

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES  
WASHINGTON, D.C.

SUPERVISIÓN Y CONTROL, S.A.  
Claimant

v.

THE REPUBLIC OF COSTA RICA  
Respondent

(ICSID Case No. ARB/12/4)

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**AWARD**

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**ARBITRAL TRIBUNAL**

Dr. Claus von Wobeser, President  
Mr. Joseph P. Klock Jr., Arbitrator  
Dr. Eduardo Silva Romero, Arbitrator

*Secretary of the Tribunal:*  
Luisa Fernanda Torres Arias

Date of dispatch to the Parties: January 18, 2017

*In representation of the Claimant:*

Mr. George Fowler

Mr. Luis Enrique Cuervo

*Fowler, Rodriguez, Valdes Fauli*

*In representation of the Respondent:*

Ms. Adriana Gonzalez

*Ministry of Foreign Trade, Costa Rica*

and

Mr. Paolo Di Rosa

Mr. Patricio Grané

Ms. Natalia Giraldo Carrillo

*Arnold & Porter LLP*

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## GLOSSARY OF ABBREVIATIONS AND TERMS USED

**Administrative Contentious Court:** the Second Circuit Administrative Contentious Court of San José de Goicochea.

**Arbitration Rules:** ICSID Rules of Procedure for Arbitration Proceedings.

**Bid or Offer:** proposal submitted by the Consortium Riteve SyC before the National Procurement Office of the Ministry of Finance on July 7, 1998, within the International Public Tender Number 002-98.

**BIT or Treaty:** Bilateral Investment Treaty between the Kingdom of Spain and the Republic of Costa Rica.

**Board of Directors:** the Board of Directors of the PTC.

**Carvajal Firm:** the firm Carvajal y Consultores S.A.

**Comptroller:** Office of the Comptroller General of the Republic of Costa Rica.

**Consortium:** The Consortium Riteve SyC, integrated by SyC and Transal, S.A.

**Contract:** Provision of Services Contract for the Creation and Functioning of Stations for the Integrated Vehicle Technical Inspection, entered into by the Public Transportation Council of the Ministry for Public Works and Transportation of Costa Rica and the Consortium Riteve SyC on May 29, 2001.

**Contractual Addendum:** Contractual Addendum to the Provision of Services Contract for the Creation and Functioning of Stations for the Integrated Vehicle Technical Inspection, entered into by MPWT and Riteve on July 20, 2012.

**COSEVI:** Road Safety Council of Costa Rica.

**Costa Rica or Respondent:** the Republic of Costa Rica.

**Counter-Memorial:** Respondent's counter memorial, submitted on March 1, 2013.

**Countersignature Official Notice:** Official communication No. 7168 (DI-AA-1793) dated June 28, 2001, issued by the Office of the Comptroller General of the Republic of Costa Rica, where the Comptroller granted the countersignature of the Contract.

**Direct Agreement:** Agreement within the Contract's framework, entered into by and between the MPWT and Riteve on July 20, 2012.

**Disqualification Proposal:** Proposal to disqualify the Arbitral Tribunal submitted by Claimant under Article 57 of the ICSID Convention.

**Executive Order 30185:** Executive Order 30185-MPWT, entitled "*Regulation on the Proceeding for the Adjustment of the Vehicle Technical Inspection (VTI) Service Rates Handled by the Consortium Riteve SyC*", published on March 6, 2002.

**Executive Order 30396:** Executive Order 30396-MPWT, issued May 7, 2002 and published on July 12, 2002, which establishes the tariffs for readjustment for the initial operations of vehicular technical inspection for Consortium Riteve SyC.

**Executive Order 30572:** Executive Order 30572-MPWT, entitled "*Amendments to the Regulations for the Integrated Technical Inspection of Automotive Vehicles Circulating on Public Roads*", issued on July 12, 2002

**Executive Order 30573:** Executive Order 30573-MPWT, which "*Derogates the Executive Order No. 30185 'Regulation on the Proceeding for the Adjustment of the Vehicular Technical Review Service Tariffs (VTR) handled by the Consortium Riteve-SyC' and its amendment Executive Order No. 30396*", dated July 12, 2002.

**Executive Order 30987:** Executive Order 30987-MPTW, entitled “*Regulation of the Procedure for the Readjustment of Rates for the Vehicle Technical Inspection Service (VTI) handled by the Consortium Riteve SyC*”, issued on February 19, 2003.

**First Contract:** First Contract entered into by and between the Consortium and the PTC on February 5, 2001.

**Hearing:** Hearing on Jurisdiction and Merits held on January 13-17, 2014.

**ICSID:** International Centre for Settlement of Investment Disputes.

**ICSID Convention:** Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

**Increase Agreement:** 12.76% increase on VTI rates for 2005, approved on December 16, 2004 by the Board of Directors.

**IRES:** Institute for Research in Economic Sciences at the University of Costa Rica.

**Local Arbitration:** Local Arbitration Proceeding initiated by Claimant in Costa Rica, against the Attorney General’s Office, as a representative of the State, and the PTC, invoking clause 11.1.3 of the Contract, before the Resolution Center for Conflicts on Property.

**Memorial or Claimant’s Memorial:** Claim Memorial submitted by Claimant on November 7, 2012.

**MPWT:** Ministry of Public Works and Transportation of Costa Rica.

**Non-Countersignature Official Notice:** Official communication No. 4579 (DI-AA-1159) dated May 3, 2001, issued by the Office of the Comptroller General of the Republic of Costa Rica, where the Comptroller denied the countersignature of the First Contract.

**Organic Law:** Organic Law of the Office of the Comptroller General of the Republic of Costa Rica.

**Parties:** Jointly, the Claimant and the Respondent.

**Procurement Office:** National Procurement Office of the Ministry of Finance.

**PSRA:** Public Services Regulatory Authority.

**PTC:** Public Transportation Council of the Ministry for Public Works and Transportation of Costa Rica.

**Regulatory Committee:** the Regulatory Committee of the PSRA.

**Rejoinder:** Respondent's Rejoinder submitted on September 6, 2013.

**Reply:** Claimant's Reply submitted on June 3, 2013.

**Request for Arbitration:** Request for Arbitration submitted by Supervisión y Control, S.A. on December 21, 2011.

**Riteve:** Riteve SyC, S.A.

**Supreme Court:** Supreme Court of Justice of the Republic of Costa Rica.

**SyC or Claimant:** Supervisión y Control, S.A.

**Tender:** International Public Tender Number 002-98 for the creation and functioning of stations for the integrated vehicle technical inspection, published in the Official Federal Gazette Number 20 on January 29, 1998.

**Terms of the Tender:** terms of the International Public Tender Number 002-98 issued by the National Procurement Office of the Ministry of Finance and the Ministry of Public Works and Transportation of Costa Rica for the creation and functioning of stations for the integrated vehicle technical inspection, published in the Official Federal Gazette Number 20 on January 29, 1998.

**VTI:** Vehicle Technical Inspection.

**VTIC:** Vehicle Technical Inspection Centers.

## I. THE PARTIES

### A. THE CLAIMANT

1. Supervisión y Control, S.A., the claimant in this arbitration (hereinafter, “**SyC**” or the “**Claimant**”), is a Spanish company incorporated in the city of La Coruña, Kingdom of Spain, on March 20, 1987.<sup>1</sup>
2. SyC is represented in this proceeding by:

George Fowler  
Luis Enrique Cuervo  
*Fowler, Rodriguez, Valdes-Fauli*  
1331 Lamar St. Suite 1560  
Houston, TX 77010  
Tel. (713) 654 1560

### B. THE RESPONDENT

3. The Republic of Costa Rica (hereinafter, “**Costa Rica**” or the “**Respondent**”) is the Respondent in this arbitration. Costa Rica is represented in this proceeding by:

Adriana Gonzalez  
*Ministry of Foreign Trade, Costa Rica*  
and  
Paolo Di Rosa  
Patricio Grané  
Natalia Giraldo Carrillo  
*Arnold & Porter LLP*  
601 Massachusetts Avenue NW  
Washington, DC 20001-3743

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<sup>1</sup> Claimant’s Memorial § 48; Exhibit C-2.

Tel. (202) 942 5060

4. The Arbitral Tribunal will refer jointly to Claimant and Respondent as the “**Parties**”.

## II. ARBITRAL AGREEMENT

5. The Request for Arbitration of SyC is based on Article XI of the Bilateral Investment Treaty between the Kingdom of Spain and the Republic of Costa Rica (hereinafter, the “**BIT**” or the “**Treaty**”), which provides:

*“Article XI. Disputes between a Party and investors of the other Party.*

*1. Notice of any investment-related dispute arising between one of the Parties and an investor of the other Party with respect to matters governed by this Treaty shall be given in writing, including detailed information, by the investor to the Party receiving the investment. To the extent possible, the parties to the dispute shall try to settle such disputes by an amicable agreement.*

*2. If the dispute cannot be settled in such manner within a period of six months after the date of the written notice referred to in Paragraph 1, the investor may submit the dispute:*

*a) to the competent courts of the Party in whose territory the investment was made;*

*b) to an international arbitral tribunal from among those cited below:*

*i) the International Centre for Settlement of Investment Disputes (ICSID), created by the ‘Convention on the Settlement of Investment Disputes between States and Nationals of Other States’, opened for signature on March 18, 1965, when each State party to this Treaty adhered to such;...”*

6. Regarding the selection of forum, Article XI.3 of the BIT provides the following:

*“3. Once an investor has submitted the dispute to an arbitral tribunal, the award shall be final. If the investor has submitted the dispute to a competent court of the Party in whose territory the investment was made, it may, in addition, resort to the arbitral tribunals referred to in this article, if such national court has not issued a judgment. In the latter case, the investor shall adopt any measures that are required for the purpose of permanently desisting from the court case then underway.”*

[Emphasis added]

7. Claimant expressly consented to the arbitration by filing its Request for Arbitration on December 21, 2011 (hereinafter, the “**Request for Arbitration**”).

### III. PROCEDURAL HISTORY

8. On June 10, 2011, Claimant notified the government of Costa Rica in writing of the existence of an investment dispute, as provided for in Article XI.1 of the BIT. In this communication, Claimant argued that Costa Rica’s actions had violated articles III, IV and V of the BIT.
9. On December 21, 2011, Claimant submitted a Request for Arbitration to the ICSID Secretariat, in accordance with article 36 of the ICSID Convention. This request was registered on February 9, 2012 as ICSID Case No. ARB/12/4.
10. On June 21, 2012 the Arbitral Tribunal was constituted, composed of Mr. Joseph P. Klock Jr., appointed by Claimant, Dr. Eduardo Silva Romero, appointed by Respondent, and Dr. Claus von Wobeser, appointed by the Chairman of the ICSID Administrative Council as president of the Arbitral Tribunal.
11. On July 17, 2012, in terms of article 13(1) of ICSID’s Rules of Procedure for Arbitration Proceedings (hereinafter, the “**Arbitration Rules**”), the Arbitral Tribunal held its first

session with the Parties by conference call. The session was recorded in a transcript, discussing among other matters the agreement of the Parties on the rules applicable to the arbitration and a provisional procedural calendar. It was also recorded that the Parties agreed that the Tribunal had been properly constituted and that they had no objections with respect to the appointment of its members.

12. On September 19, 2012, the Arbitral Tribunal issued Procedural Order No. 1, containing the Arbitral Tribunal's determinations and the Parties' agreements reached during the conference call of July 17, 2012, related to the procedural rules that would govern the arbitration.
13. On September 30, 2012, Claimant requested an extension for the filing of its Claim Memorial.<sup>2</sup> On October 11, 2012 the Arbitral Tribunal decided to grant the requested extension, modifying sections 13.1 and 14.1 of the Procedural Order No. 1. After considering the communications sent by Claimant on September 30, 2012, and October 1, 2012, and by Respondent on October 1 and 2, 2012, on October 11, 2012, the Tribunal made further modifications to section 13.1 of the procedural calendar. The procedural calendar reflected the following:

*"13.1 The schedule shall be as follows:*

*13.1.1 The Claimant shall file a Memorial by November 7, 2012;*

*13.1.2 The Respondent shall file a Counter-Memorial by February 28, 2013;*

*13.1.3 The Claimant shall file a Reply by May, 9, 2013; and*

*13.1.4 The Respondent shall file a Rejoinder by July 18, 2013."*

*"14.1 The schedule for document production shall be as follows:*

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<sup>2</sup> Emails from the Claimant to the Arbitral Tribunal dated September 30 and October 1, 2012.

14.1.1 *A request for document production by any disputing party shall be filed on or before November 14, 2012.*

14.1.2 *Objections to the request for production of specific documents or category of documents shall be filed on or before November 21, 2012.*

14.1.3 *The reply to objections to the production of specific documents or category of documents shall be filed on or before November 28, 2012.*

14.1.4 *The production of documents in respect of which there are no objections shall be on or before December 5, 2012.*

14.1.5 *The decision of the Tribunal (either upholding the objections or ordering the production of the requested documents) shall be on or about December 12, 2012.*

14.1.6 *The requested documents shall be produced two week from the date of the Tribunal's decision. The Tribunal will specify this date in the respective order.”<sup>3</sup>*

14. On November 7, 2012, Claimant submitted its claim memorial (hereinafter, the “**Memorial**” or “**Claimant’s Memorial**”), along with the factual exhibits **C-1** to **C-63**, witness statements from Amador de Castro, José Luis López, Fernando Mayorga, Eduardo Sancho González, Stephan Brunner, Francisco Jiménez and Rodolfo Méndez Mata, and the expert reports from Nicholas Good with exhibits, Rubén Hernández, Leonel Fonseca Cubillo, Luis Diego Vargas Chinchilla and Laura Cristina Rivera. On February 18, 2013 the Tribunal issued Procedural Order No. 2 on document production.
15. On March 1, 2013, Respondent submitted its counter-memorial (hereinafter, “**Counter Memorial**”), along with the factual exhibits **R-1** to **R-113**, legal exhibits **RL-1** to **RL-100**, the witness statements from Sidia María Cerdas Ruiz, Manuel Corrales Umaña, Luis Alberto Cubillo Herrera, Rodrigo Montenegro, Rodrigo Rivera Fournier, Omar Rivera

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<sup>3</sup> Correspondence from the Arbitral Tribunal to the Parties dated October 11 and 18, 2012.

Mesén, Allan Roberto Ugalde, and the expert reports from Timothy H. Hart, Manuel Enrique Jiménez Meza and Aldo Milano Sánchez with exhibits.

16. On March 5, 2013, Respondent submitted exhibit **R-114** of its Counter Memorial.
17. On March 14, 2013, Claimant sent a letter to the Tribunal complaining that Respondent raised jurisdictional objections outside the time frame provided in Procedural Order No.1. Also, Claimant requested the Arbitral Tribunal to confirm that jurisdictional issues would be addressed simultaneously with the merits of the case when rendering the final award, pointed out an alleged infringement of Procedural Order No. 2 by Respondent and requested the modification of the procedural calendar in order to submit its Reply on June 30, 2013.
18. On March 16, 2013, Respondent submitted its reply to Claimant's letter dated March 14, 2013, requesting the Arbitral Tribunal to deny the 53 (fifty-three) day extension requested by Claimant and addressing the allegations concerning failure to comply with Procedural Order No. 2, among other things. On March 19, 2013, Claimant sent a further communication.
19. On April 24, 2013 the Arbitral Tribunal by majority issued Procedural Order No. 3, granting Claimant a 25 (twenty-five) day extension for the submission of its Reply, therefore the procedural calendar contained in Section 13.1 of the Procedural Order No. 1 was modified as follows:

*"13. 1 The schedule shall be as follows:*

*13.1.1 The Claimant shall file a Memorial by November 7, 2012;*

*13.1.2 The Respondent shall file a Counter-Memorial by February 28, 2013;*

*13.1.3 The Claimant shall file a Reply by June 3, 2013; and*

*13.1.4 The Respondent shall file a Rejoinder by August 12, 2013."*

20. On April 26, 2013, Respondent requested the Arbitral Tribunal, considering the extension granted to Claimant for the submission of its Reply in the Procedural Order No. 3, to grant Respondent the same additional time for the submission of its Rejoinder. The Arbitral Tribunal granted the requested extension.
21. On May 23, 2013, the Arbitral Tribunal suggested to the Parties to hold a hearing on jurisdiction and merits (hereinafter, "**Hearing**") in the week starting on January 13, 2014. The Parties confirmed their availability by emails dated May 28, 2013.
22. On June 3, 2013, Claimant submitted its Reply (hereinafter, "**Reply**"), along with exhibits **C-064 to C-116**, the complementary witness statements of Laura Rivera, Fernando Mayorga, Victor Manuel González, and José Luis López Rodríguez with exhibits, as well as the complementary expert reports from Rubén Hernández Valle, Leonel Fonseca with exhibits, José Manuel Calderón, Ernst & Young, Nicholas Good with exhibits and Carlos Andrés Arguedas.
23. On August 6, 2013, the Arbitral Tribunal confirmed that the Hearing would be held from Monday, January 13, 2014 to Friday, January 17, 2014, and informed the Parties that a telephone conference prior to the Hearing would be held.
24. On September 6, 2013, Respondent submitted its Rejoinder (hereinafter, "**Rejoinder**"), along with the factual exhibits **R-115 to R-125**, the legal exhibits **RL-101 to RL-106**, the additional witness statements from Omar Rivera Mesén and Allan Roberto Ugalde with exhibits, and the additional expert reports from Timothy H. Hart and Aldo Milano Sánchez with exhibits.
25. On November 8, 2013, the Arbitral Tribunal presented the Parties a draft containing the procedural rules for the Hearing. Claimant submitted its comments to such draft on November 15, 2013, and Respondent submitted its comments on November 16, 2013.

26. On November 25, 2013 the pre-Hearing telephone conference was held between the Arbitral Tribunal and the Parties. This telephone conference took place with the following participants:

From the Arbitral Tribunal:

Dr. Claus von Wobeser	President
Mr. Joseph P. Klock Jr.	Co-Arbitrator
Dr. Eduardo Silva Romero	Co-Arbitrator

From the ICSID Secretariat:

Ms. Ann Catherine Kettlewell	Secretary of the Tribunal
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From Claimant:

Mr. Luis E. Cuervo	Fowler Rodríguez Valdes Fauli
Mr. George J. Fowler	Fowler Rodríguez Valdes Fauli
Mr. Luis Llamas	Fowler Rodríguez Valdes Fauli
Ms. Claudia Linares	Fowler Rodríguez Valdes Fauli

From Respondent:

Ms. Adriana González	Ministry of Foreign Trade, Costa Rica
Mr. Julián Aguilar	Ministry of Foreign Trade, Costa Rica
Ms. Andrea Zumbado	Ministry of Foreign Trade, Costa Rica
Mr. Paolo Di Rosa	Arnold & Porter LLP
Mr. Patricio Grané Labat	Volterra Fietta
Ms. Natalia Giraldo Carrillo	Arnold & Porter LLP

Court Reporter:

Mr. David Kasdan

B&amp;B Reporters

27. On December 6, 2013 the Arbitral Tribunal issued Procedural Order No. 4, regarding the procedural rules for the Hearing.
28. On January 10, 2014, Claimant requested to submit four videos at the Hearing, as well as the admission of six new documents, identified as exhibits **C-117 to C-122**. Respondent objected this request.
29. On January 11, 2014, Respondent requested the admission of a new document..
30. The Hearing was held from January 13 to January 17, 2014 in the city of Washington, D.C. The following persons participated in the Hearing:

From the Arbitral Tribunal:

Dr. Claus von Wobeser

President

Mr. Joseph P. Klock Jr.

Co-Arbitrator

Dr. Eduardo Silva Romero

Co-Arbitrator

From the ICSID Secretary General:

Ms. Ann Catherine Kettlewell

Secretary of the Tribunal

From the Claimant:

Mr. Luis E. Cuervo

Fowler Rodríguez Valdes Fauli

Mr. George J. Fowler

Fowler Rodríguez Valdes Fauli

Mr. Luis Llamas

Fowler Rodríguez Valdes Fauli

Ms. Claudia Linares	Fowler Rodríguez Valdes Fauli
Mr. Jesse Francis	XACT Data
Mr. Amador de Castro	SyC
Mr. José Luis López	SyC
Mr. Fernando Mayorga	Riteve
Mr. Stephan Brunner	General Superintendent of Securities

From the Respondent:

Ms. Adriana González	Ministry of Foreign Trade, Costa Rica
Mr. Luis Adolfo Fernández	Ministry of Foreign Trade, Costa Rica
Mr. José Carlos Quirce	Ministry of Foreign Trade, Costa Rica
Mr. Alan Thompson	Consultant of the Ministry of Foreign Trade, Costa Rica
Mr. Allan Roberto Ugalde	General Comptroller of the Republic
Mr. Hansel Arias	General Comptroller of the Republic
Mr. Paolo Di Rosa	Arnold & Porter LLP
Mr. Pedro Soto	Arnold & Porter LLP
Ms. Natalia Giraldo Carrillo	Arnold & Porter LLP
Mr. Kelby Ballena	Arnold & Porter LLP
Ms. Ana Martínez	Arnold & Porter LLP
Mr. Patricio Grané Labat	Volterra Fietta

Court Reporters:

Mr. Clay J. Frazier	B&B Reporters
Ms. Liliana Avalos Benetti	Reporter
Ms. Miriam Martín García	Reporter
Ms. Imperio García	Reporter

31. During the Hearing the Parties interrogated the following witnesses: Amador de Castro, José Luis López, Fernando Mayorga, Stephan Brunner, Sidia María Cerdas Ruiz, Manuel Corrales Umana, Luis Alberto Cubillo Herrera, Rodrigo Rivera Fournier, Rubén Hernández, Laura Rivera, Aldo Milano, Carlos Arguedas, Leonel Fonseca, Nicholas Good and Timothy Hart.
32. In relation to the admission of new evidence, during the Hearing the Arbitral Tribunal admitted the documents offered by Claimant and the document offered by Respondent, but only admitted two of the four videos offered by Claimant.
33. Before concluding the Hearing, the Tribunal asked the Parties if they thought they had had the opportunity to be heard, to offer evidence, and to adequately present their case; both Parties stated their full agreement with the handling of the proceeding and acknowledged that they had an opportunity to adequately present their case and offer the evidence they considered appropriate, in the following terms:

*“...President von Wobeser: ... I would like to ask the parties expressly if you feel that you’ve been able to state your views, if you feel that you’ve been heard, if you feel you’ve been able to present your evidence and present your case, following the rules, of course.*

...

*Mr. Fowler: From my point of view of ourselves, our law firm and Supervisión were very pleased with everything ... I felt I’ve been able to present my case and my witnesses and put forth our point of view.*

*Mr. Di Rosa: ... The Republic of Costa Rica is very pleased with the procedure...”<sup>4</sup>*

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<sup>4</sup> Corrected Transcript of the Hearing (ENG), pp. 1718-1719.

34. After the Hearing, the Parties submitted the exhibits introduced during or after the Hearing. Claimant presented the exhibits **C-117** to **C-132**, and Respondent presented exhibits **R-126** to **R-132**.
35. On March 28, 2014, the Parties submitted their Post-Hearing briefs.
36. On June 2, 2015, Claimant wrote to Ms. Luisa Fernanda Torres Arias requesting the intervention of the Secretary General of ICSID, alleging that the Arbitral Tribunal had lost its impartiality because Ms. Ann Catherine Kettlewell, the prior Secretary of the Tribunal, had joined the firm Arnold & Porter, which represents Respondent in this arbitration.
37. On July 20, 2015, Claimant submitted a proposal to disqualify the Arbitral Tribunal under Article 57 of the ICSID Convention (the “Disqualification Proposal”).
38. On August 31, 2015, Mr. Jim Yong Kim, Chairman of the ICSID Administrative Council,<sup>5</sup> informed the Parties of his intention to seek an external recommendation concerning Claimant’s Disqualification Proposal, following established ICSID practice of seeking an external recommendation when a proposal to disqualify involves a former staff member of the World Bank. Through letters dated September 21, October 13, October 15, and November 20, 2015, Mr. Jim Yong Kim appointed Mr. William K. Slate II to issue a recommendation on the Disqualification Proposal.
39. After receiving the correspondence related to the Disqualification Proposal, and a series of additional communications and submissions from the Parties and from the members of the Arbitral Tribunal, Mr. Slate issued his recommendation on February 17, 2016.
40. On March 7, 2016, Mr. Jim Yong Kim issued his final decision on Claimant’s Disqualification Proposal after considering each Parties’ arguments and the arbitrators’ explanations. Mr. Kim concluded that the Disqualification Proposal “does not meet the

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<sup>5</sup> Pursuant Article 58 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules, it falls upon the Chairman of the ICSID Administrative Council to decide the Proposal.

standard set forth in Article 57 of the ICSID Convention for the disqualification of an arbitrator,” and accordingly, rejected the Disqualification Proposal.

