the Claimant's suggestion that, once the Claimant was announced as the winning bidder, his deposit became a contribution to equity. According to the Respondent, such a position is in contradiction with the Tender Regulations; the announcement of the winner does not change the nature of the deposit.[143]

141. With respect to any rights arising from the Claimant's participation, the Respondent contends that the Claimant's expectations that the SPA would be finalized do not constitute "economic rights accruing by law" because the "economic rights" are "implicitly restricted to the rights arising out of laws similar to administrative permits, concessions, and licenses" and do not include the rights arising out of general good faith duties in pre-contractual relations.[144] The Respondent argues that the statutory obligation to negotiate in good faith does not create a right to demand that the other party conclude the contract.[145] Relatedly, the Respondent submits that statutory rights of a general nature enjoyed by the Claimant during the negotiations do not qualify as "associated activities" under the Protocol because the phrase "making (. . .) of contracts" must be understood to refer not to the conduct of contractual negotiations but to the actual conclusion of binding contracts.[146] Even if they did, the Respondent maintains that the "associated activities" under Paragraph 1 of the Protocol do not fall within the definition of "investment" under Article 1(1) of the Agreement.[147]

142. The Respondent argues that the Claimant's behavior, including his failure to cooperate with the SPF in the last stage of finalization of the SPA, led the SPF to believe that the Claimant had no serious intention to finalize the Alita deal.[148] The Respondent asserts that the SPF had the right to terminate the Alita tender negotiations because the negotiations were not "advanced," or, even if they were "advanced," it had an adequate reason for doing so on the basis of the Claimant's non-participation.[149]

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[137] Respondent's Memorial, paras. 22, 25, 72-73.

[138] Respondent's Memorial, paras. 77-79.

[139] Respondent's Reply/Rejoinder, para. 169.

[140] Respondent's Memorial, paras. 74-76.

[141] Respondent's Reply/Rejoinder, paras. 170-174.

[142] Respondent's Memorial, paras. 80-82.

[143] Respondent's Brief, paras. 37-39.

[144] Respondent's Memorial, paras. 84-85, 89-95. In the Respondent's view, the Claimant's expert oversimplifies the meaning of "economic rights" by suggesting that they are rights connected with "economic process" or "economic matters." According to the Respondent, this interpretation is not supported by practice in international investment arbitration. Respondent's Brief, para. 59. See Dolzer First Expert Report, para. 40 and Hearing Transcript 1041: 14 – 1042: 25.

[145] Respondent's Memorial, paras. 22, 25, 103-108.

[146] Respondent's Memorial, paras. 22, 25, 86-88.

[147] Respondent's Reply/Rejoinder, paras. 114-120, 186-188.

[148] Respondent's Memorial, paras. 22, 25, 141-146.

[149] Respondent's Memorial, paras. 22, 25, 96-102.

(d) Non-conformity with Lithuanian law and good faith

143. Finally, the Respondent submits that the Claimant's business activity, if any, is not protected by the Agreement since it is not in conformity with Lithuanian law.[150] According to the Respondent, the Claimant breached the obligation under the Lithuanian Civil Code to disclose information having essential importance to the conclusion of the contract by failing to disclose information about his relations with Boslita.[151] The Respondent submits that any rights obtained by the Claimant in breach of Lithuanian law do not satisfy the requirements of Article 1(1) of the Agreement to constitute an "investment," thereby precluding the Tribunal's jurisdiction over the present claim.[152]

144. As a general matter, the Respondent argues that the Claimant's lack of good faith prevents him from receiving any protection under international law.[153]

(e) Relevance of Lithuanian court decisions

145. The Respondent submits that the decisions made by the Alita Commission (a Lithuanian parliamentary commission set-up to analyze the Alita privatization), the Supreme Court of Lithuania, and the Constitutional Court are not relevant to the question of whether the Claimant has ever made an investment under the Agreement.[154] Findings of fact made by local authorities do not have precedential value for an international investment tribunal.[155] The Respondent also contends that, even if a tribunal could rely on decisions made by local authorities, the Tribunal here should not do so "since the Claimant himself disclosed serious deficiencies in the local proceedings."[156] In particular, the Respondent objects to the Tribunal's consideration of the judgment of the Lithuanian Supreme Court regarding the Alita tender process because the Court neither conducted a comprehensive examination of the Claimant's activities nor analyzed certain issues pertinent to this arbitration.[157] According to the Respondent, the Supreme Court's review was limited in these respects, just as it was limited to reviewing the facts in the context of national law.[158] The Respondent also argues that the findings by the Alita Commission are not only "purely political" but also "absolutely non-binding," as confirmed by the Constitutional Court.[159]

146. It is the Respondent's position that, by contrast, the Claimant selectively and intentionally avoids the judgment of the Supreme Court of Lithuania of 7 June 2011 in the criminal case brought by prosecutors against Mr. Milašauskas (the former Director General of the SPF) because it was stated therein that the SPF sought to act legally in the Alita tender.[160]

The Claimant's position

147. The Claimant argues that the present dispute concerns an "investment" in accordance with Article 9 of the Agreement because his business activities constitute an "investment" as defined by the "broad and non-exclusive" definition of Article 1.[161] According to the Claimant, the term "property invested" under

[150] Respondent's Memorial, paras. 22, 25.

[151] Respondent's Counter-memorial, paras. 189-192.

[152] Respondent's Memorial, paras. 22, 25, 112-117.

[153] Respondent's Reply/Rejoinder, para. 192.

[154] Respondent's Memorial, paras. 168-170.

[155] Respondent's Counter-memorial, para. 104.

[156] Respondent's Counter-memorial, paras. 105-106.

[157] Respondent's Memorial, paras. 194-196.

[158] Respondent's Memorial, para. 197.

[159] Respondent's Memorial, paras. 171-178.

[160] Respondent's Memorial, para. 199.

[161] Claimant's Memorial, para. 123.

Article 1(1) of the Agreement refers to the "property the investor obtained in the host State."[162] Moreover, the Claimant submits that the phrase "economic right[s] conferred by law" under Article 1(1)(e) of the Agreement refers to a "meaningfully limited category of legal rights [under Lithuanian law] that are economic in nature and which are capable of amounting to 'property invested.'"[163] Acquisition of an investment is part of a larger progression which is protected in full regardless of whether the investment has been acquired yet.[164]

148. The Claimant cites *Duke Energy v. Peru* and *Eureko* to support his position that the question for the Tribunal is not whether any one of the Claimant's transactions, when viewed in isolation, is sufficient to confer jurisdiction but whether the Claimant's interest in concluding the acquisition of Alita, as demonstrated through all of his activities, "'forms an integral part of a transaction which qualifies as an investment.'"[165] Additionally, the Claimant argues that "Paragraph 1 of the Protocol expressly provides that the protections in the Agreement apply to activities associated with investment" and that his participation in the Alita tender aimed at expanding his existing investment in Lithuania clearly constituted an "associated activity."[166]

(a) Activities prior to the Alita privatization

149. The Claimant first notes that, in light of the ordinary meaning of the term "investment" and the object and purpose of the Agreement, "contributions capable of giving rise to a protected investment (. . .) include '[a]ny dedication of resources that has economic value, whether in the form of financial obligations, services, technology, patents or technical assistance.'"[167] It is the Claimant's position that his activities leading up to the Alita tender constitute an investment when taken together with the tender participation, as they were characterized by "a commitment of resources of economic value to an ongoing business venture and resulting in legal and economic rights"; "a long-term commitment to Lithuania"; and "risk beyond that associated with an ordinary commercial transaction."[168] In particular, the Claimant submits that the License Agreement, the Service Agreement, and the Option Agreement serve as evidence of his personal continuous investment.[169] The Claimant denies that he withheld any information from the SPF regarding these prior commercial activities.[170]

150. With respect to the License Agreement with Boslita, the Claimant alleges that on 18 December 1997, he signed it on behalf of Bosca SpA to promote and sell the Bosca brand in the Baltic States.[171] According to the Claimant, the License Agreement confirms Boslita's ownership of the Bosca trademark in Lithuania, obliges Bosca SpA to provide Boslita with supervision and technical assistance, and requires the Claimant to provide Boslita "with all necessary technical instructions, formulae, processes and procedures" in exchange for royalties to be paid to Bosca SpA.[172] The Claimant states that the License Agreement constitutes "a contribution of intellectual property in exchange for an economic right to a share of Boslita's profits"[173] bringing it within the meaning of an "investment."

[162] Claimant's Brief, para. 13.

[163] Claimant's Brief, paras. 17, 19.

[164] Claimant's Brief, para. 83.

[165] Claimant's Rejoinder, paras. 139-147, citing *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Jurisdiction (1 February 2006), paras. 91-92, 125; *Eureko v. Poland*, Partial Award, para. 145.

[166] Claimant's Rejoinder, paras. 148-158.

[167] Claimant's Rejoinder, paras. 168-171, quoting *Romak S.A. v. Republic of Uzbekistan*, PCA Case No. 2007-07, UNCITRAL, Award (26 November 2009), para. 214.

[168] Claimant's Rejoinder, para. 167.

[169] Claimant's Counter-memorial/Reply, paras. 114-119.

[170] Claimant's Counter-memorial/Reply, para. 123. Hearing Transcript 481: 4-22.

[171] Claimant's Memorial, para. 127.

[172] Claimant's Memorial, para. 129.

[173] Claimant's Rejoinder, para. 178, referring to the License Agreement, Exh. C-22.

151. The Claimant contends that the fact that the License Agreement was not registered with Lithuanian authorities does not affect its validity.[174] In the Claimant's view, its existence is further evidenced by the Agreement on Coordination of Debt between Bosca SpA and Boslita dated 11 July 2005, concluded to address the non-payment of royalties due and owing under the License Agreement.[175]

152. Turning to the Service Agreement, the Claimant states that he signed it with Boslita in September 1999 and that, in accordance with its terms, he provided extensive and valuable "know-how" to Boslita.[176] The Claimant cites the decisions rendered in *CME v. Czech Republic*, *Bayindir v. Pakistan*, and *Bureau Veritas v. Paraguay*, arguing that "all forms of labor and in-kind contributions are equally capable of giving rise to an investment subject to treaty protection in certain contexts" and that, therefore, the services provided by the Claimant under the Service Agreement could give rise to a protected investment for the purpose of the Agreement.[177]

153. The Claimant further contends that ample corroborating evidence demonstrates the "blatant inaccuracy" of the Respondent's allegations as to the existence and authenticity of the Service Agreement.[178] The Claimant contests the Respondent's assertion that the Service Agreement would be incompatible with the Claimant's fiduciary obligations to Bosca SpA, arguing that the provision on which the Respondent relies from the Italian Civil Code does not apply to the situation in this arbitration.[179] Finally, the Claimant argues that he was paid by Boslita for the services he provided under the Service Agreement.[180]

154. The Claimant maintains that the Option Agreement represents the continuity of the Claimant's equity interests in Boslita before and after the Alita tender.[181] According to the Claimant, Bosca SpA acquired a thirty percent (30%) shareholding in Boslita in 1997, which, to avoid difficulties with the Competition Council in the context of the forthcoming privatization of the state-owned alcoholic beverage producers, it sold to Mrs. Skorupskienė on 2 July 2002;[182] on the same day, the Claimant personally entered into a five-year Option Agreement with Mrs. Skorupskienė.[183] The Claimant argues that the Option Agreement meets the definitions of both an "economic right" under the Agreement and an "associated activity" under the Protocol.[184]

155. Where the Respondent relies on the criteria defining "investment" as set out by the International Centre for Settlement of Investment Disputes ("ICSID") tribunal in *Salini v. Morocco*, the Claimant accepts that these criteria "may be considered in evaluating the existence of a relevant 'investment' for purposes of a bilateral investment treaty as much as for purposes of the ICSID Convention," but argues that "such factors: (1) cannot and should not be substituted for a fulsome review of all the relevant

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[174] Claimant's Counter-memorial/Reply, para. 124.

[175] Claimant's Counter-memorial/Reply, para. 117.

[176] Claimant's Memorial, para. 131.

[177] Claimant's Rejoinder, paras. 179-189, citing *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award (13 September 2001), para. 428; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 2005), para. 115; *Bureau Veritas, Inspection, Valuation, Assessment and Control, Bivac B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision on Objection to Jurisdiction (29 May 2009), para. 99. Claimant's Brief, para. 62.

[178] Claimant's Counter-memorial/Reply, paras. 143-147.

[179] Claimant's Counter-memorial/Reply, para. 148.

[180] Claimant's Brief, paras. 110-111. At the request of the Tribunal, the Claimant submitted evidence of the payments made under the Service Agreement after the Hearing. See para. 62 of this Award.

[181] Claimant's Counter-memorial/Reply, para. 129; Claimant's Rejoinder, paras. 172-176.

[182] Stock Purchase Agreement, Exhs. C-58/R-71.

[183] Option Agreement, Exhs. C-59/R-55.

[184] Claimant's Counter-memorial/Reply, paras. 135-137.

facts, and (2) cannot and should not be imposed as requirements for the existence of a protected investment under the Agreement."[185] The Claimant further argues that the Respondent's reliance on the *Salini* criteria disregards the plain terms of the Agreement.[186]

(b) Continuous investment

156. The Claimant objects to the Respondent's allegation that because the Claimant and Bosca SpA have separate legal personalities and because the Claimant did not own or control Bosca SpA, the activities of Bosca SpA are irrelevant to the question of jurisdiction in this case.[187] The Claimant submits that he had control of Bosca SpA, his family company, as the president.[188] The Claimant clarifies, however, that he does not maintain that any of Bosca SpA's interests with regard to Boslita constitute the "investment at issue" in this arbitration or that they are otherwise sufficient to confer jurisdiction on the Tribunal to hear this dispute.[189]

157. The Claimant argues that *Generation Ukraine v. Ukraine*, cited by the Respondent, should be distinguished from the present case. According to the Claimant, in *Generation Ukraine*, the State measures at issue prevented the purported investor from commencing operations in Ukraine; as a result, the tribunal found there was no relevant investment. Here, however, the Claimant had business operations in Lithuania prior to pursuing the Alita tender.[190] Thus, the Claimant argues an "overall investment operation" had commenced.[191] The Claimant submits that the fact that his participation in the Alita tender was "intimately related" to his pre-existing activities in the Lithuanian alcoholic beverages sector was confirmed at the Hearing.[192]

(c) Participation in the privatization

158. Second, the Claimant submits that his participation in the Alita tender in and of itself constitutes an "investment" under the Agreement.[193] Arguing that a distinction should be drawn between payments made by other bidders and the payment made by the successful bidder,[194] the Claimant maintains that his initial contribution of LTL 200,000 for participation in the Alita tender has all the characteristics of an "investment" and of an "associated activity" because it would have formed part of the total price to be paid for the shares of Alita had the Respondent not unlawfully terminated the tender.[195] The Claimant also points out that his payment can be distinguished from the expenses involved in *Mihaly v. Sri Lanka*, relied on by the Respondent because the expenses incurred by the investor in *Mihaly* were not connected to the tender process, but rather were the expenses the investor accumulated through its own development of the project.[196] Moreover, the *Mihaly* tribunal was careful to limit its decision to the facts and noted that it was not concluding that all pre-contractual expenditures were barred from

[185] Claimant's Rejoinder, paras. 164-166, citing *Salini v. Morocco*, Decision on Jurisdiction.

[186] Claimant's Counter-memorial/Reply, paras. 130-134, citing *Salini v. Morocco*, Decision on Jurisdiction, para. 52.

[187] Claimant's Rejoinder, paras. 124-125.

