

**ARBITRATION INSTITUTE
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FINAL AWARD

Made on July 31, 2012

The seat of arbitration is Stockholm/Sweden

Arbitration No.: V (125/2011)

- Claimant:** OAO GAZPROM, registered offices located at 16 Nametkina str., GSP-7, Moscow, 117997, Russian Federation (hereinafter “Claimant” or the “Gazprom”).
- Claimant’s counsel:** Mr. Barton Legum, Ms. Anna Crevon, Ms. Inna Manassyan - Salans LLP, 5, boulevard Malesherbes, 75008, Paris, France;
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Mr. Jesper Tiberg - Advokatfirman Lindahl KB, P.O. Box 1065, SE-101 39, Stockholm, Sweden.
- Respondent:** MINISTRY OF ENERGY OF THE REPUBLIC OF LITHUANIA, on behalf of the Republic of Lithuania, with its registered offices at Gedimino Av. 38/Vasario 16-osios St. 2, LT-01104 Vilnius, Lithuania, and entity code 302308327 (hereinafter “Respondent” or “the Ministry”).
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Arbitral Tribunal:

Mr. Yves Derains (Chaiman), Derains & Gharavi, 25, rue Balzac,
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Ms. Sophie Nappert (Co-arbitrator), 3 Verulam Buildings Gray's Inn,
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Ms. Sophie Lamb (Co-arbitrator), Debevoise & Plimpton LLP, Tower
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I. PROCEDURAL HISTORY

1. On August 29, 2011, Claimant filed its Request for Arbitration against Respondent (“Request”) before the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”). The arbitration clause relied upon by Claimant provides that the dispute be settled by a three-member arbitral tribunal, and that all three arbitrators are to be appointed by the SCC.
2. By letter dated September 2, 2011, the SCC notified Respondent of the Request and, in accordance with Article 5 of the SCC Arbitration Rules (“Rules”), requested Respondent to submit an answer by September 16, 2011.
3. On September 16, 2011, Respondent filed its Answer to the Request (“Answer”).
4. By letter of October 19, 2011, the SCC informed the Parties that it had appointed Ms. Sophie Nappert as co-arbitrator on behalf of Claimant, Ms. Sophie Lamb as co-arbitrator on behalf of Respondent and Mr. Yves Derains as chairman of the Arbitral Tribunal.
5. By letter of November 21, 2011, the SCC referred the case to the Arbitral Tribunal.
6. On December 5, 2011, a conference call was held between the Parties and the Arbitral Tribunal, when the organization of these proceedings was discussed. On the same day, the Arbitral Tribunal issued Procedural Order No.1, wherein the Provisional Timetable was established, as follows, and a copy of which was also sent to the SCC on that day:

“1.1 The sequence and timing of the proceedings shall be the following:

<i>n°</i>	<i>Date</i>	<i>Party</i>	<i>Description</i>
<i>(a)</i>	<i>December 30, 2011</i>	<i>Claimant</i>	<i>Statement of Claim with Witness Statements</i>
<i>(b)</i>	<i>February 17, 2012</i>	<i>Respondent</i>	<i>Statement of Defense with Witness Statements</i>
<i>(c)</i>	<i>March 16, 2012</i>	<i>Claimant</i>	<i>Statement of Reply to the Defense with Rebuttal Witness Statements if any</i>

(d)	<i>April 13, 2012</i>	<i>Respondent</i>	<i>Statement of Rejoinder with Rebuttal Witness Statements if any</i>
(e)	<i>April 30, 2012</i>	<i>Claimant/ Respondent</i>	<i>Cutting date for submitting new evidence (that could not have been submitted earlier)</i>
(f)	<i>May 4, 2012</i>	<i>Claimant/ Respondent</i>	<i>Notification of names of the witnesses to be cross-examined</i>
(g)	<i>May 10, 2012</i>	<i>All</i>	<i>Pre-hearing conference</i>
(h)	<i>May 29-30, 2012</i> <i>(with the possibility to fix a third day if necessary)</i>	<i>All</i>	<i>Evidentiary Hearing</i>

7. On December 29, 2011, Claimant filed its Statement of Claim (“SoC”), along with the Expert Opinions of Prof. Valentinas Mikelenas and Prof. Vytautas Nekrosius, and the Witness Statements of Mr. Eike Benke and Mr. Vladimir Obukhov.
8. On February 17, 2012, Respondent filed its Statement of Defense (“SoD”), along with the Expert Opinions of Dr. Irmantas Norkus and Prof. Lars Heuman, and the Witness Statements of Mr. Romas Svedas and Mr. Nerijus Eidukevicius.
9. On March 16, 2012, Claimant filed its Statement of Reply to the Statement of Defense (“Claimant’s Reply”), along with the second Expert Opinions of Prof. Valentinas Mikelenas and Prof. Vytautas Nekrosius, and the second Witness Statements of Mr. Eike Benke and Mr. Vladimir Obukhov.
10. On April 13, 2012, Respondent filed its Statement of Rejoinder (“Respondent’s Rejoinder”), along with the Second Expert Opinion of Dr. Irmantas Norkus, the Expert Opinion of Dr. Agne Tikniute, and the Second Witness Statement of Mr. Nerijus Eidukevicius.
11. On April 24, 2012, the SCC reminded the Arbitral Tribunal that the final award should be rendered by May 21, 2012.

12. On April 25, 2012, the Arbitral Tribunal informed the SCC, with the Parties in copy, that according to the Provisional Timetable, the evidentiary hearing would take place on May 29-30, 2012, making it impossible for the Arbitral Tribunal to render the final award by May 21, 2012. The Tribunal therefore requested that the deadline for the rendering of the final award be extended until September 2012.
13. On April 30, 2012, in accordance with item 1.1(e) of Procedural Order No. 1, which fixed the cut-off date for the submission of new evidence, Claimant submitted additional documents in support of its case.
14. On May 3, 2012, after consultation with the Parties, the SCC decided to extend the Tribunal's deadline for rendering the final award until September 14, 2012.
15. On May 4, 2012, the Parties informed the Tribunal of their agreement not to call witnesses or experts for cross-examination at the evidentiary hearing scheduled for May 29-30, 2012. They added that the Parties' decision not to call witnesses or experts should not be construed as agreement with the contents of the other side's witness statements or expert reports. They further advised that, given that the legal team representing Claimant did not include Lithuanian counsel, the Parties agreed that Prof. Mikelenas, who had submitted two expert reports on behalf of Claimant in this arbitration, would be allowed to be present at the hearing as an observer on Claimant's side.
16. On May 8, 2012, the Parties submitted a joint proposal regarding the organization of the hearing scheduled for May 29-30, 2012, including a provisional timetable.
17. On May 10, 2012, a pre-hearing conference call was held between the Parties and the Arbitral Tribunal, to discuss the organization of the hearing.
18. On May 29 and 30, 2012, the hearing was held in Stockholm, Sweden before the Arbitral Tribunal ("Hearing").
19. On July 4, 2012, the Parties submitted their respective Submissions on Costs.
20. On July 12, 2012, the Parties submitted their Comments on each other's Submission on Costs.
21. On July 13, 2012, the Arbitral Tribunal declared the proceedings closed, pursuant to Article 34 of the SCC Rules.

II. FACTUAL BACKGROUND

22. AB Lietuvos Dujos (“Lietuvos Dujos” or “Company”) is a limited liability company organized and existing under the laws of Lithuania and one of Lithuania's leading energy companies. Its shares are publicly traded on the NASDAQ OMX exchange. It engages in (i) natural gas purchase and sale to clients; (ii) transmission and distribution services, including operation of transmission and distribution pipelines; and (iii) transit of natural gas to the Kaliningrad Region of the Russian Federation. Lietuvos Dujos itself is not involved in exploration or production of natural gas, but purchases it from Gazprom.
23. In 1995, Lietuvos Dujos was registered by the Lithuanian State as a joint-stock company. It was then privatized in two stages through an international public tender. The first stage took place in 2002, when E.ON Ruhrgas Energy Beteiligungs AG (“Ruhrgas”), a German company and a major energy service provider, acquired 34% of the Company’s shares. The second stage took place in 2004, when Gazprom acquired other 34% of the Company’s shares.
24. Following subsequent modifications in the shareholding, the Company's current major shareholders are: (i) Ruhrgas - 38.91 %; (ii) Gazprom - 37.1 %; and (iii) Republic of Lithuania (through the Ministry of Energy) - 17.7 %.
25. On March 24, 2004, Gazprom, Ruhrgas, and the Republic of Lithuania (at the time through its State Property Fund, subsequently replaced by the Ministry of Energy) entered into the 2004 Shareholders' Agreement (“SHA”).
26. The SHA reflects the intention of its parties to “*co-operate in the management of the Company*” and records “*the terms and conditions of their joint action in the management of the Company.*”¹ The SHA governs, *inter alia*, the election of the Company's managing bodies (Section 4.3) and the parties’ obligations regarding the Company’s business (Section 6).
27. According to Section 4.3(1) of the SHA, the Company’s managing bodies shall consist of the General Meeting of Shareholders, the Company’s Board and the Head of the Management (the General Manager).
28. Article 4.3(4) of the SHA, provides that the Company's Board shall consist of five members: (i) two members elected from the candidates nominated by Ruhrgas; (ii) two members elected from

¹ Exhibit C-2.

the candidates nominated by Gazprom, and (iii) one member elected from the candidates nominated by the Ministry. The Chairman of the Board is elected for a period of two years, with the nomination alternating between Ruhrgas and Gazprom, the two largest shareholders of the Company.

29. Pursuant to Article 3.5 of the SHA, the parties will put all their efforts to ensure that their nominees elected to the Board of the Company will vote in order to achieve the objectives established in the SHA.
30. Article 4.3(8) of the SHA provides that the General Manager of the Company shall have at least two Deputy Managers, one responsible for gas purchase contracts (appointed from the nominees of Gazprom) and the other responsible for gas sale contracts (appointed from the nominees of Ruhrgas). Gas purchase contracts must be signed jointly by the General Manager and a Deputy General Manager (nominated either by Gazprom or Ruhrgas).
31. Finally, in accordance with Section 4.3(7) of the SHA, the resolutions of the Company's Board need to be approved by 4 out of the 5 members of the Board. A certain limited number of core issues, set forth in Section 3.1 of the SHA, require unanimous vote at the general meeting of the Company.
32. In 1999, prior to becoming a shareholder in the Company, Gazprom and the Company concluded a long-term agreement on the amounts and terms of supply of gas for the Republic of Lithuania for the years 2000 to 2015 ("Long-Term Agreement"). This Long-Term Agreement was retained when Gazprom became a shareholder in the Company, and continues to be amended and supplemented from time to time as the result of ongoing negotiations between Gazprom and the Company. In this connection, Section 6.1(1.9) of the SHA provides that the parties: "... *shall seek to ensure, and shall procure that the Company seeks to ensure ... safeguarding of, on terms and conditions mutually acceptable and beneficial for the Company and the Parties and on the basis of contractual obligations between the Company and the Supplier [Gazprom]: (i) the long-term gas transit to the Kaliningrad oblast of the Russian Federation, ... (iii) the long-term gas supply to the Company.*" (Emphasis added)
33. Likewise, according to Section 6.1 (1.8) of the SHA, "All agreements and transactions between the Company and the Parties, or any of the Parties, shall be at any time made on arm's length terms and conditions and subject to Board approval; in the event of the existence of several options for gas purchase by the Company, the Board, when making such decision on such

options, shall choose and approve the option which, judging by its terms and conditions, such as price, volume, duration, flexibility and reliability, is most favorable to the Company and its customers."(Emphasis added)

34. In compliance with the provisions of the SHA concerning the composition of the Company's Board, the following five persons were members of the Lietuvos Dujos' Board as of late 2010: Mr. Valery Golubev and Mr. Kirill Seleznev (elected upon nomination by Gazprom); Mr. Peter Frankenberg and Mr. Uwe Fip (upon nomination by Ruhrgas); and Mr. Romas Svedas (upon nomination by the Ministry of Energy).
35. On December 17, 2010, Messrs. Golubev, Seleznev, Frankenberg and Fip voted in favor of a Board resolution that approved the signing of an addendum to the Long-Term Agreement, regarding the gas supply price for the year 2011 (i.e. Addendum No. 52). Although Mr. Svedas voted against this resolution,² it was adopted in accordance with Section 4.3(7) of the SHA, as it was approved by 4 of the 5 members of the Board.
36. On December 29, 2010, the relevant addendum was signed on behalf of the Company by its General Manager (Mr. Viktoras Valentukevicius) and Deputy General Manager (Mr. Joachim Hockertz), in accordance with Section 4.3(8) of the Shareholders' Agreement,³ and on behalf of Gazprom, by its Deputy Chairman of the Board (Mr. Golubev).
37. Previously, on March 12, 2008, the Board of the Company had also approved the revised terms of gas transit, which were subsequently updated in an addendum to the Long-Term Agreement dated February 28, 2011. This addendum was executed on behalf of the Company by its General Manager (Mr. Viktoras Valentukevicius) and Deputy General Manager (Mr. Joachim Hockertz),⁴ and on behalf of Gazprom by its Deputy Chairman of the Board (Mr. Golubev). The gas transit terms contained in the addendum were unanimously confirmed by the Company's Board by a resolution dated March 24, 2011, with the Ministry's nominated member of the Board, Mr. Svedas, also voting to confirm that resolution.⁵
38. On February 8, 2011, the Ministry issued a letter addressed to the Company, the Company's General Manager and Messrs. Golubev and Seleznev (as members of the Company's Board).

² **Exhibit C-4.**

³ **Exhibit C-5.**

⁴ **Exhibit C-7.**

⁵ **Exhibits C-8 and C-9.**

The Ministry's letter, in summary, alleged that the Company's management and the two Board members appointed by Gazprom did not act in the Company's best interests when agreeing upon the price for gas supply for the year 2011, and when agreeing to provide natural gas transit services allegedly under non-market conditions.⁶

39. On March 3, 2011, Messrs. Golubev and Seleznev replied to the Ministry's letter above, refuting such allegations in their entirety.⁷

40. By letter of March 10, 2011, the Company also provided its refutations to the Ministry's allegations in this respect.⁸

41. On March 25, 2011, the Ministry filed an application for Investigation Proceedings before the *Vilnius Regional Court* in Lithuania (hereinafter "Lithuanian Court" or "Vilnius Court"), pursuant to Article 2.124 of the Lithuanian Civil Code, against the Company, Messrs. Golubev and Seleznev (members of the Company's Board nominated by Gazprom), and Mr. Viktoras Valentukevicius (the Company's CEO). In such court action, the Ministry requests the Lithuanian Court to appoint an expert to investigate whether the members of the Company's governing bodies indicated above acted appropriately and, if they acted inappropriately, to apply the measures and sanctions provided for at part. 1 of Article 2.131 of the Lithuanian Civil Code.⁹

42. In addition, the Ministry alleges that the Republic of Lithuania's interests as a shareholder in the Company were violated, and those of Gazprom unduly promoted when the Board approved, and the Company executed, the addenda to the Long-Term Agreement covering gas supply for 2011 and transit arrangements.¹⁰ The Ministry accuses Messrs. Golubev and Seleznev, as alleged proxies of Gazprom, of "*inappropriate activity*", based on the Ministry's suspicions that they were not pursuing the Company's best interests, and alleges that the addenda concluded by the Company in that connection do not reflect a fair price for the supply and transit of natural gas.

⁶ **Exhibit C-10.**

⁷ **Exhibit C-11.**

⁸ **Exhibit C-12.**

⁹ Further updated on December 9, 2011 (**Exhibit C-52**).

¹⁰ **Exhibit C-14.**

43. Such action was still ongoing and no decision had been taken on the merits by the Lithuanian Court at time these proceedings were closed.¹¹
44. A dispute arose between the Ministry and Gazprom under the SHA. In particular, the dispute refers as to whether the Ministry breached the arbitration agreement contained in the SHA by applying for the Investigation Proceedings described above before the Lithuanian Court.

III. JURISDICTION OF THE ARBITRAL TRIBUNAL AND APPLICABLE LAW

45. The jurisdiction of the Arbitral Tribunal stems from Article 7.14 of the SHA, which reads as follows:

“Any claim, dispute or contravention in connection with this Agreement, or its breach, validity, effect or termination, shall be finally settled by arbitration in accordance with the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. The place of arbitration shall be Stockholm, Sweden, the number of arbitrators shall be three (all to be appointed by the Arbitration Institute) and the language of arbitration shall be English.”

46. The Parties agree that the arbitration agreement stated in Section 7.14 of the SHA is governed by Swedish law.¹²
47. According to Section 7.14 of the SHA, this arbitration is governed by the *Rules of the Arbitration Institute of the Stockholm Chamber of Commerce* (“SCC Rules”).
48. The substantive rights and obligations under the SHA are governed by the laws of the Republic of Lithuania, pursuant to Section 7.15 of the SHA.

¹¹ Transcript of the Hearing, Day 1, 21:15-22: “[Claimant’s Opening Statement]: *The Ministry’s claim in Vilnius Court is proceeding. The court held multiple days of hearing in March and April; another day of evidentiary hearings will be held on Thursday of this week. The court is expected to rule in the coming months, although the next ruling should concern only whether the court will order an investigation and appoint experts. The conclusion of the proceedings is still far away.*”

¹² Claimant’s Reply, ¶ 96; SoD, ¶ 72.

IV. SUMMARY OF THE PARTIES' POSITIONS AND RELIEF SOUGHT

A. Claimant's Position

(1) Factual Background

(i) The Parties' Agreement to Manage Lietuvos Dujos Together

49. Claimant states that the main provisions of the SHA are described in its Sections 3.1, 3.5, 4.3(4), 4.3(7), 4.3(8) and 6.1. It is Claimant's position that the above provisions reflect the Parties' understanding of the role to be played by each shareholder in Lietuvos Dujos' management and functioning. The nomination and voting process preserves the interests of all three main shareholders and guarantees the smooth operation of the Company in a context where Gazprom and Ruhrgas, but not the Ministry, are commercial companies with in-depth experience of operating and managing the gas purchase, supply and distribution business.¹³

50. Claimant alleges that the SHA also explicitly recognized and addressed the fact that – as envisaged from the outset by the privatization program – Gazprom is at the same time both one of the Company's principal shareholders and also the Company's supplier of natural gas.¹⁴ As an example, Claimant cites Article 6.1(1.8) of the SHA,¹⁵ to conclude that such provision acknowledges the existence of separate and sometimes differing interests to be reconciled in instances when Lietuvos Dujos and one of its shareholders enter into gas supply and transit agreements. The SHA does not exclude any member of the Board from voting on such agreements. Nor does it prohibit the Ministry's nominee from voting, despite the Ministry's significant political interest in such agreements, which does not always coincide with the interests of the Company or its shareholders.¹⁶

¹³ SoC, ¶ 69.

¹⁴ SoC, ¶ 70.

¹⁵ “[6.1]1.8 the Company shall treat the Parties on an equal basis. All agreements and transactions between the Company and the Parties or any of the Parties shall be at any time made on arm's length terms and conditions and subject to Board approval; in the event of the existence of several options for gas purchase by the Company, the Board, when making such decision on such options, shall choose and approve the option which, judging by its terms and conditions, such as price, volume, duration, flexibility and reliability, is most favourable to the Company and its customers;”

¹⁶ SoC, ¶ 74.