41. On July 22, 2016, the Arbitral Tribunal closed the proceedings in accordance with Rule 38(1) of the Arbitration Rules. On the same date, and under instruction of the Arbitral Tribunal, Mr. Gonzalo Flores notified the closing of the proceedings to the Parties.
42. On August 11, 17 and 18, 2016 the Parties presented their submissions on costs. On August 17, 2016, Claimant made a submission requesting the Tribunal to reopen the proceedings to admit new documents into the record under Rule 38 of the Arbitration Rules.
43. After receiving submissions from the Parties, on November 17, 2016, the majority of the Tribunal issued Procedural Order No. 5, deciding as follows:

*“1. After carefully analyzing the new evidence submitted by Claimant, the Tribunal by majority has decided not to reopen the proceedings and to dismiss such new evidence, because it does not meet the requirements set forth in Rule 38 of the ICSID Rules.*

*2. Rule 38 provides that the Tribunal may reopen the proceedings exceptionally when ‘new evidence is forthcoming of such nature as to constitute a decisive factor’ or when ‘there is a vital need for clarification on certain specific points.’ In short, the majority of the Tribunal finds that (i) said evidence does not constitute a decisive factor on this case, and (ii) it has no need for clarification on any points. The detailed reasons for this decision will be included in the final Award.*

*3. The Tribunal has unanimously decided to extend the period to issue the award by a further 60 days, as allowed under Rule 46 of the ICSID Rules.”*

#### IV. DETAILED REASONS ON THE MAJORITY'S DECISION TO DISMISS CLAIMANT'S NEW EVIDENCE

44. As provided in Procedural Order No. 5, this section will discuss the reasons of the Majority's decision to dismiss Claimant's new evidence.
45. In order to determine whether the new evidence submitted by Claimant met the criteria set forth in Rule 38(2) to reopen the proceedings, the Tribunal carefully reviewed the new evidence that reflects the following facts:
- a) On September 4, 2014, the Executive Director of COSEVI certified, upon Riteve's prior request, that he was not aware of any sanctions to Riteve as a result of a breach to the Agreement.<sup>6</sup>
  - b) On November 17, 2014, Riteve submitted a request for the readjustment of rates before the PSRA. On November 24, 2014, the PSRA rejected the request claiming that it lacked the rate adjustment methodology set forth in clause 9.4 of the Contract.<sup>7</sup>
  - c) On November 10, 2015, the Executive Director of COSEVI certified, upon Riteve's prior request, that he was not aware of any breach to the terms of the Agreement by Riteve.<sup>8</sup>
  - d) On November 13, 2015, Riteve submitted before the PSRA a request for the readjustment of rates. On November 19, 2015, PSRA rejected the request claiming that it lacked the rate adjustment methodology set forth in clause 9.4 of the Contract.<sup>9</sup>

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<sup>6</sup> Certificate issued by the Executive Director of COSEVI, dated September 4, 2014.

<sup>7</sup> PSRA Resolution No. 154-RIT-2014, dated November 24, 2014.

<sup>8</sup> Certificate issued by the Executive Director of COSEVI, dated November 10, 2015.

<sup>9</sup> PSRA Resolution No. 148-RIT-2015, dated November 19, 2015.

- e) On June 1, 2016, the MPWT sent a letter to Riteve requesting Riteve's collaboration in certain initiatives that intended to promote a healthy environment and to reduce traffic accidents in Costa Rica. In exchange for the disbursements that said collaboration would require from Riteve, and acknowledging the need to establish a rate adjustment methodology for the VTI service, the Rules for the Procedure to Readjust the Rates of the VTI service would be published as of July 16, 2016.<sup>10</sup>
- f) On June 2, 2016, Riteve replied to the MPWT's June 1<sup>st</sup> letter, explaining how Riteve could contribute to the aforementioned initiatives. Riteve emphasized that its collaboration was subject to the publication and establishment of the rate adjustment methodology for the VTI service for the duration of the Contract.<sup>11</sup>
- g) On June 27, 2016, the Vice Minister of MPWT issued a statement in the Official Gazette informing the general public that a draft of the decree called "Rules of Procedure for the Rate Readjustment of the Technical Vehicular Revision Service assigned to Riteve SyC S.A" had been drafted. The statement contained a web link where the draft of the decree could be consulted, allowing any interested parties to submit any comments on the project to the MPWT.<sup>12</sup>
- h) On July 11, 2016, the PSRA issued its comments on the draft of the decree mentioned above. PSRA noted that clause 9.4 of the Contract was still in force, and said clause provides that the MPWT would issue the methodology to adjust the VTI rates. However, said methodology had not yet been published in the Gazette.<sup>13</sup>

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<sup>10</sup> Communication No. DVTSV-2016-0358 issued by MPWT, dated June 1, 2016.

<sup>11</sup> Letter from Riteve SyC to MPWT, dated June 2, 2016.

<sup>12</sup> Official Gazette No. 123, dated June 27, 2016.

<sup>13</sup> PSRA Communication No. 487-RG-2016, dated July 11, 2016.

46. Regarding the first requirement set forth in Rule 38(2), the new evidence presented by Claimant does not constitute a “*decisive factor*” in the present case, because said evidence relates to the merits of the case, and the Tribunal will not analyze the merits of the case for the reasons stated in this award. Indeed, the new documents submitted by Claimant relate to the adjustment of rates for the VTI service and the methodology for carrying it out, but they do not, in any way, change the fact that Claimant’s claims had already been submitted to local courts and do not have any influence on the decision that this Tribunal has adopted to resolve this case. Even assuming that the new evidence put forward by Claimant fully demonstrated the facts that Claimant is making reference to—and the arguments it is putting forward—said demonstration would not be relevant to the outcome of the case.
47. Regarding the second requirement, and for the same reason stated in the above paragraph, the Tribunal finds that the new evidence submitted by Claimant does not respond to a “*vital need for clarification on certain points.*” The facts of this case are clear, the Tribunal fully understands them, and the evidence offered by Claimant does not change the Tribunal’s understanding of the relevant facts to resolve this case.
48. Lastly, and in addition to the reasons above—which by themselves are sufficient to deny the admission of the new evidence—it is important to note that all the new documents submitted by Claimant on August 17, 2016, pre-date the closing of the proceedings on July 22, 2016. The PSRA Resolution No. 154-RIT-2014 dates of 24 November 2014; the PSRA Resolution No. 148-RIT-2015 dates of 19 November 2015; the Certificate issued by the Executive Director of the Road Safety Council (Consejo de Seguridad Vial) dates of 10 November 2015; the Certificate issued by the Executive Director of the Road Safety Council (Consejo de Seguridad Vial) dates of 4 September 2014; the Communication No. DVTSV-2016-0358 of the MPWT dates of 1 June 2016; the Letter from Riteve SyC to the MPWT, dates of 2 June 2016; the Official Gazette No. 123, dates of 27 June 2016; and the PSRA Communication No. 487-RG-2016, dates of 11 July 2016. Thus, the Tribunal considers that Claimant had sufficient time to submit the new evidence before the proceedings were closed, but failed to do so.

## V. SUMMARY OF THE FACTS

49. At the end of the 1990s, Costa Rica opened its economy and implemented a privatization policy, promoting international investment in various sectors of its economy, with the intention of reducing the growing external debt. For these reasons, Costa Rica started several international public tender procedures in order to award certain concession contracts.<sup>14</sup>
50. Before 1998 Costa Rica did not require any technical inspection for vehicles (hereinafter, “VTI”). The control of polluting emissions was carried out in private workshops and the service of review of security elements was done directly by the Ministry of Public Works and Transportation (hereinafter, “MPWT”) in a single station located in the city of San José, which serviced all the vehicles of the country with certain shortcomings in relation to the facilities, technology, personnel and training.<sup>15</sup>
51. In August of 1996, during the Administration of President José María Figueres, Costa Rica began a program for the control of polluting emissions called “Ecomarchamo”, in an attempt to reduce air pollution due to vehicle emissions. Under the program, every vehicle had to go through an emission inspection once a year, and twice a year in the case of taxis and buses. The inspection would be conducted by privately owned workshops, which would be properly trained and authorized by the MPWT, pursuant to article 20 of the Transit Law No. 7331 and the Executive Order 23025.<sup>16</sup>
52. On January 29, 1998, through the National Procurement Office of the Ministry of Finance (hereinafter, the “**Procurement Office**”) and the MPWT, Costa Rica issued an invitation to the International Public Tender Proceeding Number 002-98 for the creation and functioning of stations for the integrated vehicle technical inspection, published in the Official Federal Gazette number 20 on January 29, 1998 (hereinafter, the “**Tender**”).

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<sup>14</sup> Memorial §§ 2, 5, 55; Exhibit C-45.

<sup>15</sup> Memorial § 51; Statement of José Luis López; Statement of Rodolfo Méndez Mata; Statement of Francisco Jiménez; Statement of Stephan Brunner § 20; Exhibits C-43, C-47 and C-60.

<sup>16</sup> Memorial §§ 6, 7, 52; Statement of José Luis López; Exhibits C-41, C-42, C-44, C-60.

The purpose of the Tender was to award the concession for the provision of integrated VTI services to an individual operator with exclusive operation rights.<sup>17</sup> The Terms of the Tender (hereinafter, the “**Terms of the Tender**”) provided that:

- a) Every prospective bidder should file a technical offer with a rate structure and calculations.<sup>18</sup>
- b) The rate applicable to the VTI service would be charged directly to users, this rate may not exceed the one specified by the bidder in his offer, and in case the bidder was awarded, the rate would become an integral part of the binding commitments.<sup>19</sup>
- c) The revenue received by the concession holder would be limited to the rate that could be charged directly to service users, and the offered rate values for each service would be reviewed annually, according to a study prepared by the contractor and approved by the MPWT and the institution responsible for approving those rates, in order to avoid harming the economic and financial balance of the successful bidder.<sup>20</sup>
- d) The term of the contract would be ten years, which may be extended once the performance of obligations, the returns and the efficiency in providing the services, the adequacy of the personnel and other aspects necessary to evaluate the good operation of the different stations had been confirmed by the corresponding technical authority in a written report.<sup>21</sup>
- e) It would be a cause for termination of the contract if the contractor were to charge users a rate higher or lower than the approved rates.<sup>22</sup>

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<sup>17</sup> Memorial §§ 8, 56; Counter-Memorial § 32; Exhibit C-16.

<sup>18</sup> Memorial § 61; Exhibit C-16 section (II) (B) (5.6).

<sup>19</sup> Memorial § 57; Counter-Memorial § 34; Exhibit C-16 section (II) (A) (4).

<sup>20</sup> Memorial §§ 12, 58; Counter-Memorial § 35; Exhibit C-16 section (II) (B) (3).

<sup>21</sup> Counter-Memorial § 36; Exhibit C-16 section (II) (A) (5).

<sup>22</sup> Memorial § 59; Exhibit C-16 section (II) (A) (20c).

- f) The term for providing the VTI services would be ten years,<sup>23</sup> starting from the date of commencement of operations of the VTIC.<sup>24</sup> The successful bidder would have a maximum of eleven months to begin operations from the date the Comptroller countersigned the contract.<sup>25</sup>
- g) Differences between the Administration and the contractor would be settled in an amicable manner, by direct official negotiations and in case of not being able to settle them within thirty days, differences would be submitted to arbitration or to the corresponding court proceeding.<sup>26</sup>
53. On July 2, 1998, SyC entered into an agreement with the Costa Rican company Transal S.A., pursuant to which the consortium Riteve SyC (the “**Consortium**”) was formed, in order to submit a bid within the framework of the Tender.<sup>27</sup>
54. On July 7, 1998, the Consortium submitted its Bid (the “**Bid**” or “**Offer**”) within the Tender proceeding before the Procurement Office.<sup>28</sup>
55. In its bid, the Consortium proposed an average rate of CRC ₡ 7,964 (seven thousand nine hundred sixty-four colones) for the first year of service, and proposed a cost structure for the implementation of the rate adjustment formula, in order to maintain the economic balance of the contract.<sup>29</sup>
56. Similarly, in its Bid the Consortium projected that the provision of VTI service would obtain between 1998 and 2008 an internal return rate of around 13.28%, and an annual growth of 7% in the initial inspections.<sup>30</sup>

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<sup>23</sup> Counter-Memorial § 36; Exhibit C-16 section (II) (A) (5).

<sup>24</sup> Counter-Memorial § 36; Exhibit C-16 section (II) (A) (15).

<sup>25</sup> Counter-Memorial § 36; Exhibit C-16 section (II) (A) (15).

<sup>26</sup> Memorial § 60; Exhibit C-16 section (II) (A) (22.2) and (II) (A) (22.3).

<sup>27</sup> Memorial §§ 10, 63, 196; Counter-Memorial § 33; Exhibit C-12.

<sup>28</sup> Memorial § 64, 197; Counter-Memorial § 37; Exhibit C-18.

<sup>29</sup> Memorial § 65; Counter-Memorial § 37; Exhibit C-18 pp. 632 and 633.

<sup>30</sup> Counter-Memorial § 37; Exhibit C-18, table 2.18; Exhibit R-6, p. 7.

57. On November 24, 1998, the Committee on Analysis and Recommendation for Administrative Contracting after conducting an analysis of the bids submitted in the Tender, recommended to award the contract to the Consortium, because even though the rate offered was the highest among the various proposals, its Bid got the highest score under the scoring system designed by Costa Rica for it offered the best technical and financial conditions and the largest number of stations.<sup>31</sup>
58. On November 25, 1998 the Procurement Office awarded the Tender to the Consortium, under the Terms of the Tender and the bid.<sup>32</sup>
59. On February 1, 1999, by Ruling No. LPI2-98 CHG the Procurement Office declared the Consortium a successful bidder.<sup>33</sup> The award of the Tender to the Consortium was questioned by other bidders, who filed an appeal against that decision, and in light of said appeal the Comptroller General of the Republic of Costa Rica (the “**Comptroller**”) annulled the award by resolution RSL-231-99 dated June 7, 1999 and ordered the Administration to make a more comprehensive analysis of the Consortium’s proposal.<sup>34</sup>
60. After a second analysis conducted by the Committee on Analysis and Recommendation for Administrative Contracting, on November 25, 1999, the Procurement Office re-awarded the Tender to the Consortium, by a re-award ruling LPI-number 002-98.<sup>35</sup>
61. The re-award ruling issued by the Procurement Office was also questioned by third parties through appeals, but the Comptroller General confirmed the decision by Ruling RC-120-2000.<sup>36</sup>

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<sup>31</sup> Memorial §§ 11, 66; Exhibit C-27 pp. 4 and 8; Statement of José Luis López § 19.

<sup>32</sup> Memorial §§ 14, 67; Exhibit C-27; Statement of Stephan Brunner § 6; Statement of José Luis López, § 19.

<sup>33</sup> Counter-Memorial § 38; Exhibit RL-73.

<sup>34</sup> Counter-Memorial § 40; Exhibit RL-38.

<sup>35</sup> Counter-Memorial § 40; Exhibit RL-74.

<sup>36</sup> Counter-Memorial § 40; Exhibit RL-72, p. 43.

62. On February 5, 2001, the Consortium and the Public Transportation Council (hereinafter, the “PTC”) entered into a first contract (the “**First Contract**”) for the exclusive provision of the VTI service.<sup>37</sup> This First Contract established the following:

a) In clause 9.1, that the contract between the Consortium and the Administration had “...as a fundamental principle the maintenance of the contract’s economic and financial balance, so changes in costs or in the formula determined by the parties would generate an obligation to readjust the rates such that the CONTRACTOR could recover the costs of its operation and a reasonable profit...”<sup>38</sup>

b) In clause 9.4.1, that the rate adjustments would be automatic, based on indexes, excluding the MPWT’s faculty to approve the rates readjustments provided in the Tender.<sup>39</sup>

63. On March 13, 2001, through the official letter No. 001093, the Vice Chair of the PTC sent the First Contract to the Comptroller General for its countersignature.<sup>40</sup> However, the First Contract was returned to the PTC without the corresponding countersignature through the official notice No. 4579 dated May 3, 2001 (the “**Non-Countersignature Official Notice**”). The Comptroller General made the following observations regarding the conditions for an eventual extension of the contract:

*“...the possibility of extending an administrative contract emerges from the discretion that the Public Administration has ... [I]t is the Administration that has, in principle, the power to determine whether or not it is convenient to extend*

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<sup>37</sup> Counter-Memorial § 47.

<sup>38</sup> Counter-Memorial § 48.

<sup>39</sup> Counter-Memorial § 49.

<sup>40</sup> The countersignature is an act of approval by the Comptroller General, which gives legal effects to the acts it approves or countersigns. In the case of administrative contracts, the countersignature takes place after the stage in which the contract is perfected; reviewing that the content of the contract adheres to the principles of legality. The governmental entity that has entered into the contract has the legal obligation to obtain the approval of the Comptroller General, its countersignature, prior to granting the order to begin the execution of the contract, in accordance with Article 134 paragraph 1 of the Constitution of the Republic of Costa Rica. In case the Controller’s countersignature is not obtained, the act not countersigned is sanctioned with absolute nullity, so it cannot be executed. *See:* Statement of Allan Roberto Ugalde §§ 19 to 23, as well as the Statement of Manuel Corrales Umaña §§ 11 to 13.

*the contract, and to propose [to] the contractor such possibility to see if he agrees... it is not admissible to seek, through this contract, the limitation of the power of the Administration, trying to hold the State upon an eventual extension that, as provided in the document submitted to our knowledge, is mandatory for the Council as long as the contractor meets its obligations. We are facing a wrong interpretation of the national legislation... upon the conclusion of the contractual term, the Council that started it shall evaluate the convenience of extending the current legal business for ten more years, or to implement a new procedure for the selection of a contractor to continue providing this service..."<sup>41</sup>*

64. Therefore, the proposed conditions for application of the contract extension were rejected "...since they are not fully adjusted to the normative provisions of the legal order..."<sup>42</sup> Likewise, the Comptroller noted deficiencies regarding the mechanism of economic and financial balance of the contract that it was intended to adopt. Specifically, the Comptroller found that the mechanism was inapplicable because:

*"...[it] is not legally viable to limit the recognition of the readjustment to the scope of a determinate percentage of inflationary growth"<sup>43</sup> because "due to the nature of the service provision, the application of the automatic readjustment formula presented at that moment was not admissible, because it related more to the contracts for good and services by the Administration with private individuals, and not with a relation that would involve a public service like the one [tendered]"<sup>44</sup>*

65. On February 8, 2001, the corporation Riteve SyC S.A. (hereinafter, "**Riteve**") was incorporated in Costa Rica, with an authorized capital stock of USD \$6,900,000.00 (six million nine hundred thousand) dollars composed of 6,900 (six thousand nine hundred) common registered shares of USD \$1,000 (one thousand) dollars each. The corporation

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<sup>41</sup> Exhibit R-5.

<sup>42</sup> Exhibit R-7.

<sup>43</sup> Counter-Memorial § 53; Exhibit R-5.

<sup>44</sup> Counter-Memorial § 51; Exhibit R-7.

SyC owns 3,795 (three thousand seven hundred ninety-five) common registered shares of the capital stock, representing fifty-five percent (55%) of the capital stock.<sup>45</sup>

66. On May 29, 2001, in light of the Comptroller's opinion contained in the official notice dated May 3, 2001, the PTC of the MPWT and the Consortium negotiated and signed a new and final contract, entitled "*Contract for the Provisions of Services for the Creation and Operation of Stations for Integrated Vehicular Technical Inspection, entered into between the Public Transportation Council and the Riteve-SyC Consortium, composed of the Companies Transal S.A. and Supervisión y Control S.A.*" (hereinafter, the "**Contract**"). SyC signed directly as a party to such contract.<sup>46</sup> The Contract set forth the following terms, among others:
- a) The term "*fee adjustment*" is defined as a "[r]evision of the fees according to the procedure determined by the parties, to adapt [them] to the increase experienced by the contractor in the cost of the service that it provides or to adjust [them] to the economic indices that have previously been defined."<sup>47</sup>
  - b) The exclusivity rights to provide the integrated VTI services in all the territory of Costa Rica.<sup>48</sup>
  - c) PTC's obligation to "*Approve the fee adjustments for the contractor*" according to chapter nine of the Contract.<sup>49</sup>
  - d) The initial rates, these being the ones provided in the Consortium's offer.<sup>50</sup>
  - e) PTC's obligation to design and publish a special procedure which provides a methodology for the adjustment of rates before the beginning of operations.<sup>51</sup>

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<sup>45</sup> Memorial §§ 69, 70, 199, 202, 212, 223; Exhibit C-13.

<sup>46</sup> Memorial §§ 71, 201, 233; Exhibit C-13; Statement of Luis Diego Vargas § 4.

<sup>47</sup> Memorial § 72; Exhibit C-13, clause 1.1.

<sup>48</sup> Memorial § 72; Exhibit C-13, clauses 2.1 and 9.1.

<sup>49</sup> Exhibit C-13, clause 3.1.2.

<sup>50</sup> Exhibit C-13, clause 9.2.

<sup>51</sup> Exhibit C-13, clause 3.1.2 and 9.4.

f) Regarding the readjustment of rates for the provision of services:

*“9.1 ECONOMIC AND FINANCIAL BALANCE UNDER THE CONTRACT. A fundamental principle of this contracting process is maintaining the economic and financial balance of the contract, and, therefore, if any substantial changes in costs occur, the provisions of Clause 9.4 below shall be applicable...”*<sup>52</sup>

*“9.4 ADJUSTMENT OF FEES. In accordance with the principle established in Clause 9.1 above, the fees shall be adjusted ordinarily once a year or are specially [sic] whenever situations occur that alter the economic-financial balance of the contract.”*<sup>53</sup>

g) The extensions to the ten year term of the Contract, setting the agreed conditions under which the extension of the term of the Contract would not occur, consisting of: (i) the preparation of a technical report on the failure of the contractor to fulfill its obligations, submitted before the Board of Directors of the PTC (hereinafter, “**Board of Directors**”) at least six months before the date of the next extension; and (ii) the communication addressed to the contractor on the basis of the above mentioned technical report, no less than six months before the date of extension.<sup>54</sup>

h) Arbitration in Costa Rica under the Law of Alternative Dispute Resolution and Promotion of Social Peace as a mechanism for resolving disputes or disagreements related to the Contract.<sup>55</sup>

67. On June 28, 2001, the Comptroller countersigned the Contract, by official notice No. DI-AA-1793, referring to its observations on the defects of the First Contract, in which the MPWT became “... a mere verifier of the increases produced in the agreed-upon prices indices included in the proposed mathematical formula, without permitting it to make the technical

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<sup>52</sup> Exhibit C-13, clause 9.1.

<sup>53</sup> Exhibit C-13, clause 9.4.

<sup>54</sup> Exhibit C-13, clause 4.2.

<sup>55</sup> Exhibit C-13, clause 11.1.