[188] Claimant's Rejoinder, paras. 126-129, 131-132.

[189] Hearing Transcript 139: 25 – 140: 11.

[190] Claimant's Rejoinder, paras. 159-161, citing *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (16 September 2003), [*hereinafter Generation Ukraine v. Ukraine*, Award].

[191] Claimant's Rejoinder, para. 160.

[192] Hearing Transcript 339: 5 – 340: 2, 342: 12-17, 483: 20 – 484: 11, 537: 2-11.

[193] Claimant's Memorial, para. 140.

[194] Claimant's Counter-memorial/Reply, para. 155.

[195] Claimant's Counter-memorial/Reply, para. 156.

[196] Claimant's Rejoinder, para. 210.

consideration in other circumstances.[197] Regarding the Respondent's position that the deposit was not attributable to the Claimant as an investment belonging to him because it was paid by a third party, the Claimant contends that this detail is irrelevant as the payments were made "at the direction of the Claimant."[198]

159. The Claimant submits that the negotiation of the SPA is clearly an activity covered by the Agreement because the Protocol provides that all paragraphs referring to "investments" apply to "associated activities" including the "making of contracts."[199] The Claimant objects to the Respondent's argument that the term "associated activit[y]" requires a pre-existing investment.[200] In any event, the Claimant submits that the process of participating in the Alita tender should properly be interpreted as an activity "associated" with the Service Agreement and other broader investment related activities that the Claimant had in Lithuania.[201]

160. In addition, the Claimant submits that his expectations that the negotiations of the SPA be concluded and conducted in good faith grant him "economic rights" under Lithuanian law and therefore constitute an investment.[202] The Claimant argues that the negotiations between the Claimant and the SPF had reached "an advanced stage of 'considerable progress,'" and that the Claimant had obtained a right under Lithuanian law to expect that the SPA would be concluded for certain.[203] The Claimant argues that the Respondent's allegation that "only 'concessions' or other rights *in rem* amount to 'economic rights' for purposes of the Agreement" is "without support in any acceptable method of treaty interpretation."[204] The Claimant insists that he was willing to complete the negotiations.[205]

(d) Non-conformity with Lithuanian law and good faith

161. Citing the Court of Appeal of Lithuania's rejection of a request by the Respondent to reopen the previous proceedings related to the Alita privatization,[206] the Claimant argues that he acted in good faith and in conformity with Lithuanian law in the context of the Alita tender.[207] In the Claimant's view, there is no evidence that either Dr. Skorupskas or the Claimant intentionally concealed anything from the SPF with respect to the Alita tender.[208]

(e) Relevance of the Lithuanian court decisions

162. The Claimant takes the position that the decisions made by the Lithuanian courts are relevant to the present arbitration because they validate the Claimant's claim regarding his allegedly illegal treatment in the context of the Alita tender and identify those responsible for the damages caused to him.[209]

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[197] Claimant's Rejoinder, paras. 208-209, quoting *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award (15 March 2002), paras. 48-49.

[198] Claimant's Counter-memorial/Reply, paras. 158-159.

[199] Claimant's Memorial, paras. 124, 150.

[200] Claimant's Counter-memorial/Reply, para. 165.

[201] Claimant's Brief, para. 70.

[202] Claimant's Memorial, paras. 141-143. Claimant's Brief, para. 48.

[203] Claimant's Counter-memorial/Reply, paras. 161-164. Claimant's Brief, para. 40.

[204] Claimant's Rejoinder, paras. 201-205.

[205] Claimant's Rejoinder, paras. 263-270.

[206] Ruling of the Court of Appeal of Lithuania, 1 March 2012, sec. IV, Exh. C-97. This ruling was upheld by the Supreme Court of Lithuania. Ruling of the Supreme Court of Lithuania, 5 December 2012, submitted by the Claimant on 10 December 2012. See para. 71 of this Award.

[207] Claimant's Counter-memorial/Reply, paras. 166-167.

[208] Claimant's Rejoinder, para. 110. Claimant's Brief, para. 123.

[209] Claimant's Memorial, para. 105. Claimant's Counter-memorial, paras. 197-198.

The Tribunal's Decision

163. The Tribunal will first comment on the relevance of Lithuanian court decisions concerning matters related to the privatization process of Alita. The Respondent is right in arguing that, as discussed further below, factual findings by local courts do not have precedential value for an international investment tribunal and are not relevant to the question of whether the Claimant has made an investment within the terms of the Agreement, a matter that in any event no Lithuanian court has been called upon to address. However, their irrelevance in this respect does not mean that the Tribunal should completely ignore those decisions, as if they had never occurred. In fact, the Respondent itself has not hesitated, as noted in paragraph 146 of this Award, to refer to such a decision in support of its claim that the SPF sought to act legally in the Alita tender. The Tribunal is clearly not bound by any local court judgment but it must take them as facts which, together with other evidence submitted by the Parties, must be considered by the Tribunal in determining, on the basis of the Agreement and international law, whether the Claimant has made an investment and whether the Respondent has breached the Agreement. In reaching its determination, the Tribunal need not rely on the findings of the Lithuanian courts, though it finds them informative for understanding the domestic law provisions and their meaning and application to the circumstances.

164. In its consideration of whether there is a "dispute (. . .) on investments" in the present proceedings, the Tribunal observes that there is clearly a dispute between the Parties according to the plain meaning of the term and that that dispute concerns the Respondent's retraction of the Claimant's winning bid in the Alita tender process. The Parties have presented several arguments outlined above as to whether the elements of the Alita tender process, and the Claimant's other commercial activities in Lithuania, constitute "investments" such that the dispute may be considered to be a "dispute (. . .) on investments" giving the Tribunal jurisdiction according to the Agreement.

165. At the outset, the Tribunal observes that nothing in the Agreement distinguishes a dispute "on investments" from one "arising out of or relating to" investments. The Agreement defines "investment" in Article 1(1) as "any kind of property invested (. . .) by a natural or legal person of a Contracting Party in the territory of the other Contracting Party." The Tribunal concentrates on the meaning of "investment" and its extension to associated activities as described in Paragraph 1 of the Protocol. As noted by the legal experts for the Claimant and the Respondent, the Agreement, including its Protocol which is "deemed to form an integral part of the Agreement,"[210] contains a very broad definition of what constitutes an investment. Prof. Dolzer states that, "[t]he scope of the term 'investment' so defined in the main text and the Protocol is unusually broad by any standard of investment law." [211] Prof. Volterra opines that, "[a]lthough Article 1 of the BIT indeed contains a broad definition of 'investment,' and possibly the broadest, it is not 'unusually broad.'"[212] The Tribunal does not believe that there is a significant difference between an "unusually broad" and "possibly the broadest" definition of "investment."

166. For the reasons that follow, the Tribunal concludes that the Claimant made an investment in Lithuania when he concluded and realized the Service Agreement. In the Tribunal's view, winning the tender in the Alita privatization and negotiating the SPA – the subject of the present dispute – was an associated activity, as described in Paragraph 1 of the Protocol, subject to the same protection as any investment falling within Article 1 of the Agreement. The Tribunal need not decide whether the Agreement allows it to take jurisdiction over disputes concerning activities in advance of the establishment of an investment since it finds that the Claimant had an investment at the relevant time and that the disputed activity was associated with it in such a way as to bring it under the protection of the Agreement's substantive provisions.

167. On the other hand, the Tribunal is of the view that the activities of Bosca SpA in Lithuania in the late 1990s including the License Agreement with Boslita and Bosca SpA's minority shareholding between

[210] Protocol, opening paragraph.

[211] Dolzer First Expert Report, paras. 11-12, 41.

[212] Volterra First Expert Report, para. 12.

1997 and 2002 did not constitute investments of the Claimant for purposes of this arbitration. Thus, the Tribunal need only focus on the Claimant's activities in his personal capacity.

168. In that context, it is clear that the Claimant was devoting resources to a commercial venture in Lithuania with the expectation of profit as early as the time of the Service Agreement vis-à-vis Boslita. The Tribunal considers that the Service Agreement is more than an "ordinary contract for the supply of services" as the Respondent suggests.[213] Weighing the totality of the evidence submitted by the Parties, such as the list of services the Claimant provided under that Service Agreement, his many trips to Lithuania during the relevant time, his testimony and that of Dr. Skorupskas to that effect, the Tribunal determines that the Service Agreement constituted an investment as defined in the Agreement and the Protocol. Despite the difficulties highlighted by the Respondent concerning the execution, authenticity, and realization of the Service Agreement, the Tribunal finds that the Claimant has substantiated his contributions to Boslita under the Service Agreement as well as the payment he received in return for his services, albeit only recently.[214] In particular, the Tribunal is left with no doubt that the Claimant contributed considerable know-how to Boslita during the duration of the Service Agreement and know-how is specifically mentioned in Article 1(1)(d) as one form of investment under the Agreement. The Service Agreement had the necessary elements of contribution, risk and duration typically considered basic characteristics of an investment.

169. On the other hand, the Tribunal is persuaded by the Respondent's argument that the Option Agreement does not constitute an investment. In contrast with the Service Agreement where he was to receive remuneration, the Claimant admitted that he paid no consideration for "rights" under the Option Agreement nor had he exercised those rights at the time of the Option Agreement's expiration in 2007. Nothing in the Agreement, either in its definition of investment in Article 1 or in its definition of associated activities under Paragraph 1 of the Protocol, would cover this Option Agreement under these circumstances. In any event, no claim is made in connection with the Option Agreement. The Tribunal's only interest in that event is that it brings some support to the Claimant's alleged desire to expand his presence and activities in Lithuania during the period covered by the present dispute but it has no bearing on the Tribunal's conclusion on this point.

170. The Tribunal also agrees with the Respondent that the Claimant has not substantiated any argument that the Respondent interfered with his Service Agreement investment. The Claimant's claim in the present arbitration concerns only the Respondent's treatment of the Claimant in the course of the Alita tender to which the Tribunal now turns.

171. The Claimant's interest and participation in the Alita tender followed the establishment of the Boslita brand in Lithuania through the License Agreement signed between Boslita and Bosca SpA in 1997 and his own Service Agreement of 1999 with Boslita. Subsequently, the Claimant sought to expand the venture, pursuing another opportunity to grow the presence of Bosca products in the Baltic States. To do so, the Claimant embarked on the acquisition of Alita, making the required payments and preparing appropriate materials until, having offered a purchase price about double those of the other bidders, he was declared the winner of the tender and would thereafter negotiate the final terms of the SPA with the State.

172. These activities gave the Claimant a solid foundation to build upon his investment through an associated project. Looking to the Protocol to the Agreement, which includes among its provisions examples of "associated activities" to be treated as investments, the Tribunal concludes that becoming the tender winner and negotiating the SPA can be likened to "making [a] contract[]." Thus, the Tribunal finds that these activities between the Claimant and the SPF constitute an "associated activit[y]" granting the Tribunal jurisdiction over the Claimant's claim. Applying for and winning the tender led the Claimant to the contract-negotiating table. The Tribunal notes in particular that, when they were

[213] Respondent's Memorial, para. 51.

[214] Only at the Hearing did the Tribunal hear for the first time that the Claimant was receiving payments under the Service Agreement. Hearing Transcript 155: 25 – 159: 4. The Respondent has highlighted many "discrepancies" with respect to the authenticity of the Service Agreement and when it was signed. See, *e.g.*, Hearing Transcript 539: 22 – 540: 10. The Tribunal will address the Respondent's further arguments on the evidentiary nature of the Service Agreement and others of the Claimant's transactions again below. See para. 318 of this Award.

terminated by the SPF, the negotiations were at an advanced stage in which only three terms remained for discussion, two of them already agreed between the Parties' representatives but still subject to confirmation by the Claimant. In the Tribunal's view, the culmination of the tender process announcing the Claimant as the winner and commencing the negotiation of the SPA falls within the express terms and intended meaning of an associated activity.

173. The Service Agreement did not need to contemplate the acquisition of Alita for the tender process to constitute an associated activity. In the absence of an express definition of "associated," the Tribunal considers that activities are associated through their common purpose, aims, and operation. The Claimant's monetary contributions, despite their later reimbursement by the State following a decision by the Supreme Court of Lithuania ordering such reimbursement, demonstrated the seriousness of purpose the Claimant brought to the table; the status of those contributions, whether considered as a down payment or otherwise, has no bearing on the characterization of the Claimant's on-going activities.

174. As to the Respondent's allegation that the Claimant has not contributed any of his own funds to the alleged investment because the monetary contributions for the tender process were paid by third parties, the Tribunal is satisfied that the Claimant has demonstrated that these sums were advanced at his direction and on his own behalf.[215] That these sums were later reimbursed by the Respondent at the order of the Supreme Court may be something to be considered by the Tribunal when assessing damages but it does not change the fact that these amounts must be considered as having been made on behalf of the Claimant; at no time during the negotiation process did the Respondent raise any question in that regard.

175. Neither Party disputes that the Parties were in the process of negotiating a contract. Winning the tender set the Claimant apart from the other bidders allowing him to commence the contract-making process. The Respondent insists that the reference to "making [a] contract[]" means to include only the signature of a contract surrounding its entry into force. The Tribunal is not convinced by this interpretation. Rather, the Tribunal understands the term in its context in the Protocol, "the making, performance and enforcement of contracts," to be less restrictive than the Respondent proposes. Nothing in the Agreement or in its Protocol suggests that the drafters intended "making" to be so limited.

176. As to the Respondent's argument concerning the alleged failure of the Claimant to provide information of essential importance, the Tribunal is satisfied by its analysis of the relevant documents produced by the Parties and the testimony given at the Hearing that the Claimant responded adequately to the Respondent's queries at the time of his investment and did not intentionally conceal his business activities.[216] The Tribunal will further address this issue below.

177. Finally, there is the question whether the Claimant acquired an economic right accruing by law, as mentioned under the definition of "investment" in Article 1(1)(e) of the Agreement. This question does not concern any guarantee on the part of the Claimant that the SPA would be concluded; rather, it concerns whether he had an investment under the terms of the Agreement by having a right to expect that the Respondent would meet its good faith negotiation obligations. The Tribunal sees no need to take up this issue given the Tribunal's determination that the Claimant already had an investment and that his participation in the negotiations also received protected status pursuant to the Agreement.

178. The Tribunal therefore concludes only that the Claimant made an investment under the Agreement in the form of the Service Agreement and that his participation in the negotiations after winning the Alita bidding process constituted an associated activity under the Protocol of the Agreement.

[215] Bosca First Witness Statement, para. 43; Skorupskas First Witness Statement, para. 37; Cash Receipt No. 835856336, 1 April 2003, Exhs. C-27/R-45; Transaction details for initial contributions to AB Alita on behalf of L. Bosca, 2 May 2003, Exhs. C-28/R-46.

[216] Hearing Transcript 441: 25 – 442: 12.

3. Alleged termination of the Agreement

The Respondent's position

179. The Respondent submits that, in light of concerns the Republic of Italy had as to the compatibility between the Agreement and EU law and "being aware of the Claimant's claim and possible abuse of the [Agreement]," the Contracting Parties to the Agreement decided to terminate it upon the expiration of its 15-year term, *i.e.*, on 15 April 2012.[217]

The Claimant's position

180. The Claimant maintains that the documents offered by the Respondent on this point do not support its argument and that the argument is frivolous.[218]

The Tribunal's Decision

181. The Tribunal is not persuaded that the Agreement was terminated on the basis of the evidence provided: a Note Verbale to the Republic of Lithuania in which the Italian Republic merely sought the views of the Republic of Lithuania.[219] In its response, the Republic of Lithuania does not agree to annul the Agreement, but rather reiterates the Agreement's validity.[220] In the Tribunal's view, the Respondent's assertion is undermined by the plain text of the correspondence between the Contracting Parties.

