Olegs Roščins

v.

Republic of Lithuania

(ICSID Case No. ARB/18/37)

Respondent's Observations on its

Objections under ICSID Arbitration Rule 41(5)

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21 March 2019

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I. INTRODUCTION

1. The Republic of Lithuania ("**Respondent**") should not have to incur the considerable expense, costs and effort required to respond to this frivolous proceeding.[1]

2. This dispute concerns claims to ownership of frozen bank accounts in Lithuania nominally held by five British Virgin Islands and St Kitts and Nevis companies – Korofalt Ventures Ltd., Logotreck Products Inc., Machinery Trade S.A., Mita Group Ltd. and Advanta Corporation ("**Companies**"). The Claimant, Mr Olegs Roščins, is a Latvian attorney who specialises in "AML,[2] . . . FATF[3]",[4] "blocked accounts" and "consultations in case of problems with previous aspects in Estonia, Latvia and Lithuania".[5] The Claimant only became a shareholder of the Companies on or after 11 July 2012.[6]

3. Very conveniently, this was: (a) five years after 6 September 2006, the date that the Respondent's authorities restrained and froze bank accounts nominally held by those Companies on suspicion of money-laundering; (b) more than one year after 5 July 2011, the date that the Respondent's prosecutors maintained the restraint on the accounts because the true owner of those accounts was not known even after a five-year criminal investigation; and (c) six days after a 5 July 2012 judgment from one of the Respondent's courts that found that millions of US dollars in those bank accounts – although nominally held by four of those Companies – should revert to the State's ownership as "ownerless" property.[7] In other words, the Claimant obtained shares in the Companies only after the State's allegedly adverse measures had been taken and only after the money in the accounts had been taken out of the Companies' control.

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1 The Claimant filed two requests for arbitration in this dispute. The first was filed on 25 February 2015 ("**Initial RFA**") and was accompanied by twelve exhibits. These are provided to the Tribunal as **Exhibit R-1** and **Exhibits R-1-1** to **R-1-12**. The second request, and the basis for this proceeding, was filed on 28 August 2018 ("**Amended RFA**") and was accompanied by 16 exhibits.

2 "AML" is a well-known acronym for anti-money-laundering.

3 "FATF" is the Financial Action Task Force, an international body dedicated to fighting money-laundering.

4 *See* Profile of Oleg Roshchin, Your Lawyers website, **Exhibit R-20**.

5 *See* LinkedIn Profile of Olegs Roshchin, CEO at YOUR LAWYERS, **Exhibit R-36**.

6 *See infra* paragraph 52.

7 Resolution of Kaunas Regional Prosecutor's Office, 5 July 2011 ("**Kaunas Prosecutor's Resolution**"), page 1, provided as Amended RFA, Exhibit 10. *See also* Amended RFA, paragraph 22.

4. In proceedings before the Respondent's courts, the Companies were represented by counsel[8] and introduced apostilled and notarised corporate resolutions, certificates and other documents of their shareholders or members and directors. None of these documents mentioned the Claimant as a member, shareholder or director of any of the Companies at all.[9] The Claimant also was not listed on any relevant bank accounts.[10]

5. In fact, a pre-trial criminal investigation revealed that the Companies – and other entities suspected of money-laundering – had designated directors and shareholders who were plainly strawmen and were not the sophisticated businessmen who might conduct millions of US dollars of transactions. The directors and shareholders instead included drifters, alcoholics and disabled pensioners who often disclaimed any knowledge of any of the entities.[11] As such, the Respondent's courts found that the Companies had proven neither that they performed legitimate business operations nor that they were the properly designated owners of the bank accounts.[12]

6. Starting in 2015, and through two different representatives, the Claimant threatened arbitration before the International Centre for Settlement of Investment Disputes ("**ICSID**" or "**Centre**") to pursue the return of the funds that were declared State property. From 2015 onwards, and despite several promises to do so, the Claimant's counsel has failed to disclose evidence that the Claimant actually owned the Companies before 11 July 2012 and has never disclosed who beneficially owned the Companies before that date. This is despite several straightforward and reasonable requests that the Claimant provide that basic information.[13]

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8 *See, e.g.*, Kaunas Regional Court, Decision, 5 July 2012 ("**Kaunas Regional Court Decision**"), page 1, provided as Initial RFA, Exhibit 9, **Exhibit R-1-9**.

9 *See infra* paragraphs 43 – 48.

10 *See infra* paragraph 25.

11 *See infra* paragraphs 35 – 40.

12 Kaunas Regional Court, Decision, 5 July 2012, pages 10 and 11, provided as Initial RFA, Exhibit 9, **Exhibit R-1-9**. The sums of money at issue were held in bank accounts that had been opened through a Lithuanian bank's Moscow branch. *See* Initial RFA, paragraph 25, **Exhibit R-1**. The Claimant has asserted the accounts were used to temporarily hold the money in order to effectuate the international sales of goods. *See* Initial RFA, paragraph 28, **Exhibit R-1** ("the [] Companies are offshore trading companies which at that time were involved in the purchase and resale of consumer goods for resale to other trading companies with eventual resale intended for the countries of the Former Soviet Union").

13 *See infra* Section III.B.

7. Arbitration before ICSID is not the proper forum for such questionable conduct. Indeed, the ICSID Arbitration Rules ("**Arbitration Rules**") contain specific provisions that permit the early termination of precisely this type of abusive and frivolous proceeding, so that States and their hardworking taxpayers can avoid the considerable and unnecessary costs and time of defending against such claims. Arbitration Rule 41(5) provides that claims that manifestly lack legal merit should be dismissed at their initial stages. Arbitration Rule 41(6) thereafter requires that, if all of the Claimant's claims manifestly lack legal merit, the proceedings should be terminated by an award of the Tribunal to that effect.[14]

8. In this case, all of the Claimant's claims manifestly lack legal merit for two independent reasons.

9. First, since the Claimant did not own shares in any of the Companies until after the Companies' accounts were restrained or after the Companies' lack of ownership was confirmed by the judgment of 5 July 2012, manifestly: (a) there is no jurisdiction nor any claim on the merits, as the Claimant did not have interests in the now-escheated funds at the time the allegedly adverse State measures were taken; and (b) the Claimant suffered no loss because the money had already been taken – and, in the case of four Companies, had already been formally confirmed as State property by a court – at the time the Claimant acquired interests in the Companies.[15]

10. This is not a case where ownership or shareholding is disputed or where significant disputed issues of fact require determination. This is a case where the date of the Claimant's nominal acquisition of the Companies is confirmed by the documents he has submitted to the Centre and by the documents the Companies submitted to the Respondent's courts (in addition to the behaviour and nondisclosure by the Claimant's counsel). The relevant dates of the alleged adverse measures have also been presented by the Claimant's Request for Arbitration dated 25 February 2015 ("**Initial RFA**") and its Request for Arbitration dated 8 August 2018 ("**Amended RFA**").[16]

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14 *See infra* Section II.

15 *See infra* Section IV.A.

16 *See infra* Section III.

11. Second, as confirmed in the 6 March 2018 decision of the Court of Justice of the European Union ("**CJEU**") in *Slovak Republic v. Achmea B.V.* (Case-284/16) ("***Achmea* Judgment**"),[17] the 2004 accession of the Respondent and Latvia to the European Union ("**EU**") and the 2009 entry into force of the Treaty on the Functioning of the European Union ("**TFEU**") manifestly rendered ineffective the consent to ICSID arbitration in Article 7 of the 1996 intra-EU Agreement Between the Government of the Republic of Lithuania and the Government of the Republic of Latvia on the Promotion and Protection of Investments ("**Lithuania-Latvia BIT**"),[18] including because this intra-EU proceeding involves a situation where both State parties joined the EU after the relevant BIT came into force.[19]

12. For these reasons, the Respondent asks the Tribunal to dismiss these proceedings under Arbitration Rules 41(5) and 41(6), with costs awarded to the Respondent.[20]

13. The remainder of this submission will be divided as follows. **Section II** sets forth the legal basis for terminating this proceeding for manifest lack of legal merit under Arbitration Rules 41(5) and 41(6). **Section III.A** explains that the Claimant acquired shares in the Companies after the bank accounts were restrained and the bulk of the funds in the accounts were already declared State property. **Section III.B** explains that the Claimant steadfastly refused to disclose proof of continuous ownership of the Companies in years of pre-arbitration discussions. **Section IV.A** explains that the claims manifestly lack legal merit because the Claimant did not own shares in the Companies until 11 July 2012 or afterwards. **Section IV.B** explains that, as the *Achmea* Judgment confirms, there is manifestly no legal merit to the claim that Latvia and Lithuania have consented to this arbitration. **Section V** explains why the costs of the proceedings to date, as well as of the pre-arbitration negotiations, should be borne by the Claimant. **Section VI** sets forth the Respondent's requests for relief.

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17 *Slowakische Republik v. Achmea BV*, Case C-284/16, Court of Justice of the European Union (Grand Chamber), Judgment, 6 March 2018 ("***Achmea* Judgment**"), **RL-4**.

18 Agreement between the Government of the Republic of Lithuania and the Government of the Republic of Latvia on the Promotion and Protection of Investments, signed on 7 February 1996, entered into force on 23 July 1996, 1951 UNTS 299 ("**Lithuania-Latvia BIT**"), **RL-1**.

19 *See infra* Section IV.B.

20 The Respondent reserves its right to seek security for costs in this proceeding.

II. PROCEEDINGS THAT MANIFESTLY LACK LEGAL MERIT SHOULD BE DISMISSED UNDER ARBITRATION RULES 41(5) AND 41(6)

14. Arbitration Rule 41(5) provides that:

> Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.[21]

15. Arbitration Rule 41(5) was added to the Arbitration Rules in 2006 to serve a specific and necessary purpose: permitting dismissal of "patently unworthy claims *in limine*" precisely to protect respondent States from incurring the costs of defending those proceedings in full.[22] As explained by one commentator:

> The rationale behind the new [Arbitration Rule 41(5)] is to offer the possibility to a respondent to raise an objection that the case is manifestly lacking legal merit, once the registration process took place. Indeed, pursuant to [Article 36(3)] of the Convention, the Secretary-General shall register the request unless he finds on the basis of the information contained in the request that the dispute is manifestly outside the jurisdiction of the Centre. This leaves no room for considerations of the merits of the dispute at the stage of the registration process. In addition, subsequently to the registration, a

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[21] ICSID Rules of Procedure for Arbitration Proceedings, 10 April 2006 ("**Arbitration Rules**"), Rule 41(5), **RL-3**.

[22] Michele Potestà, "Preliminary Objections to Dismiss Claims That are Manifestly Without Legal Merit under Rule 41(5) of the ICSID Arbitration Rules", in *ICSID Convention after 50 Years: Unsettled Issues*, ed. Crina Baltag (Kluwer International Law, 2017), page 249, **RL-5**. *See also* ICSID Secretariat, "Possible Improvements of the Framework for ICSID Arbitration", Discussion Paper, 22 October 2004, paragraph 10, **RL-6** ("the tribunal may at an early stage of the case be asked on an expedited basis to dismiss all or part of the claim . . . without prejudice to the further objections a party might make, if the request were denied"); Antonio Parra, *The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes*, 41 ICSID Review – Foreign Investment Law Journal (2007) 47, page 65, **RL-7** ("One of the amendments of the ICSID Arbitration Rules made in 2006 was to introduce a procedure, in Rule 41, for the early dismissal by arbitral tribunals of patently unmeritorious claims.").

> Respondent could raise arguments and use supporting documents that were not made available to the Centre at the time of registration.[23]

16. In other words, "the right (however qualified) given to the objecting party under Rule 41(5)" is the right "to have a patently unmeritorious claim disposed of before unnecessary trouble and expense is incurred in defending it".[24]

17. Claims should therefore be dismissed under Arbitration Rule 41(5) when it can be shown that they are "manifestly without legal merit".[25] This extends to all claims, whether on jurisdiction, the merits or quantum.[26]

18. The word "manifest" appears several times in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID Convention**")[27] and the Arbitration Rules.[28] The meaning of "manifest" in these contexts is something that can be determined "clearly and obviously, with relative ease and despatch",[29] i.e., something that is "obvious" or "evident".[30] While not

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23 Aurélia Antonietti, *The 2006 Amendments of the ICSID Rules and Regulations and the Additional Facility Rules*, 21 ICSID Review – Foreign Investment Law Journal (2006) 427, page 439, **RL-8**.

24 *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award (Berman, Gaillard, Thomas), 1 December 2010 ("***Global Trading***"), paragraph 34, **RL-9**.

25 Arbitration Rules, Rule 41(5), **RL-3**.

26 *See Global Trading*, paragraphs 30 – 31, **RL-9**; *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg, and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award (Rowley, Nottingham, Tercier), 10 December 2010 ("***RSM Production***"), paragraph 6.1.1, **RL-10**; Aurélia Antonietti, *The 2006 Amendments of the ICSID Rules and Regulations and the Additional Facility Rules*, 21 ICSID Review – Foreign Investment Law Journal (2006) 427, pages 339-440, **RL-8**.

27 *See, e.g.*, Convention on the Settlement of Investment Disputes between States and Nationals of Other States, signed on 18 March 1965, entered into force on 14 October 1966 ("**ICSID Convention**"), Article 28 (no registration of conciliation requests manifestly outside the jurisdiction of the Centre); Article 36 (same for requests for arbitration); Article 52 (providing for annulment where Tribunal "manifestly exceeded its powers"); and Article 57 (providing for disqualification of members of Commissions or Tribunals who have a "manifest lack of the qualities" required for appointment), **RL-2**.

28 *See* Arbitration Rules, Rule 50 (annulment for manifest excess of powers), **RL-3**.