51. Claimant points out that Mr. Eidukevicius, who represented the State Property Fund during the drafting and finalization of the SHA, confirms in his witness statement that “(i) *the Board was to consist of five members, (ii) the election of the Board members was to take place upon nomination of two members by the Strategic Investor, two members by the Gas Supplier and one member by the State Property Fund and (iii) any resolution would require a 4-vote majority*”.¹⁷ Claimant alleges that the suggestion that such corporate governance structure was somehow a “*deviation*” from Lithuanian law is inaccurate.¹⁸
52. It is Claimant’s position that the parties’ agreement on the corporate governance structure of Lietuvos Dujos, reflected in particular in Sections 4.3(4) and 4.3(7) of the SHA, was in no sense a “*deviation*” from Lithuanian law. On the contrary, such a structure was explicitly authorized by Lithuanian law.¹⁹
53. Claimant relies on Article 33.2 of the Lithuanian Company Law, which stipulates that the “*number of Board members must be set in the Articles of Association of the company*” and that “*there must be at least 3 members of the Board,*” to conclude that Lithuanian law sets a minimum number of Board members, but does not preclude the parties from agreeing on a different number.²⁰
54. Furthermore, it relies on Article 35.4 of the Lithuanian Company Law, which provides that the “[d]ecision of the Board shall be adopted if more votes for than the votes against it are received, if the Articles of Association of the company do not require a larger majority of votes”, to conclude that, in order for Board resolutions to be valid, they must be adopted by at least a simple majority. However, the parties to the SHA had the right to provide for a different majority, including the 4-out-of-5 member majority to which they ultimately agreed.²¹
55. More than TLT 1 billion (or approximately EUR 290 million) has been invested in Lietuvos Dujos since its privatization in 2002-2004. This investment was made primarily by the Company’s two main shareholders, i.e. Ruhrgas and Gazprom, through reinvestment of Lietuvos Dujos’ profits. Claimant argues that as a result of Gazprom’s and Ruhrgas’ substantial

¹⁷ Claimant’s Reply, ¶ 12; Eidukevicius WS, para. 13.

¹⁸ Claimant’s Reply, ¶ 13.

¹⁹ Claimant’s Reply, ¶ 16.

²⁰ Claimant’s Reply, ¶ 14.

²¹ Claimant’s Reply, ¶ 15.

investments in Lietuvos Dujos's natural gas infrastructure, the Company's value has grown significantly since 2004.²²

(ii) The Parties' Conduct Applying the Shareholders' Agreement

56. Claimant alleges that since 2004, the election and functioning of Lietuvos Dujos' Board of Directors complied with the SHA. However, in March 2011, the Ministry disputed the application of those provisions by filing and pursuing a legal action before the Lithuanian courts.²³

57. According to Claimant, during the negotiations of the SHA, there was a general understanding between the parties that persons involved in the negotiation process on behalf of Ruhrgas and Gazprom would subsequently either be elected to the Board of Directors or exercise other management functions at Lietuvos Dujos.

(a) Election of Board Members pursuant to the provisions of the SHA

58. Claimant states that, in compliance with the SHA, five persons were elected to Lietuvos Dujos' Board in April 2010: Mr. Golubev and Mr. Seleznev (elected upon nomination by Gazprom); Mr. Peter Frankenberg and Mr. Uwe Fip (upon nomination by Ruhrgas); and Vice Minister Mr. Svedas (upon nomination by the Ministry of Energy).²⁴ The Ministry voted in favor of the election of all these five members, including Messrs. Golubev and Seleznev.²⁵

(b) Adoption of the disputed decisions by the Board of Directors of Lietuvos Dujos

59. On December 17, 2010, Messrs. Golubev, Seleznev, Frankenberg and Fip voted in favor of a Board Resolution approving the signing of Addendum No. 52 to the Long-Term Agreement. This addendum stipulated the quantities of natural gas to be supplied by Gazprom to Lietuvos Dujos in 2011 and specified the gas price formula to be applied for the supply of gas in the same

²² SoC, ¶ 83.

²³ SoC, ¶ 84.

²⁴ SoC, ¶ 89, **Exhibit C-46**.

²⁵ SoC, ¶ 90.

period. As acknowledged by the Ministry, this formula set the same price as that applied to gas supply in the year 2010.²⁶

60. Claimant further states that, although Mr. Svedas (member of the Board elected upon nomination by Respondent) voted against such Resolution, it was adopted in accordance with Section 4.3(7) of the SHA, as it was approved by 4 of the 5 members of the Board. The relevant addendum was signed on December 29, 2010 by the General Manager and the Deputy General Manager nominated by Ruhrgas, in accordance with Section 4.3(8) of the SHA.

61. Claimant objects to Mr. Svedas' witness statement, wherein he stated that his and the Ministry's opposition to the adoption of the disputed Resolution was prompted by his alleged surprise that the addendum would be "*signed by Mr. V.A. Golubev on the side of Gazprom.*" According to Claimant, Mr. Golubev's affiliation to Gazprom was well known to the Ministry, whose representatives voted in favor of Mr. Golubev's appointment to the Board of Directors.²⁷ It further states that the SHA does not limit the rights of vote of party-nominated Board members.²⁸

62. Furthermore, revised terms of gas transit were updated in an addendum dated February 28, 2011 to the Long-Term Agreement. The gas transit terms contained in such addendum were unanimously confirmed by the Board in its Resolution of March 24, 2011, with the Ministry's nominated member of the Board, Mr. Svedas, voting to confirm such resolution.²⁹

63. Despite the fact that the above decisions and actions were taken by the Board of Directors and management of Lietuvos Dujos acting as provided by the SHA, the Ministry sought to challenge their implementation. It first sent a "*demand letter*" on February 8, 2011 to the Company and to the two members of the Board nominated by Gazprom, accusing the Company's management and these Board members of not acting in the Company's best interests when agreeing upon the price of gas supply for the year 2011, and of agreeing to provide natural gas transit services under non-market conditions.³⁰

64. Claimant draws the Tribunal's attention to the fact that the two Board members nominated by Gazprom lacked the necessary quorum to take decisions under the SHA. Although the two

²⁶ SoC, ¶ 91; **Exhibits C-5, C-14 and C-11.**

²⁷ Claimant's Reply, ¶ 42; **Exhibits C-46 and C-42.**

²⁸ Claimant's Reply, ¶ 44.

²⁹ SoC, ¶ 93; **Exhibits C-6 to C-9.**

³⁰ SoC, ¶ 94; **Exhibit C-10.**

Board members nominated by Ruhrgas also considered the pricing arrangements to be favorable to the interests of the Company and approved the provisions in question without reservation, the Ministry did not challenge their activity on the Board.³¹

65. According to Claimant, there is no independent Board member in Lietuvos Dujos. It points out that, if one were to consider that Messrs. Golubev and Seleznev have a conflict of interest due to their affiliation to Gazprom, the same reasoning should apply to the three remaining Board members.³²

66. Claimant rejects the Ministry's suggestion that Mr. Golubev should have informed the Board of his potential conflict of interest and abstained from voting on the adopted resolution. In support of its position, Claimant argues that Article 2.87(6) of the Lithuanian Civil Code explicitly authorizes a member of the management body to "*enter into a contract with a legal person being in the capacity of a member of the said persons' body.*" In such a case, this member has only to notify the other members of the management of this contract.³³ Similarly, Article 2.87(5) of the Lithuanian Civil Code requires a member of the legal person's management body to "*notify other members...about the circumstances [where his personal interests are contrary or may be contrary to the interests of the legal person].*"³⁴ In the case at hand, all members of the Board were on notice of their respective affiliations to the three shareholders.³⁵

(c) The Ministry's filing and pursuing legal actions before Lithuanian courts

67. In March 2011, the Ministry filed a claim before the Vilnius Regional Court, Lithuania, requesting an investigation of the Company's and Messrs. Golubev's and Seleznev's activities, alleging a violation of the Republic of Lithuania's interests as a shareholder in the Company, to the undue advantage of Gazprom's interests, when the addenda to the Long-Term Agreement covering gas supply for 2011 and the transit arrangements mentioned above were concluded.³⁶

³¹ SoC, ¶ 96.

³² Claimant's Reply, ¶ 46.

³³ Claimant's Reply, ¶ 50; **Exhibit C-110**.

³⁴ Claimant's Reply, ¶ 51; **Exhibit C-110**.

³⁵ Claimant's Reply, ¶ 51; **Exhibit C-36**.

³⁶ SoC, ¶ 98.

68. According to Claimant, the Ministry did not substantiate its allegations or provided any supporting calculation.³⁷
69. Moreover, Claimant states that the Ministry requested the Vilnius Court to “investigate” its claims, to conclude that the Ministry’s suspicions were grounded and, as a consequence, to dismiss Messrs. Golubev and Seleznev from the Company’s Board. It further requested that the Court dismiss the Company’s General Manager, Mr. Viktoras Valentukevicius, and replace him with a person nominated by the Ministry of Energy. The Ministry also requested the Court to order the Company to renegotiate the terms of its gas supply and transit contracts with Gazprom.³⁸
70. Claimant alleges that, although each of these issues were directly regulated by the SHA, the Ministry did not file any claim against Ruhrgas or Gazprom, or against any of the Ruhrgas-nominated Board members, even though they cast precisely the same votes as their Gazprom-nominated counterparts.³⁹
71. Claimant states that a first preliminary hearing before the Vilnius Court took place on June 15, 2011, when the Court dismissed the jurisdictional allegation that the dispute was subject to arbitration under the SHA. A second preliminary hearing took place on September 28, 2011, when the Vilnius Court granted the Ministry’s request and ordered Lietuvos Dujos to produce documents substantiating the gas supply prices during the period from May 2004 until the date of filing of the Ministry’s claim, as well as agreements concluded between Lietuvos Dujos and Gazprom, by which Lietuvos Dujos provided natural gas transit services to the Kaliningrad Region, from May 2004 until the date of filing of the claim.
72. According to Claimant, the Court’s imposition of such extensive document production was unusual, given that the Court had not, and still has not, taken a decision as to whether any investigation at all is merited.⁴⁰

³⁷ SoC, ¶ 102.

³⁸ SoC, ¶ 103.

³⁹ SoC, ¶ 104.

⁴⁰ SoC, ¶ 107.

(d) Revisited Claim

73. On December 9, 2011, the Ministry filed a Revised Claim before the Vilnius Court. It is Claimant's position that the revisions did not materially change the Ministry's position and that they call for a result essentially identical to the one contemplated in the initial claim. However, Claimant alleges that the Revised Claim appears to suggest that the Ministry no longer expressly requests the Court to dismiss the members of the Company's Board and to appoint as the Company's General Manager a person to be nominated by the Ministry of Energy.⁴¹

74. Claimant alleges that in the Revised Claim, the Ministry continues to insist that Messrs. Golubev's and Seleznev's activity should be investigated because they voted in favor of certain Board resolutions, neglecting that such resolutions were approved by a majority of four votes and that the votes of Gazprom-nominated members of the Board could not suffice for their adoption by the Company.⁴²

75. According to Claimant, in the Revised Claim the Ministry requests the Court "*to apply other sanctions*" provided in Article 2.131⁴³ of the Lithuanian Civil Code, allowing the Lithuanian Court to apply one of the following measures:⁴⁴

- 1) Revoke the decisions taken by the legal person's managing bodies;
- 2) Suspend temporarily the powers of the members of legal person's managing bodies or exclude a person from legal person's managing body;
- 3) Appoint provisional members of legal person's managing bodies;
- 4) Authorize non-implementation of certain provisions of incorporation documents;
- 5) To oblige making of amendments to certain provisions of incorporation documents;
- 6) To transfer the legal person's right to vote to other person;
- 7) To oblige a legal person to take or not to take certain actions;

⁴¹ SoC, § 111.

⁴² SoC, § 112.

⁴³ **Exhibit C-58.**

⁴⁴ SoC, § 113.

8) To liquidate a legal person and appoint a liquidator.

76. Claimant alleges that the Ministry's request made by reference to Article 2.131, not only includes the initial request to dismiss Gazprom-nominated Board members, but also considerably broadens the scope of relief sought, as at present the Ministry requests the Court to apply any and all available measures that the Court would deem appropriate.⁴⁵

77. On May 29, 2012, at the Hearing, Claimant stated that the action before the Vilnius Court was still ongoing and no decision had yet been taken on the merits.⁴⁶

(e) The Emergency Arbitrator Proceedings

78. Claimant states that on June 13, 2011, in an attempt to preserve its right to have the dispute settled through arbitration, it initiated an Emergency Arbitrator proceeding under SCC Rules⁴⁷ pursuant to the arbitration agreement contained in the SHA. Gazprom requested that the Emergency Arbitrator order the Ministry of Energy to (i) move for a stay of the Initial Claim pending the rendering of a final award by the tribunal to be constituted pursuant to the SCC Rules to hear the present dispute, and (ii) refrain from any further actions before the Vilnius Court or any State Court in relation to the dispute described above pending the rendering of a final award by the tribunal to be constituted pursuant to the SCC Rules.⁴⁸

79. It further states that, although Prof. Albert van den Berg, appointed as Emergency Arbitrator, declined to grant the relief sought by Gazprom "*mainly in light of the lack of urgency*", he found that "[...] *notwithstanding the fact that the Respondent has couched its Court Claim in terms of an alleged interest of the Company and an alleged violation of fiduciary duties of two Board members and is directed against the Company and the Board Members as well the CEO, the*

⁴⁵ SoC, ¶ 114.

⁴⁶ Transcript of the Hearing, Day 1, 21: 15-22: "[Claimant's opening statement]: *The Ministry's claim in Vilnius Court is proceeding. The court held multiple days of hearing in March and April; another day of evidentiary hearings will be held on Thursday of this week. The court is expected to rule in the coming months, although the next ruling should concern only whether the court will order an investigation and appoint experts. The conclusion of the proceedings is still far away.*"

⁴⁷ Appendix II to the SCC Rules.

⁴⁸ SoC, ¶ 116.

evidence submitted by Claimant[...] establishes that Claimant's claim has a reasonable possibility of success on the merits."⁴⁹

(2) The Ministry's Action Breaches the Shareholders' Agreement

(i) The Dispute pending before the Lithuanian Court falls within the Arbitration Agreement

80. Claimant rejects the Ministry's allegations that the Lithuanian Court action does not fall within the scope of the arbitration agreement because, *inter alia*: (i) it involves other parties; (ii) it concerns a legal relationship other than the one specified in the arbitration agreement; and (iii) it falls within the exclusive jurisdiction of the Lithuanian courts. Claimant's position on these issues is summarized below.

(a) The Lithuanian court action presents a shareholders' dispute and is "in connection with" the SHA

81. Preliminarily, Claimant states that the issue before the Arbitral Tribunal is whether the dispute brought by the Ministry before the Vilnius Court is "*in connection with*" the SHA. It is undisputed that Gazprom and the Ministry are bound by an arbitration agreement and there is no question here of binding non-signatories to such arbitration agreement.⁵⁰ However, like any other contract, an arbitration agreement must be performed in good faith and a party may not attempt to circumvent it through the artifice of adding non-party entities to a court claim that is in substance a dispute falling within the arbitration agreement.⁵¹

82. Claimant states that the Ministry initiated the court proceedings against Gazprom's nominees, rather than Gazprom itself, only to attempt an escape from the application of the arbitration clause in the SHA.⁵² Claimant gives as example the decision rendered by the Bermuda Supreme Court on the *IPOC vs. CTM* case, which issued an injunction restraining one party from pursuing

⁴⁹ Exhibit C-49.

⁵⁰ Claimant's Reply, ¶ 73.

⁵¹ Claimant's Reply, ¶ 75.

⁵² Claimant's Reply, ¶ 77.

court proceedings in breach of the arbitration clause, notwithstanding the fact that the Russian proceedings formally involved some parties who were not parties to the arbitration clause.⁵³

83. Furthermore, Claimant alleges that Respondent's reliance on the SWEMAB case is unavailing. According to Claimant, in such case, neither the company of the shareholders argued that the dispute, which related to the embezzlement of funds, was covered by the arbitration clause. Unlike the SWEMAB case, Respondent requests the Lithuanian court to apply measures that are directly regulated by the SHA, such as removal of the Board members nominated by Gazprom.⁵⁴

84. It is Claimant's position that the arbitration agreement provided in Section 7.14 of the SHA is framed in broad terms, as it covers "*any claim, dispute or contravention in connection with*" the SHA. It alleges that in the context of international arbitration, this phrase embraces not only contractual remedies, but also claims for damages based in tort.⁵⁵

85. Claimant alleges that during the negotiation period of the SHA, Lithuania never requested for the arbitration agreement to be limited and never reserved the right to submit certain disputes to its domestic courts, including investigative proceedings, as confirmed by Mr. Eidukevicius in his witness statement.⁵⁶ Under these circumstances, Claimant alleges that it cannot be assumed that the Parties intended to exclude from arbitration the type of dispute currently pending before the Vilnius Court.⁵⁷

86. Claimant argues that, were there any doubt as to whether the arbitration clause prohibits initiation of investigative proceedings in contravention to arbitration, such a doubt must be interpreted against the drafter of the clause, namely the State Property Fund and its successor, the Ministry of Energy.⁵⁸

87. In addition, Claimant argues that the record does not support Respondent's allegation that Section 7.8 ("Waiver") of the SHA should be read to limit the application of the arbitration clause. On the contrary, it claims that such provision supports the opposite, as the SHA provides that all disputes in connection with the SHA be submitted to arbitration. It concludes that the

⁵³ Claimant's Reply, ¶ 76; **Exhibit C-120**.

⁵⁴ Claimant's Reply, ¶ 80; **Exhibit C-141**.

⁵⁵ SoC, ¶123.

⁵⁶ SoC, ¶124 ; Claimant's Reply, ¶ 20 ; Eidukevicius WS, para. 8.

⁵⁷ SoC, ¶125.

⁵⁸ Claimant's Reply, ¶ 26.

reference in Section 7.8 to rights or remedies provided at law can be only viewed as emphasizing the authority of the arbitrators to order all available remedies, whether set out in the SHA or by the applicable law.⁵⁹

88. Claimant further alleges that, when parties agree to settle their disputes through arbitration in the context of international commercial relations, there is a presumption in favor of “one-stop” dispute resolution. In support of this allegation, Claimant cites an excerpt of a decision from the Swedish Supreme Court dated June 14, 2007, which reads as follows⁶⁰:

“The arbitration clause may be understood to mean that all disputes with connection to the usufructuary agreement are to be determined by arbitrators. Although B.P. has alleged that the claim for compensation is not based on the agreement but is a claim founded on causation through a criminal act, the factual circumstances invoked are directly connected to the usufructuary agreement. In view hereof and as the two other grounds for the claim are to be tried by arbitrators as determined with finality, the third ground should also be deemed to be encompassed by the arbitration clause.”

89. Claimant states that the Ministry’s action before the Vilnius Court is founded on the notion that Gazprom-nominated directors should have no role in authorizing gas supply contracts between the Company and Gazprom. By doing so it seeks to undo and rewrite key corporate governance provisions of the SHA.⁶¹

90. Back in 2002, Ruhrgas made it clear that it would withdraw from negotiations unless an agreement guaranteed that the Strategic Investor and Gas Supplier together could name four out of the five directors, and that no less than four votes would be required for valid resolutions. It claims that this issue was specifically put to the Lithuanian Government, which specifically agreed to these governance arrangements.⁶² Such critical arrangements were carried through to the SHA without material modification.⁶³

91. Claimant argues that from the very beginning, the Parties contemplated that the Gas Supplier (i.e. Gazprom) would have both a significant role in managing the Company and engage in

⁵⁹ Claimant’s Reply, ¶ 26.

⁶⁰ SoC, ¶128 ; **Exhibit C-61**.

⁶¹ SoC, ¶132.

⁶² SoC, ¶133 ; Benke WS, paras. 19-22, 24.

