

PARKERINGS-COMPAGNIET AS

Claimant

v.

REPUBLIC OF LITHUANIA

Respondent

AWARD

TRIBUNAL

Dr. Julian Lew Q.C., *Arbitrator*

The Hon. Marc Lalonde P.C., O.C., Q.C., *Arbitrator*

Dr. Laurent Lévy, *President*

Secretary of the Tribunal

Ms. Martina Polasek

Date of dispatch to the parties: September 11, 2007

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1. THE PARTIES

1.1 THE CLAIMANT

1. Parkerings-Compagniet AS (“Parkerings” or “the Claimant”) is a corporation organized and existing under the laws of Norway.
2. Parkerings’ principal business activity consists in the development and operation of public and private parking facilities, including the collection of parking fees and the enforcement of parking regulations.
3. Its corporate headquarters are located at:

Økernveien 145, 9. etg.
PO Box 158 Økern
N-0509 Oslo, Norway

4. The Claimant is represented in this arbitration by:

Mr. David W. Rivkin
Mr. Gaetan J. Verhoosel
Mr. William H Taft V
Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022
USA

Mr. Zilvinas Kvietkus
Norcous & Partners
A. Goštauto str. 12 A
01108 Vilnius
Lithuania

Ms. Carita Wallgren
Roschier Holmberg, Attorneys Ltd.
Kreskuskatu 7A
00100 Helsinki
Finland

1.2 THE RESPONDENT

5. The Respondent is the Republic of Lithuania (“Lithuania” or “the Respondent”).
6. The Respondent is represented in this arbitration by:

Mr. Petras Baguska, Minister of Justice
Mr. Paulius Koverovas, State Secretary of the Ministry of Justice
Ministry of Justice

Gedimino pr. 30/1
011104 Vilnius
Lithuania

Mr Alexander Yanos
Freshfields Bruckhaus Deringer LLP
520 Madison Avenue, 34th floor
New York NY 10022
USA

Ms. Lucy Reed
Mr. Constantine Partasides
Mr Noah Rubins
Freshfields Bruckhaus Deringer LLP
2, rue Paul Cézanne
75008 Paris
France

Ms. Renata Beržanskienė
Law Office Adamonis, Beržanskienė and partners Sorainen Law Offices
Jogailos 4
01116 Vilnius
Lithuania

2. THE ARBITRAL TRIBUNAL

2.1 CO-ARBITRATOR NOMINATED BY THE CLAIMANT

7. Nominated by the Claimant in its Request for Arbitration dated 11 March 2005:

Dr Julian D. M. Lew, Q.C.
20 Essex Street
London WC2R 3AL
United Kingdom

2.2 CO-ARBITRATOR NOMINATED BY THE RESPONDENT

8. Nominated by the Respondent by letter dated 9 September 2005:

The Honorable Marc Lalonde P.C., O.C., Q.C.
1155 René-Levesque Blvd West
33rd floor
Montreal, QC H3B 3V2
Canada

2.3 CHAIRMAN OF THE ARBITRAL TRIBUNAL

9. Jointly appointed by the parties by letter dated 3 October 2005:

Dr. Laurent Lévy
Schellenberg Wittmer
15 bis, rue des Alpes
P.O. Box 2088
1211 Geneva 1
Switzerland

3. SUMMARY OF THE ARBITRAL PROCEEDINGS

3.1 INITIATION OF THE ARBITRATION AND CONSTITUTION OF THE ARBITRAL TRIBUNAL

10. On 11 March 2005, the Claimant filed its Request for Arbitration with the Secretary-General of the International Centre for Settlement of Investment Disputes (“ICSID”). With respect to the “*method of appointment of the Tribunal and appointment of arbitrator,*” ¶¶ 72 of the Request set forth the following:

The Treaty does not set forth any particular method of appointment of the Tribunal. Having regard to Article 37 of the Convention and Rule 2 of the ICSID Arbitration Rules, Parkerings proposes that the Tribunal consist of three arbitrators, one appointed by each party and the President of the Tribunal appointed by agreement of the parties.

11. Under ¶¶ 73 of the Request for Arbitration, the Claimant appointed as its arbitrator Dr. Julian D. M. Lew, Q.C. On 21 June 2005, ICSID informed the parties that Dr. Lew had accepted his appointment as arbitrator.
12. On 17 March 2005, ICSID addressed to the Respondent a copy of the Request for Arbitration.
13. On 22 April 2005, ICSID requested, in accordance with Rule 2(1)(c) of the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules), that the Claimant communicate to the Centre, on the one hand, “*information concerning the consent of Parkerings-Compagniet AS to submit the dispute with the Republic of Lithuania to ICSID,*” and, on the other hand, “*evidence of entry into force of the bilateral investment treaty between the Government of the Republic of Lithuania and the Government of the Kingdom of Norway of June 16, 1992.*” The Claimant provided the requested information by letter dated 29 April 2005.
14. On 16 May 2005, the Secretary-General of ICSID issued a “Notice of Registration,” stating that the Request for Arbitration, as supplemented by counsel for the Claimant’s letter of 29 April 2005, had been registered in the Arbitration Register. He also invited the parties to “*communicate [...] any provisions agreed by them regarding the number of arbitrators and the method of their appointment.*”

15. By letter dated 27 May 2005, the Respondent informed ICSID that *“it raises no objection to the Parkerings-Compagniet AS proposal regarding the Arbitral Tribunal consisting of three arbitrators.”*
16. By letter dated 8 August 2005, the Respondent requested an extension of the 15 August 2005 deadline for the constitution of the Tribunal to 15 September 2005. By letter dated 12 August 2005, the Claimant declared that it did not object to such time extension.
17. By letter dated 9 September 2005, counsel for the Respondent appointed the Honorable Marc Lalonde P.C., O.C., Q.C. as arbitrator. On 15 September 2005, ICSID informed the parties that Mr. Lalonde had accepted his appointment.
18. On 3 October 2005, counsel for the parties jointly informed ICSID of the parties’ agreement to appoint Dr Laurent Lévy as President of the Tribunal. By letter dated 10 October 2005, Dr Lévy accepted his appointment.
19. On 12 October 2005, ICSID informed the parties that all three arbitrators had accepted their appointment and that the Arbitral Tribunal was deemed to have been constituted and the proceedings to have begun on that same day.

3.2 FIRST SESSION OF THE TRIBUNAL

20. The Arbitral Tribunal held a first session on 25 November 2005 in London, UK. In addition to the Members of the Tribunal and the Secretary, the following persons attended the hearing:
 - (i) Representing Parkerings:
 - Ms. Carita Wallgren, Roschier Holmberg, Attorneys Ltd.,
 - Mr. Gaetan J. Verhoosel, Debevoise Plimpton LLP, and
 - Mr. Zilvinas Kvietkus, Norcoux & Partners.
 - (ii) Representing Lithuania:
 - Mr. Paulius Koverovas, State Secretary of the Ministry of Justice of the Republic of Lithuania,
 - Mr. Constantine Partasides, Freshfields Bruckhaus Deringer LLP,
 - Mr. Noah Rubins, Freshfields Bruckhaus Deringer LLP, and
 - Ms. Renata Beržanskienė, Law Office Adamonis, Beržanskienė and partners Sorainen Law Offices.

21. A sound recording was made of the hearing, copies of which were sent to the parties. The Secretary also prepared summary minutes of the session, a certified copy of which was sent to the parties on 18 January 2006.
22. At the outset of the hearing, a number of procedural issues were dealt with. In particular, it was agreed that, pursuant to Article 44 of the ICSID Convention, the proceedings would be conducted in accordance with the ICSID Arbitration Rules in force since 1 January 2003. It was also agreed that the place of the proceedings would be Paris, France, and that, in accordance with Article 22 of the ICSID Arbitration Rules, the language of the proceeding would be English. During the course of the session, the parties acknowledged that the Tribunal has been duly constituted.
23. The Arbitral Tribunal and the parties agreed on the following time table:

The Claimant shall file its memorial on the merits by February 10, 2006;

The Respondent shall file its counter-memorial on the merits, any jurisdictional objections and any request for bifurcation of the proceeding by June 12, 2006;

The Claimant shall file its observations on the Respondent's request for bifurcation, if any, by July 3, 2006;

A pre-hearing conference limited to pending procedural questions will be held in Paris on August 28, 2006; and

A hearing on the merits or on jurisdiction or on both will be held in Paris on November 6-10, 2006.

3.3 PRE-HEARING WRITTEN PHASE

24. On 17 January 2006, the Claimant filed a request for the production of documents.
25. On 20 January 2006, the Respondent acknowledged receipt of the Claimant's document production request, and filed its comments thereon.
26. On 24 January 2006, the President of the Tribunal invited, on the one hand, the Claimant to submit its reply to the Respondent's observations within four days, and, on the other hand, the Respondent to submit its rejoinder within four days of the reply. The President of the Tribunal also invited the Respondent to gather and communicate to the Claimant all the documents that it accepted to produce without awaiting a decision from the Tribunal.
27. By letter dated 27 January 2006, counsel for the Claimant informed the Tribunal that the parties had agreed upon the following production schedule, subject to the agreement of the Tribunal:

1. By February 6, 2006, Respondent shall: (i) produce to Claimant the documents responsive to categories (a), (b), (d), (e), (f), (g), and (h) of the Application; and (ii) inform Claimant whether and, if so by when, it expects to be in a position to produce to Claimant the documents responsive to categories (c), (i), (j), (k), (l), and (m) of the Application.

2. If by February 6, 2006, Respondent confirms a schedule for the production of the documents responsive to categories (c), (i), (j), (k), (l), and (m), the parties shall endeavor to reach an agreement on any adjustments to the schedule of the arbitral proceedings required by such proposed schedule, on the understanding that: (i) any such adjustments

shall not affect the August 28, 2006 pre-hearing conference or the evidentiary hearing scheduled for November 6-10, 2006; (ii) Claimant's Memorial shall be due by a date no earlier than February 17, 2006; and (iii) any extension accorded to Claimant, at a minimum, shall not diminish the amount of time allotted to Respondent for the submission of its Counter-Memorial.

3. Should the parties have any dispute over the scope or schedule of production proposed by Respondent by February 6, 2006 in accordance with ¶¶ 1 or 2 above, they shall promptly submit such dispute to the Tribunal for resolution. The parties agree that, should such a dispute arise, Claimant's Memorial shall be due by a date no earlier than February 17, 2006, and the parties shall consult to agree on a mutually acceptable schedule for submissions, again with the understanding that the August 28, 2006 pre-hearing conference and the evidentiary hearing scheduled for November 6-10, 2006 shall not be affected and that such schedule, at a minimum, shall not diminish the amount of time allotted to Respondent for the submission of its Counter-Memorial.

28. Counsel for the Claimant added that "in light of the [...] agreed Schedule, Claimant withdraws the Application at this time. Claimant's right to revive the Application in whole or in part is reserved in accordance with ¶ 3 of the Schedule."

29. By letter dated 17 February 2006, counsel for the Claimant informed the Tribunal that the parties had agreed on the following further adjustments to the schedule of the arbitral proceedings, subject to the agreement of the Tribunal:

- Claimant shall submit its Memorial on February 24, 2006.
- Respondent shall submit its Counter-Memorial on June 26, 2006.
- Claimant shall file its observations on Respondent's request for bifurcation, if any, by July 17, 2006;

The dates scheduled for the pre-hearing conference (August 28, 2006) and the evidentiary hearing (November 6-10, 2006) remain unchanged.

30. On 17 February 2006, the Secretary wrote to the parties to confirm the new schedule for the submission of written pleadings as agreed upon by the parties.

31. On 27 February 2006, the Secretary received the Claimant's Memorial, with accompanying documentation (two witness statements, one expert report, exhibits numbered CE 1 through CE 259, and authorities numbered CA 1 through CA 57), under cover of a letter dated 24 February 2006

32. By letter dated 5 June 2006, the Claimant filed, in agreement with the Respondent, the following additional documents to complement its submission of 24 February 2006:

- (i) a supplemental statement by Mr. Carlos Lapuerta responding to corrected parking revenue data provided by Respondent following submission of Mr. Lapuerta's expert report on February 24, 2006;
- (ii) four new exhibits (CE 260-263) consisting of documents produced by Respondent on May 22, 2006 in response to a supplemental document request by Claimant, including excerpted translations; and
- (iii) in accordance with Arbitration Rule 25, the annexed list of corrections of accidental errors in Claimant's February 24, 2006 submission, as well as corrected versions of four exhibits submitted with Claimant's Memorial and/or their translations (CE 21, 54, 70 and 247). This list and these corrected exhibits were previously provided to Respondent on May 4, 2006.

33. By letter dated 27 June 2006, counsel for the Respondent sought “*the Tribunal’s approval of the parties’ agreement to grant the Republic an extension for the filing of its Counter-Memorial until July 24, 2006, subject to the following two conditions: (i) the Republic’s commitment not to seek any bifurcation of the proceedings; and (ii) the maintenance of the remainder of the schedule as agreed at the procedural hearing (including the dates of the August 2006 pre-hearing/preliminary conference on procedural questions and the November 2006 hearing on the merits).*” Counsel for the Respondent further confirmed that “*the Republic will comply with the above conditions and will be filing its Counter-Memorial within the agreed deadline.*”
34. By email of 28 June 2006 and letter dated 30 June 2006, the Secretary informed the parties of the Tribunal’s approval of their agreement to extend the time limit for the filing of the Counter-Memorial until 24 July 2006.
35. On 25 July 2006, counsel for the Respondent filed its Counter-Memorial and accompanying documents (two witness statements, one expert report, exhibits numbered RE 1 through RE 94, and authorities numbered RA 1 through RA 49).
36. On 28 August 2006, the Tribunal, the parties, and the Secretary held a pre-hearing telephone conference, at the close of which the President of the Tribunal issued directions regarding the parties’ opening statements and the evidence that counsel for the parties would wish to present during the hearing. The President of the Tribunal further authorized the Claimant to file, by 15 September 2006 at the latest, two additional statements of new witnesses as well as new exhibits, provided that the issues discussed in the additional witness statements and the new exhibits be strictly limited to rebuttal of allegations made by the Respondent in its written submission or by the Respondent’s witnesses, and do not pertain to allegations already made by the Claimant or contemplated by its witnesses in prior submissions. The President also authorized the Respondent to file, by 20 October 2006 at the latest, additional statements of new witnesses (in principle, no more than two) or supplemental statements of existing witnesses, as well as additional exhibits, provided that the facts discussed in these additional/supplemental witness statements and exhibits be strictly limited to rebuttal of allegations made by the Claimant’s new witnesses or of the contents of the Claimant’s additional exhibits. The President of the Tribunal invited the parties to inform the Tribunal, by 27 October 2006 at the latest, which additional witness(es) would be called for oral examination and which adjustments would need to be made with respect to the sequence and timing of witness examination. Finally, the President of the Tribunal issued the following additional directions:
- *Witnesses will be allowed in the hearing room at any time (i.e before and after their examination). Either party may, however, apply for the exclusion of one or more witnesses from the hearing room, at certain or all times. To avoid wasting time on procedural issues during the hearing week, counsel are invited to confer before filing any such application.*
 - *The issue whether counsel shall have the opportunity to make oral closing statements and/or to file post-hearing briefs shall be discussed at the hearing. The Tribunal shall issue a determination in this respect by Wednesday 12 November 2006 at the latest, upon request from the parties, if not ex officio.*

- *Upon agreement between the parties, the hearing shall end on Friday at 1:30 p.m. at the latest.*

37. On 15 September 2006, Parkerings filed:

- two additional statements of new witnesses (Björn Öberg and Sigitas Burnickas);
- two new legal authorities that had allegedly only been issued and become available after Parkerings' submission of 24 February 2006 (CA 58 and CA 59); and
- 37 new exhibits (CE 264-CE 300).

38. On 20 October, Lithuania filed:

- two additional statements of new witnesses (Jonas Endriukaitis and Ingrida Simonyte);
- two new legal authorities (RA 50 and RA 51); and
- 9 new exhibits (RE 95-RE 103).

39. On the same date, Parkerings filed five additional documents (CE 301-CE 305).

40. On 30 October 2006, Lithuania wrote that it had no objection to the Claimant's submission of Exhibits 301-305. On the same date, Lithuania filed additional documents (RE 104 – RE 108). The Claimant did not object to the new exhibits.

3.4 THE EVIDENTIARY HEARING

41. On 27 October 2006, the Claimant addressed to the Tribunal a letter regarding the witnesses it would put forward at the hearing. On 30 October 2006, the Respondent filed a similar communication in this respect.

42. The evidentiary hearing was held in Paris on 6, 7, 8, 9 and 10 November 2006, in the course of which the following witnesses and experts were heard:

1. Mr. Bjørn Havnes
2. Mr. Sigitas Burnickas
3. Mr. Jonas Tamulis
4. Mr. Björn Oberg
5. Professor Gintautas Bartkus
6. Mr. Robertas Staskevicius
7. Mr. Raivydas Rukstele

8. Mr. Jonas Endriukaitis
 9. Ms. Ingrida Šimonytė
 10. Mr. Carlos Lapuerta
 11. Mr. Tim Giles
43. During the hearing, the Claimant filed additional documents (CE 306 – CE 311) and two additional authorities (CA 60 and CA 61)
 44. Shortly after the hearing, the Arbitral Tribunal and the parties agreed on the procedural follow-up to the hearing. In particular, they agreed that the parties would file simultaneous post-hearing briefs on 8 December 2006; the parties would file simultaneous reply post-hearing briefs consisting in a short letter response within one week of the first submission; and the parties would submit their respective statements on costs jointly with their post-hearing briefs and a statement summarizing the costs by 22 December 2006.

3.5 THE POST-HEARING BRIEFS

45. The parties simultaneously filed their first post-hearing briefs on 8 December 2006.
46. On 15 December 2006, Parkerings sent a letter to the Tribunal which identified errors in Lithuania's Counter-memorial and Lithuania's post-hearing brief.
47. On 22 December 2006, the parties filed their statement of costs.
48. On 19 January 2007, the Tribunal informed the parties that it did not find necessary to hold an additional hearing.
49. On 9 May 2007, Parkerings filed a revised statement of costs.
50. On 25 May 2007, the Tribunal declared the proceedings closed in accordance with Rule 38(1) of the Arbitration Rules.

4. MAIN FACTS RELATING TO THE MERITS OF THE DISPUTE

4.1 THE TENDER

51. Following Lithuania's gradual transition between 1991 and 1997 from a Soviet Republic to a candidate for EU membership and a market economy, the Municipality of the City of Vilnius decided to create a modern, integrated parking system for the City of Vilnius, in order to control traffic and protect the integrity of the City's historic Old Town.
52. The Municipality announced a tender (the "Vilnius Tender") for the purpose of obtaining private investment in connection with the design and operation of this parking system, including the construction of two multi-storey car parks ("MSCP").

53. On 13 November 1997, the “Organisation of Investment Development Tender Regulations” was approved by the Board of Vilnius City by Decision No. 1819V (**RE 7**). The Mayor charged the “Commission on Organization of Tenders for the Lease of Land Plots” with the organization of investment development tenders, and appointed his advisor, Robertas Staskevicius, as “head of the working party” (**RE 7**). The Commission retained the services of a Dutch consulting firm, Tebodin Consultants and Engineers (“Tebodin”), for technical advice on the tender process.

4.1.1 The Bidders

54. Of the seven potential bidders which responded to the City’s tender and expressed an interest in the construction of MSCP (**RE 8**), only two returned signed letters of intent to the City (**RE 9** and **RE 10**). These two bidders (the “Bidders”) were Egapris, a Lithuanian waste management company, and the “Getras Consortium” composed of Getras, a French investor acting through its Lithuanian subsidiary, UAB Getras Lietuva, and three Lithuanian partners, namely AB Ekinsta, Bank Hermis, and UAB Savy.
55. Together with a Swiss company, Egapris submitted a proposal (“Investment Project Vilnius Parking System”) to construct “*automated car parking lots and garages.*” More specifically, according to Egapris’ proposal, the funds were to be invested, *inter alia*, in ticket machines, MSCP, and various equipments and tools (**RE 13**).
56. The Getras Consortium, on the other hand, proposed, in its business plan on the “*development and exploitation of car parking lot system in Vilnius city,*” the construction of two underground parking lots near the Opera and Ballet Theatre, on the one hand, and the Railroad Station, on the other hand. The Getras Consortium predicted that the construction of the facilities could be completed within six years (**RE 12**).
57. On 7 July 1998, Tebodin issued an “*Evaluation of Proposals for the Parking System in Vilnius – Final Report*” (**RE 16**). In this Final Report, Tebodin concluded that “*the Egapris proposal generates higher risk to Vilnius Municipality. The quality provided to Vilnius’ residents a[n]d other system users will be lower and the risk of inconvenience is therefore higher. The parking offered by GETRAS may be constructed without any increased risk, following the rules for parking design (by the European Parking Association).*[...]”
58. A new commission created by the City, known as the “Investment Development Commission” (the “Commission”), in turn, issued the following recommendation:
- Considering evaluation done by international experts, to suggest to Vilnius city Board to approve consortium Vilniaus miesto urbanistinis vystymas (enterprise Getras, share company Ekinsta, private limited liability company Savy, share company bank Hermis, Lietuvos vystymo bankas) as a further negotiation partner in the contest of Investment Development regarding creation of Vilnius city parking lots system [(RE 16)].*
59. The City thereafter instructed that a second stage of negotiations take place with the above-mentioned two entities (Egapris and the Getras Consortium) under the existing tender. Indeed, on 10 September 1998, the Board of Vilnius City issued the following Decision No. 1709V:

1. *To approve the consortium Vilniaus miesto urbanistinis vystymas (company Getras, public company Ekinsta, private company Savy, share company bankas Hermis, Lithuanian Development Bank) and private company Egapris as further partners of negotiations in the Investment development tender for the development of Vilnius city car parking system.*
 2. *To obligate the commission for organization of investment development tenders to select, by 10 October 1998, one object at a time from the 1st stage of Multi-storey parking investment project program for technical planning in the following manner: 1) consortium Vilniaus urbanistinis vystymas, 2) private company Egapris [(RE 19)].*
60. The City then transferred the responsibility of the tender process to the Commission and replaced Tebodin with a German firm, MAS Consult, which was to provide services with respect to further submissions by Egapris and the Getras Consortium (RE 22).
61. In the course of a meeting held in March 1999, the Bidders advised the City that they did *“not agree to construct multi-storey parking lots without being entitled to manage the on-street parking system”* (RE 24). The City agreed to grant to the Bidders the management of the on-street parking system as well.

4.1.2 Parkerings

62. Parkerings was established in 1996. The founder and managing director of Parkerings since 1999 is Roger Skaug. Parkerings' majority shareholder, through the majority holding in Indre by Eindom AS, is Skips AS Tudor (“Skips”), an investment firm with a diversified industrial portfolio ultimately controlled by Mr. Wilhelm Wilhelmsen. Mr. Wilhelmsen is a well-known Norwegian entrepreneur and chairman of the Wilh. Wilhelmsen Group, a publicly listed conglomerate and a global leader in the car carrier industry. Skips acquired its participation in Eindom AS/Parkerings from Conceptor, a Norwegian development company, in December 2000.
63. With a view to participating in the Vilnius Tender, Parkerings incorporated Baltijos Parkingas UAB (“BP”), its wholly-owned Lithuanian subsidiary (CE 195).
64. On 8 April 1999, Egapris informed the City that BP would join the Egapris bid. A power of attorney signed on that date indicated that Egapris authorized, *inter alia*, “Mr. Jonas Tamulis – the consultant of UAB ‘Baltijos Parkingas’, ” and “Mr. Roger Skaug – the director of ‘Parkerings – Compagnies AS” to *“lead negotiations regarding ‘Vilnius City on-street parking and construction of multi-storey car parks and creation of a unified system’ conducted by the municipality”* (RE 25). A consortium agreement (the “Consortium Agreement”) was signed by Egapris and BP on 14 April 1999. Egapris and BP thereafter formed the “Egapris Consortium” (RE 26). The Consortium Agreement provided, *inter alia*, the following:
1. *By this agreement the Parties agree to establish a consortium and to participate jointly as consortium in the tender for the design, establishment and implementation of Vilnius City parking system announced by Vilnius City municipality, in such a way broadening financial and technical possibilities to satisfy the tender requirements.*
 2. *The Parties agree that from now on the Consortium shall participate in the tender, shall render offers and carry on negotiations as indivisible person, instead of UAB*

“Egapris”, all the rights and obligations whereof related with the participation in the tender, shall be transferred to the Consortium.

3. *The Parties undertake to jointly participate in negotiations with the representatives of Vilnius City municipality, taking into account the possibilities and aims of each other, by giving the preference to reasonable agreement to render efforts to the municipality only after agreement on the joint implementation, financial and technical sources thereof. The negotiations shall be carried out by the joint negotiation group [...].*
4. *The shareholders of UAB “Baltijos parkingas” – Parkerings Compagniet AS, a Norwegian enterprise, shall render technical consultations to consortium and provide the consortium with know-how, necessary for the successful completion of negotiations and implementation of the agreement with the City. UAB “Baltijos parkingas” shall be responsible for preparing all information and proposal as required by Vilnius City Municipality. UAB “Egapris” shall provide all required information on the company and technical information on equipment planned to be used. [...] [(RE 26)]*

65. In April 1999, UAB Savy left the Getras Consortium.

4.1.3 The Award of the Bid to the Egapris Consortium

66. On 25 May 1999, the Getras Consortium, on the one hand, and the Egapris Consortium, on the other hand, submitted summary letters outlining the terms of their final proposals.