29 *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25, Award (Reed, Pryles, van den Berg), 9 March 2017 ("***Ansung***"), paragraph 70, **RL-11**, quoting *Trans-Global Petroleum v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Tribunal's Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules (Veeder, McRae, Crawford), 12 May 2008 ("***Trans-Global***"), paragraph 88, **RL-12**. *See also RSM Production*, paragraph 6.1.1, **RL-10**.

30 *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP (Fernández-Armesto, Abraham, Danelius), 21 February 2014 ("***Caratube Annulment***"), paragraph 84, **RL-13**.

relevant in this case (where the lack of legal merit is manifest on its face and easily explained), "in some cases an extensive argumentation and analysis may be required to prove that" something is manifest.[31] In other words, "the exercise may thus be complicated; but it should never be difficult".[32]

19. In the context of Arbitration Rule 41(5), the Tribunal should "accept[] the facts as pleaded by" the Claimant, such as in its requests for arbitration.[33] This is not necessarily the end of the analysis. When assessing whether a claim lacks "legal merit", "it is rarely possible to assess the legal merits of any claim without also examining the factual premise upon which that claim is advanced".[34] As one commentator has pointed out, Arbitration Rule 41(5) allows "a Respondent [to] raise arguments and use supporting documents that were not made available to the Centre at the time of registration".[35] As such, while a full factual proceeding on the merits is neither authorised nor necessary in the context of Arbitration Rule 41(5), it is permissible to determine if the factual premises of the Claimant's request for arbitration are supportable (including based on incontrovertible documents)[36] and, in addition, whether those facts could support the stated legal claim.

20. Furthermore, Arbitration Rule 41(6) requires the Tribunal to terminate a proceeding when it determines that all of the claims are manifestly without legal merit. Arbitration Rule 41(6) states that "[i]f the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, or that all claims are manifestly without legal merit, it shall render an award to that effect".[37]

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31 *Caratube Annulment*, paragraph 84, **RL-13**.

32 *Trans-Global*, paragraph 88, **RL-12**.

33 *Ansung*, paragraph 71, **RL-11**.

34 *Trans-Global*, paragraph 97, **RL-12**.

35 Aurélia Antonietti, *The 2006 Amendments of the ICSID Rules and Regulations and the Additional Facility Rules*, 21 ICSID Review – Foreign Investment Law Journal (2006) 427, page 439, **RL-8**.

36 For example, facts that are "incredible, frivolous, vexatious or inaccurate" plainly cannot be relied on. *See Trans-Global*, paragraph 105, **RL-12**.

37 Arbitration Rules, Rule 41(6), **RL-3**.

III. THE CLAIMANT'S AMENDED REQUEST FOR ARBITRATION AND ITS SUPPORTING EXHIBITS DEMONSTRATE THAT THIS PROCEEDING MANIFESTLY LACKS LEGAL MERIT

21. As discussed above, for the limited purposes of an application under Arbitration Rules 41(5) and 41(6), the Tribunal should assume, *arguendo*, that the Claimant's factual allegations are true; but the Tribunal may also rely on other evidence, such as the contents of supporting documents, that do not require significant factual investigation.[38] As a result, this application: (a) assumes and presents the facts presented by the Claimant in its Initial RFA and Amended RFA and their exhibits; and (b) also refers to incontrovertible facts disclosed by documents, including the Companies' own submissions to the Respondent's courts, where expressly indicated. The Respondent reserves its rights to contest any of the Claimant's allegations if further proceedings in this arbitration are required.

22. The indisputable facts even as alleged by the Claimant confirm that this proceeding is a sham.

23. **Section III.A** below explains how the Claimant only acquired shares in the Companies years after the Companies' bank accounts had already been restrained and just days after the money in the accounts was (or was about to be, in the case of one company – Logotreck Products Inc.) confirmed by a court as State property. **Section III.B** then explains how, from 2015 to the present day, the Claimant has refused to provide evidence of the beneficial ownership of the Companies prior to 11 July 2012, despite many promises to do so.

[38] *See supra* paragraph 19.

A. The Claimant's Amended RFA confirms that the Claimant acquired shares in five Companies only after the State had restrained those Companies' bank accounts and only after the Respondent's courts had declared the bulk of those accounts to be property without a designated owner that belonged to the State

24. The evidence, as presented by the Claimant and the Companies themselves, confirms that the Claimant did not acquire shares in the Companies until after the relevant allegedly adverse State measures were taken.

1. From March 2005 to April 2006, five Companies opened bank accounts in the Lithuanian AB Ūkio bank from that bank's Moscow branch

25. As the Claimant's Amended RFA states, the subject of this proceeding is money that once sat in certain bank accounts of the Lithuanian AB Ūkio bank.[39] These bank accounts were opened at the Moscow branch of AB Ūkio bank[40] between March 2005 and April 2006.[41] In its Initial RFA, the Claimant provided the applications and agreements that the Companies signed to open the accounts. The following table summarises: (a) the Companies which nominally held each account; (b) the final

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39 *See* Amended RFA, paragraphs 1, 7. *See also* Initial RFA, paragraphs 21 – 22, **Exhibit R-1**.

40 Initial RFA, paragraph 22, **Exhibit R-1**.

41 *See* Initial RFA, paragraphs 23 – 27, **Exhibit R-1**. *See also* Bank Account Agreement with Machinery Trade, 25 March 2005 in Bank Account Agreements between AB Ūkio Bankas and Korofalt Ventures Ltd., Logotreck Products Inc., Machinery Trade S.A., Mita Group Ltd. and Advanta Corporation, page 37, provided as Initial RFA, Exhibit 4, **Exhibit R-1-4**; Bank Account Agreement with Mita Group Ltd., 22 June 2005, in Bank Account Agreements between AB Ūkio Bankas and Koforalt Ventures Ltd., Logotreck Products Inc., Machinery Trade S.A., Mita Group Ltd. and Advanta Corporation, page 57, provided as Initial RFA, Exhibit 4, **Exhibit R-1-4**; Bank Account Agreement with Advanta Corporation, 10 April 2006, in Bank Account Agreements between AB Ūkio Bankas and Koforalt Ventures Ltd., Logotreck Products Inc., Machinery Trade S.A., Mita Group Ltd. and Advanta Corporation, page 75, provided as Initial RFA, Exhibit 4, **Exhibit R-1-4**; Bank Account Agreement with Korofalt Ventures Ltd., 29 December 2005 in Bank Account Agreements between AB Ūkio Bankas and Koforalt Ventures Ltd., Logotreck Products Inc., Machinery Trade S.A., Mita Group Ltd. and Advanta Corporation, page 1, provided as Initial RFA, Exhibit 4, **Exhibit R-1-4**; Bank Account Agreement with Logotreck Products Inc., 5 April 2006 in Bank Account Agreements between AB Ūkio Bankas and Koforalt Ventures Ltd., Logotreck Products Inc., Machinery Trade S.A., Mita Group Ltd. and Advanta Corporation, page 19, provided as Initial RFA, Exhibit 4, **Exhibit R-1-4**. In or around January 2015, the bank accounts were transferred to Šiaulių Bankas as part of the liquidation of AB Ūkio Bankas. *See* Letter of confirmation from Šiaulių Bankas, 16 January 2015, page 1, provided as Initial RFA, Exhibit 11, **Exhibit R-1-11**.

sums of money in each account before 2 August 2012; and (c) the persons who allegedly opened those bank accounts.

Company	**Sum(s) of Money**[42]	**Individual Who Opened Account**
Korofalt Ventures Ltd.	USD 3,650,000.00	Irina Gauk (Director)[43]
Machinery Trade S.A.	USD 1,988,149.25 EUR 765,101.68 CHF 25,160.25	Borys Balenko (position not disclosed)[44]
Advanta Corporation	USD 1,300,273.97	Evgeniy Demianov (Power of Attorney)[45]
Mita Group Ltd.	USD 3,860,000.00	Mikhail Rodionov (Power of Attorney)[46]
Logotreck Products Inc.	USD 3,700,245.53	Tatyana Dudorova (Director)[47]

26. The Claimant does not appear anywhere on the papers concerning these bank accounts.

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42 *See* Amended RFA, paragraph 1. *See also* Letter of Confirmation from Šiaulių Bankas, 16 January 2015, page 2, provided as Initial RFA, Exhibit 11, **Exhibit R-11**.

43 Bank Account Agreement with Korofalt Ventures Ltd., 29 December 2005, in Bank Account Agreements between AB Ūkio Bankas and Koforalt Ventures Ltd., Logotreck Products Inc., Machinery Trade S.A., Mita Group Ltd. and Advanta Corporation, page 1, provided as Initial RFA, Exhibit 4, **Exhibit R-1-4**.

44 Bank Account Agreement with Machinery Trade S.A., 25 March 2005 in Bank Account Agreements between AB Ūkio Bankas and Koforalt Ventures Ltd., Logotreck Products Inc., Machinery Trade S.A., Mita Group Ltd. and Advanta Corporation, pages 37, 40, provided as Initial RFA, Exhibit 4, **Exhibit R-1-4**.

45 Bank Account Agreement with Advanta Corporation, 10 April 2006 in Bank Account Agreements between AB Ūkio Bankas and Koforalt Ventures Ltd., Logotreck Products Inc., Machinery Trade S.A., Mita Group Ltd. and Advanta Corporation, page 75, provided as Initial RFA, Exhibit 4, **Exhibit R-1-4**.

46 Bank Account Agreement with Mita Group Ltd., 22 June 2005, in Bank Account Agreements between AB Ūkio Bankas and Koforalt Ventures Ltd., Logotreck Products Inc., Machinery Trade S.A., Mita Group Ltd. and Advanta Corporation, pages 57 – 59, provided as Initial RFA, Exhibit 4, **Exhibit R-1-4**.

47 Bank Account Agreement with Logotreck Products Inc., 5 April 2006 in Bank Account Agreements between AB Ūkio Bankas and Koforalt Ventures Ltd., Logotreck Products Inc., Machinery Trade S.A., Mita Group Ltd. and Advanta Corporation, pages 19 – 21, provided as Initial RFA, Exhibit 4, **Exhibit R-1-4**.

2. In August 2006, AB Ūkio bank restrained each of those five Companies' bank accounts after receiving troubling information from the Austrian bank Raiffeisen about money-laundering

27. The genesis of this dispute is a massive money-laundering investigation centred on the "Commercial Bank Discount" established in the Russian Federation.

28. Money-laundering is the criminal act of having the money flow through fictitious, but facially lawful, commercial and banking transactions in order to conceal the fact that the money was obtained through criminal activities.[48] One of the ways money-laundering is accomplished is by having fictitious companies pretend to do business with one another through sham contracts and then transfer ill-gotten sums to each other's bank accounts, in order to conceal the money's actual source.[49]

29. Money-laundering is used "in every kind of international crime – human, drug, and weapons trafficking, financial crimes like tax evasion . . . and terrorist financing".[50] Indicia of potential money-laundering include the use of "paper companies run by proxies" that "have no offices, no employees" whose "real owners are hidden behind proxies – persons with no connection to them – who stand in as director and shareholders".[51] In some examples of money-laundering, "[these companies] are financial phantoms and their only possession typically is a bank account . . . ".[52] To satisfy internal banking regulations, money-laundering often uses "artificial"

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48 *See* Paul A. Schott, *Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism* (The World Bank, 2nd ed., 2006), page I-3, **RL-14**.

49 *See* Financial Action Task Force on Money Laundering, *Report on Money Laundering Typologies 2003-2004* (FATF, 2006), pages 20 – 21, **RL-15**; Paul A. Schott, *Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism* (The World Bank, 2nd ed., 2006), pages I-8 – I-9, **RL-14**.

50 The Proxy Platform, Organized Crime and Corruption Reporting Project, page 1, **Exhibit R-25**. *See also* Paul A. Schott, *Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism* (The World Bank, 2nd ed., 2006), pages V6 – V7, **RL-14**.

51 The Proxy Platform, Organized Crime and Corruption Reporting Project, page 1, **Exhibit R-25**.

52 The Proxy Platform, Organized Crime and Corruption Reporting Project, page 1, **Exhibit R-25**.

"contract[s] for buying and selling physical goods" such as "[f]ood, television sets, even sanitary ware", but where, in fact, "no real goods chang[ed] hands".[53]

30. As the Claimant's own exhibits show, on 30 and 31 August 2006, the Austrian bank Raiffeisen Zentralbank Österreich A.G. ("**Raiffeisen**") identified transactions related to thirteen entities, including each of the Companies, as money-laundering operations; Raiffeisen therefore asked AB Ūkio bank to return the funds that had recently been deposited in AB Ūkio bank accounts for those entities.[54] The deposits had come from the "Commercial Bank Discount", established in the Russian Federation, through Raiffeisen as a correspondent bank.[55] On 31 August 2006, the Central Bank of Russia closed the "Commercial Bank Discount" for violation of money-laundering and anti-terrorism laws.[56]

31. Rather than return the funds to Austria, AB Ūkio bank froze the relevant accounts pending its own internal, nongovernmental investigation.[57]

3. On 6 September 2006, the Respondent's prosecutors opened a pre-trial criminal investigation into the five Companies and eight other suspicious entities and formally restrained the Companies' bank accounts

32. On 6 September 2006, AB Ūkio bank sent the Financial Crime Investigation Service of the Ministry of the Interior of the Republic of Lithuania, Kaunas County Division (the relevant Respondent's prosecutors for this proceeding) approximately 2,500 pages of financial statements concerning those thirteen entities, including each of the

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53 Juliette Garside, "Q&A: What is the 'Troika Laundromat' and how did it work?: Billions of dollars moved from Russia to the west, mixing legitimate wealth with apparently fraudulent funds", *The Guardian*, 4 March 2019, page 2, **Exhibit R-34**.