⁶³ **Exhibit C-2**, Section 4.3(7).

substantial gas sale and transit contracts with the Company. It states that the whole point of the privatization program in this respect was to give the Gas Supplier (i.e. Gazprom) a stake, a voice and an interest in developing the Company, above and beyond its interests, as the Company's supplier and counterparty.⁶⁴

92. Claimant draws the Tribunal's attention to the fact that, if Gazprom-nominated members of the Board were excluded from voting on gas supply and transit issues, as the Ministry argues in its Revised Claim, no contract could be signed by the Company for lack of the necessary four votes.⁶⁵

(b) The Ministry's action addresses issues governed by the SHA

93. According to Claimant, which relies on Professors Mikelenas' and Nekrosius's expert opinions, the relief sought by the Ministry before the Lithuanian Court actually attempts to restrict Gazprom's rights under the SHA, not Messrs. Golubev's and Seleznev's rights as individuals. Furthermore, the Ministry's attempt to maintain its claims against Messrs. Golubev and Seleznev as "representatives" of Lietuvos Dujos is meritless, as it is the Company's General Manager and not the two out of five Board members who act as the Company's representatives.⁶⁶

94. Claimant argues that the requests for relief sought by the Ministry before the Vilnius Court are governed by the SHA, as they focus on the method of appointment of the Company's governing bodies, and the manner in which those governing bodies exercised their duties when entering into amendments to the gas supply and transit agreements.⁶⁷

95. Moreover, Respondent devoted three sub-sections of its Statement of Defence to a recital of grievances against Gazprom, taking issue with (i) Gazprom's supply monopoly; (ii) Gazprom's opposition to the implementation of the Third Gas Directive; and (iii) Gazprom's alleged decision to reduce gas supply prices to Latvia and Estonia, and not to Lithuania. It then argues that the Ministry's reference to these issues only confirms that the Vilnius Court action relates to Gazprom and its presence in Lithuania. According to Claimant, the investigative proceedings are a way to put pressure on Gazprom in furtherance of a political agenda entirely unrelated to

⁶⁴ SoC, ¶134.

⁶⁵ SoC, ¶135.

⁶⁶ SoC, ¶141.

⁶⁷ SoC, ¶150.

any dispute with Messrs. Golubev and Seleznev in their capacity as individual members of the Board.⁶⁸

96. As for the gas supply prices to neighboring countries, Lithuania's alleged discrimination at the hands of Gazprom is also unrelated to Messrs. Golubev's and Seleznev's actions as individual members of the Board of Lietuvos Dujos. Claimant states that those gas supply prices are negotiated between the relevant authorities of those countries and Gazprom, not Messrs. Golubev and Seleznev in their capacity as Lietuvos Dujos' Board members.⁶⁹

97. Claimant states that the Ministry's claim of impropriety is that Gazprom-nominated Board members voted on a gas supply contract with Gazprom, which is the very heart of the arrangements contemplated by the SHA.⁷⁰

98. According to Claimant, Sections 6.1 and 6.1.1.9 of the SHA provide that each of the parties to the SHA was obliged to ensure and procure that the Company ensure that the Company enters into long-term gas supply and gas transit contracts with Gazprom on terms mutually acceptable and beneficial to Gazprom and the Company. In addition, Section 3.5 required the parties to the SHA to use all their efforts to ensure that their nominees on the Board voted to achieve the objectives stated in Section 6. Claimant then states that the Ministry's claim before the Lithuanian Court is that the gas supply and transit contracts were not mutually acceptable and beneficial to the Company and its shareholders. The concern is that the parties to the SHA did not meet their obligation under Section 6.1 to seek to ensure and procure that the Company seeks to ensure that the contracts be entered into on the basis established in the SHA. As a consequence, the Ministry's concern is directly addressed in the SHA, falling within the scope of its arbitration clause.⁷¹

99. Claimant argues that, if Respondent felt that Gazprom was not being sufficiently cooperative with respect to the profits of the Company, the SHA provided means for Respondent to resolve this concern in its Section 6.1.1.7. It further alleges that, if Respondent felt that Gazprom's dealings with the Company were unfairly slanted towards Gazprom, this is addressed by Section

⁶⁸ Claimant's Reply, ¶ 31.

⁶⁹ Claimant's Reply, ¶ 28.

⁷⁰ Claimant's Reply, ¶ 33.

⁷¹ Transcripts of the Hearing, Day 2, pp.3-4.

6.1.1.8 of the SHA, and unequal treatment of the shareholders again falls within the arbitration clause.⁷²

100. The table below summarizes Claimant’s position in this regard:

Description of the Ministry’s request before Vilnius Court	Related provisions in the SHA
<p>Initial Claim: 1st and 2nd requests - Section 2.4(i) and (ii) of the Claim</p> <p>Relate to the dismissal of the members of the Company’s Board and the appointment as the Company’s General Manager of a person to be nominated by the Ministry of Energy</p> <p><u>**The fact that the Ministry, in its Revised Claim, no longer expressly requests to dismiss Messrs. Golubev and Seleznev from the Board makes no material difference, as the Ministry requests the Court to apply any measure available under Article 2.131 of the Lithuanian Civil Code, including the dismissal of Board members, that the Court deems appropriate.</u>⁷³</p>	<p>The appointment and dismissal of the members of the Board is specifically governed by Section 4.3 SHA, and covered by the arbitration agreement.⁷⁴</p>
<p>Initial Claim: 3rd request - Section 2.4(iii) of the Claim</p> <p>Relates to the renegotiation of the terms of the gas supply contract with Gazprom.</p>	<p>The issue of negotiating agreements between the Company and Gazprom is governed by the SHA. In particular, Section 6.1(1.8) of the SHA requires the Company’s Board, when taking a decision to approve a gas supply contract, to take into consideration the terms and conditions of those contracts, “<i>such as price, volume, duration, flexibility and reliability</i>”. The Ministry’s complaint as to the manner in which a gas supply contract was negotiated and approved by the</p>

⁷² Transcripts of the Hearing, Day 2, p. 5.

⁷³ SoC, ¶147.

⁷⁴ SoC, ¶142.

	Company's Board is a matter addressed by the SHA and shall be settled by arbitration. ⁷⁵
Initial Claim: 4 th and 5 th requests - Section 2.4(iv) and (v) of the Claim Relate to the “ <i>transparency</i> ” of the Company's gas transit activity, including the manner in which the Company negotiates and enters into gas purchase and transit agreements.	This issue is also governed by Section 6 of the SHA. Thus, any dispute regarding an alleged violation of a shareholder's right by the Company and/or its management bodies in relation to the negotiation and/or execution of the Company's gas transit obligations fall into the scope of the arbitration agreement. ⁷⁶
Initial Claim: 6 th request - Section 2.4(vi) of the Claim Relates to the procedure to be put in place for the purposes of gas purchase and transit negotiations and the manner in which gas purchase and transit agreements should be negotiated and approved by the Company's representatives and management bodies	This issue is also specifically covered by Sections 4.3 and 6 of the SHA. ⁷⁷
REVISED CLAIM: Article 2.131 of the Lithuanian Civil Code ⁷⁸	Any of the measures provided for under Article 2.131 would materially undermine and undo the Parties' agreement to co-operate in the management of the Company as embodied in the SHA.

⁷⁵ SoC, ¶143.

⁷⁶ SoC, ¶144.

⁷⁷ SoC, ¶145.

⁷⁸ **Exhibit C-58**, Article 2.131, Chapter X of the Lithuanian Civil Code (“Investigation of Legal Person's Activities”) (the court may: “1) revoke the decisions taken by the legal person's managing bodies; 2) suspend temporarily the powers of the members of legal person's managing bodies or exclude a person from legal person's managing body; 3) appoint provisional members of legal person's managing bodies; 4) authorize non implementation of certain provisions of incorporation documents; 5) to oblige making of amendments to certain provisions of incorporation documents; 6) to transfer the legal person's right to vote to other person; 7) to oblige a legal person to take or not to take certain actions; 8) to liquidate a legal person and appoint a liquidator.”).

101. Claimant alleges that the Vilnius Court can order any relief specified in Article 2.131 of the Lithuanian Civil Code, “including by imposing restrictions on the exercise of the shareholders’ rights even when such restrictions were not specifically requested” by the parties to the investigative proceedings. It then refers to the ADUM case, in which the Supreme Court of Lithuania confirmed the powers of the Lithuanian courts to grant relief against the respondent’s shareholders within the framework of the investigative proceedings, even when the claimant sought relief only against the respondent’s general manager.⁷⁹

(c) Negative effect of the Arbitration Agreement

102. It is Claimant’s position that, as a corollary of the obligation to submit disputes to arbitration, the parties are also under a duty not to submit such disputes to local courts. This duty, referred to as the negative effect of the arbitration clause, is undisputed in international arbitration. It argues that the obligation not to litigate disputes subject to arbitration is expressly provided in Section 4 of the Swedish Arbitration Act, pursuant to which “a court may not, over an objection of a party, rule on an issue which, pursuant to an arbitration agreement, shall be decided by arbitrators.” Article 10 of the Law on Commercial Arbitration of the Republic of Lithuania, based on Article 8(1) of the UNCITRAL Model Law, also requires a court to decline to hear a dispute subject to an arbitration agreement. Claimant argues that this obligation is mandatory, and not a matter of discretion.⁸⁰

103. It further alleges that, if Lithuania’s Ministry of Energy were allowed to adjudicate the dispute before Lithuanian State courts, the arbitration clause set forth in Section 7.14 of the SHA would be optional.⁸¹

(d) The Ministry’s interpretation of the “legal relationship specified in the arbitration clause” is exceedingly narrow

104. Claimant rejects the Ministry’s allegation that Swedish law does not consider a non-contractual claim to fall within the scope of an arbitration clause in an international commercial agreement.

⁷⁹ SoC, ¶149; Mikelenas Expert Opinion, paras. 33-35; Exhibit C-86, ruling of the Supreme Court of Lithuania dated June 28, 2010 (ADUM case).

⁸⁰ SoC, ¶153-158; Transcripts to the Hearing, Day 2, pp. 8-9.

⁸¹ SoC, ¶156.

According to Claimant, none of the case law relied upon by the Ministry supports such a narrow interpretation.⁸²

105. According to Claimant, the case at hand would be similar to the *Sandip* case,⁸³ where the Swedish Supreme Court acknowledged that non-contractual claims closely related to the legal relationship defined in the arbitration clause should be settled by arbitration.⁸⁴
106. Claimant explains, at pages 26-29 of its Reply, why the following cases are not applicable to this dispute: *Tupperware* case, *Carmeuse* case; *Ulla Folgerö* case and *Esselte Dymo* case.
107. Claimant states that the *Tupperware* case is not applicable, as it relates to the bankruptcy state's action to initiate claw-back recovery action in court, which is different from the situation at stake before this Arbitral Tribunal.⁸⁵
108. Respondent's reliance on the *Carmeuse* case is also unavailing. In this case, the Swedish Supreme Court ruled that parties could not limit the right to mandatory redemption of shares. For this reason, a dispute relating to the mandatory redemption of shares was not governed by the shareholder's agreement and did not fall within the scope of the arbitration. However, in the present case, Respondent does not allege that the provisions of the SHA governing the election and operation of Lietuvos Dujos' Board are inoperative and should be disregarded.⁸⁶
109. Claimant alleges that Respondent's reliance on the *Ulla Folgerö* case is also misplaced, as in that case, Ms. Folgero was allowed to pursue her court action because her claims pertained to fraudulent acts that occurred prior to the entry into force of the relevant shareholders' agreement. For this reason, her claims were not covered by the arbitration clause contained in the shareholders' agreement.⁸⁷
110. Finally, Claimant argues that Respondent's reliance on the *Esselte Dymo* case is incorrect, as this case confirms that a court action may not be used to deprive an arbitration agreement "*of its effect as a bar to litigation*". The Swedish Court ruled that the District Court should have

⁸² Claimant's Reply, ¶ 83.

⁸³ **Exhibit C-61.**

⁸⁴ Claimant's Reply, ¶ 88.

⁸⁵ Claimant's Reply, ¶ 86-87.

⁸⁶ Claimant's Reply, ¶ 90.

⁸⁷ Claimant's Reply, ¶ 91.

ordered claimant “*to show that arbitration had commenced*” and, had this been the case, the District Court should have stayed the court proceedings.⁸⁸

(ii) The court action does not fall within the exclusive jurisdiction of Lithuanian courts

111. Claimant rejects the Ministry’s allegation that the action before the Vilnius Court falls within the exclusive jurisdiction of the Lithuanian courts. The main support for the Ministry’s allegation is the opinion of Dr. Norkus, who states that the investigative proceedings in general constitute “*special proceedings*” under Lithuanian law that “*have an element of public law*”. Dr. Norkus concludes that claims brought in the investigative proceedings are not arbitrable and should be heard in Lithuanian courts regardless of the arbitration clause.⁸⁹ Claimant’s rebuttal of these arguments is summarized below.
112. Preliminarily, Claimant alleges that the relevance of the arguments advance by Dr. Norkus above is of little relevance, as both Parties concur that the arbitration agreement stated in Section 7.14 of the SHA is governed by Swedish law, not Lithuanian law.⁹⁰
113. Claimant recalls that there is no dispute that this Tribunal is competent to decide the issues before it, as the arbitrability under Lithuanian law of the dispute presented in the investigative proceedings is not in issue before this Tribunal.⁹¹
114. It is Claimant’s position that, in any event, Dr. Norkus’ arguments have no basis under Lithuanian law, as set forth below.

(a) *Investigative proceedings are not “special proceedings” that would preclude the application of the arbitration clause*

115. According to Claimant, as explained by Prof. Mikelenas, the remedies available within the framework of investigative proceedings correspond to those which are generally available under

⁸⁸ Claimant’s Reply, ¶ 93; **Exhibit- C-116**.

⁸⁹ Claimant’s Reply, ¶ 95.

⁹⁰ Claimant’s Reply, ¶ 96.

⁹¹ Claimant’s Reply, ¶ 96.

Article 1.138 of the Lithuanian Civil Code. Those remedies do not render investigative proceedings “*specific*” as argued by Dr. Norkus.⁹²

116. Furthermore, the mandatory participation of an expert does not render investigative proceedings different from other proceedings under the Civil Procedure Code. A court can appoint an expert or require the parties to provide expert evidence in any and all cases that “*require special knowledge in science, medicine, art, technology or crafts*”,⁹³ which does not render such court proceedings “*special*”.⁹⁴ Claimant highlights that a court is not bound to follow an expert report in an investigative proceeding, as in any other court proceedings. Claimant concludes that Dr. Norkus’ assertion that “*it is the body of qualified experts and not the court that assesses the appropriateness of the management of the company*” is meritless.⁹⁵
117. Claimant alleges that the only redress that the Ministry unconditionally seeks at this stage of the Lithuanian proceedings is the appointment of an expert to conduct an investigation of the Ministry’s suspicions and make a report. With respect to this redress, Section 7.14 of the SHA provides for arbitration under the SCC Rules. Under Article 29.1 of the SCC Rules, “[...] the Arbitral Tribunal may appoint one or more experts to report to it on specific issues set out by the Arbitral Tribunal in writing.” Therefore, the SHA provides for the only redress unconditionally sought by the Ministry before the Lithuanian Court.
118. Also, the possibility to seek police assistance does not differentiate investigative proceedings from any other court proceedings under the Lithuanian Civil Code. Enforcement is always in the hands of the bailiff and the investigative proceedings are not different in this respect.⁹⁶
119. Claimant alleges that mandatory assistance by a lawyer also does not render the investigative proceedings *sui generis*. The fact that the participation of a lawyer is required does not imply that the case deals with public interest.⁹⁷
120. In addition, the fact that a prosecutor is entitled to initiate investigative proceedings does not render such proceedings *sui generis*. A prosecutor acts only when he or she considers that public

⁹² Claimant’s Reply, ¶ 101.

⁹³ Claimant’s Reply, ¶ 102.

⁹⁴ Claimant’s Reply, ¶ 102.

⁹⁵ Claimant’s Reply, ¶ 103.

⁹⁶ Claimant’s Reply, ¶ 104.

⁹⁷ Claimant’s Reply, ¶ 105.

interest so requires, and the final decision on the existence of public interest is taken by the court hearing the case initiated by the prosecutor.⁹⁸ Claimant draws the Tribunal's attention to the fact that the prosecutor did not initiate the investigative proceedings currently pending before the Vilnius court, but that Respondent did. The prosecutor does not take part in these proceedings.⁹⁹

121. Finally, as for Dr. Norkus' suggestion that the investigative proceedings fall within the exclusive competence of Lithuanian courts because they must be brought by regional courts, Claimant alleges that Dr. Norkus conflates the question of arbitrability with that of attribution of subject-matter jurisdiction. Claimant argues that Lithuanian law, as any modern system of law, provides for settlement of disputes in state courts and allocates subject-matter jurisdiction between the various tiers of State courts. However, these are standard provisions that do not preclude the parties from agreeing on the settlement of their dispute through arbitration.¹⁰⁰
122. Claimant concludes that Dr. Norkus' allegations on the special nature of investigative proceedings are groundless.¹⁰¹
123. Claimant argues that the Ministry also conditionally seeks other redress before the Lithuanian Court. The condition attached to this redress is that the court ultimately finds, at a later point in the proceedings, that the challenged conducts were inappropriate. Claimant recalls that the SHA includes as parties shareholders holding together over 90% of the Company's shares. As a consequence, an arbitral tribunal constituted in a case that included all three parties to such agreement would have full authority to order the parties before it to take steps to remedy any breach that it found of the SHA. Given the parties' control over the Company, there is no apparent reason why an arbitral tribunal could not order the shareholders to cause the Company to act in a manner needed for a relief to be effective.¹⁰²

(b) The proceedings before the Vilnius court do not implicate public interest

124. Claimant points out that the Lithuanian Supreme Court has emphasized that the concept of public interest should be interpreted "*narrowly and...should only cover certain exceptional*

⁹⁸ Claimant's Reply, ¶ 106.

⁹⁹ Claimant's Reply, ¶ 107.

¹⁰⁰ Claimant's Reply, ¶ 109.

¹⁰¹ Claimant's Reply, ¶ 110.

¹⁰² Transcripts of the Hearing, Day 2, pp. 6-7.

situations” that address the “*well-being*” of the society as a whole.¹⁰³ For this reason, the existence of a public interest requiring special protection is always determined on a case-by-case basis.¹⁰⁴ Claimant concludes that it is erroneous to assert, as Dr. Norkus does, that an investigative proceeding by its very nature deals with public interest.¹⁰⁵

125. The increase of Lietuvos Dujos’ profits is the stated goal of the Ministry’s complaint in the investigative proceedings. The underlying issues in the proceedings deal with the private interests of a shareholder as regards the management of the company in which it hold shares. The dispute is of private nature and does not deal with any public interest within the meaning of Lithuanian law.¹⁰⁶ Finally, the fact that Lietuvos Dujos holds the status of an entity essential to safeguarding national security is immaterial. There is no national security issue at stake. The present dispute is one between shareholders concerning the Company’s management.¹⁰⁷

(c) The underlying dispute submitted before the Vilnius court is arbitrable

126. Dr. Norkus, the legal expert assisting the Ministry in these proceedings, relies on the ruling of the Lithuanian Supreme Court of October 17, 2011 to support the Ministry’s allegation that the dispute brought before the Vilnius Court is not arbitrable. However, that ruling dealt with the question of the arbitrability of disputes concerning specific features of public procurement contracts, not investigative proceedings. The Supreme Court expressly confirmed that Article 11 of the Lithuanian Law on Commercial Arbitration provided for an exhaustive list of matters that are not arbitrable under Lithuanian Law. Such provision references “*disputes arising from constitutional, employment, family, administrative legal relations, as well as disputes connected with competition, patents, trademarks and services marks, bankruptcy, and disputes arising from consumer contracts.*”¹⁰⁸

127. According to Claimant the investigative proceedings concern a civil law relationship, as opposed to a relationship governed by public (or administrative) law. The investigative proceedings

¹⁰³ Claimant’s Reply, ¶ 112.