*studies provided in Article 20 of the Traffic Act...*, and countersigned the Contract because *"...[it] could verify that the Administration actually implemented the observations expressed..."* by the Comptroller's Office in its official notice dated May 3, 2001 (the **"Countersignature Official Notice"**). Also, the Comptroller's Office emphasized the PTC's faculty to design a procedure that includes a rate adjustment mechanism *"...which would evaluate all those costs and expenses incurred by the contractor that are directly involved in the provision of the contracted service, and that have actually affected the contract's financial balance ..."*<sup>56</sup>

68. On November 15, 2001, a proposal on the procedure for calculating rates to be charged for the VTI services was submitted for the approval of the Board of Directors. The Board of Directors approved the methodology for the readjustment of the rates and recommended its approval to the Minister of Public Works and Transportation, Mr. Carlos Castro Arias.<sup>57</sup>
69. On March 6, 2002, based on the recommendation of the Board of Directors, the MPWT and the President of the Republic issued and published in the Gazette the Executive Order 30185-MPWT, entitled *"Procedural Regulations for Rate Readjustments for the Technical Vehicle Inspection [VTI] Service Charged to the Consortium of Riteve SyC"* (hereinafter, **"Executive Order 30185"**). The executive order included the obligation of an ordinary annual adjustment of rates in order to update the values of costs and expenses related to the provision of the service.<sup>58</sup> This automatic adjustment formula required the adjustments to update *"...all the costs and expenses directly involved in the provision of the contracted service, except the investment..."*<sup>59</sup>
70. On April 15, 2002, by official notice No. 4163, the Comptroller ruled on a request for the annulment of the Tender, emphasizing on one hand that the power to set VTI service rates *"...is exclusive to [MPWT], as indicated by article 20 of the Transit Law"* and that the

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<sup>56</sup> Memorial § 77; Counter-Memorial §§ 56, 64; Exhibit R-7; Statement of Laura Rivera § 9.

<sup>57</sup> Memorial § 78; Exhibit C-32.

<sup>58</sup> Memorial §§ 19, 79; Exhibit C-22.

<sup>59</sup> Counter-Memorial § 69; Exhibit C-22, article 4.

model for rates' readjustment should include the actual costs and expenses incurred by the contractor in providing the service. On the other hand, official notice No. 4163 argued that one of the reasons the first version of the Agreement was rejected was "... *the Administration's lack of tools to assure an agreement between the costs incurred by the contractor and the fee it would charge the final users...*" and for that purpose quoted the official notice No. 4579 (DI-AA-1159) dated May 3, 2001, which states that "...*the entity in charge of price regulation, must verify the suitable correspondence between the real costs of the execution of the service and the components that structure this price...*" Also, in that official notice, it is clarified that, regarding the first version of the Contract "...*originally the revision pricing system presented in this version of the contract includes a revision mechanism based on automatic increases linked with increases that had taken place in the price indexes selected, which turned out to be of the 'general' type ... this caused this Entity Comptroller to make the Administration see the unsuitability of such a mechanism ... [in light of] this observation, the model initially used was modified, going from one based on indexes, to a model that would rather comprise the real costs incurred by the contractor, as established by clause 9.4 of the contract endorsed by this General Comptroller's office...*"<sup>60</sup>

71. On April 25, 2002, the Board of Directors approved the adjustments to the VTI rates, based on financial and accounting information submitted by Riteve and the automatic rate adjustment formula established in Executive Order 30185.<sup>61</sup>
72. On May 7, 2002, the government of Costa Rica issued Executive Order 30396-MPWT (hereinafter, "**Executive Order 30396**") through which the readjusted rates for the beginning of operations of the VTI by the Consortium were issued. This order was published about two months later, on July 12, 2002.<sup>62</sup> Between the rates submitted by the Consortium within its Offer in 1998 and the rates published through the Executive Order 30396, there was an average increase of 30.39%.<sup>63</sup>

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<sup>60</sup> Counter-Memorial § 39; Exhibit R-9 (II) (4) p. 15.

<sup>61</sup> Counter-Memorial § 70; Exhibit C-22.

<sup>62</sup> Memorial § 80; Exhibit C-23.

<sup>63</sup> Counter-Memorial §§ 72, 73.

73. On May 8, 2002 there was a change in government and Mr. Abel Pacheco de la Espriella became President of the Republic and Mr. Javier Cháves Bolaños became Minister of Public Works and Transportation.<sup>64</sup>
74. During the first days of the new administration, there were protest marches against the Contract's entry into force, because vehicle owners were opposed to the idea of being required to have their vehicles inspected.<sup>65</sup>
75. On June 19, 2002 the Board of Directors accepted the request of the Chairman of the Board and Vice Minister of Transportation, Karla González, consisting of *(i)* revoking the resolution adopted by the Board of Directors on November 15, 2001, which gave rise to the issuance of Executive Order 30185, for being contrary to the opinions of the Comptroller's Office; *(ii)* recommending the Minister of Public Works and Transportation the revocation of that order, as well as the resolution of April 25, 2002 which was the basis of Executive Order 30396; and *(iii)* commissioning the Chairman of the Board of Directors to coordinate the presentation of a new proposal of a methodology for the VTI rates readjustment system.<sup>66</sup>
76. On July 2002, the new Vice Minister of Transportation requested Mr. Stephan Brunner and Mr. Luis Diego Vargas to develop a study related to the rates applicable to the VTI service in order to suggest to the PTC what rates to apply during the Consortium's first year of operations, which would begin on July 15, 2002. According to his statement, Mr. Brunner conducted the study following only the MPWT's instructions, without taking into account the Terms of the Tender, the Contract, or the texts of the Executive Orders 30185-MPWT (Methodology for the readjustment of rates applicable to the VTI service) and 30396-MPWT (Rates applicable to the VTI rates). The rate recommended to the PTC was lower than the readjustment requested by the Consortium.<sup>67</sup>

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<sup>64</sup> Memorial §§ 20, 81.

<sup>65</sup> Memorial § 81; Exhibit C-36.

<sup>66</sup> Counter-Memorial § 76.

<sup>67</sup> Memorial §§ 82-88, 177, 181; Statement of Stephan Brunner §§ 3, 4, 7, 9, 10, 12, 13, 16, 21.

77. On July 2, 2002, the Board of Directors met in order to execute what was agreed in the meeting of June 19, 2002, and approved new initial rates for providing the VTI service. Such rates were published through Executive Order 30572 dated July 12, 2002, entitled “*Amendments to the ‘Regulations for the Integrated Technical Inspection of Automotive Vehicles Circulating on Public Roads’*” (hereinafter, “**Executive Order 30572**”).<sup>68</sup> There was a difference of approximately 6.3% between the rates initially approved by the Board of Directors on April 25, 2002 (which served as a basis for Executive Order 30396) and those it approved on July 2, 2002.<sup>69</sup> To make the adjustment to the rates, the Board of Directors used the study conducted by Messrs. Luis Diego Vargas and Stephan Brunner.<sup>70</sup>
78. On July 5, 2002, three days after the approval of the adjusted rates, Riteve communicated to the MPWT its acceptance of the initial adjusted rates,<sup>71</sup> and on July 11, 2002, the Deputy Minister of Transportation sent to Riteve the official communication No. DVT-02-572, explaining therein that the initial rates based on the report of Messrs. Brunner and Vargas had been adjusted, following the instructions of the Comptroller.<sup>72</sup>
79. On July 12, 2002, three days before the initiation of operations of the Consortium, Costa Rica published in the Gazette the Executive Order 30573-MPWT (hereinafter, “**Executive Order 30573**”). This Executive Order derogated Executive Order 30185, through which the procedure for the readjustment of vehicle technical inspection rates had been issued, and Executive Order 30396, through which the initial rates were established, consequently granting the PTC greater powers to control those rates.<sup>73</sup>
80. With respect to Executive Order 30573, it is important to mention the following:

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<sup>68</sup> Counter-Memorial §§ 77, 88.

<sup>69</sup> Counter-Memorial § 89.

<sup>70</sup> Counter-Memorial § 90; Exhibit R-19.

<sup>71</sup> Counter-Memorial § 92; Exhibit R-14.

<sup>72</sup> Counter-Memorial § 93; Exhibit C-33.

<sup>73</sup> Memorial §§ 21, 89; Exhibit C-23.

- a) It invoked, as the grounds to derogate Executive Order 30185, the Comptroller Office's official notice dated May 3, 2001, by which it rejected the First Contract, given that if the rate revision mechanism provided in Executive Order 30185 was approved, PTC's competence would be reduced, and instead of exercising its role as service regulator it would become simply *"...mere verifier of the changes in the sources of the indices used and proper application, algebraically, of the mathematical formula..."* Quoting the same official notice, the Executive Order 30573 also established that *"...price readjustment is an inherent right that assists the contractor... it is not legally feasible to limit the recognition of the readjustment to reaching a certain percentage of inflationary growth ..., but that the contractor can gain access to the readjustment from the moment when the costs of providing the service increase, which must be documented and in any case, submitted for approval of the Board of Public Transportation ..."*<sup>74</sup>
- b) It indicated that since it was based on the provisions and methodology of Executive Order 30185, Executive Order 30396 should also be declared null and void.<sup>75</sup>

81. Riteve filed a claim against the PTC and the State before the Administrative Contentious Court of the Second Judicial Circuit of San José de Goicochea (hereinafter the **"Administrative Contentious Court"**), in which it requested the annulment of Executive Order 30573. Such claim was ruled by judgment issued on November 28, 2012, in which the Administrative Contentious Court declared that the content of the challenged executive order is *"...absolutely legal..."*, that the Executive Orders 30185 and 30396 did not confer to Riteve any personal right and that the reason they were derogated was justified in Executive Order 30573.<sup>76</sup>

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<sup>74</sup> Counter-Memorial §§ 79, 80, 294; Exhibit RL-71, whereas 5.

<sup>75</sup> Counter-Memorial § 82; Exhibit RL-71, whereas 10.

<sup>76</sup> Counter-Memorial §§ 84, 85; Exhibit RL-88.

82. On July 15, 2002, the Consortium began providing the VTI services to the Costa Rican public,<sup>77</sup> applying the initial rates recently adjusted and approved by the Board of Directors on April 25, 2002.<sup>78</sup>
83. On February 19, 2003 the Executive Order No. 30987-MPWT entitled "*Procedural Regulations for Rate Readjustment of the Technical Vehicle Inspection Service [VTI] Charged to the Consortium of Riteve SyC*" was published, and it was corrected by *errata* and published on February 28, 2003 (hereinafter, "**Executive Order 30987**"). This Regulation stated that the rates adjustments shall be made with the "*...purpose of ensuring the contract's economic and financial balance, in accordance with the valuation of duly confirmed real costs necessary for the performance of the Agreement*" so the requests for rate adjustments should include the "*...economic and financial study demonstrating the change in the costs...*"<sup>79</sup> This regulation set the guiding principles for VTI rates adjustment, but failed to include any formula.<sup>80</sup>
84. On July 8, 2003, Riteve submitted a request before the PTC for an extraordinary rates readjustment for the VTI service.<sup>81</sup> Regarding this request it is important to mention the following:
- a) Riteve requested an extraordinary rate readjustment of 26.58%, arguing that it was the appropriate increase based on the rate stated in the Offer of July 1998.<sup>82</sup>
  - b) When studied by the Board of Directors on July 22, 2003, the PTC executive director noted in the meeting that the request proposed "*...a formula that was used in regulations that were in force when the Agreement with the company was approved, which is based on the costs of labor, depreciation percentages, maintenance, etc., and then adjusted those parameters according to the inflation indices. Instead of*

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<sup>77</sup> Memorial § 92; Statement of José Luis López.

<sup>78</sup> Counter-Memorial § 96.

<sup>79</sup> Counter-Memorial § 97; Exhibit RL-75, whereas 8 and article 7 (c).

<sup>80</sup> Exhibit R-38 findings of fact 7, p.7.

<sup>81</sup> Memorial § 95; Statement of Fernando Mayorga § 15.

<sup>82</sup> Counter-Memorial § 98.

*recurring to increases in the company's real costs, what [it] does is adjust them according to general indices."*<sup>83</sup>

- c) On September 16, 2003, the Board of Directors responded to the request by increasing the rate established in July 2002—not the one offered by the Consortium in 1998—by 13.13%, basing the increase on changes in price indexes (between July 1, 2002 and September 30, 2003), as well as information from Riteve's financial statements.
- d) On October 23, 2003, the Board of Directors reevaluated the formula they had previously approved on September 16, 2003. The figures of the variables (wage indices, exchange rate variation, price indices, construction indices, etc.) in the formula were slightly modified, keeping the rate increase of 13.13%.<sup>84</sup> This increase, however, was never published by Executive Order nor did it gain legal authority.<sup>85</sup>

85. By official notice FOE-108 OP-25/2003 dated October 31, 2003, the Comptroller's Office ordered the Board of Directors to issue "*...relevant instructions, such that by means of the rate setting that would take effect as of 2004, maintenance of the Agreement's economic and financial balance would be ensured...*", and in response to that instruction, the Board of Directors decided to contract a company by tender to recommend how to proceed in the matter of establishing the rate adjustment mechanism.<sup>86</sup>
86. On November 18, 2003, Riteve filed an amparo proceeding before the Constitutional Chamber of the Supreme Court of Costa Rica (hereinafter, the "**Supreme Court**"), against the MPWT and the Chairman of the PTC, requesting (*i*) that the State answer the request for rate readjustment of July 8, 2003, and (*ii*) that the State design a methodology for rate readjustment.<sup>87</sup> Regarding such proceeding:

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<sup>83</sup> Counter-Memorial § 99; Exhibit R-16.

<sup>84</sup> Counter-Memorial §§ 101-102; Exhibit R-17.

<sup>85</sup> Counter-Memorial §§ 102-104.

<sup>86</sup> Counter-Memorial §§ 108-110; Exhibits R-20, R-22 and R-51.

<sup>87</sup> Counter-Memorial §§ 111, 162; Exhibit R-51.

- a) Through judgment number 2004-03741 issued on April 16, 2004, the Supreme Court ordered the MPWT and the Chairman of the PTC to answer and inform the writ submitted on behalf of Riteve on July 8, 2003.<sup>88</sup>
- b) Riteve alleged the infringement of the instructions contained in the referred judgment, through a new amparo proceeding; however, the Constitutional Chamber of the Supreme Court, in its judgment No. 2004-13976 dated December 3, 2004, stated that *"...the action of disobedience submitted by the protected company is unlawful, since it is clear that the Public Transport Council, as competent entity to rule on the request submitted, issued its ruling and gave notice of it within the period provided...it is seen that such entity ruled on the claims included in the action... in the referred agreement the Council approved the proposed methodology for rate calculation, and ordered that the new rates applicable to the vehicle technical inspection service will govern as of January 1, 2005, upon submission by the protected company of its audited financial statements with rate opinion as of September 2004..."*<sup>89</sup> The State fulfilled the Supreme Court's order on May 28, 2004, and on the same day the Board of Directors approved the methodology for rate calculation proposed by the firm Despacho Carvajal y Consultores S.A. (hereinafter, the "**Carvajal Firm**") in its report dated May 19, 2004.<sup>90</sup>

87. On April 26, 2004, Addendum No. 1 to the Contract was signed, establishing that in the future Riteve would be the contractor and not the Consortium. The Contract remained the same in all other aspects.<sup>91</sup>
88. On April 30, 2004, Riteve initiated a local arbitration proceeding in Costa Rica, against the Attorney General's Office, as representative of the State, and the PTC, invoking clause 11.1.3 of the Contract, before the Center for Resolution of Property Conflicts

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<sup>88</sup> Counter-Memorial § 111; Exhibit RL-77.

<sup>89</sup> Counter-Memorial § 111; Exhibit RL-79 / R-87.

<sup>90</sup> Counter-Memorial § 112.

<sup>91</sup> Memorial § 96; Exhibit C-15.

(hereinafter “**Local Arbitration**”), alleging that the PTC had breached its obligations under the Contract.<sup>92</sup> Regarding the Local Arbitration it is important to mention that:

- a) On June 2, 2004, an *ad-hoc* arbitral tribunal was formed, based in San José, Costa Rica, composed of arbitrators Eduardo Sancho Gonzalez, Rodrigo Montenegro Trejos and Aldo Milano Sánchez.<sup>93</sup>
- b) On June 24, 2004, Riteve filed its claim memorial against the PTC and Costa Rica for the alleged infringement of contractual obligations. The purpose of that claim was, mainly, that the arbitral tribunal: *(i)* declare that PTC breached the contract by not updating Riteve’s rates in a timely manner; *(ii)* declare the correct methodology that should be applied to the rate’s readjustment; and *(iii)* require the PTC and the MPWT to compensate Riteve for the damages and lost profits caused by the alleged breach of contract.<sup>94</sup>
- c) On July 22, 2004, the PTC answered the arbitral claim, filing the motion to dismiss for lack of jurisdiction of the Arbitral Tribunal to rule on matters of *imperium*, such as the determination of rates for a public service, for considering that it is an exclusive State power entrusted to the MPWT. The Arbitral Tribunal denied the motion to dismiss, and the PTC filed an appeal before the Supreme Court.<sup>95</sup>
- d) On October 21, 2004, the First Chamber of the Supreme Court issued judgment 906 A-04, by which it determined that the Arbitral Tribunal lacked jurisdiction to rule on the disputes between Riteve and the PTC, and that the determination of rates is an *imperium* power that corresponds only to the State of Costa Rica, being a governmental power and not a consensual element of

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<sup>92</sup> Memorial § 100; Counter-Memorial § 152; Statement of José Luis López § 36; Statement of Eduardo Sancho González § 5.

<sup>93</sup> Memorial § 101; Statement of Eduardo Sancho González §§ 2, 4.

<sup>94</sup> Counter-Memorial § 152.

<sup>95</sup> Memorial § 103; Counter-Memorial § 157; Statement of Eduardo Sancho González § 6.

the Contract.<sup>96</sup> The Court stated that “...[i]f the exercise of that public power is non-transferable and unwaivable, it cannot be subject of an arbitral proceeding, although, of course, they do not escape the control of the administrative-contentious jurisdiction...”, referring to Riteve’s possibility to file its claims by means of a contentious-administrative action.<sup>97</sup>

- e) On July 18, 2005, the Arbitral Tribunal ended the arbitral proceeding due to lack of jurisdiction.<sup>98</sup>

89. In 2004, the PTC hired the Carvajal Firm by tender to develop a methodology for the VTI service rate readjustment.<sup>99</sup> The report of the Carvajal Firm:

- a) Considered the official notice of October 31, 2003 issued by the Comptroller Office.
- b) Considered the provisions referring to the need to “...establish formulas for ensuring the adjustment and financial balance of the [VTI] contract ...”
- c) Determined that the economic and financial balance of the Contract had been maintained from July 2002 (start of operations) until December 2003, taking into account the 13% return on projected billing by the Consortium in its offer.<sup>100</sup>

90. During the May 28, 2004 ordinary session, the PTC agreed to approve the methodology proposed by Carvajal Firm in its report of May 19, 2004. This adjustment methodology was again approved in an extraordinary session on December 9, 2004.<sup>101</sup>

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<sup>96</sup> Memorial §§ 26, 39, 42c, 104; Counter-Memorial §§ 158-159; Exhibit RL-85 / R-121; Statement of Eduardo Sancho González § 10; Exhibit C-48.

<sup>97</sup> Counter-Memorial § 160; Exhibit RL-85 / R-121, whereas V.

<sup>98</sup> Memorial § 106; Statement of Eduardo Sancho González § 12.

<sup>99</sup> Counter-Memorial § 110.

<sup>100</sup> Counter-Memorial § 114.

<sup>101</sup> Counter-Memorial § 112; Exhibit C-57.

91. On November 23, 2004, Riteve submitted before the PTC a request for the readjustment of rates.<sup>102</sup> In the session of December 16, 2004, the Board of Directors addressed the request and approved a 12.76% increase on VTI rates for 2005 (hereinafter, the “**Increase Agreement**”), based on the rate readjustment contained in the audited financial statements submitted by Riteve and following the methodology suggested by Carvajal Firm.<sup>103</sup> Regarding this Increase Agreement:
- a) Riteve opposed the Increase Agreement, filing before the PTC a motion for revocation with appeal, questioning the rate readjustment methodology proposed by the Carvajal Firm. Such motion was dismissed on the basis of lateness and lack of legal grounds.<sup>104</sup>
  - b) On February 28, 2006 Riteve filed an ordinary proceeding before the Administrative Contentious Court against the PTC and the State, requesting the agreement be declared null and an order to pay damages and lost profits.<sup>105</sup>
92. On September 29, 2005, the Board of Directors agreed to sign an agreement with the Institute for Research in Economic Sciences at the University of Costa Rica (hereinafter, “**IRES**”) in order for the latter to suggest the rate to be charged in 2006, developing a new rate methodology through the project entitled “Rate Model for the Vehicle Inspection of the Public Transport Council”.<sup>106</sup> In view of this specific cooperation agreement, signed on October 26, 2005,<sup>107</sup> IRES prepared a report, which was approved by the Board of Directors on December 16, 2005.<sup>108</sup>
93. On December 15, 2005, Riteve submitted before the PTC a request for the readjustment of rates.<sup>109</sup> The Board of Directors analyzed that request and rejected it on January 12,

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<sup>102</sup> Memorial § 97; Statement of Fernando Mayorga §15 b.

<sup>103</sup> Counter-Memorial § 116.

<sup>104</sup> Counter-Memorial § 117; Exhibit R-27.

<sup>105</sup> Counter-Memorial § 118.

<sup>106</sup> Exhibit R-38, findings of fact 10, p. 8.

<sup>107</sup> Exhibit R-44, conclusions of law 6.

<sup>108</sup> Counter-Memorial § 121.

<sup>109</sup> Memorial § 108; Statement of Fernando Mayorga § 15 c.

2006, “...for having been submitted in an untimely manner- one month after the deadline set by the regulations...”<sup>110</sup>

94. On January 24, 2006, the PTC published in The Gazette the draft of the new rate methodology proposal, based on the IRES report.<sup>111</sup>
95. On February 28, 2006, Riteve began an ordinary judicial proceeding against the State, before the Administrative Contentious Court, for the alleged breach of Contract by the PTC and the State. In that regard:
  - a) Riteve filed a second claim, which was joined to the previous one.
  - b) In its claims, Riteve requested the Administrative Contentious Court: *(i)* to declare the nullity of the Executive Order No. 30573; *(ii)* to declare valid and effective the Executive Orders No. 30185 and 30396; *(iii)* to annul the Increase Agreement approved by the Board of Directors on December 15, 2004, which increased rates for 2005 based on the methodology proposed by Carvajal Firm; *(iv)* to command the MPWT to set the technical inspection rates based on the rate model provided in the Terms of the Tender, the Offer and the Contract; and *(v)* to sentence the State to pay damages and lost profits for an amount of CRC ₡2,850,000.000 (two million eight hundred fifty thousand colons), equivalent to USD \$1,400,000.00 (one million four hundred thousand dollars).<sup>112</sup>
  - c) On November 28, 2012, the Administrative Contentious Court issued the judgment No. 2869-2012, rejecting Riteve’s claims. The judgment concluded that Riteve failed to prove, in the absence of evidence, that it had suffered an economic and financial imbalance of the Contract.<sup>113</sup>

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<sup>110</sup> Counter-Memorial § 122; Exhibit R-32.

<sup>111</sup> Counter-Memorial § 123; Exhibit R-43.

<sup>112</sup> Counter-Memorial §§ 166,167; Exhibit RL-88.

<sup>113</sup> Counter-Memorial § 171; Exhibit RL-88 pp. 24, 67.