54 *See* Kaunas Prosecutor's Resolution, page 1, provided as Amended RFA, Exhibit 10.

55 Kaunas Prosecutor's Resolution, page 1, provided as Amended RFA, Exhibit 10.

56 Kaunas Prosecutor's Resolution, page 1, provided as Amended RFA, Exhibit 10.

57 *See* Kaunas Prosecutor's Resolution, page 1, provided as Amended RFA, Exhibit 10.

Companies.[58] That same day, the Respondent's prosecutors opened a pre-trial investigation into this possible criminal activity.[59]

33. Also that same day, on 6 September 2006, the Respondent's prosecutors formally restrained the relevant accounts, thereby freezing the sums of money at issue in this arbitration.[60]

34. Austrian authorities thereafter provided more information to the Respondent's prosecutors about the suspected money-laundering from the "Commercial Bank Discount", which was being investigated by Russian authorities as well.[61]

4. On 5 July 2011, the Respondent's prosecutors reported the results of their investigation, maintained the restraints on the Companies' accounts and recommended judicial confirmation that the accounts did not have properly identified owners and so were State property

35. The pre-trial investigation of the Companies and the other suspicious and related entities continued from 2006 until 2011, when the Kaunas Regional Prosecutor's Office issued a resolution describing the investigation's results on 5 July 2011.[62] The findings of the pre-trial investigation were troubling and raised substantial questions about each of the Companies and the other identified suspicious entities.

36. For example, during the investigation, Israeli authorities informed the Respondent's prosecutors that the name Mita Group Ltd., one of the Companies in this case, was found during a search of the premises of two known criminals, Gregory Lerner and Boris Bubnov.[63] Israeli authorities suspected that Mita Group Ltd. was used to

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58 Kaunas Prosecutor's Resolution, page 1, provided as Amended RFA, Exhibit 10.

59 Kaunas Prosecutor's Resolution, page 1, provided as Amended RFA, Exhibit 10.

60 Notice of Dispute pursuant to Article 7 of the Latvian-Lithuanian Bilateral Investment Treaty, 17 April 2015 ("**Notice of Dispute**"), paragraph 39, provided as Amended RFA, Exhibit 13. *See also* Kaunas Prosecutor's Resolution, page 1, provided as Amended RFA, Exhibit 10.

61 Kaunas Prosecutor's Resolution, pages 1 – 2, provided as Amended RFA, Exhibit 10.

62 *See* Kaunas Prosecutor's Resolution, provided as Amended RFA, Exhibit 10.

63 *See* Kaunas Prosecutor's Resolution, page 50, provided as Amended RFA, Exhibit 10.

launder money that these criminals had obtained through a fraudulent oil products purchase scheme.[64]

37. In addition, authorities in the Russian Federation confirmed that the addresses listed for the Companies on the bank accounts were not actually registered with the tax authorities.[65] In fact, none of the Companies were actually at those addresses.[66]

38. The Russian authorities also interviewed or attempted to interview the people who were suggested to be the actual officers, directors or other designated representatives of the Companies (or their relatives). Their findings were as follows:

    a. Ms Irina Gauk was the Director of Korofalt Ventures Ltd. who had opened that company's bank accounts.[67] Although her whereabouts were unknown,[68] her brother gave a statement to the Russian authorities. He stated that his sister was a "layabout" who did not "have secondary education" and "never had any business", although he continued to receive tax summons for her because her information had been used to open "a large number of firms".[69] She did not live with her child, who she had abandoned to her mother's and brother's care.[70]

    b. Mr Borys Balenko, who opened the bank accounts for Machinery Trade S.A.,[71] gave a statement to the Russian authorities and confirmed he was a Director for the company; however, he also said he "[was] not a beneficiary of the company Machinery Trade Company S.A." and was "receiving

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64 *See* Kaunas Prosecutor's Resolution, page 50, provided as Amended RFA, Exhibit 10. Public media reports show that Gregory Lerner has been convicted and imprisoned more than once in Israel for various criminal frauds. Nir Hasson, "Businessman Gregory Lerner Gets Six Years in Prison on Embezzlement Charges", *Haaretz*, 9 July 2006, **Exhibit R-23**; Ofra Edelman, "Convicted of Vast Ponzi Scheme, Gregory Lerner Given 10 Years", *Haaretz*, 28 July 2010, **Exhibit R-24**.

65 *See* Kaunas Prosecutor's Resolution, page 46, provided as Amended RFA, Exhibit 10.

66 *See* Kaunas Prosecutor's Resolution, page 46, provided as Amended RFA, Exhibit 10.

67 *See supra* paragraph 25.

68 *See* Kaunas Prosecutor's Resolution, page 35, provided as Amended RFA, Exhibit 10.

69 Kaunas Prosecutor's Resolution, page 35, provided as Amended RFA, Exhibit 10.

70 *See* Kaunas Prosecutor's Resolution, page 35, provided as Amended RFA, Exhibit 10.

71 *See supra* paragraph 25.

neither payment orders nor money thereof".[72] Mr Balenko also provided questionable answers when asked about suspicious trades between the company and another associated company.[73]

c. Mr Evgeniy Demianov, the authorised person for Advanta Corporation who had opened that company's bank accounts,[74] gave a statement to the Russian authorities. He said he worked from home, had no contact with the company's employees and simply signed pre-prepared contracts.[75]

d. Mr Mikhail Rodionov, the Director General of Mita Group Ltd. who had opened that company's bank accounts,[76] gave a statement to the Russian authorities that asserted that he had indeed been a director of that company from 2004; however, he then also claimed that he "ha[d] no recollection of who offered him this job", i.e., who his boss was.[77]

e. Ms Tatyana Dudorova, the Director of Logotreck Products Inc. that had opened that company's bank accounts,[78] gave a statement to the Russian authorities where she claimed that she simply signed documents presented to her.[79] She was made the Director of that company after responding to an employment advertisement.[80] She said she had no working knowledge of the company's activities at all.[81] She did not keep records of the documents she signed.[82] After being interviewed twice by Russian authorities, Ms Dudorova then disappeared from her home.[83]

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72 Kaunas Prosecutor's Resolution, page 49, provided as Amended RFA, Exhibit 10.

73 *See* Kaunas Prosecutor's Resolution, page 49, provided as Amended RFA, Exhibit 10.

74 *See supra* paragraph 25.

75 *See* Kaunas Prosecutor's Resolution, page 44, provided as Amended RFA, Exhibit 10.

76 *See supra* paragraph 25.

77 Kaunas Prosecutor's Resolution, page 31, provided as Amended RFA, Exhibit 10.

78 *See supra* paragraph 25.

79 *See* Kaunas Prosecutor's Resolution, pages 29 – 30, provided as Amended RFA, Exhibit 10.

80 *See* Kaunas Prosecutor's Resolution, pages 29 – 30, provided as Amended RFA, Exhibit 10.

81 *See* Kaunas Prosecutor's Resolution, pages 29 – 30, 43 – 44, provided as Amended RFA, Exhibit 10.

82 *See* Kaunas Prosecutor's Resolution, pages 29 – 30, 43, provided as Amended RFA, Exhibit 10.

83 *See* Kaunas Prosecutor's Resolution, page 47, provided as Amended RFA, Exhibit 10.

39. The findings were just as questionable for the other suspicious companies connected to the money-laundering scheme. Russian authorities interviewed the named officers, directors and representatives of those other suspicious entities and found that those officers, directors and representatives included:

a. someone who claimed to have signed documents for a stranger who approached him on the street for USD 50;[84]

b. a disabled state pensioner suffering from tuberculosis who claimed she never signed the documents with her name on them;[85]

c. a now-unemployed, former car park attendant who also claimed he had never signed the documents with his name on them;[86]

d. another person who claimed they had never "filled out any bank cards whatsoever";[87]

e. another disabled state pensioner, this one a former packer at a grocery store, who signed some bank documents when asked to do so by her brother but disclaimed knowledge of what she was signing;[88]

f. an unemployed former engineer who had lost his passport for three days, only to have it returned to him, and had never heard of the companies he was meant to represent;[89]

g. another unemployed former car park attendant who let someone make copies of his passport and had never heard of the companies he was meant to represent;[90]

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84 *See* Kaunas Prosecutor's Resolution, page 31, provided as Amended RFA, Exhibit 10.

85 *See* Kaunas Prosecutor's Resolution, pages 31 – 32, provided as Amended RFA, Exhibit 10.

86 *See* Kaunas Prosecutor's Resolution, page 32, provided as Amended RFA, Exhibit 10.

87 Kaunas Prosecutor's Resolution, page 32, provided as Amended RFA, Exhibit 10.

88 *See* Kaunas Prosecutor's Resolution, page 37, provided as Amended RFA, Exhibit 10.

89 *See* Kaunas Prosecutor's Resolution, page 38, provided as Amended RFA, Exhibit 10.

90 *See* Kaunas Prosecutor's Resolution, pages 38 – 39, provided as Amended RFA, Exhibit 10.

h. an unemployed packer who claimed that, several years ago, her passport had been stolen and then returned to her mysteriously;[91]

i. someone who refused to give testimony without stating why;[92] and

j. a shipper who was formerly unemployed, claimed not to have heard of the company he was supposed to represent and suggested his passport may have been stolen from him, and then returned to him, because "at the time he was severely abusing alcohol, and does not remember much in detail".[93]

40. These were supposed to be the officers, directors and representatives of companies that routinely transferred and held millions of US dollars, Euros and Swiss Francs in international bank accounts.

41. In the end, however, the Respondent's prosecutors exercised excruciating independence and acted conservatively. They found that the evidence that had been gathered could not support a criminal proceeding in Lithuania. Instead, since all the possible criminal activity had occurred in Russia (including opening the bank accounts), the appropriate authorities to pursue the criminal investigation were the Russian authorities. In the words of the Respondent's prosecutors:

> The data collected in the case show that the financial operations with said monies have been initiated in the Russian Federation, therefore the possibilities for determining the circumstances of the lawfulness of money acquisition should be related to the results of the investigation carried out by the law enforcement authorities of this country. All possible investigative actions have been carried out in the Republic of Lithuania in order to collect meaningful data supporting the presence of constituent objective elements of the offence pursuant to the Art. 216 of the Criminal Code of LR., however it must be concluded that they are insufficient in order to be able to state that in carrying out discussed financial operations, an act has been committed which has the elements of said offence, therefore the pre-trial investigation in this part should be terminated.[94]

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91 *See* Kaunas Prosecutor's Resolution, page 39, provided as Amended RFA, Exhibit 10.

92 *See* Kaunas Prosecutor's Resolution, page 40, provided as Amended RFA, Exhibit 10.

93 Kaunas Prosecutor's Resolution, pages 40-41, provided as Amended RFA, Exhibit 10.

94 Kaunas Prosecutor's Resolution, page 56, provided as Amended RFA, Exhibit 10.

42. That finding, however, was not the end of the matter. Even if criminal liability in Lithuania could not yet be established, there was the issue that the restrained funds in the bank accounts plainly did not belong to the fictitious officers, directors and shareholders who only sometimes even claimed to represent the Companies. As the Claimant's Notice of Dispute dated 17 April 2015 ("**Notice of Dispute**") explains, under the Respondent's laws, property that is restrained during a criminal investigation "shall be returned to the rightful owners, in case the latter are not established, then shall become a national property [sic]".[95] Here, as the Respondent's prosecutors confirmed, the owners were not known or established. As a result, the prosecutors maintained their restraint on the accounts and suggested that the money in them should be considered property without a designated owner because, among other things, the beneficiary or beneficiaries of the money was unknown.[96] The prosecutors therefore recommended the sums of money be confirmed as "ownerless" property belonging to the State through appropriate judicial procedures.[97]

5. During judicial proceedings concerning the Companies' bank accounts, each of the five Companies presented evidence of their shareholders and directors – none of whom were the Claimant at the relevant time

43. Under the Respondent's law, an application can be made in court to confirm that property does not have a designated "owner".[98] On 15 November 2011, the Respondent's State Tax Inspectorate under the Ministry of Finance sought a declaration from the Kaunas District Court that the funds in bank accounts for four of the Companies – Korofalt Ventures Ltd., Machinery Trade S.A., Mita Group Ltd. and Advanta Corporation (and also one more entity not at issue in this case) – did not have a designated "owner" and thus should be confirmed to be State property.[99]

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95 Notice of Dispute, paragraph 49, provided as Amended RFA, Exhibit 13.

96 *See* Kaunas Prosecutor's Resolution, pages 55 – 57, provided as Amended RFA, Exhibit 10.

97 *See* Kaunas Prosecutor's Resolution, page 57, provided as Amended RFA, Exhibit 10.

98 *See* Excerpts from the Civil Code of the Republic of Lithuania, Articles 4.57 to 4.58, **Exhibit R-21**.

99 *See* Kaunas City District Court, Decision, 8 December 2011, page 1, provided as Initial RFA, Exhibit 8, **Exhibit R-1-8**.