182. On the basis of all the above, the Tribunal concludes that it has jurisdiction over this dispute.

C. JUST AND FAIR TREATMENT

The Claimant's position

183. In the Claimant's view, the obligation on the Contracting Parties in the first sentence of Article 2(2) of the Agreement to "ensure just and fair treatment of the investments of investors of the other Contracting Party" should be construed in the same way as the obligation found in many bilateral investment treaties to provide "fair and equitable treatment" ("FET"). The Claimant asserts that FET is understood to incorporate a requirement that States act consistently with an investor's "legitimate expectations."[221]

184. The Claimant submits that the Respondent acted contrary to the Claimant's "legitimate expectations" in violation of the first sentence of Article 2(2) in two related respects.[222] First, the Claimant argues that the Respondent violated domestic law and policy in its actions toward the Claimant thereby

[217] Respondent's Reply/Rejoinder, para. 194.

[218] Claimant's Rejoinder, para. 112.

[219] Note Verbale from the Republic of Italy to the Republic of Lithuania, dated 21 August 2007, Exh. R-144. Note Verbale from the Republic of Italy to the Republic of Lithuania, dated 1 February 2012, Exh. R-146.

[220] Note Verbale from the Republic of Lithuania to the Republic of Italy, dated 30 March 2012, Exh. R-145.

[221] Claimant's Memorial, paras. 165-166, 168, citing *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability (25 August 2006) [*hereinafter Total v. Argentina*, Decision on Liability], para. 106; *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (11 September 2007) [*hereinafter Parkerings v. Lithuania*, Award], para. 277; *MTD v. Chile*, Award, para. 113; *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award (17 March 2006), [*hereinafter Saluka v. Czech Republic*, Partial Award], paras. 297, 302.

[222] Claimant's Memorial, para. 163.

undermining the Claimant's legitimate expectations formed on the basis of Lithuanian law.[223] Second, the Claimant asserts that the Respondent's lack of good faith in undertaking negotiations with the Claimant constitutes an independent basis for its violation of the first sentence of Article 2(2).[224]

185. The Claimant first argues that his decision to participate in the Alita tender was premised on his expectations arising from "the domestic legal framework; from the [G]overnment's stated policies; and from the fundamental premise that the [Respondent would] deal with the investor and its investment consistently, transparently and in good faith."[225] It is the Claimant's position that his expectations "were subsequently destroyed by the cumulative actions" of the Respondent.[226] The Claimant asserts that the Respondent's violation of its own legal order is persuasive evidence that it acted with casual disregard to the rule of law in violation of the first sentence of Article 2(2).[227] Turning to other sources, the Claimant cites *Eureko v. Poland*, in which the tribunal stated that "[the respondent's] arbitrary and unlawful disregard for the extant strategy and policy (. . .) by necessity" violated an investor's legitimate expectations of investment expansion.[228]

186. The Claimant distinguishes this case from cases that involve changes to the existing legislative framework.[229] In the Claimant's view, the actions of the SPF during the Alita tender were political and incompatible with the applicable Lithuanian law and regulations as well as the Lithuanian Constitution.[230]

187. Second, the Claimant argues that the SPF "unreasonably frustrated" his efforts to finalize the SPA, and that the SPF "failed to 'develop a workable cooperative solution'" with him in the negotiations, demonstrating its bad faith.[231] The Claimant refers to the statement made by the Lithuanian Supreme Court that the SPF's unlawful conduct had "undermined [the Claimant's] reasonable trust and lawful expectations that the agreement [would] be concluded."[232] The Claimant submits that the Respondent's *ex post facto* "justification" for the termination of the negotiations (that the Claimant was unwilling to participate) is unconvincing and in any event does not justify its breach of the FET obligation.[233]

188. According to the Claimant, FET protection extends to investors at a pre-contract stage.[234] Not only is a contract not required for legitimate expectations to be formed, but some tribunals have concluded that, under customary international law, FET is a quasi-contract protection.[235] The Claimant maintains that

[223] Claimant's Memorial, para. 175.

[224] Claimant's Memorial, para. 182.

[225] Claimant's Memorial, paras. 169-175. Claimant's Counter-memorial/Reply, para. 210.

[226] Claimant's Memorial, para. 175.

[227] Claimant's Counter-memorial/Reply, para. 207, citing *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment of 20 July 1989, 1989 I.C.J. Reports 15, para. 128.

[228] Claimant's Memorial, paras. 178-181, citing *Eureko v. Poland*, Partial Award, paras. 191, 196, 198, 207-208.

[229] Claimant's Counter-memorial/Reply, paras. 221-224, referring to *Continental Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award (5 September 2008), paras. 132-147, 258.

[230] Claimant's Memorial, para. 176.

[231] Claimant's Memorial, paras. 182-185, citing *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award (19 January 2007), [*hereinafter PSEG v. Turkey*, Award], paras. 186, 242, 246.

[232] Claimant's Memorial, para. 188, quoting Supreme Court of Lithuania, Judgment (10 October 2006), Exh. C-1E, p. 13.

[233] Claimant's Counter-memorial/Reply, paras. 219-220.

[234] Claimant's Counter-memorial/Reply, paras. 206, 208.

[235] Claimant's Counter-memorial/Reply, paras. 206, 208, citing *Glamis Gold, Ltd. v. United States of America*, UNCITRAL/NAFTA, Award (8 June 2009), para. 767.

since the SPA negotiations had advanced to such a stage that they could not have been terminated under Lithuanian law, he had "legitimate expectations" that the contract would be concluded.[236]

189. Moreover, legitimate expectations may arise not only from "specific assurances given to the investor" but also, the Claimant argues, from "the prevailing legal framework at the time of investment."[237] In any event, the Respondent did make "specific commitments," through the Law on Privatization of State-Owned and Municipal Property and its accompanying Regulations as well as the Alita Information Memorandum, that "it would obey the rule of law in the process of privatizing Alita."[238]

190. Finally, the Claimant objects to the Respondent's allegation that the Claimant did not act in good faith by not providing the Respondent with information requested by the SPF and that the Claimant could not form legitimate expectations as a result.[239] The Claimant contends that he "responded fully and completely" to the questions asked by the Respondent in the tender process, and that the Respondent was well aware of his business activities including his relationship to Boslita.[240]

The Respondent's position

191. Adopting the Claimant's argument that the Agreement intended to import the FET standard of "legitimate expectations," the Respondent submits that the Claimant could not have had any legitimate expectations permitting recovery under the Agreement. It asserts that any expectation on the part of the Claimant that the SPA would be concluded based on the announcement of the Claimant as the tender winner cannot be described as objective, reasonable and legitimate and would not give rise to a claim under the Agreement.[241] In the Respondent's view, the SPA negotiations did not create any specific rights that could justify legitimate expectations, nor did the general legal framework surrounding the tender process create such expectations.[242]

192. The Respondent argues that legitimate expectations must be based on "a specific assurance or a promise of a State"[243] and that no specific assurances were given here with respect to the conclusion of the SPA.[244] The Claimant's pre-contractual right was "neither specific nor explicit or enforceable enough to generate legitimate expectations."[245] The Respondent differentiates the *Tecmed v. Mexico* case, in which the tribunal found that the State violated the investor's legitimate expectations, on the basis that, there, the investor had the necessary permit to invest which gave rise to its expectations, whereas no legitimate expectations had arisen here through the negotiation process.[246] In the Respondent's view, the Claimant gained only "the right to be invited to negotiate the SPA prior to other bidders."[247]

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[236] Claimant's Counter-memorial/Reply, para. 209. Claimant's Memorial paras. 100-101.

[237] Claimant's Counter-memorial/Reply, paras. 210-216, quoting *Suez, Sociedad General de Aguas de Barcelona S.A., and Interagua Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability (30 July 2010), para. 203.

[238] Claimant's Counter-memorial/Reply, paras. 216-217.

[239] Claimant's Counter-memorial/Reply, para. 225.

[240] Claimant's Counter-memorial/Reply, paras. 226-229.

[241] Respondent's Counter-memorial, paras. 156-159.

[242] Respondent's Reply/Rejoinder, para. 237.

[243] Respondent's Counter-memorial, para. 158.

[244] Respondent's Counter-memorial, paras. 159-166.

[245] Respondent's Reply/Rejoinder, paras. 239-240, 243-248.

[246] Respondent's Counter-memorial, para. 167-168. Respondent's Brief, para. 96. *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003), [*hereinafter Tecmed v. Mexico*, Award].

[247] Respondent's Reply/Rejoinder, para. 250.

193. The Respondent claims that the Claimant failed to provide information regarding Bosca SpA's shareholding in Boslita during the Alita tender despite the SPF's numerous requests and that such failure to cooperate "plainly conflicts with the duty of good faith."[248] In effect, the Claimant's concealment of his relations with Boslita precludes his "legitimate expectations" argument.[249] Moreover, the Respondent points to the following facts: (1) the Claimant failed to provide evidence of his ability to pay for Alita's shares; (2) the Claimant ignored the inquiries sent from the SPF to him and his representatives; (3) the Claimant failed to express his disagreements, if any, to the SPF; and (4) the Claimant failed to show up to initial the draft SPA despite several requests and warnings by the Lithuanian authorities.[250]

194. Even if the tender created legitimate expectations on the part of the Claimant, the Respondent maintains that only a "blatant disregard" of the applicable tender rules violates the FET standard and that the SPF's decision to annul the Alita tender results was not a "blatant disregard" of the rules.[251] The Respondent submits that the SPF's decision to terminate the negotiations was based on the Claimant's conduct during the negotiations.[252]

The Tribunal's Decision

195. The Tribunal will begin with the following preliminary comments.

196. The expression "just and fair treatment" is used in the first sentence of Article 2(2) of the Agreement but, as the Parties have accepted, there is no reason to consider that it has a different meaning from "fair and equitable treatment" found in many investment treaties and arbitral awards. Thus, the Tribunal will treat "just and fair treatment" as having the same meaning as FET. The same conclusion has been reached in a number of awards addressing similar terms.[253]

197. Secondly, it is worth repeating that the Tribunal is not bound by the conclusions of the Alita Commission. Other than the occasional reference, in light of the political nature of that Commission, the Tribunal will not consider the Commission's conclusions in reaching the Tribunal's decision.

198. Nor is the Tribunal bound by the decisions of the Lithuanian courts on the subject, as discussed above, even though due deference should be given to such decisions, particularly when they interpret Lithuanian law. In the *Helnan v. Egypt* case,[254] the arbitral tribunal stated that, when a tribunal is considering an issue of domestic law previously ruled upon by a domestic court, the tribunal "will accept the findings of local courts as long as no deficiencies, in procedure or substance, are shown in regard to the local proceedings which are of a nature of rendering these deficiencies unacceptable from the viewpoint of international law, such as in the case of a denial of justice." No such inappropriate conduct by the local courts has been alleged in the present case; the Lithuanian courts appear to have applied high standards of judicial propriety in each of their judgments.

199. Thirdly, the Tribunal is called upon to address the issues raised by the present dispute under the provisions of the Agreement, international law and, where the Agreement refers to local laws, Lithuanian law. For this reason, a breach of the privatization process under domestic law does not, without further analysis, constitute a breach of the Agreement. The Tribunal has to base its conclusions

[248] Respondent's Counter-memorial, paras. 174-175. Respondent's Reply/Rejoinder, paras. 252-255. Respondent's Brief, para. 87.

[249] Respondent's Counter-memorial, para. 176. Respondent's Reply/Rejoinder, para. 254. Respondent's Brief, paras. 87-90, citing expert testimony found at Hearing Transcript 967: 6-14, 1099: 4-17.

[250] Respondent's Brief, para. 103.

[251] Respondent's Reply/Rejoinder, para. 257.

[252] Respondent's Counter-memorial, paras. 169, 177-183. Respondent's Reply/Rejoinder, paras. 260-262.

[253] *Total v. Argentina*, Decision on Liability, para. 106; *Parkerings v. Lithuania*, Award, para. 277.

[254] *Helnan International Hotels v. Arab Republic of Egypt,* ICSID Case No. ARB/05/19, Award (3 July 2008), para. 106.

on the substantive provisions of that Agreement. As stated in Article 3 of the ILC Articles on State Responsibility, "[t]he characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."[255] The ad hoc committee in the *Vivendi* case put it this way: "[a] state may breach a treaty without breaching a contract, and *vice versa*."[256]

200. Finally, in the same way, the decision of the Supreme Court of Lithuania of 7 June 2011 to the effect that the former Director General of the SPF, Mr. Milašauskas, was not guilty of a criminal act does not rule out the possibility that the Respondent, through the SPF, breached the Agreement. As stated by the Supreme Court, "[a]buse of office is a premeditated crime" involving intent to abuse one's office and knowledge that one's actions "might cause huge damages to the State."[257] In analyzing whether a State or one of its agents breached a substantive provision of an investment agreement, an arbitral Tribunal does not refer to the same criteria as those that apply in domestic criminal law.

201. Upon review of the evidence and submissions produced by the Parties, the Tribunal concludes that, in the present instance, the Respondent has breached its obligation of just and fair treatment contained in the Agreement.

202. The breach in question here is not a breach of a contract (which the Claimant himself recognizes never came into existence)[258] between the Claimant and the SPF. It rather results from the breach of the Claimant's rights by virtue of the Respondent's conduct in the privatization of Alita including when viewed in the context of the relevant provisions of the Lithuanian Civil Code (particularly Articles 6.159 and 6.163) and of the Law on Privatization of the State-Owned and Municipal Property of the Republic of Lithuania ("Privatization Law") and Tender Regulations (particularly Articles 20-21 of the Law[259] and Articles 38-60 of the Regulations).[260]

203. After having been declared the winning bidder of the privatization of Alita on 26 June 2003,[261] the Claimant was entitled to good faith negotiations[262] toward an SPA with the SPF, carried out according to law. In his bid of 7 May 2003,[263] the Claimant, who offered by far the highest price for the purchase of Alita, also proposed three terms which differed from those of the standard SPA issued to bidders by the SPF.[264] He wished to pay the purchase price in two installments rather than one lump sum, to name Paris as the place of arbitration rather than Lithuania, and to see the penalties for breach of the SPA reduced from one hundred percent (100%) to one percent (1%) of the purchase price. From the moment of the bid's acceptance, the Parties were bound by the provisions of the Civil Code to pursue their negotiations in good faith.

204. The Tribunal finds telling that, when accepting the Claimant's bid on 26 June 2003, the PTC approved his bid without expressing any reservation while it was surely aware of the conditions the Claimant had introduced in his bid. On that occasion, the PTC decided "[a]s a result of the assessment of the tenders

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[255] Responsibility of States for International Wrongful Acts, UN Doc. A/RES/56/83, 12 December 2001.

[256] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic,* ICSID Case No. ARB/97/3, Decision on Annulment (3 July 2002), para. 95.

[257] Judgment of the Supreme Court, Criminal Case No. 2K-292/2011, Exhs. C-47/C-62/R-85, p. 5.

[258] Claimant's Brief, para. 41.

[259] Privatization Law, Exh. R-1.

[260] Tender Regulations, Exh. R-2.

[261] Minutes No. 6 of the PTC, Exhs. C-31/R-25.

[262] Article 6.163 of the Civil Code, Exh. RLA-36.

[263] Draft SPA provided by the Claimant, Exh. R-13.