67. The proposal prepared by the Getras Consortium read as follows:

6. *Investment obligations*
- 6.1 *The construction of multi-storey car parks:*
 - 6.1.1 *The Consortium obliges to construct approximately 14 multi-storey car parks, i.e. to create approximately 5300 multi-storey parking places, taking into consideration the prepared Vilnius city parking plan.*
 - 6.1.2 *The Consortium obliges to project and construct not less than a minimal number (2) of multi-storey car parks within one year from the beginning of the construction works.*
 - 6.1.3 *The Consortium obliges to construct approximately 14 multi-storey car parks within 8 years from the beginning of the construction of the first two car parks, taking into consideration the prepared Vilnius city parking plan and the commercial validity.*
 - 6.1.4 *The Consortium obliges to invest necessary funds, not less than 120 million Litas, into the construction of multi-storey car parks during the defined period.*
 - 6.1.5 *The Consortium obliges to perform all necessary investments and works related to the construction of multi-storey car parks under the approved parking plan and schedule.*
- 6.2 *The Consortium obliges to install ticket machines, serving for on-street parking places in Vilnius city under the plan and requirements, approved by the Municipality.*
 - 6.2.1 *The Consortium obliges to install 1 ticket machine for 15 on-street parking places. Ticket machines will be installed within 3 months after the signing of the Agreement, after interception of parking activities from SP UAB “Komunalinis ūkis”. [(emphasis added)]*

- 6.2.2 *The Consortium obliges to perform all other investments related to on-street parking under the parking plan, approved by the Municipality.*
- 6.2.3 *The Consortium obliges to invest not less than 1800 Litas for one available and to be created in the future on-street parking place.*
- 6.3 *The Consortium obliges to invest into the development of car parks, transferred under the exploitation agreement.*
- 6.4 *All investments into the development of the parking system, established in the Agreement, will be performed by declaring contests (including for constructional works and machinery supply).*

[...] [(RE 27)]

68. In turn, the proposal dated 25 May 1999, prepared by the Egapris Consortium read as follows:

- 6. *Investment obligations*
 - 6.1 *Construction of multi-storey car parks:*
 - 6.1.1 *The Consortium undertakes to construct not less than 10 multi-storey car parks, i.e. to develop not less than 3000 multi-storey parking places.*
 - 6.1.2 *The Consortium undertakes to start designing a minimum number (2) of multi-storey car parks immediately after the Signature of this Agreement and to commence their construction immediately after receipt or permits from relevant institutions and the Municipality.*
 - 6.1.3 *The Consortium undertakes to construct not less than two multi-storey car parks each year starting from 2000, subject to the general parking plan.*
 - 6.1.4 *During a defined period of time, the Consortium undertakes to invest in the construction of multi-storey car parks not less than LTL 140 million. This period will depend on the terms for approval of the general parking plan, the results of the pre-project works and the possibility to obtain requisite building permits from relevant institutions.*
 - 6.1.5 *The Consortium undertakes to make all necessary investments and to perform the works all in connection with the constitution of multi-storey parking lots according to the approved parking plan.*
 - 6.2 *The Consortium undertakes to install ticket machines serving the on-street parking places in the city of Vilnius according to the requirements approved by the Municipality, ensuring the possibility to make settlements in cash and by different types of cards.*
 - 6.2.1 *The Consortium undertakes to install, within 6 months as from the signature date of the Agreement, requisite number of ticket machines in the currently existing on-street parking places.*
 - 6.2.2 *The Consortium undertakes to install in Vilnius city, within 24 months as from the signature date of the Agreement, not less than 350 ticket machines according to the parking plan approved by the Municipality.*
 - 6.2.3 *The Consortium undertakes to install in total not less than 350 ticket machines in Vilnius city and to place 1100 parking signs according to the parking plan approved by the Municipality, upon receipt of relevant permits from the Municipality, the Police and other institutions.*
 - 6.2.4 *The Consortium undertakes to make other investments relating to the on-street parking according to the parking plan approved by the Municipality.*
 - 6.2.5 *The Consortium undertakes to invest not less than LTL 10,3 million in the on-street parking.*

6.2.6 *The Consortium will seek to build not less than 6000 on-street parking lots within the 5 years period.*

6.3 *All investment in the development of the parking system contemplated in this Agreement will be made by way of tender (Including tenders for construction and equipment supply works).*

[...] [(RE 28)]

69. MAS Consult thereafter issued a report recommending that the City refrain from naming a winner (RE 29). With respect to the technical aspects of the project, MAS Consult stated that *“it is foreseen that the awarded tender will have to construct and develop 3,000 multi-storey parking spaces, as well as to automate and manage 6,000 on-street parking spaces (the data may be corrected in the process of preparation of the parking layout)”* (RE 29).
70. On 6 June 1999, the Commission, on the other hand, *“approve[d] the position suggested by the negotiation group to orientate in further negotiations to a 10-year agreement validity term [...]”* (RE 30). The Commission concluded that *“taking into consideration the agreement validity terms suggested by the consortium of UAB Egapris and UAB Baltijos parkingai and the consortium Vilniaus miesto urbanistinis vystymas [...], and having adopted the initial position regarding the agreement validity term [mentioned above], the proposal of the consortium of UAB Egapris and UAB Baltijos parkingai [was] more favourable to Vilnius City Municipality”* (RE 30). The Commission therefore resolved to *“recommend to the committees of Vilnius City Council and the Board of Vilnius City to consider the possibility of negotiations on the conditions of the agreement with the consortium of UAB Egapris and UAB Baltijos parkingai, and to familiarize them with the proposals made by the consortium Vilniaus miesto urbanistinis vystymas”* (RE 30).
71. On 29 July 1999, the Egapris Consortium sent to the City a first draft agreement (the “First Draft”). Article 7.3 read: *“The Municipality undertakes to insure the investments of the Consortium partners against political risk”* (RE 33).
72. By decision No. 1478V issued on 19 August 1999, the Board of the City of Vilnius *“approve[d] the Consortium of UAB Egapris and UAB Baltijos parkingas as further partner of negotiations regarding the creation of conditions for development of Vilnius city parking system”* (RE 35), thus awarding the bid to the Egapris Consortium.

4.2 THE AGREEMENT BETWEEN THE EGAPRIS CONSORTIUM AND THE VILNIUS MUNICIPALITY

4.2.1 The Negotiations Regarding the Agreement

73. In the course of a negotiation meeting held on 19 October 1999, the representatives of the Municipality, UAB Komunalinis ūkis, MAS Consult, and the Egapris Consortium discussed the issue of the *“collection of parking fee and distribution thereof between the Municipality and the Consortium”* (RE 36). According to the minutes of this meeting, it was *“proposed to divide the parking fee in pay parking places into two parts – local charges for the Municipality and the fee for the Consortium; the relative part of the local charge, as compared to the total fee, will be defined in further stages of*

negotiation; it will be approved by Vilnius City Council; [...] (RE 36). The solution proposed for the on-street parking concession was thus that of a hybrid fee, according to which the parking fee would be divided into a local parking fee component, on the one hand, which the Egapris Consortium would collect for the City and give to the latter in its entirety, and a service fee component, on the other hand, which would not be a parking fee and which the Egapris Consortium would therefore be entitled to keep.

74. During meetings held on 23 and 28 October 1999, the issue of the “*mechanism and legal grounds for granting land to the Consortium for construction of multi-storey car parks*” was discussed (RE 37 and RE 38).
75. According to the minutes of the meeting of 23 October 1999, it was resolved that “*the negotiation group of VCM [“Vilnius City Municipality”] [would] analyse the draft ‘Basic provisions of the Joint Venture Agreement’ submitted by the Consortium, defining the proposals of the latter regarding granting of land for the construction of multi-storey car parks, and [would] submit its comments and recommendations*” (RE 37).
76. At the meeting of 28 October 1999 regarding the “*use of land plots intended for multi-storey car parks and the obligations of VCM and the Consortium relating thereto,*” “*VCM propose[d] that all multi-storey car parks be considered as infrastructure objects and that formation of land plots in the location of the parking lots be postponed until the expiry of the agreement with the Consortium. The Consortium [, in turn] wishe[d] that VCM prepared a project anticipating the mechanism of such land use, which would be analysed by the Consortium and which would be discussed in the course of further negotiations*” (RE 38).
77. On 20 December 1999, MAS Consult issued a “*Report on negotiations with the Consortium of UAB Egapris and UAB Baltijos Parkingas*”. The report provided that (RE 39):

2.3.1 *The Consortium shall:*

- *work out the parking plan on the basis whereof the parking system will be developed;*
- *develop the parking system in the manner defined in the Agreement and the parking plan as approved by the Municipality:*
 - *Building at least 450 ticket machines;*
 - *Building of at least 10 multi-storey car parks*
 - *Co-ordination of all actions with the Municipality and performance thereof in the manner prescribed by the European Standards;*

2.3.2 *The Municipality shall:*

- *consider and determine the changes in the level of public parking order and the fees, consider and adopt the decisions regarding the normative acts and issues relating to parking, adopt the decision on the approval of the parking plan;*
- *provide the Consortium with the full information requisite for the preparation of the parking plan, as well as the information concerning the existing parking system, give necessary assistance and ensure participation of its employees in the preparation of the parking plan;*

- *transfer the right to the Consortium allowing to collect local charges in the street parking place and set the limits of the extra fee that can be collected by the Consortium for the parking.*

78. On 28 December 1999, the Sorainen Law Office issued, at the City's request, a legal opinion (the "Sorainen Memo"), based on the "*legal acts of the Republic of Lithuania which were in effect on December 27, 1999*" (CE 11). This Memo discussed, in particular, the issue of the legality of the hybrid fee, stating, in substance, that Lithuanian courts were likely to view both components of the parking fee as a unitary whole and, therefore, to consider them as being regulated by the Law on Fees and Charges. According to the Sorainen Memo, if the fee were to be treated as a unitary whole, then the collection of money by the Egapris Consortium would be contrary to the law, due to the fact that the initial tender did not provide for such payment to be made to the concessionaire by the City. Indeed, with respect to this issue, the Sorainen Memo opined the following:

[...] In view of the provisions of Article 5.1.3 of the Agreement, a conclusion should be drawn that the local fee, which, in accordance with Articles 2 and 3 of the Law on [sic] of the Republic of Lithuania on Local Fees, may be fixed for the time vehicles were parked in the on-street parking places designated by the Vilnius City Council, will be comprised partly for the vehicle parking time in the public on-street parking places designated by the Vilnius City Council. In this instance, the legal basis of the remaining part of the fee for the vehicle parking time in the on-street parking places designated by the Vilnius City Council, which in accordance to Article 5.1.3 of the Agreement goes to the Consortium, becomes questionable.

We are of the opinion that any tax, fee or payment of any kind, which is paid or is demanded to be paid, including the exceptions applied to certain person categories, for the vehicle parking time in on-street parking places designated by the Vilnius City Council, is the regulatory subject-matter of the aforementioned Law on the Republic of Lithuania on Local Fees, and should be considered the local fee, as it is defined in Article 2 of the same Law with all the ensuing consequences (Article 7 of the aforementioned Law).

While analyzing the legality of the commitment of the Municipality to transfer the right to collect a fee for vehicle parking time and for violations of the Parking Regulations for on-street parking places designated by the Vilnius City Council, we draw the conclusion that the legal acts of the Republic of Lithuania do not create any legal obstacles to make such a commitment and exercise its existing right, which is a precondition of such obligation.

Whereas the legal basis of the fee, which goes to the Consortium according to articles 5.1.3-5.1.7 of the Agreement for the vehicle parking time for on-street parking places designated by the Municipality Council, raises doubts. Such conclusion shall be drawn due to the following reasons, listed hereinafter:

- 1) *Vehicle parking lots are the property, which belongs to the Municipality by the Public property right, which was obtained by basis of the Law on State property transfers to the property of Municipalities based on Law or created anew;*
- 2) *The Consortium does not obtain ownership of vehicle parking lots on the grounds of the Law on Lease or other grounds to administrate the property, for the usage of which the arbitrary fee may be collected from users of parking places.*
- 3) *Any fee or other payment for vehicle on-street parking places designated by the Vilnius City Council, in our opinion, is the regulatory subject-matter of the Law of the Republic of Lithuania on Local Fees, and should be considered a local fee, as it is defined in Article 2 of the same Law.*

In view of what was presented in clause 3 hereinbefore, we would take the view that the legal acts of the Republic of Lithuania and contractual deeds and obligations, indicated in

the Agreement of the Municipality and the Consortium, do not create sufficient and clear legal ground for the Consortium to have a right to collect a portion of the fee for vehicle parking time for on-street parking places designated by the Municipal Council, which is derived from the entire fee, established in Article 5.1.3, less local charges approved by the Municipality Council. [...] [(CE 11)]

79. On the other hand, a legal opinion prepared of 29 December 1999 by Lideika, Petrauskas, Valiūnas ir Partneriai (or “Lawin” firm), the Lithuanian legal counsel of the Egapris Consortium, provided that the hybrid fee was in accordance with the law. Indeed, this opinion provided the following:

Following your request, we would like to comment the legal situation relating to collection of payment for car parking in places designated by the Municipality (streets and squares). The agreement between Vilnius City Municipality and the Consortium establishes that such payment will consist of local charges and the portion of payment falling on the Consortium.

The portion of payment falling on the Consortium is to be legally qualified as payment for service, which will be rendered by the Consortium to car drivers. The scope of this service is the development of parking system in the city and its administering. Car parking in pay place is to be qualified as a behaviour of a driver expressing his/her will to use the service rendered by the Consortium and to pay for it according to the rate set by the Consortium [(RE 40)].

80. On 29 December 1999, the Vilnius City Council adopted Decision No. 482, approving the draft agreement between the parties, and authorizing Mayor Imbrasas to sign the agreement with the Egapris Consortium on behalf of the Municipality (CE 12). On the same day, the City also adopted Decision No. 483 regarding the performance of the Agreement (RE 41).

4.2.2 The Agreement

81. On 30 December 1999, the Egapris Consortium and the Municipality signed an agreement (“the Agreement”)(CE 13). The Agreement was signed by each of the Egapris Consortium members. According to the Agreement, BP and Egapris were jointly and severally liable for the Egapris Consortium’s performance of the Agreement (Article 1.2 of the Agreement).
82. The Agreement pertained to the creation, development, maintenance and enforcement of the public parking system in the City of Vilnius. More specifically, the Agreement provided for an exclusive concession to operate the city’s street parking and to operate ten MSCP.
83. The Consortium was granted an exclusive right to act as a “sole partner of the Municipality” for the organization, maintenance, development and enforcement of the public parking system in the areas of the City of Vilnius designated by the Agreement. Article 1.2 of the Agreement defined the terms “sole partner of the Municipality” as “a person, that is granted the exclusive rights to collect local charges and penalties for violation of parking regulations in the streets and squares as established in the city Council, and to construct multi-storey car parks in the locations specified in Annex No. 1 to this Agreement.”

84. Thus, the Egapris Consortium was granted an exclusive thirteen-year right to operate all the street parking, that is specifically to collect the parking fees, and to enforce the parking regulations namely through the clamping of vehicles. With respect to the Consortium's right to enforce parking regulations through clamping, the Agreement foresaw the transition to a fine system as soon as the applicable legislation would have been passed (Article 5.3.4 of the Agreement).

85. With respect to the parties' liability, Article 7.2.1 of the Agreement provided the following:

The liability of the Parties deriving from the terms and conditions of the present Agreement is understood as responsibility for the actions of the Party itself or failure to perform such actions due to which the undertakings of the Party will not be properly, fully and in due time fulfilled. Neither Party shall be liable and no sanctions shall be imposed on it if the breaches of this Agreement will occur due to the actions or failure to act by the other Party or any other third party, as well as due to irresistible forces (force majeure), as defined in the Government Resolution No. 840 "On the Approval of Rules for Release from Liability due to Irresistible Forces (force majeure)" dated 15 July, 1996.

86. The latter Resolution provided the following:

1. *The term "force majeure" shall serve to define extraordinary circumstances that cannot be foreseen or avoided, or removed by using any means.*

[...]

2. *A party shall not be financially held liable for failure to perform any of its obligations if it is capable of proving that:*

2.1 *it has failed to fulfill the obligations due to the obstacle being beyond its control;*

2.2 *it cannot be anticipated that at the moment of entering into the contract the party could have foreseen that obstacle or its [e]ffect on the ability to perform the obligations;*

2.3 *it could not avoid or overcome the obstacle or at least its effect;*

3. *The obstacles, mentioned in clause 2 hereof, may arise as a result of the following events below:*

[...]

3.5 *lawful or unlawful acts of state government institutions (except for those acts which, pursuant to other contractual provisions, were taken by a party requesting release from liability [...]) [(RE 5)].*

4.2.2.1 The Consortium's Obligations under the Agreement

87. Under the Agreement, the Consortium was to comply, *inter alia*, with the following main obligations.

88. First, the Consortium was to "*initiate, prepare, co-ordinate and submit to Vilnius city Council for approval a plan of public parking system in Vilnius city [(the "Parking Plan")]*" [...] (Article 1.4.2 of the Agreement; see also Article 2.1.1 of the Agreement). The Parking Plan was to "*include parking signs, parking zones, the recommended fee structure, parking control and regulations, and conditions and priorities for construction of multi-storey car parks. Upon preparation and approval of the Parking plan the*

Parties [were to] agree upon its implementation schedule” (Article 1.4.2 of the Agreement). “ The objective of the Parties [was] to design a plan which [could] provide the basis for a detailed regulation of traffic flow and parking” (Article 2.1.3 of the Agreement).

89. The Consortium was to create, manage and operate the “*public parking system for Vilnius city, including installation of ticket machines and construction of multi-storey car parks, complying with the Standards; [...] invest into the present parking system in order to establish the public parking system and structure of Vilnius city in accordance with the approved plan, terms and conditions of this Agreement; [and] plan and design the modifications of the current parking system in accordance with the Agreement and the approved Parking plan and carry out the investments related thereto*” (Article 1.4.2 of the Agreement).

90. The key elements of the so-called “Investment Program” were the following:

- *the Consortium constructs multi-storey car parks – no less than 10 in total;*
- *the Consortium improves the current street parking system (purchases and installs equipment, trains the employees, purchases other equipment, including IT hardware, vehicles etc.);*
- *the Consortium installs 450 new ticket machines with the terms established in the schedule of implementation of the Parking plan;*
- *the Consortium installs new parking signs and traffic flow control signs – approximately 1050 signs;*
- *the Consortium creates integrated parking information system;*
- *the Consortium develops the street parking system according to the Standards and this Agreement;*
- *the Consortium develops the street infrastructure according to this Agreement, the Joint Activity Agreement and the approved Parking plan (Sub-Clause 4.1.1 of the Agreement). (CE 13, Article 4.1.1)*

91. With respect to MSCP, the Consortium had to “*plan, design, and construct multi-storey car parks in accordance with the laws and regulations of the Republic of Lithuania and in a line with this Agreement, the Parking plan and its implementation schedule in order to develop an adequate car parking structure and capacity*” (Sub-Clause 1.4.2 of the Agreement). The Consortium was to construct no less than ten MSCP in the city of Vilnius, “*two [...] every year during the life-time of this Agreement, except for the first year*” (Article 4.4.5 of the Agreement), in the locations specified in Annex No. 1 to the Agreement. The full ownership of the MSCP was to be retained by the Consortium (**CE 13**).

92. The Agreement provided the following with respect to the planning and construction process of the MSCP:

- 4.4.2 *After the Municipality issues the full collection of the design conditions, in each individual case the parties shall sign the Joint Activity Agreement, [...] in the form of Annex No. 8. [setting forth the time allocated for the design and construction of the MSCP] [...].*

4.4.3 *Not later than within 9 months after the Joint Activity Agreement is signed, unless the shorter term is established in the Joint Activity Agreement, the Consortium shall prepare and co-ordinate the design project of a multi-storey car park [which] shall be submitted to the Municipality. After the design projects are approved, the Municipality, with the participation of the Consortium, shall obtain construction permits in the name of itself and/or the Consortium, or the Consortium, with the participation of the Municipality, shall obtain construction permits in the name of itself and/or the Municipality.*

4.4.4 *After the Municipality obtains the construction permits in the name of the Municipality and/or Consortium [...], the [latter] shall construct said car parks in accordance with this Agreement and the Joint Activity Agreement [...], and shall ensure that the multi-storey car parks are constructed and made ready for use pursuant to the Procedure for Approving of the Constructions for Use STR.1 1.01:1996, approved by Order No. 108 of the Ministry of Construction and Urban Development as of 23 August 1996, and not later than within 24 months after the construction permits were issued, unless the Joint Activity Agreement provides for the shorter period.*

[...]

4.4.8 *Within [twenty] one day after the date of this Agreement, the Consortium shall evaluate the preliminary locations for construction of multi-storey car parks specified in Annex No. 1, and shall indicate two locations for which the detailed plans are already prepared and shall file applications for the issue of design conditions. The Municipality of Vilnius City shall, upon receipt of the application submitted by the Consortium, issue to the Consortium the collections of the design conditions for the specified locations, whereupon the Consortium shall commence the design works under the terms of this Agreement.*

93. *With respect to street parking, “the Consortium [undertook] to install 450 new ticket machines within the period established in the schedule of implementation of the Parking plan in the spaces of the streets and squares of Vilnius City which locations are defined by the Decision of the Vilnius city Council and correspond to the parking program. [...] The additional locations of the streets and squares where the Consortium shall be granted the right to collect payments for the parking of vehicles, shall be established by the Decision of the Vilnius City Council in accordance with the Parking plan approved according to the established procedure after the ticket machines in the above mentioned places are installed by the Consortium accordingly with the schedule of implementation of the parking plan” (Articles 4.3.1 and 4.3.2 of the Agreement).*

4.2.2.2 The Municipality’s Obligations under the Agreement

94. *Article 1.5.1 of the Agreement provided that “in order to achieve its aims and create favourable conditions for the Consortium to fulfill its obligations under this Agreement, the Municipality shall, within the [?] time limits of its competence, undertake the following:”*

- *to consider and establish the public parking order in the city and the adjustments of parking fee level taking into account suggestions and recommendations made by the Consortium and the needs of the city’s population;*
- *to refrain from any amendments to the present city parking order that would deteriorate the Consortium’s possibilities and conditions for implementing of its obligations hereunder. This obligation does not include the adjustments to local duties if such adjustments are made before March 1, 2000, in accordance with the conditions of this Agreement;*

- *to assign to the Consortium the right to collect local charges established by the Vilnius city Municipality Council, including penalties imposed for the violation of the parking order, in the streets and squares as defined by the Vilnius city Council in accordance with the conditions of this Agreement and the approved parking plan;*
- *within one month from the date of coming into force of the Agreement to hand over to the Consortium all necessary information (agreements for use of the parking spaces) related to the parking in the streets and squares specified in Annex No. 4 to this Agreement [(Annex No.4: list of streets and squares in which car-parks have been equipped pursuant to the established procedure and in which the Consortium, consisting of UAB Baltijos parkingas and UAB Egapris, will have the right to collect local duty, clamp vehicles for the non-observance of the provisions relating to the Collection of Charges established for the owners of the vehicles (drivers) for the use by the latter of watched car-parks in the streets and squares of Vilnius and to collect charges for the unclamping of the vehicles)];*
- *timely and in accordance with appropriate procedure to consider legislative and regulatory issues related to parking, including parking signs, penalty level and structure (clamping, other means of blocking of the vehicle or a fine charge notice);*
- *in accordance with the terms and conditions of this Agreement and valid legal acts to consider and make decisions regarding the approval of the public parking system plan as worked out by the Consortium;*
- *to ensure the way of use of the land plots, permits and approvals necessary for the construction of multi-storey car parks in accordance with the conditions of the Joint Activity Agreement attached as Annex No. 8 hereto;*
- *to consider and determine the fee structure and fee rates for street and ground parking in accordance with the conditions and procedure established by this Agreement;*
- *to ensure the service rendering according to the city maintenance and cleaning rules;*
- *to use all its efforts in order to ensure that the necessary decisions of the institutions not subordinated to the Municipality are taken for successful development of the parking system (including appropriate modifications of the laws and other statutory acts, relevant traffic signs, fee levels and structure, use of land and other relevant issues);*
- *to provide the Consortium with all information necessary for drawing up of the Parking plan which information is defined in Annex No. 3, or provide with a possibility to get access to such information and photocopy it, and to ensure the participation of appropriate Municipality's subdivisions within the limits of their competence in the process of the drawing up of such plan. The Parties understand that the Municipality does not possess all the information necessary for the drawing up of the plan and that this may affect the quality of the Parking plan;*
- *not to extend agreements concluded prior to the Agreement, if that does not constitute the breach of such agreement, and to refrain from making any new agreements that would impede creation of the unified parking system in the city according to the conditions of this Agreement;*
- *to provide the Consortium with the possibility to use the city GIS in the process of drawing up the Parking plan;*
- *to fulfill all other obligations under this Agreement.*

95. The Agreement specifically provided, under Article 1.5.2 *in fine*, that “*undertakings of the Municipality shall be limited to the scope of its competence, or the competence of institutions subordinated to it.*”

4.2.2.3 Revenue Sharing Mechanism under the Agreement

96. The Consortium - which had to prepare the Parking Plan - was responsible for the equity and debt financing for the construction of the MSCP and the establishment of the Parking Plan. In order to ensure that the Consortium would obtain a reasonable return on its investments, Article 5 of the Agreement provided that the proceeds of the maintenance and enforcement of the Vilnius public parking system would be shared among the parties to the Agreement. The Consortium was entitled to three different income streams.
97. First, in accordance with its exclusive right to operate for thirteen years all the street parking in the city, collect the parking fees, and enforce the parking regulations through the clamping of vehicles, the Consortium was entitled to a service fee portion of the public parking fee that it was to collect. The public parking fee indeed consisted contractually of two elements: a local charge for the Municipality and a service fee for the Consortium.
98. With respect to the determination of the local charge and the service fee, Articles 5.1.1, 5.1.2, and 5.1.3 of the Agreement provided that *“the Consortium shall collect charges established by the Vilnius City Council for the duration of parking in the places of streets and squares that are determined by the Municipality Council, and shall transfer such charges to the account indicated by the Vilnius City Municipality. [...] The local charges for the parking time of the vehicles in the places of streets and squares that are determined by the Municipality Council shall be fixed by the Vilnius City Council according to the Law On Local Charges for the Republic of Lithuania. [...] The local charges constitute a part of the parking fee for the parking time in the places of streets and squares that are determined by the Vilnius City Council. The other part of the parking fee falls upon the Consortium.”* The part of the fee that was allowed to the Consortium thus depended on the amount of the local charge for one hour of parking established by the Vilnius City Council, its ceiling being fixed in the Agreement under Article 5.1.3.
99. The service fee was to be fixed either by the Consortium, in which case it was to be calculated in accordance with the provisions of Articles 5.1.3.1 through 5.1.3.5 of the Agreement, or by separate agreement between the parties, in which case it was to be calculated in accordance with Article 5.1.4 of the Agreement. The Consortium was to collect the entire amount and then transfer the portion corresponding to the local charges to the Municipality.
100. Second, the Consortium was entitled to the full amount of the parking fees it would collect in MSCP.
101. In this respect, Article 3.1.5 of the Agreement provided that *“multi-storey car parks constructed shall not be transferred to the Municipality, and they will remain the property of the Consortium or its members. All rights regarding management and operation of the multi-storey car parks shall be retained by the Consortium or the companies established by it.”* According to the Agreement, there was no time limitation

on the right to operate MSCPs. Furthermore, Article 5.1.9 of the Agreement stipulated that “*the parking fee for the parking time in the multi-storey car parks owned by the Consortium shall be fixed by the Consortium.*”

102. Third, the Consortium was entitled to seventy percent of unclamping charges. It was the Consortium’s right to enforce parking regulations thus generating an independent revenue stream. Indeed, the Agreement granted to the Consortium the right to collect “clamping fees” for the release of each clamped vehicle, seventy per cent of which the Consortium was entitled to keep, the remaining thirty per cent going to the Municipality.

103. In this respect, Articles 5.1.11, 5.1.12, and 5.1.13 of the Agreement provided the following:

The Consortium shall as from the day it is granted the right to collect local charges in accordance with Item 5.1.6, be obliged to clamp the vehicle by technical means or limit the usage of the vehicle by other means established by statutory acts, if the vehicle owner has failed to pay according to the established procedure prescribed for parking in the payable parking places or has parked the vehicle in violation of the rules of parking established for the places specified in Annex No. 4 to this Agreement. The Consortium shall, as from the day on which it is entitled to collect legal charges according to Item 5.1.6 hereof, collect the fee from vehicle owners in the streets and squares as indicated in Annex No. 4 to this Agreement for unclamping of the vehicles, which fee shall be based on tariffs approved by the Vilnius City Council [...]. The Consortium shall be obliged to transfer 30 per cent of the collected fee for unclamping to the account indicated by the Vilnius City Municipality for every month in arrears until the tenth day of the next month.

104. The Agreement provided that the transition to a fining system would occur “*as soon as there is a legal base and the technical means of state authorities create appropriate conditions*” (Article 5.3.4 of the Agreement).

105. In accordance with the above, the Consortium thus undertook to pay to the City:

- a fixed fee of LTL 200,000 (EUR 57,924) to be paid in equal monthly installments (Article 5.1.14 of the Agreement);
- thirty percent of the fees collected by the Consortium in connection with the unclamping of vehicles that would have failed to pay the parking fees;
- Additionally, Article 5.1.15 of the Agreement provided that

In case the aggregated sum of the revenues received in the financial year by the Municipality under Items 5.1.1, 5.1.13 and 5.1.14 of this Agreement is less than 1.000.000 Litas, the fixed amount established in Item 5.1.14 shall be increased by such amount that the annual revenue of the Municipality received under Items 5.1.13 and 5.1.14 equals to 1.000.000 Litas. The consortium undertakes within 30 days after the end of the financial year to transfer to the account indicated by the Vilnius City Municipality the sum equal to the amount by which the fixed amount established in Item 5.1.14 is increased.

4.2.3 The incorporation of the Operator

106. According to the Agreement, the Consortium was to establish a management company that would run the street parking concession.

107. Article 1.2 of the Agreement defined the “management company” as

a private company incorporated by the Consortium in accordance with Item 3.1.3 of [the] Agreement that shall own the ticket machines installed in accordance with the Agreement, integrated management information system and other resources needed for operation of the parking system and collection of the local charge for the public parking of vehicles in the city of Vilnius.