- d) The trial court judgment was confirmed by the Appeals Court on August 19, 2013. Against this ruling, Riteve filed a cassation appeal, which the Supreme Court rejected by unanimous vote on December 5, 2013.
96. On March 7, 2006, Riteve submitted before the PTC an extraordinary request for the readjustment of rates.<sup>114</sup>
97. On May 2, 2006, IRES submitted to the Board of Directors a second report with a methodology proposal for the adjustment of rates.<sup>115</sup>
98. On November 15, 2006, Riteve submitted before the PTC another request for the readjustment of rates.<sup>116</sup> Both requests were considered by the Board of Directors for their study and analysis in its session of December 19, 2006, requesting Riteve the audited financial statements of 2006, with their corresponding report for the period of October 2005 to September 2006 and the statistical information of that period.<sup>117</sup>
99. On December 19, 2006, the Board of Directors agreed to approve the rate methodology proposed by IRES.<sup>118</sup> Regarding the report and its approval, it is worth mentioning:
- a) The report proposed “...an inflation-neutral model for recovery of nominal costs for the company, that is to say, that the effective inflation adjustment ceiling as such was cancelled out by the real relative costs adjusted by the same inflation parameter and then adjusted for productivity...”<sup>119</sup>
- b) Riteve rejected the methodology proposed in that report, filing a motion for revocation with appeal and nullification of the agreement that had approved such methodology. Riteve requested that in its place, the formula approved by the PTC on October 23, 2003 be applied, despite the fact it never gained

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<sup>114</sup> Memorial § 109; Statement of Fernando Mayorga § 15 d.

<sup>115</sup> Counter-Memorial § 127; Exhibit R-38.

<sup>116</sup> Memorial § 110; Statement of Fernando Mayorga § 15 e.

<sup>117</sup> Counter-Memorial § 126; Exhibit R-34.

<sup>118</sup> Counter-Memorial § 127; Exhibit R-38.

<sup>119</sup> Counter-Memorial § 125; Exhibit R-43 p. 12.

legal enforceability.<sup>120</sup> Based on the IRES technical criteria, the Board of Directors rejected that motion for revocation. Furthermore, because the motion for revocation was accompanied by an appeal, it was forwarded to the MPWT, who admitted the appeal and annulled the agreement reached in ordinary session of December 19, 2006 because it had procedural defects, having been decided without granting a hearing to Riteve. In its ruling, the MPWT urged the PTC to develop a new rate methodology by collaborating with the Public Services Regulatory Authority (hereinafter “PSRA”).<sup>121</sup> Consequently, Riteve was granted a hearing and in light of its observations, the IRES upheld its conclusions of previous reports, confirming the validity of the methodology contained in the draft published on January 24, 2006.

c) In view of the above, the Board of Directors approved the IRES rate adjustment model in its session of August 11, 2009.<sup>122</sup>

100. On November 14, 2007, Riteve submitted before the PTC a request for the readjustment of rates.<sup>123</sup>
101. On November 14, 2008, Riteve submitted before the PTC a request for the readjustment of rates.<sup>124</sup>
102. On December 17, 2008, a Reform to Act 7331, entitled Act of Transit by Terrestrial Public Roads, was approved by Act 8696. Act 8696 provided in Article 19 that the VTI would be provided in the service centers of the companies to which the Ministry of Works awarded that concession by public tender, promoting the greatest possible number of service providers. It also determined that the PSRA had the authority to review the vehicle inspection rates, regardless of whether under the Contract it had been agreed

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<sup>120</sup> Counter-Memorial § 128; Exhibit R-38, p. 9.

<sup>121</sup> Counter-Memorial § 132; Exhibit R-38.

<sup>122</sup> Counter-Memorial § 138; Exhibit R-44.

<sup>123</sup> Memorial § 111; Statement of Fernando Mayorga § 15 f.

<sup>124</sup> Memorial § 112; Statement of Fernando Mayorga § 15 f.

that the rate approval was a prerogative of the PTC.<sup>125</sup> Also, under this reform the Minister of Public Works and Transport became competent to decide contractual extension for the VTI service.<sup>126</sup> It is noteworthy that Riteve remained as the only VTI service provider in Costa Rica, despite the provisions of Act 8696.<sup>127</sup>

103. On November 13, 2009, Riteve submitted before the PSRA a request for the readjustment of rates, based on the methodology approved in the session of October 23, 2003.<sup>128</sup> In relation to this request:

a) The Regulatory Committee of the PSRA (hereinafter, the “**Regulatory Committee**”), created for the function of setting rates for public services and to rule on the motions for revocation filed against the PSRA’s actions, rejected the readjustment request on July 2, 2010, stating that it did not meet the admissibility requirement to provide a PTC certification indicating the current methodology for rate adjustment.<sup>129</sup>

b) The Regulatory Committee reconsidered the request, and on December 11, 2012, it decided that since Riteve was the exclusive provider of VTI services, the PSRA was not competent to act as the regulatory authority. Moreover, because the Contract’s provision should be enforced, the competent entity to approve the methodology was the MPWT, not PSRA. For the foregoing reasons, the Regulatory Committee decided to reject the request for the adjustment of rates.<sup>130</sup>

104. On December 17, 2009, the PSRA requested the PTC to publish in the Gazette the rate adjustment mathematical formula, given that the PTC had not done so to that date.<sup>131</sup>

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<sup>125</sup> Memorial §§ 29, 42 d, 113, 114, 115, 116, 118, 119; Statement of Rubén Hernández §§ 58, 66; Report of Luis Diego Vargas §§ 7, 8; Statement of Leonel Fonseca Cubillo § 19.

<sup>126</sup> Exhibit C-49.

<sup>127</sup> Counter-Memorial § 188; Exhibit R-70, point eight.

<sup>128</sup> Memorial § 120; Statement of Fernando Mayorga § 17.

<sup>129</sup> Counter-Memorial § 143; Memorial § 126; Statement of Fernando Mayorga § 18.

<sup>130</sup> Counter-Memorial § 146; Exhibit R-68.

<sup>131</sup> Memorial § 121; Statement of Fernando Mayorga § 21.

105. On April 29, 2010, the Chairman of the Libertarian Movement, the Minister of the Presidency and the Chief of the National Liberation Party entered into a Political Agreement in order to ensure good governance, called "Commitment to Improve Governance in Costa Rica and to respond in a more timely way to Development Challenges". Said agreement records the government's commitment to eliminate the exclusivity granted by contract to the Consortium in order to open the market to several operators.<sup>132</sup>
106. On June 15, 2010, the PSRA requested from the PTC the methodology for rate readjustment.<sup>133</sup>
107. On November 12, 2010, Riteve submitted a new request for rate readjustment, based on the rate adjustment methodology proposed by the Carvajal Firm. The Regulatory Committee rejected the request on December 22, 2010, claiming that it did not meet the admissibility requirement to provide a PTC certificate indicating the current methodology for rate adjustment.<sup>134</sup>
108. On November 17, 2010, the PSRA again requested from the PTC the methodology for the readjustment of rates and the evidence of its publication in the Gazette.<sup>135</sup>
109. On May 9, 2011, the MPWT issued Ruling 333 by virtue of which it decided not to extend the Contract, urging the Road Safety Council (hereinafter, "COSEVI") to promote a tender to award to the greatest possible number of companies the concession for the provision of the VTI service.<sup>136</sup> The decision not to extend the Contract was taken without complying with the requirements referred to in clause 4.2 of the Contract, i.e. the issuance of a report.<sup>137</sup>

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<sup>132</sup> Memorial §§ 28, 122, 123, 124; Report of Diego Luis Vargas § 13; Exhibit C-35.

<sup>133</sup> Memorial § 125; Statement of Fernando Mayorga § 19; Exhibit C-29; Exhibit R-46.

<sup>134</sup> Counter-Memorial § 148; Memorial § 128; Statement of Fernando Mayorga § 22; Exhibit C-31.

<sup>135</sup> Memorial § 127; Statement of Fernando Mayorga § 21; Exhibit C-24.

<sup>136</sup> Memorial §§ 30, 42 e, 135, 136; Counter-Memorial § 180; Statement of Francisco Jiménez; Exhibit C-19.

<sup>137</sup> Exhibit C-49.

110. On May 26, 2011, Riteve submitted before the MPWT the official notice No. 052501-2011 requesting, in accordance with clause 4.2 of the Contract, that the MPWT deliver COSEVI's Technical Report on which the decision not to extend the Contract was based. Also, Riteve indicated that such decision would imply not enforcing clause 12.6 of the Contract in relation to the contractor's donation of property, facilities and equipment to the Costa Rican State, that the agreement to grant the use of the facilities that Riteve made available to the MPWT would become ineffective in accordance with clause 3.2.13 of the Contract, and that Riteve's obligation to periodically calibrate the Executive Power's inspection line which was donated to the Administration according to clause 3.2.14 of the Contract would also be invalidated. In view of the foregoing, COSEVI's Executive Management proceeded to issue a technical report on the possible extension of the Contract in accordance with clause 4.2 of such Contract. Additionally, the report showed that there had been no breaches in nine years on Riteve's part, and that the continuity of the VTI service is considered of public interest.<sup>138</sup>
111. On November 14, 2011, Riteve submitted before the PSRA a request for the readjustment of rates<sup>139</sup> based on the rate adjustment methodology proposed by the Carvajal Firm. The Regulatory Committee rejected the request on December 15, 2011, alleging that it did not meet the admissibility requirement to provide the certification from PTC indicating what the current methodology for rate adjustment was.<sup>140</sup>
112. On November 17, 2011, PSRA again requested from the PTC the methodology for the readjustment of rates, as well as the evidence of its publication in the Gazette.<sup>141</sup>
113. On June 15, 2012, the MPWT, based on the analysis of the COSEVI Legal Advisor's Office, considering of public interest to ensure the continuity of the VTI service, revoked the decision not to extend the Contract; therefore, derogating and annulling Ruling 333 of May 9, 2011, and extending the Contract for another 10 years, starting from July 15,

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<sup>138</sup> Exhibit C-49.

<sup>139</sup> Memorial § 129; Statement of Fernando Mayorga § 17.

<sup>140</sup> Counter-Memorial § 149; Memorial § 131; Statement of Fernando Mayorga §§ 17, 18, 24; Exhibit C-30.

<sup>141</sup> Memorial § 130; Statement of Fernando Mayorga § 23; Exhibit C-28.

2012. In that ruling, the MPWT informed Riteve that “...pursuant to clause 4.2 [of the Contract], it must be understood that the contract term is extended for another term of equal length, that will become effective as of July 15, 2012...”<sup>142</sup>

114. On July 20, 2012, approximately one month after revoking the decision not to extend the Contract, the MPWT signed the following two agreements with Riteve:

- a) A direct agreement within the framework of the Contract, which stated that:
  - (i) the government of Costa Rica had decided to extend the term of the Contract from July 16, 2012 to July 15, 2022;
  - (ii) regarding the establishment of the methodology for the applicable rate readjustment between 2012 and 2022, the MPWT prepared in the Ordinary Session 37-2004 of May 27, 2004 and again in the Extraordinary Session 19-2004 of December 9, 2004, an executive order draft entitled "*Regulation of the Procedure for the Adjustment of Rates for Vehicle Technical Inspection Service (VTI) handled by Riteve SyC SA*", in order for PSRA to approve the rates for this service for the Contract's extension and to regulate the rate adjustments for the entire term according to the formula resulting from the methodology approved by the PTC when it was competent to do so (hereinafter, "**Direct Agreement**"). The MPWT committed to publish the methodology before August 10, 2012, including the corresponding rates, and Riteve accepted that upon fulfillment of the above, it would forego any additional rate claim.<sup>143</sup>
  
- b) A contractual addendum to modify clauses 7, 8 and 11 of the Contract, in order to (i) clarify the scope of the reports Riteve must submit; (ii) establish the competence of COSEVI in relation to investigation, and (iii) incorporate international arbitration as the mechanism to resolve any dispute arising

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<sup>142</sup> Memorial §§ 31, 157; Counter-Memorial § 187; Exhibit C-49.

<sup>143</sup> Memorial §§ 32, 41, 42 h, 158; Counter-Memorial §§ 189-190; Exhibit C-57.

between the Parties in relation to the Contract (hereinafter, the "**Contractual Addendum**").<sup>144</sup>

115. Costa Rica did not publish the methodology for rates readjustment before August 10, 2012 as provided in the Direct Agreement of July 20, 2012.<sup>145</sup>
116. On October 26, 2012, Act 9078 was published setting forth new reforms to the Transit Law. Section V of this new law, entitled "Vehicle Inspection", provided MPWT with the power to review all state or private entities that meet the requirements outlined in the Act, and grant, through COSEVI, authorizations to vehicle technical inspection centers (hereinafter, "VTIC"), defining these as state or private entities for technical-mechanical motor vehicle inspection. Also, the new law stated in Article 29 that the PSRA would be competent to "...[perform] the technical studies to establish a tariff model to be used to fix the tariff bands that define the minimum and maximum amounts that a [VTIC] may charge for Vehicle inspection and re-inspection..."<sup>146</sup>
117. On November 16, 2012, Riteve submitted before the PSRA a request for the readjustment of rates. The Regulatory Committee rejected the request on December 11, 2012, claiming that Riteve had not submitted a copy of the Contract's Addendum and had not specified the current methodology for rate readjustment.<sup>147</sup>

## VI. CLAIMS OF THE PARTIES

118. According to its Memorial, Claimant requested the following declarations from the Arbitral Tribunal:

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<sup>144</sup> Exhibit C-53.

<sup>145</sup> Memorial §§ 159, 184; Counter-Memorial §§ 191-194; Statement of Amador de Castro § 35; Statement of José Luis López § 45; Exhibit C-55.

<sup>146</sup> Memorial §§ 42 f., 186, 188; Exhibit C-54, articles 24 to 29.

<sup>147</sup> Counter-Memorial § 150; Exhibit R-68.

a) That Respondent has breached its obligations under article III of the BIT because:

- i. It did not give Claimant's investment fair and equitable treatment at all times. (Memorial, § 513.)
- ii. It incurred in denial of justice by preventing, through a ruling of the Supreme Court of Justice, that the arbitration mechanism contractually agreed upon be carried out. (Memorial, § 514.)
- iii. It treated Claimant in an unfair and discriminatory manner by not responding to the requests for readjustment of rates, thereby preventing the full enjoyment of its investments. (Memorial, § 515.)
- iv. It engaged in arbitrary, unilateral and unjust acts through the derogation of Executive Order 30185, which approved the methodology for the readjustment of the rates. (Memorial, § 516.)
- v. It engaged in arbitrary and unfair acts by giving Claimant less favorable treatment as compared to the treatment given to other investors in public services. (Memorial, § 517.)
- vi. It engaged in arbitrary, unilateral and unfair acts upon the approval of amendments to the Transit Act in 2008 and in 2012, which affected the exclusive rights granted to Claimant under the Contract. (Memorial, § 518.)
- vii. It engaged in arbitrary, unilateral and unfair acts by terminating the Contract through Ruling 333. (Memorial, § 519.)
- viii. It committed a "*serious breach of obligations agreed to in the contract for the provision of technical vehicle inspection.*" (Memorial, § 520.)

- b) That Respondent has breached its obligations under article V of the BIT by adopting measures equivalent to expropriation by terminating the Contract and affecting the exclusive operating rights thereunder. (Memorial, § 521.)
- c) That Respondent is liable for the breach of its obligations under the BIT and therefore is obligated to pay lost profits to Claimant in an amount no less than €261,600,000.00 (two hundred sixty-one million six hundred thousand euros), which includes what was not received due to the lack of rate adjustments and damages for the termination of the exclusive right to operate in Costa Rica between 2012 and 2022. (Memorial, § 522.)
- d) That Respondent is obligated to pay Claimant all the costs and expenses incurred as a result of this arbitration. (Memorial, § 523.)

119. In its Counter-Memorial, Respondent requested the Tribunal to:

- a) Declare that it lacks jurisdiction to hear and rule on the dispute brought by the Claimant; or
- b) Reject all the claims of Claimant as legally and factually invalid. (Counter-Memorial, § 681.)

## VII. DISPUTED ISSUES

120. From the arguments made by the Parties in their memorials and briefs, as well as during the Hearing, the Tribunal finds that the disputed issues in this case can be classified for analysis as follows:

### A. Jurisdiction and/or Admissibility

- a) Opportunity to Present Objections regarding Jurisdiction.

- b) Forum Selection Clause contained in Article XI.3 of the Treaty.
- c) Requirement of Consultation and Waiting Period established in Article XI.1 and XI.2 of the Treaty.
- d) Jurisdiction in the case of claims based on Article III.2 of the Treaty.

#### **B. Questions of Merits**

- a) Fair and Equitable Treatment.
  - i. Stability
  - ii. Legitimate Expectations
  - iii. Arbitrariness and Discrimination
  - iv. Denial of Justice
- b) Full Protection and Security.
- c) National Treatment and Most Favored Nation.
- d) Measures Equivalent to Expropriation.

#### **C. Existence of Damages**

121. In section VIII, the positions and arguments of the Parties are summarized with respect to the disputed issues listed above.

## VIII. ARGUMENTS OF THE PARTIES

122. From the narration of arguments and positions by the Parties in their memorials and briefs, the statements of both Parties in the hearing, and the various documents that both Parties attached to their briefs, the following arguments in relation to the disputed points can be discerned:

### A. JURISDICTION AND ADMISSIBILITY

#### 1. OPPORTUNITY TO PRESENT OBJECTIONS TO JURISDICTION

##### (i) Position of SyC

123. SyC states that on February 28, 2013 the deadline for Costa Rica to present its Counter-Memorial expired, and therefore by presenting its Counter-Memorial on March 1, 2013, Costa Rica's objections on jurisdiction were not timely filed under clauses 11.9 and 11.10 of Procedural Order No. 1.<sup>148</sup>

124. Consequently, Claimant argues that the Tribunal should apply the legal consequences provided in Costa Rican law, specifically the provisions of the Administrative and Civil Procedure Codes according to which "*...the court will declare the defendant in violation, and the facts of the claim will be considered affirmatively answered ...*"<sup>149</sup> and "*...if the defendant does not answer the claim within the time established in the summons, the court will declare the defendant in violation, and the facts of the claim will be considered affirmatively answered ...*"<sup>150</sup>

##### (ii) Position of Costa Rica

125. Costa Rica argues that the request of SyC to consider the claim to have been responded to affirmatively must be rejected outright, in view of the following:<sup>151</sup>

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<sup>148</sup> Reply §§ 82-84; Exhibit C-110.

<sup>149</sup> Reply § 558; Statement of Laura Rivera of May 28, 2013, § 47.11; Exhibit C-98, Article 65.

<sup>150</sup> Reply §§ 557-560; Exhibit C-99, Article 310.

<sup>151</sup> Rejoinder §§ 21-33.

- a) Claimant itself states that it is aware that since it is an arbitral procedure, substance should prevail over strict formality.<sup>152</sup>
- b) Costa Rica had already put in evidence the lack of legal grounds for SyC's request that its objections should be considered not presented,<sup>153</sup> given that the request was not grounded on either the ICSID Arbitration Rules or investment arbitration practice.<sup>154</sup> Additionally, SyC did not elaborate on this matter in subsequent correspondence.
- c) The arbitral proceeding is governed by the ICSID Arbitration Rules,<sup>155</sup> as was established in Procedural Order No. 1, and not by the Costa Rican rules of procedure invoked by SyC.
- d) Article 41 of the ICSID Arbitration Rules allows the Arbitral Tribunal to consider jurisdictional matters at any stage of the proceeding, and it has the duty to assess its own jurisdiction.<sup>156</sup>
- e) Various arbitral tribunals, as in the case *AIG v. Kazakhstan*, have admitted objections to jurisdiction even after the submission of the counter-memorial. Also in *Pezold v. Zimbabwe* in which the Tribunal exercised its flexibility and discretion under Rule 26 (3) of the ICSID Arbitration Rules and admitted objections that the State did not present until its Rejoinder.
- f) The delay incurred by Costa Rica in filing its Counter-Memorial was of only four minutes, and SyC did not prove in any way the detriment that this delay could have caused, since there was none, especially considering that Claimant requested and subsequently obtained a 25 day extension to file its Reply, which resulted in an adjustment of the entire procedural calendar.

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<sup>152</sup> Letter of SyC to the Arbitral Tribunal on March 14, 2013.

<sup>153</sup> Letter of SyC to the Arbitral Tribunal on March 14, 2013.

<sup>154</sup> Letter of Costa Rica to the Secretary of the Arbitral Tribunal, on March 16, 2013, p. 10.

<sup>155</sup> In force since April 10, 2006.

<sup>156</sup> Exhibit RL-101.

- g) SyC's request is unprecedented in international arbitration and would result in serious and irreparable harm to Respondent by denying its right to a defense.

## 2. JURISDICTION IN THE CASE OF CLAIMS BASED ON ARTICLE III.2 OF THE TREATY

### (i) Position of Costa Rica

126. Respondent claims that, although Claimant dedicated several paragraphs of its Memorial to the umbrella clause,<sup>157</sup> it did not base any of its claims under this provision, and therefore the Tribunal should not even consider whether Respondent has breached the umbrella clause provided in the last sentence of Article III.2 of the BIT.
127. Respondent further states that even if SyC had made a claim under the umbrella clause, the Arbitral Tribunal would not have jurisdiction under the BIT to rule on it, given that "*... the Umbre[lla] Clause applies to the obligations that the State had acquired with the foreign investor (in this case, the Claimant), but not the obligations that the State had acquired with a subsidiary of the investor. In this case, the Claimant bases its apparent claim on the Umbre[lla] Clause in the Agreement between [PTC] and Riteve SyC, where the Claimant is not a party...*"<sup>158</sup> In this regard, Costa Rica cites the case *Burlington Resources. v. Ecuador*, in which the majority of the tribunal concluded that the investor cannot rely on the umbrella clause in a treaty to exercise the contractual rights of its subsidiary against the State.<sup>159</sup>
128. Therefore, Respondent claims that the allegations based on the umbrella clause must be denied because a direct contractual relationship with the foreign investor does not exist, considering that since April 26, 2004 until now, the parties to the Contract have been the State (acting through the MPWT and the PTC) and the Costa Rican company Riteve.<sup>160</sup>

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<sup>157</sup> "Each Party shall comply with any obligation that it has assumed related to investments by investors of the other Party." Exhibit C-3.

<sup>158</sup> Counter-Memorial § 596.

<sup>159</sup> Counter-Memorial § 598; Exhibit RL-100, § 220.

<sup>160</sup> Counter-Memorial § 605.

129. Costa Rica claims that SyC is not a party to the Contract, so the Arbitral Tribunal lacks jurisdiction over SyC's claims under the "*umbrella clause*", which Claimant has failed to refute given that:
- a) SyC cannot question that it is not a party in the Contract, since although it was part of the Consortium, it later assigned all its contractual rights to Riteve. Thus, SyC ceased to be a party to the Contract since April 26, 2004, date of the Contractual Addendum by which the assignment of rights was made, and therefore it was not a party to the Contract when filing its request before the ICSID. Furthermore, the contractual relationship between Riteve and the State is subject to Costa Rican law, and SyC has not proved that it can directly exercise the contractual rights that Riteve has under that law.
  - b) SyC suggests that Riteve is its vehicle or "*alter ego*" in respect to the obligations that Costa Rica assumed under the Contract, but otherwise denies said relationship regarding its failure to comply the "*Fork in the Road Clause*" set forth in the BIT, based on the existing formal difference between the two companies.
130. SyC has never disputed Costa Rica's argument regarding that there should be a direct contractual relationship between the plaintiff investor and the State for the investor to invoke the umbrella clause, but focused its argument on the fact that SyC and its subsidiary Riteve are equivalent for contractual purposes, mainly because of a joint and several liability of SyC regarding Riteve's contractual obligations. Costa Rica asserts, however, that SyC ceased to be a party to the Contract when the Consortium assigned its rights under the Contract to Riteve on April 26, 2004, and as shown by both the Addendum Contract dated April 26, 2004 and the one dated July 20, 2012, the contractor or concessionaire to the State is Riteve, not SyC. Therefore, under the current Contract the State only has obligations with Riteve. Since the State does not have obligations with SyC, there is nothing that can be protected by the umbrella clause, being the joint

and severed responsibility of the Claimant an obligation with the State, but not *vice versa*.<sup>161</sup>

(ii) Position of SyC

131. Regarding Costa Rica's statement that there are no references in section VIII of the Memorial to the umbrella clause or to the last sentence of Article III.2, as well as the alleged lack of jurisdiction of ICSID to hear claims under the umbrella clause of the BIT because of allegations that it is not a party to the Contract, (i) SyC points out that in its Memorial it requested a declaration that Costa Rica had failed to fulfill obligations under Article III of the Treaty, "... *serious[ly] breach[ing] obligations agreed to in the contract for the provision of technical vehicle inspection...*"<sup>162</sup>, making it clear that SyC claims damages for breach of contract which "...*were internationalized by virtue of the umbrella clause...*"<sup>163</sup> in addition to the fact that when explaining what the umbrella clause is, reference is made to the section in which the obligations under the Contract are listed; and (ii) the Contract was not signed by a subsidiary of SyC, as was the case in *Burlington Resources v. Ecuador*, but by the Consortium, and considering what a consortium is under Costa Rican law,<sup>164</sup> and since Mr. José Luis López in his status of attorney in fact for SyC was involved and signed the Contract, it is clear evidence that SyC is a party to the Contract.<sup>165</sup>
132. Claimant argues that the existence of joint liability confirms that SyC is a party to the Contract, given that under Costa Rican law, a contract only produces effects between the parties, and therefore if SyC has obligations under the Contract, necessarily it is a party thereto, for the entire performance of the Contract. Claimant also argues that the assignment of rights and obligations to Riteve did not change its obligations at all, nor its status as party; such assignment simply consisted of creating a legal entity in Costa

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<sup>161</sup> Post Hearing Brief of Costa Rica §§ 46-47.