¹⁰⁴ **Exhibit C-138.**

¹⁰⁵ Claimant’s Reply, ¶ 103.

¹⁰⁶ Claimant’s Reply, ¶ 116.

¹⁰⁷ Claimant’s Reply, ¶ 119.

¹⁰⁸ Claimant’s Reply, ¶ 123; **Exhibit C-105.**

initiated by the Ministry do not deal with a dispute regarding public law relations, government procurement, patent, bankruptcy or any other issue listed in Article 11 mentioned above.¹⁰⁹

128. Dr. Norkus' suggestion that "*the legislator was not able to include [investigative proceedings] into the list of non-arbitrable disputes presented in Article 11*" because investigative proceedings were introduced into the Civil Code subsequent to the enactment of Article 11, is groundless. Had the legislature intended to include the investigative proceedings in the list of non-arbitrable disputes, it could easily have introduced the necessary changes in Article 11 when this Article was amended in 2001. Claimant also argues that the current draft of the amendments to be introduced to the Lithuanian Law on Commercial Arbitration also does not provide that the investigative proceedings are non-arbitrable.¹¹⁰
129. Swedish law, which is the law governing the arbitration clause before the Tribunal, similarly contains no provision that would find the proceedings before Vilnius court non-arbitrable.¹¹¹
130. Moreover, the Svea Court of Appeal has specifically found that the arbitrability of international disputes dealing with issues of foreign law should be decided on a case-by-case basis, in such a way as to give full effect to the parties' agreement to arbitrate disputes "*regarding matters that they normally can freely agree upon without any restrictions.*"¹¹²
131. Finally, Claimant concludes that, as the SHA regulates issues on which the Parties were free to agree, this dispute is arbitrable under Swedish law.¹¹³

(3) The Ministry's Action Breaches the Substantive Obligations of the Shareholders' Agreement

132. According to Claimant, in addition to breaching the arbitration clause, the Ministry's action before the Vilnius Court also violates the substantive obligations of the SHA, which such legal action seeks to circumvent. Such breach constitutes an additional basis for awarding the reliefs sought by Claimant in this arbitration.¹¹⁴

¹⁰⁹ Claimant's Reply, ¶ 125.

¹¹⁰ Claimant's Reply, ¶ 126.

¹¹¹ Claimant's Reply, ¶ 127.

¹¹² Claimant's Reply, ¶ 130; **Exhibit C-142**.

¹¹³ Claimant's Reply, ¶ 132.

¹¹⁴ SoC, ¶¶ 159-160.

133. Claimant alleges that in its Statement of Claim it addressed each of the requests submitted by the Ministry in its Initial Claim and its Revised Claim, and demonstrated that each of such requests was inconsistent with the provisions regulating the subject of the requests in the SHA.¹¹⁵ Claimant concludes that the Ministry's suggestion that the Statement of Claim fails to specify which obligations under the SHA the Ministry is alleged to have breached is meritless.¹¹⁶

(4) The Ministry Should Be Ordered to Terminate the Lithuanian Court Proceedings

134. Claimant argues that the Tribunal has the power to enforce the arbitration agreement and order the Ministry to terminate the court proceedings. It claims that specific performance is the most appropriate remedy in the event of a breach of an arbitration agreement, as if the only remedy for a party's refusal to perform an arbitration agreement were an award of damages, the arbitration agreement would be of little value.¹¹⁷

135. According to Claimant, Article 24(2) of the SCC Arbitration Rules required the Ministry in its Statement of Defense to state "*whether, and to what extent, the Respondent admits or denies the relief sought by Claimant*". It then notes that the Ministry does not deny that specific performance is an appropriate remedy if "*the Investigation Proceedings are covered by the arbitration agreement in the SHA*" and the Tribunal finds that an "*obligation,[] either under the arbitration agreement,[] or under the SHA, has been breached.*"¹¹⁸

136. By citing as an example the ICSID case *ATA vs. Jordan*¹¹⁹, Claimant argues that it is well-established in international arbitration that arbitral tribunals have the power to enforce an arbitration agreement and order a party to refrain from initiating and/or pursuing litigation in violation of the arbitration agreement. This is so even if local courts disregard the arbitration agreement and proceed to hear the dispute subject to the arbitration clause.¹²⁰

¹¹⁵ Claimant's Reply, ¶ 135.

¹¹⁶ Claimant's Reply, ¶ 136.

¹¹⁷ SoC, ¶162; **Exhibit C-69**.

¹¹⁸ Claimant's Reply, ¶ 139.

¹¹⁹ **Exhibit C-59**.

¹²⁰ SoC, ¶165.

137. Claimant alleges that an order to terminate the court action is the only remedy that will protect Gazprom from suffering irreparable injury. If the legal action is successful, it will lead to the definitive loss of Gazprom's right to have the dispute heard in arbitration.¹²¹

(5) Gazprom has Suffered Damages as a Result of the Ministry's Breach of the Arbitration Agreement

138. Gazprom alleges that it has incurred legal costs as a result of the Ministry's violation of the arbitration agreement. While the main relief sought by Gazprom is specific performance, it is also entitled to compensation for these losses, like any other loss resulting from a breach of contract.

139. To date, the costs incurred by Gazprom on behalf of Messrs. Golubev and Seleznev in defending against the Ministry's action before the Lithuanian courts amount to EUR 39,683 (including VAT) in legal fees of Salans LLP, and EUR 21,164 (including VAT) in legal fees of Moteikaa ir Audzevicius.¹²² Claimant submitted a spreadsheet summarizing further costs for counsel incurred as of April 30, 2012.¹²³

140. Furthermore, the costs incurred by Lietuvos Dujos in defending the Lithuanian court action amount to date to EUR 211,667, including (i) the costs of additional working hours of Lietuvos Dujos' employees required to collect documents, the production of which was ordered by the Court; (ii) the costs of translation and bookbinding services; (iii) legal fees; and (iv) management time spent defending Lietuvos Dujos against the Ministry's action in the Vilnius Court.¹²⁴

141. Claimant highlights that the Ministry does not dispute that Gazprom has paid the amounts indicated above, nor does it question the calculation of damages.¹²⁵

142. Claimant points out that the Ministry's main comment to Gazprom's claim for damages is that "*costs incurred by third parties in local court proceedings can and should be claimed as part of those proceedings*" and therefore "*the alleged loss has not yet matured.*" The Ministry provides no evidence, information or even argument in support of its assertion that attorneys' fees and

¹²¹ SoC, ¶166.

¹²² SoC, ¶170; **Exhibit C-57.**

¹²³ **Exhibit C-148.**

¹²⁴ SoC, ¶171; **Exhibits C-53 and C-54.**

¹²⁵ Claimant's Reply, ¶ 143.

other costs can be recovered in the Vilnius court action. It provides no information as to the conditions under which such costs could be recovered, if in fact it could. Nor does the Ministry provide any evidence that any party has in fact claimed costs in the Vilnius Court action.¹²⁶

143. Furthermore, Claimant states that Respondent put forward two new arguments at the Hearing:¹²⁷ (i) that the costs of Lietuvos Dujos are not Gazprom's costs; and (ii) that the documentary evidence offered by Gazprom does not provide sufficient supporting information. It further alleges that, if the Ministry questions the quality of the evidence submitted by Gazprom on damages, it should have raised this in its pleadings, which would have allowed Gazprom to submit the supporting invoices. Claimant argues that Respondent cannot raise new arguments on damages for the first time after the deadline for submitting evidence has passed, and in the middle of a hearing.

(6) Claimant's Prayer for Relief

144. As set forth in paragraph 145 of Claimant's Statement of Reply:

"145. [...]Gazprom requests the Arbitral Tribunal to:

- (a) declare that the Ministry's initiation and prosecution of the Lithuanian court proceedings described above was in breach of the arbitration agreement contained in the Shareholders' Agreement, and that the Ministry is liable to compensate Gazprom for all damages suffered in consequence of such breach;*
- (b) order the Ministry to discontinue the Lithuanian court proceedings forthwith and to refrain from any further actions in Lithuanian court in violation of the arbitration agreement contained in the Shareholders' Agreement;*
- (c) order the Ministry of Energy to pay damages to Gazprom, resulting from the Ministry of Energy's violation of the arbitration agreement by submitting the present dispute to Lithuanian court, including without limitation costs incurred by Gazprom in connection with providing representation to Gazprom-nominated members of the Company's Board, presently estimated at approximately EUR 139,164, subject to further revision as the case may be;*

¹²⁶ Claimant's Reply, ¶ 142.

¹²⁷ Transcripts of the Hearing (Day 1), pp. 95-96.

- (d) *order the Ministry of Energy to pay costs of this arbitration, including all expenses that Gazprom has incurred or shall incur herein in respect of the fees and expenses of the arbitrators, the SCC, Gazprom's legal counsel, experts and consultants, as well as Gazprom's own internal costs and management time, in an amount to be quantified following the hearing on merits;*
- (e) *order the Ministry of Energy to pay post-award interest at a rate which by 8 percentage units exceeds the official reference rate as from time to time fixed by the Bank of Sweden, on the amounts awarded until full payment thereof; and*
- (f) *order such other relief as the Tribunal may deem just and proper.”*

B. Respondent's position

(1) Factual Background

(i) General Remarks on the SHA and the arbitration agreement

145. Respondent states that the underlying facts in dispute are to a large extent non-contentious. It is not in dispute that the SHA includes an arbitration agreement covering disputes between the parties in connection with the SHA. Nor is contested that the SHA contains certain voting provisions, rules on election of Board members, or procedures for approval of decisions relating to gas supply contracts.¹²⁸
146. However, it was never discussed or contemplated that the arbitration agreement was to bind Lietuvos Dujos or the Board of individual Board members, or that it would bar any party from invoking its statutory rights to apply for investigation of the activities of Lietuvos Dujos pursuant to Lithuanian Law.¹²⁹
147. Respondent argues that, in order to understand the conditions under which the negotiations of the 2002 Shareholders Agreement took place, which were the basis for the SHA, it is important to note that the State Property Fund is a public law body whose civil law capacity is limited by authority expressly attributed to it by law. In such capacity, the State Property Fund was not in a position to waive or limit the State's rights under law without obtaining express authorization of

¹²⁸ SoD, ¶ 5.

¹²⁹ SoD, ¶ 20.

the competent controlling institutions. Drafts of the 2002 Shareholders' Agreement had to be approved by the Government of the Republic of Lithuania and were commented in detail by a number of ministries and state institutions. It concludes that the 2002 Shareholders' Agreement was carefully assessed and scrutinized before being agreed and signed.¹³⁰

148. Respondent states that the SHA essentially incorporated the terms and conditions of the 2002 Shareholders' Agreement, which is not contested by Claimant.¹³¹ It was never indicated or discussed that rules other than the normal corporate standards of care and duties under Lithuanian law were to apply to the Board or individual Board members.¹³²
149. Respondent alleges that the SHA contained certain deviations from the default rules of corporate governance of Lithuanian law, which were thoroughly considered before being accepted.¹³³ The hesitation of the State Property Fund to deviate from the Lithuanian Civil Code, as well as the importance of explicitly identifying any such deviations, is reflected in Section 7.8 of the SHA ("Waiver"). This Section emphasizes that no waiver of statutory rights, if even possible, was agreed by the parties. It further notes that the SHA contains a co-called "*entire agreement clause*" in its Section 7.4 which reads as follows: "*this [SHA] constitutes the entire agreement between the parties hereto with respect to matters dealt with therein and supersede any previous agreement between the parties hereto in relation to such matters...*"¹³⁴

(ii) The period 2004-2010

150. Respondent states that prior to the initiation of these proceedings in 2011, the parties to the SHA never made any attempt to invoke the provisions of the SHA as a way to regulate the vertical relationship between the shareholders and Lietuvos Dujos or its management body.¹³⁵

¹³⁰ SoD, ¶ 21.

¹³¹ SoD, ¶ 23.

¹³² SoD, ¶ 25.

¹³³ Respondent's Reply, ¶ 4.

¹³⁴ SoD, ¶ 26.

¹³⁵ SoD, ¶ 27.

(iii)Developments in 2010 onwards

(a) *The implementation of the third gas package*

151. Since early 2010, Lithuania has been engaged in a review of its energy legislation, driven by the requirement to comply with and implement the directive 2009/73/EC of the European Parliament and of the Council 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (the “Gas Directive”). Respondent states that the main purpose of the Gas Directive is to make the European gas markets more competitive, *inter alia*, by requiring energy companies to separate supply and production from transmission activities. At the heart of the Gas Directive lies the concept of “*unbundling*” of the operation of gas pipelines from the business of supplying gas.¹³⁶
152. When the Republic of Lithuania declared its intention to implement the new law providing for ownership unbundling in accordance with the Gas Directive, Gazprom, seeking to safeguard its dominant position in the market, strongly objected. However, the Government of Lithuania, in order to comply with EU law and to protect the public interest, eventually enacted a new law on natural gas providing for ownership unbundling, which came into force on August 1, 2011.¹³⁷

(b) *Gazprom’s decision to reduce its gas price to neighboring countries*

153. Respondent states that at the end of 2010 it was announced by Gazprom that the Republic of Latvia and the Republic of Estonia were to be granted a 15% discount on the gas price in 2011, while the price for the Republic of Lithuania was to remain the same.¹³⁸ According to Russian media, in April 2011 the gas price (per cubic meter) for Latvia was USD 379 and USD 389 for Estonia, whereas Lithuania had to pay USD 448.¹³⁹
154. Even prior to such public announcement, Gazprom made no attempts to hide the fact that such price difference was based on political controversies. On several occasions, representatives of the Gazprom’s management expressly stated that the “*discriminating treatment*” of Lithuania was related to the Lithuanian Government’s decision to implement ownership unbundling in

¹³⁶ SoD, ¶ 30- 31.

¹³⁷ SoD, ¶ 32.

¹³⁸ SoD, ¶ 33; WS of Svedas, para. 10.

¹³⁹ SoD, ¶ 34; **Exhibit R-6**.

accordance with the Gas Directive. Gazprom had officially stated that Lithuania's implementation of such reforms would lead to increases in the gas price for end consumers.¹⁴⁰

155. On January 25, 2011, the European Commission was asked to investigate possible market abuse from Gazprom as a result of the politically motivated price discrimination. Gazprom recently reiterated that it might reduce the gas price for Lithuania, provided that Lithuania would abstain from implementing the Gas Directive.¹⁴¹

(c) The December Board resolution - renewal of the supply contract

156. According to Mr. Svedas, Board member in Lietuvos Dujos appointed by the Ministry at the time, the gas price to be applied between Gazprom and Lietuvos Dujos for the year 2011 was submitted for Board approval at the very last moment. In addition, by letter of December 15, 2011, Mr. Golubev (chairman of the Board), suggested to Mr. Valentukevicius (General Manager), under the heading "*Other questions*" on the Board meeting agenda, that the Board "*vote for the adoption of Addendum No. 52 to the agreement of gas supply to Lithuania about the prolongation of the existing conditions on 2011*". This addition to the agenda was made only two days prior to the voting and Mr. Svedas was only informed about this on the day the voting was to take place, *i.e.* December 17, 2010.¹⁴²

157. On this same day, Mr. Svedas sent a letter to Mr. Valentukevicius requesting additional information, as the resolutions were to be made *in capsulam*, with the effect that there would be no physical meeting at which the issue would be discussed. Mr. Svedas' attention was drawn to the fact that the Addendum No. 52 was signed by Mr. Golubev on behalf of Gazprom, which raised concerns regarding the potential conflicts of interest with respect to Mr. Golubev and whether the Addendum No. 52 had been properly negotiated on behalf of Lietuvos Dujos.

158. As Mr. Svedas' letter remained unanswered, he wrote a new letter to Mr. Golubev on December 27, 2010, which remained unanswered for several weeks.

159. In view of the foregoing, the Ministry had strong reasons to believe that the price agreed on the Gazprom long-term supply agreement was not commercially motivated and that members of the

¹⁴⁰ SoD, ¶ 36; **Exhibit R-7**.

¹⁴¹ SoD, ¶ 36; **Exhibits R-8** and **R-6**.

¹⁴² SoD, ¶ 38.

Board and the General Manager of Lietuvos Dujos were not promoting the best interests of the Company.

(d) The Ministry's decision to initiate Investigation Proceedings

160. Based on its suspicions of improper activities, and in accordance with the Lithuanian Civil Code, the Ministry submitted a notice to Lietuvos Dujos and its management requesting that Lietuvos Dujos “*discontinued its improper activities...*”¹⁴³ As such notice gave no results, the Ministry decided to make use of its statutory right as a minority shareholder to initiate Investigation Proceedings against the Company and its management.¹⁴⁴

(2) The Investigation Proceedings

(i) Fundamental principles of the Investigation Proceedings

161. The right to initiate Investigation Proceedings is laid down in Articles 2.124 to 2.131 of the Lithuanian Civil Code. According to Respondent, the Investigation Proceedings are considered to be of public interest. They are designed for the protection of minority shareholders against unlawful and improper actions taken by the legal entity, its management bodies or members of the management bodies.¹⁴⁵ They are strictly limited to investigating the legal entity, its management bodies or members of the management bodies. Therefore, any shareholder owning no less than 10% of the share capital of a company is entitled to initiate Investigating Proceedings before the Lithuanian courts.¹⁴⁶

162. Respondent states that, within the framework of Investigation Proceedings, it is not possible to investigate the activities of a shareholder who is not a member of the management body, its conduct towards the company or towards other shareholders.¹⁴⁷

163. Furthermore, it alleges that in such proceedings, should the court find that the shareholder's doubt as to the activities of the legal entity may be justified, the court will initiate an investigation. In that case, the court will appoint an independent expert who will be authorized

¹⁴³ SoD, ¶ 41.

¹⁴⁴ SoD, ¶ 42.

¹⁴⁵ SoD, ¶ ¶ 43-44.

¹⁴⁶ SoD, ¶ 46.

¹⁴⁷ SoD, ¶ 48.

to carry out the investigation. The independent expert will be appointed and his/her opinion assessed by the competent court at its discretion. While the parties have the right to make suggestions with respect to suitable experts and remedies to be applied, the court is not bound by any submissions of the parties, but will make its own determination.¹⁴⁸

(ii) Public law nature: Investigation Proceedings differs from ordinary commercial disputes

164. According to Respondent, the following specific features of the Investigation Proceedings differentiate it from ordinary commercial disputes:

- The applicant in the Investigation Proceedings does not have the full burden of proof for the alleged misconduct. The role of the applicant is limited to convincing the court that the management may have acted inappropriately;¹⁴⁹
- In order to facilitate the conduct of the investigation, the court may allow the expert to examine documents and interrogate individuals of legal entities other than the company subject to the proceedings. The court may also engage the police to assist the expert. Respondent highlights that all these measures can be decided *ex officio*;¹⁵⁰
- The court is not bound by the prayers for relief submitted by the applicant. However the remedies available to the court may only be directed against the company which is under investigation. The court is not empowered to amend or disqualify the content of any shareholders' agreement; and
- It is not possible to renounce the right to initiate Investigation Proceedings. Any agreement through which a person purports to waive the right to initiate Investigation Proceedings would be considered null and void.¹⁵¹

¹⁴⁸ SoD, ¶ 49.

¹⁴⁹ SoD, ¶ 50.

¹⁵⁰ SoD, ¶ 51.

¹⁵¹ SoD, ¶ 54.