[264] Standard draft Share Sale and Purchase Agreement, Exh. R-8; Draft SPA provided by the Claimant, Exh. R-13.

and their respective specifications and clarifications delivered by the buyers (. . .) , to recognise Luigiterzo Bosca the winner of the public tender for privatisation of (. . .) Alita."[265]

205. Similarly, in its letter of 30 June 2003 to Dr. Skorupskas announcing the winner of the public tender,[266] the SPF simply invited him to a meeting for "preparation of the draft agreement on sale-purchase of the shares (. . .) ," without any indication that the conditions noted by the Claimant in his bid could be an obstacle to the conclusion of the SPA.

206. The minutes of the subsequent meeting of the PTC on 8 July 2003 with the Claimant, Dr. Skorupskas and Jonas Saladžius, a Lithuanian lawyer representing the Claimant, indicate that it was decided that "the Buyer and the representatives of the State Property Fund deal with the issues raised during the sitting and inform the other side about possible resolution and results thereof."[267] But, according to the minutes, the only issue raised on that occasion relating to the conditions put forward by the Claimant in his bid concerned the Claimant's intention to make the payment of the purchase price in two installments; he appears to have been asked merely if his intentions had changed in that respect and told that, if not, a bank guarantee would be required. The other matters addressed during the 8 July meeting dealt with the aim to reach an agreement by early August, the timing of a shareholders' meeting of Alita, the advisability for the Claimant to submit a notification to the Competition Council and the issuance of a press release.

207. While the draft SPA subsequently transmitted to the Claimant by the SPF did not include the conditions laid out by the Claimant, one would have expected that, if these conditions were matters that the Respondent could not accept, the Respondent would either have rejected the Claimant's bid or, at least, indicated that these three conditions were matters of concern that should be the subject of further negotiations.

208. Again, according to the minutes of a meeting between representatives of the Claimant and the PTC on 11 July 2003, only the Claimant's method of payment, an update of the information about Alita and the Claimant's preparation of documents for the Competition Council were discussed.[268]

209. The Parties have advised the Tribunal that negotiations took place during the course of the summer but it is only in the minutes of the 26 August 2003 meeting between the PTC and representatives of the Claimant (these representatives refused to sign the minutes alleging that they were inaccurate) that the issue of the fines and the place of arbitration are mentioned.[269] It appears to have been stated on that occasion that the PTC "disagreed to reduce the fines stipulated in the draft agreement presented to the Buyer."[270] On the other hand, the Claimant's representatives indicated that they would consider the possibility of satisfying the purchase price in a single payment and the Respondent agreed to consider the Claimant's proposal that the place of arbitration be Paris.

210. Assuming that the minutes of 26 August 2003 constitute a reasonable summary of the discussions which took place and even accepting the reservations expressed in that respect by the Claimant's representatives, it would be fair to conclude that, by that time, the only point of significant disagreement between the Parties had to do with the issue of fines which remained unresolved at the time of the annulment of the Claimant's tender on 14 October 2003.

211. In his witness statement commenting on a meeting of 8 September 2003 with Dr. Skorupskas and Mr. Saladžius, Mr. Nosevič alleges that, on that occasion, "all unresolved issues were closed and the draft SPA in the Lithuanian language, which provided for payment of the whole purchase price in one

[265] Minutes No. 6 of the PTC, Exhs. C-31/R-25.

[266] Announcement of the Winner of the Public Tender sent by PTC Chairman Antanas Malikėnas to Gintaras Skorupskas, Exhs. C-32/R-26.

[267] Minutes No. 10 of the PTC, Exhs. C-44/R-29.

[268] Minutes No. 11 of the PTC, Exhs. C-45/R-30.

[269] Minutes No. 20 of the PTC, Exhs. C-46/R-32.

[270] Minutes No. 20 of the PTC, Exhs. C-46/R-32.

instalment, was finally coordinated."[271] It is interesting to note that, in the minutes, no mention is made of the issue of fines, an issue that was clearly much more contentious and important to each Party than whether the payment of the purchase price was to occur in one or two installments.

212. Both Parties recognize that there was no obligation on either of them to eventually sign an SPA which did not meet the conditions each of them had set out. However, once the Claimant had been selected as the winner of the tender, both were bound by the Lithuanian Civil Code to carry out negotiations toward an SPA in good faith[272] and the Claimant had legitimate expectations that, if the SPF abided by the Privatization Act and the Tender Regulations, he would eventually initial an SPA. He could further expect that that signed SPA would then be subject to confirmation by the PTC and, if the PTC refused such confirmation, the SPF could then refer the matter to the Government for a final decision.[273] The SPF was thus under an obligation to pursue the negotiations through the process established under the Regulations; this obligation implied that the SPF needed to propose final terms, after having sought the input of the Claimant on the outstanding issues, and to have the result recorded in the minutes of negotiations, thus formally concluding the negotiations on the basis of those terms. The Claimant's limited communication during this period did not relieve the SPF of its legal obligations in this respect.

213. Unfortunately, the PTC and the SPF decided to short-circuit the privatization process. On 10 October 2003, the PTC proposed to the SPF "to cancel the results of the public tender and to adopt respective decisions regarding the further course of privatization of AB Alita,"[274] even though the PTC was made aware that there were still outstanding issues to be finalized. On 14 October, the SPF issued the Annulment Order, annulling the award of the tender on the basis of the Claimant's failure to initial the draft SPA and authorizing the PTC "to conduct negotiations with the second place winner of the public tender."[275]

214. The Lithuanian Supreme Court, reviewing many of the same facts as in the present case, concluded in its 2006 judgment, that "the negotiations for the preparation of the draft [SPA] for initialling were disrupted due to unlawful actions of the [PTC] and that the [Claimant] was eliminated from the negotiations without a sufficient reason (without reaching agreement on the payment procedure). Such behavior on the part of the [PTC] undermined the [Claimant's] reasonable trust and lawful expectations that the [SPA would] be concluded."[276] The Supreme Court then ruled that the SPF "exercised its right to annul the results (. . .) in an inappropriate and unfair manner" and that "the actions of the [PTC] were unjustified and unfair."[277]

215. It would be conceivable for the Tribunal to conclude nonetheless that the failure by the PTC and the SPF to fully abide by the procedure set in the Privatization Law and the Tender Regulations, while illegal under Lithuanian law, does not give rise to a breach of "just and fair treatment" or of the FET standard. A procedural illegality does not inevitably result in a breach of the substantive provisions of an investment treaty under international law. Evaluating whether there has been a breach of the FET standard requires a fact-specific analysis; on these facts, the Tribunal concludes a violation must entail more than a simple procedural misstep.

216. However, a number of circumstantial events from September 2003 to the end of that year lead the Tribunal to conclude that it is faced with more than a mere procedural error.

217. There is, first of all, a letter of 2 September 2003 from the SPF inviting the Claimant to initial the draft SPA on 4 September and acknowledging that "a few non-material items of the agreement remained for

[271] Nosevič Witness Statement, para. 48.

[272] Articles 1.5, 6.4, 6.158 and 6.163 of the Civil Code, Exh. RLA-36.

[273] Decree 1502, Article 46 of the Tender Regulations, Exh. R-2.

[274] Minutes No. 24 of the PTC, Exhs. C-48/R38, p. 2.

[275] Annulment Order, Exhs. C-37/R-39.

[276] Judgment of the Supreme Court, Civil Case No. 3K-7-470/2006, Exh. C-1E, p. 13.

[277] Judgment of the Supreme Court, Civil Case No. 3K-7-470/2006, Exh. C-1E, p. 14.

coordination."[278] While it is true that, according to the draft SPA sent to the SPF on the Claimant's behalf on 28 August 2003 by Mr. Saladžius, the Respondent appeared willing to move the place of arbitration to Stockholm and the Claimant was ready to pay the purchase price in a single payment, (the negotiators for each side still needed confirmation from their principals), there still remained the issue of the fines that could be imposed in case of a breach of the SPA investment undertaking. All three conditions had been made part of the Claimant's bid, declared by the PTC to be the winner of the public tender, and remained present in his application materials when that action was approved by the SPF on 30 June 2003.

218. Even though it was recognized by both sides that there remained matters to be negotiated, the Claimant had legitimate expectations that none of the conditions he had set in his bid would be insurmountable obstacles to the conclusion of the SPA. The same conclusion was reached by the Supreme Court of Lithuania when it declared in its 10 October 2006 judgment that "the principle of good faith requires that any negotiations in which considerable progress has been reached are not disrupted without a sufficient reason. The prohibition on disruption of negotiations in which considerable progress has been reached is explained by the fact that, in such negotiations, a party has reasonable grounds for believing that the intentions of the other party are serious and that the agreement will be concluded for certain."[279] As mentioned above, if the Respondent's representatives had severe reservations concerning the conditions attached to the Claimant's bid, they should, at least, have made them clear when approving the Claimant's bid. While the issues of the arbitration venue and the method of payment appeared to be nearing resolution by the end of August, it is more than strange for the SPF to state in its 2 September 2003 letter that only "a few non-material items of the agreement remained for coordination." In an earlier email of 25 July 2003 to Mr. Saladžius, Mr. Nosevič had simply stated: "the decision on the sizes of amounts/penalties/interest payable on delay will be made by the representatives of the Commission of the Public Tender."[280] And it is only in the minutes (contested by the Claimant's representatives) of a 26 August 2003 meeting between the PTC and the Claimant's representatives that the first indication that the PTC "disagreed to reduce the fines stipulated in the draft agreement presented to the Buyer" appears.[281] The Claimant was fully entitled up to that time to assume that his condition on fines would be either accepted or reasonably compromised. On 2 September 2003, a letter was sent to the Claimant inviting him to initial two days later a draft SPA which contained no change at all by the Respondent to the 100% level of fines.

219. Then, there is the meeting of 8 September 2003, between the then Prime Minister, Mr. Brazauskas, and the Director General of the SPF, Mr. Milašauskas, along with the head of the State security department and the police commissioner. On the occasion of that meeting, according to the minutes, Mr. Brazauskas instructed the SPF to submit a certificate prepared by officers of the national law enforcement authorities concerning the Claimant's reliability as an investor.[282] Nonetheless, Mr. Milašauskas testified that the meeting was about the economic impact of the Alita privatization and its consequences for Lithuania.[283] It is unusual, to say the least, that, taking into account the alleged objective of the meeting, the participants should be the head of the security service and the police commissioner and not officials of departments dealing with economic matters.

220. The very next day, the SPF sent a letter to Dr. Skorupskas requesting information concerning the Claimant's shareholding in Bosca SpA and the Claimant's and Bosca SpA's shareholding in "Boslita ir Co. and Boslita." There followed a series of repeated requests to Dr. Skorupskas concerning Bosca SpA.

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[278] Letter from PTC Chairman Antanas Malikėnas to Gintaras Skorupskas, Exh. R-33.

[279] Judgment of the Supreme Court, Civil Case No. 3K-7-470/2006, Exh. C-1E, p. 13.

[280] E-mail from Miroslav Nosevič to Jonas Saladžius along with draft SPA, as an attachment thereto, Exh. R-121.

[281] Minutes No. 20 of the PTC, Exhs. C-46/R-32, p. 2.

[282] Media Article: *Aldona Jankauskienė, Buyer of Alita Did Not Succeed in Appeasing the Mayor of Alytus*, LIETUVOS RYTAS, Exh. C-133; E-mail from the PTC member Judita Barkauskienė to Gintaras Skorupskas, dated 15 September 2003, Exh. R-92; Media Article: *Algirdas Brazauskas Does Not Like the Privatisation of Alita but Takes No Responsibility*, Exh. C-5 and Hearing Transcript 852: 13-23.

[283] Hearing Transcript 881: 5-25.

221. On 10 September 2003, a meeting took place between the Claimant, Dr. Skorupskas, Mr. Saladžius and Mr. Milašauskas. On that occasion, the Claimant stated that there remained open issues in the negotiations. Mr. Milašauskas made no attempt to insist that the Claimant initial the draft SPA nor did he raise the question of the relations between Bosca SpA and Boslita or with the Claimant's tender. According to Dr. Skorupskas' testimony, it was agreed that "we have to carry on with the negotiations and to finalize a few outstanding issues."[284] There is some disagreement between the versions of events as reported by the Claimant and Dr. Skorupskas, on the one hand, and Mr. Milašauskas,[285] on the other. However, on the basis of the evidence submitted to the Tribunal, including the protocols for witness interrogations of Dr. Skorupskas and Mr. Saladžius taken in the course of Lithuanian court proceedings in 2007 and 2009,[286] the Tribunal is satisfied that the versions given by the Claimant and his colleagues are more reliable.

222. Then, on 30 September, the SPF sent a letter to the Claimant (which he says he received only on 7 October) inviting him again to initial the SPA, under threat of annulment of the tender results if he did not do so by 10 October 2003.

223. Apart from the above events, no steps appear to have been taken by the SPF to make any further progress in the negotiations during September and early October, in spite of the very significant price premium in the Claimant's bid compared to the other three bids.

224. On 8 October, Mr. Flavio Facchin of Banca del Gottardo, one of the banks used by the Claimant in connection with his tender for Alita, wrote to Mr. Milašauskas to remind him that there were unresolved issues and that the negotiations were not complete. That letter followed previous phone conversations between these two persons at the end of September.

225. The Tribunal has already referred to the 10 October decision of the PTC and the Annulment Order of the SPF of 14 October 2003.

226. Strangely enough, on the very same day as the SPF's Annulment Order, the second and the third competing bidders jointly notified the PTC that they were no longer interested in participating in the further public tender for Alita, stating they had each found other opportunities for their capital.[287]

227. On 17 October, the Director General of the SPF wrote to the Claimant, formally informing him that the SPF had annulled the tender results on the basis of the Claimant's failure to initial the SPA.[288]

228. Finally, on 21 October, notwithstanding that the bid by the Executive Consortium did not meet the requirement (of both the Privatization Law and Tender Regulations) that negotiations with a second place bidder could only be initiated if the other bid was no more than fifteen percent (15%) lower than the rejected first bid,[289] the PTC recognized the fourth place bidder (which had suddenly moved to the

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[284] Hearing Transcript 550: 6-11. First Bosca Witness Statement, para. 67. Third Bosca Witness Statement, paras. 7-13. Third Skorupskas Witness Statement, para. 10.

[285] Milašauskas Witness Statement, paras. 6-8.

[286] Record of Interrogation of Witness Gintaras Skorupskas, Exh. C-120; Media Article: *Bosca is Sure of the Prospects of Alita*, Bosca First Witness Statement, Exh. 24; Testimony of Gintaras Skorupskas in Criminal Case No. 1-544-119/2009 (excerpt), Exh. R-93.

[287] In his Memorial (para. 72), the Claimant mentions that, on 1 October 2003, the two bidders "communicated to the SPF and to the Privatisation Commission in writing about their further decision concerning participation in the privatisation of Alita." However, the Claimant has not produced any document in that regard. The information seems to have been taken from the "Conclusions of the Ad Hoc Investigation Commission of the Seimas Formed for the Investigation of the Circumstances of Privatisation of Alita" which mentions that event but which also does not produce any document in support of that statement. Exh. C-2, p. 3.

[288] Letter from the SPF Director General Povilas Milašauskas to Luigi Bosca, dated 17 October 2003, Exhs. C-38/R-40; Protocol of the PTC No. 28, 6 November 2003, Exh. R-115; Minutes No. 20 of the PTC, Exhs. C-46/R-32. Bosca First Witness Statement, para. 76.

[289] Article 16, paragraph 1 of the Law and Article 35 of the Tender Regulations, Exh. R-2.

second place)—the Consortium composed of members of the Alita management—as the winner of the tender and opened negotiations with it. On 10 November, an SPA was initialed and sent to the PTC which approved it on 27 November. That agreement contained some minor modifications to the issue of fines, in spite of the previous position of the SPF toward the Claimant to the effect that the matter was non-negotiable.[290] Alita was sold for 73.4 percent of the price offered by the Claimant.