44. On 8 December 2011, the first instance court ruled that, in its view, four of the Companies owned the funds and thus the funds should not be State property. The court found that the State Tax Inspectorate had, in its view, not overcome an evidentiary burden to establish that the property was ownerless.[100]

45. The Respondent's State Tax Inspectorate appealed that decision to the Kaunas Regional Court, a second instance court. Under the Respondent's laws, the Kaunas Regional Court is entitled to perform a *de novo* review of both the factual and legal findings of the first instance court.[101]

46. On 13 June 2015, Logotreck Products Inc., the fifth of the Companies at issue in this case, started a proceeding in the Vilnius Regional Court seeking the return of the restrained funds held in the bank account under its name.[102]

47. Throughout all of the judicial proceedings referred to above, each of the Companies was represented by an attorney. In those proceedings, the Companies presented evidence to show who owned their shares and were their directors. None of that evidence mentioned the Claimant. Instead, that evidence was as follows:

    a. Korofalt Ventures Ltd. presented apostilled and notarised copies of an incumbency certificate, register of directors and register of members, resolution of the directors and confirmation of the appointment of directors.[103] These documents showed that, as of 22 October 2007 (and until 31 January 2012), the sole director of the company was Mr Alexei Alexandrovich Kakovkin.[104] The sole shareholder of the company was Mr

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100 *See* Kaunas City District Court, Decision, 8 December 2011, pages 7 – 8, provided as Initial RFA, Exhibit 8, **Exhibit R-1-8**.

101 *See*, *e.g.*, Excerpts from the Code of Civil Procedure of the Republic of Lithuania, Article 320.1, **Exhibit R-22** ("The limits of appeal procedure in hearing a case shall consist of the factual and legal grounds of the appeal and the verification of the absolute grounds for the invalidity of the judgment.").

102 Statement of Claim of Annava Limited, Vectrus Commerce Ltd., Moduls Business Inc. and Logotreck Products Inc., 13 June 2012, as submitted to the Respondent's courts, **Exhibit R-35**.

103 Certificate of Incumbency in Documents concerning Korofalt Ventures Ltd., 6 November 2007, as submitted by the company to the Respondent's courts, **Exhibit R-2**.

104 Certificate of Incumbency in Documents concerning Korofalt Ventures Ltd., 6 November 2007, as submitted by the company to the Respondent's courts, **Exhibit R-2**; Certificate of Incumbency in Documents concerning Korofalt Ventures Ltd., 31 January 2012, as submitted by the company to the Respondent's courts, **Exhibit R-3**.

Sergey Vladimirovich Sharoykin,[105] who acquired his shares on 17 October 2005.[106] Previous directors of the company included Ms Irina Gauk (discussed above)[107] as well as Mr Edward Petre-Mears.[108]

b. Machinery Trade S.A. presented an apostilled and notarised copy of a certificate of incumbency. The sole director and shareholder of the company was Mr Borys Balenko (discussed above),[109] appointed to both positions on 25 February 2005.[110]

c. Advanta Corporation presented apostilled copies of its certificate of incorporation and certificate of incumbency, among other documents. These documents did not disclose Advanta Corporation's shareholders, but it did disclose that a certain Mr or Ms Stavrinou was the sole director of the company from 18 July 2005 onwards.[111]

d. Mita Group Ltd. presented an apostilled and notarised copy of a certificate of incumbency. The sole director and shareholder of the company was Mr Dmitry Filippov, appointed in both positions as of 6 February 2012.[112]

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105 *See* Certificate of Incumbency in Documents concerning Korofalt Ventures Ltd., 6 November 2007, as submitted by the company to the Respondent's courts, **Exhibit R-2**; Certificate of Incumbency in Documents concerning Korofalt Ventures Ltd., 31 January 2012, as submitted by the company to the Respondent's courts, **Exhibit R-3**.

106 *See* Documents concerning Korofalt Ventures Ltd., certified on 25 June 2010, as submitted by the company to the Respondent's courts, page 5, **Exhibit R-8**.

107 *See supra* paragraph 38.a.

108 *See* Documents concerning Korofalt Ventures Ltd., certified on 25 June 2010, as submitted by the company to the Respondent's courts, page 3, **Exhibit R-8**. Mr Petre-Mears is a well-known "sham director", or nominee director, based in the St Kitts and Nevis. James Ball, "Sham directors: the woman running 1,200 companies from a Caribbean rock", *The Guardian*, 25 November 2012, **Exhibit R-26**.

109 *See supra* paragraph 38.b.

110 Certificate of Incumbency in Documents concerning Machinery Trade S.A., 12 July 2010, as submitted by the company to the Respondent's courts, page 3, **Exhibit R-4**.

111 Certificate of Incumbency in Documents concerning Advanta Corporation, 18 June 2010, as submitted by the company to the Respondent's courts, **Exhibit R-6**.

112 Certificate of Incumbency in Documents concerning Mita Group Ltd., 27 March 2012, as submitted by the company to the Respondent's courts, **Exhibit R-5**.

Previously, the director had been Mr Mikhail Rodionov (discussed above).[113]

e. Logotreck Products Inc. presented notarised copies of an incumbency certificate, register of directors and register of members, resolution of the directors and confirmation of the appointment of directors.[114] The sole director of the company was Ms Tatyana Dudorova (discussed above),[115] who was appointed on 3 January 2006, and the sole shareholder was Mr Mikhail Rodionov (also discussed above with respect to Mita Group Ltd.),[116] appointed on 5 January 2006.[117]

48. As the Tribunal will notice, many of these officers and directors are the same individuals who provided questionable and suspicious information to Russian authorities.[118] The Tribunal will also immediately notice that the Claimant, Mr Olegs Roščins, is not found in a single one of those documents.[119]

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113 *See supra* paragraph 38.d.

114 Certificate of Incumbency in Documents concerning Logotreck Products Inc., 31 January 2012, as submitted by the company to the Respondent's courts, **Exhibit R-7**; Documents concerning Logotreck Products Inc., certified on 25 June 2010, as submitted by the company to the Respondent's courts, **Exhibit R-9**.

115 *See supra* paragraph 38.e.

116 *See supra* paragraph 38.d.

117 Certificate of Incumbency in Documents concerning Logotreck Products Inc., 31 January 2012, as submitted by the company to the Respondent's courts, **Exhibit R-7**; Documents concerning Logotreck Products Inc., certified on 25 June 2010, as submitted by the company to the Respondent's courts, **Exhibit R-9**.

118 *See supra* paragraph 38.

119 Although it could not have been known to the Respondent's prosecutors at the time, the registered agents that provided the documents submitted as evidence in the proceeding before the Vilnius Regional Court – Commonwealth Trust Limited, Coverdale Trust Services Limited and Midland Trust Limited – have been warned, fined and sanctioned by the British Virgin Islands Financial Services Commission multiple times, over several years, for contravention of that jurisdiction's Anti-Money Laundering and Terrorist Financing Code of Practice, 2008, including for failing to perform adequate customer diligence. *See* Commonwealth Trust Limited, Financial Services Commission of British Virgin Islands, 25 June 2014, **Exhibit R-29**; Commonwealth Trust Limited, Financial Services Commission of British Virgin Islands, 4 August 2013, **Exhibit R-27**; Commonwealth Trust Limited, Financial Services Commission of British Virgin Islands, 26 September 2013, **Exhibit R-28**; Midland Trust Limited, Financial Services Commission of British Virgin Islands, 23 December 2013, **Exhibit R-30**; Midland Trust Limited, Financial Services Commission of British Virgin Islands, 30 November 2015, **Exhibit R-31**; Coverdale Trust Services Limited, Financial Services Commission of British Virgin Islands, 21 August 2015, **Exhibit R-32**; Coverdale Trust Services Limited, Financial Services Commission of British Virgin Islands, 15 February 2017, **Exhibit R-33**.

6. On 5 July 2012, a second instance court confirmed that four of the Companies had not demonstrated proper ownership of their accounts and, therefore, that the accounts were State property

49. On 5 July 2012, the Kaunas Regional Court overturned the decision of the first instance court.[120] It found that the four relevant Companies had not shown sufficient evidence to prove their actual, substantive ownership of the funds.[121] It also found that the results of a pre-trial investigation could and should be assessed just like any other form of evidence in a civil proceeding.[122] The judges of the Kaunas Regional Court, who had the final power to establish facts *de novo*,[123] found that they were not satisfied that the four Companies owned the funds, including because they were not convinced that the Companies were engaged in actual business activities.[124] They therefore determined that the funds had to revert to ownership of the State.[125]

50. Under the Respondent's laws, the judgment of the Kaunas Regional Court became binding and effective, and *res judicata*, on the day it was issued, notwithstanding the possibility of a cassation appeal to the Supreme Court of Lithuania.[126] An appeal to the Supreme Court also does not interrupt a judgment's effectiveness and the Supreme Court is bound by the facts established by the lower courts.[127]

51. The funds for all five of the Companies were transferred to an escrow account of the tax authorities on 2 August 2012.[128]

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120 *See supra* paragraph 45.

121 Kaunas Regional Court Decision, page 11, provided as Initial RFA, Exhibit 9, **Exhibit R-1-9**.

122 Kaunas Regional Court Decision, page 9, provided as Initial RFA, Exhibit 9, **Exhibit R-1-9**.

123 *See supra* paragraph 45.

124 Kaunas Regional Court Decision, page 10, provided as Initial RFA, Exhibit 9, **Exhibit R-1-9**.

125 Kaunas Regional Court Decision, pages 11 – 12, provided as Initial RFA, Exhibit 9, **Exhibit R-1-9**.

126 Excerpts from the Code of Civil Procedure of the Republic of Lithuania, Article 331.6, **Exhibit R-22**.

127 *See* Excerpts from the Code of Civil Procedure of the Republic of Lithuania, Article 353.1, **Exhibit R-22**.

128 *See* Letter of Confirmation from Šiaulių Bankas, 16 January 2015, pages 1 – 2, provided as Initial RFA, Exhibit 11, **Exhibit R-1-11**.

7. Only then did the Claimant acquire shares in the five Companies, on 11 July 2012 or thereafter

52. Remarkably, it was only six days after the adverse judgment of the Kaunas Regional Court that the Claimant finally appeared anywhere on the relevant corporate documents of the Companies.

53. Indeed, the exhibits to the Claimant's own Amended RFA show that the Claimant only acquired shares or ownership in the Companies after the 5 July 2012 judgment that confirmed the State's ownership of the four Companies' bank accounts.[129] The exhibits show that:

a. The Claimant was appointed as a Director Korofalt Ventures Ltd. (BVI) on the "11th day of July, 2012" and was issued 50,000 shares in that company on the "11th day of July, 2012".[130]

b. The Claimant was appointed as a Director of Logotreck Products Inc. (BVI) on the "11th day of July, 2012" and was issued 1,000 shares in that company on the "11th day of July, 2012".[131]

c. The Claimant was appointed as a Director of Machinery Trade S.A. (BVI) on the "01st day of August, 2012" and was issued 50,000 shares[132] in that company on the "01st day of August, 2012".[133]

d. In this proceeding, the Claimant has only introduced a certificate of incumbency that shows he was the Director and Shareholder of Mita Group

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129 *See supra* paragraph 49.

130 Certificate of Incumbency for Korofalt Ventures Ltd. prepared by Commonwealth Trust Limited, 31 March 2015, page 3, provided as Amended RFA, Exhibit 2.

131 Certificate of Incumbency for Logotreck Products Inc. prepared by Commonwealth Trust Limited, 31 March 2015, page 3, provided as Amended RFA, Exhibit 3.

132 This exhibit actually refers to "50,000" shares and "50,0000 shares". The latter figure appears to be a typo. Certificate of Incumbency for Machinery Trade S.A. prepared by Commonwealth Trust Limited, 1 April 2015, page 3, provided as Amended RFA, Exhibit 4.

133 Certificate of Incumbency for Machinery Trade S.A. prepared by Commonwealth Trust Limited, 1 April 2015, page 3, provided as Amended RFA, Exhibit 4.

Ltd. as of 15 April 2015.[134] In the civil proceedings before the Respondent's courts, Mita Group Ltd. provided apostilled and notarised evidence that its sole shareholder and director was Mr Dmitry Filippov as of late 6 February 2012.[135]

e. The Claimant was appointed as the "Sole Director" of Advanta Corporation (St. Kitts and Nevis) on "July 30, 2012". He has also only introduced a certificate that acknowledges that he was a shareholder in that company as of the "April 2, 2015".[136]

54. After 11 July 2012, the four Companies subject to the 2012 court judgment continued to pursue their right to appellate cassation review under the Respondent's laws[137] (which did not interrupt the effectiveness of the prior judgment[138]). On 18 January 2013, the Supreme Court of Lithuania confirmed that there were no legal grounds to overturn the prior judgment. The Supreme Court affirmed that, as a court of cassation, it had no power to review the factual determinations of the lower court.[139]

55. Furthermore, Logotreck Products Inc. continued to seek the return of the funds nominally held by it in the Respondent's courts. Unsurprisingly, given the 5 July 2012 judgment of the Kaunas Regional Court concerning the other four Companies, on 18 December 2013, the Vilnius Regional Court also confirmed that the funds nominally attributed to Logotreck Products Inc. were ownerless property.[140] On 4 September 2014, the second instance court confirmed that decision.[141] On 5

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134 Certificate of Incumbency for Mita Group Ltd. prepared by Midland Trust Limited, 15 April 2015, page 3, provided as Amended RFA, Exhibit 5.

135 *See supra* paragraph 47.d.

136 Certificate of Incumbency for Advanta Corporation prepared by Morning Star Holdings Limited, 2 April 2015, page 1, provided as Amended RFA, Exhibit 6.

137 *See* Order of the Supreme Court of Lithuania, 18 January 2013, provided as Amended RFA, Exhibit 11.

138 *See supra* paragraph 50.