(iii) Jurisdictional objection dismissed by the Lithuanian Court

165. Respondent states that Mr. Golubev and Mr. Seleznev raised a jurisdictional objection before the Lithuanian court, requesting the court to dismiss the application for the Investigation Proceedings due to the arbitration agreement in the SHA. The court dismissed the objection, concluding that “[t]his case does not originate from contractual relations where, according to the presented [SHA], the shareholders included a commercial arbitration clause.”¹⁵²

(iv) Relief suggested by Respondent to the Lithuanian Court

166. According to Respondent, the Ministry has requested the court to initiate an investigation and proposed remedies in case the court or the expert found that improper acts have been committed. It alleges that the suggested remedies are only directed towards Lietuvos Dujos and that none of the suggested remedies will affect the SHA, as claimed by Gazprom.¹⁵³

167. The remedies suggested by the Ministry, but subject to the discretion of the court, are:

“1.1 to obligate AB Lietuvos Dujos no later than within 1 (one) month as of the effective date of the Court judgment to start negotiations with OAO Gazprom for setting a fair and just purchase price of natural gas and no later than within 3 (three) months as of the effective date of the Court judgment to present the Board of AB Lietuvos Dujos with newly negotiated conditions for purchase of natural gas from OAO Gazprom for approval;

1.2 to obligate AB Lietuvos Dujos to announce information in its annual report about:

1.2.1 income received by AB Lietuvos Dujos from the natural gas transit activities;

1.2.2 expenses incurred by AB Lietuvos Dujos in relation to the natural gas transit activities;

1.2.3 investments performed by AB Lietuvos Dujos in connection with the natural gas transit activities;

1.2.4 the tariff for the natural gas transit services charged during the reporting period, indicating the method (formula) of calculation of this tariff and all its constituent parts;

¹⁵² SoD, ¶ 60.

¹⁵³ SoD, ¶ 62.

1.2.5 the purchasing price which was paid by AB Lietuvos Dujos during the reporting period, indicating the method (formula) of calculation of this price and all its constituent parts;

1.3 to obligate AB Lietuvos Dujos to ensure that the negotiations on the terms of purchase of natural gas, as well as for the conditions of the provision of the natural gas transit service:

1.3.1 be conducted in good faith, seeking the best supply conditions and the lowest supply price and the highest transit service price;

1.3.2 be conducted after getting appropriately prepared for them and after having performed a full analysis before the negotiations, what negotiating argument the representatives of AB Lietuvos Dujos can use in the negotiations;

1.4 to obligate AB Lietuvos Dujos to establish the procedure for adoption of decisions, which would ensure that the conditions for the purchase of natural gas and the conditions of provision of the natural gas transit services agreed by way of good faith negotiations be approved by a decision of the Board of AB Lietuvos Dujos no later than on 30 November of each year and in approval of such conditions the following information and documents be obligatorily presented to the Board of AB Lietuvos Dujos:

1.4.1 indicate which actions were carried out by the representatives of AB Lietuvos Dujos during negotiations for the conditions of the purchase of natural gas and the conditions of providing the natural gas transit service, what arguments were prepared to be used in the negotiations;

1.4.2 the reasons why the conditions of the purchase of natural gas and the conditions of providing the natural gas transit service, as presented for approval, are to be regarded the best conditions AB Lietuvos Dujos could negotiate;

1.4.3 a written confirmation by the head of AB Lietuvos Dujos that the conditions presented for approval were set by way of good faith negotiations and that the conditions presented for approval are in accordance with the conditions in the market taking into account the volumes of natural gas transmitted by transit and the substitutability of the Company's services;

1.5 to obligate AB Lietuvos Dujos to prepare and approve effective rules for avoiding conflicts of interest that would be in accordance with the international practices;

1.6 to impose other measures of impact indicated in paragraph 1 of Article 2.131 of the Civil Code, which, in the opinion of the court, would allow to ensure proper activities of AB Lietuvos Dujos and its Management Bodies (the Board and the head).”¹⁵⁴

(3) The Ministry has not breached the arbitration agreement by initiating the Investigating Proceedings

(a) Interpretation of Swedish case law

168. Respondent alleges that Gazprom has misunderstood how to read and interpret case law from the Swedish Supreme Court. It states that the Supreme Court only grants leave to try a case if it involves issues of general interest and there is a need to establish a precedent. The relevance of the Supreme Court decision is not limited to the specific facts of the particular case as Gazprom seems to be suggesting. A Supreme Court decision establishes a precedent as a general principle, unless the field of application has been explicitly limited by the court in its reasons, or by a subsequent decision. The attempt by Gazprom to distinguish on the facts the cases relied on by the Ministry is therefore not helpful to Gazprom’s case.¹⁵⁵

(b) The Investigation Proceedings involve different parties not bound by the arbitration agreement in the SHA

169. The Ministry does not deny that it agreed to arbitrate disputes under the SHA with Gazprom and Ruhrgas, and that it was not going to bring such disputes before the Lithuanian courts. It says that it has not done so.¹⁵⁶

170. According to Respondent, Gazprom confirmed that it is not part of its case that Lietuvos Dujos, or its management, is bound by the arbitration agreement in the SHA. Gazprom makes reference to the test of arbitrability under Swedish law, good faith and Bermudan case law, none of which is relevant for the determination of whether the Investigation Proceedings fall outside the arbitration agreement already because the parties are different.¹⁵⁷

¹⁵⁴ SoD, ¶ 61.

¹⁵⁵ Respondent’s Rejoinder, ¶ 26.

¹⁵⁶ Respondent’s Rejoinder, ¶ 6.

¹⁵⁷ Respondent’s Rejoinder, ¶ 28.

171. It alleges that the core of Gazprom’s argument is at paragraph 79 of its Reply, where Gazprom argues that “[b]ecause the dispute pending in Lithuanian courts is in substance one between the Ministry and Gazprom, the Ministry’s arguments that an arbitration clause is only binding on its signatories is of no help to the Ministry’s case”. Respondent contends that the only relevant argument brought up by Gazprom is that the determination under Swedish law of whether a court procedure (between certain parties) falls under an arbitration agreement (between other parties), should be based on whether there is a dispute “*in substance*” between the latter parties.¹⁵⁸ It further alleges that there is no support in Swedish law for such an argument, as Swedish law does not accept that a court disregards the designated parties and instead bases its assessment on such vague criteria. Respondent states that even if the use of such a vague test was accepted, there is no dispute “*in substance*” between the Ministry and Gazprom.¹⁵⁹
172. Respondent further alleges that Swedish law bases the determination of whether or not a certain dispute falls within an arbitration agreement on the identity of the parties or on how the claims have been formulated for a number of good reasons. It then mentions that a court decision (or an arbitral award) only has *res judicata* effect with respect to the formally designated parties to the proceedings.¹⁶⁰
173. Respondent relies on the SWEMAB case to point out that Swedish courts have already dismissed precisely the type of “*in substance*” arguments put forward by Gazprom in this arbitration, and based their decision on the conclusion that the arbitration agreement did not cover the disputes with third parties.¹⁶¹

(c) The Investigation Proceedings concern a different cause of action and therefore a legal relationship other than the one specified in the arbitration agreement in the SHA

174. Respondent alleges that, even if the parties would have been the same, under Swedish law an arbitration agreement cannot be extended to disputes that concern legal relationships other than the one identified in the arbitration agreement.¹⁶²

¹⁵⁸ Respondent’s Rejoinder, ¶ 30.

¹⁵⁹ Respondent’s Rejoinder, ¶ 30.

¹⁶⁰ Respondent’s Rejoinder, ¶ 31.

¹⁶¹ Respondent’s Rejoinder, ¶ 32.

¹⁶² Respondent’s Rejoinder, ¶ 33.

175. The Investigation Proceedings not only involve other parties, but are also based on the Lithuanian Civil Code and concern an investigation of the activities of Lietuvos Dujos and fiduciary duties of its management. This is a cause of action which concerns a legal relationship completely different from that identified in the arbitration agreement in the SHA.¹⁶³ Respondent's concern when initiating the Investigation Proceedings was a breach of fiduciary duties by Mr. Golubev, Mr. Seleznev and Mr. Valentukevicius, which is related to the public interest. This is because the fiduciary obligations owed by members of management to the company are for the benefit of, *inter alia*, the company, its shareholders, creditors of the company, employees and consumers.¹⁶⁴
176. Contrary to Gazprom's allegation, Respondent argues that it is well established by several court decisions that the legal relationship is indeed defined by how the claim is formulated.¹⁶⁵ The decisive factor is the legal basis invoked in support of the prayers for relief, and not primarily the prayers for relief.¹⁶⁶
177. Under Swedish law, a party is at liberty to frame its claim as it deems fit, and thereby determine the legal relationship forming the basis of a claim.¹⁶⁷ Respondent relies on the *Ulla Folgerö* case¹⁶⁸ in support of this argument. It alleges that, since the claimant in that case had formulated a claim as an action under the Swedish Company Act (personal liability for Board members), the court found that the claim was not based on the shareholders' agreement concluded by the parties, including the arbitration clause. Respondent concludes that the legal basis relied on by claimant was thus non-contractual and for this reason the court found that the arbitration agreement was not applicable.
178. Respondent argues that Gazprom's interpretation of the *Tupperware* case¹⁶⁹ is inconsistent with Swedish law. In the *Tupperware* case the Supreme Court explicitly confirmed the general principle that even though a legal relationship defined in an arbitration (or prorogation clause)

¹⁶³ Respondent's Rejoinder, ¶ 33.

¹⁶⁴ Transcripts of the Hearing, Day 2, pp. 48-49.

¹⁶⁵ Respondent's Rejoinder, ¶ 35.

¹⁶⁶ Respondent's Rejoinder, ¶ 35.

¹⁶⁷ Respondent's Rejoinder, ¶ 35.

¹⁶⁸ **Exhibit C-114** or **R-25**.

¹⁶⁹ **Exhibit C-144** or **R-23**.

might be related to another legal relationship invoked by one of the parties, an arbitration agreement cannot be extended so as also to cover this related legal relationship.¹⁷⁰

179. Respondent also relies on the *Carmeuse* case, to illustrate that a contractual relationship based on a shareholders' agreement, which is binding on the parties, is a legal relationship separate from a legal relationship based on company law which is binding on the company and its organs.¹⁷¹ Respondent further relies on the *Esselte Dymo* case to show the strict demarcation between non-contractual and contractual claims.¹⁷²
180. According to Respondent, the *Sandpit* case relied on by Gazprom is not applicable to this case, *inter alia* because in that case there was undisputedly a binding arbitration clause between the parties to the dispute. It also mentions that the case was heavily criticized when first rendered.¹⁷³
181. Finally, Respondent highlights that on the recent *Xcaret* case,¹⁷⁴ the Supreme Court confirmed that: (i) an arbitration agreement only covers the legal relationship specified in the agreement; and (ii) it is the legal basis relied upon by the claimant that determines which legal relationship the claim concerns and, thus, the applicability of any arbitration agreement.¹⁷⁵

(d) Exclusive jurisdiction of the Lithuanian courts

182. It is Respondent's position that the Lithuanian courts have exclusive jurisdiction to hear applications for Investigation Proceedings, which means that, even had the parties been the same and the dispute deemed to be "*in connection*" with the SHA, this does not constitute a bar to initiating the Investigation Proceedings.¹⁷⁶
183. Furthermore, Respondent alleges that under Lithuanian law it is not possible to validly waive the right to initiate investigation proceedings. Pursuant to Article 5, Section 2 of the Lithuanian Code of Civil Procedure, the waiver of the right to apply to court is null and void. In addition,

¹⁷⁰ Respondent's Rejoinder, ¶ 39.

¹⁷¹ Respondent's Rejoinder, ¶ 42.

¹⁷² Respondent's Rejoinder, ¶ 44.

¹⁷³ Respondent's Rejoinder, ¶ 47.

¹⁷⁴ **Exhibit R-107.**

¹⁷⁵ Respondent's Rejoinder, ¶ 50.

¹⁷⁶ Respondent's Rejoinder, ¶ 51; SoD, ¶ 90; Prof. Heuman's Expert Opinion, ¶ 24.

Article 2.6 of the Civil Code provides that restriction of legal capacity, term which also covers contractual waiver of rights, may only be imposed by explicit provision of law.¹⁷⁷

(e) The Investigation Proceedings are a special type of proceedings concerning public interest

184. Respondent alleges that the Investigating Proceedings display a number of features of a public law nature, for example:

- The fact that the procedure entails an assessment of the management's statutory duties, which are fiduciary in nature, cannot under Lithuanian law be excluded or modified by the shareholders through contract;¹⁷⁸ and
- The fact that the Investigation Proceedings are designed not only to protect the interests of minority shareholders, but also the broader public interest of all stakeholders of a company.¹⁷⁹

185. Respondent concludes that the protection of the interest of gas consumers of Lietuvos Dujos is likely to be regarded as public interest under the Lithuanian Civil Code.¹⁸⁰

(f) Could the Investigation Proceedings be conducted by an arbitral tribunal under the SHA?

186. Respondent maintains that it would not have been possible for a tribunal constituted under the arbitration agreement in the SHA to decide and carry out an investigation of Lietuvos Dujos and its management pursuant to the Lithuanian Civil Code. This is not only because the parties to the proceedings are different, but also due to the fact that a tribunal would not have the authority under the arbitration agreement to exercise the *ex officio* powers vested with the court in Investigation Proceedings. Nor would the Tribunal have the authority to apply the remedies available to the court under the Lithuanian Civil Code, such as to order the liquidation of the company.¹⁸¹

¹⁷⁷ Transcript of the Hearing, Day 2,75: 18-21.

¹⁷⁸ Respondent's Rejoinder, ¶ 54.

¹⁷⁹ Respondent's Rejoinder, ¶ 55.

¹⁸⁰ Respondent's Rejoinder, ¶ 57.

¹⁸¹ Respondent's Rejoinder, ¶ 58.

187. Even if there were certain provisions in the SHA which would have given Respondent a possibility to redress its concern under the SHA, Respondent has no obligation to do so.¹⁸² It alleges that neither the arbitration clause nor the SHA precludes the Ministry from choosing to redress its concerns regarding fiduciary duties before the Lithuanian courts.¹⁸³ In any event, Respondent would not have a practical choice to start arbitration against Gazprom, unless it created formal basis for a claim.¹⁸⁴

(4) The Ministry has not breached the SHA by initiating the Investigation Proceedings

188. Respondent points out that in its SoD, it requested Claimant to clarify its claim for breach of the SHA. It states that the relief sought by Gazprom does not contain any reference to a breach of the SHA, but only a breach to the arbitration agreement in the SHA.

189. Respondent alleges that Gazprom's references in its Reply that Respondent breached "*key provisions on governance of the Company set forth in the Shareholders' Agreement*" and its reference to Part IV A.4 and Part IV A.1-2 of its SoC does not clarify Gazprom's claim.

190. In any case, Respondent states that it has not breached any of the provisions of the SHA. Even had Respondent breached any provision of the SHA, the remedy available to Gazprom would be limited to seeking damages for breach of contract. The specific performance request to withdraw an action before the Vilnius Court is not a remedy for such a breach. Therefore, there is no causal link between the alleged breach and the remedy sought. Respondent concludes that Gazprom seems to agree with this position, as it has not linked any of its prayers for relief to the alleged breach of the SHA.¹⁸⁵

(5) Response to Gazprom's claim for damages and specific performance

191. Gazprom has requested that the Tribunal order the Ministry to withdraw its application in the Investigation Proceedings. The request assumes that the Investigation Proceedings are covered by the arbitration agreement in the SHA, which is not the case. The Tribunal, therefore, does not have jurisdiction to order specific performance. Even if the Tribunal had jurisdiction, there is no

¹⁸² Transcript of the Hearing, Day 2, 59: 21-25; 60: 1-2.

¹⁸³ Transcript of the Hearing, Day 2, 60: 25; 61: 1-3.

¹⁸⁴ Transcript of the Hearing Day 2, 66: 10-12.

¹⁸⁵ Respondent's Rejoinder, ¶ 63.

legal basis for any specific performance order, as no corresponding obligation, neither under the arbitration agreement nor under the SHA, has been breached.¹⁸⁶

192. As regards Gazprom's claim for damages, Respondent alleges that Gazprom incorrectly stated in its Reply that the Ministry does not dispute Gazprom's payment of the invoices, or its calculation of damages. Respondent clarifies that it has already stated in its SoD that no amounts were admitted. Respondent rejects Gazprom's claim on quantum in its entirety.¹⁸⁷
193. Respondent alleges that costs incurred by third parties in local court proceedings can and should be claimed as part of those proceedings. As the Investigation Proceedings are still pending, the alleged loss has at any rate not yet matured.¹⁸⁸
194. Furthermore, Respondent alleges that the evidence provided by Gazprom regarding its damages is remarkably poor. Respondent cites, for example, Exhibit C-148, which is a list of costs that Gazprom alleges to have incurred during the investigation proceedings on behalf of Mr. Golubev and Mr. Seleznev. It argues that it is impossible to see from this list what measures were taken, and points out that no supporting document is provided. There is not a single invoice or any other evidence that these costs have actually been paid. Respondent further notes that a substantial amount on this list refers to costs allegedly paid to Salans, while Salans is not acting as counsel in the Investigation Proceedings.¹⁸⁹
195. Respondent also refers to Exhibit C-147, which it describes as a letter produced for the purposes of this arbitration and suggests that Lietuvos Dujos has incurred certain costs. In order for Gazprom to be successful, it has to demonstrate that its income was affected, which it has not done. Respondent alleges that, just because the Company has incurred costs, this does not mean that its shareholders will receive lesser dividends, for instance. Respondent concludes that the costs for which Gazprom is seeking compensation are attributable to third parties.¹⁹⁰

¹⁸⁶ SoD, ¶ 97.

¹⁸⁷ Respondent's Rejoinder, ¶ 65.

¹⁸⁸ SoD, ¶ 99.

¹⁸⁹ Transcript of the Hearing, Day 2, 81: 19-24.

¹⁹⁰ Transcript of the Hearing, Day 2, 83: 17-18.

(6) Respondent's Request for Relief

196. In its last submission, Respondent requests that the Arbitral Tribunal:¹⁹¹

“(i) dismiss Gazprom’s prayer for an order for ‘such relief as the Tribunal may deem just and proper’;

(ii) dismiss due to lack of jurisdiction Gazprom’s prayer for an order that the Ministry withdraws its application in the Investigation Proceedings, or alternatively, to reject this prayer on the merits;

(iii) reject all other claims by Gazprom in their entirety;

(iv) order Gazprom to compensate the Ministry for its costs of arbitration and the Emergency Arbitration proceedings together with interest thereon at a rate determined according to Section 6 of the Swedish Interest Act from the date of the Award until the date of full and final payment; and

(v) order Gazprom alone to bear the fees and expenses of the arbitrators and the SCC.”

V. THE TRIBUNAL'S DECISION

197. The arbitration clause of the SHA is provided in its Article 7.1, which reads as follows:

“Any claim, dispute or contravention in connection with this Agreement, or its breach, validity, effect or termination, shall be finally settled by arbitration in accordance with the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. The place of arbitration shall be Stockholm, Sweden, the number of arbitrators shall be three (all to be appointed by the Arbitration Institute) and the language of arbitration shall be English.”

198. It is common ground between the Parties that the obligation to submit disputes to arbitration includes the duty not to submit such disputes to State Courts. This is the so-called negative effect of the arbitration clause, which is reflected in Section 4 of the Swedish Arbitration Act, pursuant to which *“a court may not, over an objection of a party, rule on an issue which, pursuant to an arbitration agreement, shall be decided by arbitrators.”* Article 10 of the Law on

¹⁹¹ Respondent's Rejoinder, p. 28.

Commercial Arbitration of the Republic of Lithuania leads to the same conclusion, as it requires a court to decline to hear a dispute subject to an arbitration agreement.