108. On 28 January 2000, BP and Egapris entered into an Agreement on Business Principles (the “ABP,” **CE 14**) to allocate to each of the Consortium members the functions, responsibilities and liabilities related to the exercise of the Consortium’s rights and obligations under the Agreement. One of the purposes of the ABP was to provide a determination on the issue of ownership of the above-mentioned management company.

109. The ABP granted BP the right to incorporate and operate the project management company that would be responsible for the performance of all of the obligations of the Egapris Consortium under the Agreement, except the construction of MSCP. The Consortium’s rights and duties relating to the construction of the MSCP were to be equally shared by its members. Once duly delivered, all the MSCP would be leased to the project management company.

110. It was agreed in the ABP that BP would incorporate the management company Vilniaus Parkavimo Kompanija (“VPK”).

111. Pursuant to Sub-Clause 1.3 of the ABP,

With effect from the date of the Company’s registration and up until the execution by EGAPRIS of the Call Option referred in clause 2 below, BP shall be sole and lawful successor to all the rights and obligations assumed by Consortium under the Agreement with Municipality in respect to management operation of the Management Company.

112. It was agreed that Egapris would have the right to purchase 49 percent of VPK from BP for LTL 1,960,000 (EUR 567,655) (Call Option) (Article 2.4 of the ABP).

113. Egapris could also waive its right to purchase the VPK shares in exchange for a payment from BP of LTL 4,000,000 (EUR 1,200,000) (Article 2.11 of the ABP). Article 2.12 of the ABP further provided that, should BP fail to pay Egapris the amount due in case of waiver of Egapris’ right to participate, “*out of 1 000 000 (one million) Litas initially contributed by BP for the shares of the Company, 500 000 (five hundred thousand) Litas will be deemed as a penalty for non-performance and will count as having been made for the benefit of Egapris as its contribution/payment for 50% of the shares in the Company. Notwithstanding the above, the rights of the shareholder holding 50% (fifty percent) of the shares in the Company will be granted to Egapris only upon contribution by BP and Egapris in equal sums – 1 500 000 (one million five hundred thousand) Litas each – of the remaining Company’s share issue price.*”

114. On 17 February 2000, BP registered VPK as the project management company in accordance with the “Articles of Association of the Private Company ‘Vilniaus

Parkavimo Kompanija” (the “Articles of Association of VPK,” **CE 23**), paying LTL 4 million into VPK’s capital.

115. On 1st February 2000, Egapris notified that it irrevocably and unconditionally waived its right to claim compensation under Article 2.11 of the ABP and also irrevocably declared its decision not to elect to exercise its Call Option provided under Article 2.2 of the ABP (**RE 43**).
116. In January 2001, Egapris purported to exercise the call option. BP however refused to tender the shares. The dispute was taken to court, and on 19 November 2003, the Vilnius district court ruled as follows:

The court, upon hearing the case,

(...)

DECIDED:

Not to examine a part of the law suit where the Claimant requested:

- 1) to acknowledge a non performance by the Defendant UAB Baltijos Parkingas of the obligations set forth in Clauses 2.5, 2.10, 2.11 and 2.12 of the Agreement on Business principles made between UAB Egapris and UAB Baltijos Parkingas on January 28, 2000, for which reason the said Agreement was not implemented;*
- 2) to obligate the Defendant to perform the obligations set forth in Clause 2 of the Agreement on Business Principles to execute the agreement on purchase-sale of 50% of the shares of UAB Vilniaus Parkavimo Kompanija;*
- 3) to restitute the violated rights of UAB Egapris to acquire 50% of the shares of UAB Vilniaus Parkavimo Kompanija;*
- 4) to repeal the Loan Agreement No. 144000902069/22 and pledge of 50% of shares of UAB Vilniaus Parkavimo Kompanija, which transactions were made in violation of the Agreement on Business Principles between UAB Egapris and UAB Baltijos Parkingas, as of January 28, 2000.*

To reject the remaining part of the law suit.

[...]

This Decision may be appealed against before the Lithuanian Court of Appeals by appeal filed via this court within 30 days [(CE 187)].

117. On 1 July 2004, however, the Court of Appeals repealed the decision of the court of first instance, and instructed “*Defendant UAB ‘Baltijos parkingas’ [...] to perform the obligation, i.e. to conclude the agreement with Plaintiff UAB ‘Egapris’ [...] regarding sale-purchase of fifty percent (50%) of shares in UAB ‘Vilniaus parkavimo kompanija’ [...] in accordance with the terms laid down in clauses 3.12 and 2.13 of the Agreement on Business Principles (made between UAB ‘Egapris’ and UAB ‘Baltijos parkingas’ on January 28, 2000) and in exchange of consideration of LTL 1 500 000*” (**CE 216**).
118. On 1 March 2000, the Municipality adopted Decision No. 519, determining “*that the collection of local fees and charges shall be effected by UAB Vilniaus Parkavimo Kompanija, established by the Consortium, constituted by UAB Baltijos Parkingas and UAB Egapris,*” and that “*the collection of fees and charges shall be executed by the employees of UAB Vilniaus Parkavimo Kompanija holding the certificates of UAB Vilniaus Parkavimo Kompanija*” (**CE 25**).

4.3 LEGALITY OF THE AGREEMENT AND MODIFICATIONS OF LAWS

4.3.1 The legality of the parking fee

119. By letter dated 8 February 2000, the local representative of the National Government in Vilnius¹ (the “Government Representative”) wrote to Mayor Imbrasas, stating that “*certain provisions of the [...] Agreement approved by Vilnius City Council’s Decision No 482 [were] in contradiction with effective laws and regulatory acts*” (CE 17). This Government Representative therefore requested that at the next meeting of the Vilnius City Council, the issue of the amendment or revocation of Decision No 482, which approved the Agreement, be discussed (CE 17; see also CE 18). More specifically, the Government Representative raised the following three issues and provided the following explanations:

[...] Income received on local fees and charges must be accounted for in the Municipal budget item as “other payments”. However, under the approved Agreement, the Consortium is granted the right to collect a local charge, fixed by the Vilnius City Council, for the duration of parking. Local charge is treated as a constituent element comprising the tax for the duration of parking in the places specified by the Municipality. Another portion of the tax goes to the Consortium; the portion of the tax is defined by the Consortium itself. However, the Law of the Republic of Lithuania on Local Fees and Charges does not provide for the possibility that collection of local charges might be delegated to enterprises; moreover, it does not provide for the possibility that enterprises shall fix the portion of the local charge that goes to them.

[...]

Under the Agreement on Joint Activity, the Municipality undertakes to ensure that any free plots of state-owned land located in the construction place of the infrastructure object will not be formulated and those plots of land will not go to land sales or lease auctions following the procedure established by the Government Resolution No 692 “On Sales and Lease of New Plots of State-owned Land Designated for Non-agricultural Purposes (activity)” as of 2 June 1999, and none of the third persons will be authorized to use land in the above area or to hindrance management and use of the mentioned land. In addition, the Municipality undertakes to provide the Consortium with a possibility to construct the infrastructure object in the specified place. The Law of the Republic of Lithuania on Construction prescribes that the right of the builder shall be exercised in cases when the builder owns a plot of land or holds and uses it on other grounds established by the laws of the Republic of Lithuania, and the builder has a prepared, in a prescribed manner, and approved design documentation of a construction work, and builder has a construction permit issued in the prescribed manner. Since the Municipality will not formulate new plots of land, and construction permits are issued by the Inspection of Construction of a Construction Work of Administration of County Governor, it might be maintained that construction of multi-storey car parks is in general impossible [(emphasis added)].

The main Agreement prescribes that the Consortium shall be sole partner of the Municipality, which is entitled with an exclusive right to collect a local charge and be engaged in construction of multi-storey car parks in the places specified by the Municipality. However, the Law of the Republic of Lithuania on Competition prescribes that any arrangement with the purpose to restrict competition or any arrangement which restricts or might restrict competition shall be prohibited and therefore null and void [(emphasis added)]. [...] (CE 17)

¹ The Government Representative has the constitutional authority and duty to supervise the legality of all municipal acts. Specifically, the Government Representative has to ensure consistency of municipal acts with Lithuanian laws and decrees and protect the rights of individuals and organizations.

120. In the course of a meeting held on 11 February 2000, the Vilnius City Council rejected the Government Representative's request and voted to uphold Decision No. 482 (CE 19). By letter dated 25 February 2000, Mayor Imbrasas informed the Government Representative of the Vilnius City Council's decision to uphold Decision No 482 (CE 24).
121. This decision was supported by a report issued by the Municipality's legal counsel (CE 20).
122. On 8 March 2000, notwithstanding the decision of 11 February 2000 of the Vilnius City Council, the Ministry of Justice of the Republic of Lithuania stated the following in a letter to the Government of the Republic of Lithuania:

[...] it is assumed that a fee/charge and a tax by nature are different categories. Consequently, local fee/charge cannot be treated as a constituent element of tax. Moreover, the laws do not grant private legal entities the right to collect local fees/charges defined by the Municipal Council. Granting of exclusive rights normally restricts competition within a certain field of activity. Therefore, it is maintained that granting of exclusive rights should neither be in contradiction with the interests of other economic entities nor restrict competition. Therefore, the statements of the Government Representative in Vilnius County, produced in presentation No 2T as of 8 February 2000, with respect to treating a local charge as a constituent element comprising the tax, with respect to delegating to a private legal entity the right to collect local charges, with respect to granting a private legal entity exclusive rights, in our opinion are based on the Law on Local Fees and Charges and the Law on Competition [(emphasis added)] [(CE 27)].

123. Arguing that "certain provisions of the Contract approved by Vilnius City Municipal Council Decision No. 482 are inconsistent with the applicable laws and secondary legislation," the Government Representative filed, on 9 March 2000, a complaint with the Administrative Court of Vilnius District, requesting that the latter "satisfy the complaint and [...] recognis[e] as invalid and repeal Decision of 29 December 1999 of Vilnius City Council" (CE 28). The Government Representative reiterated the explanations provided in his letter of 8 February 2000, as follows:

[...] the approved Contract grants the right to the Consortium to collect the local charge established by Vilnius City Municipal Council for car parking time. The local charge is treated as a component part of the fee for car parking time in the areas established by the Council of the Municipality. The other part of the charge is received by the Consortium who determines on its own discretion the amount of charge due to it. However, the Republic of Lithuania Law on Fees and Charges does not provide for the possibility to delegate the collection of local charges to companies, let alone the right to determine the amount of such local charge by such companies themselves.

[...] The Law of the Republic of Lithuania promulgates that the builder's right shall be realized after the available land plot acquired by right ownership, lease of any other right provided for by law is prepared, the construction project is coordinated and a construction authorization is acquired in the established manner. In view of the fact that the Municipality will not form new land plots, and authorizations are issued by the Constructions Building Inspectorate of the County Governor's Administration, in general, construction of multi-storey parking areas should be considered as not possible.

According to the Framework Contract, the Consortium will be a single partner of the Municipality enjoying exclusive right to collect local charge and construct multi-storey parking areas on the sites designated by Vilnius City Council. The Republic of Lithuania Law on Competition promulgates that all agreements aimed at limiting competition or

which limit or might limit competition, shall be prohibited and recognized as null and void as from the moment of their drafting. [...] [(CE 28)]

124. On 19 May 2000, the Vilnius District Administrative Court issued a decision in which it “resolved [...] to satisfy petition by Government’s Representative in Vilnius District in part [and] repeal the Decision No. 482 of Vilnius City Council as of 29 December 1999 Regarding Approval of the Agreement between Vilnius City Municipality and Consortium formed between UAB Baltijos Parkingas and UAB Egapris to the extent approving Paragraphs 2.4.1, 5.1.3, 5.1.3.1, 5.1.3.2, 5.1.3.3, 5.1.3.4, 5.1.3.5, 5.1.4 and 5.1.13 of the Agreement, as well as paragraph 1 of Article 5 of Joint Activity Agreement under Annex No. 8 hereof” (CE 33).
125. Although this Court rejected the Government Representative’s claim that Lithuanian law prevented the Municipality from giving the parking fee collection service into private concession (the Court stressed that Articles 4.2 and 6.1 of the Law on Local Fees and Charges grant the Municipal Council the right to delegate collection of local charges to other entities), the Court found the hybrid parking fee to be inconsistent with existing laws and regulations. The Court consequently annulled Decision No 482 to the extent that it authorized the Municipality to include in the Agreement provisions considered inconsistent with Lithuanian law, on the basis of the following considerations:

Under the Agreement between Vilnius City Municipality and Consortium a local charge is treated as a component part of the fee (tax) for car parking time in the areas established by the Council of the Municipality. Such treatment does not correspond to the provisioning of the Law on Tax Administration and the Law on Local Fees and Charges. [...]

The Law on Local Fees and Charges does not provide for a possibility to split a local charge into two means of payment – local charge and parking fee (tax) – [and paragraph 4 of Article 3 of the said law] treats the local charge as a single and indivisible. [Besides, according to Article 7] of the said law, income received from local fees and charges shall be credited to the item of other payments of the budget of the municipality. Therefore, a part of Paragraph 2.4.1 of the Agreement establishing transfer from the municipality to the Consortium of the right to collect parking fees, as well as a part of Paragraph 5.1.3 establishing that a local charge is a component part of the parking fee (tax) and that the other part of the charge is received by the Consortium who determines in its own discretion the amount of charge due to it, as well as Paragraphs 5.1.3.1, 5.1.3.2, 5.1.3.3, 5.1.3.4, 5.1.3.5 and 5.1.4 establishing ratio between the local charge due to the municipality and the fee due to the Consortium are not compatible with the law.

[...] the said fee for unclamping shall be treated as a variety of the local charge and shall be subject to collection and accounting rules governing local charges. Therefore, Paragraph 5.1.13 of the Agreement, to the extent establishing contribution of 30 per cent of the collected fee for unclamping to the account of municipality, is not compatible with the Law on Tax Administration and the Law on Local Fees and Charges. [...] [(CE 33)]

126. The Municipality appealed the decision of the Vilnius District Administrative Court, which was repealed in April 2001 by the Supreme Administrative Court, for lack of jurisdiction of the lower court. The Supreme Administrative Court decided to “repeal the Decision passed by Vilnius Administrative Court and hand over the case for a hearing by Vilnius First County Court” (CE 85).

4.3.2 The new Law on Fees and Charges

127. On 13 June 2000, the Parliament adopted a new Law on Fees and Charges (the “new Law on Fees and Charges”), which replaced the 1996 Law (see Article 18 of the new Law on Fees and Charges) (**CE 136**). The new Law on Fees and Charges provided, in its Article 11(2) – authorizations subject to local fees and charges – that “*a payer of local fees and charges may not be required to pay for an object on which local fees or charges are levied in any other way than by paying a local fee or charge*”. This new Law further provided, in its Article 13.2, that “*the rates of local fees and charges shall be established in LTL in round numbers.*”

4.3.3 The new Law on Clamping

128. On 5 September 2000, the Government passed Decree No. 1056 Regarding Authority to Define and Approve Procedures for Forced Removal or Clamping of Vehicles Using Clamping Devices. This Decree “*authorize[d] the Ministry of Interior to define and approve before the 1st of October 2000, the Procedures for Forced Removal or Clamping of Vehicles Using Clamping Devices.*” Decree No. 1056 nullified the Decree of 29 July 1991 Regarding Approval of Regulations of Forced Removal or Clamping of Vehicles (**CE 41**).
129. On 24 November 2000, the Mayor of the Municipality of Vilnius wrote to the Government of the Republic of Lithuania (**CE 56**): “*Upon the entering into force of the present Resolution [the decree No. 1056], municipalities lose their legal basis to block vehicle running gear in cases of paid parking rules violations; rights and functions of municipalities, defined by the Law on Local Fees [...] are violated*”. The Municipality requested the Government to re-authorize the municipalities to regulate clamping on their territory.
130. On 27 November 2001, the Government adopted Decree No. 1426 (**CE 97**). This Decree re-authorized clamping, provided that clamping be done in the presence of a police officer. Indeed, Article 14 of the Decree provided that “*in cases specified in paragraph 13.1 above the vehicles shall be clamped by the police officer using clamping devices, and in cases specified in paragraph 13.2 – by police officer together with the person authorized so by municipality by taking use of the clamping devices provided by municipality.*”
131. On 3 December 2001, BP alleged that it was losing substantial amounts of money as a result of this change in the regulatory system. BP characterized the legislative changes with respect to clamping as a *force majeure* (**CE 98**).
132. On 10 April 2002, the Vilnius City Council implemented Decree No. 1426 through its Decision No. 542 Regarding Partial Amendment of the Vilnius City Council’s Decision No. 151 of 11 September 1996 Regarding Imposition on Vehicle Owners (Drivers) of Duty for the Use of Pay Car Parking Spaces and Parking Lots (**CE 115**). Article 12 of this Decision provided that “*vehicles ignoring the pay parking regulations [...] shall be clamped using mechanical devices. Clamping of vehicles shall be undertaken by a*

police officer, acting concertedly with an employee of UAB Vilniaus Parkavimo Kompanija possessing a special authorization certificate [...].”

4.3.4 The amendment of the Law on Self-Government

133. On 12 October 2000, the Law on Self-Government was amended (**CE 47**). Until then, this Law did not establish, at least not expressly, any restrictions on the ability of municipalities to enter into Agreements on Joint Activity (JAAs) with private entities. Article 9 of the October 2000 version of the Law on Self-Government reads as follows:

1. *Municipalities may exercise other State functions (public administration and public service rendering), which are not provided for in this Law, under contracts concluded with State institutions or agencies. A municipality may conclude such contracts only in the event that the municipal council gives its consent. [...]*
2. *For general purposes a municipality may conclude joint activity contracts or public procurement contracts with State institutions and (or) other municipalities.*

134. Thus, in this new version, the Law on Self-Government restricted the right of municipal authorities to conclude JAAs to other public counterparties only.

4.4 THE PERFORMANCE OF THE AGREEMENT

4.4.1 The submission of Parking Plans

135. In the course of a meeting held on 28 January 2000, the Consortium submitted to the Municipality a “*list of information necessary to draft the parking plan*” (**CE 15**).

136. Also in January 2000, “*the Consortium submitted a tender to the Vilnius Development Department of the Vilnius Municipality tender on issuing the technical requirements of construction of the underground parking lot next to the Opera and Ballet Theatre*” (**CE 15**). Each Consortium partner proposed its first site for the construction of a MSCP. BP proposed a site near the Pergales Movie Theatre (the “Pergales MSCP”) and asked the Municipality to issue a list of the conditions for the design (**CE 30**). Egapris proposed another location for its own MSCP.

137. The Municipality’s Development Department asked BP to start planning work for a second MSCP in Gedimino site instead of the Pergales MSCP.

138. On 24 August 2000, BP addressed to the Municipality a draft Parking Plan (**CE 37**) and on 1st September 2000, completed draft parking plans were officially submitted (**CE 40**).

139. On 6 October 2000, the Municipal Enterprise Vilniaus Planas proposed that (**CE 44**) “*the draft in essence could be approved provided certain supplements and adjustments were made [...]*”.

140. On 11 October 2000, the Municipality’s Energy and Facility Department suggested that the draft should be adjusted. The Department observed that (**CE 45**) “[...] *some*

elements in terms of scope of the parking plan as defined an Annex 2 of the Agreement between Vilnius city municipality and the consortium [...] were missing [...].

141. On 13 October 2000, the Municipality's Transport Council discussed the Plans and resolved (**CE 48**):

- 1.1 *Reconstruction of Pylimo street as a segment comprising the Old City ring under the draft Vilnius City Parking Plan, by introducing two-ways traffic is not supported by any calculations. [...] Calculation should be produced that would substantiate advantages of the proposed alterations of the traffic organisation when compared with current situation.*
- 1.2 *The street net and traffic organisation provided in the draft is not quite definite. Detailed planning of the street net is necessary.*
- 1.3 *The draft should be supplemented by a scheme of public transport communication system.*

142. On 20 October 2000, the National Monument Protection Commission ("NMPC") objected to the parking plan. The NMPC decided to object to the project of construction of the parking for the following reason (**CE 49**):

Projects of such type and scale like the project of the construction of planned underground garages in the Old Town of Vilnius should be developed concurrently taking into consideration the possible direct and indirect environmental impact of planned works and also the impact on cultural properties. In the opinion of the State Monumental Protection Commission, the planned garages [...] would change the character of the Old Town of global value; destroy large areas of unexplored cultural layer. Also, the intensity of traffic and air pollution in the Old Town is likely to increase. The Old Town might become less attractive in terms of tourism and to the residents and visitor, and this would be a great loss.

143. On 24 November 2000, the Environmental Protection Department of Vilnius Region stated that (**CE 57**):

The plan does not contain the assessment of consequences of solutions from the viewpoint of environment.

Based on the first assessment, we do not approve of the construction of underground garages in Sereikiskiu Park. Their need in this place is not sufficiently grounded, and the territory is unique and valuable both from environmental and other aspects. [...]

Opinion: We do not in essence object to the Vilnius city car parking plan. In further project-making stages, to assess environmental impact, project the means of compensation for cutting down greenery and built-up squares.

144. On 12 December 2000, the Vilnius Urban Development Department stated (**CE 60**) that *"the division approves of the main ideology stated by the preparers of the plan with regard to the organisation and management of the traffic in the city's historical centre, vehicle parking on the streets, and the necessity of construction of underground (multi-storey) garages, and, essentially, to their positioning as specified in the plan."*

145. On 22 December 2000, the Vilnius Territorial Division underlined that (**CE 61**):

- 1.1 *the solutions presented in the referred documents directly affect a cultural monument old city of Vilnius [...];*

1.2 *the delivered document was drafted without having obtained under the established procedure the conditions with regard to special planning document formulation issued by the Department of Cultural Heritage protection (Vilnius Territorial Division) and without having implemented the requirements established by the procedures and rules with respect of special planning documents formulation as prescribed by relevant laws of the Republic of Lithuania and other legal acts, i.e.:*

1.2.1 *the requirements with respect of formulation of certain purpose special planning as prescribed by the Law on the Territorial Planning;*

1.2.2 *the requirement with respect to formulation of certain purpose special planning laid down in the general regulations for formulation, coordination and approval of special planning documents;*

1.2.3 *the requirements with respect to formulation of certain purpose special planning laid down in the regulations for formulation and issue of the conditions with respect to territorial planning documents. [...]*

146. Despite all the oppositions, the Municipality decided, on 4 January 2001, to “*permit to the UAB to design an underground parking lot on the Gedimino Ave. section from Jogailos Str. to Katedros SQ*” (CE 67). On 26 January 2001, the Mayor of Vilnius City Arturas Zuokas (CE 70) “*approves the construction of the underground garage in Gedimino Avenue between Odmiiniu and Savivadybes Squares and notifies that the Municipality will provide the required assistance to realize this project*”.

147. However, on 12 March 2001, the State Monument Protection Commission of the Republic of Lithuania issued unfavorable opinions regarding the project and stressed that (CE 81) “*upon installation of garages, a big portion of archaeological heritage of the old city of Vilnius will be destroyed; use of multiple up-to-date materials and technologies will damage the authenticity of the old city of Vilnius [...]*”. Nevertheless, the Ministry of Environment of the Republic of Lithuania wrote that (CE 84) “*while being well-aware of the importance of the Old Town of Vilnius and the need to preserve the cultural and natural heritage, we are of the opinion that it’s too early to declare the loss of authenticity of the Old Town of Vilnius. Similar parking areas have been constructed in the centres of many cities throughout Europe while reconciling the needs of heritage, modern economy and social development*”. [...]

148. Finally, the Municipality changed its mind and decided, on 22 March 2001, to develop exclusively the Pergales MSCP (see RE 63).

149. Two weeks after the decision to abandon the Project of MSCP on Gedimino Avenue, the Mayor Arturas Zuokas, in a letter of 27 April 2001, reminded BP that the first Parking Plan (near the Pergales Theater) “*after coordination, public debate and checking by the territorial planning supervisory authority had to be furnished to the Council of Vilnius on 11 08 2000*” (CE 86).

150. The Mayor added “[w]e hereby propose the 6-month term calculated from the receipt of this official letter for furnishing the parking Plan coordinated, deliberated and checked in the established manner for approval to the council of Vilnius city. In the Event of the failure to submit the Parking Plan by the specified deadline, the Municipality or Vilnius City will terminate the Contract with the consortium [...]

151. During a meeting of 19 June 2001 with the Vilnius City Development Department Commission for the Construction of Underground Garages, BP argued that **(CE 87)** *on the initiative of the heads of the City it was decided to implement the project of Gedimino Avenue which did not justify itself, and, as a result realization of the project for construction of multi-storey underground parking areas was delayed.*
152. In September 2001 **(CE 90)**, BP submitted its second Parking Plan.
153. During a meeting of the Working Group (see ¶ 161) on 22 November 2001, the City accused BP of non-compliance with its contractual obligation, that is the delivery of concrete plans for the construction of the Pergales MSCP as stated on 27 April 2001 **(CE 96 and RE 70)**. In its letter dated 3 December 2001, BP alleged that the delay was also due to the City's delay in taking the necessary action to procure the necessary land and in the delivery of the design conditions for the Pergales Parking **(CE 98)**.
154. In February 2002, Mayor Zuokas requested BP to *“provide written reasons of the failure to submit within the established deadlines the parking plan”* **(CE 106)**.
155. On 20 March 2002, BP wrote to Mayor Zuokas **(CE 108)**. In its letter, BP explained that

“the main reasons to the delayed approval of the parking plan are as follows:

- a) the city had not all the necessary information, and it had to be collected separately;*
- b) the technical task was submitted to the company with a long delay;*
- c) discussions of the plan in committees were not properly organized;*
- d) terms of heritage preservation were submitted just in March 2001;*
- e) the Municipality changed its position regarding the car parks under Gedimino Avenue and car parks in the Old Town in March 2001;*
- f) the Municipality has still not made a clear decision on the ways of solution of parking problems (construction of car parks) in the Old Town.*

We would like to draw your attention to that the approved parking plan is the company's concern first of all, and very important one. The plan is necessary for the company in order to plan a proper and effective parking system, to know and evaluate the business development, the required investments, terms and return. [...]

We are enclosing the prepared parking plan to this letter once again. In the plan, you find two alternative versions, basically of the uncertainty concerning the Old Town”.

156. In his response of 19 April 2002, Mayor Zuokas stated that *“delayed preparation of the Parking Plan may not be substantiated by absence of the technical task, because legal acts regulating territorial planning establishes that the technical task is not necessary for the preparation of the special plan. Provisions of the Contract and Law on Territorial Planning require furnishing the Municipality with the Parking Plan after its coordination, public debates and verification by the territorial planning supervisory authority. The Municipality is not obligated to deliberate the Parking Plan which does not satisfy this requirement, and submission of such plan may not be considered a proper discharge of the Consortium's obligation. The term of the preparation of the Parking Plan should not be influenced by the Municipality's position on the construction of multi-storey parking areas in the sites other than those specified in Annex No.1 to the Contract. By virtue of*

Clause 2.2.2 of the Contract, the Parking Plan shall be prepared in observance of sites specified in the Annex. No.1 for the construction of multi-storey parking areas and their detailed plans. Neither decision of the Municipality regarding the ways of settlement of parking problems in the Old Town of public transport system development strategy is an obstacle for the discharge of the consortium's obligation to prepare the Parking Plan" [(CE 16)].

4.4.2 The Joint Activity Agreement

157. A form of Agreement on Joint Activity ("JAA") was appended to the Agreement as Annex No. 8 (CE 13). The JAA pertained among others to the transfer to the Consortium of land for the construction of the MSCP.

158. On 26 March 2002, Mayor Arturas Zuokas sent to the Consortium a draft of Joint Activity Agreement for the Pergales parking (CE 110) emphasizing:

Construction of over ground building with commercial functions [...] is not a priority of the Municipality of the City of Vilnius, is not foreseen in the Main Agreement and existing detailed plans of sites, and should not be foreseen in the joint activity agreements on multi-storey underground parking constructions.