139 Order of the Supreme Court of Lithuania, 18 January 2013, page 11, provided as Amended RFA, Exhibit 11.

140 Order of the Supreme Court of Lithuania, 5 December 2014, page 1, provided as Amended RFA, Exhibit 12.

141 Order of the Supreme Court of Lithuania, 5 December 2014, page 1, provided as Amended RFA, Exhibit 12.

December 2014, the Supreme Court of Lithuania refused to hear a cassation appeal on the grounds that the appeal did not present exceptional issues of law.[142]

B. In pre-arbitration negotiations, the Claimant consistently failed to produce documents establishing his ownership of any of the Companies prior to 11 July 2012

56. By 2014, then, the Companies had exhausted all potential appeals to the Respondent's courts to obtain the restrained bank accounts despite the accounts' questionable ownership. As a result, in early 2015, the Claimant sought – unsuccessfully – to initiate an ICSID arbitration. During the years that followed the Claimant's Initial RFA, the Claimant steadfastly failed to provide evidence that he had anything to do with the Companies prior to 11 July 2012, even though that was when the adverse State measures were taken.

1. In 2015 and 2016, the Claimant's previous counsel, Mr Julian H. Lowenfeld, promised but then failed to deliver proof of ownership during all relevant periods

57. On 25 February 2015, the Claimant – along with each of the Companies as claimants[143] – filed its Initial RFA with twelve exhibits, seeking to start an ICSID proceeding concerning the facts outlined above.[144] Not one of those exhibits demonstrated the Claimant's ownership of the Companies' shares.

58. The Respondent's Ministry of Foreign Affairs responded to the Initial RFA on 7 April 2015, noting that the Claimant had failed to seek pre-arbitration negotiations as required under Article 7 of the Lithuania-Latvia BIT.[145] The Claimant withdrew the Initial RFA on 16 April 2015.[146]

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142 Order of the Supreme Court of Lithuania, 5 December 2014, page 2, provided as Amended RFA, Exhibit 12.

143 Since the Companies were not Latvian entities, they were not entitled to invoke the Lithuania-Latvia BIT.

144 Initial RFA, **Exhibit R-1**.

145 Note Verbale from Ministry of Foreign Affairs of the Republic of Lithuania to the Secretary-General of ICSID, 7 April 2015, **Exhibit R-18**.

146 *See* Letter from ICSID to the Parties, 16 April 2015, **Exhibit R-19**.

59. Thereafter, on 17 April 2015, the Claimant's counsel, Mr Julian H. Lowenfeld of New York, delivered a Notice of Dispute by email to the Respondent. The Notice of Dispute, which is Exhibit 13 to the Amended RFA, only named the Claimant as the investor and removed the reference to the Companies as claimants. In the Notice of Dispute, the Claimant asserted that he was "the sole owner of the [] Companies"[147] but, rather than proving that fact, the Claimant stated that "[p]roof that the [] Companies are and were beneficially owned by Mr. Roščins . . . will be provided during negotiations".[148] The Notice of Dispute therefore represented that the Claimant was willing and able to produce documents to demonstrate his beneficial ownership of the Companies for all relevant periods in the dispute. This turned out to be entirely untrue.

60. Upon receipt of the Notice of Dispute, the Respondent undertook the required internal procedures to appoint counsel to represent it in the dispute. On 31 August 2015, external counsel for the Respondent sent a letter to the Claimant's counsel noting that "Lithuania is prepared to meet its obligations under Article 7 of the BIT" to conduct good faith consultations about the dispute provided that the Claimant "present corresponding evidence" of its entitlement to invoke Article 7 of the Lithuanian-Latvian BIT.[149] That letter then went on to state that:

> However, to date, your client has failed to present evidence to establish that he owns the corporate entities cited in the Notice and, through them, the funds which he claims constitute the 'investment in Lithuania' in this matter. In order to establish that the Notice is valid under the BIT, and Lithuania's related obligation to engage in consultations, your client must at a minimum first provide (in addition to valid and legible proof of citizenship) evidence of his ownership of the five corporate entities cited in the Notice: [the Companies].
>
> Providing this evidence should be simple, taking the form of share ownership certificates, annual returns listing shareholders and shareholder ledgers for these corporate entities, all over the relevant period of time at issue up to the present. Indeed, presumably, such

147 Notice of Dispute, paragraphs 7, 10, provided as Amended RFA, Exhibit 13.

148 Notice of Dispute, paragraph 30, provided as Amended RFA, Exhibit 13.

149 Letter from the Respondent's counsel (Robert Volterra and Vilija Vaitkute Pavan) to the Claimant's counsel (Julian H. Lowenfeld), 31 August 2015, page 1, **Exhibit R-10**.

> basic documents from your client are already within your possession.[150]

61. Through this communication, the Respondent established its willingness to negotiate in good faith with any investor that actually showed ownership of the investment "all over the relevant period of time at issue up to the present".[151]

62. By email dated 9 September 2015, Mr Lowenfeld responded that "please be advised that my client confirms that he does have the evidence you request, of course, and is prepared to present said evidence", so long as: (a) the Respondent's counsel provided proof that they represented the Respondent; and (b) the Respondent agreed that documents to be provided would not be used for any purposes except the consultations and an eventual "ICSID arbitration itself".[152] Mr Lowenfeld then again committed to providing the requested documents, saying that:

> Once you provide proof of your retainer and authority to negotiate on behalf of the government of the Republic of Lithuania, and once we agree as to the purposes for which the documents you have requested can and cannot be used (basically, settlement and litigation - yes, PR and scandal - no), we will forward you PDF scans proving my client's ownership of said companies.[153]

63. The Respondent accepted both conditions, and counsel provided proof of its retention, by email dated 14 September 2015.[154]

64. Even though the Respondent had satisfied both of the Claimant's conditions, the Claimant never actually provided the requested proof of ownership. Indeed, at this

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150 Letter from the Respondent's counsel (Robert Volterra and Vilija Vaitkute Pavan) to the Claimant's counsel (Julian H. Lowenfeld), 31 August 2015, page 1, **Exhibit R-10**.

151 Letter from the Respondent's counsel (Robert Volterra and Vilija Vaitkute Pavan) to the Claimant's counsel (Julian H. Lowenfeld), 31 August 2015, page 1, **Exhibit R-10**.

152 E-mail from the Claimant's counsel (Julian H. Lowenfeld) to the Respondent's counsel (Vilija Vaitkute Pavan) dated 9 September 2015 in E-mail chain between the Respondent's counsel (Robert Volterra and Vilija Vaitkute Pavan) and the Claimant's counsel (Julian H. Lowenfeld), 31 August 2015 to 7 October 2015, page 2, **Exhibit R-11**.

153 E-mail from the Claimant's counsel (Julian H. Lowenfeld) to the Respondent's counsel (Vilija Vaitkute Pavan) dated 9 September 2015 in E-mail chain between the Respondent's counsel (Robert Volterra and Vilija Vaitkute Pavan) and the Claimant's counsel (Julian H. Lowenfeld), 31 August 2015 to 7 October 2015, pages 2 – 3, **Exhibit R-11**.

154 *See* E-mail from the Respondent's counsel (Vilija Vaitkute Pavan) to the Claimant's counsel (Julian H. Lowenfeld) dated 14 September 2015 in E-mail chain between the Respondent's counsel (Robert Volterra and Vilija Vaitkute Pavan) and the Claimant's counsel (Julian H. Lowenfeld), 31 August 2015 to 7 October 2015, page 1, **Exhibit R-11**.

point, the Claimant simply stopped communicating with the Respondent at all. On 7 October 2015, the Respondent's counsel was forced to send a follow-up email to the Claimant's counsel, stating that "we would like to kindly remind you that Lithuania remains available to enter into consultations provided that Mr Roscins submits evidence proving that he owns the entities cited in the Notice of the Dispute".[155] Still nothing was heard from the Claimant's counsel.

65. On 18 March 2016, six months after its prior communication, the Claimant's counsel finally sent an email to the Respondent's counsel. In that email, Mr Lowenfeld first "apologize[d] . . . for the long delay in responding to your previous letter", which he claimed was based on a personal situation.[156] Suddenly, rather than handing over the requested proof of ownership, Mr Lowenfeld stated that his client would only provide proof of ownership at an in-person meeting in London. He said:

> My client will personally attend the consultation and will provide proof of his ownership of the corporations whose assets were unlawfully confiscated. But he will do so at the meeting, during the consultations. Not before.[157]

66. Mr Lowenfeld then suggested that it was inappropriate to ask for proof of ownership before an in-person meeting. He went on to say that:

> I note that we have not asked for any preliminary discovery from you, and do not feel that such discovery is an appropriate pre-condition just in order to begin initial consultations that are clearly required by the bilateral investment treaty between Latvia and Lithuania. Nowhere in the treaty is there any pre-condition of pre-arbitration discovery just in

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155 E-mail from the Respondent's counsel (Vilija Vaitkute Pavan) to the Claimant's counsel (Julian H. Lowenfeld) dated 7 October 2015 in E-mail chain between the Respondent's counsel (Robert Volterra and Vilija Vaitkute Pavan) and the Claimant's counsel (Julian H. Lowenfeld), 31 August 2015 to 7 October 2015, page 1, **Exhibit R-11**.

156 E-mail from the Claimant's counsel (Julian H. Lowenfeld) to the Respondent's counsel (Robert Volterra and Vilija Vaitkute Pavan) dated 18 March 2016 in E-mail chain between the Claimant's counsel (Julian H. Lowenfeld) and the Respondent's counsel (Robert Volterra and Vilija Vaitkute Pavan), 18 March 2016 to 6 April 2016, pages 3 – 4, **Exhibit R-12**.

157 E-mail from the Claimant's counsel (Julian H. Lowenfeld) to the Respondent's counsel (Robert Volterra and Vilija Vaitkute Pavan) dated 18 March 2016 in E-mail chain between the Claimant's counsel (Julian H. Lowenfeld) and the Respondent's counsel (Robert Volterra and Vilija Vaitkute Pavan), 18 March 2016 to 6 April 2016, page 4, **Exhibit R-12**.

> order to begin the consultations. Such a precondition would, indeed, hardly be in the spirit of the consultation requirement itself. [158]

67. Unsurprisingly, the Respondent did not agree that a purported investor could invoke treaty-based consultations when he also refused to even turn over basic documents proving his ownership of the investment. By email dated 30 March 2016, the Respondent's counsel therefore informed Mr Lowenfeld that:

> Your most recent communication indicates that Mr Roscins is willing to present evidence of his ownership of the relevant companies but only during the consultations. With respect, that is not appropriate. Mr Roscins is only entitled to request consultations if he fits within the criteria of the treaty. Your proposal thus amounts to nothing more than that Lithuania agree now with Mr Roscin's mere assertion that he is entitled to request consultations. Lithuania declines to do so. This is not a question of "preliminary discovery", whatever that might be.
>
> Lithuania repeatedly stated in letters sent to you on 31 August 2015, 14 September 2015 and 7 October 2015 that it was ready and willing to enter into consultations upon submission of the requested evidence proving that Mr. Roscins owns the entities cited in the Notice of the Dispute as well as valid and legible proof of his citizenship. These are things not only that Mr Roscins was obliged to provide Lithuania in the event that he was interested to engage it in discussions under the treaty but that he would be obliged to provide in any event in order to have his claim registered at ICSID. Mr Roscins's failure to provide this evidence for more than half a year, despite claiming to be in possession of it, entitles Lithuania to conclude that Mr Roscins is not acting in good faith. In any event, he has failed to establish that he has a right to consultations under Article 7 of the treaty.
>
> As a result, Lithuania does not see any possibility to engage in consultations under Article 7 of the treaty, nor finds it reasonable to proceed with any further communication regarding this issue.[159]

68. It was only at that point that the Claimant's counsel offered any documents regarding ownership of the Companies. On 1 April 2016, Mr Lowenfeld wrote to the Respondent's counsel and provided only "proof that my client owns the companies in

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158 E-mail from the Claimant's counsel (Julian H. Lowenfeld) to the Respondent's counsel (Robert Volterra and Vilija Vaitkute Pavan) dated 18 March 2016 in E-mail chain between the Claimant's counsel (Julian H. Lowenfeld) and the Respondent's counsel (Robert Volterra and Vilija Vaitkute Pavan), 18 March 2016 to 6 April 2016, page 4, **Exhibit R-12**.

159 E-mail from the Respondent's counsel (Robert Volterra) to the Claimant's counsel (Julian H. Lowenfeld) dated 30 March 2016 in E-mail chain between the Claimant's counsel (Julian H. Lowenfeld) and the Respondent's counsel (Robert Volterra and Vilija Vaitkute Pavan), 18 March 2016 to 6 April 2016, page 3, **Exhibit R-12**.

question (the most recent certificates of authority)".[160] The documents Mr Lowenfeld provided were identical to Exhibits 2 to 6 to the Amended RFA.

69. The Respondent immediately recognised the Claimant's deliberate and telling omission: despite having previously committed to provide documents demonstrating ownership "all over the relevant period of time at issue up to the present",[161] the Claimant had only provided documents proving ownership on 11 July 2012 or thereafter. For all the reasons already discussed above, the documents Mr Lowenfeld finally turned over did not actually demonstrate the Claimant's ownership of the Companies when the accounts were frozen and the bulk of them were confirmed to be State property.[162] The obvious implication was that it was highly unlikely that the Claimant had any interests in the Companies at the time the allegedly adverse State measures were taken.

70. On 6 April 2016, the Respondent's counsel therefore responded to Mr Lowenfeld and stated:

> Having reviewed the documentation provided, Lithuania can only reiterate its position that Mr Roščins failed to prove he is entitled to request consultations under the treaty. There is no evidence that Mr Roščins was the beneficial owner of the companies listed in the Notice of Dispute at the relevant time.[163]

71. In November 2016, Mr Roščins himself attempted to communicate with the name partner of Ellex Valiunas via text to engage in direct discussions.[164] In one of those messages, Mr Roščins stated that "[i]t would be worth for us to talk as adults, and

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160 E-mail from the Claimant's counsel (Julian H. Lowenfeld) to the Respondent's counsel (Robert Volterra) dated 1 April 2016 in E-mail chain between the Claimant's counsel (Julian H. Lowenfeld) and the Respondent's counsel (Robert Volterra and Vilija Vaitkute Pavan), 18 March 2016 to 6 April 2016, page 2, **Exhibit R-12**.