199. Likewise, it is common ground that bringing disputes which fall under the scope of an arbitration clause before State Courts constitutes a breach of such arbitration clause, and that an arbitral tribunal has jurisdiction to find that such a breach has occurred and to draw the legal consequences arising therefrom.
200. What is in dispute in the present case is whether an application for Investigation Proceedings before the Lithuanian Court, pursuant to article 2.124 of the Lithuanian Civil Code, amounts to bringing to State Courts a dispute which falls within the scope of Article 7.14 of the SHA. This is the first issue to be decided by the Arbitral Tribunal (1). Then, if the answer is in the affirmative, the Arbitral Tribunal has to find whether the actual applications filed by Respondent before the Lithuanian Court are such disputes falling within the scope of Article 7.14 of the SHA (2) and, if so, whether Claimant is entitled to specific performance of the arbitration clause (3) and/or damages (4). Finally, the Arbitral Tribunal has to allocate the costs of these arbitration proceedings between the Parties (5).

(1) Does the application for Investigation Proceedings pursuant to Article 2.124 of the Lithuanian Civil Code constitute a breach of the arbitration clause of the SHA?

201. According to Article 2.124 of the Lithuanian Civil Code, several categories of persons, including any shareholder who holds shares amounting to no less than 1/10 of the authorized capital of a company, and the Public Prosecutor, are entitled to “*request the court to appoint experts who have to investigate whether a legal person or, legal person’s managing bodies or their members, acted in proper way, and in the event that improper actions are established, to apply measures specified in Article 2.131 of the given code [Lithuanian Civil Code]*”.
202. The measures specified in Article 2.131 of the Lithuanian Civil Code are very broad. Pursuant to this provision, the Court may, *inter alia*:
- 1) Revoke the decisions taken by the legal person’s managing bodies;
 - 2) Suspend temporarily the powers of the members of the legal person’s managing bodies or exclude a person from the legal person’s managing body;
 - 3) Appoint provisional members to the legal person’s managing bodies;
 - 4) Authorize the non-implementation of certain provisions of the incorporation documents;

- 5) Require the amendment of certain provisions of the incorporation documents;
- 6) Transfer to other persons the legal person's right to vote;
- 7) Require a legal person to perform or not to perform certain actions; and
- 8) Liquidate a legal person and appoint the liquidator.

203. At first glance, one might conclude that there is no relation whatsoever between the arbitration clause of the SHA and an application for Investigation Proceedings under Article 2.124 of the Lithuanian Civil Code. The former covers disputes between shareholders. The latter contemplates an action opened to several categories of persons, including (but not limited to) shareholders holding at least 1/10 of the authorized capital, in order to obtain that the company, its managing bodies or their members, be investigated by a court expert, and that appropriate measures be taken by the court in case it concludes that improper actions occurred.

204. As pointed out by Professor Mikelénas, an expert proffered by Claimant, *“the aim of the Investigative Proceedings is to grant legal measures to the shareholders of a company in order to allow them to assess whether the company is managed according to the governing principles of the company established by the law, whether there have been a misconduct in the management of the company and whether the company is managed for the benefit of all the shareholders.”*¹⁹² Professor Mikelénas adds that *“there are three possible areas of investigations: actions and activities of the legal person, actions and activities of the management of the legal person and actions and activities of the members of management body of the legal person.”*¹⁹³

205. A shareholder who is not part of the management body cannot be investigated, according to Dr. Norkus, an expert proffered by Respondent, a view shared by Professor Mikelénas.¹⁹⁴ Consequently, when an application for Investigation Proceedings under article 2.214 of the Lithuanian Civil Code is made by one shareholder, it is not the actions of other shareholders as such which are to be investigated, but the actions of the company itself, its governing bodies or members of its governing bodies. The actions of a shareholder that is not part of the governing bodies, even if it has the right to appoint members of the governing bodies, cannot be investigated in such proceedings.

¹⁹² Prof. Mikelénas' Expert Opinion of December 23, 2011, at n°7 p. 4. . Dr. Norkus, an expert proffered by Respondent expresses a similar opinion at n° 23-24, pp. 8-9 of his expert opinion of February 13, 2012.

¹⁹³ Prof. Mikelénas, *op. cit.* p. 5. As a matter of fact Prof. Mikelénas points out such similarity of views in his opinion of March 15, 2012, at n° 5 p.4

¹⁹⁴ Dr. Norkus, expert opinion of February 13, 2012 at n° 55, p. 19. Prof. Mikelénas, at n° 30, p. 10 of his opinion of March 15, 2012.

206. The object of the investigation is not whether the provisions of a shareholders' agreement, if any, have been respected by the other shareholders. The remedies available to the judge are not those afforded in case of contractual breach, pursuant to the law applicable to the shareholders' agreement. The obligations at stake are not those defined by any shareholders' agreement, but the legal fiduciary duty owed by any member of a managing body to a company, including the duty to act fairly, prudently and loyally towards the company. It is noteworthy that there is apparently no fundamental disagreement on that issue between Prof. Mikelénas and Dr. Norkus.¹⁹⁵ The only divergences between the two experts are (i) whether the duty of loyalty could be an arbitrable issue, and (ii) whether the management body of a company should act only in the interest of the company or also in the interest of the shareholders.
207. Irrespective of the answer to be given to those disputed questions, it remains that the obligations at stake in the Investigation Proceedings, whatever their scope and their arbitrability, are duties resulting from the law and not defined by a contractual agreement between shareholders.
208. To sum up on this point, the applicant to the Investigation Proceedings and the person to be investigated may be shareholders, but the legal relationship involved in the Investigation is not grounded in the shareholders' agreement to which they are parties. To use the terminology rightly used by Counsel for Respondent, the legal relationship at stake in the Investigation Proceedings is on a vertical level (i.e. between a shareholder on the one hand, and the company and/or its officers and managers on the other hand), while the contractual legal relationship in a shareholders' agreement is on a horizontal level (i.e. between shareholders of equal rights).¹⁹⁶
209. On the basis of the above observations, it seems that the application for Investigation Proceedings under Article 2.214 of the Lithuanian Civil Code could never result in the breach of an arbitration clause included in a shareholders' agreement. However, this may be a superficial view, and Claimant submits several contrary arguments in the instant case.
210. Claimant first stresses that in this case the arbitration clause is very broad and covers "*Any claim, dispute or contravention in connection with this Agreement, or its breach, validity, effect or termination...*" Thus, there would be a breach of the arbitration clause should it be found that the dispute brought by the Respondent before the Lithuanian Court is "*in connection with*" the SHA.

¹⁹⁵ See Dr. Norkus' expert opinion of February 13, 2012 at n° 44-51 and Prof. Mikelénas' expert opinion of March 15, 2012 at n° 26-29, pp.9-10.

¹⁹⁶ Transcript, Day 2, 118: 1-5.

211. Moreover, Claimant points out that an arbitration agreement must be performed in good faith and a party may not attempt to circumvent it through the artifice of adding non-party entities to a court claim that is, in substance, a dispute falling within the arbitration agreement.¹⁹⁷ Claimant states that Respondent initiated the court proceedings against Gazprom’s nominees, rather than Gazprom itself, for the sole purpose of attempting to circumvent the arbitration clause in the SHA.¹⁹⁸ It underscores that Respondent requests the Lithuanian Court to apply measures that are directly regulated by the SHA, such as the removal of the Board members nominated by Gazprom.¹⁹⁹ Claimant alleges that during the negotiation period of the SHA, Respondent never suggested that the arbitration agreement be limited and never reserved the right to submit certain disputes to its domestic courts, including investigative proceedings, as confirmed by Mr. Eidukevicius in his witness statement.²⁰⁰
212. Under these circumstances, Claimant alleges that it cannot be assumed that the Parties intended to exclude from arbitration the type of dispute currently pending before the Vilnius Court.²⁰¹ If there were any doubt in this respect, the principle of interpretation *contra proferentem* finds application to support the Claimant’s views, given that the drafters of the SHA were the State Property Fund and its successor, the Ministry of Energy.²⁰²
213. In addition, Claimant submits that the statement in Section 7.8 of the SHA (“*Waiver*”) that “*The rights or remedies provided in this Agreement are cumulative and not exclusive of any rights or remedies otherwise provided by law*” can be only viewed as emphasizing the authority of the arbitrators to order all available remedies, whether set out in the SHA or by the applicable law.²⁰³
214. The Arbitral Tribunal finds the above arguments of the Claimant have unequal value. The reference to Section 7.8 of the SHA is of no avail as it begs the question submitted to the Arbitral Tribunal. Although Claimant is right when it stresses that this Section confirms the authority of the arbitrators to order all the remedies available at law, and not only those existing under the SHA, the arbitrators do not have such authority if the application for Investigation Proceedings

¹⁹⁷ Claimant’s Reply, ¶ 75.

¹⁹⁸ Claimant’s Reply, ¶ 77.

¹⁹⁹ Claimant’s Reply, ¶ 80; **Exhibit C-141**.

²⁰⁰ SoC, ¶124 ; Claimant’s Reply, ¶ 20 ; Eidukevicius WS, para. 8.

²⁰¹ SoC, ¶125.

²⁰² Claimant’s Reply, ¶ 26.

²⁰³ Claimant’s Reply, ¶ 26. Respondent draws the opposite conclusion that this Section emphasizes that no waiver of statutory rights, if even possible, was agreed by the parties, in SoD, ¶26.

does not fall within the scope of the arbitration clause, which is the issue to be decided in these proceedings.

215. Likewise, Mr. Eidukevicius' witness statement and the *contra proferentem* principle of interpretation do not help Claimant. Assuming that the parties never had the intent to exclude from the scope of the arbitration clause any type of dispute covered by this clause - an assumption that the Arbitral Tribunal has no difficulty to make in light of the wording of the arbitration clause - the issue whether the application for Investigation Proceedings amounts to such a dispute remains to be decided.
216. The Arbitral Tribunal is satisfied that two of Claimant's arguments deserve particular consideration.
217. First, it cannot be seriously disputed that the scope of the arbitration clause of the SHA is especially broad. The reference to "*Any claim, dispute or contravention in connection with this Agreement, or its breach, validity, effect or termination...*" is a clear expression of the intent of the Parties that all disputes between them in connection with the SHA are to be resolved by arbitration, be those disputes contractual or non-contractual. The *Ulla Folgerö* case,²⁰⁴ referred to by Respondent in support of its argument that a non-contractual dispute falls outside of the scope of the arbitration clause, is not relevant to the matters at hand. In that case, the claimant had initiated an action under the Swedish Company Act (personal liability for board members not as shareholder), a legal basis unconnected to the obligations of the shareholders' agreement between the parties, which contained the arbitration clause. Moreover, Ms. Folgero was allowed to pursue her court action because her claims pertained to fraudulent acts that occurred prior to the entry into force of the relevant shareholders' agreement. For this reason, her claims were not covered by the arbitration clause contained in the shareholders' agreement.
218. Second, the Arbitral Tribunal is also satisfied that good faith does not allow a party to an arbitration agreement to resort to legal artifice in order to circumvent it and submit to a State Court a dispute the substance of which falls within the scope of the arbitration clause. Good faith is not foreign to Swedish law and there is authority to the effect that "*a party which enters*

²⁰⁴ Exhibit C-114 or R-25.

*into an arbitration agreement should have a far-reaching duty to act loyally with the contents of the agreement.”*²⁰⁵

219. Reference to good faith in this case leads the Arbitral Tribunal to find that when a shareholder signs an arbitration agreement included in a shareholders’ agreement, it undertakes to resort to arbitration to resolve all the disputes between the shareholders relating to or, as pointed out in the arbitration clause at issue in this arbitration, “*in connection*” with the shareholders’ agreement. As a consequence, a shareholder using the Investigation Proceedings against another shareholder to enforce its rights under the shareholders’ agreement would breach its obligation to perform the arbitration clause in good faith.
220. However, this does not mean that, by entering into the arbitration clause, the parties to the SHA undertook not to resort to Investigation Proceedings, pursuant to Article 1.124 of the Lithuanian Civil Code, as the Claimant seems to imply. For an application for Investigation Proceedings to constitute a breach of the arbitration clause, two cumulative conditions must be met.
221. The first is that the petitioner requests a relief that could modify the SHA or affect the rights of the shareholders under the SHA, which is the realm of the arbitration clause. The second is that the party requesting the Investigation could have obtained in arbitral proceedings, pursuant to the arbitration clause of the SHA, the relief it is seeking through the Investigation. If it could not so obtain through arbitration proceedings the relief it pursues in the Investigation Proceedings, it cannot be the case that the Investigation circumvents the arbitration clause agreed upon by the shareholders.
222. In order for the Tribunal to make a determination in this respect, the substance of the dispute submitted before the Lithuanian Court has to be taken into consideration, as suggested by Claimant. However, contrary to Claimant’s view, the Tribunal considers that the identity of the parties may not be ignored or conflated, although the Respondent’s reference to the SWEMAB case, in support of its contention that an arbitration agreement did not cover disputes with third parties, is misplaced.²⁰⁶ The question is not whether arbitration may be brought against third parties, but whether requesting the investigation of third parties will necessarily jeopardize the rights of other shareholders under the SHA.

²⁰⁵ Lindskog, Skijeforfarande. En Kommentar, 2006, p. 127 (**Exhibit C-122**). Although it is not applicable to this case, it is worth recalling that article 1.5 (1) of the Lithuanian Civil Code requires the parties to perform their duties according to the principles of justice, reasonableness and good faith (**Exhibit C-110**).

²⁰⁶ Respondent’s Rejoinder, ¶ 32.

223. Respondent's argument with respect to the alleged exclusive jurisdiction of the Lithuanian courts to decide on Investigation Proceedings is not relevant to the present case. Indeed, if a request is within the exclusive jurisdiction of the Lithuanian courts, filing such request does not circumvent the arbitration clause, because the remedies sought could not be obtained through arbitration. The issue that the Tribunal has to consider is that of remedies requested before the State court that are obtainable through arbitration. *Mutatis mutandis*, the same observation applies to the Parties' discussion relating to the arbitrability of the issues in front of the Lithuanian Court and to the public interest involved therein.
224. On the above basis, the Arbitral Tribunal is satisfied that an application before the Lithuanian courts for investigation pursuant to article 2.124 of the Lithuanian Civil Code may in principle, under the two aforementioned conditions, amount to bringing to Lithuanian State Court a dispute which falls within the scope of Article 7.14 of the SHA, and therefore constitutes a breach thereof. Consequently, the Arbitral Tribunal must decide whether such was the case for the actual applications filed by Respondent.

(2) Did the applications filed by Respondent breach the arbitration clause of the SHA?

225. Respondent alleges that the remedies requested before the Lithuanian State Court are directed solely towards Lietuvos Dujos, two of its managing members and its CEO, and that none of the remedies would affect the SHA. This is contested by Gazprom. The Tribunal therefore has to analyze whether any of the remedies requested by Respondent before the Lithuanian Court could affect the shareholders' rights and obligations under the SHA, and whether such remedies could have been obtained by resorting to arbitration pursuant to the SHA.
226. As stated above, on March 25, 2011, Respondent filed its Initial Claim²⁰⁷ before a Lithuanian Court requesting appointment of experts to investigate whether the members of the Company's governing bodies and the Company's CEO acted appropriately and, if the Court concludes that they acted inappropriately, to apply certain measures provided under Article 2.31 of the Lithuanian Civil Code.
227. Subsequently, on December 9, 2011, Respondent filed its Revised Claim, whereby it reformulated its request for relief submitted in the Initial Claim, alleging that there was a risk that some of the sanctions specified therein, by the time the judgment entered into force, might

²⁰⁷ See **Exhibit C-14**, Respondent's Initial Claim, dated March 25, 2011.

be inapplicable due to a change of circumstances. For instance, the term of office of the members of the governing bodies of the Company will expire in 2013. In light of this, Respondent “*without changing its position regarding the merits of the claim, without abandoning or narrowing the requests raised [in the Initial Claim], for the sake of economy and expedition of the process, reformulates and simplifies the proposal presented in the [Initial Claim regarding the sanctions, at this point in time specifying exclusively such sanction that may be implemented independently of the time the judgement enters into force]*”.²⁰⁸

228. The Tribunal therefore first analyses below the relief sought by Respondent in the Initial Claim, comparing it to the provisions of the SHA, in order to determine whether such relief, if granted, would necessarily jeopardize rights and obligations under the SHA, and whether it was available through arbitration proceedings (i). This will be followed by the same analysis with respect to the Revised Claim (ii).

(i) Initial Claim vs. Arbitration Clause

229. The remedies requested by the Ministry in its Initial Claim before the Lithuanian Court are as follows:

“[...] Plaintiff hereby is requesting the Court:

1. *To initiate the investigation of the activity of AB Lietuvos Dujos (identification number 120059523, the address of the registered office: Aguonu St. 24, Vilnius), and, if it will be proved that the activity of AB Lietuvos Dujos and / or the members of its governing bodies Valery Golubev, the date of birth: 14 June 1952, Kirill Seleznev, the date of birth: 23 April 1974, and / or Viktoras Valentukevičius, personal identification number 35410170018, is inappropriate:*

1.1. *To dismiss the aforementioned persons from their positions in the governing bodies of AB Lietuvos Dujos – to dismiss Valery Golubev, the date of birth: 14 June 1952, from the position in the Company’s Board, to dismiss Kirill Seleznev, the date of birth: 23 April 1974, from the position in the Company’s Board, and to dismiss Viktoras Valentukevičius, personal identification number: 35410170018, from the position of the Company’s CEO;*

1.2. *Prior to the first meeting of the Company’s Board which would be attended by the new members of the Board elected by the general meeting of AB Lietuvos Dujos instead of the Members of the Board dismissed by the Court, to temporarily appoint the person nominated by the Plaintiff, whose candidature will be presented to the Court prior to proceeding with the consideration of the case **per se**, to the position of the Company’s CEO;*

²⁰⁸ Exhibit C-52, p. 18.

- 1.3. *To obligate AB Lietuvos Dujos, no later than within 1 (one) month of the date of validation of the Court judgement, to initiate negotiations with OAO Gazprom on setting a fair and correct price for the purchase of natural gas and, no later than within 3 (three) months of the date of validation of the Court judgement, to submit to the Board of AB Lietuvos Dujos for approval the new terms on the purchase of natural gas from OAO Gazprom agreed upon through negotiations;*
- 1.4. *To obligate AB Lietuvos Dujos to announce in its annual report information about:*
 - 1.4.1. *The revenue received by AB Lietuvos Dujos from the natural gas transit activity;*
 - 1.4.2. *The expenses connected with the natural gas transit activity, which are borne by AB Lietuvos Dujos;*
 - 1.4.3. *The investments connected with the natural gas transit activity, which are implemented by AB Lietuvos Dujos;*
 - 1.4.4. *The tariff of gas transit services applied for the reporting period, indicating the methodology (formula) for the calculation of this tariff and all component elements;*
 - 1.4.5. *The price for the purchase of natural gas, which was paid by AB Lietuvos Dujos for the reporting period, indicating the methodology (formula) for the calculation of this price and all component elements;*
- 1.5. *To obligate AB Lietuvos Dujos to secure that negotiations on the terms of purchase of natural gas and the terms of rendering the natural gas transit service:*
 - 1.5.1. *Would be conducted in good faith, aiming at the best terms of supply and the least supply price and the highest transit service price;*
 - 1.5.2. *Would be conducted after duly preparing for these negotiations and, prior to negotiations, analyzing in detail what arguments may be used by the representatives of AB Lietuvos Dujos during negotiations;*
- 1.6. *To obligate AB Lietuvos Dujos to establish the procedure for the adoption of resolutions which would secure that the terms of purchase of natural gas and the terms of rendering the natural gas transit service agreed upon through fair negotiations are to be adopted by the resolution of the Board of AB Lietuvos Dujos no later than on 30 November of each year and that to adopt these terms the Company's Board must be provided with the following information and documents:*
 - 1.6.1. *Indicating which actions were carried out by the representatives of AB Lietuvos Dujos during negotiations on the terms of purchase of natural gas and the terms of rendering the transit service, what arguments were prepared for negotiations;*
 - 1.6.2. *Indicating why the terms of purchase of natural gas and the terms of rendering the transit service presented for adoption should be considered as the best possible terms for AB Lietuvos Dujos that could be achieved through negotiations;*
 - 1.6.3. *The written confirmation of the CEO of AB Lietuvos Dujos that the terms that are being submitted for approval have been set through fair negotiations and that the terms that are being submitted for approval are in line with the market conditions taking into*

account the volumes of gas transported by transit and the possibilities of replaceability of services of AB Lietuvos Dujos;

*1.7. To obligate AB Lietuvos Dujos to draw up and adopt effective rules for avoiding the conflict of interests that would be in line with the international practice. [...]*²⁰⁹

230. Claimant states that the Ministry's requests under points 1.1 and 1.2 above relate to the dismissal of members of the Company's Board and the appointment of a person to be nominated by the Ministry of Energy as the Company's General Manager. It then alleges that the appointment and dismissal of the members of the Board is specifically governed by Section 4.3 of the SHA, and that the Ministry's requests before the Lithuanian Court are an attempt to circumvent the arbitration clause.²¹⁰ Respondent contends, *inter alia*, that the Investigation Proceedings does not fall within the scope of the arbitration clause, as it involves different parties and a different legal relationship from that specified in the SHA.