159. On 9 April 2002, BP sent a revised draft of Joint Activity Agreement in which all references to construction above the Pergales parking were deleted (CE 113).

160. However, the Municipality refused to sign the Joint Activity Agreement, given that, in the meantime, the legislation of Lithuania seemed to have taken a negative view of JAAs with private parties (see CE 104; the Republic of Lithuania's Counter-Memorial, ¶¶ 121-122 and the Claimant's Memorial, ¶¶ 107-108). On 5 July 2002, the Mayor Zuokas wrote to BP (CE 126):

Construction of the multi-storey parking lots is one of the major obligations of the Consortium consisting of UAB Baltijos Parkingas and UAB Egapris foreseen by the agreement signed on 30 December 1999 by the Municipality and the Consortium. The agreement foresees that the multi-storey parking lots will be constructed on the basis of joint activity agreements. However, according to the Local Autonomy Law of the Republic of Lithuania (edition of 12 October 2000) Article 9 Part 2 the Municipality can make joint activity agreements or common public purchase agreements with the state institutions and (or) other municipalities for common purposes. This provision of the law is still not interpreted unanimously and there is a great probability that the joint activity agreement signed by the Municipality will be contested in court as contradicting the above mentioned provision of law. It also could be impeded by the fact that the multi-storey parking lots will be private property, not the Municipality's. Considering this factor we suggest, in the short run, considering the possibility of amending the agreement signed on 30 December 1999 rejecting the Consortium's obligation to construct multi-storey parking lots foreseen by the agreement and respectively the Municipality's obligation to ensure the method of land use for the Consortium, organisation of permissions and co-ordination according to the provisions of the joint activity agreement. According to the amended agreement of 30 December 1999, as suggested the Consortium would preserve the right and obligations connected with providing parking services and charging local fees on overground parking lots, also, considering the decreased volumes of investments into development of parking infrastructure, correcting the expiry date of the Agreement and revenue allocation between the Consortium and the Municipality.

161. Thus, on 29 July 2002, Mayor Zuokas established a Working Group for reconsideration of the Agreement of 30 December 1999 (**CE 127**).
162. On 5 September 2002, BP proposed the conversion of the Joint Activity Agreement into a Cooperation Agreement as the Municipality had done with the Company Pinus Proprius (see ¶¶ 167-171) (**CE 133**).
163. On 9 September 2002, the Working Group decided to (**CE 134**) “conclude partnership agreements instead of joint activity agreements on the construction of multi-storied car parks [...]”.
164. On 24 February 2003, the Vilnius District Court decided to (**CE 155**) “nullify [...] annex 8 [the form of JAA] of the Agreement made between Vilnius City Municipality and UAB “Baltijos parkingas” and UAB “Egapris”, which Agreement was approved by Decision No. 482 [...]”.
165. On 6 May 2003, the Director of the Administration of the Municipality of Vilnius, Raivydas Rukštelė wrote to the Government Representative that (**CE 169**)

[d]uring the meeting of the representatives of the Parties held on 9 September 2002, on proposal of the Municipality it was decided to sign cooperation agreements instead of joint activity agreement. However, changing only the title of the contract and of the designation of the Parties’ obligations might be insufficient for eliminating the inconsistencies. Therefore, it would be very important to the Municipality to know the opinion of the Government Representative, as of the authority supervising the legitimacy of the legal acts passed by the Municipality [...].

166. On 22 May 2003 (**CE 168**), the Lithuanian Court of Appeals decided to “uphold the Decision passed by Vilnius District Court on 24 February 2003, and reject the Appeal”.

4.4.3 The Pinus Proprius Project

167. In April 2001, the City discussed the possibility of building a Parking under Gedimino Avenue and southern part of Municipality Square with the company Pinus Proprius UAB. Pinus Proprius was proposing the development of property it owned partly while the City owned the rest. Pinus Proprius owns a building on Gedimino Avenue and was planning the renovation of the building into a hotel (**RE 56**).
168. On 24 October 2001, the Municipality approved, by Decision No. 417, the signing of a Joint Activity Agreement with Pinus Proprius (**CE 95**). However, on 18 January 2002, the Representative of the Government, Gintautas Jakimavicius, requested the Vilnius District Administrative Court to revoke the Decision No. 417 on the approval of the JAA:

a conclusion should be made that the Law does not provide for the right for municipalities to conclude joint venture agreement with private persons and that Vilnius City Municipality Council having passed the decision No.417 of 24 October 2001 and by Clause 1 thereof approved the draft joint venture agreement with Pinus Proprius UAB exceeded the scope of competence of public authorities [(CE 104)].

169. The Vilnius District Administrative Court sent the case to the Vilnius District Court, which was within its jurisdiction.

170. On 27 March 2002, the Vilnius City Council decided (Decision No. 530) to approve a Cooperation Agreement between the Municipality on Vilnius and Pinus Proprius. On 19 April 2002, the Government Representative, Gintautas Jakimavicius, wrote the Vilnius District Court (**CE 117**):

The Vilnius city Council on March 27, 2002, issued decision No. 530 "On the Approval of the Cooperation Agreement" whereby item 1 approved the Cooperation Agreement between the Municipality of the City of Vilnius and Joint Stock Company "Pinus Proprius." By this decision the Vilnius City Council actually changed decision No. 417 of 10/24/01 "On Approval of the Partnership Agreement," i.e. it became out of force. Since the decision became out of force, the legal issue also disappeared. Consequently, the case was dismissed.

Considering the presented circumstances [...] I withdraw the claim and therefore ask the Court: To dismiss the case [...].

171. Thus, on 20 August 2002, the City of Vilnius concluded a Cooperation Agreement with Pinus Proprius (**CE 128**).

4.4.4 The modification of the Agreement of 30 December 1999

172. The Agreement of 1999 provided that the multi-storey parking lots will be constructed on the basis of a Joint Activity Agreement. However, the Municipality considered that, by virtue of the 12 October 2000 amendment of the Law on Self-Government, it had become impossible to conclude such kind of contracts with private companies, namely with persons other than State institutions or municipalities (see ¶ 168). Thus, with the avowed purpose of ensuring the lawfulness of the Agreement, the Municipality decided to establish a working group in order to bring the Agreement in conformity with the revised Law on Self-Government.

173. During the meeting of 9 September 2002, the representatives of the City of Vilnius and the representatives of BP agreed (**CE 134**):

1. *To exclude the provisions of the Agreement on the rights and obligations of the Consortium to collect parking fees and fines for violation of parking rules. To appeal to the Government of the Republic of Lithuania with the request to issue a consent granting the right to Vilnius city Municipality to carry out public procurement from the single source. [...]*
3. *To conclude partnership agreements instead of joint activity agreements on the construction of multi-storied car parks. [...]*

174. However, on 2 October 2002, Mayor Zuokas and Bjorn Avnes, a representative of Parkerings, discussed also the opportunity to cancel the Agreement. Following this discussion, Bjorn Avnes addressed a letter dated 11 October 2002 to Mayor Zuokas summarizing the remarks made during the meeting of 2 October 2002 (**CE 137**):

The unexpected obstacles, that have been met during the implementation of the Agreement, might prove that the step was a bit too brave. We have suffered serious economical losses and setbacks in the development of the project. I am therefore prepared to meet with your request to renegotiate the Agreement, in order to arrive at a mutually acceptable solution.

As we discussed, there are two main options available to us:

- (a) *The Municipality cancels the Agreement.*

- (b) *the Agreement is renegotiated on all terms, basically so that the Municipality takes back the right to the land for construction of car parks as requested in your letter dated 5th July 2002 [CE 126], and our company becomes the subcontractor to the City solely for street parking and parking house management.*

Alternative (a) is regulated under the Agreement and would imply that we are reimbursed for our expenses (investments and losses) plus ten percent, and the Municipality retains all rights and obligations, but also including the parking house close to the market place, parking plan and operational systems.

According to my knowledge, the amount would be in the order of 15 millions LITAS, including the ten percent.

Alternative (b) is more elaborate. As we would be giving up the real-estate opportunities present in the Agreement at this time, this will need to be economically compensated. [...]

Making a reasonable assumption on the outcome of a renegotiation as outlined above, the total cost to the Municipality to regain major parts of the Agreement would be in the order of 11 million LITAS. [...]

175. On 8 November 2002, Mayor Arturas Zuokas replied to Bjorn Avnes:

[...] This Agreement is very important to Vilnius Municipality. I entirely agree with you that both partners must cooperate in seeking the way out of the difficult situation we are in now. [...]

Therefore, I would like to stress the main points determining Municipality's decision on the issue, once again:

- *The object of the competition that took place in 1997 and was followed by competitive negotiations and by signing the Agreement with Consortium in 1999, was the construction of parking lots – not any other real estate development projects which could be profitable even if separate from the whole parking system. This meant to us and to both competitors that a part of the parking fees collected in public places should cover the expenses of construction of parking lots. [...]*

[...] I may only express serious doubts about the amounts of funds, indicated in you letter as desired compensations for the member of Consortium in case of changing or terminating the Agreement.

Implementation, renegotiation or termination of the Agreement is a complex problem. Possible ways of solving it should be pointed out by the specialists representing both partners. Therefore I suggest you to present your proposals, considering the change and termination of the Agreement, for the negotiations which are being carried out by specially appointed representatives. [...] [(CE 140)]

176. Regardless of the correspondence between Bjorn Avnes and Mayor Arturas Zuokas, the Working group continued the negotiation. On 27 November 2002, during a meeting of the Working Group, BP asked the representatives of the Municipality why (CE 142):

[...] despite an agreement reached between the Parties, Vilnius City Municipality does not implement the decision adopted by the working groups to apply to the Government with regard to the permission granting the right to carry service procurement from the single source. [...] In the opinion of BP representatives, the decision of the working groups was not influenced by any other additional circumstances and its implementation lies exclusively within the competence of the Mayor of the Municipality. BP representatives outlined that inactivity of responsible authorities of the Municipality poses a threat to the continuity of the Agreement of 30 December 1999 and raises doubts about the effectiveness of initiated negotiations.

177. The representatives of the Municipality responded (CE 142) that there were [...] “two reasons due to which no application was submitted to the Government: [...] the

Consortium hasn't yet implemented an obligation set forth in point 5.1.15 of the Agreement regarding the payment of the sum of LTL 626,187 for the year 2001 to the Municipality and hasn't yet provided information indicated in points 3.2 and 3.3 of the Agenda" [...]. Thus, a dispute was arising over BP's performance of the Agreement especially over its payment.

178. In its letter dated 28 November 2002, Skips AS Tudor (Parkerings' parent corporation) underlined the failure by Vilnius Municipality to address the Lithuanian Government for permission to carry out public procurement of the Consortium's parking service. Skips AS Tudor also argued that the Agreement [of December 1999] allowed commercial development on the top of the multi-storey car parks (**CE 143**). Moreover, concerning the payment of the amount set forth in point 5.1.15 of the same Agreement, Skips AS Tudor emphasized that (**CE 143**):

As you may know, the key source of the consortium's income are originating from the two contractual rights - the right to collect parking fees and the right to collect re-clamping penalties - which rights have been temporarily assigned to us by Vilnius Municipality by virtue of the Agreement, made in 1999. As a consequence of force majeure situation, resulting from the actions of the Government and the Parliament, one of those rights and related income streams was vanished, and the other one was significantly reduced. Accordingly, the total income of the consortium was adversely affected and we have suffered a serious financial loss. The Agreement defines the revenue sharing scheme that is based on the income, not on profit. Therefore, once force majeure had a direct impact on the income, it had a direct impact on overall revenue sharing. We cannot understand how Vilnius Municipality, having lost the right that was temporarily assigned to the consortium, still requests the same amount of the revenue originating from such right.

179. On 3 February 2003, during a meeting with the Working Group, both parties maintained the same position. BP representatives proposed to submit the dispute concerning the payment of the sum under point 5.1.15 of the Agreement to a court or to any other impartial authority. However, the parties agreed to continue the negotiation (**CE 150**).

*During the next meeting of the Working Group on 13 February 2003, the Municipality representatives informed BP that (**CE 153**) "the Municipality is preparing to appeal to the court regarding the fulfillment of the obligation provided for in point 5.1.15."*

180. On 24 February 2003, the Vilnius District Court ruled in favour of a challenge to the hybrid fee structure brought by the Government Representative under the New Law on Fees and Charges (see ¶ 124 and **CE 155**). As a result, the parking fee provision of the Agreement of December 1999 was cancelled. This decision was confirmed on 22 May 2003 by the Lithuanian Court of Appeals (**CE 168**).

181. By letter dated 25 March 2003, the Mayor of the City of Vilnius proposed to the Consortium various actions, especially the termination of the Agreement that had become incompatible with applicable law and the conclusion of a new contract for fee collection service (**CE 156**).

182. On 16 May 2003, BP made a counter proposal, consisting in a direct agreement with VPK, namely the Operator, that is the management company for the BP-Egapris Consortium for the collection of local fees and charges, and a second and separate agreement with BP for the construction of the Multi-storied Parking (**CE 166**).

183. On 24 October 2003, VPK submitted its proposal for a renegotiated agreement for collection of parking fees (**CE 180**):

- 1.1 *VPK shall provide the following service to the Municipality:*
 - a) *operate and develop the car parking system of the Municipality [...];*
 - c) *collect parking charges [...];*
- 2.1 *The contract shall be valid for 20 years, and VPK shall have the right of option to extend it by 10 years.*
- 3.1 *The Municipality shall pay to VPK the consideration for services [...] on a monthly basis. The amount of payment shall be calculated as a percentage from collected income. [...]*

184. On 17 November 2003, a provisional agreement was concluded between the Municipality and VPK (**CE 186**), to ensure the continued collection of parking charges pending negotiation.

185. On 9 December 2003, the Municipality responded to the VPK proposal of 24 October 2003 with a counter-proposal for an agreement with a duration of four years, at the end of which all shares of VPK would be transferred to the Municipality free of charge (**CE 190**).

186. On 18 December 2003, VPK responded to the Municipality counter-proposal of 9 December 2003. In substance, VPK proposed either a 15-year agreement without the construction of the multi-storey parking or a 10-year agreement with VPK's rights and obligations to construct multi-storey parking (**CE 192**).

187. The Municipality responded on 15 January 2004 (**CE 204**):

Due to the amended legal acts, further implementation of the Agreement concluded [...] on December 1999 is no longer possible and there are no legal preconditions for revising this Agreement.

The conditions specified in the written proposal submitted by VPK on 18 December 2003 regarding the establishment of new legal relations with Vilnius City Municipality are not acceptable to Vilnius City Municipality. We remind you that a proposal from Vilnius City Municipality of 9 December 2003 regarding the conclusion of the Agreement with VPK and the fulfillment of the obligations set in the Agreement of 30 December 1999 has already been submitted to you.

[...] [W]e also would like to remind you that the deadline set by Vilnius City Municipality Council for negotiations expires on 27 January 2004. Upon the expiry of this term and in case of failure to conclude a new Agreement, VPK will be deprived of its right to collect local charges for parking in Vilnius City.

4.4.5 The termination of the Agreement by the Municipality

188. By decision N° I-221 dated 21 January 2004, the Municipality of Vilnius decided to terminate the Agreement between the Municipality of the City of Vilnius and the Consortium Formed by UAB Baltijos Parkingas and UAB Egapris dated 30 December 1999 with effect from 1 March 2004 (**CE 206**).

189. By another decision N° I-222 date 21 January 2004, the Municipality of Vilnius decided to annul the local regulations that allowed VPK to collect the parking fee (**CE 207**).

190. The notice of termination of the Agreement was sent to the parties on 27 January 2004. In substance, the reasons for termination were the followings (**CE 210**):

The Agreement dated 30 December 1999 is terminated [...] by reason of material breach on the part of the Consortium formed by UAB Baltijos Parkingas and UAB Egapris of the following provisions of the Agreement:

- 1) *Omission to draw up, coordinate and submit for approval by the Vilnius City Council of the Parking Plan introducing the public parking system in the Vilnius City within the time-limits defined in the Agreement [...];*
- 2) *Failure to ensure to the Municipality [...] the availability of, and direct and real time access to, all information specified [...];*
- 3) *Failure to make investments defined in the Agreement, including failure to build and equip multi-storey car parks within the time-limits defined in the Agreement [...];*
- 4) *Failure to pay to the Municipality of the City of Vilnius the amounts due under the Agreement [...];*

191. Moreover, the Municipality requested the immediate and gratuitous transfer of 100 percent of the shares of VPK.

192. Following the Agreement's repudiation, the Municipality sued BP and VPK in recovery of the Clause 5.1.15 amount (see ¶¶ 179). On 29 June 2005, the Vilnius Regional Court decided that (**CE 234**):

The consortium was deprived of the right to collect from the owners of cars a fee for unblocking road wheels and thus lost one of contractual sources of income. Plaintiff [the Municipality] indicates that the increase of the fixed fee under Clause 5.1.15 of the Agreement is unconditional and not subject to any circumstances. However, such argument of Plaintiff is not recognized as grounded. Defendants [BP] substantially show that if such argument of Plaintiff is accepted, it should be recognized that LTL 1,000,000 must be paid even if the consortium's right to collect local charge is annulled by a certain legal regulation. The court decides that such interpretation of the Agreement would obviously conflict with the principles of good faith and common sense in general and would mean breach of such principles while interpreting this particular Agreement.

193. The decision of the Vilnius Regional Court was confirmed on appeal on 20 October 2005 (**CE 235**).

5. POSITION OF THE PARTIES

5.1 THE CLAIMANT

5.1.1 On jurisdiction

194. As set out in fuller summary in Section 7.2.1 below, Claimant argues that the Tribunal has jurisdiction.

5.1.2 On the merits

195. Parkerings contends that it is an investor subject to the protection of the Agreement between the Government of the Republic of Lithuania and the Government of the Kingdom of Norway on the Promotion and Mutual Protection of Investments dated 16 June 1992 (hereinafter the “Treaty” or “BIT”).
196. The Claimant alleges that through the acts and omissions of its municipal and national authorities, Lithuania has violated Parkerings’ investors rights under the Treaty and must be held responsible.
197. Parkerings has thus based its claim on a three-pronged argumentation:
- (i) Lithuania has violated its duty to grant the investment equitable and reasonable treatment and protection under Article III of the Treaty;
 - (ii) Lithuania has violated its duty under Article IV of the Treaty to afford the investment protection no less favourable than that afforded to investors from a third State;
 - (iii) Lithuania has violated its duty not to indirectly expropriate without compensation under Article VI of the Treaty.

5.1.2.1 Breach of the duty to grant equitable and reasonable treatment

198. According to the Claimant, the Treaty obligation to grant “equitable and reasonable treatment” holds Lithuania to a stricter standard of conduct than the “fair and equitable treatment” standard more commonly found in other bilateral investment treaties. A showing of breach of Article III of the Treaty therefore requires less than a showing of breach of the standard of “fair and equitable treatment” (see ¶ 272 below).
199. The Claimant submits that Lithuania’s conduct falls within the concept of unfair, inequitable or unreasonable treatment prohibited by the Treaty. Through the acts and omissions of its central and municipal authorities, Lithuania did:
- (i) Engage in grossly unfair and discriminatory conduct (see Section 8.1.2.1 below);
 - (ii) Engage in arbitrary and opaque conduct (see Section 8.1.3.1 below);
 - (iii) Frustrate Parkerings’ legitimate expectations (see Section 8.1.4.1 below);
200. In light of the above, the Claimant submits that Lithuania breached Article III of the Treaty beyond any possible doubt.

5.1.2.2 Breach of the obligation of protection

201. The Claimant alleges that the Respondent failed to protect its investment in violation of Article III of the BIT (see full summary in Section 8.2.1 below).

5.1.2.3 Breach of the duty to afford no less favourable treatment

202. The Claimant argues that the core of Lithuania's obligation under Article IV of the Treaty is to provide Norwegian nationals engaging in commercial activities the same standard of treatment as nationals from any other State (see Section 8.3.1 below).
203. According to the Claimant, Lithuania has treated Pinus Proprius, an investment of Litprop Holding BV, a Dutch investor, more favourably than BP. The Claimant submits that Lithuania breached Article IV of the Treaty.

5.1.2.4 Breach of the duty not to expropriate without compensation

204. The Claimant alleges that Lithuania destroyed BP's value by undermining and then terminating the Agreement. The Claimant argues that Lithuania indirectly expropriated Parkerings' ownership interest in BP. By failing to provide compensation, Lithuania breached its obligations under Article VI of the Treaty (see full summary in Section 8.4.1 below).

5.1.2.5 Damages

205. The Claimant argues that Parkerings is entitled to full compensation for all injuries arising out of Lithuania's violations of the Treaty. The purpose is to eliminate all consequences of the violations and reinstate the situation which would have likely existed in the absence of any violation.
206. Pursuant to Article VI (2) of the Treaty, the appropriate measure of compensation in cases of lawful expropriation is the market value of the investment immediately before the date of expropriation. While this provision requires the expropriation to be lawful, Parkerings contends that it also provides the relevant standard for determining the appropriate measure of compensation for Lithuania's violations of the Treaty, which entailed the destruction of BP.
207. The definition of fair market value has been established under international law as being the price a buyer would be willing to pay the seller under circumstances in which each party had reliable information in order to maximize its financial gain and neither party was under duress or threat. Fair market value should be measured at the time the investor suffered the injury that gave rise to a right to compensation, that is 21 January 2004 in the present case, *i.e.* the date on which the Municipality decided to terminate the Agreement in breach of the Treaty.
208. According to the Claimant, the fair market value compensation must take into account the future profitability of BP, given that continued demand for its services was guaranteed in the relevant market. In other words, the fair market value of BP in January 2004 would reflect the strong demand for its service and the predictability of revenue streams guaranteed by the Agreement. Accordingly, BP's value should be determined by reference to the company's reasonably anticipated profitability using the discounted cash flow (DCF) method.

209. Tribunals have long accepted that forecasting future cash flows will necessarily implicate some degree of uncertainty but that the mere existence of such uncertainty does not warrant preclusion of compensation for future profitability. The use of a DCF valuation in the present case is particularly appropriate for two reasons:
- (i) first, the parking business stands out for its stability, low risk, and predictability, which reduces the margin of uncertainty to a minimum. In BP's case, predictability was enhanced by the nature of its contractual rights under the Agreement, in that it was to be the sole partner of the Municipality in the design, development and operation of the integrated parking system;
 - (ii) second, several buyers (e.g. NCC and Skanska) made arms-length offers for a stake in BP in 2000 and 2001 using the DCF method to establish their offer price, which is consistent with general valuation practice in the parking industry.
210. The Claimant further argues that any diminution of value attributable to or associated with Lithuania's conduct should be discarded. The purpose of this rule is to preclude the host State from using its executive, legislative or judicial branches to progressively reduce the value of an asset and then expropriate it. This is of particular importance in the present case where Lithuania gradually eroded the value of BP, first by litigating and legislating away the legal framework of the investment, then by refusing to either perform or renegotiate the Agreement in good faith, and finally by unlawfully terminating the Agreement. Thus, full compensation of the fair market value of BP on 21 January 2004 requires the Tribunal to disregard any diminution in the value of BP that might have been caused by each of these various steps leading up to the destruction of BP.
211. In light of the above, the Claimant contends that its expert, Mr. Lapuerta, has correctly valued BP as of January 2004 in the amount of EUR 38.5 million taking into account the following assumptions:
- (i) BP would build the five MSCPs assigned to Egapris under the ABP, given that BP and Egapris were jointly and severally liable and that the latter had no prospect of carrying out the work itself pursuant to its insolvency;
 - (ii) Egapris was not able to enforce its call option under the ABP for 50% of the shares in VPK.
212. After deduction of the projected investment in the construction of 10 MSCPs that BP was unable to make due to Lithuania's breach, as well as of the returns BP could have made using these funds elsewhere, Mr. Lapuerta reaches the amount of EUR 20.4 million (NOK 176.4 million at the exchange rate on 21 January 2004) as compensation owed to Parkerings for the destruction of BP, in addition to the interest computed thereupon.

5.1.3 Prayers for relief

213. Based upon all the above submissions, Parkerings requests the following relief:²

Parkerings respectfully requests that the Tribunal:

- (a) *Declare that Lithuania has breached its obligations under the Treaty and international law;*
- (b) *Award Parkerings damages in the amount of NOK 176.4 million as the fair market value of BP as of January 21, 2004;*
- (c) *Award Parkerings interest at the NIBOR rate, compounded monthly for the period January 22, 2004 through the day of payment;*
- (d) *Direct Lithuania to pay all of Parkerings' costs and expenses, including legal fees, incurred in connection with this arbitration; and*
- (e) *Order any such further relief as may be available and appropriate in the circumstances.*

5.2 THE RESPONDENT

5.2.1 On jurisdiction

214. As set out in fuller summary in Section 7.2.2 below, the Respondent argues that most of Parkerings' claims are groundless and fall outside the scope of the Tribunal's jurisdiction under the Treaty. Therefore, Lithuania submits that the claims should be dismissed for lack of jurisdiction.

5.2.2 On the merits

215. According to the Respondent, all of the Claimant's claims must fail on the following grounds.

5.2.2.1 Lithuania has not frustrated Claimant's legitimate expectations

216. The Respondent argues that the Claimant's attempt to lower the standard for a violation of the duty to treat the investment fairly and equitably is meritless (see ¶¶ 282 *et seq.*).

217. The Respondent argues that a claim based upon the frustration of legitimate expectations due to governmental action requires the investor to show that such action frustrated expectations that the host State created or reinforced through its own conduct. In the present case, Lithuania cannot be held responsible for Parkerings' failure to conduct the required due diligence prior to signing the Agreement nor its failure to obtain other guarantees that investors typically demand in agreements with States or their agencies (see Section 8.1.4.1 below).

² See Claimant's Memorial, ¶ 272

218. Concerning Claimant's allegation of arbitrary conduct, the Respondent alleges that it clearly explained during the negotiations that the Agreement was untested and was subject to legal challenges. Moreover, the Respondent argues that the claims set out by the Claimant are only allegations of contract breach (see Section 8.1.3.1 below)

5.2.2.2 There has been no expropriation by Lithuania

219. The Respondent submits that Parkerings cannot bring a claim for expropriation on the basis of the alleged wrongful termination of the Agreement.

220. The Respondent also argues that Parkerings has not been substantially deprived of its ownership of BP.

221. Furthermore, a claim of contract breach cannot form the basis of an expropriation claim where, as here, the Claimant, pursuant to the Agreement, could seek redress before the Lithuanian courts (see Section 8.4.1 below).

5.2.2.3 Lithuania has not violated its duty to grant Claimant protection

222. According to the Respondent, protection within the meaning of the Treaty is not intended to generate an all-encompassing duty for the host State. The Respondent alleges that the guarantee of protection is characterized by the standard of due diligence.

223. As to Parkerings' specific argument that the Government should have backed up BP in its contractual dispute with the Municipality and challenge the termination of the Agreement, the Respondent argues that it is inconsistent with the purpose of the Treaty (see Section 8.2.1 below).

224. Therefore, the Respondent argues that it has not violated its duty to protect the Claimant.

5.2.2.4 The Claimant was not subject to any discrimination

225. The Respondent alleges that in order to make out a claim for discrimination, that is to say a violation of the Treaty's Equitable and Reasonable Treatment provision and/or a violation of the Treaty's Most Favored Nation's provision (MFN), the Claimant must show that two separate investors were similarly situated and that the two investors were treated differently.

226. The Respondent contends that the Claimant did not show that a third investor was similarly situated and treated differently (see full summary in Section 8.1.2.1 and 8.3.1 below).