161 *See* Letter from the Respondent's counsel (Robert Volterra and Vilija Vaitkute Pavan) to the Claimant's counsel (Julian H. Lowenfeld), 31 August 2015, page 1, **Exhibit R-10**.

162 *See supra* Sections III.A.4, III.A.5 and III.A.7.

163 E-mail from the Respondent's counsel (Vilija Vaitkute Pavan) to the Claimant's counsel (Julian H. Lowenfeld) dated 6 April 2016 in E-mail chain between the Claimant's counsel (Julian H. Lowenfeld) and the Respondent's counsel (Robert Volterra and Vilija Vaitkute Pavan), 18 March 2016 to 6 April 2016, page 1, **Exhibit R-12**.

164 Exchange of text messages, provided as Amended RFA, Exhibit 14. The text messages are not properly labelled but are referred to as Exhibit 14 on page 15 of the Amended RFA. For the avoidance of doubt, the Respondent's counsel obtained the permission of Mr Lowenfeld to communicate directly with his client.

then to move forward with the luggage of data", i.e., to begin consultations before the required proof of ownership was presented.[165]

72. On 14 November 2016, the Respondent's counsel reiterated its prior position – that "[t]here is no evidence that Mr Roščins was the beneficial owner of the companies listed in the Notice of Dispute at the relevant time" – and then stated "[t]he situation remains unchanged. Nothing has occurred to alter this response".[166]

73. That appeared to be the end of this dispute. Faced with the reasonable requirement to show proof of his ownership of the Companies prior to 11 July 2012, i.e., when relevant adverse State measures were taken, Mr Roščins and his counsel disappeared.

2. In July 2018, the Claimant's latest representative, Professor Stanislovas Tomas, demanded compensation for the Claimant but also did not provide evidence of ownership at the relevant times

74. The Claimant's silence ended on 20 July 2018. On that date, the Claimant, now represented by Professor Stanislovas Tomas, sent out two communications. First, Professor Tomas sent a "Final Offer" to the Respondent's counsel.[167] The "Final Offer" claimed that "our informal negotiations were fruitless" and demanded payment of the amount of USD 28,563,716.45 and CHF 49,481.09 within "the next 10 days", failing which Professor Tomas would start this ICSID proceeding.[168] Second, Professor Tomas delivered a letter, in Lithuanian, to the Ministry of Justice of the Republic of Lithuania. That letter demanded that the Ministry of Justice terminate its relationship with external counsel, provide information about the sums the Ministry

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165 Exchange of text messages, provided as Amended RFA, Exhibit 14.

166 E-mail from the Claimant's counsel (Vilija Vaitkute Pavan) to the Respondent's counsel (Julian H. Lowenfeld) dated 14 November 2016 in E-mail chain between the Respondent's counsel (Vilija Vaitkute Pavan) and the Claimant's counsel (Julian H. Lowenfeld), 11 November 2016 to 14 November 2016, page 1, **Exhibit R-13**.

167 Letter from the Claimant's counsel (Professor Stanislovas Tomas) to the Respondent's counsel (Robert Volterra and Vilija Vaitkute Pavan), 20 July 2018, **Exhibit R-14**.

168 Letter from the Claimant's counsel (Professor Stanislovas Tomas) to the Respondent's counsel (Robert Volterra and Vilija Vaitkute Pavan), 20 July 2018, pages 1 – 2, **Exhibit R-14**.

had paid external counsel and evaluate whether the failure of the negotiations were due to the claimed "fault and arrogance" of external counsel.[169]

75. On 6 August 2018, the Ministry of Justice of the Republic of Lithuania responded to the Claimant's "Final Offer". The Ministry confirmed its willingness to engage in treaty consultations with the Claimant if he provided the required evidence. The Ministry stated that:

> Please be informed that having received the "Notice of dispute" of Mr. Olegs Roscins dated 17 April 2015, the Republic of Lithuania has been willing to seek a peaceful settlement of the dispute with Mr. Roscins. Notwithstanding, there was no possibility to enter into negotiations as Mr. Roscins failed to present convincing evidence proving that during all the relevant period of time he has been the sole owner and/or beneficiary of the Companies and thus substantiating his investment in Lithuania. The documents submitted by Mr. Roscins on 1 April 2016 failed to prove the requested. The last communication to Mr. Roscins' legal counsel Mr Julian Lowenfeld was sent in November 2016, however, up to now (during the period of more than 1 year and 8 months) we have not received any response to our repeated invitation to submit relevant and sufficient documents necessary for the negotiations.[170]

76. The Ministry's communication also informed the Claimant of the implications of the *Achmea* Judgment on these proceedings.[171]

77. The Claimant then filed the Amended RFA on 8 August 2018. As discussed above, the Amended RFA also did not provide proof of the Claimant's interests in the Companies prior to 11 July 2012. To the contrary, the evidence in the Amended RFA only establishes the Companies' ownership as of 11 July 2012 or later.[172]

78. This proceeding was registered on 16 August 2018.

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169 Letter from the Claimant's counsel (Professor Stanislovas Tomas) to the Respondent (Ministry of Justice), 20 July 2018 (English translation), **Exhibit R-15**.

170 Letter from the Respondent (Ministry of Justice) to the Claimant's counsel (Professor Stanislovas Tomas), 6 August 2018, page 1, **Exhibit R-16**.

171 Letter from the Respondent (Ministry of Justice) to the Claimant's counsel (Professor Stanislovas Tomas), 6 August 2018, page 2, **Exhibit R-16**.

172 *See supra* paragraph 53.

79. By letter dated 24 October 2018, and re-sent on 16 November 2018, Professor Tomas responded to the Ministry's communication of 6 August 2018. In that letter, Professor Tomas suggested that, as a result of the decision in "*Slovakia v. Achmea*, C-284/16", "[a]ny participation of Lithuania in the constitution of the Arbitral Tribunal would be contrary to your internal law . . . and would be prohibited by the Lithuanian administrative courts" (emphasis in original).[173] Professor Tomas then suggested that the civil servants who had been assigned to this matter should be dismissed from their jobs and not permitted "to return to public service for the next 10 years".[174]

80. Nevertheless, the Respondent duly appointed external counsel for the arbitration phase of this dispute and thereafter participated in the constitution of the Tribunal (as did the Claimant).

IV. THE CLAIMANT'S CLAIMS MANIFESTLY LACK LEGAL MERIT

81. From all of the foregoing, it is plainly clear that the Claimant's claims manifestly lack legal merit. **Section IV.A** below explains how the claims manifestly lack legal merit because the Claimant did not own shares in the Companies prior to 11 July 2012. **Section IV.B** explains how this intra-EU dispute manifestly lacks legal merit because the consent to arbitration in Article 7 of the Lithuania-Latvia BIT is incompatible with the later-incurred treaty obligations of Lithuania and Latvia as a result of their accession to the EU.

82. As a result, under Arbitration Rules 41(5) and 41(6), this proceeding should be dismissed for manifest lack of legal merit.

A. The Claimant's claims manifestly lack legal merit because the Claimant did not acquire shares in the Companies until 11 July 2012

83. The fact that the Claimant did not own shares in the Companies until at least 11 July 2012 manifestly forecloses any claim the Claimant can raise as a matter of jurisdiction

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173 Letter from the Claimant's counsel (Professor Stanislovas Tomas) to the Respondent (Ministry of Justice), 24 October 2018, **Exhibit R-17**.

174 Letter from the Claimant's counsel (Professor Stanislovas Tomas) to the Respondent (Ministry of Justice), 24 October 2018, **Exhibit R-17**.

or the merits (*see* **Section IV.A.1**) or any claim of loss or damage to support quantum (*see* **Section IV.A.2**).

1. The fact the Claimant did not own any shares in the Companies until after the allegedly adverse State measures were taken to deprive the Companies of the disputed funds means that, as a manifest legal matter, the Centre lacks jurisdiction and that the Claimant has no claim on the merits

84. As numerous ICSID tribunals have consistently confirmed, an investor is not entitled to invoke the protections of a BIT unless it can "establish that it had an investment at the time the challenged measure was adopted".[175] In other words, a tribunal's jurisdiction is "limited *ratione temporis* to judging only those acts and omissions occurring after the date of the investor's purported investment".[176] Absent this requirement, a claim lacks jurisdiction *ratione personae*, *materiae* and *temporis*.

85. This basic "uncontested"[177] principle is so manifest that, as the tribunal in *Phoenix Action* explained, "[i]t does not need extended explanation".[178] An internationally

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175 *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award (Kaufmann-Kohler, Brower, Landau), 24 March 2016, paragraph 326, **RL-16**. *See also Vito G. Gallo v. Government of Canada*, UNCITRAL, PCA Case No. 55798, Award (Fernández-Armesto, Castel, Lévy), 15 September 2011, paragraph 328, **RL-17** (tribunals do not have jurisdiction unless "the claimant can establish that the investment was owned or controlled by the investor at the time when the challenged measure was adopted"); *Philip Morris Asia Limited v. Commonwealth of Australia*, PCA Case No. 2012-12, UNCITRAL, Award on Jurisdiction and Admissibility (Böckstiegel, Kaufmann-Kohler, McRae), 17 December 2015 ("***Philip Morris***"), paragraph 529, **RL-18** (the applicable test is whether "claimant made a protected investment before the moment when the alleged breach occurred").

176 *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (Stern, Bucher, Fernández-Armesto), 15 April 2009 ("***Phoenix Action*, Award**"), paragraph 68, **RL-19**. *See also Peter Franz Voecklinghaus v. Czech Republic*, UNCITRAL, Final Award (Beechey, Klein, Lévy), 19 September 2011, paragraphs 162–165, **RL-20** (the tribunal held that it had no jurisdiction *ratione temporis* where the investor retained no legal or beneficial ownership in his investment at the time of the alleged occurrence of the State's expropriatory act); *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award (van den Berg, Landau, Stern), 31 March 2011 ("***GEA Group***"), paragraph 170, **RL-21** ("The Tribunal agrees with Ukraine that in order for the Tribunal to hear the Claimant's claims, the Claimant must have held an interest in the alleged investment before the alleged treaty violations were committed."); *ST-AD GmbH v. Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction (Stern, Klein, Thomas), 18 July 2013 ("***ST-AD***"), paragraph 300, **RL-22** ("It is an uncontested principle that a tribunal has no jurisdiction *ratione temporis* to consider claims arising prior to the date of the alleged investment, since a BIT cannot be applied to acts committed by a State before the claimant invested in the host country . . . . According to the well-known principle of non-retroactivity of treaties in international law, a BIT cannot apply to the protection of an investor before the latter indeed became an investor under said BIT.").

177 *ST-AD*, paragraph 300, **RL-22**.

lawful act does not become retroactively unlawful because a claimant, at a later date, decides to acquire an already distressed investment. As explained by Professor Zachary Douglas, "the timing of the investor's acquisition of its investment determines the commencement of the substantive protection afforded by the investment treaty and hence the temporal scope for the tribunal's adjudicative power over claims based upon an investment treaty obligation".[179]

86. For example, as a matter of the merits, each and every one of the clauses of the Lithuania-Latvia BIT that the Claimant relies on[180] plainly only extends to existing investments of Latvian investors:

a. Article 4 provides limitations on the right to expropriate "against investments of investors" (not investments that might become investments of investors);[181]

b. Article 3 limits itself to "investments made by investors" (not investments that might be made by investors);[182] and

c. Even understood in its most expansive sense as advanced by the Claimant (which is not the appropriate standard), the favourable conditions clause in Article 2 at best provides the Respondent will "encourage investors . . . to make investments" and provides that the Respondent will "admit such investments in accordance with its laws and regulations";[183] it in no way acts retroactively to promise that any investment a Latvian investor thinks of making shall never have previously been subject to an adverse State measure.

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178 *Phoenix Action*, Award, paragraph 67, **RL-19**, cited with approval in *GEA Group*, footnote 128, **RL-21**; *ST-AD*, paragraph 303, **RL-22**.

179 Zachary Douglas, *The International Law of Investment Claims* (Cambridge, 2009), paragraph 303, **RL-23**.

180 *See* Amended RFA, paragraphs 32 – 67.

181 Lithuania-Latvia BIT, Article 4, **RL-1**.

182 Lithuania-Latvia BIT, Article 3, **RL-1**.

183 Lithuania-Latvia BIT, Article 2, **RL-1**.

87. In this case, the evidence very clearly is that the Claimant did not acquire interests, such as shares, in any of the Companies until 11 July 2012 or after.[184] Notably, this was after both of the adverse State measures that the Claimant itself identifies as the relevant acts of the Respondent:

a. Referring to the 6 September 2006 decision of the Respondent's prosecutor to restrain all the relevant bank accounts,[185] the Claimant states that "[o]n 06/09/20[0]6,[[186]] the Respondent freezes the Investment of the Claimant. This is a measure with an effect equivalent to an expropriation".[187] Whether or not that is the case, it is in fact a measure that predates 11 July 2012 by about six years.

b. Referring to the Kaunas Prosecutor's Resolution, which maintained a restraint on the same accounts,[188] the Claimant asserts that "[o]n 05/07/2011, the Respondent transfers the Investment into the property of the Respondent. This is the expropriation itself".[189] This purported "expropriation" occurred more than a year before the Claimant acquired any shares in any of the Companies.