231. Section 4.3 of the SHA, termed "*Election of managing bodies*", establishes, among other things, the composition of the managing bodies of the Company and the election of their members (Section 4.3(4)).²¹¹ In addition, Section 4.3(5) provides that "*Any Party may propose that any member of the Board nominated by such Party be removed with or without cause at any time, and the Parties agree to vote at the nearest General Meeting of Shareholders for the removal and replacement of such member of the Board with another member of the Board nominated by the removing Party. [...]*". However, the Tribunal notes that there is no provision for the removal of the members of the Board nominated by any party other than the party having nominated such member, whatever the reason for such removal.

²⁰⁹ Exhibit C-14, pp. 19-21.

²¹⁰ SoC, ¶ 142.

²¹¹ Section 4.3(4) of the SHA reads as follows: "*Pursuant to the Articles of Association of the Company, the Company's Board shall consist of 5 members. In this regard the Parties agree that 2 (two) members of the Company's Board shall always be elected from the candidates nominated by the Strategic Investor [Ruhrgas], 1 (one) member of the Company's Board – from the candidates nominated by the VTF [State Property Fund, succeeded by the Ministry], and 2 (two) – from the candidates nominated by the Supplier [Gazprom]. The Parties agree to cast their votes at the General Meeting of Shareholders in such a manner that the provisions of section 4.3 thereof is [sic] fulfilled. For the purpose of paragraph 4 of this section 4.3, the Shareholders agree that when electing members of the Board, the Parties shall distribute their votes at the General Meeting of Shareholders for each of the candidates nominated by the Party under paragraph 4 of this section 4.3. The Chairman of the Board shall be elected for a period of 2 (two) years. The nomination right shall alternate between the Strategic Investor and the Supplier. Each Party shall procure that the Board member nominated by it shall vote for the election of the chairman of the Board nominated in accordance with the preceding sentence.*"

232. The Tribunal finds that, if the Lithuanian Court considers that the members of the Company's Board acted inappropriately towards the Company, the removal of such members would not jeopardize the rights and obligations agreed in the SHA. Particularly, Section 3.5 of the SHA provides that "*The parties will put all their efforts to ensure that their nominees elected to the Board of the Company will vote in order to achieve objectives established by this Agreement and Share Sale and Purchase Agreements and provisions of privatization of the Company established by the Government of the Republic of Lithuania.*" Consequently, should the Lithuanian Court conclude that the members of the Board were exercising their functions inappropriately, Gazprom could even be in breach of the SHA if it tried to prevent their removal, having as it does an obligation to put all its efforts to ensure that its nominees will vote towards achieving the objectives of the SHA. In addition, should its nominees be in breach of their fiduciary duties towards the Company, no provision of the SHA would protect the other shareholders, let alone the Company.
233. The Tribunal also notes that Respondent requests the Lithuanian Court that, in case it determines that the Company's CEO be removed, "*to temporarily appoint the person nominated by the Plaintiff [the Ministry], whose candidature will be presented to the Court prior to proceeding with the consideration of the case per se, to the position of the Company's CEO;*" (emphasis added). Again, the Tribunal finds that granting such a request would not interfere with the rights and obligations established in the SHA, as any necessary temporary appointment of a successor to the removed CEO is an emergency measure which is a natural consequence of the Court's decision to remove the CEO.
234. The Tribunal now turns to point 1.3 of Respondent's Initial Claim, requesting the Lithuanian Court to order the Company to initiate negotiations with Gazprom "*on setting a fair and correct price for the purchase of natural gas and, no later than within 3 (three) months of the date of validation of the Court judgement, to submit to the Board of AB Lietuvos Dujos for approval the new terms on the purchase of natural gas from OAO Gazprom agreed upon through negotiations;*".
235. It is Claimant's position that the negotiation of agreements between the Company and Gazprom is governed by the SHA, and therefore covered by its arbitration clause. It points out that, in particular, Section 6.1 (1.8) of the SHA requires that the Company's Board, when deciding on the approval of a gas supply contract, take into consideration the terms and conditions of those contracts "*such as price, volume, duration, flexibility and reliability*".

236. Article 6.1(1.8) of the SHA reads as follows:

“Section 6. THE COMPANY’S BUSINESS

1. Except as the Parties may otherwise agree in writing or save as otherwise herein provided, the Parties shall seek to ensure, and shall procure that the Company seeks to ensure the following: [...]

1.8. the Company shall treat the Parties on an equal basis. All agreements and transactions between the Company and the Parties or any of the Parties shall be at any time made on arm’s length terms and conditions and subject to the Board approval; in the event of the existence of several options for gas purchase by the Company, the Board, when making such decision on such options, shall choose and approve the options which, judging by its terms and conditions, such as price, volume, duration, flexibility and reliability, is most favourable to the Company and its customers;”
(emphasis added)

237. The Tribunal finds that the procedure for the negotiation of agreements to be entered into between the Company and a party to the SHA (i.e. the Ministry, Gazprom or Ruhrgas) is governed by the SHA. As a consequence, a decision from the Lithuanian Court ordering the renegotiation of such agreement would affect the rights of the Parties to the SHA to have the disputes “*in connection with*” the SHA settled by arbitration. Therefore the Tribunal finds that Respondent cannot resort to State Courts to order the Company to renegotiate the terms agreed with Gazprom on the purchase of natural gas. If Respondent believes that, in breach of the fiduciary duties of the Company’s members of the Board (nominated by Gazprom), the contract concluded between the Company and Gazprom was not entered into in the Company’s best interests, it has to bring this matter to an arbitral tribunal constituted in accordance with the arbitration clause of the SHA. The Company, which is not a signatory to the SHA, would not have to be a party to such arbitration, as its three main shareholders (all parties to the SHA) can define the interests of the Company.

238. As for Respondent’s claim under point 1.4 of its Initial Claim, it refers to Respondent’s request to the Lithuanian Court “*to obligate AB Lietuvos Dujos to announce in its annual report information about: 1.4.1. The revenue received by AB Lietuvos Dujos from the natural gas transit activity; 1.4.2. The expenses connected with the natural gas transit activity, which are borne by AB Lietuvos Dujos; 1.4.3. The investments connected with the natural gas transit activity, which are implemented by AB Lietuvos Dujos; 1.4.4. The tariff of gas transit services*

applied for the reporting period, indicating the methodology (formula) for the calculation of this tariff and all component elements; 1.4.5. The price for the purchase of natural gas, which was paid by AB Lietuvos Dujos for the reporting period, indicating the methodology (formula) for the calculation of this price and all component elements;” (emphasis added)

239. The Tribunal finds that Respondent’s request above, regarding the information that the Company’s annual report should contain, is not governed by the SHA, and therefore is not covered by its arbitration clause.
240. As for Respondent’s claims under points 1.5 and 1.6 of its Initial Claim, they refer to the requests to the Lithuanian Court to “[1.5] obligate AB Lietuvos Dujos to secure that negotiations on the terms of purchase of natural gas and the terms of rendering the natural gas transit service: 1.5.1. Would be conducted in good faith, aiming at the best terms of supply and the least supply price and the highest transit service price; 1.5.2. Would be conducted after duly preparing for these negotiations and, prior to negotiations, analyzing in detail what arguments may be used by the representatives of AB Lietuvos Dujos during negotiations;” and “[1.6] To obligate AB Lietuvos Dujos to establish the procedure for the adoption of resolutions which would secure that the terms of purchase of natural gas and the terms of rendering the natural gas transit service agreed upon through fair negotiations are to be adopted by the resolution of the Board of AB Lietuvos Dujos no later than on 30 November of each year and that to adopt these terms the Company’s Board must be provided with the following information and documents: [...]” (emphasis added)
241. The Tribunal finds that both of the above-mentioned requests relate to the procedure to be put in place for the purposes of gas purchase and gas transit negotiations and the procedure for their approval by the Company’s management bodies, and that these issues are governed by Sections 4.3 and 6 of the SHA. Any modification to such provisions by a State Court would result in an amendment to the SHA at the initiative of the Ministry, through its domestic courts, and a circumvention of the arbitration clause, since the same result could be obtained through arbitration under the SHA.
242. For the above reasons, the Tribunal finds that Respondent cannot request State courts to require the Company to establish new rules related to the procedure to be put in place for the purposes of gas purchase and transit negotiations, and the manner in which they should be approved by the Company’s management bodies, as indicated in Respondent’s requests 1.5 and 1.6 above.

243. As for Respondent’s claim under point 1.7 of its Initial Claim, it refers to the request to the Lithuanian Court to “*obligate AB Lietuvos Dujos to draw up and adopt effective rules for avoiding the conflict of interests that would be in line with the international practice. [...]*”.
244. The Tribunal finds that Respondent cannot be prevented from requesting the Lithuanian Court to require the Company to adopt rules for avoiding conflicts of interests in line with international practice, provided that such new rules do not jeopardize the rights and obligations established in the SHA. This would only be the case if the rules are found to be in breach of Lithuanian law.
245. The Tribunal now turns to the analysis of Respondent’s Revised Claim.

(ii) Revised Claim vs. Arbitration Clause

246. By way of reminder, on December 9, 2011, Respondent filed its Revised Claim before the Lithuanian Court. In the Revised Claim, Respondent reformulated its request for relief, as it alleged that some of the sanctions specified in the Initial Claim might turn out to be inapplicable due to a change of circumstances by the time the judgment enters into force.
247. The remedies suggested by the Ministry in its Revised Claim read as follows:

“1. To initiate an investigation of the activity of AB Lietuvos Dujos (identification number 120059523, head office address: Aguonu St. 24, Vilnius), and should the activity of AB Lietuvos Dujos and / or the members of its Governing Bodies Valery Golubev born on 14 June 1952, Kirill Seleznev born on 23 April 1974, and / or Viktoras Valentukevičius, personal identification number 35410170018, be proved to be inappropriate:

1.1 to obligate AB Lietuvos Dujos no later than within 1 (one) month of the date the Court judgment enters into force to initiate negotiations with OAO Gazprom on setting a fair and correct price for the purchase of natural gas and, no later than within 3 (three) months of the date the Court judgment enters into force, to submit newly negotiated terms of the purchase of natural gas from OAO Gazprom to the Board of AB Lietuvos Dujos for its approval;

1.2 to obligate AB Lietuvos Dujos to announce in its annual report information on the following :

1.2.1 the revenue received by AB Lietuvos Dujos from natural gas transit activity;

1.2.2 the expenses related to natural gas transit activity, which are borne by AB Lietuvos Dujos;

1.2.3 the investments connected with natural gas transit activity, which are implemented by AB Lietuvos Dujos;

1.2.4 the tariff of gas transit services applied for the reporting period, indicating the methodology (formula) for the calculation of this tariff and all constituent parts;

1.2.5 the purchasing price of natural gas, which was paid by AB Lietuvos Dujos for the reporting period, indicating the methodology (formula) for the calculation of this price and all constituent parts;

1.3 to obligate AB Lietuvos Dujos to ensure that the negotiations on the terms of purchase of natural gas and the terms of providing the natural gas transit service:

1.3.1 are conducted in good faith, aiming at the best terms of supply and the lowest supply price and the highest transit service price;

1.3.2 are conducted after due preparation for the negotiations and that detailed analyses are conducted prior to negotiations based on which representatives of AB Lietuvos Dujos will argue during negotiations;

1.4 to obligate AB Lietuvos Dujos to establish a decision-making procedure which would secure that the terms of purchase of natural gas and the terms of rendering the natural gas transit service agreed upon through fair negotiations are to be adopted by resolution of the Board of AB Lietuvos Dujos no later than on 30 November of each year and that to adopt these terms the Company's Board must be provided with information and documents:

1.4.1 indicating which actions were carried out by the representatives of AB Lietuvos Dujos during negotiations on the terms of purchase of natural gas and the terms of rendering the transit service, and what arguments were prepared for the negotiations;

1.4.2 reasoning why the terms of purchase of natural gas and the terms of rendering the transit service presented for adoption should be considered as the best possible terms for AB Lietuvos Dujos that could be achieved through negotiations;

1.4.3 written confirmation from the CEO of AB Lietuvos Dujos that the terms that are being submitted for approval have been set through fair negotiations and that the terms that are being submitted for approval are in line with the market conditions taking into account the volume of gas transmitted by transit and the possibility of replacing the services of AB Lietuvos Dujos;

1.5 to obligate AB Lietuvos Dujos to draw up and adopt effective rules for avoiding a conflicts of interest that would be in line with the international practice;

1.6 to apply other sanctions provided by the CC Article 2.131 part 1 which in the opinion of the court would be instrumental in securing the proper activities of AB Lietuvos Dujos and its governing Bodies (the Board of Directors and the CEO)."²¹²

248. The Tribunal notes that Respondent's Revised Claim, as compared to its Initial Claim, contains the following two differences: (a) Respondent no longer expressly requests the dismissal of Mr. Valery Golubev and Mr. Kirill Seleznev from their respective positions on the Company's Board, or the dismissal of Mr. Viktoras Valentukevičius from his position as the Company's CEO; nor (b) the temporary appointment of a new person in replacement of the Company's

²¹² Exhibit C-52, pp. 21-22.

CEO; but rather (c) adds a general claim that the Lithuanian Court “*apply other sanctions provided by the CC Art. 2.131 part 1 which in the opinion of the court would be instrumental in securing the proper activities of AB Lietuvos Dujos and its governing bodies (the Board of Directors and the CEO).*”

249. The Tribunal notes that Respondent’s request under point 1.1 of its Revised Claim is the equivalent of Respondent’s request under point 1.3 of its Initial Claim and, therefore, the Tribunal’s finding stated at paragraphs 234-237 above equally applies in this respect.
250. As for Respondent’s request under point 1.2 of its Revised Claim, it is the equivalent of Respondent’s claim under point 1.4 of its Initial Claim and, therefore, the Tribunal’s finding stated at paragraphs 238-239 above equally apply in this respect.
251. As for Respondent’s requests under points 1.3 and 1.4 of its Revised Claim, they are the equivalent of Respondent’s claims under points 1.5 and 1.6 of its Initial Claim and, therefore, the Tribunal’s finding stated at paragraphs 240-242 above equally applies in this respect.
252. As for Respondent’s request under point 1.5 of its Revised Claim, it is the equivalent of Respondent’s claims under point 1.7 of its Initial Claim and, therefore, the Tribunal’s finding stated at paragraphs 243-244 above equally applies in this respect.
253. Finally, Respondent’s request under point 1.6 of its Revised Claim, which is a general request that the Lithuanian Court “*apply other sanctions provided by the CC [Lithuanian Civil Code] Art. 2.131 part 1 which in the opinion of the court would be instrumental in securing the proper activities of AB Lietuvos Dujos and its governing bodies (the Board of Directors and the CEO)*” (emphasis added), has no equivalent in Respondent’s Initial Claim, and will be analyzed below.
254. By way of reminder, Article 2.131, part 1, chapter X (termed “*Investigation of Legal Person’s Activities*”) of the Lithuanian Civil Code reads as follows:

“1. In the event that the expert’s report points out that legal person’s (legal person’s managing bodies or their members) activities are inappropriate and the court approves the said conclusion, the court may, upon receipt of opinions of the parties and public institutions mentioned in Article 2.130 of the given Code, apply one of the following measures:

1) revoke the decisions taken by the legal person’s managing bodies;

- 2) *suspend temporarily the powers of the members of legal person's managing bodies or exclude a person from legal person's managing body;*
- 3) *appoint provisional members of legal person's managing bodies;*
- 4) *authorize non implementation of certain provisions of incorporation documents;*
- 5) *to oblige making of amendments to certain provisions of incorporation documents;*
- 6) *to transfer the legal person's right to vote to other person;*
- 7) *to oblige a legal person to take or not to take certain actions;*
- 8) *to liquidate a legal person and appoint a liquidator.”*²¹³

255. In order to decide whether Respondent's request under point 1.6 above is in breach of the arbitration clause, the Tribunal has to analyze each of the possible measures that can be taken by the Lithuanian Court pursuant to Article 2.131 above.

256. Item 1 of Article 2.131 (part 1) provides that the Court may “*revoke the decisions taken by the legal person's managing bodies*”. The Tribunal finds that Respondent cannot be prevented from requesting the Lithuanian Court to revoke decisions that were taken in violation of Lithuanian law, as an arbitral tribunal constituted pursuant to the arbitration clause contained in the SHA would not have jurisdiction to take such a decision. This is because the revocation of decisions taken by the Company's managing bodies due to inappropriate activities of their members is not governed by the SHA and is not an issue “*in connection with*” the SHA.

257. As for item 2 of Article 2.131 (part 1), which provides that the Lithuanian Court may “*suspend temporarily the powers of the members of legal person's managing bodies or exclude a person from legal person's managing body*”, it is equivalent to Respondent's request 1.1 of its Initial Claim. For the reasons stated at paragraphs 230-232 above, the Tribunal finds that the removal of members from the Company's Board, should the Lithuanian Court find that they acted inappropriately, will not jeopardize the rights and obligations agreed in the SHA.

258. As for item 3 of Article 2.131 (part 1), which provides that the Lithuanian Court may “*appoint provisional members of legal person's managing bodies*”, the Tribunal finds that such measure is simply a consequence of a State court's decision regarding the dismissal of the members of the Company's managing bodies. The Tribunal notes, however, that in its Initial Claim, Respondent only requested the provisional replacement of the Company's CEO, in case of his removal by the

²¹³ Exhibit C-58.

Lithuanian Court, but that it does not request the provisional replacement of the two members of the Board nominated by Gazprom, in the event of their removal by the Lithuanian Court. In any event, the removal of members of the Board for breach of fiduciary duties, as well as any necessary provisional appointment arising thereof, is not governed by the SHA.