5.2.2.5 The Claimant is not entitled to compensation

227. The Respondent has shown that Parkerings' claims are meritless. Accordingly, no compensation can be claimed.

228. Further, Parkerings' claim for damages is entirely speculative and flawed on several grounds, namely:

- (i) The Claimant has not established any causation between the alleged Treaty violations and the damages it seeks. The Claimant is only entitled to damages with respect to harm that was the direct result of the State's unlawful acts. The specific provision on expropriation of which the Claimant avails itself cannot provide any guidance on the measure of compensation for other Treaty violations;
- (ii) The Claimant's claim for damages based upon an estimation of BP's future profits had it built all 10 MSCPs and operated them until 2012 is equivalent to a claim for lost profits. No tribunal has awarded lost profits where as here, the claiming party has not made the investment which would give rise to the cash flow claimed. On the contrary, tribunals have adopted a cautious approach to the use of the DCF method.

229. It is undisputed that the Claimant's integrated parking system never became operational. Parkerings never made any investment in any of the MSCPs nor did it begin construction of a single one. As a result, the parking project never existed as required in the DCF model.

230. According to the Respondent, damages should be limited to proven net out-of-pocket expenditures. However, the Claimant has made no submissions in this respect and has not met the onus of proving its damages accordingly. The Respondent submits that Parkerings actually never made any significant investment expenditures. At any rate, any investment costs that the Claimant incurred must be reduced by the benefit that it received from BP.

231. Furthermore, the claim for lost profits *per se* is erroneous for the following reasons:

- the valuation date is not 21 January 2004, as it overlooks the preceding four years during which many intervening factors could have altered BP's value. The only reliable date for calculation is the year 2000, which is closer to the alleged detrimental State actions and thus minimizes any speculation about the ensuing period;
- BP and VPK are not devoid of any value. On the contrary, BP's assets are worth at least LTL 188'590 and BP further owns all shares of VPK, a fully operational company;
- Mr. Lapuerta's analysis is overstated, as it should not have (1) included a corruption-risk related discount, (2) excluded expenditures or revenues for 2000 and 2001, (3) disregarded Egapris' call option upon VPK's shares, or (4) included an eleventh MSCP (*i.e.* the Turgaus MSCP) in the calculation. As a matter of fact, the net present value (NPV) of Claimant's investment was near zero, whether valued in 2000 or 2004: it was negative in 2000 and below EUR 0.95 million as of 2004;

- the two arms-length offers the Claimant refers to do not provide any indication as to the fair market value of its investment. In any event, such offers made in 2000 and 2001 are only useful insofar as a DCF analysis is carried out for 2000 as opposed to 2004. Further, the Respondent points out that NCC and Skanska's offers were contingent upon certain events and conditions that were contrary to the assumptions made in Mr. Lapuerta's report (e.g. the right to develop additional MSCPs, the premium for project legality or the premium for the extinction of Egapris' call option).

5.2.3 Prayers for relief

232. Based upon all the above submissions, Lithuania requests the following relief:³

For the foregoing reasons, the Respondent respectfully requests that the Tribunal:

- DISMISS all of the Claimants' claims in their entirety; and*
- ORDER the Claimant to pay all of the costs and expenses of this arbitration, including the fees and expenses of the Republic's expert, Mr. Tim Giles, the fees and expenses of any experts to be appointed by the Tribunal, the fees and expenses of the Republic's legal representation in respect of this arbitration, and any other costs of this arbitration.*

6. ISSUES TO BE DETERMINED BY THE TRIBUNAL

233. In light of the facts and submissions of the parties set forth above, the questions arising for the Tribunal's determination are the following:

- Does the Tribunal have jurisdiction over Parkerings' claims? (see Section 7 below);
- What is the applicable standard for the duty of "equitable and reasonable treatment" within the meaning of Article III of the Treaty? (see Section 8.1 below) Has Lithuania violated Article III of the Treaty? In particular, did Lithuania engage in unfair and discriminatory or arbitrary and opaque conduct with respect to Parkerings' investment? (see Section 8.1.2 and 8.1.3 below) Did Lithuania frustrate Parkerings' legitimate expectations? (see Section 8.1.4 *et seq.* below);
- Has Lithuania violated its obligation of protection pursuant to Article III of the Treaty? (see Section 8.2 below);
- Has Lithuania violated its duty to afford no less favourable treatment under Article IV of the Treaty? (see Section 8.3 below);
- What is the applicable standard in terms of expropriation within the meaning of Article VI of the Treaty? (see Section 8.4 below) Has Lithuania breached its duty not to expropriate Parkerings' investment? (see Section 8.4.2 below);

³ *Idem*, ¶ 342.

- (vi) Is Parkerings entitled to any compensation and if so, what is the measure thereof? This question may be moot depending on the decision in the foregoing issues;
- (vii) What are the costs of this case and how should they be apportioned between the Parties?

7. JURISDICTION

7.1 ISSUES FOR DETERMINATION

234. The Tribunal's jurisdiction over the claims of the Claimant will be examined in light of the requirement of the ICSID Convention and the BIT.

235. Article 25(1) of the ICSID Convention provides as follows:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

236. Article IX of the BIT contains the following dispute settlement clause:

1. *Any dispute which may arise between an investor of one contracting party and the other contracting party in connection with an investment on the territory of that other contracting party shall be subject to negotiations between the parties in dispute.*
2. *If any dispute between an investor of one contracting party and the other contracting party continues to exist after a period of three months, the investor shall be entitled to submit the case:*
 - A. *Either to the International Centre of Settlement of Investment Disputes having regard to the applicable provisions of the Convention on the Settlement of investment disputes between States and Nationals of other States opened for signature at Washington D.C. on 18 March 1965,*
 - B. *or in case both contracting parties have not become parties to this Convention, to an arbitrator of International ad hoc Arbitral Tribunal established under the Arbitration Rules of the United Nations Commission on the International Trade Law. The parties to the dispute may agree in writing to modify these rules. The Arbitral Award shall be final and binding on both parties to the dispute.*

7.2 THE PARTIES' POSITION

7.2.1 Parkerings

237. Parkerings contends that the Tribunal has jurisdiction.

238. The Claimant argues that it is a company incorporated under the laws of Norway and is an investor subject to the protection of the Treaty. The Claimant specifies that it owns

100 percent of the shares of the Lithuanian company BP, which constitutes an investment in Lithuania.

239. The Claimant contends that through the acts and omissions of its municipal and national authorities, Lithuania has violated the Treaty.⁴
240. The Claimant argues that Article IX of the Treaty, which governs the dispute between a contracting party and an investor, "*grants the Tribunal jurisdiction over any and all disputes in connection with an investment, including disputes arising out of breaches of contract or violation of domestic law*"⁵.
241. The Claimant underlines that it pleaded breaches of Lithuania's obligations under the Treaty and not breaches of the Agreement. The Claimant alleges that the Respondent cannot deny its Treaty claims arguing that some facts do not rise to the level of a Treaty breach.
242. Finally, the Claimant is opposed to the Respondent's opinion that the Lithuanian Courts were able to remedy to the present problems.⁶

7.2.2 The Republic of Lithuania

243. The Respondent argues that Parkerings' claims fall outside the scope of the Tribunal's jurisdiction under the Treaty. Specifically, more than half of the claims concern alleged breaches of the Agreement; these commercial disputes cannot be the basis of a claim under the BIT. Furthermore, the Respondent argues that the Tribunal has no jurisdiction under the BIT on several grounds:

- (i) Parkerings is not a party to the Agreement and has no rights thereunder;⁷
- (ii) Lithuania as host State is not responsible on an international level for acts of its agencies. The conduct of State organs including municipalities is not attributable to the State, unless such conduct had legal effects on an international level⁸
- (iii) BP and the Municipality agreed to submit all disputes arising under the Agreement to the Lithuanian Courts. In order to observe this contractual choice, ICSID tribunals do not have jurisdiction over purely contractual claims which do not amount to claims for Treaty violations. Claims arising out of contracts between investors or their subsidiaries and the Government or its agencies do not constitute claims cognizable under bilateral investment treaties. Further, the Treaty does not, in the present case, contain an umbrella clause. However, the Respondent admits that where the foreign investor is denied a remedy for a contractual breach in a domestic forum, such breach of contract may constitute

⁴ See Claimant's Memorial, ¶ 190.

⁵ See Claimant's Post-hearing Brief, p. 4.

⁶ See Claimant's Post-hearing Brief, p. 6-7.

⁷ See Respondent's Counter-memorial, ¶ 140.

⁸ See Respondent's Counter-memorial, ¶¶ 148-151.

an international wrong. This is not the case here, given that the Agreement provided for dispute resolution before the Lithuanian Courts. The Respondent alleges that the Lithuanian Courts were perfectly able to protect Claimant's rights.⁹

244. Therefore, Lithuania submits that the following claims should be dismissed for lack of jurisdiction:¹⁰

- (a) *Claimant's allegation of breach of the Equitable and Reasonable Treatment Clause by virtue of the City's supposed failure to properly recognize an event of force majeure under Section 7.2.1 of the Agreement;*
- (b) *Claimant's allegation of breach of the Equitable and Reasonable Treatment Clause by virtue of the City's supposed failure to disclose material information during contract negotiations, as required under the good faith duty set out under Lithuanian law;*
- (c) *Claimant's allegation of breach of the Equitable and Reasonable Treatment Clause by virtue of the City's supposed failure to issue consistent directions to BP regarding its performance under the Agreement, as required under Section 1.5.1 of the Agreement;*
- (d) *Claimant's allegation of breach of the Equitable and Reasonable Treatment Clause by virtue of the City's supposed failure to defend the Agreement against measures adopted by the Government as required under Section 1.5.1 of the Agreement;*
- (e) *Claimant's allegation of breach of the Equitable and Reasonable Treatment Clause by virtue of the City's supposed failure to renegotiate in good faith as required under the good faith duty set out under Lithuanian law;*
- (f) *Claimant's allegation of breach of the Full Security and Protection Clause by virtue of the City's supposed failure to renegotiate in good faith as required under the good faith duty set out under Lithuanian law; and*
- (g) *Claimant's allegation of breach of the Expropriation Clause by virtue of the City's supposed termination of the Agreement on grounds that were not permitted under Article 7 of the Agreement.*

7.3 DISCUSSION ON THE TRIBUNAL'S JURISDICTION

245. There is no doubt that the conditions *rationae personae* of the ICSID Convention are met, as the parties are, on the one hand, a national of the Kingdom of Norway, Parkerings, and on the other hand, the Republic of Lithuania.

246. The parties gave their consent to arbitration: the Republic of Lithuania, on 16 June 1992, by signing the BIT and Parkerings, on 11 March 2005, with its Request for Arbitration.

247. The Arbitral Tribunal notes that pursuant to Article IX of the BIT, any dispute in connection with an investment shall be subject to negotiations between the parties. If the dispute continues to exist after a period of three months, the investor is entitled to

⁹ See Respondent's Counter-memorial, ¶¶ 152-158 and Respondent Post-Hearing Brief, p.1.

¹⁰ See Respondent's Counter-Memorial, pp. 56-57.

submit the case to an arbitral tribunal. In the absence of parties' determination on that matter, the Tribunal considers that the conditions of Article IX of the BIT are met.

248. Thus the first question for the Tribunal to resolve here is whether the Claimant is an investor in Lithuania.

7.3.1 The Claimant's Investment

249. In accordance with Article 25 of the ICSID Convention, an arbitral tribunal established pursuant to the ICSID Convention has jurisdiction *ratione materiae* over "any legal dispute arising directly out of an investment." No definition of "investment" is to be found in the ICSID Convention.

250. Article I of the BIT gives the definition of the term "Investment":

The term "Investment" means every kind of asset invested in the territory of one contracting party in accordance with its laws and regulations by an investor of the other contracting party and includes in particular, though not exclusively:

(...)

(II) Shares, debentures or any other forms of participation in companies.

251. UAB Baltijos Parkingas (BP) is a Lithuanian company, registered with the Lithuanian Company Register. Parkerings, which is a company registered in Norway, is "the owner of sixty five thousand (65,000) ordinary shares of the Company [BP] for the value of one hundred (100) Litas each, comprising 100% of the authorized capital of the Company."¹¹

252. In the *Vivendi* case, the ICSID *ad hoc* Committee held that "[...] the foreign shareholding is by definition an investment and its holder an investor [...]"¹².

253. In this case the Tribunal accepts the Claimant's contention that "Parkerings' direct 100 percent ownership interest in BP constitutes an investment in Lithuania within the meaning of the Treaty."¹³

254. The Arbitral Tribunal is therefore of the opinion that Parkerings is an investor in Lithuania for the purpose of the ICSID Convention and within the meaning of the BIT, since it owns the entirety of the shares of a Lithuanian company which is BP.

255. The issue is thus to determine whether the dispute arises in connection with such investment in Lithuania.

¹¹ See Exhibit **C 195**.

¹² *Compañía de Aguas del Aconquija S.A and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002, *reprinted in* 19 *ICSID Rev.—FILJ* 89 (2004), ¶ 50.

¹³ See Claimant's Memorial p. 60; Exhibit **CE 195**.

7.3.2 Did the claims fall under the Treaty?

256. The Claimant asserts that its claims arise from action that the Republic of Lithuania undertook in violation of the BIT. The Claimant does not base its request on breaches of the Agreement.¹⁴
257. The Respondent, however, rightly distinguishes between disputes arising out of contract breaches and disputes under the BIT. In particular, the Respondent states that investor-state arbitration is only available to adjudicate rights contained in the Treaty.¹⁵
258. However, the issue lies elsewhere. It is uncontroversial that this dispute is between Parkerings and the Republic of Lithuania whilst the Agreement was entered into by two different entities, namely BP and the City of Vilnius, both of which are not parties to this arbitration. It is undisputed that States are responsible on an international level for acts of municipalities (and other State *constituent subdivisions*)¹⁶ that are contrary to international law and that States are not liable internationally for acts of their agencies that are wrongful under domestic law. For instance, the *ad hoc* Committee in *Vivendi* held:

*[...] in the case of a claim based on a treaty, international law rules of attribution apply, with the result that the state of Argentina is internationally responsible for the acts of its provincial authorities. By contrast, the state of Argentina is not liable for the performance of contracts entered into by Tucumán, which possesses separate legal personality under its own law and is responsible for the performance of its own contracts.*¹⁷

259. In the present case, the Claimant alleges that the Republic of Lithuania itself, and not the City of Vilnius, violated its obligations under the BIT by virtue of the attribution to the State of the acts of the Municipality. As a result, the proper parties to the dispute are Parkerings and the Republic of Lithuania. That the Claimant was not a party to the Agreement is irrelevant as the Arbitral Tribunal is not ruling on breaches of the Agreement but on violation of the BIT. Put differently, the Claimant is alleging treaty violation and there is nothing convincing in the record that may lead to the suspicion of the Claimant having disguised contract claims with Treaty claims for the benefit of jurisdiction. Whether the Respondent did in fact violate the Treaty (or the international law) is a matter of substance and merit rather than of jurisdiction.

¹⁴ See Claimant's Memorial, p. 60 *et seq.*

¹⁵ See Respondent's Counter-Memorial, p. 48-49.

¹⁶ See *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, September 16, 2003, p. 39, reprinted in 44 *ILM* 404 (2005). See, e.g., Luigi Condorelli, *L'imputation à l'état d'un fait internationalement illicite: solutions classiques nouvelles tendances*, 1984 («sont attribués à l'Etat, d'après le droit international, tous les comportements de tous ceux qui, dans l'ordre interne de l'Etat concerné, exercent effectivement les prérogatives de la puissance publique»). Free translation: *The attribution to a State of an internationally wrongful fact: classical solution, new tendencies* ("According to international law, will be attributed to a State, all the conduct of those who, in the domestic body of law of the State, will actually exercise the prerogatives of sovereignty").

¹⁷ See *Compañía de Aguas del Aconquija S.A and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002, *supra* note 12 ¶¶ 96.

260. Furthermore, the Claimant is rightfully alleging that its claim is based on its investment that went sour. This is an adequate response to Respondent's argument that the Lithuanian Courts do have jurisdiction over claims based on the Agreement. As a matter of rights, the Arbitral Tribunal has no jurisdiction over the claims based on the Agreement.
261. The phrase "*any dispute [...] in connection with the investment*" as provided by Article IX (1) of the BIT is a general provision that provides the basis for an international Arbitral Tribunal's competence over any disputes related to an investment.
262. This is recognized in the decisions of past international tribunals.¹⁸ For instance, in the case *SGS v. Republic of the Philippines*, the Arbitral Tribunal held that:

[t]he term "dispute with respect to investments" is not limited by reference to the legal classification of the claim that is made. A dispute about an alleged expropriation contrary to Article VI of the BIT would be a "dispute with respect to investments".¹⁹

263. In *Vivendi*, the *ad hoc* Committee stated that:

it is not open to an ICSID tribunal having jurisdiction under a BIT in respect of a claim based upon a substantive provision of that BIT, to dismiss the claim on the ground that it could or should have been dealt with by a national court. In such a case, the inquiry which the ICSID tribunal is required to undertake is one governed by the ICSID convention, by the BIT and by applicable international law.²⁰

[...]

It is not the Committee's function to form even a provisional view as to whether or not the Tucumán conduct involved a breach of the BIT, and it is important to state clearly that the Committee has not done so. But it is nonetheless the case that the conduct alleged by Claimants, if established could have breached the BIT. The claim was not simply reducible to so many civil or administrative law claims concerning so many individual acts alleged to violate the Concession Contract of the Administrative law of Argentina. It was open to Claimants to claim, and they did claim, that these acts taken together, or some of them, amounted to a breach of [...] the BIT.²¹

264. The Arbitral Tribunal notes that the Claimant alleged exclusively violations of the BIT and particularly failure to afford its *investment equitable and reasonable treatment and protection, to accord its investment treatment no less favorable than the treatment accorded to investment by investors from a third State*, and last, a breach of its *obligation not to expropriate without compensation*.²²
265. *Prima facie*, the conduct of the Republic of Lithuania through its subdivision constituent (the Municipality of the City of Vilnius) had an impact on the investment of the

¹⁸ The Tribunal is of the opinion that it must pay due consideration to earlier decisions of international tribunals.

¹⁹ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, January 29, 2004, *reprinted in 8 ICSID Rep.* 518 (2005), ¶ 131.

²⁰ See *Compañía de Aguas del Aconquija S.A and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002, *supra* note 12, ¶ 102.

²¹ *Idem*, ¶ 112.

²² See Claimant's Memorial p. 60-77.

Claimant. The claims are therefore *in connection with the investment* and fall under the Treaty. The Arbitral Tribunal emphasizes that the substantive justification of the Claimant's claims is not a matter of jurisdiction but of merit. This question will be developed below.

266. As the claims fall under the Treaty, whether the Claimant should have submitted the dispute before the Lithuanian courts is not relevant at the stage of examination of the jurisdiction. The Arbitral Tribunal concludes that it has jurisdiction under Article IX of the Treaty.

8. MERITS

267. The Claimant's substantive claim under the BIT is, as stated in paragraph 197 above under three main headings:

- i Lithuania has violated its duty to grant the Claimant's investment in Lithuania "equitable and reasonable treatment and protection" as required under Article III of the Treaty;
- ii Lithuania has violated its duty to accord the Claimant's investment in Lithuania "treatment no less favourable than that accorded to investments made by investors of any third state as required under Article IV of the Treaty;
- iii Lithuania has violated its duty not to indirectly expropriate the Claimant's investment without compensation as required under Article VI of the Treaty.

8.1 CLAIMS FOR VIOLATION OF THE DUTY OF EQUITABLE AND REASONABLE TREATMENT (ARTICLE III OF THE TREATY)

268. Article III of the Agreement between the Government of the Republic of Lithuania and the Government of the Kingdom of Norway on the Promotion and Mutual Protection of Investments provides that:

Each contracting party shall promote and encourage in its territory investments of investors of the other contracting party and accept such investments in accordance with its laws and regulations and accord them equitable and reasonable treatment and protection. Such investments shall be subject to the laws and regulations of the contracting party in the territory of which the investments are made.

269. The Claimant alleges that Lithuania breached its obligation to accord Parkerings's investment *equitable and reasonable treatment*. The Claimant alleges:

- "*the Treaty accord equitable and reasonable treatment holds Lithuania to a stricter standard of conduct than the fair and equitable treatment standard more commonly found in other investment treaties*"²³ (see below 8.1.1);

²³ See Claimant's Memorial, p.61

- “Lithuania subjected BP to grossly unfair and discriminatory treatment”²⁴ (see below 8.1.2);
- “Lithuania’s conduct was grossly arbitrary and opaque”²⁵ (see below 8.1.3);
- and finally, that: “Lithuania frustrated Parkerings’s legitimate expectations”²⁶ (see below 8.1.4).

270. The Arbitral Tribunal will examine each of these arguments separately.

8.1.1 The distinction between the notions of fair and reasonable

271. Unlike other BITs, the Treaty refers to “*equitable and reasonable*” in its Article III. This led to a discussion on the content of such standard and to whether it has the same meaning as “*fair and equitable*” standard.

272. Regarding the applicable standard, the Claimant alleges that “*the Treaty obligation to accord equitable and reasonable treatment holds Lithuania to a stricter standard of conduct than the fair and equitable treatment standard more commonly found in other investment treaties*”.

273. To support its opinion, Claimant relies on the French text of Olivier Corten that discusses the notion of “*équitable*” and “*raisonnable*”: what is “*reasonable*” could not be inequitable but an equitable solution might be unreasonable if it is insufficiently rational²⁷.

274. The Respondent alleges that “*Claimant’s analysis does not comport with the dictates of the Vienna Convention on the Law of Treaties (the Vienna Convention) which governs the Treaty’s interpretation.*” The Respondent underlines that “*a Treaty should be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”*”²⁸ Moreover, the Respondent contends that the terms “reasonable” and “fair” are “*virtually synonymous*.”²⁹ The Respondent finally argues that “*the set of bilateral investment treaties signed by Norway, where the formulae “fair and equitable “ and “equitable and reasonable” seem to have been used indistinctively within the standard clause generally devoted to the promotion and protection of investments*” confirms that the two phrases are synonymous.”³⁰

²⁴ *Idem*, p. 64.

²⁵ *Idem*, p. 66.

²⁶ *Idem*, p. 68.

²⁷ See Oliver Corten, *L’utilisation du “raisonnable” par le juge international*, Editions de l’Université de Bruxelles, 1997.

²⁸ See Respondent’s Counter-Memorial, ¶ 167.

²⁹ *Idem*, ¶ 169.

³⁰ *Idem*, ¶ 171.

275. The Arbitral Tribunal considers that the interpretation of the Treaty is effectively governed by the Vienna Convention which provides that a Treaty should be interpreted, pursuant to Article 31, “*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.*”
276. The interpretation given by the Claimant, based on Corten’s interpretation of the terms equitable and reasonable, is not convincing. If the two phrases are given their plain meaning, it is far from apparent that they should differ in any way. Thus, under this approach, treatment is fair when it is “*free from bias, fraud or injustice; equitable, legitimate [...]*”; and, by the same token, equitable treatment is that which “*is characterized by equity or fairness, [...] fair , just , reasonable.*”³¹
277. The standard of “*fair and equitable treatment*” has been interpreted broadly by Tribunals and, as a result, a difference of interpretation between the terms “*fair*” and “*reasonable*” is insignificant. The Claimant did not show any evidence which could demonstrate that, when signing the BIT, the Republic of Lithuania and the Kingdom of Norway intended to give a different protection to their investors than the protection granted by the “*fair and equitable*” standard.
278. Thus the Arbitral Tribunal intends to identically interpret the notion “*equitable and reasonable*” and the standard “*fair and equitable.*”
279. The Claimant raises three issues that shall now be examined:
- Did Lithuania engage in unfair and discriminatory treatment?
 - Did Lithuania engage in arbitrary conduct?
 - Did Lithuania frustrate Parkerings’ legitimate expectations?

8.1.2 Was the Treatment “*unfair and discriminatory*”?

8.1.2.1 The position of the parties

280. The Claimant alleges that Lithuania subjected BP to grossly unfair and discriminatory treatment. The principle of *fair and equitable treatment* is violated where a host State’s conduct is grossly unfair or discriminatory. Discrimination is a significant element in determining whether the standard of fair and equitable treatment has been breached.
281. In the present case, the Claimant contends Lithuania subjected BP to the following unfair and discriminatory measures:
1. the Municipality instructed BP to relinquish the Gedimino MSCP on the grounds of cultural heritage concerns and public opposition in April 2001, at a time BP had already carried out important planning and design works. Further, in breach of the Agreement whereby BP was to be the sole partner of

³¹ Stephen Vascianne, in Bishop, Crawford and Reisman, *Foreign Investment Dispute*, ¶ 7, p. 1015.

the Municipality, the Mayor handed over the project to another contractor, Pinus, six months later;³²

2. the Mayor chose to sign the JAA relevant to the Pergales site with the Municipality's newly selected contractor to the detriment of BP and advocated the validity of his decision in the local court litigation with the Government Representative;³³
3. after VPK lost the clamping and part of the parking income, the Municipality claimed that BP should have foreseen the clamping prohibition, without, however, considering it as a *force majeure* event which should have released BP of its obligations under Clause 5.1.15 of the Agreement, as confirmed by the Lithuanian Courts. Further, when clamping resumed, the Municipality was receiving 40% of the fees whilst VPK was receiving nothing;³⁴
4. the City of Vilnius refused to renegotiate the Agreement unless BP provided the payment of the amount of Clause 5.1.15 of the Agreement.³⁵

282. The Respondent is of the opinion that “[i]n international law, the principle of non-discrimination encompasses both “most favored nation treatment” (between aliens) and “national treatment” (between aliens and nationals).”³⁶

283. The Respondent argues that any discrimination claim must establish that similar situations were treated differently by the host State. In other words, the Claimant has not established a different treatment of Parkerings and Pinus under like circumstances..³⁷

284. The facts relating to the MSCP built by Pinus and those relating to Parkerings are distinct. In particular, the MSCP projected by BP in Gedimino was significantly bigger than the MSCP built by Pinus Proprius and encroached into the City Old Town. The location of the MSCP built by Pinus Proprius outside of the Old Town entailed a different treatment of the two projects by the Cultural Heritage Commission.

285. The MSCP built by Pinus Proprius had to be sold to the City after construction was completed. The MSCP built by BP did not have to be sold to the City.

286. As to the Cooperation Agreement entered into between the Municipality and Pinus Proprius, it did not involve any transfer of land belonging to the City as opposed to any

³² See Claimant's Memorial, ¶ 201.

³³ *Idem*, ¶ 202.

³⁴ *Idem*, ¶ 203.

³⁵ *Idem*, ¶ 205.

³⁶ See Respondent's Counter-Memorial, ¶ 238.

³⁷ *Idem*, ¶ 241.

potential cooperation agreement with BP which would have required the lease or the sale of land through a public auction pursuant to the applicable law on land.³⁸

8.1.2.2 Discussion

287. Various tribunals have held that a discriminatory conduct is a violation of the standard of the *fair and equitable treatment*. In CMS Gas Transmission Company v. The Argentine Republic, the Tribunal considered that:

*any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment. The standard is next related to impairment: the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of the investment must be impaired by the measures adopted.*³⁹

288. In order to determine if there is discrimination in violation of the standard of *the fair and equitable treatment*, one has to make a comparison with another investor in a similar position (*like circumstances*). For instance, in the case Antoine Goetz et consorts c. République du Burundi (Award of 10 February 1999), the Tribunal stated that:

*[u]ne discrimination suppose un traitement différencié appliqué à des personnes se trouvant dans des situations semblables.*⁴⁰

289. The Tribunal considers that the conduct of the City of Vilnius could possibly amount to a contractual breach of the Agreement. It should be noted, however, at the outset of the present dispute, that a possible breach of an agreement does not necessarily amount to a violation of a BIT.
290. As to arguments (3) and (4) (see above ¶ 280), even if a contractual breach had occurred, the evidence in the record does not show any comparison made by the Claimant with another investor which could bring under the BIT the actions mentioned in those arguments. The Tribunal is not in a position to determine if there had been a discriminatory measure against the Claimant as no comparison is possible with another investor. As a result, the arguments (3) and (4) are not evidence of discrimination within the meaning of Article III of the Treaty.
291. Concerning the arguments (1) and (2) (see above ¶ 280) the violations alleged by the Claimant and the position of the Respondent are substantially the same as those discussed under *Most-favoured-Nation Treatment* (MFN) (see below section 8.3) In certain situations where an MFN clause has been incorporated within a BIT, establishing a discrimination under the standard of *fair and equitable/reasonable treatment* is not necessary (see below ¶¶ 366 *et seq*). Consequently, the Arbitral Tribunal refers to the discussion of the *Most-Favoured-Nation Treatment* under section 8.3 below.