229. After having sought legal guidance, the SPF was advised on 24 November that "considerable grounds exist to believe that the actions of the State Property Fund may qualify as non-complying with the provisions of the Regulations" under the Privatization Law;[291] the memorandum added however that "the actions of the Property Fund (. . .) in this particular case may be subject to the provisions of the Civil Code which regulate extreme necessity."[292]

230. On 27 November 2003, the PTC approved the Executive Consortium's draft SPA.

231. On 1 December, the Prosecutor General's Office sent a letter to the Anti-Corruption Commission of the Seimas and the Government, challenging the legality of the agreement made with the Consortium.[293]

232. On 2 December, the Anti-Corruption Commission sent a letter on the same subject to the Prime Minister who immediately requested the advice of the SPF; on 5 December, the SPF answered, rejecting the doubts raised concerning the legality of the actions of the SPF.[294]

233. Finally, on 24 December 2003, the Government approved the draft SPA with the Consortium and on 6 January 2004, that agreement was signed.

234. Following a petition of 23 November 2006 from the Seimas to the Constitutional Court, that Court ruled on 23 May 2007 that the 24 December 2003 approval by the Government of the sale of Alita to the Consortium was "in conflict with Item 2 of Article 94 of the Constitution and with the constitutional principle of a state under the rule of law." It also ruled that the Government approval "was in conflict with the provision (. . .) of Paragraph 1 (. . .) of Article 16" of the Privatization Law.[295]

235. The Tribunal wishes to stress that, in its consideration of "just and fair treatment," it is not called upon to rule on any of the actions of the Lithuanian authorities subsequent to the annulment of the Claimant's bid in October 2003, and that its conclusion to the effect that the Claimant was not accorded just and fair treatment is independent of the events subsequent to the Annulment Order of 14 October 2003. These events nonetheless comfort the Tribunal in its decision that the actions of the Respondent vis-à-vis the Claimant during September and October 2003 constituted a breach of Article 2(2) of the Agreement concerning just and fair treatment and that the Respondent is liable for the damages resulting from such behavior. The legitimate and reasonable expectations of the Claimant resulting from his selection as the winning bidder were illegally frustrated by the Respondent's authorities.[296]

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[290] Protocol of the PTC No. 28, 6 November 2003, Exh. R-115. Minutes No. 20 of the PTC, 26 August 2003, Exhs. C-46/R-32. Respondent's Counter-memorial, paras. 71-72, 315. Respondent's Reply, paras. 63, 261, 294, 355-356.

[291] Legal opinion from the law firm Anicas, Okincic and Partners, regarding the actions of the State Property Fund in the privatisation of a block of shares of Alita AB by open tender procedure, Exh. C-40, p. 4.

[292] Legal opinion from the law firm Anicas, Okincic and Partners, regarding the actions of the State Property Fund in the privatization of a block of shares of Alita AB by open tender procedure, Exh. C-40, p. 7 and Article 6.253 of the Civil Code, Exh. RLA-36.

[293] Letter from the Prosecutor General's Office regarding the privatization of Alita AB, 1 December 2003, Exh. C-42.

[294] Seimas of the Republic of Lithuania, "Resolution no. X-922 regarding the conclusions of the ad hoc investigation commission of the Seimas formed for the investigation of the circumstances of the privatization of Alita AB," Exh. C-2, p. 4.

[295] Judgment of the Constitutional Court, Case No. 70/06, Exh. C-1C, *in fine*.

[296] *Saluka v. Czech Republic*, Partial Award, para. 302, where legitimate expectations are considered as the "dominant element" of the FET standard; *Tecmed v. Mexico*, Award, para. 154; see also *Rumeli Telekom A.S.*

D. UNJUSTIFIED OR DISCRIMINATORY MEASURES

The Claimant's position

236. The Claimant also maintains that the Respondent subjected the transformation, use, and enjoyment of the Claimant's investment to unjustified and discriminatory measures in violation of the first sentence of Article 2(2) of the Agreement by dismissing him from the tender and proceeding to execute the SPA with a more politically connected local investor, the Executive Consortium.[297] In interpreting the phrase "unjustified or discriminatory measures," the Claimant points to the more commonly used terms "arbitrary or discriminatory measures" and "unreasonable or discriminatory measures" found in other bilateral investment treaties.[298] The Claimant submits that "arbitrariness" is regularly construed to refer to an abuse of authority or abuse of discretion, as defined under customary international law, on the part of a respondent State.[299]

237. It is the Claimant's position that the SPF abused its authority by dismissing his bid and ending negotiations before the SPA could be finalized and by failing to afford the Claimant due process.[300] According to the Claimant, the SPF, the Claimant's representative, and Mr. Malikėnas were all in agreement that the SPA had not been fully and finally negotiated when the tender result was cancelled.[301] The Claimant rejects the Respondent's justifications that the negotiations were terminated due to his lack of cooperation, stating that not only was he willing to participate and that his representatives readily participated on his behalf, but that he also demonstrated he had access to ample funds.[302] Rather, the Claimant argues, the SPF did not do what it could do, in good faith, to complete the negotiation of the SPA with the Claimant.[303] The Claimant also points to the fact that the SPA negotiations froze after Mr. Milašauskas met with Prime Minister Brazauskas on 8 September 2003.[304]

238. The Claimant further contends that the SPF's conduct during the tender negotiations process was discriminatory because it dismissed the Claimant from the tender process without any reasonable justification.[305] In the Claimant's view, the Respondent's conclusion of an SPA with the Executive Consortium on the basis of what it asserts were its local political connections is not only arbitrary but also overtly discriminatory.[306] The Claimant also argues that the SPF's actions in respect of the Executive Consortium reveal the illegitimate nature of the SPF's motivations that constitutes an independent basis for concluding that its actions were arbitrary.[307] The Claimant asserts that, in the absence of any reasonable justification for selecting the last place bidder, the SPF's failure to maintain adequate or appropriate records during the tender process further supports the Claimant's position that the SPF acted with bias.[308]

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and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award (29 July 2008), para. 609.

[297] Claimant's Memorial, para. 163.

[298] Claimant's Memorial, para. 190.

[299] Claimant's Memorial, paras. 195-197.

[300] Claimant's Memorial, para. 200.

[301] Claimant's Brief, para. 130.

[302] Claimant's Brief, para. 126.

[303] Claimant's Brief, para. 133.

[304] Claimant's Brief, paras. 141-142.

[305] Claimant's Memorial, para. 212. Claimant's Counter-memorial/Reply, paras. 231-233.

[306] Claimant's Memorial, para. 215.

[307] Claimant's Memorial, paras. 204-205.

[308] Claimant's Memorial, paras. 213-214, quoting Supreme Court of Lithuania, Judgment (10 October 2006), Exh. C-1E, p. 13.

The Respondent's position

239. The Respondent argues that the SPF's decision to close negotiations and award the tender to the Executive Consortium was objective and reasonable and made in light of its "commercial interests,"[309] that is, to maximize the benefit on the transaction "since the arrangement of a new public tender could have resulted in [a lower share price.]"[310] According to the Respondent, the SPF annulled the Claimant's win of the tender on the basis that the Claimant neglected to provide evidence of having sufficient financial support to complete the transaction, refused to cooperate in the negotiations, refused to allow his representative to initial the agreed terms of the SPA on his behalf, and failed to initial the draft SPA by the deadline set by the SPF.[311]

240. It is the Respondent's position that the SPF's decision to negotiate with the Executive Consortium was a responsible business choice. By law, the SPF had to complete the Alita privatization by the beginning of 2004 and the Executive Consortium was the only bid that remained. The SPF sought professional legal advice on the matter and was advised to select the Executive Consortium rather than open a new tender.[312]

241. To evaluate whether a measure is discriminatory toward a foreign investor, the Respondent looks to the standard adopted by the tribunal in *Saluka v. Czech Republic*. There, according to the Respondent, the tribunal concluded that a respondent State must provide a rational justification for any differential treatment.[313] Here, the Respondent maintains that the SPF was justified by the business and legal circumstances at the time to select the Executive Consortium when it believed the Claimant was unable or unwilling to conclude the SPA.

242. Finally, the Respondent contends that the Claimant has not proven any discriminatory intent on the part of the SPF or any other entity.[314]

The Tribunal's Decision

243. Article 2(2) of the Agreement provides in its first sentence that "(b)oth Contracting Parties shall at all times ensure just and fair treatment of the investments of investors of the other Contracting Party." The second sentence adds that "management, maintenance, use, transformation, enjoyment or assignment of the investments effected in their territory by investors of the other Contracting Party, (. . .) shall in no way be subject to unjustified or discriminatory measures."

244. In light of its conclusion above based on the just and fair treatment clause in the first sentence of Article 2(2), the Tribunal does not consider it necessary to decide whether the Respondent violated the Agreement under the second sentence. Any additional breach is not relevant unless it leads to additional damages, which it would not do here.

E. NATIONAL TREATMENT

The Claimant's position

245. The Claimant submits that the Respondent violated Article 3(1) of the Agreement by affording his investment less favorable treatment than it afforded that of the Executive Consortium when it granted

[309] Respondent's Counter-memorial, paras. 184-193. Respondent's Reply/Rejoinder, paras. 267-271.

[310] Respondent's Brief, para. 114.

[311] Respondent's Counter-memorial, para. 178.

[312] Respondent's Counter-memorial, para. 82.

[313] Respondent's Counter-memorial, para. 191, citing *Saluka v. Czech Republic*, Partial Award, para. 460.

[314] Respondent's Counter-memorial, para. 213.

the Consortium the tender after previously having awarded it to the Claimant.[315] The Claimant argues that this difference in treatment constitutes a denial of national treatment under the Agreement.[316]

246. Citing *Pope & Talbot v. Canada*, the Claimant maintains that once a claimant has "made a *prima facie* showing of less favorable treatment, the respondent State must 'justify' the difference by showing that the treatment has been implemented pursuant to a rational, non-discriminatory government policy."[317] Other arbitral tribunals have likewise concluded that differences in treatment are presumptive violations of national treatment obligations but the presumption may be rebutted by the State if it "produces sufficient evidence that the treatment in question has a reasonable basis in rational, non-discriminatory government policies."[318]

247. Arguing that the construction of Article 3(1) does not require the Tribunal to evaluate the likeness of circumstances between the relevant comparators as some tribunals have done under different treaties, the Claimant asserts that the Respondent violated its national treatment obligation when it accorded less favorable treatment to the Claimant's objectively superior bid than to the bid of the Executive Consortium, a domestic comparator.[319] Upon comparison, however, the Claimant maintains that he was similarly situated to the Executive Consortium.[320]

248. The Claimant argues that the Respondent has not presented a legitimate reason for treating his investment differently than it treated the domestic investor's bid. The reasons given by the Respondent in the domestic litigations were rejected by the Supreme Court, by the Alita Commission, and by the Constitutional Court.[321]

249. Finally, in the Claimant's view, Article 3(1) of the Agreement provides an obligation to afford national treatment not only to "investments" but also to "activities associated with those investments" as set out in Paragraph 1 of the Protocol.[322] Thus, according to the Claimant, not only does his tender payment fall within the scope of Article 3(1), but so does his participation in the negotiations surrounding the SPA, which qualifies under the Protocol as an activity undertaken in furtherance of his pre-existing investments in Lithuania.[323]

The Respondent's position

250. The Respondent objects to the Claimant's assertion that the Respondent violated the "national treatment clause" of Article 3(1), arguing that (1) the clause does not apply to the Claimant's participation in the

[315] Claimant's Memorial, paras. 221, 248.

[316] Claimant's Memorial, paras. 240-241. Claimant's Counter-memorial/Reply, paras. 247-248, quoting *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002), para. 169.

[317] Claimant's Memorial, paras. 229-231, citing *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL/NAFTA, Interim Award (26 June 2000), paras. 78-79.

[318] Claimant's Memorial, para. 244.

[319] Claimant's Memorial, paras. 240, 247.

[320] Claimant's Memorial, para. 251. Claimant's Counter-memorial/Reply, para. 245, referring to *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL/NAFTA, Award on the Merits of Phase 2 (10 April 2001), [*hereinafter Pope & Talbot v. Canada*, Award], para. 78; *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL/NAFTA, Partial Award (13 November 2000), para. 248; *Champion Trading Company and Ameritrade International, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Award (27 October 2006), para. 130.

[321] Claimant's Memorial, para. 249.

[322] Claimant's Memorial, paras. 225-226. Claimant's Counter-memorial/Reply, paras. 241-243.

[323] Claimant's Memorial, para. 227.

Alita tender and (2) even if the clause were applicable, the Claimant failed to prove that his participation was subject to less favorable treatment than a similarly situated domestic investor.[324]

251. First, the Respondent submits that the national treatment obligation under Article 3(1) does not apply to the Claimant's participation in the Alita tender because the Claimant did not make an investment as defined by the Agreement. Article 3(1) does not envisage protection for the pre-contractual stage of a planned investment.[325] The Respondent argues that "making (. . .) of contracts" under the list of associated activities qualifying as investments named in the Protocol refers to a "right accruing from [a] signed and binding contract" and not the contract negotiation process.[326] In any event, the Respondent maintains that the Claimant has failed to establish that it was "making [a] contract."[327]

252. Second, the Respondent submits that, even if Article 3(1) is applicable, the Claimant's claim still fails because the Claimant and the Consortium were not similarly situated and therefore cannot be compared. Referring to the analyses of other arbitral tribunals reviewing national treatment claims, the Respondent maintains that a similarly situated domestic comparator must be produced to be successful with a national treatment claim.[328] Here, in the Respondent's view, the Consortium was not situated similarly to the Claimant because the Consortium provided proof of sufficient funding as required with its bid and proposed providing its payment in one installment, making it a "safer" bid than the Claimant's.[329]

253. In the Respondent's view, the Claimant was granted "not less, but more favorable treatment than the Consortium" in that the Claimant was declared the winner of the tender.[330] The Claimant did not follow through with the necessary steps to finalize the SPA and secure his acquisition.[331] The Respondent also submits that the Claimant's allegations that the SPF was more flexible in negotiations with the Consortium than it was in those with the Claimant are not supported by the facts.[332]

254. The Respondent maintains that, as the tribunal in *Noble Ventures v. Romania* found, to prevail on a national treatment claim, the Claimant must show that the measure taken by the Respondent was "directed specifically (. . .) by reason of [the Claimant's] nationality."[333] According to the Respondent, the SPF terminated the negotiations based on "rational policy considerations" and did not have any intentions to harm the Claimant.[334]

The Tribunal's Decision

255. In light of its conclusion above based on the just and fair treatment clause, the Tribunal does not find it necessary to reach a determination concerning the Parties' arguments on national treatment. The Claimant would not in any event be entitled to greater relief than for the Respondent's breach of the just and fair treatment clause discussed above; accordingly, the Tribunal will not examine the alleged breach of the national treatment clause.

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[324] Respondent's Counter-memorial, para. 195.

[325] Respondent's Counter-memorial, paras. 197-200.

[326] Respondent's Reply/Rejoinder, para. 281.

[327] Respondent's Reply/Rejoinder, para. 284.

[328] Respondent's Counter-memorial, para. 201.

[329] Respondent's Counter-memorial, paras. 202-204.

[330] Respondent's Counter-memorial, paras. 206-207.

[331] Respondent's Counter-memorial, para. 209.

[332] Respondent's Brief, paras. 110-111.