88. Moreover, based on timing alone, it is also obvious that the 5 July 2012 decision of the Kaunas Regional Court confirming that the accounts of four Companies did not have identified owners, contributed to the Claimant's decision to acquire the shares in the Companies from 11 July 2012 onwards.[190] That judgment, too, was potentially an adverse State measure – and it predates the Claimant's acquisition of those Companies' shares by at least six days.

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184 *See supra* paragraph 53.

185 *See supra* paragraphs 32 – 33.

186 The Amended RFA has a typo here; the year was 2006, not 2016.

187 Amended RFA, paragraph 32.

188 *See supra* paragraphs 32, 34.

189 Amended RFA, paragraph 33.

190 *See supra* paragraph 53.

89. Finally, with respect to Logotreck Products Inc.,[191] in addition to the fact that the relevant restraints on the bank accounts already existed for years prior to the date the Claimant acquired shares in that company (on 11 July 2012) and therefore all of the discussion above applies equally to this entity,[192] the question of whether that entity's accounts had a properly identified owner was also *sub judice* before the Vilnius Regional Court in June 2012, i.e. before 11 July 2012.[193] Notably, the Kaunas Regional Court confirmed that the accounts of the other identically-placed Companies did not have properly identified owners on 5 July 2012.[194] Thus, the Claimant's acquisition of Logotreck Product Inc.'s shares on 11 July 2012 was also taken in anticipation of a reasonably foreseeable dispute concerning the outcome of the litigation regarding that company before the Vilnius Regional Court, constituting a manifest abuse of process.[195] Arbitration Rule 41(5) is an appropriate mechanism to address manifest claims for abuse of process, such as this one.[196]

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191 *See supra* paragraph 46.

192 *See supra* paragraphs 84 - 88.

193 *See supra* paragraph 46.

194 *See supra* paragraph 49.

195 *See, e.g.*, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections (Veeder, Tawil, Stern), 1 June 2012, paragraph 2.99, **RL-24** (finding an abuse of process occurs when a claimant has obtained an investment at a time when it could "see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy"); *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction (McLachlan, Sureda, Stern), 8 February 2013, paragraph 145, **RL-25** ("At the heart, therefore, of this issue is a question of fact as to the nature of the dispute between the parties, and a question of timing as to when the dispute that is the subject of the present proceedings arose or could reasonably have been foreseen."); *Philip Morris*, paragraph 554 ("[t]he Tribunal is of the opinion that a dispute is foreseeable when there is a reasonable prospect, as stated by the *Tidewater* tribunal, that a measure which may give rise to a treaty claim will materialise") and paragraph 586, **RL-18** ("In the Tribunal's view, there was no uncertainty about the Government's intention to introduce plain packaging as of that point. Accordingly, from that date, there was at least a reasonable prospect that legislation equivalent to the Plain Packaging Measures would eventually be enacted and a dispute would arise."); *Lao Holdings NV. v. The Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction (Binnie, Hanotiau, Stern), 21 February 2014, paragraph 76, **RL-26** ("[the] moment when things have started to deteriorate so that a dispute is highly probable"); Emmanuel Gaillard, *Abuse of Process in International Arbitration*, 32(1) ICSID Review (2017) 17, page 20, **RL-27** ("Abuse of process will arise where a corporate claimant makes or restructures its investment in order to gain access to a dispute with the host State that is foreseeable, but may not yet have crystallized.").

196 E. Brabandere, *The ICSID Rule on Early Dismissal of Unmeritorious Investment Treaty Claims: Preserving the Integrity of ICSID Arbitration*, 9(1) Manchester Journal of International Economic Law (2012) 23, page 44, **RL-28** ("Although the objective of Rule 41(5) is not explicitly aimed at targeting claims that constitute an 'abuse of process', it is likely that the rule will prevent, or at least offer an adequate procedure to assess the submission of such claims, since it provides arbitral tribunals

2. The fact that the Claimant did not own shares in any of the Companies until after the Companies had been deprived of the disputed funds confirms, as a manifest legal matter, that the Claimant did not suffer any loss or damages

90. Were that not sufficient, the Claimant also manifestly has no claim on quantum because he has not suffered any loss that can be compensated by this Tribunal.

91. In the Amended RFA, the Claimant seeks the return of the "whole Investment" of "$ 14 498 668.75, € 765 101.68, and CHF 25 160.25" plus interests.[197] However, in order to establish his case for compensation, the Claimant must show that he, himself, suffered loss from the alleged deprivation of the funds and bank accounts at issue – even if that loss can, in certain circumstances, be indirect or derivative.[198]

92. The Claimant acquired shares in all of the Companies as of 11 July 2012 or thereafter. As of that date: (a) the bank accounts of the Companies had already been restrained by the Respondent's prosecutors since 6 September 2006 and so the funds had already been denied to the Companies;[199] (b) the Respondent's prosecutors had maintained that restraint on 5 July 2011, after an investigation of several years revealed information that foreclosed the possibility the Companies being the true owners of those funds;[200] and (c) for four Companies, the funds had been confirmed as State property as of 5 July 2012 by a judgment effective as of that date – with the necessary implication that Logotreck Products Inc.'s funds would face the identical judgment in proceedings concerning that Company.[201]

93. As a result, the Claimant never acquired any indirect interests in the restrained funds whatsoever. He acquired interests in the Companies that, for all practical and legal

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operating under the ICSID Convention with a procedure to assess the claims, *inter alia* on these grounds in an early stage in the proceedings.").

197 Amended RFA, paragraph 68.

198 *See* Irmgard Marboe, "Compensation and Damages in Investment Treaty Arbitration", in *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, ed. Katia Yannaca-Small (Oxford University Press, 2nd ed., 2018), paragraph 25.26, **RL-29** (the condition "s*ine qua non*" of a claim for loss is actual damage suffered by the claimant).

199 *See supra* paragraph 33.

200 *See supra* paragraph 42.

201 *See supra* paragraphs 49, 51.

purposes, had already lost those funds. The Claimant therefore manifestly suffered no compensable loss, direct or indirect, that can support this proceeding.

B. The claims also manifestly lack legal merit because the consent to arbitration in the 1996 Lithuania-Latvia BIT has been null and void since at least the 2009 entry into force of the TFEU, as confirmed by the recent *Achmea* Judgment

94. In addition to the Claimant's failure to own the Companies when the adverse State measures were taken, this Tribunal also manifestly lacks jurisdiction because the consent to ICSID arbitration in Article 7 of the 1996 Lithuania-Latvia BIT became legally ineffective after those countries became EU Member States in 2004 and the TFEU entered into force in 2009.

1. As the Judgment in *Slovak Republic v. Achmea* recently confirmed, the consent to arbitration in Article 7 of the Lithuania-Latvia BIT is manifestly incompatible with the terms of the TFEU that limit the judicial bodies that can determine questions of EU law

95. On 7 February 1996, both Lithuania and Latvia signed the Lithuania-Latvia BIT,[202] which then came into force on 23 July 1996.[203] Article 7 of that treaty contains a clause submitting a "dispute concerning investment between one of the Parties and an investor of the other Party" to either ICSID or *ad hoc* UNCITRAL arbitration.[204]

96. Eight years later, on 1 May 2004, Latvia and Lithuania became EU Member States.[205] Both countries then ratified the Treaty of Lisbon (which converted the Treaty Establishing the European Community into the TFEU[206]) by May 2008[207] – and that

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202 Lithuania-Latvia BIT, page 8, **RL-1**.

203 Lithuania-Latvia BIT, footnote 1, **RL-1**.

204 Lithuania-Latvia BIT, Article 7, **RL-1**.

205 *See* Treaty of Accession, signed on 16 April 2003, entered into force on 1 May 2004, 2003 Official Journal of the European Union (L 236) 46, Article 1.1, **RL-30** ("The . . . Republic of Latvia [and] the Republic of Lithuania . . . hereby become members of the European Union and Parties to the Treaties on which the Union is founded as amended or supplemented."); Notice concerning the entry into force of the Treaty of Accession, 2003 Official Journal of the European Union (L 236) 46, **RL-31** ("Subject to the ratification procedure the Treaty of Accession will enter into force on 1 May 2004.").

206 The TFEU "organises the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competences". Treaty on the Functioning of the European Union, 13

treaty came into force on 1 December 2009.[208] The TFEU contains two relevant provisions concerning the judicial bodies that were entitled to interpret its terms. First, Article 267 of the TFEU provides that the CJEU "shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties . . . ".[209] The "Treaties" are defined as the TFEU itself and the Treaty on European Union.[210] Second, Article 344 of the TFEU then establishes that "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein." [211]

97. In other words, under the TFEU, any question concerning the interpretation or application of the TFEU or the Treaty on European Union – which is more than likely to arise in an intra-EU investment dispute[212] – can only be submitted to the judicial and dispute resolution bodies designated for that purpose in the TFEU. This does not include investor-State arbitral tribunals. The incompatibility of these provisions with Article 7 of the Lithuania-Latvia BIT is plain: by ratifying the TFEU in 2008 (which then entered into force in 2009), Lithuania and Latvia precluded the possibility of submitting disputes concerning the interpretation of EU law, which is a necessary part of any investment dispute brought by an EU investor against an EU Member State, to an arbitration tribunal under Article 7 of the Lithuania-Latvia BIT.

98. This is why, on 6 March 2018, the CJEU found that clauses consenting to investor-State arbitration in intra-EU BITs are incompatible with the obligations of the TFEU. The decision of the CJEU was clear and definitive:

December 2007, entered into force on December 2009, 2012 Official Journal of the European Union (C 326) 47 ("**TFEU**"), Article 1(1), **RL-32**.

207 Table of ratifications in each country, Foundation Robert Schuman, **RL-33**.

208 *See* Fact Sheets on the European Union – 2019: The Treaty of Lisbon, European Parliament, page 1, **RL-34**.

209 TFEU, Article 267, **RL-32**.

210 TFEU, Article 1(2), **RL-32**.

211 TFEU, Article 344, **RL-32**.

212 *See* TFEU, Articles 3 and 4 (defining exclusive and shared competencies of the EU and Member States), **RL-32**.

> Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States . . . under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.[213]

99. The *Achmea* Judgment is in no way qualified or limited. It applies with equal force to all investor-State arbitration clauses in intra-EU BITs. Furthermore, the *Achmea* Judgment acted *ex tunc*, because the decision clarified the "meaning and scope" of the existing law the way it "ought to have been understood and applied from the time of its coming into force".[214] In other words, the incompatibility between the TFEU and the BIT – and the consequent nullity of the offer to arbitrate included in Article 7 of the BIT – has existed since the ratification of the TFEU, at a minimum.[215]

100. Following the CJEU's lead, EU Member States have entered into a series of declarations confirming the incompatibility of the TFEU with investor-State arbitration provisions in intra-EU BITs.[216] The Declaration of the Representatives of

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213 *Achmea* Judgment, paragraph 60, **RL-4**.

214 *Amministrazione Delle Finanze Dello Stato v. Denkavit Italiana*, Case 61/79, Judgment of the European Court of Justice, 27 March 1980, paragraph 16, **RL-35** ("The interpretation which . . . the Court of Justice gives to a rule of Community law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force."). *See also Access to German Minority Schools in Upper Silesia*, Advisory Opinion, PCIJ (series A/B) No. 40, 15 May 1931, page 19, **RL-36** ("the interpretation given by the [PCIJ] to the terms of the Convention has retrospective effect – in the sense that the terms of the Convention must be held to have always borne the meaning placed upon them by this interpretation").

215 In fact, Article 7 of the Lithuania-Latvia BIT was incompatible with Lithuania's and Latvia's obligations as members of the EU from the moment those countries became EU Member States in 2004. This is because the predecessor to the TFEU, the Treaty Establishing the European Community contained two provisions – Articles 234 and 292 – that were virtually identical to Article 267 and 344 of the TFEU. As a result, these two articles had the same effect as Articles 267 and 344 of the TFEU. For current purposes, of course, the relevant date of incompatibility can be either 2004 when Lithuania and Latvia acceded to the Treaty Establishing the European Community or 2009 with the entry in force of the TFEU – the legal analysis remains unchanged. *See* Treaty Establishing the European Community, signed on 25 March 1957, entered into force on 1 January 1958, 2002 Official Journal of the European Communities (C 325) 33, Article 234 (providing, like Article 267 of the TFEU, that the CJEU "shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty"); Article 292 (providing, like Article 344 of the TFEU, that "Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein."), **RL-37**.

216 *See* Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, 15 January 2019 ("**Declaration**"), **RL-38**; Declaration of the Representatives of the Republic of Finland, the Grand Duchy of Luxembourg, the Republic of Malta, the Republic of Slovenia and the Kingdom of Sweden, 16 January 2019, **RL-40**; Declaration of the Representative of

the Governments of the Member States of 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union (the "**Declaration**"), which was signed by the Respondent, Latvia (the Claimant's country of origin) and 20 other EU Member States, confirms that "all investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to Union law and thus inapplicable"[217] and that "[a]n arbitral tribunal established on the basis of investor-State arbitration clauses lacks jurisdiction, due to a lack of a valid offer to arbitrate by the Member State party to the underlying bilateral investment Treaty".[218] The Declaration further states that:

> By the present declaration, Member States inform investment arbitration tribunals about the legal consequences of the *Achmea* judgment, as set out in this declaration, in all pending intra-EU investment arbitration proceedings . . .[219]

101. The Claimant also has agreed that EU law and Article 7 of the Lithuania-Latvia BIT are incompatible. The Claimant has stated that:

> Any participation of [the Respondent] in the constitution of the Arbitral Tribunal would be contrary to [the Respondent's] internal law as explained in [the *Achmea* Judgment], and would be prohibited by the [Respondent's] administrative courts as [the Respondent] explained in [its] letter no. (1.11)7R-5182 (emphasis in original).[220]

102. As such, the incompatibility of Article 7 of the Lithuania-Latvia BIT with the Articles 267 and 344 of the TFEU is manifestly clear.