³⁸ *Idem*, ¶¶ 247-250.

³⁹ CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/08, Award, May 12, 2005; *reprinted in* 44 *ILM* 1205 (2005), ¶ 290; See also Stephen Vascianne, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, *Brit. Y.B. Int'l L.* 99, 133 (1999).

⁴⁰ See *Antoine Goetz and others v. Republic of Burundi*, ICSID Case No. ARB 95/3, Award, February 10, 1999, *reprinted in* 15 *ICSID Rev.—FILJ* 457 (2000), ¶ 121.

292. However, the Tribunal shall review the question whether the conduct of the Respondent was arbitrary.

8.1.3 Was the conduct of the Respondent “arbitrary”?

8.1.3.1 *Position of the parties*

293. The Claimant alleges that the conduct of the Republic of Lithuania was grossly arbitrary and opaque in violation of Article III of the Treaty. According to the Claimant, it is well established that fair and equitable treatment inherently precludes arbitrary and capricious actions against investors. Inconsistency of State action and complete lack of transparency are a clear showing of arbitrariness. A foreign investor may expect the host State to act consistently, *i.e.* without arbitrarily revoking any pre-existing decisions or permits issued by the State, which were relied upon by the investor to assume its commitments, as well as to plan and launch its commercial and business activities.

294. The obligation to afford investments fair and equitable treatment also places the State under an affirmative obligation not to approve investments on terms that are inconsistent with Government policies or laws. A State cannot escape its international responsibility by requiring the investor to be more knowledgeable about its laws and regulations than its own authorities.

295. The Claimant submits that Lithuania subjected BP to arbitrariness and lack of transparency:⁴¹ Lithuania failed to disclose to Parkerings information pertaining to the viability of the hybrid parking fee concept prior to the execution of the Agreement. Although the Municipality of Vilnius was in possession of a legal opinion (“*the Sorainen Memo*”) questioning the conformity of the parking fee with the Lithuanian law, it did not inform BP before the signing of the Agreement. The Municipality of the City of Vilnius failed to warn BP about the imminent changes to the applicable law.⁴²

296. Examples of arbitrariness on the part of the Republic of Lithuania include:

- The Municipality of the City of Vilnius arbitrarily refused to acknowledge the existence of a force majeure event and insisted on full payment of Article 5.1.15 of the Agreement.⁴³
- The Municipality and various public entities adopted a “*blatantly contradictory and ambiguous position in connection with the Parking Plan.*”⁴⁴
- The Municipality changed its opinion several times concerning the first MSCP site.

⁴¹ See Claimant’s Memorial, p. 66 *et seq.* and Claimant’s Post-Hearing Brief, p. 60 *et seq.*

⁴² See Claimant’s Post-Hearing Brief, p. 61

⁴³ *Idem*, p. 62.

⁴⁴ See Claimant’s Memorial, ¶ 210.

- The Municipality arbitrarily refused to issue the necessary design conditions and to enter into the necessary land-use agreement.
- The Municipality accused BP of failure to perform its construction obligation, refused to negotiate in good faith and then terminated unlawfully the Agreement.⁴⁵

297. The Respondent states that the *Sorainen Memo* was disclosed to BP before the signing of the Agreement. The Respondent alleges that it made it clear that the measures set out in the Agreement were untested and could be subject to legal challenges.⁴⁶ For the Respondent, the State is not responsible for the consequence of “*unwise business decisions or for the lack of diligence of the investor.*”⁴⁷

298. The Respondent underlines that BP was granted a force majeure claim by the Lithuanian Courts.⁴⁸

299. The Respondent is of the opinion that the conduct alleged by the Claimant does not give rise to a claim under the Treaty and that the conduct alleged is “*nothing more than allegation of contract breach.*”⁴⁹

8.1.3.2 Discussion

a) The Sorainen Memo

300. It is not disputed by the parties that arbitrariness is incompatible with the standard of *fair and equitable treatment*.

301. Based on the facts as discussed by the Parties, the Tribunal finds that a memo (“*the Sorainen Memo*”) concerning the Law on Fees and Charges was effectively in possession of the City of Vilnius prior to the execution of the Agreement on 30 December 1999.⁵⁰ Indeed, the memorandum is dated 28 December 1999 and the Respondent does not allege that it received the document after 30 December 1999. Mr. Robertas Staskevicius confirmed that “[...] *it was before City Council. It was on 28th of December. When we’ve got this -- [Sorainen memo] it was immediate discussion of that because it was quite serious issue.*”⁵¹

302. The record does not convincingly show that any information contained in the *Sorainen Memo* and, *a fortiori*, a copy of the memorandum, was given to the Claimant by the City of Vilnius before the conclusion of the Agreement. Accordingly, the Tribunal assumes

⁴⁵ See Claimant’s Post-Hearing Brief, p.81.

⁴⁶ See Respondent Counter-Memorial, p. 68.

⁴⁷ *Idem*, p. 72.

⁴⁸ See Respondent Post-Hearing Brief, p. 17.

⁴⁹ *Idem*, p. 11 *et seq.*

⁵⁰ See CE 11 ;

⁵¹ See Robertas Staskevicius, Tr. 1307:17-21.

that Mr. Tamulis did not receive a copy of this memorandum and that the Claimant was unaware of its existence (up to April 2000).⁵²

303. In substance, the *Sorainen Memo* contains a brief (5 pages) legal opinion regarding the draft of the Agreement between the Municipality of Vilnius and the Consortium. In its most relevant part, the Memorandum reads as follows:

we would take the views that the legal acts of the Republic of Lithuania and contractual deeds and obligations, indicated in the Agreements of the Municipality and the Consortium, do not create sufficient and clear legal ground for the Consortium to have right to collect a portion of the fee for vehicle parking time for on-street parking places designated by the Municipality Council, which is derived from the entire fee, established in Article 5.1.3, less local charges approved by the Municipality Council.

304. The information contained in the *Sorainen Memo* is characterized as the opinion of a law firm regarding the Agreement. The document does not provide any information which was not, at the time of its drafting, accessible to the public or at least to any other qualified law firm. The Claimant could have also obtained an opinion from another law firm.

305. It is not disputed that the Claimant did, in fact, receive a legal opinion dated 29 December 1999 from another law firm, namely the Lawin Firm. The opinion concluded that:

“Following your request, we would like to comment the legal situation relating to collection of payment for car parking in places designated by the Municipality (streets and squares). The Agreement between Vilnius City Municipality and the Consortium establishes that such payment will consist of local charges and the portion of payment falling on the Consortium.

The portion of payment falling on the Consortium is to be legally qualified as payment for services, which will be rendered by the Consortium to car drivers. The scope of this service is the development of parking system in the city and its administering. Car parking in pay place is to be qualified as a behaviour of a driver expressing his/her will to use the service rendered by the Consortium and to pay for it according the rate set by the Consortium.”⁵³

306. Mr. Tamulis testified convincingly that such opinion was only a “*small piece of an exhibit from the legal opinion which we had from Lawin regarding the whole thing around the hybrid parking fee.*”⁵⁴ In the view of the Arbitral Tribunal, the Claimant, when it requested such opinion, was without doubt aware that the business environment, and especially various provisions of the Agreement, were not certain. In fact, it would have been foolish for a foreign investor in Lithuania to believe, at that time, that it would be proceeding on stable legal ground, as considerable changes in the Lithuanian political regime and economy were undergoing.

307. Another matter is whether, in itself, failing to disclose a legal opinion (such as the *Sorainen Memo*) to the counter-party before entering into an Agreement has

⁵² See Claimant’s Memorial, ¶ 45.

⁵³ See Exhibit R 40.

⁵⁴ See Jonas Tamulis Stmt, Tr. 514-515.

international consequences for a State party. Such a conduct is often considered as a breach of good faith or a “*culpa in contrahendo*”. However, such a conduct, while objectionable, does not, in itself, amount to a breach of international law. It would take unusual circumstances to decide otherwise; in particular, the Claimant has been unable to show that the Sorainen Firm (or the Municipality of Vilnius) was in possession of information unavailable to the public, especially to other legal experts.

308. In *MTD v. Republic of Chile*, the Tribunal noted that:

*[the State is not] responsible for the consequences of unwise business decisions or for the lack of diligence of the investor. Its responsibility is limited to the consequences of its own action to the extent they breached the obligation to treat the Claimants fairly and equitably.*⁵⁵

309. The Tribunal concludes that the City of Vilnius did not act arbitrarily when it failed to disclose the *Sorainen Memo* and its content to BP. Whatever the effect of the non-production of the *Sorainen Memo* on the Claimant’s contractual rights is not a matter for this Tribunal.

b) The Force majeure

310. As already stated, breaching the Agreement will not automatically result in a violation of the Respondent’s international law obligations under the BIT. In the present instance, the Tribunal concludes that the force majeure (see ¶ 295) claim and any breaches of the Agreement do not reach the status of a BIT breach.

311. In fact this issue has been reviewed by the Lithuanian Courts. On 29 June 2005, a Lithuanian court ruled on the problem of *force majeure*:

*“[h]aving evaluated the arguments presented by the parties, the court decides that the grounds do exist to recognize that non-performance of the Defendant’s contractual obligations as a consequence of lost income from unblocking road wheels was conditioned by Force majeure events, i.e. Government Resolution no 1056, therefore there are ground to release Defendants [BP] from fulfilment of obligations related to such part of income”.*⁵⁶

312. The Lithuanian Court of Appeals confirmed this decision and held that:

“[...] upon adoption of Government Resolution No 1056, Defendants [BP] could not perform the obligation under Clause 5.1.1 of the Agreement. [...] Thus Defendants did not fulfil part of the monetary obligation under the Agreement for objective reasons and the court of first instance had sufficient grounds to release them from the part of the obligation the performance of

⁵⁵ MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, May 25, 2004, available at <http://www.asil.org/ilib/MTDvChile.pdf>, ¶ 167.

⁵⁶ See Exhibit C 234.

*which was directly related with the collection of the unclamping fee and its transfer to Plaintiff.*⁵⁷

313. Two layers of Lithuanian Courts confirmed that the City of Vilnius acted wrongfully when it refused to recognise the existence of a force majeure situation. On that point, the Courts ruled in favour of BP. The fact that the Lithuanian Courts denied some of BP's claims is not relevant in the present proceedings; indeed subject to denial of justice, which is not at issue here, an erroneous judgment (if there should be one) shall not in itself run against international law, including the Treaty. On that matter, the Respondent did not act arbitrarily in contradiction with the provisions of the Treaty.

c) The termination of the Agreement

314. The Claimant alleges that the City of Vilnius (see ¶ 295) did not act in good faith during the contractual relationship, refused to renegotiate the Agreement in good faith, and finally, decided unilaterally to terminate the Agreement.
315. Fair and equitable treatment is denied when the investor is treated in such an unjust or arbitrary manner that the treatment is unacceptable from an international law point of view.⁵⁸ Indeed, many tribunals have stated that not every breach of an agreement or of domestic law amounts to a violation of a treaty. For instance, in the Saluka v. Poland case, the Tribunal stated:

*The Treaty cannot be interpreted so as to penalise each and every breach by the Government of the rules or regulations to which it is subject and for which the investor may normally seek redress before the courts of the host State. [...] something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements. (¶¶ 442-443).*⁵⁹

316. Under certain limited circumstances, a substantial breach of a contract could constitute a violation of a treaty. So far, case law has offered very few illustrations of such a situation. In most cases, a preliminary determination by a competent court as to whether the contract was breached under municipal law is necessary⁶⁰. This preliminary determination is even more necessary if the parties to the contract have agreed on a specific forum for all disputes arising out of the contract. For the avoidance of doubt, the requirement is not dependent upon the parties to the contract being the same as the parties to the arbitration.

⁵⁷ See Exhibit C 235.

⁵⁸ See S.D. Myers, Inc. v. Government of Canada, NAFTA UNCITRAL Arbitration, First Partial Award, November 13, 2000, available online at <http://www.dfait-maeci.gc.ca/>, p. 65.

⁵⁹ See UNCITRAL Arbitration, Partial Award, March 17, 2006; See also Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award, July 14, 2006, available online at http://www.worldbank.org/icsid/cases/pdf/ARB0112_Azurix-Award-en.pdf

⁶⁰ See for instance, Generation Ukraine Inc. v. Ukraine, ICSID Case No ARB/00/9, Award, September 16, 2003, *supra* note 16, p. 91 and Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, reprinted in 43 ILM 967 (2004), ¶¶ 114-115.

317. However, if the contracting-party is denied access to domestic courts, and thus denied opportunity to obtain redress of the injury and to complain about those contractual breaches, then an arbitral tribunal is in position, on the basis of the BIT, to decide whether this lack of remedies had consequences on the investment and thus whether a violation of international law occurred. In other words, as a general rule, a tribunal whose jurisdiction is based solely on a BIT will decide over the “treatment” that the alleged breach of contract has received in the domestic context, rather than over the existence of a breach as such.
318. In the case at hand, there is no doubt that BP had access to the Lithuanian Courts. In fact, neither BP nor the Claimant has challenged the alleged violation of the Agreement, with the exception of *force majeure* case, before the Lithuanian Courts as provided by the Agreement⁶¹(see above ¶ 310). The experts confirmed that the Lithuanian Courts are independent⁶² and that levels of corruption had declined substantially.⁶³.
319. Mr. Bjorn Havnes declared that “[t]o be honest with you, I don’t think it would stand a chance in the Lithuanian courts.”⁶⁴ However, again, this testimony seems to show the emotion of the witness rather than reflect the actual reliability of the Lithuanian judiciary. The failure to complain of the violation of the Agreement before the Lithuanian Court leads to two consequences. First, the Claimant failed to show that the Municipality of Vilnius terminated the Agreement wrongfully and therefore breached the Agreement. Second, even supposing that the Agreement has been wrongfully terminated, the Claimant failed to show that the right of BP to complain of the breach of the Agreement has been denied by the Republic of Lithuania and thus that its own investment was actually not accorded, by the Respondent, an equitable and reasonable treatment in such circumstances.
320. Given the above circumstances, the Arbitral Tribunal cannot reach the conclusion that Article III of the BIT was breached.

8.1.4 Legitimate expectations

8.1.4.1 Position of the parties

The Claimant contends that the Republic of Lithuania has violated its obligation to accord a *fair and equitable treatment* by frustrating its legitimate expectations. The standard of fair and equitable treatment requires the host State to treat international investments in a way that does not affect the basic expectations that were taken into account by the foreign investor in making its investment. Parkerings was therefore entitled to expect that Lithuania maintain a stable and

⁶¹ See CE 13, Article 7.3. of the Agreement.

⁶² See Gintautas Barktkus, Tr. 908.

⁶³ See Expert Report of Carlos Lapuerta, p. 4.

⁶⁴ See Bjorn Havnes, Tr. 1072.

predictable legal and business framework, as well as act transparently in a consistent manner free from any ambiguity.

321. The Claimant principally alleges that:

- a) *“Lithuania frustrated Parkerings’s legitimate expectation that it would respect and protect the legal integrity of the Agreement*

The Municipality of Vilnius did not inform the Claimant of the existence of the “Sorainen memo” that questioned the consistency of a hybrid parking fee with the Lithuanian Laws⁶⁵;

Moreover, modification of law had the effect to invalidate several decisive provisions of the Agreement. The Municipality did not object to the new law “even though it had contractually undertaken to use its best efforts to ensure that the Government’s laws and decrees furthered the successful development of the parking system”;

Claimant emphasizes that it “had a legitimate expectation that Lithuania would not employ its municipal and national instrumentalities to first induce investment by Parkerings on the false promise of a contractual armor for its investment, and then deliberately to perforate that legal armor to expose Parkerings to the arbitrariness of the Municipal authorities⁶⁶;

- b) *“Lithuania frustrated Parkerings’s legitimate expectation that it would respect and protect the economic integrity of the Agreement”*:

Notwithstanding the modification of law, the Municipality continued to require the full performance of the Agreement by BP and notably the payment of the Clause 5.1.15;

The Municipality failed to deliver to BP the design conditions of MSCP and changed several times the site of the construction, but pretended that BP had breached the Agreement;

The Municipality refused to renegotiate in good faith the Agreement;

The Municipality repudiated unlawfully the Agreement.⁶⁷

322. The Claimant alleges that it was “entitled to expect that Lithuania maintain a stable and predictable legal and business framework,”⁶⁸ and that “Lithuania was required to act in a consistent manner, free from ambiguity and totally transparently in its relation with Parkerings.”⁶⁹ The Claimant asserts that by frustrating its legitimate expectations, the Respondent violated Article III of the BIT.

323. The Respondent alleges that not every regulatory action that creates a business problem amounts to a treaty violation.⁷⁰ For the Respondent, the Claimant should prove that “the Government’s conduct frustrated the investor’s investment-backed

⁶⁵ See Claimant’s Memorial, ¶ 215.

⁶⁶ *Idem*, ¶ 216.

⁶⁷ *Idem*, ¶ 217

⁶⁸ *Idem*, p. 68.

⁶⁹ *Idem*, ¶ 216.

⁷⁰ See Respondent Counter-Memorial, p. 65.

*expectations that the State created or reinforced through its own acts.*⁷¹ The Respondent alleges that neither the City nor the Government of Lithuania induced Parkerings to invest by making representations as to the stability of the legal regime applicable to the Agreement.⁷² On the contrary, Parkerings was aware that the arrangements set out in the Agreement were untested and could be subject to legal challenge.⁷³ Parkerings should have known the potential modification of law and the legal challenges of certain provisions of the Agreement.⁷⁴

324. The Respondent noted that the Agreement does not contain a provision stabilizing the legal regime applicable to the Agreement, but contains a provision exempting the City from responsibility for actions taken by the Lithuanian Government.⁷⁵

325. Finally, the Respondent argues that the claims consist only of possible breaches of the Agreement and therefore that the Claimant should have acted before the Lithuanian Courts.⁷⁶

8.1.4.2 Discussion

326. The Tribunal notes that in this case a difference has to be made between: **a)** the obligations of the Republic of Lithuania not to modify the law, and **b)** the obligations of the Municipality of Vilnius to inform and protect the Claimant against the potential economic impact of such modification on the Agreement.

a) Did Lithuania frustrate Parkerings' legitimate expectation that it would respect and protect the legal integrity of the Agreement?

327. In 2000, subsequent to the signing of the Agreement of 29 December 1999, the Lithuanian Parliament amended several laws which affected the Agreement. The Law on Local Fees and Charges was modified on 13 June 2000,⁷⁷ the Decree on Clamping was amended on 5 September 2000⁷⁸ and finally, the Law on Self-Government was modified on 12 October 2000.⁷⁹

328. The Agreement provided that the Consortium was granted the right to collect the parking fees and the clamping fees. The parties agree that the modification of the Law on Local Fees and Charges and the amendment of the Decree on Clamping prevented the Consortium from receiving an important part of its income.

⁷¹ *Ibidem.*

⁷² See Respondent Post-Hearing Brief, p. 18.

⁷³ See Respondent Counter-Memorial, p. 68.

⁷⁴ *Ibidem.*

⁷⁵ *Idem*, ¶¶ 189-200.

⁷⁶ *Idem*, ¶¶ 201-206.

⁷⁷ See Exhibit CE 136.

⁷⁸ See Exhibit CE 41.

⁷⁹ See Exhibit CE 47.

329. The questions to be resolved are whether Parkerings had any legitimate expectation in the stability of the *legal system* and whether its expectation has been frustrated.
330. In order to determine whether an investor was deprived of its legitimate expectations, an arbitral tribunal should examine “[...] *the basic expectation that were taken into account by the foreign investor to make investment* [...]”⁸⁰. In other words, the *Fair and Equitable Treatment* standard is violated when the investor is deprived of its legitimate expectation that the conditions existing at the time of the Agreement would remain unchanged.
331. The expectation is legitimate if the investor received an explicit promise or guaranty from the host-State, or if implicitly, the host-State made assurances or representation that the investor took into account in making the investment. Finally, in the situation where the host-State made no assurance or representation, the circumstances surrounding the conclusion of the agreement are decisive to determine if the expectation of the investor was legitimate.⁸¹ In order to determine the legitimate expectation of an investor, it is also necessary to analyse the conduct of the State at the time of the investment.
332. It is each State’s undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a *stabilisation* clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power.
333. In principle, an investor has a right to a certain stability and predictability of the legal environment of the investment. The investor will have a right of protection of its legitimate expectations provided it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances. Consequently, an investor must anticipate that the circumstances could change, and thus structure its investment in order to adapt it to the potential changes of legal environment.
334. In the present case, various modifications of laws occurred in Lithuania. It is not contested that these amendments had an impact on the investment expectations of the Claimant, as it was deprived of its right to receive part of its expected income.⁸²

⁸⁰ See *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, *reprinted in 19 ICSID Rev.—FILJ* 158 (2004), ¶ 154.

⁸¹ See *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, *supra* note 60. See also, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, *supra* note 80, ¶¶ 152 *et seq.*; *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005, *supra* note 39.

⁸² See *The Republic of Lithuania Counter-Memorial*, ¶ 81: « *the Lithuanian Government had taken actions that, with respect to the On-Street parking Concession, prevented (or would eventually prevent) the concessionaire, VPK, from collecting the fee as provided under the Agreement and from penalizing drivers who failed to pay the fees provided under the Agreement* ».

Neither is it contested that the Republic of Lithuania gave no specific assurance or guarantee to Parkerings that no modification of law, with possible incidence on the investment, would occur. The legitimate expectations of the Claimant that the legal regime would remain unchanged are not based on or reinforced by a particular behaviour of the Respondent. In other words, the Republic of Lithuania did not give any explicit or implicit promise that the legal framework of the Agreement would remain unchanged.

335. In 1998, at the time of the Agreement, the political environment in Lithuania was characteristic of a country in transition from its past being part of the Soviet Union to candidate for the European Union membership. Thus, legislative changes, far from being unpredictable, were in fact to be regarded as likely. As any businessman would, the Claimant was aware of the risk that changes of laws would probably occur after the conclusion of the Agreement. The circumstances surrounding the decision to invest in Lithuania were certainly not an indication of stability of the legal environment. Therefore, in such a situation, no expectation that the laws would remain unchanged was legitimate.
336. By deciding to invest notwithstanding this possible instability, the Claimant took the *business risk* to be faced with changes of laws possibly or even likely to be detrimental to its investment. The Claimant could (and with hindsight should) have sought to protect its legitimate expectations by introducing into the investment agreement a stabilisation clause or some other provision protecting it against unexpected and unwelcome changes.
337. The record does not show that the State acted unfairly, unreasonably or inequitably in the exercise of its legislative power. The Claimant has failed to demonstrate that the modifications of laws were made specifically to prejudice its investment.
338. Consequently, in the case at hand, the Tribunal is not persuaded that the Claimant had any legitimate expectation that the Government of the Republic of Lithuania would not pass legislation and regulatory measures which could harm its investment. In that respect, the Tribunal considers that the Respondent did not violate Article III of the BIT.
- b) Did Lithuania, by the action and omission of the Municipality, frustrate Parkerings' legitimate expectation that it would respect and protect the economic and legal integrity of the Agreement?**
339. The Claimant contends that the City of Vilnius was aware of the existence of the proposals to amend the Law on Fees and Charges, the Decree on Clamping and the Law of Self-Government, but never informed the Claimant during the negotiation and prior to the signing of the Agreement
340. Concerning the amendment of the Decree on Clamping and the modification of the Law on Self-Government, the record confirms that Mayor Zuokas was a member of the

Board of the Association of Local Authorities in Lithuania.⁸³ On 22 October 1999, the Board of the Association of Local Authorities in Lithuania had to “*submit comments and proposals to the Seimas, Government and any other state authorities on the improvement of the legal base of local self-government and other laws related to the operation of the local authorities.*”⁸⁴

341. Consequently, the City of Vilnius was in possession of information, prior to the conclusion of the Agreement, concerning possible modifications of the Law on Self-Government and omitted to advise the Claimant. It is evident that the Respondent, as mentioned above (see ¶ 335), had the contractual obligation to act and negotiate in good faith prior to the conclusion of the Agreement. By failing to do so, it may have breached the Agreement but that is not a matter for this Tribunal.
342. However, first, the record does not show that the Respondent deliberately neglected to advise the Claimant of the possible amendment of the law. Second, as described above (see ¶ 335), the political environment was changing at the time of the negotiation of the Agreement and the Claimant should have known that the legal framework was unpredictable and could evolve. Third, the fact that the City of Vilnius knew the intention of the legislator to modify certain laws, does not mean that the City of Vilnius knew the substance of the modification. Indeed, the record does not show that the City of Vilnius was in possession of any specific information which indicated that the Agreement would be affected by a modification of the law. Fourth, the Claimant failed to demonstrate that any investor or at least a qualified law firm was unable to get the information about the amendment process. Therefore, the Tribunal sees no reason why, in the circumstances, the alleged contractual obligation of the Municipality to inform BP of the future modification of the law is constitutive of a *legitimate expectation* for the Claimant.
343. The Claimant alleges a violation by the Municipality of Vilnius of its obligation to use its best efforts to ensure that the Government’s laws and decrees furthered the successful development of the parking system. The Claimant alleges that following the different modifications of laws, it was deprived of various sources of income in violation of the Agreement. Moreover, the Claimant accuses the Representative of the Municipality and notably the Mayor of failing to act in good faith to protect and respect the Agreement and especially the economic interest of the Claimant in the performance of the Agreement.
344. It is evident that not every hope amounts to an expectation under international law. The expectation a party to an agreement may have of the regular fulfilment of the obligation by the other party is not necessarily an expectation protected by international law. In other words, contracts involve intrinsic expectations from each party that do not amount to expectations as understood in international law. Indeed, the party whose *contractual expectations* are frustrated should, under specific conditions, seek redress before a national tribunal. As stated by the Tribunal in Saluka, “[t]he Treaty cannot be

⁸³ See Exhibit CE 256, p. 3084.

⁸⁴ *Idem*, p. 3077.

*interpreted so as to penalise each and every breach by the Government of the Rules or regulations to which it is subject and for which the investor may normally seek redress before the courts of the host State.*⁸⁵

345. In the case at hand, the Claimant alleges that the Municipality of Vilnius frustrated its legitimate expectation in violation of Article III of the Treaty (see ¶¶ 321 *et seq.*). However, the Tribunal considers that the Claimant's expectations are, in substance, of a contractual nature. The acts and omissions of the Municipality of Vilnius, in particular any failure to advise or warn the claimant of likely or possible changes to Lithuanian law, may be breaches of the Agreement but that does not mean they are inconsistent with the Treaty.
346. In conclusion, the Arbitral Tribunal finds that the Claimant has not been deprived of any legitimate expectation in violation of Article III of the Treaty.

8.2 CLAIMS FOR VIOLATION OF THE OBLIGATION OF PROTECTION (ARTICLE III OF THE TREATY)

347. Pursuant to Article III of the BIT the contracting States also agreed to accord *protection* to the investor.

8.2.1 Position of the parties

348. The Claimant alleges that the Respondent failed to protect its investment.⁸⁶
- (a) When parking meters owned by VPK were destroyed, the Police did not identify any suspects, did not find any evidence.
 - (b) Claimant sought the protection of the Prime Minister against the action and omission of the Municipality but no such protection was given. Claimant alleged that *"the Government Representative failed to disclose that the Municipality was treating BP unfairly and engaging in discrimination by refusing to enter into a Cooperation Agreement"*.
 - (c) Claimant reproaches the Government Representative for its passiveness when the Municipality refused to sign a Cooperation Agreement with BP and then repudiated the Agreement.
349. The Claimant argues that the Republic of Lithuania, in order to comply with its obligation, *"must show that it took all measure of precaution to protect Parkerings' investment and met the standard of due diligence. [...] Lithuania's duty of protection extends to guarding against the action of both non-state actors and organs of government. [...] a state has a duty to protect aliens and their investment against unlawful acts committed by some of its citizens. If such acts are committed with the active assistance of state-organs a breach of International Law occurs. [...] If the wrong has been committed by a private individual or a state organ, Lithuania is under an obligation to punish the wrongdoer."*⁸⁷

⁸⁵ See *Saluka Investment BV (The Netherlands) v. The Czech Republic*, UNICITRAL Case, ¶ 442.