[333] Respondent's Counter-memorial, para. 212, citing *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award (12 October 2005), para. 180.

[334] Respondent's Counter-memorial, paras. 211, 213-214. Respondent's Reply/Rejoinder, paras. 290-292, 294.

F. MOST-FAVORED-NATION TREATMENT

The Claimant's position

256. As an alternative to his argument under Article 3(1) of the Agreement, the Claimant submits that the Respondent violated Article 3(2)'s most-favored-nation ("MFN") treatment obligation by failing to extend to the Claimant the same treatment it is obligated to afford to United States investors with regard to new investments under Article II of the Treaty Between the Government of the United States of America and the Government of the Republic of Lithuania for the Encouragement and Reciprocal Protection of Investment ("US-Lithuania BIT").[335]

257. According to the Claimant, Articles II(1) and II(3)(b) of the US-Lithuania BIT provide more favorable treatment than the present Agreement in that the US-Lithuania BIT explicitly prohibits discriminatory measures during the pre-establishment phase of an investment.[336] Specifically, the Claimant contends that the Respondent violated its obligations under Articles II(2) and II(3)(b) of the US-Lithuania BIT incorporated through Article 3(2) of the Agreement by "'screen[ing]' Mr. Bosca's attempted acquisition of Alita on the basis of his nationality," "apply[ing] criteria applicable to that acquisition on a less favorable basis than those applied to the Executive Consortium," and "impair[ing] the acquisition of Alita with arbitrary and discriminatory measures."[337]

258. The Claimant asserts that he is not seeking to alter the definition of "investment" under the Agreement through the use of the US-Lithuania BIT; rather, he seeks to expand the application of its substantive protections under the present Agreement's MFN clause, relying on the decisions in *Pope & Talbot v. Canada* and *MTD v. Chile* which concluded that the relevant MFN clauses supported expanded protection for the investors.[338] The Claimant argues that the MFN clause extends the scope of a right already conferred by the Agreement by pointing to the treatment of the "investor" rather than an "investment."[339] Accordingly, the Claimant maintains that the definition of "investor" is not predicated on the meaning of "investment." For example, Article 2(1) of the Agreement requires that both Contracting Parties "encourage investors of the other Contracting Party to invest in their territory." This provision confirms, the Claimant contends, that the definition of the term "investor" was not intended to entail the characteristic of having an "investment."[340]

259. The Claimant argues that the Respondent's allegation that the dispute settlement provision of the Agreement is "incompatible" with the operation of the MFN clause rests on a false premise that disputes "on investments" and those "arising out of or relating to" investments are not equivalent.[341] According to the Claimant, a dispute "on investments" can exist regardless of whether the investment has been fully acquired by a claimant.[342] Likewise, the Claimant submits that the definition of "investor" under Article 1(2) of the Agreement includes "any legal or natural persons that are engaged

[335] Claimant's Memorial, para. 221.

[336] Claimant's Memorial, para. 258. Claimant's Brief, para. 94.

[337] Claimant's Memorial, para. 269.

[338] Claimant's Memorial, paras. 262-263, citing *Pope & Talbot v. Canada*, Award, para. 117; *MTD v. Chile*, Decision on Annulment (21 March 2007), para. 18.

[339] Claimant's Counter-memorial/Reply, para. 253.

[340] Claimant's Brief, para. 81. The Claimant notes, in an aside, that all three languages of the original Agreement are authentic, though the English text governs where there is any dispute. On this basis, the Claimant finds it unnecessary to discuss the meaning of the relevant provisions in those other languages; nevertheless, the Claimant maintains that its position is supported by all three languages of the Agreement and elaborates briefly upon their respective significances. Claimant's Brief, paras. 86-88.

[341] Claimant's Counter-memorial/Reply, para. 253.

[342] Claimant's Brief, para. 103.

in contributing something of value to the host State in the expectation of future profit or gain" and does not require that the investor's investment be fully formed or acquired.[343]

The Respondent's position

260. The Respondent objects to the Claimant's assertion that the Respondent violated the MFN obligation under Article 3(2) of the Agreement, arguing that MFN treatment under the Agreement does not extend to the pre-establishment phase of investment because the Agreement does not recognize protection for pre-establishment investments.[344] In the absence of an investment, the MFN clause does not enable the Claimant to seek a remedy at all.[345] Rather, the Respondent asserts that the Claimant is seeking to subvert the limits of protection in the Agreement and extend the jurisdiction of the Tribunal beyond the scope of the Agreement to the Claimant's pre-contractual conduct.

261. The Respondent argues, first, that the MFN clause in Article 3(2) cannot create a "distinct and novel right" unrelated to the Agreement[346] nor extend protection under another treaty to beneficiaries not otherwise entitled to protection under the governing treaty.[347] The Respondent elaborates on the implications of Article 3(2)'s reference to "investors" rather than "investments" by pointing to the definition of "investor" in the Agreement as an individual who is "investing" – meaning, according to the Respondent, already investing and continuing to invest, *i.e.*, with an investment.[348] According to the Respondent, the deliberate phrasing of Article 3 implies the Contracting Parties' intention to exclude the pre-establishment stage of investment from the ambit of protection of the MFN unlike in the US-Lithuania BIT.[349]

262. The Respondent submits that the application of the MFN here would be incompatible with the dispute settlement provision of the Agreement which provides for the jurisdiction of a tribunal only over disputes "on investments."[350] The Respondent points to the Claimant's statement that he "does not contest the notion that '[t]he existence of an investment, as defined in Article 1(1) of the Agreement, is a prerequisite to the submission of a dispute.'"[351] The Respondent also maintains that if the Contracting Parties had intended to deviate from customary international law to extend the substantive standards of the Agreement, the Contracting Parties would have explicitly so provided in the Agreement as in the US-Lithuania BIT.[352]

263. The Respondent argues that in any event it did not violate the MFN clause because it did not fail to accord the Claimant national treatment vis-à-vis the Claimant's activities in Lithuania.[353]

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[343] Claimant's Brief, para. 89.

[344] Respondent's Counter-memorial, para. 217.

[345] Respondent's Counter-memorial, para. 218.

[346] Respondent's Counter-memorial, paras. 220-222. Respondent's Reply/Rejoinder, para. 302.

[347] Respondent's Counter-memorial, paras. 223-228. Respondent's Reply/Rejoinder, para. 303.

[348] Respondent's Brief, para. 125, citing Hearing Transcript 1047: 15 – 1048: 10. The Respondent asserts that its reading is supported by a translation of the Italian version of the Agreement. Respondent's Brief, para. 125.

[349] Respondent's Counter-memorial, paras. 229-230.

[350] Respondent's Counter-memorial, paras. 231-234. Respondent's Reply/Rejoinder, paras. 306-307.

[351] Respondent's Brief, para. 118, quoting Claimant's Memorial, para. 255.

[352] Respondent's Counter-memorial, paras. 235-237. Respondent's Reply/Rejoinder, para. 307.

[353] Respondent's Counter-memorial, para. 238.

The Tribunal's Decision

264. The Tribunal has already ruled that the Service Agreement constituted an investment of the Claimant under the Agreement and that his accepted bid for Alita was an associated activity under the Protocol to the Agreement which should be considered part of his investment. Therefore, the Tribunal does not find it necessary to carry out an analysis concerning the added value of the Agreement's MFN clause in this respect, all the more since any conclusion in that regard would not lead to awarding additional damages.

G. EXPROPRIATION

The Claimant's position

265. The Claimant argues that "expropriation" includes not only a measure that deprives an investor of the value of his investment but also a measure that deprives the investor of a discrete right having economic value – a right that is associated with, but separable from, the investor's overall investment, such as the Claimant's right to conclude a contract.[354] In the Claimant's view, his case presents a "classic case of direct expropriation" in violation of Article 5 of the Agreement because the SPF deprived him of his right to conclude a contract for the purchase of Alita and negatively affected the value of his investment in Lithuania.[355]

266. The Claimant observes that Article 5 of the Agreement requires the Respondent not to take any measures that would deprive the Claimant of the value of his investment "unless such measures were: (1) undertaken in the public interest; (2) accompanied by payment of full and effective compensation; (3) non-discriminatory; and (4) in accordance with law."[356] The Claimant submits that none of the cumulative requirements under Article 5(1) were met here.[357] First, the Claimant points to the fact that the Alita Commission determined that the Respondent's conduct during the tender harmed the public interest of Lithuania.[358] Second, the Claimant argues that the Respondent's expropriatory measures in the context of the tender were undertaken in violation of its own domestic laws, as confirmed by Lithuania's highest national courts.[359] Third, the Claimant argues that the Respondent's conduct was "blatantly discriminatory."[360] Fourth, the Claimant contends that the Respondent did not provide him with "immediate, full and effective" compensation.[361]

267. In particular, the Claimant submits that the Respondent violated Article 5 by appropriating his right to conclude the SPA for the purchase of Alita, an economic right accruing by law.[362] He analogizes to the circumstances in the case of *Eureko v. Poland* in which the tribunal concluded that the respondent State had violated the expropriation clause of the Dutch-Polish bilateral investment treaty by "refusing to conduct an IPO after it had committed to the claimant that it would do so."[363] The Claimant contends

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[354] Claimant's Memorial, paras. 281-286, citing *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) [hereinafter *Waste Management v. Mexico*, Award], paras. 162-163, 168.

[355] Claimant's Memorial, paras. 287-291. Claimant's Counter-memorial/Reply, para. 267.

[356] Claimant's Memorial, para. 271.

[357] Claimant's Memorial, para. 293.

[358] Claimant's Memorial, paras. 294-298.

[359] Claimant's Memorial, paras. 299-302.

[360] Claimant's Memorial, para. 303.

[361] Claimant's Memorial, para. 304.

[362] Claimant's Memorial, para. 274.

[363] Claimant's Memorial, para. 279, quoting *Eureko v. Poland*, Partial Award, para. 240.

that the economic right he had acquired under Lithuanian law for compensation was "akin to concessions, permits and licenses."[364]

268. In the Claimant's view, this case can be distinguished from *Generation Ukraine v. Ukraine* on which the Respondent relies. In its award, the tribunal found no expropriation despite the existence of several contracts. Here, the Claimant contends, he has shown "what his investment was, what his rights were under Lithuanian law, as well as the way in which the [Respondent] interfered with those rights," whereas Generation Ukraine was unable to substantiate these critical features in the presentation of its case.[365]

The Respondent's position

269. The Respondent rejects the Claimant's contention that the SPF's decision to annul the Alita tender results and to conclude the SPA with the Executive Consortium constitutes expropriation.[366] The Respondent submits that Article 5 of the Agreement has no application here.[367] Rather, the Respondent claims that "expropriation" as intended under Article 5 requires "a strong interference with clearly defined contract rights"[368] whereas the Respondent argues that the Claimant has acquired no "economic right" under the Agreement.[369] The Claimant's alleged right to conclude the contract, if any, does not constitute an object of expropriation according to the Respondent because it cannot be an object of a commercial transaction, has no monetary value, and lacks "clarity and explicitness of the parties' mutual obligations."[370]

270. In addition, the Respondent argues that the Claimant's expectations, if any, that the SPA would be concluded cannot constitute an object of expropriation until such expectations are transformed into legally binding contractual rights.[371] In the Respondent's view, parties negotiating a contract have only "rights of procedural nature arising out of general statutory duties of good faith" which cannot be equated with "rights arising out of governmental agreements or administrative decisions granting valid, explicit proprietary rights."[372]

271. The Respondent cites the award in *Generation Ukraine v. Ukraine* to support its assertion that the denial of rights arising out of contractual relations may not amount to expropriation of future commercial return.[373] The Respondent maintains that it is even more speculative to claim that the denial of pre-contractual rights amounts to expropriation.[374]

272. With respect to the termination of negotiations, the Respondent submits that "neither tangible nor intangible property was transferred to the State or to the other parties."[375] In this regard, the Respondent

[364] Claimant's Counter-memorial/Reply, paras. 256-260.

[365] Claimant's Counter-memorial/Reply, paras. 261-263, citing *Generation Ukraine v. Ukraine*, Award, paras. 18.1-18.4, 20.26-20.27, 20.31-20.32.

[366] Respondent's Counter-memorial, para. 240.

[367] Respondent's Counter-memorial, para. 241.

[368] Respondent's Reply/Rejoinder, paras. 314-316, quoting *PSEG v. Turkey*, Award, para. 279.

[369] Respondent's Counter-memorial, paras. 243-244.

[370] Respondent's Counter-memorial, paras. 245-252, quoting *PSEG v. Turkey*, Award, para. 279; *PSEG v. Turkey*, Decision on Jurisdiction (4 June 2004), para. 103.

[371] Respondent's Counter-memorial, paras. 257-261. Respondent's Reply/Rejoinder, para. 332.

[372] Respondent's Reply/Rejoinder, paras. 309-313.

[373] Respondent's Counter-memorial, para. 253, quoting *Generation Ukraine v. Ukraine*, Award, para. 20.27. Respondent's Reply/Rejoinder, paras. 319-323.

[374] Respondent's Counter-memorial, paras. 254-256.

[375] Respondent's Counter-memorial, para. 265.

comments that the SPF's decision to negotiate with the Executive Consortium was "a separate decision and a separate procedure" from its decision to withdraw from the negotiations with the Claimant and cannot constitute an expropriation.[376] Moreover, the Respondent argues that the termination of the negotiations did not affect the overall economic value of the Claimant's alleged activities in Lithuania.[377]

The Tribunal's Decision

273. As set out above, the Tribunal finds no reason to scrutinize whether the factual record supports a finding of liability under other provisions of the Agreement including Article 5 as alleged by Claimant and contested by the Respondent in light of the Tribunal's determination that the Respondent breached the Agreement's just and fair treatment clause. Any additional breach is not relevant unless it leads to additional damages, which it would not do here.

H. DAMAGES AND QUANTUM

274. The Tribunal will take up the Parties' arguments on damages and on quantum together after their presentation below.

1. Entitlement to damages

The Claimant's position

275. The Claimant claims that he is entitled to damages of EUR 207,971,000 including interest, as of 7 September 2012.[378]

276. The Claimant submits that the issue of damages in this case is governed by the Agreement and by principles of customary international law.[379] The Claimant argues that, through the Agreement's MFN clause, he is entitled to the most favorable damages permitted under international law principles applicable to Lithuania.[380] Relying on the *Chorzów Factory* case, the Claimant submits that he is entitled to monetary damages equivalent to the benefit of the bargain he would have had received if the Respondent had not wrongfully expropriated his investment.[381] According to the Claimant, but for the unlawful actions of the Respondent, the SPA would have been concluded and the Claimant would have acquired at least 83.77 percent of the Alita shares by early 2004.[382]

277. The Claimant objects to the Respondent's assertion that he is not entitled to damages in connection with the "un-concluded contract,"[383] arguing that he seeks a remedy not for a breach of a contract but for the

[376] Respondent's Reply/Rejoinder, para. 328.

[377] Respondent's Counter-memorial, paras. 268-275. Respondent's Reply/Rejoinder, para. 330.

[378] Claimant's Brief, paras. 1, 165. In the Claimant's Memorial, the Claimant submitted that he was entitled to damages of EUR 229,836,000. Claimant's Memorial, para. 335. The Claimant later lowered this total in response to the Respondent's criticism that the Claimant's original calculation did not take into account that "the sales and distribution costs should be considered to be a function of sales." Claimant's Counter-memorial/Reply, paras. 323, 332-333.

[379] Claimant's Memorial, paras. 306-307.

[380] Claimant's Memorial, para. 310.