<sup>162</sup> Reply § 195.

<sup>163</sup> Reply § 194.

<sup>164</sup> Reply § 205; Exhibit C-12, Clause 4, "*the consortia agreement will be governed by the stipulations of article 38 of the Law of Administrative Procurement and the stipulations of article forty-one of the General Code for Administrative Procurement, without creating a new legal entity different to each of its members.*"

<sup>165</sup> Reply §§ 202-203.

Rica. In this respect, SyC asserts that being party to the Contract, it has legitimacy for filing claims under the umbrella clause.<sup>166</sup>

### 3. FORUM SELECTION CLAUSE CONTAINED IN ARTICLE XI.3 OF THE TREATY

#### (i) Position of Costa Rica

133. Costa Rica states that the jurisdiction of the Tribunal cannot be based on the presumed consent granted by Costa Rica by the sole fact of having signed the BIT, which is not absolute or unlimited. On the contrary, the BIT provides express conditions that expressly limit the scope of that consent.<sup>167</sup>
134. Respondent argues that the Arbitral Tribunal does not have jurisdiction to hear and rule regarding SyC's claims under the Treaty, because Claimant previously submitted before a local court in Costa Rica the same dispute about its investment now submitted before this Tribunal without having adopted the necessary measures to desist definitely from the judiciary proceedings before the local courts had issued a judgment.<sup>168</sup>
135. This is because, according to Respondent, SyC failed to comply with the stipulations of the fork in the road clause, provided in Article XI.3 of the BIT, which stipulates:<sup>169</sup>

*"3. Once an investor has submitted the dispute to an arbitral tribunal, the award shall be final. If the investor has submitted the dispute to a competent court of the Party in whose territory the investment was made, it may, in addition, resort to the arbitral tribunals referred to in this article, if such national court has not issued a judgment. In the latter case, the investor shall adopt any measures that are required for the purpose of permanently desisting from the court case then underway..."*

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<sup>166</sup> Post Hearing Brief of SyC §§ 46-47.

<sup>167</sup> Post Hearing Brief of Costa Rica § 21.

<sup>168</sup> Counter-Memorial § 201.

<sup>169</sup> Counter-Memorial § 202.

136. Respondent states that Costa Rica's consent depends on the fulfillment of these conditions, so that, in this dispute, "...Costa Rica did not consent to submit to international arbitration disputes related to investments that have previously been submitted to a competent national court and have resulted in a decision without the investor having abandoned the action..."<sup>170</sup> In the absence of a withdrawal by SyC (acting through Riteve, a company controlled by SyC) before the local court issued a judgment, the will of the parties to exclude the possibility of multiple motions is not respected.<sup>171</sup> The Parties' consent to submit a dispute to arbitration is conditioned on not having exhausted the local administrative or judicial remedies. In the case at hand, Claimant submitted the dispute to international arbitration without having withdrawn from the local instance before the court issued its judgment on November 28, 2012.<sup>172</sup>
137. In light of the foregoing, Respondent claims that given that Claimant did not withdraw from the local instance, the conditions under the BIT were not met for Costa Rica's consent to submit to international arbitration the investment disputes to be perfected, given that *(i)* there was a proceeding before a competent Costa Rican court that referred to the same dispute that is now the subject of this arbitration, with the same fundamental basis,<sup>173</sup> *(ii)* in both instances, the lawsuits were filed by Claimant,<sup>174</sup> *(iii)* Claimant failed to take the necessary steps to definitely withdraw from the local instance, and *(iv)* the local court already issued judgment.<sup>175</sup>
138. According to Respondent, SyC did not meet the jurisdictional requirement to withdraw from the controversy that it had previously submitted before a competent national court prior to the issuance of a judgment, and should not be allowed to hide behind its local business Riteve to evade the jurisdictional requirements of the BIT, considering that:<sup>176</sup>

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<sup>170</sup> Counter-Memorial § 203.

<sup>171</sup> Counter-Memorial § 208.

<sup>172</sup> Counter-Memorial § 209.

<sup>173</sup> Counter-Memorial §§ 215, 226, "both are asking for a decision declaring that Costa Rica has acted against the law, that it did not adjust Riteve SyC's rates of, and that the Costa Rican State be condemned to pay a compensation for the difference between the rate that the Costa Rican State authorized Riteve SyC to charge its users and the adjusted rate that, according to Riteve SyC, the Costa Rican State should have authorized pursuant to the Contract."

<sup>174</sup> Counter-Memorial §§ 218, 231, "Claimant has used Riteve SyC, a company that it fully controls (for it being its majority shareholder), as a means to submit the dispute to a competent national court through the judicial channel."

<sup>175</sup> Counter-Memorial § 211.

<sup>176</sup> Rejoinder §§ 34-51.

- a) SyC does not deny in its Reply the existence of a "Fork in the Road Clause" in Article XI.3 of the BIT, nor does SyC dispute the fact that a competent national court in Costa Rica issued a judgment on November 28, 2012, without SyC having withdrawn that procedure before the issuance of said judgment.
- b) Claimant denies being plaintiff in the lawsuit filed before the local court since it acted through Riteve, and denies having filed identical breach of contract claims in both venues, which consist of the request to declare that Costa Rica did not adjust the rates for VTI service, breaching the Contract and therefore should be sentenced to pay a compensation to cover the difference between the rate that the State authorized Riteve to charge users, and the one that it should have charged them.
- c) SyC did not prove that it was another entity that controlled the local proceedings, different from the one that controls the current arbitration. Claimant failed to prove that it was Riteve's minority shareholder (Transal S.A.) who had driven Riteve's acts on the local proceeding, or that said minority shareholder could block SyC's decision to withdraw from the local proceeding.
- d) SyC merely highlighted the difference between the names of the claimants in the registration documents of the local proceeding and the parties named in this arbitration, failing to observe the complexity of this issue. In this regard, Costa Rica quotes the case *Pantechniki v. Albania* to assert that such matters should be evaluated with discernment. In this regard, Respondent states that SyC has recognized on several occasions that it effectively controls Riteve SyC,<sup>177</sup> and therefore it is clear that Riteve is "...a mere vehicle for the Claimant..."<sup>178</sup>

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<sup>177</sup> Rejoinder § 42, quoting Exhibit C-7.

<sup>178</sup> Rejoinder § 42.

- e) SyC's arguments are inconsistent. On one hand, Claimant argues that it is not involved in the local proceeding, while at the same time bases its claim of denial of justice on Resolution 000906-A-04 of October 21, 2004 issued by the First Chamber of the Supreme Court, which declared the lack of jurisdiction of the local arbitral tribunal.<sup>179</sup>
- f) As to the identity of the subject matter, SyC attempts to deny that in both proceedings it seeks the same goal: compensation for alleged breaches of Contract by Costa Rica, related to the adjustment of VTI service's rates, distinguishing between administrative claims (which in SyC's view are not contractual in nature) and claims of breach under the BIT. In this regard, Costa Rica quotes the *Pantechniki v. Albania* award, which established that it is not sufficient to assert that a claim is based on a Treaty to argue it is different from another claim under local jurisdiction, and instead it must be determined whether the claim has an independent existence beyond the Contract, which Costa Rica denies.
- g) Respondent considers that SyC's assertion that in the local trial no economic compensation was requested is false, since in the November 28, 2012 judgment the Judicial Branch notes that Riteve requested that "... *the State be ordered to pay present and future damages and losses...*" and including as loss of profits "...*the amount Riteve failed to earn from July 2002 to December 31, 2005, due to the difference between the established rate and that it would have earned if the [PTC] and the [MPWT] had complied with their contractual and constitutional obligations...*"<sup>180</sup>
- h) SyC is trying to benefit from a formality, considering that on the one hand it intends to consider Riteve an *alter ego* of SyC for the purposes of the *umbrella clause*, regarding the obligations Costa Rica assumed with Riteve, but on the

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<sup>179</sup> Rejoinder § 72.

<sup>180</sup> Rejoinder §48; quoting Exhibit R-96, pp. 2-3.

other hand, and incongruously, SyC intends to deny that relationship with Riteve with respect to the *Fork in the Road Clause*.

- i) Allowing SyC to use its local corporation Riteve to evade the jurisdictional requirements of the BIT would create the possibility of conflicting rulings between a local court and an international tribunal, which the BIT attempts to avoid.

139. As to the obligation SyC had to withdraw its local lawsuit when filing its claim before ICSID, while SyC argues that the fact that the local court had not yet issued a ruling exempted SyC from the obligation to withdraw its local suit, Costa Rica claims that it is precisely in this situation that the Treaty requires the Claimant to withdraw its local suit in order to bring a claim before an ICSID tribunal. Although SyC argues that "*there are no precedents that have indicated that there is a lack of international jurisdiction because of the invocation of a clause of this nature*",<sup>181</sup> Costa Rica alleges that at least two ICSID Tribunals dismissed similar cases: *Pantechniki v. Albania* and *Commerce Group v. El Salvador*.

140. Costa Rica further asserts that the Addendum to the Contract of July 20, 2012 does not give jurisdiction to ICSID, as stated by SyC for the first time in its Reply. In this regard, Costa Rica indicates that:<sup>182</sup>

- a) The provision of the Addendum on which SyC relied refers exclusively to the ICSID Additional Facility, and not to ICSID itself. Thus, Costa Rica emphasizes that SyC did not submit its claim before the Additional Facility, nor did it meet the requirements of Article 3.1 of the Arbitration Rules of the Additional Facility.

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<sup>181</sup> Post Hearing Brief of Costa Rica § 43; quoting the Transcript, Day 1 (SPA), Opening Allegations of the Claimant, L. Cuervo, p. 57.

<sup>182</sup> Rejoinder §§ 74-75.

- b) The Contractual Addendum requires the formation of a "*Conciliation Committee*" prior to arbitration, and not having met this requirement, international arbitration would not be appropriate under the Contractual Addendum.
- c) The Contractual Addendum states in its arbitration clause that in the case ICSID's jurisdiction was questioned, as was the case in this arbitration, the Parties agreed to submit any dispute to the International Court of Arbitration of the International Chamber of Commerce. Therefore, under the mentioned clause SyC would have to withdraw its current complaint before ICSID.

(ii) Position of SyC

141. Claimant argues that an ICSID tribunal has jurisdiction to hear a dispute brought before it "... *if the facts alleged by the Claimant as they appear in the initial briefs raise the violation of one or more provisions of the Bilateral Investment Agreement...*"<sup>183</sup> According to Claimant, the facts presented in the Memorial presume violations of the obligations contained in Articles III and V of the Treaty.
142. In addition, Claimant contends that the Arbitral Tribunal:
- a) Has jurisdiction *ratione personae* because SyC is a Spanish corporation, and had that nationality when submitting its Request for Arbitration before ICSID.<sup>184</sup>
  - b) Has jurisdiction because of the voluntary agreement between Costa Rica and SyC. First, Article XI of the Treaty confirms Costa Rica's consent to submit any dispute arising from the breach of the Treaty before an arbitral tribunal.<sup>185</sup> Indeed, in the *Lanco International Inc. v. Argentine Republic* case, the

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<sup>183</sup> Memorial § 227, citing *SGS Société Générale de Surveillance S.A. v. Republic of Philippines*, ICSID Case No. ARB/02/06, Decision of the Tribunal on Objections to Jurisdiction, January 29, 2004, § 157.

<sup>184</sup> Memorial § 228.

<sup>185</sup> Memorial § 229.

tribunal found that signing a treaty in which parties agreed to submit the disputes to an arbitral tribunal constitutes written expression of consent to submit such disputes to international arbitration, being "*a generic offer for submission to ICSID arbitration.*"<sup>186</sup> Second, SyC confirmed its consent to arbitrate by submitting its Request for Arbitration, meeting the requirement provided in Article 25 of the ICSID Convention.<sup>187</sup> Third, the conditions in the Treaty were met, given that the dispute was notified in writing to Costa Rica through a Notice of Intent dated May 31, 2011, and six months passed between that notice and the filing of the Request for Arbitration, in accordance with Article XI of the Treaty.<sup>188</sup>

- c) Has jurisdiction *ratione temporis*, given that the execution of the Contract, Riteve's incorporation, the start of operations, and the current dispute took place during the effective term of the Treaty.<sup>189</sup>
- d) Has jurisdiction *ratione materiae* since the dispute, legal by nature, arises from Costa Rica's infringement of its obligations to promote and protect SyC's investment under the Treaty.<sup>190</sup> In this regard, Article III.2 of the Treaty requires Costa Rica to "*...perform any obligation already incurred in connection with investments by investors...*" including investments consisting of "*...rights to economic and trade activities granted under a contract...*" as well as contractual rights to economic benefits.<sup>191</sup>

143. Moreover, SyC states that it has not filed any action against Costa Rica in domestic courts in relation to Article XI of the Treaty, offering as evidence the notarial certification that proves that Supervisión y Control, S.A. is not involved in any contentious proceedings before administrative judges in Costa Rica.<sup>192</sup>

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<sup>186</sup> Memorial § 229, quoting *Lanco International Inc. v. Argentine Republic*, ICSID Case No. ARB/97/6, Decision on Jurisdiction, December 8, 1998, § 44.

<sup>187</sup> Memorial § 229.

<sup>188</sup> Memorial §§ 235, 236.

<sup>189</sup> Memorial § 230.

<sup>190</sup> Memorial § 231.

<sup>191</sup> Memorial § 231.

<sup>192</sup> Memorial § 238; Exhibit C-62.

144. Concerning the alleged *lis pendens*, in connection with Costa Rica's assertion that SyC submitted that same dispute concerning its investment before a local court and without taking the necessary steps to permanently withdraw from that judicial instance,<sup>193</sup> SyC states that:

- a) It is not the same claimant, since *(i)* it is SyC and not Riteve who has the character of investor; *(ii)* SyC and Riteve are different corporations; and, *(iii)* 45% of Riteve's shares are owned by the Costa Rican corporation Transal S.A., who has no interest in this arbitration. Therefore, Claimant states that SyC has not filed any proceeding in Costa Rica.<sup>194</sup>
- b) It is not the same dispute, since the issue submitted before a local court was an action for annulment of administrative acts, so it concerned claims related to annulling, different from the claims for compensation of damages due to breach of contractual obligations by Costa Rica. In addition, MPWT and Riteve, in the Addendum to the Contract, expressly renounced to submit any disputes arising from the Contract or related to it before domestic authorities, since they would be submitted to international arbitration.<sup>195</sup>
- c) There is no proceeding of which SyC can or should desist from. According to Article XI of the Treaty, for it to be necessary to desist from an action there is a prior condition that the investor has submitted the dispute to the competent court of the contracting party, being understood that the only one that can desist from a proceeding is the one who has the status of party. Given that SyC was not a party in the administrative-law proceeding filed by Riteve and that Transal S.A. is not a party in this arbitration, to claim that Riteve should desist from the action for annulment "...would lead to the absurdity of taking away from an entity that has no claim in the arbitration process a legitimate claim

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<sup>193</sup> Reply §§ 95-96.

<sup>194</sup> Reply §§ 97-108.

<sup>195</sup> Reply §§ 109-122.

*that was raised before the judges of its country in regards to the issuance of an administrative action that it considers null and against the law...*"<sup>196</sup> Claimant also argues that if it abused its majority position in Riteve, it would be liable to Transal S.A. for leaving it without protection. Therefore, the situation Article XI of the Treaty is intended to regulate did not occur in the case at hand.<sup>197</sup>

- d) No *lis pendens* exists, since the necessary requirements are not met, and the Costa Rican court itself mentioned in the judgment of November 28, 2012 that **(i)** the right invoked in this arbitration, based on the Treaty, is not the same as the one heard in the local trial, and **(ii)** the claims in each of the two proceedings are very different in nature; the claim filed before local courts related to the annulment of public conduct (and incidentally property-related) while the claim in this arbitration exclusively pertaining to property.<sup>198</sup> SyC also points out that the factual background in *Pantechniki SA Contractors & Engineers v. Albania* was different from the current dispute, given that in both instances the claim was contractual and the same company that filed a lawsuit before the Albanian courts subsequently notified its claim under the bilateral investment treaty.<sup>199</sup>
- e) SyC claims it does not meet the three requirements set forth in the award of *Benvenuti and Bonfant SRL v. The Government of the People's Republic of the Congo*, which are **(i)** identity of parties, **(ii)** identity of matter and **(iii)** identity of subject.<sup>200</sup> In this regard, SyC states that in both the procedure before the Administrative Contentious Court and the arbitration proceeding before ICSID there is: **(i)** no identity of parties; **(ii)** the matter in the local suit is different from the matter in the arbitration proceeding; and **(iii)** there is no identity in the subject because the local trial was not a contract-related proceeding and was limited to facts occurring between 2002 and 2005,

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<sup>196</sup> Reply § 130.

<sup>197</sup> Reply §§ 123-132.

<sup>198</sup> Exhibit RL-88 § XXII, p. CR-05782.

<sup>199</sup> Reply §§ 138-146.

<sup>200</sup> Reply § 147, quoting *Benvenuti and Bonfant SRL v. The Government of the People's Republic of the Congo*, ICSID Case No. ARB/77/2, Award, August 8, 1980, 21 I.L.M. 740 (1982), § 1.14.

compared to the arbitration damages arising from multiple actions of Costa Rica covering the period 1998-2012 and claiming future damages for period ending in 2022.<sup>201</sup>

- f) Moreover, assuming without conceding that SyC had submitted a dispute to the domestic judges of Costa Rica, Claimant alleges that pursuant to Article XI of the Treaty, even if the investor previously went before local courts it may refer the dispute to arbitration “...as long as said national court has not issued judgment ...”, and both the Request for Arbitration and the memorial were submitted *before* a judgment was issued in the local trial.<sup>202</sup>

145. Moreover, SyC also argues that Article XI of the Treaty is not a Fork in the Road Clause as Costa Rica claims, because the words “*may in addition*” suggest that it is not a forum selection clause, but rather a clause that permits international arbitration even when the investor has attempted to have a local court hear the dispute. SyC insists that when it presented its Request for Arbitration, the decision of the local proceeding had not yet been issued; in addition to the fact that such dispute was filed by a different company, and the claims were different from the claims in this proceeding.<sup>203</sup>
146. SyC also states that on July 20, 2012, MPWT and Riteve expressly confirmed that ICSID jurisdiction existed by signing the Contractual Addendum, which in clause 11.4 provides that any dispute arising with respect to the Contract would be submitted to international arbitration, and specifically designating ICSID to manage the arbitration.<sup>204</sup>

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<sup>201</sup> Reply §§ 147-159.

<sup>202</sup> Reply §§ 160-170.

<sup>203</sup> Post Hearing Brief of SyC § 27.

<sup>204</sup> Reply §§ 89-91; Exhibit C-67.

**4. REQUIREMENT OF CONSULTATION AND WAITING PERIOD ESTABLISHED IN ARTICLES XI.1 AND XI.2 OF THE TREATY**

(i) Position of Costa Rica

147. Respondent contends that SyC submitted five new claims in its Memorial that are not related in any way with the three claims described in its Notice of Intent dated May 31, 2011 and in its Request for Arbitration. In this regard, Costa Rica claims that the terms of the Treaty do not allow the unilateral expansion of the scope of the dispute.<sup>205</sup> Costa Rica summarizes these five new claims in the following points:

*“(a) argument under Article III.1 of the Treaty (denial of justice) based on Resolution 000906-A-04 of October 21, 2004 of the First Chamber of the Supreme Court of Justice (Sala Primera de la Corte Suprema de Justicia) of Costa Rica, declaring the lack of jurisdiction of the local Arbitral Tribunal;*

*(b) argument under Articles III.1 and III.2 of the Treaty, on the grounds of ‘the issuance on December 17, 2008, of an amendment to the Traffic Act’;*

*(c) argument under Articles III.1 and III.2 of the Treaty, on the grounds of ‘the issuance on October 26, 2012, of a New Traffic Act’;*

*(d) argument under articles III.1, III.2 and V, on the grounds of ‘having unilaterally and unfairly terminated the contract of services for vehicular inspection through Resolution 333 of May 9, 2011, issued by the Minister of Public Works and Transportation without ordering payment of a prompt and adequate compensation;’*

*(e) argument under article III.1 of the Treaty, on the grounds of not having published a specific methodology before August 10, 2012, after having committed to do so on July 20, 2012.”<sup>206</sup>*

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<sup>205</sup> Counter-Memorial § 236.

<sup>206</sup> Counter-Memorial § 237.

148. Further, Respondent argues that under Article XI.1 of the Treaty, the dispute must be "...given in writing, including detailed information, by the investor to the Contracting Party receiving the investment...", meaning that SyC had to notify Costa Rica of all its claims, including the five claims previously mentioned, at least six months prior to the submission of the dispute to arbitration.<sup>207</sup> However, SyC only met this requirement regarding "three of the claims it identified in its Memorial," not for the five new claims.<sup>208</sup>
149. According to Respondent, as in *Burlington Resources Inc. v. Ecuador*, in which the Arbitral Tribunal "... found itself not to have jurisdiction to hear the claims that had been neither notified nor object of the amicable consultation between the parties to the dispute"<sup>209</sup>, the Arbitral Tribunal has no jurisdiction over these five new claims. Consequently, the Tribunal should decline jurisdiction and dismiss these claims for not having complied with the requirements of Article XI.1 of the Treaty,<sup>210</sup> in light of the following:<sup>211</sup>
- a) Costa Rica pointed out in its Counter-Memorial that there are five new claims presented by SyC in its Memorial that were not related to the three claims described in Claimant's Notice, and SyC did not demonstrate in its Reply compliance with the notice requirements in terms of Article XI.1 of the Treaty, which requires the investor to notify the State of all its claims and with detailed information.
  - b) SyC in its Reply does not answer the allegation made by Respondent and instead states that SyC effectively notified the State of the existence of a dispute under the Treaty. Even though SyC's notification to the State is uncontested, the Claimant never proved that it had notified Costa Rica in the

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<sup>207</sup> Counter-Memorial § 238.

<sup>208</sup> Counter-Memorial § 239.

<sup>209</sup> Counter-Memorial § 242.

<sup>210</sup> Counter-Memorial §§ 240, 246.

<sup>211</sup> Rejoinder §§ 52-59.

manner required by the Treaty, with detailed information on each of the dispute issues, with respect to these five new claims.