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the Government of Hungary, 16 January 2019, **RL-39**. Six Contracting Parties to the TFEU reserved judgment as to the legal consequences of the *Achmea* Judgment for cases brought under the Energy Charter Treaty. This question is irrelevant for the present dispute. These six Contracting Parties also unequivocally confirmed the *Achmea* Judgment's interpretation of the TFEU and the conclusion that arbitration clauses in intra-EU BITs are "inapplicable". *See* Declaration of the Representatives of the Republic of Finland, the Grand Duchy of Luxembourg, the Republic of Malta, the Republic of Slovenia and the Kingdom of Sweden, 16 January 2019, page 1, **RL-40**; Declaration of the Representative of the Government of Hungary, 16 January 2019, page 1, **RL-39**.

217 Declaration, page 1, **RL-38**.

218 Declaration, page 1, **RL-38**.

219 Declaration, page 3, **RL-38**.

220 Letter from the Claimant's counsel (Professor Stanislovas Tomas) to the Respondent (Ministry of Justice), 24 October 2018, **Exhibit R-17**.

2. As a matter of both EU law and public international law, the terms of the later-adopted TFEU prevail over the incompatible terms of the consent to investor-State arbitration in Article 7 of the Lithuania-Latvia BIT

103. For each of the following reasons, it is manifestly clear that, because the terms of the later-adopted TFEU prevail over the incompatible terms of Article 7 of the Lithuania-Latvia BIT, Article 7 of the Lithuania-Latvia BIT became legally ineffective at least when the TFEU entered into force in 2009 (if not when Lithuania and Latvia acceded to the EU in 2004[221]).

104. First, in Article 267 of the TFEU, both Lithuania and Latvia agreed to be bound by the dispositive determinations of the CJEU with respect to the "interpretation of the [TFEU and Treaty on European Union]".[222] The binding judicial determination of the CJEU therefore has *res judicata* effect that bars the application of Article 7 of the Lithuania-Latvia BIT.[223]

105. Second, through the Declaration and its companion declarations, all the EU Member States have issued an "authentic interpretation" "endowed with binding force" that confirms that the TFEU excludes the possibility of consent to investor-State arbitration as in Article 7 of the Lithuania-Latvia BIT.[224] This "authentic interpretation" also has "prospective and retrospective effect because [it] reflect[s] what the parties intended the existing treaty to mean".[225] Moreover, applying the terms of the Vienna Convention on the Law of Treaties ("**VCLT**"), Article 31(3)(a),

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221 *See supra* footnote 215.

222 *See supra* paragraph 96.

223 *See* Bin Cheng, *General Principles of Law a Applied by International Courts and Tribunals* (Cambridge University Press, 2006), page 338 , **RL-41** ("*res judicata*, that is to say, what has been finally decided by a tribunal, is binding upon the parties. As Article 37 II of the Hague Convention for the Pacific Settlement of International Disputes, 1907, provides: — 'Recourse to arbitration implies an engagement to submit in good faith to the award.' The binding effect of the award is thus inherent in the very institution of arbitration or judicial settlement.").

224 Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Nijhoff, 2009), page 429, paragraph 16, **RL-42**. *See also Question of Jaworzina (Polish-Czechoslovakian Frontier)*, Advisory Opinion, PCIJ (Series B) No. 8, 6 December 1923, paragraph 80, **RL-43** ("it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body which has power to modify or suppress it").

225 Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation*, 104 American Journal of International Law (2010) 179, page 201, **RL-44**.

the Declaration is also a "subsequent agreement between the parties regarding the interpretation of the [Lithuania-Latvia BIT] or the application of its provisions" that must be taken into account when interpreting the validity of the consent to arbitration in the Lithuania-Latvia BIT.[226]

106. Third, Article 4(3) of the Treaty on European Union contains a so-called "priority clause" which requires Member States to ensure the faithful application of the TFEU and therefore effectively provides that the terms of the TFEU and the Treaty on European Union prevail over inconsistent and incompatible provisions in other treaties between EU Member States.[227] Manifestly, priority clauses in later-adopted treaties should be given effect.[228] In this case, the priority given to the TFEU by Lithuania and Latvia means that the pre-existing terms in Article 7 of the Lithuania-Latvia BIT lacked legal effect as of the date the TFEU entered into force.

107. Fourth, if this priority clause was not given its obvious effects, Article 30(3) of the VCLT would further confirm, as a manifest matter, that Article 7 of the Lithuania-Latvia BIT no longer has legal effect. Article 30(3) provides that:

> When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.[229]

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226 Vienna Convention on the Law of Treaties, signed on 23 May 1968, entered into force on 27 January 1980, 115 UNTS 331 ("**VCLT**"), Article 31(3)(a), **RL-45**.

227 Treaty on European Union, signed on 7 February 1992, entered into force on 1 January 1993, 2012 Official Journal of the European Union (C 326) 13, Article 4(3) ("The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union."), **RL-46**. *See also Commission of the European Economic Community v. Italian Republic*, Case 10/61, Judgment of the Court, 27 February 1962, page 10, **RL-47** ("in matters governed by the EEC Treaty [now the TFEU], that Treaty takes precedence over agreements concluded between Member States before its entry into force, including agreements made within the framework of GATT"); Martti Koskenniemi, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", in *Report of the Study Group of the International Law Commission* (A/CN.4/L.682), 13 April 2006, paragraph 283, **RL-48** ("The EC Treaty takes absolute precedence over agreements that Member States have concluded between each other.").

228 *See, e.g.*, Nele Matz-Lück, *Treaties, Conflict Clauses*, Max Planck Encyclopedia of Public International Law, April 2006, paragraphs 4, 10, **RL-49** (establishing that "parties can establish provisions that claim primacy of a treaty over others" and that conflict clauses, including "Clauses Claiming Priority over Existing Treaties", are "binding … for the parties to the treaty that is incorporating the clause").

229 VCLT, Article 30(3), **RL-45**.

108. In this case, Article 7 of the Lithuania-Latvia BIT is incompatible with the terms of the "later treaty", the TFEU, and therefore no longer applies.

109. For all these reasons, as a manifest legal matter, at least on 1 December 2009 – the date the TFEU entered into force – the provisions in Articles 244 and 367 of the TFEU prevailed over, and invalidated, the consent to arbitration in Article 7 of the 1996 Lithuania-Latvia BIT.

3. The legal ineffectiveness of Article 7 of the Lithuania-Latvia BIT means that the Centre lacks jurisdiction over this dispute

110. Finally, because consent to arbitration in the Lithuania-Latvia BIT has been legally ineffective since at least December 2009, it follows that the Centre lacks jurisdiction over this dispute.

111. As explained in the Report of the Executive Directors to the Convention, "[c]onsent of the parties is the cornerstone of the jurisdiction of the Centre".[230] The ICSID Convention, standing alone, does not provide consent to arbitration. Instead, under the well-known "double barrelled" or "double keyhole" approach, a purported claimant must show an independent and legally effective source of consent to ICSID arbitration.[231] In this case, the legal invalidity of the consent to arbitration in Article 7 of the Lithuania-Latvia BIT since at least December 2009 means that there is no such independent source of consent for this proceeding, which was commenced by an Amended RFA filed on 8 August 2018.

112. In other words, the incompatibility of the consent to arbitration in Article 7 with the TFEU confirms that the Claimant's assertion of jurisdiction manifestly lacks legal merit – and provides yet another reason why this proceeding should be dismissed under Arbitration Rules 41(5) and 41(6).

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230 Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, International Bank for Reconstruction and Development, 18 March 1965, paragraph 23, **RL-50**. *See also* Christoph Schreuer et al., *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd ed., 2009), page 190, paragraph 376, **RL-51**.

231 *See* Christoph Schreuer *et al.*, *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd ed., 2009), page 117, paragraph 124, **RL-51** ("In examining whether the requirements for an 'investment' have been met, most tribunals apply a dual test: whether the activity in question is covered by the parties' consent and whether it meets the Convention's requirements. … This dual test has at times been referred to as the 'double keyhole' approach or as a 'double barrelled' test").

V. THE RESPONDENT IS ENTITLED TO ITS COSTS FOR DEFENDING THIS PROCEEDING

113. For all the foregoing reasons, this proceeding should be dismissed for manifest lack of legal merit. Moreover, the Respondent should also be awarded its costs to date for these proceedings.

114. Article 61(2) of the ICSID Convention provides that "except as the parties otherwise agree, . . . [the Tribunal] shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid".[232] Here, the parties have not agreed otherwise. Arbitration Rule 47(1) provides that "[t]he award shall be in writing and shall contain . . . (j) any decision of the Tribunal regarding the cost of the proceeding".[233]

115. Article 61(2) establishes the broad discretion of the Tribunal to award costs.[234] Tribunals have not hesitated to award costs to respondents that have been forced to bear the time and expense of meritless claims,[235] including in the context of the dismissal of manifestly meritless claims under Arbitration Rule 41(5).[236] Costs are also routinely awarded against parties who engage in bad faith litigation tactics.[237]

116. The Claimant, Mr Olegs Roščins, should be personally required to bear, in full, all the costs and expenses of the Tribunal and the Centre and all of the Respondent's legal fees and expenses for this dispute. For one, as demonstrated above, the Claimant made the decision to suddenly acquire interests in the Companies after the allegedly

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232 ICSID Convention, Article 61(2), **RL-2**.

233 Arbitration Rules, Rule 47(1), **RL-3**.

234 *See Phoenix Action*, Award, paragraph 150, **RL-19** (stating that Article 61(2) "establishes the Tribunal's discretion in allocation arbitration costs (the advances paid by the parties to ICSID) and the fees for legal representation between the parties as it deems appropriate").

235 *Phoenix Action*, Award, paragraph 151, **RL-19** ("The Respondent has been forced to go through the process and should not be penalized by having to pay for its defense"); *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award (McRae, Lévy, Lew), 13 August 2009, paragraph 185, **RL-52** ("an award to the Respondent of full costs will . . . discourage others from pursuing such unmeritorious claims").

236 *Ansung*, paragraphs 165 – 166, **RL-11** (awarding costs to Respondent after a successful Arbitration Rule 41(5) application); *RSM Production*, paragraphs 8.3.5 – 8.3.6, **RL-10** (same).

237 *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award (Tercier, Lalonde, Thomas), 17 September 2009, paragraph 159, **RL-53** ("the misconduct of an arbitration proceeding leads generally to the allocation of all costs on the party in bad faith").

adverse State measures had already been taken against the Companies' bank accounts.[238] He then decided to initiate this ICSID arbitration on the basis of that manifestly delayed acquisition of shares. As an attorney, the Claimant must or should have known that this was patently abusive and frivolous. Bringing such a manifestly meritless action demands an award of costs against the Claimant himself.

117. If that were not enough, the Claimant's behaviour to date confirms the necessity of assessing costs in order to dissuade future misconduct. The facts are:

a. The Claimant brought the Initial RFA even though he did not meet the requirements of the Lithuania-Latvia BIT, causing him to withdraw that Initial RFA shortly after the Respondent objected.[239]

b. The Claimant's Notice of Dispute promised to deliver proof of beneficial ownership of the Companies' shares for all relevant times.[240] The Claimant never did so.

c. The Claimant's first counsel, Mr Julian H. Lowenfeld, promised to deliver evidence of ownership for all relevant times if the Respondent agreed to limited conditions.[241] When the Respondent satisfied those conditions, the Claimant and Mr Lowenfeld disappeared for months.[242]

d. The Claimant and Mr Lowenfeld then re-appeared and suddenly refused to produce the evidence they had already promised to provide, until the Respondent formally began treaty consultations in person.[243] When the Respondent still demanded sufficient evidence of ownership at all relevant times, the Claimant then disappeared for almost two years.[244]

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238 *See supra* Section IV.A.

239 *See supra* paragraphs 57 – 58.

240 *See supra* paragraph 59.

241 *See supra* paragraphs 60 – 62.

242 *See supra* paragraphs 63 – 64

243 *See supra* paragraph 65.

244 *See supra* paragraphs 67 – 73

e. The facts, and the evidence the Companies submitted to the Respondent's courts, show that the Claimant could never have produced evidence demonstrating ownership of the Companies prior to 11 July 2012 – because he did not own the Companies at that time.[245] As a result, the position he and his counsel took in all the conversations above constituted bad faith.

f. About two years afterwards, the Claimant then re-appeared suddenly through Professor Tomas, demanded immediate compensation and then initiated this proceeding – all still without providing the required evidence of ownership at the relevant time.[246]

g. The Tribunal has been provided with some of the email correspondence from Professor Tomas to the Respondent's counsel, which speaks for itself.

118. As a result, the Respondent should be awarded all costs for this proceeding – and costs for addressing the Claimant's Initial RFA and its subsequent Notice of Dispute. The award should also bear interest at a compounded annual EURO-LIBOR rate.

VI. REQUEST FOR RELIEF

119. For all the foregoing reasons, the Respondent respectfully requests that the Tribunal:

a. declare that the Claimant's claims are manifestly without legal merit;

b. declare that the Claimant shall bear in full the costs of the proceeding and the fees and expenses of the Tribunal and charges for the use of the facilities of the Centre; and

c. order that the Claimant pay, in full, the Respondent's legal costs and expenses and all other costs and expenses associated with this dispute, including both the costs of this arbitration and the costs of addressing the Claimant's Initial RFA and its subsequent Notice of Dispute.

[signature on following page]

245 *See supra* Section III.A.

246 *See supra* paragraph 74.

21 March 2019

Volterra Fietta Ellex Valiunas

Counsel for the Respondent