[381] Claimant's Memorial, paras. 311-312, quoting *The Factory at Chorzów (Germany v. Poland)*, Judgment (Claim for Indemnity) (Merits) of 13 September 1928, 1928 P.C.I.J. (ser. A) No. 17, para. 125. Claimant's Counter-memorial/Reply, para. 284.

[382] Claimant's Counter-memorial/Reply, paras. 287, 290.

[383] Claimant's Counter-memorial/Reply, para. 293, quoting Respondent's Counter-memorial, paras. 284-298.

deprivation of his investment.[384] The Claimant further submits that the ILC Articles on State Responsibility require that "compensation shall cover any financially assessable damage including loss of profits insofar as it is established."[385] Thus, the Claimant argues that the Respondent must compensate him for all damages he suffered as a result of the Respondent's illegal conduct.[386]

278. The Claimant also disputes the Respondent's argument that the Claimant's damages have "no causal link with the alleged breaches" of the Agreement because the SPA "would not have been concluded anyway."[387] The Claimant maintains that the SPA would have been concluded but for the Respondent's arbitrary and discriminatory conduct.[388] There were no intervening causes or factors precipitating the termination of negotiations, nor did the Claimant have any intention to break off negotiations; further, the financing of the purchase price had been secured.[389] The Claimant maintains that there is no basis to support the Respondent's position that the competition authorities would have rejected the acquisition of Alita by the Claimant or his proposed subsequent acquisition of Boslita.[390] Even if the Tribunal were to determine that it lacks conclusive evidence to find that the Claimant would have acquired Alita and managed it profitably in the absence of the SPF's wrongful conduct, according to the Claimant the "loss of a specific and substantial chance" to do so is compensable under international law.[391]

The Respondent's position

279. The Respondent submits that, even assuming *arguendo* that the Respondent breached its international obligations, the Claimant cannot claim damages.[392] Were the Tribunal to conclude that damages were warranted, the Respondent argues that the Claimant has received adequate remedy through Lithuanian national courts,[393] that is, reimbursement for the direct damages associated with the terminated negotiations in the amount of LTL 1,733,584.99 (or EUR 502,081).[394]

280. In the Respondent's view, the Claimant's claim for damages is "disproportional" to the value of his alleged investment and constitutes a "manifest abuse" of the Agreement.[395] The Respondent suggests that the claimed damages, if granted, would have an "obvious and strong negative impact" on the Respondent's economy that should be taken into consideration in the assessment of the damages.[396]

281. The Respondent argues that awarding compensation to the Claimant for lost profits would be "overly speculative and uncertain" since no contract was concluded between the Claimant and the SPF.[397] The *Chorzów Factory* principle relied upon by the Claimant applies to breaches involving "income-

[384] Claimant's Counter-memorial/Reply, paras. 295-296.

[385] Claimant's Memorial, para. 315.

[386] Claimant's Memorial, para. 317.

[387] Claimant's Counter-memorial/Reply, para. 294, quoting Respondent's Counter-memorial, paras. 303-332.

[388] Claimant's Brief, paras. 51-56.

[389] Claimant's Counter-memorial/Reply, paras. 302-306.

[390] Claimant's Counter-memorial/Reply, paras. 311-313.

[391] Claimant's Brief, paras. 57, 60.

[392] Respondent's Counter-memorial, para. 279.

[393] Respondent's Counter-memorial, para. 194. Respondent's Reply/Rejoinder, paras. 273-276.

[394] Respondent's Counter-memorial, para. 280.

[395] Respondent's Counter-memorial, paras. 280-283, citing *Himpurna California Energy Ltd. v. PT (Persero) Perusahaan Listruik Negara (PLN)*, UNCITRAL, Final Award (4 May 1999); *Tecmed v. Mexico*, Award, para. 186. Respondent's Reply/Rejoinder, paras. 340-342.

[396] Respondent's Counter-memorial, paras. 339-341.

[397] Respondent's Counter-memorial, paras. 285-288. Respondent's Reply/Rejoinder, paras. 343-346, 468-483. Respondent's Brief, para. 134.

producing asset[s]," unlike here.[398] The Respondent contends that the Claimant could at best seek recovery of direct damages, which have already been awarded by Lithuanian courts.[399] Moreover, the Respondent suggests that the UNIDROIT Principles of International Commercial Contracts provide for recovery of direct expenses and the lost opportunity to conclude another contract but not lost profit.[400] According to the Respondent, under Lithuanian law, the Claimant would not have been indemnified for lost profit.[401]

282. It is the Respondent's position that the Claimant fails to demonstrate any causal link between his claimed damages and the Respondent's allegedly wrongful action.[402] The Respondent argues that the Claimant did not demonstrate his willingness and/or ability to conclude the SPA negotiations, and that, even if the SPF had not terminated the negotiations, the Claimant would have never signed the SPA.[403] The Respondent further objects to the amount of claimed damages, arguing that it was not and could not have been aware at the moment of the termination of the negotiations that the Claimant could have suffered such damages.[404] The Claimant failed to mitigate damages in the tender process by not requesting an injunction or seeking an annulment of the agreement between the SPF and the Executive Consortium.[405]

283. With respect to the Claimant's alleged plan to acquire and merge Boslita with Alita, the Respondent submits that the Claimant would have been prevented from acquiring Alita under the Lithuanian laws on competition in light of his alleged interest in Boslita and the dominant position of Alita in the relevant market.[406] The Respondent argues that the merger would contravene Lithuania's Explanations on Market Definition and Horizontal Guidelines which provide direction to the Lithuanian competition authority.[407] In the Respondent's view, the Lithuanian State Competition and Consumer Rights Protection Authority would have blocked the merger "and, thus, cost synergies resulting from the merger should not be considered."[408]

2. Quantum

The Claimant's position

284. Turning more specifically to the calculation of damages, the Claimant argues that the date of the unlawful act and the date of the forthcoming award should be used to carry out the necessary calculations of the damages owing to him.[409] The Claimant names 14 October 2003, the date on which he was removed from the Alita tender negotiations, as the date of the unlawful act.[410]

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[398] Respondent's Counter-memorial, para. 289.

[399] Respondent's Counter-memorial, paras. 290-294, 298.

[400] Respondent's Counter-memorial, paras. 295-298, quoting *Commentary on the UNIDROIT Principles of International Commercial Contracts 1994*, Article 2.1.15, p. 51.

[401] Respondent's Counter-memorial, paras. 299-301.

[402] Respondent's Counter-memorial, paras. 304-305.

[403] Respondent's Counter-memorial, paras. 314-315. Respondent's Reply/Rejoinder, paras. 349-358, 361-362, 365-367.

[404] Respondent's Counter-memorial, paras. 329-332. Respondent's Reply/Rejoinder, paras. 372-373.

[405] Respondent's Counter-memorial, paras. 333-335. Respondent's Reply/Rejoinder, paras. 464-467.

[406] Respondent's Counter-memorial, paras. 316-328.

[407] Respondent's Reply/Rejoinder, paras. 406-425.

[408] Respondent's Counter-memorial, paras. 352-359.

[409] Claimant's Memorial, paras. 318-319.

[410] Claimant's Memorial, para. 319.

285. The Claimant submits that the commonly used discounted cash flow ("DCF") method is the most appropriate method to determine the fair market value of the Claimant's investment.[411] In applying the DCF method, the Claimant argues that "post-act events" may be taken into consideration in the case of unlawful expropriation or other breaches of the Agreement, and that, even if an "*ex ante* projection" based on the data prior to 2003 were used, the amount of the Claimant's damages would in fact be greater than the amount calculated in consideration of "post-act events."[412]

286. The Claimant submits that his damages include the value of Alita and the proceeds of the Alita business he would have received.[413] Based on his expert report, the Claimant submits that the present value of Alita is LTL 400,339,000.[414] According to the Claimant, his damages also include, but are not limited to: (1) "the lost synergies that would have resulted from combining the Boslita and Alita businesses, such as increased buying power, reduction in overheads, costs of raw materials and other inputs, increased distribution capacity, increased export capacity, increased goodwill in the former USSR countries and increased margins;" (2) the lost opportunity to expand existing operations; and (3) loss of the subsequent increase in market value of the company, lost profits, and loss of market share.[415]

287. The Claimant contends that, in addition, he is entitled to compound interest of 2.8 percent on the amount of the damages calculated above beginning on the date of the Respondent's wrongful act, *i.e.*, 14 October 2003.[416]

The Respondent's position

288. The Respondent objects to the Claimant's use of the DCF method to calculate his alleged damages, arguing that the DCF method is used to estimate future free cash flows of "income-earning assets" and is not appropriate to calculate the value of a "free-standing right to conclude a contract."[417]

289. Even if the DCF method is employed, the Respondent maintains that the Claimant's expert incorrectly relies on the financial performance of Alita after the privatization in his calculation.[418] As a primary matter, the Claimant's expert wrongly calculates the value of Alita rather than that of Alita's shares.[419] Other calculation choices made by the expert contribute to an overstatement of the Claimant's alleged damages. For example, the Respondent disputes the value of the alleged "synergies" resulting from the proposed merger of Boslita and Alita, arguing that the Claimant's business plans are "highly speculative," and that numerous legal obstacles would have prevented the Claimant from executing the merger.[420] The Respondent argues that the Claimant's assertion that he would have exported his products to Russia is based on "uncertain and speculative" assumptions.[421] Further, in the Respondent's view, the Claimant incorrectly adds back corporate income taxes deducted in assessing his suffered damages to his valuation.[422]

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[411] Claimant's Memorial, paras. 322-323, citing, *inter alia*, *Lemire v. Ukraine*, Award, paras. 219, 227; *Tecmed v. Mexico*, Award, paras. 185-186.

[412] Claimant's Counter-memorial/Reply, paras. 325-326.

[413] Claimant's Memorial, para. 321.

[414] Claimant's Memorial, para. 327. Claimant's Brief, paras. 155-156.

[415] Claimant's Memorial, para. 321. The Claimant subtracts the purchase price he would have paid for Alita, adds taxes and converts Lithuanian litas to Euro. Claimant's Memorial, para. 325.

[416] Claimant's Memorial, paras. 332-333. Claimant's Counter-memorial/Reply, para. 332.

[417] Respondent's Counter-memorial, para. 345.

[418] Respondent's Counter-memorial, paras. 347-351.

[419] Respondent's Brief, paras. 144-146.

[420] Respondent's Counter-memorial, paras. 353-359. Respondent's Reply/Rejoinder, paras. 369-371, 374-375.

[421] Respondent's Counter-memorial, paras. 360-362. Respondent's Reply/Rejoinder, paras. 460-463.

[422] Respondent's Counter-memorial, para. 369. Respondent's Reply/Rejoinder, para. 506.

290. The Respondent disagrees with the Claimant's calculation of interest for three reasons. First, the Respondent argues that the Claimant cannot calculate interest on lost profits as of the day of the alleged breach because such an approach would lead the Claimant to unjust enrichment by allowing him to earn interest on profits yet to be received if the Claimant had acquired Alita.[423] Second, the Claimant cannot calculate interest on both the lost profits and the income-earning capital; this calculation contravenes Article 36 of the ILC Articles on State Responsibility and would provide the Claimant with double recovery.[424] Third, the Respondent contends that the Claimant cannot seek recovery of interest on the loss of profit in connection with what he has never invested because this recovery too would provide the Claimant with double recovery: having saved the money he would have paid to acquire Alita, the Claimant cannot be put in a more favorable position than the one he would have been in had he in fact acquired Alita.[425]

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The Tribunal's Decision on Damages and Quantum

291. Based on the comparatively very large price offered by the Claimant, he had legitimate expectations that the Respondent would approve the SPA with the conditions contained in his bid. But the Tribunal does not agree with the Claimant's statement that "Mr. Bosca's acquisition of Alita was a certainty."[426]

292. First of all, there is no certainty that the Claimant would have accepted the condition on fines set by the SPF in the draft SPA. The Claimant, even at the time of his testimony at the hearing, never confirmed that he would have been ready to accept anything significantly different from the condition he had set or that he would have been willing to compromise on the basis of the very minor adjustments subsequently granted to the Consortium.[427] It is worth noting that in the Lithuanian proceedings the Claimant initiated before the Vilnius District Court on 17 November 2003, the Claimant stated that, although he was committed to reaching a reasonable agreement, the conditions set out in his bid "formed an integral part of the Tender Bid that [the] State Property had accepted, therefore, they could not have been altered without Luigiterzo Bosca's approval."[428] Further, he noted that he "adhered to the position that penalty amounts set forth in his Tender Bid and his proposals regarding draft Contract attached thereto should be reflected in the final draft Contract."[429]

293. It is not out of possibility, bearing the very strong reservations of the Claimant concerning the issue of fines, that he might, in the end, have decided to walk away from the deal, even at the cost of losing the payments he had already made.

294. As far as the Respondent is concerned, it could well have held to its guns (as it did), notwithstanding the great financial superiority of the Claimant's bid. The PTC or the Government might have considered that, in light of the refusal of the Claimant to accept the provision on fines, he could not be trusted to abide by the conditions set out in the SPA and the Lithuanian laws and regulations and that it would be preferable to call for a new tender. This is an option that the SPF's advisor, Suprema, considered before finally opting to try to negotiate with the fourth place bidder (who had suddenly become the second place bidder). It is not inconceivable either that, for whatever reason, (even after having received the Consortium's bid), the Government might by then have changed its mind and

[423] Respondent's Counter-memorial, para. 364.

[424] Respondent's Counter-memorial, paras. 365-366.

[425] Respondent's Counter-memorial, para. 367. Respondent's Reply/Rejoinder, para. 530.

[426] Claimant's Brief, para. 151.

[427] Hearing Transcript 383: 17-21 (Mr. Bosca's testimony: "I wanted to negotiate something about the amount of the fine, or a cap on the fine, or something which could make me a little more confident. This was the main reason, and they kept saying no, no, no.").

[428] Claimant's Claim Application with Vilnius District Court, Exh. R-91, pp. 3, 7.

[429] Claimant's Claim Application with Vilnius District Court, Exh. R-91, pp. 3, 7.

decided to cancel the privatization of Alita, reimburse the bidder and keep it as a State-owned company, at least for a certain period, before putting it again on the market.

295. The Tribunal has taken notice of the unchallenged testimony of the former Chairman of the Competition Council, Prof. Rimantas Stanikūnas, to the effect that the Council would have approved the Claimant's purchase of Alita, especially taking into account the fact that, with the entry of Lithuania into the European Union, Alita's geographic market had expanded and encompassed the whole EU. However, the Tribunal is not convinced that the Council would not have imposed some restrictions on the transaction once it would have been made aware of the Service Agreement between the Claimant and Boslita, the Option Agreement between the Claimant and Mrs. Skorupskienė on thirty percent (30%) of the shares of Boslita and the Claimant's plan for combining the activities of Boslita and Alita in 2004. It remains an open question whether the Claimant would have proceeded with the purchase of Alita if such restrictions had been imposed, since they would most likely have had an impact on the expected rate of return of the Claimant's investment.

296. The Tribunal's view is that the outcome of the process was by no means certain and the Parties themselves have recognized that, even after the declaration that the Claimant was the winning bidder, they were still in pre-contractual negotiations.[430]

297. The Tribunal's conclusion is that the Claimant is entitled to compensation for lost opportunity resulting from the failure of the SPF to respect the legal rules which governed it in the negotiations of the SPA with the winning bidder who had legitimate expectations that the negotiations would be carried out in accordance with law and that the SPA could be successfully concluded.