150. Finally, Costa Rica indicates that SyC has requested measures that the Arbitral Tribunal is not authorized to take, which are therefore invalid and must be rejected outright. Respondent summarizes those measures as follows:<sup>212</sup>

*“... [First], it demands that the Tribunal exercise jurisdiction regardless of the non-compliance by the Claimant with the express conditions of consent to the arbitration jurisdiction that the Contracting States of the Treaty expressly agreed to in the Treaty. Secondly, the Claimant invites the Tribunal to ignore the high threshold of the international standards under which it presents its claims and to act as an ex aequo et bono court- which the tribunal is not empowered to do, as there has been no consent from both Parties for this, as required by Article 42(3) of the ICSID Convention. Third, it requests that the Tribunal examine and revoke the conclusions of fact and even of Costa Rican law which competent Costa Rican courts have reached. At the request of the Claimant itself and its subsidiary and alter ego, Riteve SyC, [Costa Rican] courts have already considered and issued a conclusive ruling, with the effects of res judicata, with respect to exactly the same controversy that the Claimant now seeks to submit to ICSID. Fourth, it requests the Tribunal to condemn Costa Rica to pay a spectacular indemnification for totally illusory damages, without having demonstrated a single cent in material losses and much less the multi-million amount in damages it claims...”*

(ii) Position of SyC

151. In the case of the alleged failure to comply with the Consultation Period, SyC argues that the issue of the consultation period has been studied by other international arbitral tribunals as procedural and not mandatory and jurisdictional, as in the case *SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan*, in which the tribunal held that

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<sup>212</sup> Post Hearing Brief of Costa Rica § 6.

"compliance with such a requirement is, accordingly not seen as amounting to a condition precedent for the vesting of jurisdiction ..." <sup>213</sup>

152. Also, SyC alleges that there are clear differences between this case and *Burlington Resources Inc. v. Republic of Ecuador* cited by Costa Rica, both in the wording of the treaty and on the facts of the dispute.
153. Indeed, in *Burlington* the first communication to Ecuador was made by a company different from the claimant, without reference to a breach of the treaty in question. Thus, Ecuador claimed that it was never notified of the existence of a dispute and did not know about it until the request for arbitration, leaving Ecuador without the opportunity to settle the dispute before said request. Unlike in *Burlington*, SyC notified Costa Rica of the existence of an investment dispute under Article XI.1 of the Treaty through the Notice of Intent dated May 31, 2011.
154. *Murphy Exploration and Production v. Republic of Ecuador*, also cited by Costa Rica, dealt with a dispute concerning the same bilateral treaty between the United States and Ecuador. Claimant alleges Respondent overlooked significant differences between the case cited and the case at hand, such as the facts of the case and the requirements for submission to arbitration. Unlike in *Murphy*, where Ecuador alleged that Murphy notified its claim only days before submitting its request for arbitration, in the case at hand more than six months passed between the time the Notice of Intent was notified and the date on which the Request for Arbitration was submitted.<sup>214</sup>

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<sup>213</sup> Reply § 174, citing *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, August 6, 2003, § 184.

<sup>214</sup> Reply §§ 171-192.

## B. QUESTIONS OF MERITS

### 1. FAIR AND EQUITABLE TREATMENT

#### 1.1 Stability

##### (i) Position of SyC

155. Claimant argues that the stability of the legal system is an essential element of fair and equitable treatment. Therefore the right to obtain at any time fair and equitable treatment is violated when measures taken by a State substantially alter the legal and business environment in relation to which an investment was decided and carried out, producing a loss of business certainty and stability.<sup>215</sup>
156. Claimant asserts that the government infringes on the international obligation to honor the fulfillment of contractual obligations when its decisions interfere significantly with the investor's rights, or when the conduct that infringes an undertaken obligation comes from a State's sovereign power or function.
157. In that sense, SyC argues Costa Rica breached its obligations under the Treaty when it enacted significant legal and regulatory changes that resulted in a change of the policy that was considered in the Contract. This was not an ordinary contractual breach of a commercial nature, which would not be deemed a breach under the Treaty.<sup>216</sup>

##### (ii) Position of Costa Rica

158. Respondent claims that not just any error in the State's conduct constitutes a violation of its obligation to provide fair and equitable treatment.<sup>217</sup> Respondent states that the stability of the legal system cannot be interpreted as an essential element of fair and

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<sup>215</sup> Memorial §§ 462-463, quoting *LG&E Energy Corp et al v. Republic of Argentina*, ICSID Case ARB/02/1, Decision on Liability, October 3, 2006, 46 ILM 40; *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award, May 12, 2005, § 276; and *Sempra Energy International v. Republic of Argentina*, ICSID Case No. ARB/02/16, Award, September 28, 2007, § 303.

<sup>216</sup> Memorial §§ 488-491, quoting *e.g.*, *Sempra Energy International v. Republic of Argentina*, ICSID Case ARB/02/16, Award, September 28, 2007, §§ 310-311.

<sup>217</sup> Counter-Memorial § 262.

equitable treatment, and the fair and equitable treatment cannot be interpreted as inseparable from stability and predictability.<sup>218</sup> According to Respondent, Claimant extrapolates the conclusions in the CMS, LG&E, and Sempra cases against Argentina concluding that "*the stability of the legal system is an essential element of fair and equitable treatment.*" However, said cases differ from the Treaty in that the Bilateral Investment Treaty between Argentina and the United States of America had among its objectives of fair and equitable treatment the legal system's stability.<sup>219</sup> In this regard, Respondent argues the following:

*"...Claimant cannot extrapolate the conclusion of the three awards in CMS, LG&E and Sempra, in the sense that 'the stability of the legal system is an essential element of fair and equitable treatment' and intend to apply the same conclusion to the present case, because the terms of this Agreement are significantly and materially different from the terms of the agreement between Argentina and the United States."*<sup>220</sup>

## 1.2 Legitimate Expectations

### (i) Position of SyC

159. Claimant asserts that the State's failure to comply with the investor's legitimate expectations, those that induced him to make the investment, constitutes a violation of the obligation to give the investor at all times fair and equitable treatment. For this reason, the analysis of fair and equitable treatment involves the necessary consideration of investor expectations when investing, relying on the protections provided by the host State. SyC also states that the obligation of fair and equitable treatment is violated if the State's conduct is characterized as arbitrary.<sup>221</sup>

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<sup>218</sup> Memorial §§ 462-463.

<sup>219</sup> Counter-Memorial §§ 264-266.

<sup>220</sup> Counter-Memorial § 267.

<sup>221</sup> Memorial §§ 464, 468, 473, quoting *Técnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case ARB(AF)/00/2, Award, May 20, 2003, 43 I.L.M. 133, § 154; *LG&E Energy Corp et al v. Republic of Argentina*, ICSID Case ARB/02/1, Decision on Liability, October 3, 2006, 46 ILM 40, § 130; and *Waste Management, Inc. v. Mexico*, ICSID Case ARB (AF)/00/3, Award, April 30, 2004.

160. In light of the foregoing, Claimant alleges that Costa Rica violated its obligation to provide SyC's investment fair and equitable treatment and full protection and security by:<sup>222</sup>
- a) Preventing that the contractually agreed arbitration mechanism could be processed through a Resolution of the Supreme Court.
  - b) Repeatedly breaching its obligations in an unfair and discriminatory manner by failing to respect the rates submitted by the contractor in its offer, failing to approve the methodology for rate readjustment, failing to publish, and rejecting various requests for rate readjustment for more than seven years.
  - c) Breaching contractual obligations by repealing decrees and approving amendments to traffic laws, in the exercise of the State's exclusive powers, that eliminated already granted rights to SyC.
  - d) Abstaining from readjusting the applicable rates and ending the exclusive rights granted under the Contract.
161. SyC argues that the principle of "service at cost" invoked by Costa Rica should not be applied to the Contract because:<sup>223</sup>
- a) Said principle is expressed in Article 5 of Law 7593 of 1995 (amended by Law No. 8660 of August 8, 2008), which does not mention the VTI service. Also, for a public service to be understood as regulated and under the regulatory authority "... it is indispensable to have *an express statement by the law ...*" The relevant regulatory authority in this case, the PSRA, does not include the VTI service in its list of public services regulated.<sup>224</sup>

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<sup>222</sup> Memorial § 471.

<sup>223</sup> Reply §§ 326-347.

<sup>224</sup> Reply §§ 326, 327, 330; Statement of Laura Rivera of May 28, 2013 § 17.

- b) According to Carlos Arguedas' report, there is no reference to the Contract being subject to the principle of service at cost in any official notice from the Comptroller, nor was this mentioned during the tender proceeding.<sup>225</sup>
- c) The same PSRA expert used by Costa Rica reaches the conclusion that in view of the rate regulation established in the Contract, the PSRA cannot apply to the Contract the same regulation that it applies to the rest of the services it regulates, from which SyC infers that the rules of the Law 7593, which is where the principle of service at cost is found, do not apply to the Contract.<sup>226</sup>
- d) The regulation is a limitation on the free market and on free enterprise, and therefore "*...it must be enshrined expressly and cannot be applied by analogy or extension ...*"<sup>227</sup>
- e) Because VTI is not a public service, the principle of service at cost should not apply. SyC cites several official rulings of the PSRA and the Attorney General in which they postulated that the VTI service is not a public service.
- f) The contract did not provide specific provisions regarding public services regulation, establishing that everything related to VTI corresponded to the PTC, the contracting entity.
- g) PSRA's rejection of the readjustment requests confirms that VTI service is not a public service subject to its regulation.

162. According to SyC the Contract does not limit the profitability and in this respect points out that:<sup>228</sup>

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<sup>225</sup> Report of Carlos Arguedas §§ 30-31.

<sup>226</sup> Reply §§ 336-337; Statement of Luis Alberto Cubillo Herrera §§ 65, 66.

<sup>227</sup> Reply § 339; quoting the Statements of Laura Rivera and Leonel Fonseca Cubillo.

<sup>228</sup> Reply §§ 385-403.

- a) The Contract does not limit the profitability of the company, and if so, Costa Rica has the burden of proof to establish a contractual limitation to that profitability, given that it is the Respondent who claims the above.
- b) According to Mr. Carlos Arguedas' report, the Comptroller did not mention limitations to profitability in the framework of the implementation of the adjustment mechanisms provided in the Contract, in any of its pronouncements.<sup>229</sup>
- c) The methodology for the rate readjustment in the Contract provides that all costs and expenses must be taken into account, but nothing is mentioned regarding the issue of profitability.
- d) The Terms of the Tender do not mention anything regarding a possible limitation of the contractor's profitability.<sup>230</sup>
- e) None of the methodologies referred to for the rate readjustment implies said limitation on profitability, including *(i)* the methodology in Executive Order 30185; *(ii)* the methodology from the Carvajal Firm; *(iii)* the October 21, 2003 formula; and *(iv)* the methodology used by Mr. Brunner and Mr. Vargas in 2002.

163. In connection with Costa Rica's statement that the Consortium submitted in its Offer a rate of return of 13.28%, SyC counters that this statement is false<sup>231</sup> for two reasons: *(i)* there was never a complementary offering, and *(ii)* the document Costa Rica claims as a supposed original complementary offer to the Consortium's July 7, 1998 Bid does not correspond to what was announced since it is "*... a document that was informally provided in the meetings held in the [Comptroller General Office] after it notified the government of its decision to not endorse the contract.*"<sup>232</sup> Furthermore, clause 1.2 of the Contract sets forth

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<sup>229</sup> Report of Carlos Arguedas, conclusion 3.

<sup>230</sup> Statement of José Luis López of May 29, 2013 § 4; Statement of Fernando Mayorga of May 13, 2013 § 4 n.

<sup>231</sup> Reply §§ 404-409.

<sup>232</sup> Reply § 408.

the documents that govern it (the Terms of the Tender and the bid of the contractor), without mentioning any supplement to the offer.

164. In relation to the source of its expectations, SyC states that:<sup>233</sup>
- a) Said expectations arise from *(i)* the Terms of the Tender; *(ii)* the offer; *(iii)* the award of the Tender; and *(iv)* the Contract, countersigned by the Comptroller's Office.
  - b) The content of the official notices from the Comptroller cannot produce the effects intended by Costa Rica, since *(i)* they are internal acts of the State, between the Comptroller and the MPWT, without the Consortium being notified of such documents; *(ii)* it is questionable whether the constitutional countersignature was appropriate, given that the Contract does not provide for public funds payment; and *(iii)* even if the countersignature was appropriate, the Comptroller's prerogative is whether to validate a Contract, not to modify its contents.
  - c) SyC does not seek the enforcement of the provisions of the First Contract, which has no binding effect, but requests the enforcement of the obligations clearly stipulated in the Contract, which had the Comptroller's countersignature.
165. Regarding the increased costs, evidenced by the budget for the admissibility of rates adjustment, SyC contends that:<sup>234</sup>
- a) Costa Rica's own expert, Timothy Hart, asserts that in the two times Costa Rica readjusted rates in 2002 and 2005, such adjustments were due to Riteve's rising costs.<sup>235</sup>

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<sup>233</sup> Reply §§ 410-418.

<sup>234</sup> Reply §§ 497-522.

<sup>235</sup> Reply § 512, quoting the Report of Timothy Hart §§ 49, 50.

- b) The Contract, defining what is meant by rate adjustment, states that it would include both costs increase and the necessary adjustments based on economic indicators.<sup>236</sup>
- c) According to Nicholas Good's report, Riteve's labor costs have increased in direct proportion to inflation, stating that since 2003 operating costs have increased by 148%.
166. SyC states that the document identified as **R-6**, contrary to the claims of Costa Rica, was not part of the offer. It was confirmed at the Hearing that according to the declaration of Amador Castro, said document, where a return of 13.28% was expressed, not only was it not part of the offer, but was presented two years after its date, when the Contract had already been awarded. Moreover, it would not have made sense to accept a return of 13.28% considering that at the time the bank interest in Costa Rica was approximately 20%. Claimant also asserts that this reference was not about profit expectations, but was simply a fixed factor to apply the Comptroller's formula.<sup>237</sup>
167. SyC states that the Comptroller never ruled on the contents of Executive Order 30185 since the Comptroller's Countersignature Official Notice had been issued six months before the Executive Order. Thus, the government could not refer to such notice to base its decision to revoke. Consequently, SyC argues that the executive order was not revoked for being against the law, but as a political decision, namely that the MPWT wanted to lower the initial applicable rates.<sup>238</sup>
168. Likewise, SyC asserts that the minutes of the PTC session held on November 11, 2003<sup>239</sup> show that the Comptroller opposed the formula applied by Mr. Vargas and Mr. Brunner. However, SyC considers that having lowered the rates, the opinion of the Comptroller was not considered binding.<sup>240</sup>

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<sup>236</sup> Exhibit C-13, clause 1.1.

<sup>237</sup> Post Hearing Brief of SyC § 54.

<sup>238</sup> Post Hearing Brief of SyC § 65.

<sup>239</sup> Exhibit R-20, p. 2.

<sup>240</sup> Post Hearing Brief of SyC § 69.

169. Claimant alleges that the Carvajal Firm report "...proves that 13% has nothing to do with a possible ceiling or limit on profitability but is only a factor within the adjustment formula..."<sup>241</sup> SyC also argues that the profitability was not limited, considering that in 2004, when the only approved rate adjustment was made, the profit before taxes was 22.35% and the net profit was 14.47%. Therefore, if the reference to 13% is understood as a limit to profitability, the adjustment would not have been appropriate.<sup>242</sup>

(ii) Position of Costa Rica

170. Based on the opinion of various arbitral tribunals,<sup>243</sup> Respondent argues that there are three requirements in order for the investor's expectations to be protected under the independent standard of fair and equitable treatment: first, "...they have to be legitimate and reasonable; second, they must be based on conditions offered or commitments assumed by the State; and third, they have to have been taken into account by the investor when deciding whether or not to make the investment."<sup>244</sup> Considering the above, and based on *LG&E v. Argentina*, the only investor's expectations subject to protection are the ones based on the terms offered by the receiving State at the time of investment, must have real existence, and be legally enforceable. The investor cannot unilaterally establish expectations.<sup>245</sup>

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<sup>241</sup> Post Hearing Brief of SyC §§ 76, 77.

<sup>242</sup> Post Hearing Brief of SyC § 76.

<sup>243</sup> *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, August 18, 2008, § 340 (Exhibit RL-32); *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, § 154 (Exhibit RL-92); *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN3467, Award, July 1, 2004, § 185 (Exhibit RL-61); *LG&E Energy Corp et al. v. Argentine Republic*, ICSID Case No. ARB 02/1 Decision on Liability, October 3, 2006, § 127 (Exhibit RL-51); *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, Award, March 31, 2010, § 150 (Exhibit RL-53); *OKO Pankki Oyj and others v. Estonia*, ICSID Case No. ARB/04/6, Award, November 19, 2007, § 247 (Exhibit RL-62); *Suez Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 and *AWG Group v. Argentine Republic*, UNCITRAL, Decision on Liability, July 30, 2010, § 223 (Exhibit RL-90); *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, September 11, 2007, §§ 330-333 (Exhibit RL-64), among others.

<sup>244</sup> Counter-Memorial §§ 273, 288.

<sup>245</sup> Counter-Memorial § 273; *LG&E Energy Corp et al. v. Argentine Republic*, ICSID Case No. ARB/ 02/1, Decision on Liability, October 3, 2006, § 130 (Exhibit RL-51).

171. On the legal nature of the Contract, Costa Rica claims that the State owns and has the rights to the VTI service, because it is a public service that cannot be lost, even if the service is delegated to an individual.<sup>246</sup> The consideration received for the service is therefore subject to the limits imposed by Costa Rican law, such as the principle of "service at cost" that the PSRA Act defines as the principle that "...determines the pricing method and the prices of public services, in such a way that only the costs necessary to provide the service are contemplated, which will allow a competitive retribution and ensure the appropriate development of the activity..."<sup>247</sup>
172. Costa Rica claims that (i) the Attorney General has highlighted, before the start of operations, that the actual costs and expenses incurred by the contractor must be included in the methodology for rate readjustment;<sup>248</sup> (ii) the Contract provides in Clause 9.1 that the principle of service at cost is one of the guiding principles of the tariff system;<sup>249</sup> and (iii) several authorities, among them the Comptroller, the Attorney General, and the Supreme Court, have confirmed that the Contract is governed by that principle.<sup>250</sup>
173. On the other hand, Costa Rica invokes the principle of "economic and financial balance" arguing that this is another guiding principle of the Contract under Clause 9.1, which states that the Contract has as a "...fundamental principle the maintenance of the economic and financial balance of the agreement..." defining such concept in its clause 1.1 as the "...economic and financial situation with which the execution of the contract begins, to which the contractor is entitled in the event of increases in its costs that modify the originally agreed conditions, including the reasonable recovery of its investments or earnings..."<sup>251</sup> The Executive Order 30987, which established the procedure for rate readjustment states that the purpose of the rate adjustments is the "... intention of guaranteeing the economic and financial balance of the agreement, in accordance with the evaluation of properly verified

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<sup>246</sup> Counter-Memorial §§ 357-358; Exhibit C-13, clause 2.3.

<sup>247</sup> Exhibit RL-50, article 3(b).

<sup>248</sup> Counter-Memorial § 360.

<sup>249</sup> Counter-Memorial § 361; Exhibit C-13, clause 9.1.

<sup>250</sup> Counter-Memorial § 362.

<sup>251</sup> Counter-Memorial §§ 366-367.

*real costs that are necessary for the execution of the agreement...*”,<sup>252</sup> even providing in Article 7 that when applying for an adjustment it is necessary to submit the economic financial study that proves the cost modification. In this regard, Costa Rica claims that **(i)** SyC has failed to prove in the local trial or in its Memorial that the referred economic financial balance of the Contract has been affected;<sup>253</sup> and **(ii)** Riteve’s audited financial statements show that the economic financial balance of the Contract has not been affected, but rather that it has been maintained since the beginning of the Concession.<sup>254</sup>

174. Costa Rica states that SyC’s expectation that the contract would be automatically extended—without any State’s discretion—was not legitimate, per the Comptroller’s official notices to SyC before it made the investment. Respondent claims that in those official notices, the Comptroller stated that the Contract did not grant an automatic right to extend the Contract, “... *rather conferred discretion on the [MPWT]...*”<sup>255</sup>
175. As for SyC’s argument that the Comptroller General’s Countersignature Official Notice supposedly confirms the right of the Consortium to a rate readjustment ordinarily once a year, Respondent rejects this argument claiming that the Comptroller was clear in establishing that any rate adjustment, both ordinary and extraordinary, would be made only when the Consortium could prove an imbalance of the economic and financial equation of the Contract capable of justifying the rate increase requested.<sup>256</sup>
176. With regard to SyC’s legitimate expectations,<sup>257</sup> Costa Rica claims that **(i)** SyC did not refute any of the three requirements listed in the Counter-Memorial;<sup>258</sup> **(ii)** SyC did not identify the facts on which its claims with respect to those expectations are based, referring to the concept without specifying a factual basis; **(iii)** contradictorily, in its

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<sup>252</sup> Counter-Memorial § 369; Exhibit RL-75, whereas 8.

<sup>253</sup> Counter-Memorial § 373-374.

<sup>254</sup> Counter-Memorial § 388 (“*According to Mr. Hart’s report, in ten years of execution of the Agreement the Claimant has not suffered any detriment to its equity or substantial changes in the costs of the Agreement, which would have justified a rate adjustment.*”)

<sup>255</sup> Counter-Memorial § 417.

<sup>256</sup> Rejoinder § 140.

<sup>257</sup> Rejoinder §§ 154-168.

<sup>258</sup> Rejoinder § 155 (“(1) *be legitimate and reasonable; (2) be based on conditions offered or commitments made by the State; and (3) have been taken into account by the investor when deciding to make the investment*”).

Reply, SyC identifies the countersigned Contract as a source of legitimate expectations, while questioning the value of the Comptroller's Non-Countersignature Official Notice and Countersignature Official Notice; and *(iv)* SyC could not have a legitimate expectation of automatic rate adjustments, since both the Non-Countersignature Official Notice and the Countersignature Official Notice determined the unlawfulness of such automatic adjustments *prior* to Claimant's investment.

177. Regarding the efforts of Costa Rica to develop and implement a methodology for rate readjustment, Respondent restates that even under the self-standing standard of fair and equitable treatment, as insufficient as SyC considers Costa Rica's efforts, these do not fall under any of the necessary characteristics.<sup>259</sup>
178. Although SyC's argues that the VTI service is not a public service because it is not listed as a public service in Article 5 of the 7593 Act or PSRA Act, and therefore the VTI service should not be governed by the principle of service at cost, Costa Rica contends that the list referred to is not exhaustive, concluding that it does not mean that the VTI service is not a public service simply because it is not included in that article. Respondent cites examples of services that were not included in the aforementioned article that have been recognized and treated as public services, based on the expert opinion of Aldo Milano and on the statements of the Attorney General's Office.<sup>260</sup>
179. Regarding the Legal Opinion 103-J-2003 issued by the Attorney General on June 30, 2003, document in which SyC supports its position on the nature of the VTI service, Respondent claims it is not legally binding, being merely a legal opinion requested by the Legislative Assembly but not by a governmental entity.<sup>261</sup> Additionally, the case law of the Constitutional Chamber of the Supreme Court has repeatedly noted VTI to be a public service, becoming a binding criterion<sup>262</sup> that has been confirmed by the

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<sup>259</sup> Rejoinder §§ 187-189; Counter-Memorial § 281.

<sup>260</sup> Exhibit R-48, p. 8 ("*little does it matter, for this purpose that the activity is not provided for in article 5 of the PSRA Law. Therefore, to that activity the general regime of public services shall be applicable ...*"); Rejoinder §§ 211, 212; Supplementary Expert Report of Aldo Milano Sánchez of September 3, 2003 § 59.

<sup>261</sup> Rejoinder § 217; Supplementary Statement of Omar Rivera Mesén, September 4, 2013 § 22.

<sup>262</sup> Rejoinder §§ 218, 219; Exhibit R-122, Conclusions of law II and III.

Attorney General's Office in an opinion subsequent to the one cited by SyC<sup>263</sup> – consistent with Contract clause 2.3, which identifies the VTI service as a public service.