⁸⁶ See Claimant's Memorial, p. 72 *et seq.* and Claimant's Post-Hearing Brief, p. 117.

⁸⁷ See Claimant's Memorial, ¶ 222.

350. The Claimant alleges that, by its failure to protect the investment, the Respondent has breached its obligation under Article III of the Treaty.
351. The Respondent contends that it granted the Claimant the *full protection and security* as provided by the Treaty. Under International Law, the guarantee of protection is characterized by the standard of due diligence. This standard requires “*the state to take reasonable steps to prevent hostile acts toward investors that it knew or should have known were about to take place.*”⁸⁸
352. In the Respondent’s view, “*the guarantee of protection and security is not absolute and does not impose strict liability on the State that grants it.*”⁸⁹ “*The simple fact that Claimant is not pleased with the result of a state action does not constitute a basis for a claim under the protection clause, provided the state exercised due diligence.*”⁹⁰
353. The Respondent alleges that Lithuania reacted reasonably within the parameter of due diligence of a democratic state to the various complaints lodged by Claimant and BP.⁹¹ For the Respondent, the non-intervention of the Government’s Representative concerning the termination of the Agreement and the refusal of the City of Vilnius to sign a Cooperation Agreement do not amount to a violation of the Treaty. Indeed, the termination was not wrongful and, therefore, did not merit any legal challenge; Lithuania had no obligation to challenge an alleged breach of the Agreement if the contracting party had the right and the opportunity to challenge the breach itself.⁹²

8.2.2 Discussion

354. Article III of the Treaty only mentions the term *protection*. In a number of decisions, Tribunals make reference to the standard of “*full protection and security.*” It is generally accepted that the variation of language between the formulation “*protection*” and “*full protection and security*” does not make a significant difference in the level of protection a host State is to provide.⁹³ Moreover, *in casu*, the Parties make systematically reference to the standard of “*full protection and security.*” Therefore, the Arbitral Tribunal intends to apply the standard of “*full protection and security.*”
355. A violation of the standard of *full protection and security* could arise in case of failure of the State to prevent the damage, to restore the previous situation or to punish the author of the injury.⁹⁴ The injury could be committed either by the host State, or by its agencies or by an individual.

⁸⁸ See Respondent Counter-Memorial, p. 86.

⁸⁹ *Idem*, ¶ 228.

⁹⁰ See Respondent Counter-Memorial, ¶ 230.

⁹¹ *Idem*, ¶ 232.

⁹² *Idem*, ¶ 235.

⁹³ See for instance Rubins N., Kinsella S., *International Investment, Political Risk and Dispute Resolution*, New-York, 2005.

⁹⁴ See *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, December 8, 2000, reprinted in 41 *ILM* 896 (2002), ¶¶ 84-95.

356. The Claimant alleges damages to its materials due to vandalism. However, the Claimant does not show that such vandalism would have been prevented if the authorities had acted differently. The Claimant only contends that the police did not find the authors of this offence. Both parties agree that Lithuanian authorities started an investigation to find the authors of the vandalism.
357. The Arbitral Tribunal finds that the record does not show in which way the process of investigation amounted to a violation of the Treaty. In *Tecmed*, the Tribunal underlined that “*the guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it.*”⁹⁵
358. The Claimant criticized the alleged failure of the Prime Minister to protect its investment against the action and omission of the municipality. However, the record does not show that the Prime Minister did not act in any manner that should be incompatible with his function and duties. The Claimant failed also to demonstrate a negligence of the Prime Minister that could amount to a breach of the BIT.
359. The Claimant also criticized the Respondent for its passivity when the City of Vilnius breached the Agreement. However, the Arbitral Tribunal considers that the investment Treaty created no duty of due diligence on the part of the Respondent to intervene in the dispute between the Claimant and the City of Vilnius over the nature of their legal relationships.
360. The Respondent’s duty under the Treaty was, first, to keep its judicial system available for the Claimant to bring its contractual claims and, second, that the claims would be properly examined in accordance with domestic and international law by an impartial and fair court. There is no evidence - not even an allegation – that the Respondent has violated this obligation.
361. The Claimant had the opportunity to raise the violation of the Agreement and to ask for reparation before the Lithuanian Courts. The Claimant failed to show that it was prevented to do so. As a result, the Arbitral Tribunal considers that the Respondent did not violate its obligation of protection and security under the Article III of the BIT.

8.3 CLAIMS FOR VIOLATION OF THE OBLIGATION TO ACCORD TREATMENT NO LESS FAVORABLE THAN THE TREATMENT ACCORDED TO INVESTMENTS BY INVESTORS OF A THIRD STATE (ARTICLE IV OF THE TREATY)

362. Article IV of the Treaty provides that

1. *[I]nvestments made by investors of one contracting party in the territory of the other contracting party, as also the returns therefrom, shall be accorded treatment no less favourable than that accorded to investments made by investors of any third state.*

⁹⁵ See *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, *supra* note 80, ¶¶ 177.

8.3.1 Position of the parties

363. In substance, the Claimant alleges that the Respondent violated Article IV of the Treaty as follows:⁹⁶

- (a) the City of Vilnius rejected the project of MSCP proposed by BP on the Gedimino site for cultural heritage concerns, because the project was situated in the Old Town of the City of Vilnius. However, the Municipality authorized another company (Pinus Proprius) to build a MSCP on the same site;
- (b) the City of Vilnius refused to sign a Joint Activity Agreement (JAA) with BP for the Gedimino MSCP and for the Pergales MSCP for legal reason, but signed a JAA with the Company Pinus Proprius;
- (c) Once the JAA signed with the Company Pinus Proprius has been declared unlawful, the City of Vilnius transformed it into a Cooperation Agreement. However, the City of Vilnius refused to conclude a similar Cooperation Agreement with BP as a substitute of the JAA.

364. In the Claimant's view, the Companies Pinus Proprius and BP were facing similar circumstances. The refusal of the City of Vilnius to sign a JAA or a Cooperation Agreement prevented BP from the construction of any MSCP in Vilnius and thus deprived it of the opportunity to carry out its investment as it was entitled to do under the Agreement.

365. The Respondent alleges that the situation of the MSCP built by Pinus Proprius on the Gedimino site was clearly different from the project proposed by the Claimant on the Gedimino site and the Pergales site.⁹⁷

- (a) The MSCP built by Pinus Proprius on the Gedimino site was smaller than the MSCP project proposed by the Claimant. The proposed MSCP designed by the Claimant extended to the Odiminiu Square, which is part of the Old Town area as defined by the Annex No. 5 of the Agreement, but the one constructed by Pinus Proprius was not. The Respondent underlines that a construction in the Old Town needed the approval of the Government's Cultural heritage Commission.
- (b) The Joint Activity Agreement could not be signed with BP since the modification of the Article 9(2) of the Law on Self-Government which prohibited the conclusion of such agreement with private entities. The Respondent alleges that the Cooperation Agreement signed with Pinus Proprius was not a JAA. However, the conclusion of a similar Cooperation Agreement with BP was not possible for various reasons:
 - A transfer of land was necessary for the MSCP proposed by BP and not for the MSCP built by Pinus Proprius, as the latter was already the owner of part of the land where the MSCP was built. Consequently, a Public Auction was necessary for the transfer of state-owned land to BP⁹⁸;
 - Pinus Proprius had the contractual obligation to transfer its own land to the State when the building would be achieved. Pinus Proprius also agreed to sell the MSCP to the City. On the contrary, BP could remain the owner of the MSCP built on the Gedimino site and on Pergales site and would have the possibility to lease the state-owned land or to buy it⁹⁹.

⁹⁶ See Claimant's memorial, p. 74 and Claimant's Post-Hearing Brief, p. 99.

⁹⁷ See Respondent Counter-Memorial, p. 90 and Respondent Post-Hearing Brief, p. 5

⁹⁸ See Respondent Counter-Memorial, ¶ 248.

⁹⁹ See Respondent Post-Hearing Brief, p. 6.

- The MSCP built by Pinus Proprius was under state-owned land that was not delineated by a land plot and, therefore, could never be owned or leased by Pinus Proprius. On the contrary, the project of MSCP on Pergales site proposed by BP was situated on a state-owned land delineated as a land plot and therefore required a Public Auction.¹⁰⁰

366. Article IV of the Treaty is known as the standard of the “*Most-favoured-nation Treatment*”. *Most-favoured-nation (MFN)* clauses are by essence very similar to “*National Treatment*” clauses. They have similar conditions of application and basically afford indirect advantages to their beneficiaries, namely a treatment no less favourable than the one granted to third parties. Tribunals’ analyses of the *National Treatment* standard will therefore also be useful to discuss the alleged violation of the *MFN* standard.

367. *National treatment* and *Most-Favoured-Nation treatment* are treaty clauses that have the same substantive effect as the international treatment standard: foreigners should be afforded treatment no less favourable than the one granted to local citizens. The international law requirement in fact acts as a minimum requirement as it would be useless for the States party to a treaty to grant benefits less sweeping than customary law. In other words, all the requirements, be they national treatment, most favoured-nation-treatment or non-discrimination at large, will in effect bar discrimination against foreign national investing in the country concerned. All investors benefiting from a treaty will benefit of a treatment identical or better than nationals or third countries persons. There is, thus, no reason discretely to address the issue of non-discrimination: the two aspects, under most-favoured-nation requirements (Article IV of the Treaty) on the one hand and under international customary law on the other.

368. Discrimination is to be ascertained by looking at the circumstances of the individual cases. Discrimination involves either issues of law, such as legislation affording different treatments in function of citizenship, or issues of fact where a State unduly treats differently investors who are in similar circumstances. Whether discrimination is objectionable does not in the opinion of this Tribunal depend on subjective requirements such as the bad faith or the malicious intent of the State: at least, Article IV of the Treaty does not include such requirements. However, to violate international law, discrimination must be unreasonable or lacking proportionality, for instance, it must be inapposite or excessive to achieve an otherwise legitimate objective of the State. An objective justification may justify differentiated treatments of similar cases. It would be necessary, in each case, to evaluate the exact circumstances and the context.

369. The essential condition of the violation of a *MFN* clause is the existence of a different treatment accorded to another foreign investor in a similar situation.¹⁰¹ Therefore, a

¹⁰⁰ *Idem*, pp. 5-6.

¹⁰¹ See Goetz and others v. Burundi, ICSID Case No. ARB/95/3, Award, February 10, 1999, *supra* note 40, ¶ 121.

comparison is necessary with an investor in *like circumstances*. The notion of *like circumstances* has been broadly analyzed by Tribunals¹⁰².

370. For example, in *Pope and Talbot Inc. v. Government of Canada*, the Tribunal held that:

[i]n evaluating the implication of the legal context, the Tribunal believes that, as a first step, the treatment accorded a foreign owned investment protected [...] should be compared with that accorded domestic investment in the same business or economic sector.¹⁰³ [...]

Once it is established that a foreign and domestic investor are in the same business or economic sector, “[d]ifference in treatment will presumptively violate [the principle] unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or de facto, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing of NAFTA. [...] A formulation focusing on the like circumstances [...] will require addressing any difference in treatment, demanding that it be justified by showing that it bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign-owned investment.¹⁰⁴

371. In order to determine whether Parkerings was in *like circumstances* with Pinus Proprius, and thus whether the MFN standard has been violated, the Arbitral Tribunal considers that three conditions should be met:

- (i) Pinus Proprius must be a foreign investor;
- (ii) Pinus Proprius and Parkerings must be in the same economic or business sector;
- (iii) The two investors must be treated differently. The difference of treatment must be due to a measure taken by the State. No policy or purpose behind the said measure must apply to the investment that justifies the different treatments accorded. *A contrario*, a less favourable treatment is acceptable if a State’s legitimate objective justifies such different treatment in relation to the specificity of the investment.

372. With regard to the first condition **(i)**: The parties are not disputing the fact that the company Pinus Proprius is an investor in Lithuania. As Pinus Proprius is owned by the Dutch company Litprop Holding BV, it is a foreign investor within the meaning of the BIT.¹⁰⁵

373. With regard to the second condition **(ii)**: BP and Pinus Proprius are engaged in similar activities. Both Pinus Proprius and BP are companies acting in the construction and management of parking garages. Both are competitors for the same MSCP project in

¹⁰² See for instance: Occidental Exploration and Production Company v. Republic of Ecuador, UNICITRAL Case No. UN 3467, Final Award, July 1, 2004, ¶¶ 173-176; Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. AB(AF)/99/1, Award, December 16, 2002, *reprinted in 18 ICSID Rev.—FILJ 488* (2003), ¶¶ 170 *et seq*; S.D. Myers, Inc v. The Government of Canada, NAFTA UNICITRAL Arbitration, First Partial Award, November 13, 2000, ¶¶ 248-250.

¹⁰³ See *Pope & Talbot Inc. v. The Government of Canada*, NAFTA Case, Award on the merits of phase 2, April 10, 2001, ¶ 78.

¹⁰⁴ *Idem*, ¶¶ 78-79.

¹⁰⁵ See Exhibit CE 249.

Gedimino. Thus, the Arbitral Tribunal finds that Pinus Proprius and BP are in a similar economic and business sector.

374. With regard to the last condition (iii): The Claimant alleges that Pinus Proprius has been treated differently than BP, because, first, Pinus Proprius has been authorised to construct its MSCP in Gedimino, but BP's project also situated in Gedimino has been refused. Second, the Municipality of Vilnius refused to conclude a JAA or a Cooperation agreement with BP but accepted such a conclusion with Pinus Proprius.
375. However, the situation of the two investors will not be in *like circumstances* if a justification of the different treatment is established.
376. The Arbitral Tribunal will discuss separately the two alleged discriminatory measures, namely whether the Municipality wrongfully granted Pinus and denied BP an authorisation to build a MSCP under Gedimino Avenue (see below *the situation of the Gedimino MSCP*, section 8.3.2.1); and whether the Municipality wrongfully refused to enter into a Cooperation Agreement with BP, whilst it had concluded such a Cooperation Agreement with Pinus (see below *The Situation of the Pergales MSCP*, section 8.3.2.2).

8.3.1.1 The situation of the Gedimino MSCP

377. In order to determine if the two investors were *in like circumstances*, or if the measure taken by the Municipality was justified, the Arbitral Tribunal analyses below the situation of the two investors.
378. In substance, the Respondent argues that BP's MSCP project in Gedimino was *fundamentally different* from the MSCP built by Pinus Proprius. First, the MSCP project proposed by the Claimant was clearly bigger than the MSCP built by Pinus Proprius. Second, the proposed MSCP designed by the Claimant extended to the Odiminiu Square, which is part of the Old Town area as defined by Annex No. 5 of the Agreement, but the one constructed by Pinus Proprius did not. Finally, BP's project reached the Vilnius' historic Cathedral Square. The Respondent underlines that a construction in the Old Town needed the approval of the Government's Cultural Heritage Commission.
379. The record confirms that Claimant's proposed project on the Gedimino site and the MSCP built by Pinus Proprius were almost identically located in the sense that they are both situated in the Old Town. Indeed, the maps produced by the Respondent¹⁰⁶ show that the Pinus Proprius MSCP is partly superimposed with the MSCP project of BP.
380. However, the Claimant's project is considerably bigger than the MSCP constructed by Pinus Proprius¹⁰⁷. All the maps clearly show that BP's MSCP extended under Gedimino Street as far as the Cathedral Square.¹⁰⁸ The Claimant's project involved the

¹⁰⁶ See Exhibits RE 97, RE 102-103.

¹⁰⁷ See Respondent Counter-Memorial, p. 93; Exhibits RE 97 and RE 102-103.

¹⁰⁸ See Exhibits RE 97, RE 102-103.

construction of a garage comprising over 500 parking slots by comparison; the MSCP constructed by Pinus Proprius consists of only 233 parking slots.¹⁰⁹

381. However, notwithstanding the difference of size, both Pinus Proprius MSCP and BP's MSCP project in Gedimino show obvious similarities. They are located in the Old Town district of the City of Vilnius as defined by the Administrative borders.¹¹⁰ The Old Town as defined by the Administrative borders is protected territory as defined by the applicable laws and regulations.¹¹¹ The Old Town of Vilnius as defined by its administrative borders is considered to be practically the same as the area defined by UNESCO.¹¹²
382. The territory of the Old Town as defined by UNESCO is a protected area which requires the approval of various administrative Commissions in order, notably, to make any construction.¹¹³ Mr Robertas Staskevicius agreed that “[t]he Department of Cultural Heritage Protection, their concern was over the administrative region in Vilnius designated by UNESCO as being the protected administrative region.”¹¹⁴ And that “they [the Department of Cultural Heritage Protection] would be concerned about an activity that took place within that zone [the administrative region in Vilnius designated by UNESCO].”¹¹⁵
383. The Tribunal understands that inside the Old Town as defined by UNESCO is located the Old Town as defined by Annex 5 of the Agreement.¹¹⁶ Annex 5 of the Agreement supplies the contractual definition of the Old Town. Mr. Robertas Staskevicius confirmed that “the reason why that zone was identified in the contract with the consortium was to make sure that the consortium focused on solving the traffic and parking problems in that specific zone.”¹¹⁷ Mr. Robertas Staskevicius confirmed also that “as far as this department [the Department of Cultural Heritage Protection] within the Ministry of Culture of the Lithuanian Government was concerned, it didn't matter how the parties had defined a part of the Old Town in annex 5 of the Contract.”¹¹⁸ It is not immediately apparent why Annex 5, clearly a contractual document binding the Municipality of Vilnius and BP, should be relevant, as argued by the Respondent, in assessing whether Pinus Proprius was *in like circumstances* with Parkerings.
384. Nevertheless, *ex abundanti cautela*, it appears that after analysis of the maps furnished by the Respondent,¹¹⁹ neither the MSCP built by Pinus Proprius nor the MSCP

¹⁰⁹ See CE 39, CE 40 and CE 95.

¹¹⁰ See Exhibits RE 97, RE 102, RE 103; See also Exhibit CE 294.

¹¹¹ See Exhibit CE 75 and CE 294 ; See Robert Staskevicius, TR 1350:19.

¹¹² See Robert Staskevicius, TR 1348:13.

¹¹³ See for instance CE 81, CE 60, CE 69, CE 84.

¹¹⁴ See Robert Staskevicius, TR 1348:13

¹¹⁵ See Robert Staskevicius, TR 1348:20.

¹¹⁶ See Exhibits CE 13, RE 97, RE 102, RE 103.

¹¹⁷ See Robert Staskevicius, TR 1352:12.

¹¹⁸ *Idem*, TR 1350:9.

¹¹⁹ See Exhibits RE 97, RE 102-103

proposed by BP are situated in the Old Town District, as defined by Annex 5 of the Agreement.¹²⁰ The most recent maps furnished by the Respondent established that BP's project did not extend into the Annex 5 area¹²¹. Consequently, this argument is not useful for the Tribunal's determination.

385. Another feature does however call the Tribunal attention: the MSCP planned by BP extends significantly in the Old Town as defined by UNESCO and especially near the historical site of the Cathedral. The record shows that various administrative Departments and Commissions in Lithuania were opposed to the MSCP as planned by BP. On 20 October 2000, the State Monument Protection Commission of the Republic of Lithuania objected to the parking plan for the following reason:

*Projects of such type and scale like the project of the construction of planned underground garages in the Old Town of Vilnius should be developed concurrently taking into consideration the possible direct and indirect environmental impact of planned works and also the impact on cultural properties. In the opinion of the State Monumental Protection Commission, the planned garages [...] would change the character of the Old Town of global value; destroy large areas of unexplored cultural layer. Also, the intensity of traffic and air pollution in the Old Town is likely to increase. The Old Town might become less attractive in terms of tourism and to the residents and visitor, and this would be a great loss. [The State Monumental Protection Commission] resolves: to object the project of construction of the underground garages in the Old Town of Vilnius [...]*¹²².

386. On 4 December 2000, the Urban Development Department of the Vilnius Municipality stated its objection to BP's MSCP project under Gedimino:

*The city's humanitarian community would psychologically not accept this proposal. The final conclusions concerning the feasibility of construction of this garage would have to be supplied by detailed exploratory archaeological works, because this square [Odminiu] is a supposed site of the defensive installations of Vilnius Castle. In terms of the townscape, the site of the square is very important in the formation of the area of Cathedral Square. Clearance of the trees and extension and distortion of the Cathedral area is not architecturally acceptable. This site also remains the subject of the debate on the feasibility of construction – for the purpose of better formation of the area of Cathedral Square and creation of a site of particular public significance. Therefore, it would be purposeful to design the garage only together with a structure that would occupy the square, provided that construction of such a structure would be permitted. Currently, such construction is irrelevant*¹²³.

387. On 22 December 2000, the Vilnius Territorial Division underlined:

*the solutions presented in the referred documents directly affect a cultural monument old city of Vilnius [...]*¹²⁴.

388. Finally, on 12 March 2001, the State Monument Protection Commission of the Republic of Lithuania stated, concerning the MSCP project filed by BP:

¹²⁰ See Exhibits RE 103 and RE 104.

¹²¹ See Exhibits RE 97, RE 99, RE 100, RE 102, RE 103;

¹²² Exhibit CE 49

¹²³ Exhibit CE 60.

¹²⁴ Exhibit CE 61.

In case construction of underground garages in the old city of Vilnius embarked now, it can be stated that Lithuania failed to perform obligation undertaken upon signing in November 1999 of the Convention for the Protection of the Architectural heritage of Europe and the European Convention on the Protection of the Archaeological heritage. All legal acts concerning regulation of territorial planning, land relationship, heritage protection, environment protection and construction would be infringed [...].

Upon installation of garages, a big portion of archaeological heritage of the old city of Vilnius will be destroyed; use of multiple up-to-date materials and technologies will damage the authenticity of the old city of Vilnius¹²⁵.

389. In a letter to the City Development Committee dated 25 July 2001, Mr. Jonas Tamulis, member of the board of BP, wrote that

[g]iven the suspension of solution in the Old Town territories (in the boundaries within which it is inscribed in the UNESCO List of World Heritage) for stage two we do not propose any sites in this territory. The second step should involve construction of parking areas in such sites according to the parking plan which should necessarily be independent form solution regarding the Old Town¹²⁶.

390. The Arbitral Tribunal considers, as described above (see ¶ 383), that the difference based on the alleged encroachment in the Old Town as defined by the Annex 5 of the Agreement is not relevant.
391. The difference in size of the two MSCPs also is, in and by itself, not decisive either to establish that the two investors were not *in like circumstances* but it may be one of the factors to take into consideration.
392. On the other hand, the fact that BP's MSCP project in Gedimino extended significantly more into the Old Town as defined by the UNESCO, is decisive. Indeed, the record shows that the opposition raised against the BP projected MSCP were important and contributed to the Municipality decision to refuse such a controversial project. The historical and archaeological preservation and environmental protection could be and in this case were a justification for the refusal of the project. The potential negative impact of the BP project in the Old Town was increased by its considerable size and its proximity with the culturally sensitive area of the Cathedral. Consequently, BP's MSCP in Gedimino was not similar with the MSCP constructed by Pinus Proprius.
393. That being said the Claimant failed to show that Pinus Proprius benefited of a more favourable treatment regarding the administrative requirements, *i.e.* that is was exempt of such requirements or obtained a clearance more easily. It is the Claimant's burden of proof to show that the foreign investor has been treated more favourably.
394. The Tribunal notes that the Pinus Proprius project was also situated in the Old Town as defined by the UNESCO and should have likely met the same administrative requirements as BP's. Indeed, the project had to be approved by, among others, the State Monument Protection Commission of the Republic of Lithuania, the Urban Development Department of the Vilnius Municipality and the Vilnius Territorial Division.

¹²⁵ Exhibit CE 81.

¹²⁶ Exhibit CE 89.

However, there is no evidence that Pinus Proprius has been treated differently from BP in the discharge of the administrative requirements. For instance there is no evidence that Pinus Proprius failed to apply or did not receive the permission, from the State Monument Protection Commission of the Republic of Lithuania or the Urban Development Department of the Vilnius Municipality or the Vilnius Territorial Division, to construct its MSCP in the Old Town.

395. Moreover, the record does not evidence that Pinus Proprius faced the same objections and that its project had the same potential impact on the Old Town. On the contrary, the record shows that the Pinus Project did not extend near the Cathedral area which may have meant it was less controversial.
396. Nonetheless, despite similarities in objective and venue, the Tribunal has concluded, on balance, that the differences of size of Pinus Proprius and BP's projects, as well as the significant extension of the latter into the Old Town near the Cathedral area, are important enough to determine that the two investors were not *in like circumstances*. Furthermore, the Municipality of Vilnius was faced with numerous and solid oppositions from various bodies that relied on archaeological and environmental concerns. In the record, nothing convincing would show that such concerns were not determinant or were built up to reject BP's project. Thus the City of Vilnius did have legitimate grounds to distinguish between the two projects. Indeed, the refusal by the Municipality of Vilnius to authorize BP's project in Gedimino was justified by various concerns, especially in terms of historical and archaeological preservation and environmental protection. These concerns are peculiar to the extension of BP's project in the Old Town and thus could justify different treatment with Pinus Proprius. In the absence of convincing evidence that Pinus Proprius benefited from a more favourable treatment in terms of administrative requirement, the Arbitral Tribunal finds that the Claimant failed to demonstrate a discrimination concerning the Gedimino car park.
397. Finally, the Tribunal notes that, in April 2001, the Municipality of Vilnius ordered the Consortium to abandon the Gedimino project and to study the MSCP on the Pergales site.¹²⁷ BP accepted to start the planning for the site of Pergales and also agreed that the site of Gedimino was uncertain due to its location in the Old Town (see above ¶ 392)¹²⁸. The record is insufficient to show that the Municipality of Vilnius unduly rejected the Gedimino project of MSCP proposed by BP. On the contrary, the Gedimino site was only one possibility among several other locations. The refusal of one site did not deprive BP of the possibility to propose other locations and finally to construct its ten MSCPs as agreed.¹²⁹

8.3.1.2 The situation of the Pergales MSCP

398. As set out above (see ¶¶ 363-364) the Claimant alleges, first, that the Municipality refused to sign a Joint Activity Agreement (JAA) with BP but concluded a JAA with

¹²⁷ See Exhibits R 63 and CE 89.

¹²⁸ See Exhibits CE 89.

¹²⁹ *Ibidem*

Pinus Proprius, and second, that once the JAAs had been declared unlawful under the Law on Self-Government, the Municipality refused to transform the JAA envisioned by BP into a Cooperation Agreement as it did with Pinus Proprius.

399. JAAs are used in Lithuania to embody private-public partnerships for construction, if the project is situated on state-owned land and if the constructor is neither the owner nor the lessee of the land.¹³⁰

400. In his statement, Mr. Sigitas Burnickas explained that:

Under Lithuanian law, much of the land available for infrastructure development within the city of Vilnius was formally owned by the national government, and not the Municipality. This necessitated a two step process for each car park – first, the Municipality had to obtain the land from the State; second, the Municipality had to transfer that land to the consortium member responsible for developing that particular car park.

In accordance with applicable construction regulations the permits for the construction of car parks could be issued only if the developer had possession of the relevant land plot by proprietary right, by lease (or sublease), or by right of use. Under the land lease law of 1998, however, the state-owned land plots could only be leased to the consortium through an auction procedure. [...]