298. The Claimant called upon a valuation expert, Dr. José Alberro, to estimate the damages the Claimant suffered. Dr. Alberro estimated damages of EUR 205,996,000 as of 1 May 2012.[431] As to the Claimant himself, his claim for pre-tax damages as of 7 September 2012 was set at EUR 207,971,000.[432]

299. For its part, the Respondent retained the services of Mr. Brent Kaczmarek who argued that Dr. Alberro's methodology contained several flaws which rendered his conclusions "unsound and unreliable."[433]

300. Without questioning the quality of the analysis contained in these two reports, it should be noted that Dr. Alberro was instructed to evaluate the damages resulting from the annulment of the Claimant's successful bid as well as the denial of the Claimant's right to receive the benefits associated with the ownership of Alita.[434] In the Tribunal's view, these two assumptions are distinguishable. While the first is legitimate in the present case, the Tribunal does not agree that the Annulment Order of the SPF opens the door to a claim for damages (lost profits) that could have been claimed had the SPA been concluded. The only sustainable claim in the present case is one for lost opportunity in a pre-contractual situation.

301. The Claimant, in pre-contractual negotiations, is only entitled to recover direct damages (monies paid to the Respondent in the privatization process and costs incurred in this case). Lost profits based on the assumption of an agreed SPA are much too remote and speculative. The Respondent has provided sufficient arbitral and doctrinal support for that position.[435]

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[430] Claimant's Brief, para. 41. Respondent's Brief, para. 40.

[431] Alberro Second Expert Report, p. 4.

[432] Claimant's Brief, para. 164.

[433] Kaczmarek Expert Report, p. 14.

[434] Alberro First Expert Report, p. 4.

[435] Among others, *PSEG v. Turkey*, Award, paras. 312-313; *Metalclad v. Mexico*, Award, paras. 120-121; Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009), para. 288.

302. The Claimant has already been reimbursed (albeit belatedly) by the Respondent for the amounts paid to the Respondent on his behalf as well as the direct costs incurred, following the decision of the Supreme Court of Lithuania in 2006. Though the Claimant is not entitled to double recovery, the Lithuanian courts were not called upon to rule on the Respondent's liability under the Agreement, a matter which is under the responsibility of this Tribunal.

303. The Tribunal concludes that the Respondent breached the Agreement and should indemnify the Claimant; however, the Claimant has already been reimbursed for the monies he paid to the Respondent. The only question that remains is the amount of costs incurred by the Claimant in connection with the present proceedings that should be reimbursed by the Respondent.

VI. THE COSTS OF ARBITRATION

The Claimant's position

304. The Claimant submits that, under Articles 40(1) and 40(2) of the UNCITRAL Rules, the Tribunal has broad discretion to allocate costs, taking into account the circumstances of the case.[436] The Claimant requests that the Tribunal order the Respondent to pay all fees and costs in light of the Claimant's success in the Lithuanian courts, his attempt to settle with the Respondent, and what the Claimant has alleged as the Respondent's bad faith conduct.[437]

305. The Claimant claims as his costs EUR 4,580,421.21 (USD 5,824,822.17), made up of EUR 3,504,113.78 (USD 4,456,014.43) in attorneys' fees, EUR 516,608.36 (USD 657,197.62) in expert witness' fees, EUR 81,396.85 (USD 103,498.24) in other reasonable and necessary fees and costs, and EUR 78,302.22 (USD 99,547.06) in travel and accommodation costs associated with hearing preparation and attendance, as well as EUR 400,000 in case deposits requested by the Tribunal.[438]

The Respondent's position

306. According to the Respondent, its costs amount to EUR 890,230.27[439] consisting of (1) case deposits of EUR 400,000;[440] (2) EUR 306,830 in expert fees;[441] and (3) EUR 183,400.27 in legal representation fees.[442]

307. On 28 November 2012, the Respondent submitted Comments on the Claimant's Costs Application, which raised five objections to that Application. First, it argued that the Claimant should not be awarded costs incurred prior to 19 March 2010, the date of the initiation of this arbitration, because he failed to negotiate a possible settlement.[443] Second, the counsel costs of the two law firms retained by the Claimant do not meet the test of reasonableness and proportionality, taking into account the level of expertise of the Claimant's counsel.[444] Third, the issues raised by the Claimant in his Costs Application concerning the relevance of national court decisions and those relating to counsel for the Respondent cannot support the awarding of costs against the Respondent.[445] Fourth, the Claimant is responsible for

[436] Claimant's Costs Application, para. 9. Claimant's Amended Costs Application, para. 7.

[437] Claimant's Costs Application, paras. 1, 18. Claimant's Amended Costs Application, paras. 1, 13-14.

[438] Claimant's Amended Costs Application, paras. 3, 15-18.

[439] Respondent's Amended Statement on Costs, para. 3.

[440] Respondent's Amended Statement on Costs, para. 4.

[441] Respondent's Amended Statement on Costs, para. 6.

[442] Respondent's Amended Statement on Costs, para. 7.

[443] Respondent's Comments, para. 5.

[444] Respondent's Comments, paras. 6, 9.

[445] Respondent's Comments, para. 10.

abuse of process by having submitted at least four documents that he has not shown to be authentic: the Option Agreement,[446] the Contract for Buying-Selling Shares,[447] the Stock Purchase Agreement of 2 July 2002[448] and the Service Agreement.[449] Fifth, the Claimant resorted to abuse of process by waiting until his Post-Hearing Brief to submit a clear and explicit statement of his position, thus depriving the Respondent the opportunity for further rebuttal.[450]

The Tribunal's Decision

308. Both the Claimant and the Respondent have submitted proper documentation in support of their claims for costs.

309. Before ruling on costs, the Tribunal will address the arguments raised by each Party.

310. As to the Claimant, the fact that the he prevailed in the Lithuanian courts has been well established and the Tribunal has addressed above the import of these decisions; such decisions by domestic courts are irrelevant for the purpose of determining the allocation of costs in an international arbitration. The Claimant has raised new claims under the basis of the Agreement and international law, which was his full right, and the Respondent was entitled to defend itself against such claims.

311. As to the argument that the Claimant attempted, without success, to settle with the Respondent, the Tribunal has received little, and somewhat contradictory, evidence in that regard. In its view, the Tribunal has not obtained enough evidence to conclude that any Party behaved improperly or negligently in that respect. The steps taken by either side in that regard were too tentative and vague to justify any conclusion as to costs in the present arbitration.

312. As to the conduct of the LAWIN law firm and some of its members in this case, the Tribunal has already addressed this issue in its Procedural Order No. 2 and ruled that it "did not believe that it has the authority to rule on the interpretation to be given to the ethical rules applicable to Lithuanian attorneys under Lithuanian law." As to the fact that one of the LAWIN partners, Dr. Smaliukas (whose wife is also a partner and counsel in this case), was produced as a legal expert witness and that one of its senior associates, Mr. Nosevič, was produced as a fact witness has also been addressed in that Order. The Tribunal ruled that such a procedure was highly unusual and that it would bear these circumstances in mind when addressing the issues raised by the Parties. The evidence provided by these two witnesses has had no noticeable influence on the conclusions reached by the Tribunal, either on law or on facts. As to the case of Mr. Giedrius Stasevičius, another partner who appeared in this case, the issue raised in his respect had to do with his previous role as counsel to Suprema, a consulting firm which advised the SPF during the Alita tender negotiation process; in the Claimant's view, Mr. Stasevičius' active role in the Hearing underscored his conflicting duties to his client and to the Tribunal. However, as with the other members of the LAWIN law firm mentioned above, this is clearly a matter coming under the Lithuanian professional ethical rules and cannot have a bearing on the issue of costs.

313. As to the Respondent's arguments, the Tribunal answers them as follows.

314. As to the first concerning the period during which costs can be eligible for payment, the Tribunal does not see a valid reason to reject any cost incurred by the Claimant prior to the initiation of this arbitration on 19 March 2010 so long as the claimed costs are related to the present arbitration and fully justified. In his Costs Application, the Claimant specifies that he is submitting costs he incurred during the arbitration proceedings. They appear to include only those incurred after the six-month negotiation period ending in August (or early September) 2007, which post-dates most of the local proceedings. The Tribunal has dealt above with the argument based on the alleged settlement negotiations.

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[446] Option Agreement, Exhs. C-59/R-55.

[447] Contract of Buying Selling Shares Ivasauskas Bosca SpA, Exhs. C-57/R-70.

[448] Stock Purchase Agreement Skorupskienė Bosca SpA, Exhs. C-58/R-71.

[449] Service Agreement, Exhs. C-24/R-72. Respondent's Comments, para. 11.

[450] Respondent's Comments, para. 13.

315. Secondly, there is clearly a large differential between the Claimant's and the Respondent's legal costs. The Respondent chose to rely principally on a Lithuanian law firm (EUR 142,866.87) which it retains in other matters and only marginally on the foreign law firm it retained (EUR 40,533.40). Moreover, there is little doubt that the Respondent could rely on the contribution of its officials in various departments to support the work of its external counsel, with no apparent cost attributed to this case. The Claimant was in a very different situation. He selected, as was his right, an international law firm which played a prominent role in this case and was seconded by a Lithuanian law firm.

316. It is not the task of the Tribunal to determine the choice of counsel for the Parties; the Tribunal does not see anything inappropriate or abnormal in the strategy chosen in that regard by the Claimant. Furthermore, taking into account the nature of the case and all it involved, the Tribunal does not find the costs claimed to be out of proportion when compared to those claimed in other cases of a similar nature.

317. Thirdly, the Tribunal has already addressed the issue of the relevance of the national courts' decisions and the challenges to counsel for the Respondent. The Tribunal does not find the Claimant's arguments in that regard frivolous or inappropriate and they cannot be considered as an abuse of process.

318. Fourthly, the Tribunal does not consider either as an abuse of process the fact that the Claimant could not produce authentic texts of the documents mentioned above. The Tribunal is of the view that the copies produced and the testimonies of the relevant witnesses in that respect allowed the Tribunal to rely on the content of those documents.

319. Finally, the Tribunal cannot find an abuse of process in the content of the Claimant's Post-Hearing Brief. The "clear and explicit explanation of his position" which, the Respondent says, came out only in the Claimant's Post-Hearing Brief seems to the Tribunal to flow naturally from the written and oral evidence previously submitted by the Parties. The Respondent has provided no evidence to support its contention in that regard. Furthermore, if the Respondent felt that the Claimant had taken a position in his Post-Hearing Brief which was new, it was always open to the Respondent to apply to the Tribunal for an authorization to answer that new position, which the Respondent has not done.

320. Having disposed of the arguments raised by each Party in relation to costs, the Tribunal will concentrate on the reasons which guide it in its decision. The authority of the Tribunal in matters of fees and costs is dealt with in Articles 38, 40(1) and 40(2) of the UNCITRAL Rules.

321. Article 40(1) provides:

> Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

322. As to Article 40(2), it reads:

> With respect to the costs of the legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

Article 38 leaves open the meaning of "assistance" in the context of "the costs of legal representation and assistance."

323. The Claimant has been successful on the issues of admissibility, jurisdiction and liability and on the principle of damages. The Tribunal sees no reason not to follow the general principle enunciated in Article 40(1); the costs of arbitration in this case should be borne by the Respondent as detailed in the following paragraphs.

324. The Tribunal fixes the costs of arbitration as follows, plus interest as determined below:

- As per Article 38(a) of the UNCITRAL Rules, the fees of the Tribunal members amount to EUR 484,326.52, *i.e.*, The Hon. Marc Lalonde's fees total EUR 250,736.92, Mr. Daniel Price's fees total EUR 100,500.00, and Prof. Brigitte Stern's fees total EUR 133,089.60.

- As per Article 38(b)-(c) of the UNCITRAL Rules, the remaining costs expended from the Parties' case deposit for the Tribunal members' travel and other assistance rendered by the PCA and service-providers in the course of these proceedings total EUR 199,245.27.

The Tribunal will treat the Parties' expert witness costs, as well as the travel and accommodation costs of each Party, as part of the costs of legal representation and assistance under Article 38(e) per the discussion below; thus, the Tribunal need not approve any additional witness-related costs, nor have the Parties enumerated any, pursuant to Article 38(d). Finally, in reference to Article 38(f), the Tribunal notes that no costs were incurred by any appointing authority in this matter nor by the Secretary-General of the PCA.

325. Together, the costs of arbitration referenced above as falling within Article 38(a-c) of the UNCITRAL Rules amount to EUR 683,571.79 plus interest as determined below, and shall be borne by the Respondent in full, in accordance with Article 40(1). Thus, the Respondent shall pay the Claimant half this amount (or EUR 341,785.90) and the PCA shall reimburse the Parties in equal parts the amount that remains in the case deposit (EUR 116,428.21, or EUR 58,214.10 to each Party).

326. As to the costs of legal representation and assistance under Article 38(e) and Article 40(2), although the Tribunal has ruled that the Claimant's damages be very substantially reduced from his claim for EUR 207,971,000, the Claimant is the successful Party in light of the breach committed by the Respondent. Accordingly, the Tribunal finds that the Claimant may generally recover the costs of his legal representation from the Respondent.

327. The Tribunal is also mindful, however, that not all the Claimant's expert reports were relevant or useful to the Tribunal's analysis. For instance, the expert report authored by Dr. Ariel Cohen submitted by the Claimant did not make any meaningful contribution to the Tribunal's analysis. In addition, while prevailing on the principle of damages, the Claimant has failed to obtain anything approaching his claim in that respect. Thus, the Tribunal is of the view that the Respondent, in addition to supporting its own costs, should bear most of the Claimant's costs, excepting twenty percent (20%). The Respondent should bear eighty percent (80%) of the legal representation and assistance costs incurred by the Claimant which totalled EUR 4,180,421.21 (thus, 80% of Claimant's total legal fees amounts to EUR 3,344,336.97) plus interest as determined below.

328. Interest on the amount awarded to the Claimant shall run from the date of this Award and be set at the Euro Interbank Offered Rate (Euribor) three-month rate in effect on the date of this Award, plus two percent (2%) compounded semi-annually from the date of this Award.

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VII. DISPOSITIF

329. The Tribunal therefore unanimously decides and awards as follows:

(a) The Claimant's claim is admissible and the objections raised by the Respondent in that respect are dismissed.

(b) The Tribunal has jurisdiction over the dispute.

(c) The Respondent has breached its obligation to grant just and fair treatment to the Claimant, under the first sentence of Article 2(2) of the Agreement.

(d) In light of its decision concerning just and fair treatment and of the fact that any further breach would not, in this case, lead to additional damages, the Tribunal does not deem it necessary to rule on the other alleged breaches of the Agreement raised by the Claimant.

(e) The Claimant is only entitled to recover direct damages (monies paid to the Respondent in the privatization process of Alita and costs incurred in this case).

(f) The Claimant has already been reimbursed by the Respondent for the amounts paid to it on behalf of the Claimant in the privatization process of Alita.

(g) The Respondent shall bear the costs of arbitration in this case expended from the case deposit in the amount of EUR 683,571.79 plus interest as determined below.

(h) The Respondent shall pay to the Claimant eighty percent (80%) of the costs of legal representation and assistance incurred by him which totalled EUR 4,180,421.21 (80% of which amounts to EUR 3,344,336.97) plus interest as determined below.

(i) Interest on the amount awarded to the Claimant shall run from the date of this Award and be set at the Euro Interbank Offered Rate (Euribor) three-month rate in effect on the date of this Award, plus two percent (2%) compounded semi-annually from the date of this Award.

Stockholm, Sweden

Date: 17 May 2013

Brigitte Stern.

Prof. Brigitte Stern
Co-arbitrator

Daniel Price

Mr. Daniel Price
Co-arbitrator

Marc Lalonde

The Hon. Marc Lalonde
Presiding Arbitrator