180. On the other hand, Costa Rica argues that SyC accuses Respondent of "...*distort[ing] the facts...*"<sup>264</sup> since Costa Rica provided in its Counter-Memorial proof that showed that the Consortium projected that it would get an internal rate of return of 13.28% and an annual growth of 7% in initial inspections for the VTI service between 1998 and 2008; the internal rate of return being, "... *an element that reflects contractual balance at the beginning of the concession, at least in relation to the contractor. This element in turn is used as a point of reference to later determine whether a rate adjustment is in line or not ...*"<sup>265</sup> However, Costa Rica states that Claimant contradicts itself, since after accusing Costa Rica of fabricating said document, it asserts that, "...*the document that Costa Rica now intends to utilize and falsely state was part of the bid, was a document that was informally provided in the meetings held in the CGR after it notified the government of its decision to not endorse the contract...*"<sup>266</sup> These projections, reflecting at the time an internal rate of return of 13.28%, were confirmed by Claimant's witness, José Luis López, Chairman of Riteve, who also confirmed the delivery of said projections to the Comptroller on April 26, 2001.<sup>267</sup>
181. According to Respondent, this proves that at the time of signing the Contract, the Consortium did not expect to get "... *an internal rate of return of more than 20% [o]r even 35% for providing that service. That is ultimately a profitability that is vastly superior to what the company projected before it began operations.*"<sup>268</sup> SyC did not refute in its Reply having obtained a return of 644% (21.6% annually) on its capital contribution, between September 30, 2001 and December 31, 2011.<sup>269</sup> Therefore, Costa Rica claims that not only has SyC not established a financial economic imbalance of the Contract to its detriment, but it also failed to refute that the Consortium's profits were much higher than

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<sup>263</sup> Rejoinder § 221, quoting the opinion C-053-2010 of March 25, 2010; Exhibit R-48.

<sup>264</sup> Reply § 404.

<sup>265</sup> Rejoinder § 240.

<sup>266</sup> Reply § 408.

<sup>267</sup> Rejoinder § 243; Supplementary Statement of José Luis López, May 29, 2013 § 38.

<sup>268</sup> Rejoinder § 246.

<sup>269</sup> Rejoinder § 248.

originally projected. Thus, if there is an imbalance it is in detriment of the State, not of the contractor.<sup>270</sup>

182. Costa Rica argues that, as in the case of *Iberdrola v. Guatemala*, SyC's claims must be dismissed on the ground that it has not carried its burden of proof of specifically identifying which acts or omissions by Costa Rica constituted breaches of specific provisions of the Treaty.<sup>271</sup>

### 1.3 Arbitrariness and Discrimination

#### (i) Position of SyC

183. The arguments of the Claimant in this respect refer to the fact that Costa Rica:
- a) Issued the Executive Order 30573-MPWT, three days before the start of operations, repealing the Executive Orders that had established the methodology for rate readjustment and the rates applicable for the first year of operations.
  - b) Issued Ruling 333, unilaterally terminating the Contract, making the decision not to extend the Contract for political reasons.
  - c) Approved reforms to Transit Laws that abolished the exclusivity rights granted to Riteve under the Contract.
  - d) Breached its obligation to publish the methodology agreed under the agreement of July 20, 2012.<sup>272</sup>

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<sup>270</sup> Rejoinder § 247.

<sup>271</sup> Post Hearing Brief of Costa Rica §§ 63, 64; *Iberdrola Energía S.A. v. Guatemala*, ICSID Case No. ARB/09/05, Award, August 17, 2012, § 349 (Exhibit RL-42).

<sup>272</sup> Memorial § 350.

184. With regard to the constitutional and legal powers of the Comptroller and its limitations, SyC states the following:<sup>273</sup>

- a) The Comptroller's memorandums regarding the countersignature were not directed to the Consortium, but only to the Deputy Chairman of PTC. Therefore, the Consortium never knew the Comptroller's position, situation it expressed in the letter of July 5, 2002 addressed to the MPWT.<sup>274</sup>
- b) The statements of the Comptroller were known by the MPWT more than eight months before the publication of the Executive Order 30185, and therefore invoking those statements to repeal said Executive Order is arbitrary and unfair.
- c) The purpose of the Comptroller's powers, provided in Article 11 of its Organic Law (hereinafter, the "**Organic Law**") is to "*...ensure the legality and effectiveness of internal controls and management of public funds in entities over which it has jurisdiction...*" Likewise, the Constitution of Costa Rica states in Article 184 that the main faculty of the Comptroller is the supervision and scrutiny of the public treasury, which is constituted by public funds.<sup>275</sup> In this regard, the Contract **(i)** does not provide for payment of the rates with public funds; **(ii)** does not provide for administration of public funds by the contractor; and, **(iii)** does not require the Comptroller's countersignature.
- d) The Comptroller has no power to co-manage, modify or exercise powers corresponding to the administration of the Contract. The Constitutional Chamber analyzing whether the Comptroller could or not intervene in the issue of price adjustments, expressed through vote 6432-98 that "*It is not constitutionally possible that the proper Comptroller defines what, how and when payment by concept of readjustment is made, and that it's this institution which*

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<sup>273</sup> Reply §§ 252-293.

<sup>274</sup> Exhibit R-14, p. 3.

<sup>275</sup> Exhibit R-91, article 11 of the Organic Law of the Comptroller.

*elaborate formulas and publish general opinions corresponding to the active administration*",<sup>276</sup> as Ms. Laura Rivera mentions in her witness statement. SyC also states that the Comptroller acknowledged that it did not have the authority to establish rates, because that power was reserved for the Administration.<sup>277</sup>

- e) The Comptroller has the authority to intervene in the tender proceedings, authority it used in this case, and if it found that the Terms of the Tender (particularly on the issue of rates) were contrary to Costa Rican law it could have intervened to ensure the tender was not awarded and declared void, but it did not. SyC alleges that by intervening in this case, the Comptroller *"...was able to exercise its constitutional and legal powers in this case, it intervened and it concluded that the basis of the tender presented a problem because it did not establish an automatic system for adjustment."*<sup>278</sup> Likewise, SyC quotes the Comptroller's Ruling 231 of 1999, deciding the appeals filed by other tender participants, which provides that *"...the main conclusion of the [Comptroller General] was [that] the notice is simply disregarded when referring to the mechanism but it is clear that the periodicity is annual and the initiative provenes from the concessionaire."*<sup>279</sup> Also, SyC quotes the Comptroller's Ruling 120-2000 of March 30, 2000, which concludes that *"With respect to the accurate rates, the tender rules themselves establish mechanisms and procedures for its establishment and adjustments as shown on pages 103 and 156..."*<sup>280</sup> Said pages provide that *"The rates will be adjusted annually according to studies conducted by the contractor duly approved by the MPWT"* and that *"The offered rate values for each of the services will be reviewed annually according to a study conducted by the contractor and approved by the MPWT and the entity responsible for approving those tariffs in order to avoid damaging the economic and financial balance of the successful*

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<sup>276</sup> Reply § 275; Statement of Laura Rivera of May 28, 2013 § 14.

<sup>277</sup> Reply § 278; Exhibit C-93, Statement of the Comptroller before the Legislative Assembly in Extraordinary Session of April 16, 2013.

<sup>278</sup> Reply § 285.

<sup>279</sup> Reply § 286; Exhibit C-85 p. 28.

<sup>280</sup> Reply § 287; Exhibit C-86 p. 19.

*bidder.*"<sup>281</sup> SyC considers it arbitrary and unfair that the Comptroller first issued an opinion without finding any defect, and later changed its criterion and abused its powers when it is doubtful that it had the authority.<sup>282</sup>

185. Furthermore, regarding the countersignature by the Comptroller, SyC states that:

- a) The countersignature may be required, according to the Constitution, only when a payment from public funds is contemplated since the controlling, auditing, and monitoring functions conferred to the Comptroller General refer exclusively to public funds in accordance with the opinion of the expert Ruben Hernandez. Therefore, the Administration had no obligation to seek such countersignature in this case.<sup>283</sup>
- b) Clause 12.5 of the Contract conditions the Comptroller's countersignature to approve an amendment "*...if so required by law...*", but it does not provide that any amendment to the Contract requires the Comptroller's countersignature.<sup>284</sup>
- c) In conclusion, the Comptroller's countersignature of the Contract confirms its content conformed to the existing law. However, in determining the rights and obligations of the Parties, what governs is what the parties expressly agreed upon and established in the Contract.<sup>285</sup>

186. In relation to the provisions of the Comptroller's pronouncements, SyC states that:<sup>286</sup>

- a) The Comptroller's Non-Countersignature Official Notice dated May 3, 2001, through which the countersignature of the First Contract was denied, was based on the opposition to apply its own formula previously published on

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<sup>281</sup> Reply § 288; Exhibit C-90, pp. 103, 156, 157.

<sup>282</sup> Reply § 290.

<sup>283</sup> Reply § 301; Statement of Rubén Hernández of May 6, 2013 §§ 20, 21, 39 f.

<sup>284</sup> Reply § 302; Exhibit C-13, clause 12.5.

<sup>285</sup> Reply §§ 307-308.

<sup>286</sup> Reply §§ 309-325.

December 2, 1982, because said mechanism was not intended for public services provided by the private sector on behalf of the State. SyC also alleges that in said official notice the use of indexes to calculate the rate readjustment was not objected to, and that by arguing that said readjustment is not limited to the changes in the indexes used “...the [Comptroller] acknowledges that part of the work that corresponds to the [PTC], as the entity responsible to set the tariff and regulate the service, consists of verifying the changes in the sources of the indexes utilized and the correct application of the mathematical formula in algebraic terms”,<sup>287</sup> and that the Comptroller’s Office accepted that it should produce an ordinary rate adjustment every year, which it subsequently confirmed in its official notice dated June 28, 2001. On the other hand, SyC mentions that in the official notice dated May 3, 2001 the Comptroller’s Office recognized that the PTC should verify the changes in the sources of the indexes used and the rightful application of the mathematical formula in algebraic terms, for which SyC asserts that “If an important part of the [Comptroller’s] duties functions (sic) is to verify the compliance of the Government’s obligations, and if the endorsement had the importance that Costa Rica intends, it is not understandable for the [Comptroller Office] to not have done anything to verify that the [Comptroller] complied with the obligations mentioned by [the Comptroller] in its official memorandum.”<sup>288</sup>

- b) SyC invokes the constitutional right to property intangibility as a source of the right to readjust rates, and in this regard states that:<sup>289</sup>
  - i. The right to economic and financial balance is part of and derives from the right to property intangibility protected in Article 45 of the Constitution of Costa Rica, and in accordance with the decisions of the Constitutional Chamber, price adjustments in order to keep the

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<sup>287</sup> Reply § 320; Statement of Fernando Mayorga of May 13, 2012 § 4 b.

<sup>288</sup> Reply § 324.

<sup>289</sup> Reply §§ 348, 349.

originally agreed economic level intact are part of the right to property intangibility.

- ii. Price adjustments are a right of the contractor and an obligation (not a power) of the State in any contract entered into with it, according to various precedents of the Constitutional Chamber.
  - iii. SyC asserts, based on Article 31 of the Administrative Contracting Law, that the price adjustments are not contractual. Instead, SyC claims that in any contract with the State price adjustment is recognized as a right that is granted at the moment the offer is submitted. According to Claimant the purpose is to obtain compensation for the higher costs incurred in implementing the agreed subject of the Contract; assertion that SyC supports in the Judgments 785-90 and 1801-90 issued by the Constitutional Chamber.
  - iv. The Constitutional Chamber has explained that price adjustments are made "*... through the application of mathematical equations based on the official price and cost indices prepared by the Executive Power.*"<sup>290</sup>
- c) The economic and financial balance in Costa Rica is a constitutional right of the contractor to rate readjustment. The expert opinion of Timothy Hart is wrong because it considers it a balance of the contract and applies "*... factors designed by him ...*"<sup>291</sup>
  - d) Profitability is not a factor in the calculation of the adjustments, and the need to limit profitability is not envisaged, either in the Contract or in the laws that govern it. The only scenario for the admissibility of adjustments are those agreed by the Parties, i.e. increases in costs or changes in economic indicators.

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<sup>290</sup> Reply § 370; Statement of Laura Rivera of May 28, 2013 § 17, quoting vote 6432 of the Constitutional Chamber.

<sup>291</sup> Reply § 373.

- e) The Comptroller General referred to the financial balance as a right of the contractor to respect what was agreed to contractually.<sup>292</sup>

187. In its Reply, SyC also stated that in its Counter-Memorial, Costa Rica acknowledged the following facts presented by SyC:<sup>293</sup>

- a) The State's failure to fulfill its obligation to annually readjust the rate applicable to the VTI service. Between July 2002 and July 2012, two readjustments were made out of ten that should have been implemented, because the PTC has not issued a methodology for said readjustment, despite being one of its obligations according to the Contract.
- b) The government unilaterally revoked Executive Orders 30185 and 30396, even though Executive Order 30185 was issued and published by the MPWT nine months after the Comptroller's official notices in which the decision to revoke them is allegedly based on. According to SyC this confirms that "... *political motives were determinant* ..." <sup>294</sup>
- c) That the First Chamber of the Supreme Court prevented the arbitral mechanism agreed in the Contract from operating, even though *(i)* said mechanism was provided for in the Contract; *(ii)* it was also provided for in each one of the drafts of the Contract; and *(iii)* the report in which the Legal Affairs Director of the PTC concluded that the rate issue could not be the subject of an arbitral tribunal's decision was issued three years after the Contract was signed.
- d) Costa Rica approved on December 17, 2008 a law contrary to the exclusive rights granted to SyC under the Contract, by giving the PSRA faculties related

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<sup>292</sup> Reply § 382, quoting Exhibit C-115 ("...*the appropriate thing to do is to rescue, ratify or highlight the obligation (right and duty) of the MPWT to 'promote and support incorporating technical professional associations to the vehicle inspection program', for which it shall take appropriate measures so as not to affect the financial balance that must be maintained intact under the term of the contract between the State and the Consortium Riteve SyC*".)

<sup>293</sup> Reply §§ 443-496.

<sup>294</sup> Reply § 466.

to rates for the VTI service, even though that faculty belongs to the PTC under the Contract. Similarly, through Ruling 333 Costa Rica decided not to extend the Contract in order to expand the market to several operators, and if that ruling was later overturned it was not to respect the contractor's rights but to ensure the continued provision of the VTI service.

- e) Costa Rica issued a Transit Law on October 26, 2012 that ended the exclusivity awarded by contract to SyC.
- f) Costa Rica failed to comply with its obligation to adopt and publish the methodology for rate readjustment during the first ten years of the Contract.
- g) The MPWT signed a Direct Agreement under which it was bound to publish a methodology for rate readjustment.

188. In relation to the obligation to provide foreign investors fair and equitable treatment, SyC stated that:

- a) The Treaty provides that fair and equitable treatment in no case may be less favorable than what is required by international law. Costa Rica is part of the Free Trade Agreement among the Dominican Republic, Central America and the United States, which provides a comprehensive mechanism for the protection of foreign investment under the obligation to give fair and equitable treatment. In this regard, SyC argues that the obligation of fair and equitable treatment must be interpreted in light of this treaty, in case it is found to be more favorable.<sup>295</sup>
- b) Costa Rica repeatedly argues in its Counter-Memorial that the power to establish the rates for VTI and the methodology for their adjustment is a power of imperium, and therefore only the government of Costa Rica could issue said methodology and establish the rates. Although Riteve submitted

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<sup>295</sup> Reply §§ 572-573.

documents proving the increase in its costs, the government has failed to fulfill its obligation to adopt and publish the methodology, and to establish the rates based on said methodology.<sup>296</sup>

- c) SyC requests the Arbitral Tribunal, in its assessment of what is fair and equitable, to take into account the following facts:<sup>297</sup>
- i. SyC submitted various rates with its Offer in 1998, whose values should have been updated to the equivalent figures when signing the Contract in 2001.
  - ii. The PTC, the appointed authority responsible for approving and publishing the methodology for rate readjustment, did not fulfill its obligations.
  - iii. Despite having twice reached an agreement on the methodology applicable to rate readjustment (the first in the Contract and reflected in Executive Order 30185, the second through the Direct Agreement of July 2012), the government of Costa Rica did not comply with the obligations undertaken and ignored the decisions it reached in those agreements.
  - iv. Costa Rica invokes in its defense the actions of agencies that are not involved in the Contract, such as the Comptroller.
  - v. The Treaty in its preamble mentions the importance of creating favorable conditions for investment, and mentions the importance of enhancing economic cooperation between the two countries.<sup>298</sup>

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<sup>296</sup> Reply § 590.

<sup>297</sup> Reply § 591.

<sup>298</sup> Reply § 599.

- vi. Regarding the award of *Suez Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v. Argentine Republic*, Claimant argues that the purpose of economic cooperation reaffirms and reinforces the importance of fair and equitable treatment in the structure of the treaty created by the contracting parties.<sup>299</sup>
- vii. When citing the award issued in *Enron Corporation Ponderosa Assets v. Republic of Argentina*, Costa Rica omitted that the tribunal concludes that a stable legal system for investment is an essential element of fair and equitable treatment, that the protection of the investor's expectations when making the investment is an aspect of the standard, and that these expectations derived from conditions offered by the State to the investor at the time of investment, defining those expectations as those based on the conditions offered by the State at the time of the investment, which cannot be established unilaterally by one party, and that in said case the source of such legitimate expectations was the contract and the law applicable to it, conclusions which could be reached in this case.<sup>300</sup>
- viii. Costa Rica seeks to limit the profitability of SyC, without having any express provision in the Contract or permitted by law, which is contrary to the conditions necessary to promote investment.<sup>301</sup>
- ix. All the facts recognized by Costa Rica constitute arbitrary measures contrary to foreign investment.<sup>302</sup>

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<sup>299</sup> Reply § 611; *Suez Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, July 30, 2010, §§ 218-219, 222, 229, 231 (Exhibit RL-90).

<sup>300</sup> Reply §§ 602-603; *Enron Corporation y Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Award, May 22, 2007, §§ 260-262 (Exhibit RL-36).

<sup>301</sup> Reply §§ 608, 625.

<sup>302</sup> Reply § 624.

189. Claimant states that in order to determine whether the State breached its obligation not to take discriminatory measures pursuant to Article III.2 of the Treaty, the State's action must be analyzed for reasonableness, in the sense that it follows a rational policy.<sup>303</sup>
190. Also, SyC argues that the fair and equitable treatment to which Costa Rica was bound allowed Claimant to expect Respondent not to act in a contradictory manner, that is, "*...without reversing decisions arbitrarily or previous or existing approvals issued by the State in which the investor relied and based the assumption of commitments and the planning and implementation of economic and commercial operation ...*"<sup>304</sup>
191. In light of the foregoing, SyC argues that Costa Rica has breached its obligation not to obstruct in any way by arbitrary or discriminatory measures the enjoyment of its investment, established under Article III.2 of the Treaty.<sup>305</sup>
192. Claimant's allegations in this regard are that Costa Rica:
- a) Engaged in contradictory and arbitrary behavior by overturning Executive Orders 30185 and 30396 three days before operations began.<sup>306</sup>
  - b) By enacting Ruling 333 Respondent decided not to extend the Contract and urged COSEVI to promote a tender to award the concession for the provision of the VTI service to the largest possible number of companies.
  - c) Ended the exclusive rights granted under the Contract in an arbitrary and discriminatory manner.<sup>307</sup>
193. Claimant regards Ruling 333 as a decision to terminate the Contract, and asserts that:<sup>308</sup>

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<sup>303</sup> Memorial § 494, quoting *AES Summit Generation Limited AES-TISZA EROMU KFT v. Republic of Hungary*, ICSID Case ARB/07/22, Award, September 23, 2010, §§ 10.3.1 - 10.3.9.

<sup>304</sup> Memorial § 499, quoting *Técnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case ARB(AF)/00/2, Award, May 29, 2003, 43 I.L.M. 133 § 154.

<sup>305</sup> Memorial §§ 365-371.

<sup>306</sup> Memorial §§ 498, 500.

<sup>307</sup> Memorial §§ 394, 395.

<sup>308</sup> Reply §§ 523-529.

- a) Clause 4 of the Contract provides the agreements on extensions, which state that the decision not to extend was only considered a "...possible decision..." Consequently, SyC could expect the extension with only a possibility of non-extension in which case the decision should be based on a technical report communicated to Riteve six months prior to the date of extension. However, said report was never prepared, and the MPWT based its decision not to extend the contract on its intention to award the VTI service to a larger number of bidders.
- b) If said decision was reversed, it was not to honor the obligations contracted with the Consortium, but in order to ensure continuity in the provision of VTI service.

(ii) Position of Costa Rica

194. Referring to arbitrary and discriminatory measures, Costa Rica agrees that the standard of fair and equitable treatment requires the State not to act in a discriminatory and arbitrary manner regarding the treatment given to foreign investors and their investments. In the case of several treaties, including the Treaty, there is a provision that expressly prohibits arbitrary and discriminatory measures. Therefore, Respondent claims that proving that none of the government actions that Claimant identifies are arbitrary or discriminatory under Article III.2 of the Treaty also implies the refutation of Claimant's allegations of arbitrariness and discrimination under the obligation to give fair and equitable treatment provided in Article III.1 of the Treaty.<sup>309</sup> Citing the case of *Enron Corporation and Ponderosa Assets, LP v. Argentine Republic*, Costa Rica claims that for a State's conduct to be considered an arbitrary and discriminatory measure, it must rise to the level of severity of being manifestly improper, and there must be a capricious, unreasonable or absurd differentiation in comparison to other entities or sectors.<sup>310</sup>

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<sup>309</sup> Counter-Memorial § 274.

<sup>310</sup> Counter-Memorial §§ 275-276; *Enron Corporation y Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Award, May 22, 2007, §§ 281, 282 (Exhibit RL-36).

195. Thus, Costa Rica claims that SyC did not meet its burden of proof to demonstrate that the acts and omissions of the State referred to in the Claimant's Memorial are in violation of the obligation to give fair and equitable treatment in line with the minimum standard of treatment, either under international law or under the autonomous standard of protection.<sup>311</sup> Costa Rica points out the following:

- a) On the subject of SyC's expectations (the annual rate adjustments for the VTI service, the automatic extension of the Contract in case of the absence of a "technical breach report" and the exclusive right to provide the VTI service), Claimant does not meet the requirements established by case-law to be considered legitimate.<sup>312</sup>
- b) SyC's expectation that the Contract and the legal system granted it the right to automatic and annual rate increases is not legitimate, given that:
  - i. Before investing, the Comptroller explained to Claimant that "...a rate adjustment methodology based on general indexes, which as a result gave automatic adjustments, would be improper because it is opposite to Costa Rican law."<sup>313</sup> Moreover, expectations that are contrary to the law or the Contract cannot be considered legitimate; consequently, the First Contract did not get the Comptroller's countersignature and therefore never had legal force under the Costa Rican legal system, since "...automatic rate readjustment was not in conformity with the economic and financial balance of the Agreement and, also, that it undermined the supervision power of the [PTC], which would remain limited only to 'verifying' the increases that would take place, without having the possibility of conducting the technical studies necessary to determine if such increases were actually justified..."<sup>314</sup> Therefore, SyC knew that rate adjustments

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<sup>311</sup> Counter-Memorial § 277.

<sup>312</sup> Counter-Memorial § 289.

<sup>313</sup> Counter-Memorial § 290.