In the consortium's case, the joint activity agreement would work as follows. First, the Municipality would obtain the state-owned land plots by right of trust and apply, on its behalf or on behalf of the consortium member, for the construction permit. Second, the consortium member would finance and carry out the construction works on the state-owned land. Because of the joint activity agreement, there was no requirement for a lease of transfer of any kind during construction. Third, upon completion of construction, each of the parties received a defined share in the joint property. The division of property was agreed to in the model joint activity agreement: the consortium member would own the car park and the Municipality would receive the associated public infrastructure that the consortium member had constructed. Under the provision of the land lease law, the consortium member who owned the car park on the state-owned land could lease that land without having to go through an auction¹³¹.

401. In summary, the Tribunal understands that a JAA or Cooperation Agreement is necessary to start the construction and permits to avoid the public auction as defined by Article 7 section 1 of the Law on leasing of Land.¹³² Indeed, pursuant to Article 7 section 1 of the Law on leasing of Land:

State-owned land, save for the case stipulated in paragraph 2 of this article, in the procedure set by the Government shall be leased in an auction for the person, whose bid for land lease fee is the highest. [...]¹³³

402. However, Article 7 section 2 of the same law provides that if the prospective lessee already owns a building on the said land, no public auction is necessary:

In case state-owned land is developed with buildings owned or rented by natural or legal persons, it shall be leased without an auction in the procedure set by the Government.

¹³⁰ See Lithuania TR. 375:24-376:5.

¹³¹ See Burnickas Stmt. ¶ 11.

¹³² See Lithuania, Tr. 375:24-376:5.

¹³³ See Exhibits RE 11.

403. In the case at hand, it is not disputed that Pinus Proprius was the owner of a small part of the land on its MSCP building site.¹³⁴ BP was not the owner of the land on the MSCP building site and, consequently it needed a JAA in order to construct its MSCP. This was also the case for Pinus Proprius, at least for the part of the land it did not own.
404. However, on 12 October 2000, the Amendment of the Law on Self-Government precluded the public authorities from concluding JAA with a private entity. In substance, Article 9 Section 2 of the Law on Self-Government provides that “[f]or general purposes a municipality may conclude joint activity contracts or public procurement contracts with State institutions and (or) other municipalities.”¹³⁵ It is common ground that a municipality is thus authorized to enter into JAAs but exclusively with State constituent divisions to the exclusion of private entities.
405. On 24 October 2001, the Vilnius City Council decided to conclude a JAA with the Company Pinus Proprius.¹³⁶ However, on 18 December 2001, the Representative of the Government for Vilnius Region, Mr Gintautas Jakimavicius, suspended the enforcement of the decision of the Vilnius City Council pursuant to the Law on Local Self-Government,¹³⁷ and on 18 January 2002, requested the Vilnius District Administrative Court to revoke the decision of the Vilnius City Council. In substance, the Representative of the Government for Vilnius Region stated:

*a conclusion should be made that the Law does not provide for the right for municipalities to conclude joint venture agreement with private persons and that Vilnius City Municipality Council having passed the decision No.417 of 24 October 2001 and by Clause 1 thereof approved the draft joint venture agreement with Pinus Proprius UAB exceeded the scope of competence of public authorities*¹³⁸.

406. On 27 March 2002, the Vilnius City Council agreed to modify the controversial JAA into a *Cooperation Agreement*.¹³⁹ Thus, the Representative of the Government for the Vilnius Region, Mr. Gintautas Jakimavicius, wrote to the Vilnius District Administrative Court:

*[t]he Vilnius City Council on March 27, 2002, issued decision No. 530 “on the Approval of the Cooperation Agreement” whereby item 1 approved the Cooperation Agreement between the Municipality of the City of Vilnius and the Joint Stock Company “Pinus Proprius.” By this decision the Vilnius City Council actually changed decision No. 417 of 10/24/01 “On approval of the Partnership Agreement,” i.e. it became out of force. Since the decision became out of force, the legal issue also disappeared. Consequently, the case was dismissed.*¹⁴⁰

¹³⁴ See Letter from Counsel for Respondent dated 9 November 2006; Rukstele 1517:6-23.

¹³⁵ Exhibit CE 47.

¹³⁶ Exhibit CE 95.

¹³⁷ Exhibit CE 99.

¹³⁸ Exhibit CE 104.

¹³⁹ See Exhibit CE 112 and CE 128.

¹⁴⁰ See Exhibit CE 117.

407. Finally, on 20 August 2002, the Vilnius City Municipality concluded a *Cooperation Agreement* with Pinus Proprius.¹⁴¹ The record shows that the *Cooperation Agreement* and the JAA signed between Pinus Proprius and the City of Vilnius are in every respect similar.¹⁴²
408. BP's situation evolved differently. Indeed, in March 2002, the Mayor of the Municipality of Vilnius, Mr. Zuokas, sent to BP a draft Joint Activity Agreement¹⁴³ and, in April 2002, BP sent a revised draft of the JAA.¹⁴⁴ However, the City of Vilnius never concluded the JAA with BP for the Construction of the MSCP on Pergales site.¹⁴⁵ It is not contested that the City of Vilnius also refused to conclude a *Cooperation Agreement* with BP similar to the one concluded with Pinus Proprius.
409. The Claimant alleges that BP and Pinus Proprius were *in like circumstances* and that by refusing to conclude a JAA or a Cooperation Agreement with BP, the Municipality of Vilnius gave a treatment more favourable to Pinus Proprius.
410. However, the Tribunal finds that in order to determine whether the claiming investor and another (most favoured) investor used as benchmark were in like circumstances, at least two elements were significantly different between the BP and Pinus Proprius projects and therefore different treatment could be justified.
411. Before addressing such two differences, the Tribunal wishes to comment on a significant difficulty the Claimant is facing. Entering into agreements is subject to party autonomy and no one may be forced to contract. Under conditions changing from one law to another, parties may conclude framework agreements and define conditions under which they will have to enter into such agreement. Even when the legislation recognizes the enforceability of such obligation to contract, party autonomy will still play its part in the negotiation and conclusion of the agreements. *In casu*, the City of Vilnius is a public entity and thus has to act with the defence of public interests as its main yardstick. Public interest does, of course, depend on the policy of the administration running the public entity at any particular time. Thus, it is a difficult endeavour to show discrimination in a public entity entering into an agreement with a certain person and refusing to conclude a similar agreement with another party. Apart from factors applying to individuals or companies (timing, financing, opportunities,...) a public entity may have legitimate motivation of its own at the time to exercise its discretion to contract or not to contract.
412. The two differences which the Tribunal considers relevant are (i) the substantive differences to the content of the agreements, and (ii) the existence and non-existence of a signed JAA with Pinus Proprius and BP respectively. These two differences are reviewed below.

¹⁴¹ See Exhibit CE 128.

¹⁴² Exhibit CE 95 and CE 128.

¹⁴³ See Exhibit CE 110.

¹⁴⁴ See Exhibit CE 113.

¹⁴⁵ See for instance CE 116, CE 126,

413. **With regard to the first difference between the projects:** The substance of the Cooperation Agreement signed with Pinus Proprius was different from the proposed JAA with BP. Indeed, pursuant to Article 7.2 of the *Cooperation Agreement* between the City of Vilnius and Pinus Proprius, the parties

agree on the following principles of apportionment in kind of their joint property, i.e. the Infrastructure Unit:

(a) title to the Underground Car Park A (including the internal service lines necessary for the operation of the car park) shall be vested in PINUS PROPRIUS;

(b) title to the remaining part of the Infrastructure (i.e. the service lines, transport communication, pavement, minor architectural structures, collectors to house service lines of the city, etc.) save the part indicated in paragraph (a) above, shall be vested in the Municipality.¹⁴⁶

414. This part of the Pinus Proprius Agreement was similar to the one contained in the BP draft JAA.

415. However, pursuant to Article 10.4.3. of the same Cooperation Agreement:

Should the Municipality receive the Lithuanian Government's consent for purchase from the sole source of the Underground Car Park A or fulfil other requirements prescribed by laws as applicable in the event of purchase to this particular transaction, the parties undertake to enter into a leasing contract with respect to the Underground Car park A subject to the requisite conditions set forth below:

(i) transfer by PINUS PROPRIUS of the Underground Car Park A into the Municipality's possession and use on the stipulation that once the price quoted for the Underground Car Park A has been paid the Underground Car Park A will become the ownership of the Municipality;

(ii) the period of payment for the Underground Car Park A being 10 years as the of the date of signing the leasing contract;

(iii) PINUS PROPRIUS giving its consent to transfer by the Municipality against payment of the Underground Car park A to other third parties to be used for business needs;

(iv) no payment for use of the Underground Car Park A being effected to PINUS PROPRIUS¹⁴⁷.

416. In brief, Pinus Proprius had the contractual obligation to sell the MSCP to the Municipality of Vilnius upon completion of the construction.

417. On the other hand, pursuant to the form of JAA annexed to the Concession Agreement between the Municipality of Vilnius and BP:

3.2.1. the multi-storey car park would belong by the right of ownership to the consortium or the consortium Member only;

3.2.2. the remaining part the Object if Infrastructure (engineering services, transport, communications, etc.), except those specified in sub-item 3.2.1. of part 3 of this Article, would belong by the right of ownership to the Municipality¹⁴⁸.

¹⁴⁶ See Exhibit CE 128; see also Rukstele Tr. 1523:2-3.

¹⁴⁷ Exhibit CE 128.

¹⁴⁸ See Exhibit CE 13 and also project of Joint Activity Agreement, Articles 3.3.2.1. and 3.3.2.2., CE 113.

418. Neither the draft JAA annexed to the Concession Agreement, nor the draft JAA proposed by the Mayor Zuokas on 9 April 2002 contained a provision that obliged BP to sell the MSCP to the Municipality. Mr. Rukstele explained that:

after BP-Egapris constructed car park, according to the condition of the joint activity agreements with them, particularly which is different from agreement of cooperation with Pinus Proprius. They [BP-Egapris] had the right to register even the beginnings of the construction to separate it from--to make it their own property and to apply for lease to purchase the land plot on which that construction is built. And this is not the case with Pinus Proprius¹⁴⁹.

[...] there was an obligation on behalf of Pinus Proprius to sell the car park to municipality. It was not intending to be the owner of that car park to municipality¹⁵⁰.

419. The Claimant accepts that “[u]nlike Pinus, BP would lease the land on which it built its MSCPs. That was possible because of the above cited provision of Article 7(2) of the Land Lease Law that allows a private company to acquire a lease interest in publicly owned land if it already owns building on the land – clearly BP’s case.”¹⁵¹

420. In summary, BP’s draft JAA provided that the investor will be the owner of the MSCP and will lease or buy the publicly-owned land after completion of works. Unlike BP’s JAA, Pinus Proprius’ Cooperation Agreement provided that the investor will sell its MSCP to the Municipality (subject to the Lithuanian Government authorizing such a purchase) and therefore will not lease or buy the publicly-owned land. This dissimilarity is significant. It may very well be that the economic difference is limited or even non-existent. The record does not evidence that it is the case. Nevertheless, the legal situation is different: one investor remains the owner of the investment while the other must return it to the City. Whatever the compensation paid, the two situations are not the same.

421. Both BP and Pinus Proprius needed a JAA in order to construct the car parks. Once the construction would be completed, both investors would be the owners of the MSCP. On that matter, they are similar. However, Pinus Proprius would be obliged, subsequently, to sell its MSCP to the Municipality, if the latter was authorized to buy it. Therefore, the JAA or the Cooperation Agreement signed with Pinus Proprius was useful for the construction process but had neither the purpose nor the effect of avoiding the public auction (Article 7(1) of the Land Lease Law). BP needed a JAA or a Cooperation Agreement for the construction process, but more fundamentally, to avoid the public auction. This is a further difference.

422. In substance, a public auction has several objectives, and especially gives the assurance to the State that the highest price will be paid for the lease of the publicly-owned land. Moreover, the public auction guarantees the equality of treatment as all entities interested have the opportunity to apply for the lease.

¹⁴⁹ See Rukstele Tr. 1527:2-14.

¹⁵⁰ *Idem*, Tr. 1527:20-24.

¹⁵¹ Claimant’s Post-Hearing Brief, p.114.

423. In the case of Pinus Proprius, the public auction was not necessary because the investor was not to keep the MSCP and would not need to enter into a lease of the land. The Municipality would be the owner of the MSCP and the publicly-owned land would not be leased by another private entity.
424. On the other hand, BP had a right to own the MSCP and therefore to lease the publicly-owned land. Consequently, the public auction was an obligation, unless the Municipality and BP concluded a JAA. In the context of the legal uncertainty of the JAA and the Cooperation Agreement with regard to the Law on Self-Government, the Municipality of Vilnius could refuse the conclusion of such Agreement with BP and thus dispense with the obligation to organize a public auction.
425. In addition, the Cooperation Agreement concluded with Pinus Proprius afforded full power of self-determination to the Municipality of Vilnius after the construction of the MSCP. Indeed, the Municipality - once properly authorized by superior authorities - could decide, at its sole discretion, to buy the MSCP after completion of works. The consequences of the conclusion of JAA or Cooperation Agreement were, therefore, limited to the time of the construction process. The Agreement had no impact in this regard after the construction.
426. It was not the case with BP, which was contractually entitled to remain the owner of the MSCP and therefore had the right to lease the land. It is evident that the consequences of the conclusion of a Cooperation Agreement with Pinus Proprius were limited in terms of time and importance, while the conclusion of a JAA or Cooperation Agreement with BP had wider ranging effects.
427. BP and Pinus Proprius situations were different enough to justify a different treatment. Therefore, the Tribunal on balance has concluded that both investors were not *in like circumstances*.
428. **With regard to the second difference between the projects:** As described above (see ¶¶ 405-407) in October 2001, the City of Vilnius concluded a JAA with Pinus Proprius. A few months later, the Representative of the Government for the Vilnius Region challenged the validity of the JAA. Thus, the JAA was withdrawn and a Cooperation Agreement was concluded in its place. The Cooperation Agreement concluded in March 2002 was nothing more than a change of title of the existing JAA in order to avoid the decision of the Vilnius District Administrative Court on the legality of the JAA. In other words, the Municipality wanted to avoid that its decision to conclude a JAA be declared in violation of the Law on Self-Government.
429. In the case of BP, the situation was clearly different; BP never concluded any JAA with the Municipality of Vilnius. The conclusion of a Cooperation Agreement with BP would have required the conclusion of a new agreement and not the modification of an existing, possibly binding and enforceable agreement. It is therefore at least credible and understandable that the Municipality of Vilnius refused to conclude a new agreement with BP due to the uncertainty of the legality of JAA or Cooperation Agreements.

430. Under the circumstances, the Arbitral Tribunal concludes that Pinus Proprius' situation differed from BP's situation. As a result, the decision of the Municipality of Vilnius to refuse the conclusion of a JAA or a Cooperation Agreement with BP could be justified by the difference.

8.4 EXPROPRIATION

431. Article VI of the Treaty provides that:

Investments made by investors of one contracting party in the territory of the other contracting party cannot be expropriated, nationalized or subjected to other measures having a similar effect (all such measure hereinafter referred to as "expropriation") except when the following conditions are fulfilled:

- (I) The expropriation shall be done for public interest and under domestic legal procedures;*
- (II) It shall not be discriminatory;*
- (III) It shall be done only against compensation. [...]*

8.4.1 Position of the parties

432. The Claimant alleges that pursuant to Article VI of the Treaty, the investment cannot be expropriated, nationalized or subjected to measures having a similar effect except for a public purpose, in a non-discriminatory manner, upon payment of compensation and in accordance with domestic laws.

433. Claimant argues that by repudiating the Agreement, the Republic of Lithuania destroyed the value of BP and VPK. Moreover, the Claimant contends that the "Government's litigious, legislative, and administrative interference with the Agreement deprived BP of the legal security afforded by the Agreement."¹⁵² By preventing the execution and demanding full performance of the Agreement at the same time, and then repudiating the Agreement, the Municipality of Vilnius destroyed BP. Thus, by taking the asset that was the sole purpose of BP's existence, Lithuania indirectly expropriated Parkering's ownership interest in BP.¹⁵³ BP became a "company with assets, but without business." By failing to provide compensation for this expropriation, Lithuania breached its obligation under Article VI of the Treaty.¹⁵⁴

434. The Claimant contends that whether Lithuania benefited or not from the expropriation is irrelevant. On the contrary, whether the investor continues to enjoy the benefit of ownership is decisive.¹⁵⁵

435. The Respondent alleges that the termination of a contract only amounts to an expropriation in limited cumulative circumstances. First, the termination must be wrongful; second, there must be no remedy under the contract for the wrongful

¹⁵² See Claimant's Memorial ¶ 237.

¹⁵³ *Idem*, ¶ 238

¹⁵⁴ *Idem* ¶ 239 and Claimant's Post-Hearing Brief, p. 123.

¹⁵⁵ *Idem* ¶ 235.

termination; and third the termination must give rise to a substantial deprivation of the investor's enjoyment of the property in question.¹⁵⁶

436. The Respondent contends that the termination was lawful under the terms of the Agreement¹⁵⁷ and that, in any case, the Claimant never brought a claim before the contractually agreed forum, *i.e.* Lithuanian Courts. The Respondent underlines that the Lithuanian Courts were in position to give a fair and impartial hearing of the Claimant's case.¹⁵⁸ Finally, the Respondent alleges that the Claimant was not deprived of its property since it still owns and controls BP and because BP and VPK continue to develop their activities in Lithuania.¹⁵⁹

8.4.2 Discussion

437. The Treaty expressly contemplates *de facto* expropriation besides the formal or direct expropriation. *De facto* expropriation (or indirect expropriation) is not clearly defined in treaties, but can be understood as the negative effect of government measures on the investor's property rights, which does not involve a transfer of property but a deprivation of the enjoyment of the property.

438. As indicated in *Metalclad v. Mexico*, the Tribunal stated that

*expropriation [...] includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.*¹⁶⁰

439. The parties are not challenging the fact that the expropriation can be direct or indirect and that, in the case at hand, the expropriation alleged by the Claimant is indirect. There is no mention of any direct expropriation.
440. In the present case, the expropriation results, according to the Claimant, of the wrongful termination of the Agreement between the City of Vilnius and BP. Undoubtedly, wrongful termination of an agreement amounts to a breach thereof. Whether contract rights may be expropriated is widely accepted by the case law and the legal authors. However, under limited circumstances, three cumulative conditions (which will be addressed below ¶¶ 443-456) should be met to elevate a breach of an agreement to the level of an indirect expropriation within the meaning of the Treaty.
441. Having said that, an expropriation does not necessarily amount to a violation of the Treaty. Indeed, pursuant to Article VI of the Treaty, the expropriation is *legitimate* if

¹⁵⁶ See Respondent Counter-Memorial, p. 81.

¹⁵⁷ *Idem*, ¶¶ 210-212.

¹⁵⁸ *Idem*, ¶ 214.

¹⁵⁹ *Idem*, ¶ 218 and ¶¶ 220-224

¹⁶⁰ See *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARF (AF)/97/1, Award, August 30, 2000, reprinted in 16 *ICSID Rev.—FILJ* 168 (2001), ¶ 103.

done for public interest and under domestic legal procedures; if not discriminatory; and if done against compensation.

442. Therefore, the Arbitral Tribunal will first determine if an indirect expropriation occurred (see ¶¶ 443-456). If the answer is positive, it will analyse if the expropriation is *legitimate*.

443. **First**, a breach of an agreement will amount to an expropriation only if the State acted not only in its capacity of party to the agreement, but also in its capacity of sovereign authority, that is to say using its *sovereign power*. The breach should be the result of this action. A State or its instrumentalities which simply breach an agreement, even grossly, acting as any other contracting party might have done, possibly wrongfully, is therefore not expropriating the other party.

444. The Tribunal agrees with the tribunal in *Azurix Corp. v. the Argentine Republic* which held that:

contractual breaches by State party or one of its instrumentalities would not normally constitute expropriation. Whether one or series of such breaches can be considered to be measures tantamount to expropriation will depend on whether the State or its instrumentality has breached the contract in the exercise of its sovereign authority, or as a party to a contract. As already noted, a State or its instrumentalities may perform a contract badly, but this will not result in a breach of treaty provisions “unless it be proved that the state or its emanation has gone beyond its role as a mere party to the contract, and has exercised the specific functions of a sovereign.”¹⁶¹

445. In the present case, on 27 January 2004, Mr. Artūras Zuokas, Mayor of the City of Vilnius, informed the Consortium that the Agreement dated 30 December 1999 was terminated. The reason invoked was a “*material breach on the part of the Consortium formed by UAB Baltijos Parkingas and UAB Egapris of [...] provisions of the Agreement.*”¹⁶² The record does not show that the State, *i.e.* the Municipality, acted differently than another contracting party would have done. In other words, assuming that the Municipality of the City of Vilnius breached the Agreement, there is no evidence that it used its sovereign power in that respect.

446. It is thus unnecessary and irrelevant to ascertain whether the termination breached the Agreement.

447. Therefore, the termination of the Agreement by the City of Vilnius cannot be considered as an expropriation under the BIT due to the fact that the City of Vilnius did not act as a sovereign authority and did not use that authority to expropriate the rights of BP.

448. **Second**, a breach of contract, if there should be one is, in itself, not always sufficient to amount to an indirect expropriation within the meaning of the BIT. An investor faced with a breach of an agreement by the State counter-party should, as a general rule, sue that party in the appropriate forum to remedy the breach. Therefore, as already

¹⁶¹ See *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, July 14, 2006, *supra* note 59, ¶ 314.

¹⁶² Exhibit CE 210.

stated (see ¶ 316), a preliminary determination of the existence of a contractual breach under domestic law is, in most cases, a prerequisite.

449. If the investor is deprived, legally or practically, of the possibility to seek a remedy before the appropriate domestic court, then the Arbitral Tribunal might decide on the basis of the BIT if international rights have been violated (see above ¶ 317). That would be the case, for instance, if a party is denied the possibility to complain about the wrongful termination of the agreement before the forum contractually chosen.

450. For instance, in the Waste Management case, the Tribunal concluded that:¹⁶³

it is one thing to expropriate a right under a contract and another to fail to comply with the contract. Non-compliance by a government with contractual obligations is not the same thing as, or equivalent or tantamount to, an expropriation. In the present case, the Claimant did not lose its contractual rights, which it was free to pursue before the contractually chosen forum.

451. In Azinian and others v. the United Mexican States, the Tribunal noted that:

[t]he problem is that Claimants' fundamental complaint is that they are the victims of a breach of the Concession Contract. NAFTA does not, however, allow investors to seek international arbitration for mere contractual breaches. Indeed, NAFTA cannot possibly be read to create such a regime, which would have elevated a multitude of ordinary transactions with public authorities into potential international disputes.

The Tribunal added that “*the Claimants have raised no complaints against the Mexican courts; they do not allege a denial of justice.*”¹⁶⁴

452. In Generation Ukraine v. Ukraine, the Tribunal held that:

*an international tribunal may deem that the failure to seek redress from national authorities disqualifies the international claim, not because there is a requirement of exhaustion of local remedies but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a reasonable – not necessarily exhaustive – effort by the investor to obtain correction.*¹⁶⁵

453. In the case at hand, BP and possibly the Claimant had the opportunity to bring the case before the forum contractually chosen, *i.e.* Lithuanian Courts, in order to complain of the breach of the Agreement (see above ¶ 316). The record does not show any objective reason to question the Lithuanian Courts' ability to dispose of the case fairly, competently, impartially and within a reasonable period of time.¹⁶⁶ Nevertheless, neither BP nor the Claimant challenged the termination before the forum contractually chosen, *i.e.* the Lithuanian Courts.¹⁶⁷

¹⁶³ See Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB (AF)/00/3, Award, April 30, 2004, *supra* note 60, ¶ 175.

¹⁶⁴ See Robert Azinian and others v. United Mexican States, ICSID Case No. ARB(AF)/97/2, Award, November 1, 1999, *reprinted in* 14 *ICSID Rev.—FILJ* 538 (1999), ¶ 87 and ¶ 100.

¹⁶⁵ See Generation Ukraine Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award, September 16, 2003, *supra* note 16, p. 91.

¹⁶⁶ See Gintautas Barktkus, Tr. 908 and Expert Report of Carlos Lapuerta, p. 4.

¹⁶⁷ See Article 7.3 of the Agreement between the Municipality of Vilnius and the Consortium, CE 13.

454. It is not the mission of the present Arbitral Tribunal to decide on the alleged breach of the Agreement, entered into by a company which acted as vehicle of the investment of the Claimant. In the absence of any objective reason not to bring the case before national tribunals, it cannot be concluded, on the basis of the facts at hand, that the Claimant's investment has been indirectly expropriated.
455. **Third**, the breach of the Agreement, *in casu* the termination of the agreement, must give rise to a substantial decrease of the value of the investment.¹⁶⁸
456. In the case at hand, the Arbitral Tribunal finds that it is not worth analysing the existence of a decrease of the value of the Claimant's investment as no other conditions for the existence of an expropriation developed above are met (see above ¶¶ 443-454). Thus it can be concluded that Parkerings has not been expropriated within the meaning of Article VI of the Treaty. Accordingly, the question whether the expropriation was *legitimate* is not relevant and does not need to be discussed here either.

9. THE ISSUE OF COSTS

457. Both parties sought the costs of this arbitration in the event that they were successful.
458. By letter dated 22 December 2006, Parkerings presented the Tribunal with a statement of costs and expenses of € 2,655,584.75 which included the sum of € 196,591.42 paid to ICSID as deposit towards the fees and expenses of the Arbitral Tribunal. By letter of 9 May 2007, Parkerings amended its statement of costs and expenses to € 2,655,584.75.
459. On the same date, the Republic of Lithuania presented the Tribunal with a submission of costs and expenses of € 1,340,716.10 which included the sum of € 196,591.42 paid to ICSID as deposit towards the fees and expenses of the Arbitral Tribunal.
460. The parties filed no additional comments on statements of costs.
461. It is unambiguous from Article 61(2) of the ICSID Convention and Rule 28 of the ICSID Arbitration Rules that the Arbitral Tribunal has discretion with regard to costs.
462. There is no rule in international arbitration that costs must follow the event. Thus, the question of costs is within the discretion of the Tribunal with regard, on the one hand, to the outcome of the proceedings and, on the other hand, to other relevant factors.
463. In the Tribunal's view, the proceedings were expeditiously and efficiently conducted by the representatives of both parties.

¹⁶⁸ See *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, *supra* note 80, ¶ 115; see also *Telenor Mobile Communications AS v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, September 13, 2006, *available online at* www.worldbank.org/icsid, ¶¶ 65 *et seq.*

464. Even if no violation of the BIT or international law occurred, the conduct of the City of Vilnius was far from being without criticism. In such circumstances, the Arbitral Tribunal concludes that an equitable result would be that each party bears its own costs and expenses, and that the costs and expenses of the Tribunal be paid equally by both parties.

10. THE AWARD

465. Having heard and read all the submissions and evidence in this arbitration, and for the reasons set out above, the Tribunal unanimously decides that:

- a) the Tribunal has jurisdiction to hear and consider all the claims made by the Claimant in this case;
- b) the conduct of the Republic of Lithuania, which is the subject of the claims in this arbitration, did not involve a violation of the duty of equitable and reasonable Treatment (Article III of the Treaty);
- c) the conduct of the Republic of Lithuania as claimed in this arbitration did not involve a violation of the obligation of protection (Article III of the Treaty);
- d) the conduct of the Republic of Lithuania as claimed in his arbitration did not involve a violation of the obligation to accord treatment no less favorable than the Treatment accorded to investment by investor of a third State (Article IV of the Treaty);
- e) the conduct of the Republic of Lithuania as claimed in this arbitration did not involve a violation of the prohibition of expropriation (Article VI of the Treaty);
- f) Parkerings' claims are accordingly dismissed in their entirety;
- g) Each party shall bear its own costs and half of the costs and expenses of these proceedings.

[signature]

Dr. Julian Lew

Arbitrator

Date: August 13, 2007

[signature]

Dr. Laurent Lévy

President

Date: August 14, 2007

[signature]

The Hon. Marc Lalonde

Arbitrator

Date: August 9, 2007