259. As for items 4 and 5 of Article 2.131 (part 1), they provide respectively that the Lithuanian Court may “*authorize non implementation of certain provisions of incorporation documents*” and “*oblige making of amendments to certain provisions of incorporation documents.*” The Tribunal finds that Respondent cannot be prevented from requesting such measures before State courts, as an arbitral tribunal having jurisdiction based on the arbitration clause in the SHA would not have jurisdiction to modify or prevent the implementation of provisions of the Company’s incorporation documents in case they fall foul of Lithuanian Law.
260. As for item 6 of Article 2.131 (part 1), it provides that the Lithuanian Court may “*transfer the legal person’s right to vote to other person*”. The Tribunal finds that Respondent cannot request a State court to modify the shareholders’ rights to vote as established in the SHA, as disputes in relation to these fall within the scope of the arbitration clause. Therefore, even if the Lithuanian Court should find irregularities in the activities of the members of the Company’s Board and its CEO, modifying the voting rights under the SHA would contravene the arbitration agreement in the SHA.
261. As for item 7 of Article 2.131 (part 1), it provides that the Lithuanian Court may “*oblige a legal person to take or not to take certain actions*”. The Tribunal notes that this is a very broad provision and reiterates that Respondent may not request before the Lithuanian Court, or any State court, for a relief that would jeopardize the rights and obligations established in the SHA and that Respondent could also request to an arbitral tribunal constituted pursuant to the arbitration clause of the SHA.
262. As for item 7 of Article 2.131 (part 1), it provides that the Lithuanian Court may “*liquidate a legal person and appoint a liquidator.*” The Tribunal finds that Respondent cannot be prevented from requesting State courts to liquidate the Company if it finds that the Company is performing illegal activities. This is because an arbitral tribunal constituted pursuant to the arbitration clause

of the SHA would not have jurisdiction to take such decision, unless the dispute is related to Section 3.1(1.4) of the SHA.²¹⁴

263. On the basis of the above, the Tribunal finds that Respondent's requests under points 1.1, 1.3 and 1.4 of its Revised Claim to the Lithuanian Court are in breach of the arbitration clause of the SHA. As for Respondent's request under point 1.6 of the Revised Claim, such request shall be limited to measures that (i) would not jeopardize the rights and obligations agreed between the parties in the SHA; and (ii) would not be open to Respondent to request before an arbitral tribunal constituted pursuant to the arbitration clause of the SHA.

(3) Specific Performance

264. It is Claimant's position that the Tribunal has the power to enforce the arbitration clause contained in the SHA, and requests that the Ministry be ordered to terminate the Investigation Proceedings before the Lithuanian Court. Claimant alleges that specific performance is the most appropriate remedy for the breach of an arbitration agreement. If the only remedy for a party's refusal to perform an arbitration agreement were an award of damages, the arbitration agreement would be of little value.²¹⁵

265. According to Respondent, Claimant's request for specific performance presumes that the Investigation Proceedings are covered by the arbitration agreement in the SHA, which on Respondent's submission is not the case. Therefore, according to Respondent, the Tribunal does not have jurisdiction to order specific performance. Even if the Tribunal had such jurisdiction, there would be no legal basis for any specific performance order, as no corresponding obligation, either under the arbitration agreement, or the SHA, has been breached.²¹⁶

266. As stated in paragraphs 220-221 above, the Arbitral Tribunal finds that an application before the Lithuanian courts for Investigation Proceedings, pursuant to article 2.124 of the Lithuanian Civil Code, may, under some conditions, amount to bringing to a State court a dispute falling within the scope of the arbitration clause of the SHA, and therefore be in breach thereof. The Tribunal

²¹⁴ Section 3.1(1.4) reads as follow: "3.1. As long as the Republic of Lithuania owns at least 7% of the Shares, no Party will vote, and will ensure that no Affiliate of such Party will, vote at the general meeting of shareholders of the Company any of their Shares in favour of a decision on, or which will result in, the following if at least one other Party does not vote in favour of the same decision and provided, however, that the voting in favour of such decisions should not be unreasonably withheld: [...] 1.4 voluntary liquidation of the Company." (Emphasis added)

²¹⁵ SoC, ¶ 162; **Exhibit C-69**.

²¹⁶ SoD, ¶ 97.

also finds that it has the powers to limit the Ministry's requests (suggested remedies) under items 1.1, 1.3, 1.4 and 1.6 of its Revised Claim²¹⁷ filed before the Lithuanian Court, in order to prevent the Ministry from breaching the arbitration clause provided in the SHA. The Tribunal notes that Respondent does not challenge the Tribunal's power to order specific performance if it finds that Respondent has breached the arbitration clause in the SHA.²¹⁸ As a consequence, the Tribunal finds that it has jurisdiction to order the Ministry not to bring a request before the Lithuanian Court that could affect the rights of the shareholders under the SHA.

267. In light of the Tribunal's findings in the previous section of this award, the Tribunal decides that Respondent must withdraw the following requests made in its Revised Claim of December 9, 2011, before the Lithuanian Court:

- *“1.1 to obligate AB Lietuvos Dujos no later than within 1 (one) month of the date the Court judgment enters into force to initiate negotiations with OAO Gazprom on setting a fair and correct price for the purchase of natural gas and, no later than within 3 (three) months of the date the Court judgment enters into force, to submit newly negotiated terms of the purchase of natural gas from OAO Gazprom to the Board of AB Lietuvos Dujos for its approval;”*
- *“1.3 to obligate AB Lietuvos Dujos to ensure that the negotiations on the terms of purchase of natural gas and the terms of providing the natural gas transit service:
1.3.1 are conducted in good faith, aiming at the best terms of supply and the lowest supply price and the highest transit service price;
1.3.2 are conducted after due preparation for the negotiations and that detailed analyses are conducted prior to negotiations based on which representatives of AB Lietuvos Dujos will argue during negotiations;”*
- *“1.4 to obligate AB Lietuvos Dujos to establish a decision-making procedure which would secure that the terms of purchase of natural gas and the terms of rendering the natural gas transit service agreed upon through fair negotiations are to be adopted by resolution of the Board of AB Lietuvos Dujos no later than on 30 November of each year and that to adopt these terms the Company's Board must be provided with information and documents:*

²¹⁷ Exhibit C-52, pp. 21-22.

²¹⁸ SoD, ¶ 97.

1.4.1 indicating which actions were carried out by the representatives of AB Lietuvos Dujos during negotiations on the terms of purchase of natural gas and the terms of rendering the transit service, and what arguments were prepared for the negotiations;
1.4.2 reasoning why the terms of purchase of natural gas and the terms of rendering the transit service presented for adoption should be considered as the best possible terms for AB Lietuvos Dujos that could be achieved through negotiations;
1.4.3 written confirmation from the CEO of AB Lietuvos Dujos that the terms that are being submitted for approval have been set through fair negotiations and that the terms that are being submitted for approval are in line with the market conditions taking into account the volume of gas transmitted by transit and the possibility of replacing the services of AB Lietuvos Dujos;”

268. As for Respondent’s request under point 1.6 of the Revised Claim,²¹⁹ the Tribunal decides that Respondent must limit such request to measures that would not jeopardize the rights and obligations established in the SHA, and in addition that could not be requested before an arbitral tribunal constituted pursuant to the arbitration clause of the SHA.

(4) Damages

269. Gazprom alleges that it has incurred legal costs as a result of the Ministry’s violation of the arbitration clause. It states that, to date, costs incurred by Gazprom on behalf of Messrs. Golubev and Seleznev in defending the Ministry’s action before the Lithuanian Court amount to EUR 39,683 (including VAT) in legal fees of Salans LLP, and EUR 21,164 (including VAT) in legal fees of Moteikaa ir Audzevicius.²²⁰ A spreadsheet summarizing further costs, incurred as of April 30, 2012, was submitted by Claimant.²²¹

270. Furthermore, costs incurred by Lietuvos Dujos in defending against the same legal action amount to date to EUR 211,667, including (i) costs for additional working hours of Lietuvos Dujos’ employees required to collect documents, the production of which was ordered by the

²¹⁹ Respondent’s request under point 1.6 of the Revised Claim reads as follows: “1.6 to apply other sanctions provided by the CC Article 2.131 part 1 which in the opinion of the court would be instrumental in securing the proper activities of AB Lietuvos Dujos and its governing Bodies (the Board of Directors and the CEO).”

²²⁰ SoC, ¶170; Exhibit C-57.

²²¹ Exhibit C-148.

Court; (ii) costs of translation and bookbinding services; (iii) legal fees; and (iv) management time spent defending Lietuvos Dujos against the Ministry's action before the Vilnius Court.²²²

271. Respondent alleges that Claimant incorrectly stated that the Ministry does not dispute that Gazprom has paid the invoices, or its calculation of damages. Respondent clarifies that it has already stated in its SoD that no amounts were admitted. Respondent rejects Gazprom's claim on quantum in its entirety.²²³
272. In any event, Respondent alleges that costs incurred by third parties in local court proceedings can and should be claimed as part of those proceedings. As the Investigation Proceedings are still pending, the alleged loss has at any rate not yet matured.²²⁴
273. The Tribunal notes that Claimant's claims are based on the allegation that Respondent breached the arbitration agreement of the SHA by filing its application for Investigation Proceedings before the Lithuanian Court. The Tribunal has found, however, that applying for Investigation Proceedings before the Lithuanian Court is not, per se, a breach of the arbitration clause of the SHA. The Tribunal has found that Respondent's breach in this respect is limited to only some of the requests that are in connection with the SHA.
274. In light of its above findings, the Tribunal considers that it is not possible to quantify the amount of costs incurred by Claimant, on behalf of Messrs. Golubev and Seleznev, in defending their position against the Ministry's action before the Lithuanian Court, with respect to those requests made by Respondent that have been found to be in breach of the arbitration clause.
275. In addition, there is no evidence that part of the damages incurred by Lietuvos Dujos as a result of the Lithuanian proceedings was and/or will be ultimately borne by Gazprom.
276. In view of the above, the Tribunal rejects Claimant's request for damages in its entirety.

(5) Costs

277. Claimant and Respondent have each requested the Arbitral Tribunal to make the other party liable for the Arbitration Costs (as defined in Article 43 of the SCC Rules) and order it to pay the

²²² SoC, ¶171; Exhibits C-53 and C-54.

²²³ Respondent's Rejoinder, ¶ 65.

²²⁴ SoD, ¶ 99.

costs incurred in the conduct of this arbitration, including legal representation (Article 44 of the SCC Rules).

278. In its submission of July 4, 2011, Claimant requested that Respondent bear the costs of the arbitration which amount to EUR 1,460,059.48. Such amount includes the costs incurred in the emergency arbitrator proceedings conducted immediately prior to this arbitration, pursuant to para. 119 of the Order on Interim Measures issued by the Emergency Arbitrator on June 24, 2011. In accordance with Article 10(5) of Appendix II of the SCC Rules, the costs of the emergency arbitrator proceedings have been reserved to be apportioned between the Parties by the present Tribunal in its final award.

279. The Tribunal notes that in its Reply, Claimant requests the Tribunal to order the Ministry to pay post-award interest on the amounts awarded until full payment thereof, at a rate exceeding the official reference rate, as from time to time fixed by the Bank of Sweden, by 8 percentage units.²²⁵

280. Claimant's costs are broken down as follows:

Costs of Arbitration	EUR 190,600.00
Salans' Legal Fees and Disbursements	EUR 818,878.06
Legal Experts and Consultants	EUR 227,860.48
VAT (18%, payable in the Russian Federation)	EUR 222,720.93
TOTAL	EUR 1,460,059.48

281. On July 11, 2012, in its comments to Claimant's Statement on Costs, Respondent submitted, in summary, that the legal fees claimed by Gazprom (i.e. EUR 818,878.06) are not reasonable or acceptable. It noted that Respondent's corresponding costs amounts to half of it.²²⁶ It also noted that in item C of Claimant's Statement on Costs, Gazprom claims compensation for works allegedly performed by *Motieka & Audzevicius* in the amount of EUR 119,941.61. Respondent objected to this claim contending that there is no document on the record supporting that such firm has been involved in these proceedings.²²⁷ Moreover, Respondent's objected to the amount claimed for Prof. Nekrosius' expert opinion (i.e. EUR 11,023.17), which it submits is not

²²⁵ Claimant's Reply, ¶ 145 (e).

²²⁶ Respondent's Comments to Claimant's Statement on Costs, ¶¶ 3-4.

²²⁷ Respondent's Comments to Claimant's Statement on Costs, ¶¶ 7-8.

reasonable for two single-page documents.²²⁸ Finally, Respondent noted that Gazprom has included the costs incurred during the emergency arbitration proceedings in its Statement on Costs, but fails to specify the exact amount. Respondent submitted that it was Gazprom that applied for the Emergency Arbitration proceedings, which was ultimately denied by the emergency arbitrator. Respondent requested that, as a consequence, irrespective of the outcome of the present arbitration, this Tribunal should order Gazprom to compensate the Ministry for its costs in the Emergency Arbitration.²²⁹

282. In its submission of July 4, 2012, Respondent requested the Tribunal to order Respondent to compensate the Ministry for its costs in the arbitration amounting to EUR 683,007.31, together with interest thereon at a rate determined according to Section 6 of the Swedish Interest Act (SFS 1975:635) from the date of the Award until the date of final payment.

283. Respondent's costs are broken down as follows:

Fees for legal services	EUR 406,324.80
Expenses (including but not limited to costs for courier delivery, travel to and from meetings in Stockholm, hotel accommodation, translation, telecommunication and data search etc.)	EUR 14,882.72
Costs for the Ministry's expert witnesses	EUR 43,507.23
Advance payment of costs to the Arbitral Tribunal	EUR 174,100
Fees for legal services and expenses incurred in the Emergency Arbitration proceedings	EUR 44,192.56
TOTAL	EUR 683,007.31

284. On July 11, 2012, in its comments to Respondent's Statement on Costs, Claimant submitted that the Tribunal should reject Respondent's Submission on Costs, as this arbitration confirms that Respondent, by submitting its dispute with Gazprom to the Lithuanian Court, has breached and continues to breach the arbitration clause of the SHA.²³⁰ As to the disparity in the amount of costs incurred by each of the Parties, Gazprom argued that this is a result of the different approaches taken by the Parties to the issues in dispute. It underscores that the issues in dispute are worth millions of euros to Gazprom, and the Ministry's approach suggests that it places a

²²⁸ Respondent's Comments to Claimant's Statement on Costs, ¶¶ 11-12.

²²⁹ Respondent's Comments to Claimant's Statement on Costs, ¶¶ 13-14.

²³⁰ Claimant's Comments to Respondent's Statement on Costs, p.1.

lesser value on them. Finally, Claimant submitted that its request for costs is reasonable notwithstanding the lesser amount claimed by the Ministry.²³¹

285. The Arbitral Tribunal is satisfied that all the costs claimed by the Parties are part of the arbitration costs.
286. As set out in Article 43 of the SCC Rules, the parties are jointly and severally liable for the costs of the arbitration. Article 43 also stipulates that the Arbitral Tribunal shall apportion the costs of the arbitration between the Parties, having regard to the outcome of the case and other relevant circumstances.
287. Considering its findings in these proceedings, the Arbitral Tribunal finds it fair that the fees and expenses of the Arbitral Tribunal and the administrative fee and any expenses of the SCC Institute shall be paid in equal shares by Claimant and Respondent. The Arbitral Tribunal has taken into consideration that Claimant was successful in part of its claims, but unsuccessful on the principle that Respondent was altogether prevented from applying for the Investigation Proceedings before the Lithuanian Court.
288. As for the Parties' legal costs, including fees and expenses, the Arbitral Tribunal, exercising its discretion pursuant to Articles 43 (5) and 44 of the SCC Rules, decides that each of the Parties must bear its own costs, including those incurred in the Emergency Arbitration proceedings.
289. Similarly, the fees and expenses of the Emergency Arbitrator and any expenses of the SCC in this respect shall be borne in equal share by the Parties. This is because, although Claimant's request before the Emergency Arbitrator was denied, it was filed as a result of Respondent's breach of the arbitration agreement contained in the SHA. Consequently, Respondent must bear half of its costs as it is partially responsible for its commencement.
290. The SCC has determined the costs of the arbitration as follows:

Mr. Yves Derains - Chairman

Fee EUR 90,950 plus any VAT

Expenses EUR 1,690 plus any VAT

Per diem allowance EUR 1,000

Ms. Sophie Nappert - Co-arbitrator

Fee EUR 54,570 plus any VAT

²³¹ Claimant's Comments to Respondent's Statement on Costs, p.2.

Expenses GBP 312 plus any VAT
Expenses SEK 1,000 plus any VAT
Per diem allowance EUR 1,000

Ms. Sophie Lamb - Co-arbitrator

Fee EUR 54,570 plus any VAT
Expenses GBP 403 plus any VAT
Per diem allowance EUR 1,000

Ms. Ana Paula Montans – Secretary of the Arbitral Tribunal

Expenses EUR 1,511 plus any VAT
Per diem allowance EUR 1,000

Stockholm Chamber of Commerce

Administrative Fee EUR 32,000 plus any VAT
Court reporter EUR 8,623 plus any VAT

291. The fees and expenses specified under paragraph 290 above will be paid out of the advances paid by the Parties to the SCC Institute.

VI. THE TRIBUNAL'S HOLDING

292. For the above reasons, the Arbitral Tribunal:

- i) declares that Respondent's initiation and prosecution of the Lithuanian court proceedings described above was partially in breach of the arbitration agreement contained in the SHA;
- ii) orders Respondent to withdraw its requests under points 1.1, 1.3 and 1.4 of its Revised Claim, dated December 9, 2011, and to limit its request under point 1.6 of such Revised Claim to measures that would not jeopardize the rights and obligations established in the SHA and that Respondent could not request before an arbitral tribunal constituted pursuant to the arbitration clause of the SHA;
- iii) dismisses Claimant's claim for damages in its entirety;
- iv) decides that the Parties shall be liable, jointly and severally, for the payment of the following costs of the arbitration:
 - Fee of Mr. Yves Derains of EUR 90,950, expenses of EUR 1,690 and per diem allowance of EUR 1,000. In addition, Respondent will be liable for VAT at 19,6% on the following amounts: EUR 45,475 (50% of the fee) and EUR 845 (50% of the expenses).

- Fee of Ms. Sophie Nappert of EUR 54,570, expenses of GBP 312, SEK 1,000 and per diem allowance of EUR 1,000.
- Fee of Ms. Sophie Lamb of EUR 54,570, expenses of GBP 403 and per diem allowance of EUR 1,000.
- Expenses of Ms. Ana Paula Montans of EUR 1,511 and per diem allowance of EUR 1,000. In addition, Respondent will be liable for VAT at 19,6% on EUR 755,50 (50% of the expenses).
- Administrative fee of the Stockholm Chamber of Commerce of EUR 32,000 and court reporting services of EUR 8,623. In addition, Respondent will be liable for VAT at 25% on the following amounts: EUR 16,000 (50% of the fee) and EUR 4,311.50 (50% of the expenses).

Between the Parties, the liability for the costs of the arbitration shall be borne in equal shares.

- v) decides that each Party shall bear its own legal costs; and
- vi) rejects any other claim, petition or demand of the Parties, whether implicit or expressly introduced in this arbitration.

Made on 31st July, 2012

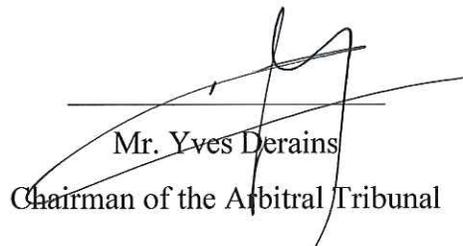
The seat of the arbitration is Stockholm, Sweden



Ms. Sophie Lamb
Co-arbitrator



Ms. Sophie Nappert
Co-arbitrator



Mr. Yves Derains
Chairman of the Arbitral Tribunal

HOW TO APPEAL IN RESPECT OF CERTAIN COSTS

Under Section 41 of the Swedish Arbitration Act, a party may bring an action against the Award in respect of the remuneration of the arbitrators and the SCC Institute. A party having reason to challenge the Award in this respect shall file an appeal before the District Court of Stockholm within three months of the date the party received an original or a certified copy of the Award.