<sup>314</sup> Counter-Memorial § 293; Exhibit R-5, p. 6.

could not depend on a formula based on overall indexes that result in automatic increases.<sup>315</sup>

- ii. The Comptroller countersigned the Contract precisely because the rate adjustment clause had been amended, eliminating any reference to automaticity and general indexes included in the First Contract.<sup>316</sup> Therefore, the rate adjustment clause in the final version of the Contract does not contemplate a formula based on general indexes that produces automatic increases.
- c) Regarding the alleged lack of approval and publication of the methodology for rate readjustment, Costa Rica claims that several methodologies for rate readjustment were approved, also approving the respective increases under the current methodology. Although some of them were later invalidated because they were not in line with the Contract, in the cases that were in line with the Contract, both the methodology and the increase were opposed by Riteve through various actions.<sup>317</sup> Additionally, any error by the PTC in its attempts to adopt and implement a methodology for rate adjustment is not an infringement of the minimum standard of treatment under customary international law invoked by the Claimant.<sup>318</sup>
- d) Regarding the Claimant's requests to readjust rates, Costa Rica argues that *(i)* SyC did not prove that Costa Rica had not approve them having the contractual obligation to do so;<sup>319</sup> *(ii)* SyC did not prove that the failure to authorize increases constitutes a violation of the obligation to provide fair and equitable treatment under the Treaty; *(iii)* SyC was not entitled to readjustment, given that readjustments are not automatic, but "*...must be authorized only when there has been a consequence on the 'economic and financial*

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<sup>315</sup> Counter-Memorial § 295.

<sup>316</sup> Counter-Memorial § 300; Exhibit R-7.

<sup>317</sup> Counter-Memorial §§ 305-306, 327.

<sup>318</sup> Counter-Memorial § 328.

<sup>319</sup> Counter-Memorial § 354.

*balance' of the Agreement; that is to say, when there have been 'substantial changes in costs' that affect the conditions originally agreed, 'including the reasonable recovery of the investments or the earnings' on the part of the contractor..."*<sup>320</sup> Also, Costa Rica states that "*... neither in the ordinary proceedings, nor in this international arbitration, has the Claimant been able to demonstrate the existence of an economic imbalance in the Agreement, in such a way that rate increases would turn out to be justifiable.*"<sup>321</sup>

196. Regarding the decision not to extend the Contract for another ten years, provided in Ruling 333, Costa Rica states that it was not unfair, arbitrary, unpredictable or capricious, and therefore it is not a violation of fair and equitable treatment.<sup>322</sup> Respondent mentions that the resolution included the reasons and the legal basis why the MPWT decided not to extend the Contract,<sup>323</sup> and the contractual clause<sup>324</sup> on which it relied to do so.<sup>325</sup> Also, Costa Rica counters that Ruling 333 was not a "rescission", nor a "termination", as mentioned by the Claimant,<sup>326</sup> and instead claims that SyC's assertion that the MPWT by reversing said Ruling, "*...acknowledged that it had issued Resolution 333 unfairly and arbitrarily*"<sup>327</sup> is false.
197. Furthermore, given that the Contract was subsequently extended for another ten years, Costa Rica concludes that the original decision not to extend it caused no damage to SyC. It is worth noting that Ruling 333 was reversed and annulled by the MPWT before the exhaustion of the initial term.<sup>328</sup>

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<sup>320</sup> Counter-Memorial § 355.

<sup>321</sup> Counter-Memorial § 356.

<sup>322</sup> Counter-Memorial §§ 392, 393.

<sup>323</sup> Counter-Memorial § 404 ("*the decision not to extend the Agreement was grounded in Article 19 of the aforementioned Traffic Act amendment. Article 19 stipulates to this respect that 'the largest possible number of service providers for vehicle owners obligated to get technical inspections will be encouraged'...*"); Exhibit C-19, whereas 8.

<sup>324</sup> Costa Rica asserts that clause 4.2 provides that the initial term's extension is at the discretion of the Administration. Counter-Memorial, §§ 395-403.

<sup>325</sup> Counter-Memorial § 394.

<sup>326</sup> Counter-Memorial § 406.

<sup>327</sup> Counter-Memorial § 415, quoting Memorial § 398.

<sup>328</sup> Counter-Memorial §§ 408, 409.

198. As for SyC's challenge of the constitutional and legal authority of the Comptroller to countersign the Contract, Costa Rica asserts the following:<sup>329</sup>
- a) SyC attacks the Comptroller's authority to countersign for the first time in its Reply, and in no previous process that power had been challenged.
  - b) The Parties, including the company Riteve controlled by Claimant, recognized the Comptroller's authority, as well as the necessity to obtain its countersignature, and followed the opinion and guidelines of said entity voluntarily.
  - c) Clauses 4.1, 9.4 and 12.5 of the Contract, which refer to the countersignature requirement, prove false SyC's assertions that the countersignature was not included as a requirement in the Contract. These clauses mention that the countersignature is the starting point and prior step to the contractor's operations, using the countersignature as the date from which the term for the publication of the rate adjustment methodology must be counted. Respondent also argues that any amendment or extension of the Contract required the Comptroller's countersignature. This implies that the countersignature is required for the entry into force of the Contract, because if the Contract did not require countersignature it would make no sense to submit its amendments or extensions to countersignature.
  - d) As to SyC's claim that the Comptroller had no authority to countersign the Contract because the Contract does not provide for payments with public funds, given that the Contract expressly refers to the requirement of countersignature, Costa Rica argues that it is not necessary to answer this statement. However, Respondent mentions that according to Article 8 of the Organic Law, the term "*Public Treasury*" is not limited only to public fundraising, but also covers issues such as "*administrative contracts*", being

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<sup>329</sup> Rejoinder §§ 80-142.

bound to ensure the legal integrity of the administrative contracts in the light of the applicable law. Moreover, the very concept of "*public funds*" is wide, and includes obligations under administrative contracts, according to Article 9 of the Organic Law. Active payment of funds by the State is not required for a contract to necessitate countersignature. Instead if the Contract is subject to the rules of government contracting and under the legal concept of *public treasury* and *public funds*, both concepts being broad, a contract will require countersignature.

- e) Regarding the official notice through which the Comptroller decided not to countersign the First Contract, for not being in line with the law, SyC made several observations. Respondent explains that the reason why the Comptroller opposed its own formula (published on December 2, 1982) was that said formula had to do only with continued supply contracts, services contracts and leases not related to buildings or premises, in which an automatic adjustment formula was acceptable, but that formula was not applicable to the VTI service as clarified by the Comptroller, because it is a public service provided by the private sector on behalf of the State and paid directly by users, rather than a service provided by the private sector directly to the State, in which case the aforementioned formula would apply.
- f) SyC argues that the Comptroller's decision not to countersign the Contract did not challenge the Consortium's right to economic and financial balance, nor the power to make rate adjustments. Costa Rica states that it does not deny that right of SyC, but claims that such adjustments apply only in certain circumstances described in the Contract and in the official notice issued by the Comptroller.
- g) SyC asserts that the Non-Countersignature Official Notice recognized that rate readjustment should not be limited only to the component of inflation, but failed to mention that said official notice confirms this by stating that "*...the contractor may qualify for a readjustment from the moment an increase occurs*

*in the service provision costs, which must be documented and, on every occasion, submitted for approval by the Public Transport Council...*"<sup>330</sup>

- h) SyC argues that the Non-Countersignature Official Notice does not conclude on the inadmissibility of a methodology based on mathematical formulas using objective indexes. However, this does not mean that said methodology was appropriate, especially if it is considered that in the same official notice the Comptroller stated that the economic and financial balance of the Contract will be maintained when the PTC, during the rate revisions, "... makes the respective rate studies based on the financial information submitted by the contractor as has already been established in the request for proposals."<sup>331</sup>
- i) SyC argues that the Comptroller agreed that an ordinary rate readjustment should occur every year; nevertheless, Respondent states that the Comptroller did do no more than refer to the rate review mechanism of the First Contract, which was a mere description of a contractual clause, not something that the Comptroller had accepted.
- j) As to SyC's argument that the countersignature, as a simple act of approval of a contract to be effective, cannot define the content thereof, Costa Rica states that in the case of not being able to countersign a contract for being contrary to the law, the Comptroller should issue a reasoned decision that specifies the errors that should be corrected in order to remedy the deficiency that prevents the countersignature. Furthermore, this decision does not imply any substitution of the agreement of the parties, and may be challenged. Therefore, the Comptroller's aim when issuing its Non-Countersignature Official Notice was to point out to the parties the legal flaws that prevented the First Contract from being approved.

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<sup>330</sup> Rejoinder § 117

<sup>331</sup> Rejoinder § 118, quoting Exhibit R-5 p. 7.

199. In the case of the Comptroller's statements before the Legislative Assembly on April 16, 2013, cited by SyC in order to infer that the Comptroller exercised powers of the Administration that did not correspond to it when issuing its Non-Countersignature Official Notice and Countersignature Official Notice, Costa Rica does not question the content of what is cited, since said statements do not refer to the contents of the mentioned official notices. In the same statement the Comptroller refers to the process of countersignature and the Comptroller's authority to *(i)* not countersign a contract that does not comply with the laws; and *(ii)* to indicate to the parties the legal errors that must be corrected.<sup>332</sup>
200. Regarding the alleged disregard by the Consortium of the position of the Comptroller, Respondent considers it a false statement since once the Non-Countersignature Official Notice had been issued, the Consortium itself, together with the PTC, undertook the correction of the First Contract's legal defects by signing a new version that rectified those deficiencies. Thus, SyC cannot claim that it was not aware of that official notice, especially when knowing that getting the countersignature was required for the Contract's enforcement. Also, Reply Exhibit C-84 indicates that the Comptroller's opinion about Executive Order 30185 was known by the Consortium on the same day that the VTI Supervisory Authority made it known to the PTC in a meeting on May 6, 2002.<sup>333</sup>
201. On the issue of the Comptroller's powers, Costa Rica states that at the Hearing, Claimant's legal expert, Mr. Carlos Vargas Arguedas, recognized that all contracts are subject to countersignature, including the Contract in question, and that the Comptroller did not exceed its powers by issuing the Countersignature Official Notice. Claimant's other legal expert also confirmed that the Comptroller acted in strict compliance with the rules when issuing the Non-Countersignature Official Notice and the Countersignature Official Notice. Therefore, Costa Rica asserts that Claimant failed

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<sup>332</sup> Rejoinder § 133, citing Exhibit C-93.

<sup>333</sup> Rejoinder § 137; Exhibit C-84, pp. 12, 13.

to support its argument that the Comptroller exceeded its functions, improperly acting as co-manager of the Contract.<sup>334</sup>

202. Although SyC said at the Hearing that both Executive Order 30185 and 30396 had been revoked "*without any explanation*",<sup>335</sup> Ms. Cerdas explained during the Hearing that on May 6, 2002, PTC officers met with Comptroller officers to discuss the VTI service rate issue, and that the Comptroller officers highlighted that the rate readjustment formula provided in Executive Order 30185 was invalid, given that it was based on overall indexes, as the Comptroller had previously stated in its Non-Countersignature Official Notice and Countersignature Official Notice. Also, Ms. Cerdas argued that on the same day PTC officers informed Riteve in writing of the observations made by the Comptroller, and after analyzing the content of Executive Order 30185 in view of such comments, the PTC and the MPWT agreed with the Comptroller and considered that the rate readjustment methodology should be adjusted according to such indications in order to amend the error.<sup>336</sup>
203. As for the approval and publication of a methodology for the VTI service rate readjustment, Costa Rica contends that contrary to what Claimant indicates, as was confirmed in the Hearing by Ms. Cerdas, Director of Legal Affairs of the PTC, the PTC has approved rate adjustment formulas on five occasions, and it was SyC who opposed their adoption by administrative and judicial proceedings.<sup>337</sup> The methodologies that have been approved by the PTC are the following:

*“(i) rate adjustment formula approved by the [PTC] Board of Directors on 16 September 2003, agreeing to a 13.13% rate increase;*

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<sup>334</sup> Post Hearing Brief of Costa Rica §§ 75-76.

<sup>335</sup> Post Hearing Brief of Costa Rica § 88, quoting Transcript Day 1, (ENG), p. 190: 21-22.

<sup>336</sup> Post Hearing Brief of Costa Rica §§ 88-89.

<sup>337</sup> Post Hearing Brief of Costa Rica §§ 96-97.

*(ii) rate adjustment formula approved by the [PTC] Board of Directors on 23 October 2003, which maintained the 13.13% increase approved on 16 September 2003, but considered minor changes to the figures;*

*(iii) rate calculation methodology proposed by Despacho Carvajal and approved by the [PTC] Board of Directors on 28 May 2004;*

*(iv) rate adjustment formula approved by the [PTC] Board of Directors on 16 December 2005; and*

*(v) rate adjustment formula approved by the [PTC] Board of Directors on 19 December 2006.”<sup>338</sup>*

204. Also, the instances in which Riteve opposed the methodologies approved by the Board of Directors were the following:

*“(i) application for partial revocation with subsidiary appeal filed by Riteve SyC on 19 January 2005 against the [PTC] Board of Directors’ decision approving the 12.76% [VTI] rate increase for 2005, approved on 16 December 2004;*

*(ii) local ordinary proceeding initiated by Riteve SyC on 20 February 2006 against [PTC] and the State (File: 06-000159-0163-CA), requesting annulment of the [PTC] Board agreement to approve a 12,76% increase of [VTI] rates for 2005, approved on 16 December 2004;*

*(iii) application for partial revocation with a subsidiary appeal lodged by Riteve SyC on 15 January 2007 against the agreement adopted by the [PTC] Board of Directors on 19 December 2006, approving a new rate methodology proposed by the Instituto de Investigaciones en Ciencias Económicas of the Universidad de Costa Rica (IICE”);*

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<sup>338</sup> Post Hearing Brief of Costa Rica § 98.

*(iv) application for review, clarification and addition lodged by Riteve SyC against the Resolution of the [MPWT] of 12 March 2009, in which the [MPWT] had accepted the appeal lodged by Riteve SyC on 15 January 2007; and*

*(v) the rejection of the IICE methodology presented by Riteve SyC on 6 July 2009.”<sup>339</sup>*

205. On the other hand, Costa Rica recalls that it has never denied Riteve the right to obtain rate readjustments in the scenario of an imbalance as contemplated in the Contract, but Claimant, who has the burden of proof to demonstrate that imbalance, has never done so.<sup>340</sup>
206. Costa Rica also mentions that the contractor does not have the possibility of unlimited profit, as alleged by SyC, given the explicit limitation to profitability in clause 1.1 of the Contract when defining "*economic financial equilibrium*".<sup>341</sup> Costa Rica emphasizes the modest expectations SyC had regarding the return on its investment, as revealed by the projections contained in Riteve's Economic Projection 1998-2008, in which Claimant had projected an internal rate of return of 13.28%, as confirmed at the Hearing by the majority partner of Claimant, Mr. Amador de Castro.<sup>342</sup> Furthermore, SyC's own expert, Mr. Nicholas Good, confirmed that he agreed with the calculation of Costa Rica's expert in damages, Mr. Hart, that Riteve has had an internal rate of return of 31.75%, which is almost equivalent to three times the one originally projected by Claimant.<sup>343</sup>
207. As for the principle of economic and financial balance of the Contract, which according to SyC would apply only to the extraordinary rate readjustments, but not to the regular ones, Costa Rica alleges that even Claimant's legal expert, Ms. Rivera, confirmed that the principle of economic balance applies also to regular reviews.<sup>344</sup>

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<sup>339</sup> Post Hearing Brief of Costa Rica § 99.

<sup>340</sup> Post Hearing Brief of Costa Rica §§ 105-106.

<sup>341</sup> Post Hearing Brief of Costa Rica §§ 116-117.

<sup>342</sup> Post Hearing Brief of Costa Rica § 120; Exhibit R-6 p. 7; Transcript Day 2 (SPA), Cross-examination of A. De Castro, p. 50.

<sup>343</sup> Post Hearing Brief of Costa Rica § 127.

<sup>344</sup> Post Hearing Brief of Costa Rica §§ 133-134.

208. Costa Rica also notes that the rate adjustment sought by Claimant is not justified if one takes into account that the rate stipulated in its Offer was the highest, combined with the fact that the volume of inspections increased exponentially (much higher than originally projected), as did the company profits.<sup>345</sup>
209. As for the rules of contract interpretation according to Costa Rican law, Respondent states the following:

*"...in the event the Agreement is deemed to be unclear, the Costa Rican legal system provides an interpretation canon that must be respected, as follows: in the event of a vague Administration contract clause, 'public interest shall prevail', as provided by the PGR in its Legal Opinion OJ-190-2001 of 5 December 2001. The RFP bid documents establish the mechanisms to select the bid that best suits public interest, and public interest continue to be the guiding principle throughout the contract execution phase.*

*Another fundamental principle to consider regarding contract interpretation is the principle of efficiency, provided in Article 10 of the General Law of Public Administration. This Article provides that 'administrative norms shall be interpreted in the manner that best guarantees achievement of the public goal pursued, fully respectful of the relevant rights and interests.' The norm also provides that administrative norms should be 'interpreted and integrated considering other related norms, and the value and nature of the conduct and facts to which it refers.' Therefore, the administrative norm must be interpreted in the best manner possible to guarantee achieving the public goal pursued, with full respect for the relevant rights and interests..."<sup>346</sup>*

210. Respondent answers that the reason the State decided to reverse Executive Orders 30185 and 30396 issued by MPWT, through Executive Order 30573, was that they were

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<sup>345</sup> Post Hearing Brief of Costa Rica § 142.

<sup>346</sup> Post Hearing Brief of Costa Rica §§ 169-170.

contrary to law and to the previous Comptroller's criteria,<sup>347</sup> for the same reason the First Contract was not countersigned. Moreover, the legality of Decree 30573 was confirmed by a competent national court, which rejected Riteve's request for annulment considering that Executive Order 30573 was "*absolutely legal*", stating that "*it would not be appropriate to affirm that the [Executive Order] objected is arbitrary.*"<sup>348</sup> This is so because the methodology provided in Executive Order 30185 was contrary to Costa Rican law for it was not based on the Consortium's actual costs and expenses, nor on a proven imbalance in the economic and financial conditions of the Contract, but rather on general indexes that resulted in automatic rate increases.<sup>349</sup>

211. As to Executive Order 30396, Respondent states that it had to be reversed because "*...by founding [Executive Order 30396] on the provisions and methodology of [Executive Order 30185], the last one, the repeal of which turns out to be imperative, it determined that both regulations must be left without effect or value...*"<sup>350</sup> Therefore, Costa Rica claims that the State corrected defects from which the Consortium "*...would have benefited, but benefits to which it had never been entitled...*" Thus, even if SyC suffered damage as a result of losing a "*...unexpected benefit...*"<sup>351</sup> it had no right to, the correction of the error cannot be considered a State violation, even if the correction caused the loss of the windfall profit. In that regard, Costa Rica states that:

*"...that [Executive Order 30573] which the Claimant calls 'unfair' and 'arbitrary', has a rational base, is consistent and coherent with previous pronouncements of the comptroller entity of the State (the Comptroller's Office), is in conformity with the clause of the Agreement regarding rate adjustments (Clause 9.4), is neither arbitrary nor discriminatory, did not alter the legal frame that existed when the Claimant made its investment, and keeps a rational relation with the principles of service at cost and economic financial balance that govern the privity of contract with Riteve SyC. Consequently, it is not possible to conclude*

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<sup>347</sup> Counter-Memorial §§ 334, 335 ("*Specifically, these decrees were contrary to the 'indications of the Comptroller Entity in its Official Letters 4579 (Di-AA-1159) of May 03, 2001 and 7168 (Di-AA-1793) of June 28, 2001'*"); Exhibit RL-71.

<sup>348</sup> Counter-Memorial § 344; Exhibit RL-88 p. 52.

<sup>349</sup> Counter-Memorial § 346.

<sup>350</sup> Counter-Memorial § 348; Exhibit RL-71.

<sup>351</sup> Counter-Memorial § 352.

*in any way that, by adopting [Executive Order 30573], Costa Rica has violated its obligation to give fair and equitable treatment."*<sup>352</sup>

212. Costa Rica also argues that the decision to open the market to allow other companies to provide the VTI service, reflected in Article 19 of the Transit Law of 2008, "*...was in no way unfair, unforeseen, capricious, arbitrary, discriminatory; neither does it in any way become a breach by Costa Rica of the obligation to give the Claimant fair and equitable treatment ... neither can such decision be deemed a violation of the exclusive right Riteve SyC has under the Agreement.*"<sup>353</sup>
213. Costa Rica argues that said decision was taken because of the obligation to protect the public interest and to ensure the continuity of the VTI service in the country, in view of the fact that given the possibility that the Contract would not be extended, or that it could be terminated earlier by either party, "*...it was reasonable for the State to take the necessary precautions so that another company (or companies) could provide [VTI] service in Costa Rica ...*"<sup>354</sup> It involved, in any case, predictable provisions, and the Claimant could not have legitimately had the expectation that "*...the State would never consider permitting another company or other companies to provide the [VTI] service ...*" or that "*... it would have a monopoly ad perpetuum for providing the [VTI] service in Costa Rica ...*"<sup>355</sup>
214. Additionally, Respondent claims that given that in reality no other company has been authorized to provide the VTI services in Costa Rica, the decision to open the market did not interfere with SyC's investment, as it continues to be the exclusive provider of the service and said decision did not cause Claimant any damage. Consequently, Respondent has not breached any obligation under the Treaty.<sup>356</sup>
215. Respondent states that SyC mixed in its claim about arbitrary or discriminatory measures two concepts of international investment law without defining the scope of

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<sup>352</sup> Counter-Memorial § 351.

<sup>353</sup> Counter-Memorial § 421.

<sup>354</sup> Counter-Memorial § 423.

<sup>355</sup> Counter-Memorial § 425.

<sup>356</sup> Counter-Memorial §§ 423, 431.

either: *(i)* the obligation not to obstruct investments by arbitrary or discriminatory measures provided in Article III.2 of the Treaty, and *(ii)* the national treatment obligation contained in Article IV of the Treaty.<sup>357</sup>

216. Regarding the scope of the obligation not to obstruct investments by arbitrary or discriminatory measures, Respondent asserts, based on case law, that for a measure attributable to the State to be considered arbitrary "*...there must be an important dose of intentionality, very serious and shocking error in the State behavior. It is clear and beyond question that a mere legal error on itself does not constitute arbitrariness.*"<sup>358</sup> Regarding the concept of discrimination, Costa Rica cites the tribunal's opinion in the Enron case, in which the existence of a "*...capricious, irrational or absurd...*" treatment given to economic sectors was considered necessary for considering there had been discrimination.<sup>359</sup>
217. With regard to measures that SyC invokes as contrary to Article III.2 of the Treaty, Costa Rica has stated the following: *(i)* Executive Order 30573-MPWT, whereby Executive Orders 30185 and 30396 were revoked, is not arbitrary or discriminatory for it has a rational and factual basis, meets regulations and pre-established standards, and follows the aims and objectives of a rational policy established by the State for public services, both before and after its issuance;<sup>360</sup> *(ii)* the decision not to extend the Contract contained in Ruling 333 was not arbitrary or discriminatory, given that it was based on the good faith interpretation of Clause 4.2 of the Contract, in light of the Comptroller's official notices, was rationally related to a legitimate public policy to promote free competition in the VTI service, was not unfair, and ultimately caused no adverse effects to Riteve given that it was revoked and annulled before the exhaustion of the initial ten year term of the Contract;<sup>361</sup> *(iii)* the decision to promote the participation of as many VTI service providers as possible is not arbitrary or discriminatory, since it is rational to both take provisions in case Riteve stopped providing the VTI service and to adopt and promote a free competition policy for the benefit of users, which cannot be

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<sup>357</sup> Counter-Memorial § 467.

<sup>358</sup> Counter-Memorial § 476.

<sup>359</sup> Counter-Memorial § 477; Exhibit RL-36 § 281.

<sup>360</sup> Counter-Memorial §§ 485, 486.

<sup>361</sup> Counter-Memorial § 492.

considered as a discriminatory or arbitrary decision, given that no provision of the Transit Law of 2008 or other governmental act has excluded Riteve from participating in COSEVI's public procurement contracts in order to provide the VTI service,<sup>362</sup> nor does it violate Article III.2 of the Treaty given that it did not hinder the enjoyment of the investment;<sup>363</sup> *(iv)* the rate increase ordered by PSRA for other public services (water, electricity, fuel, public transport) is not an arbitrary or discriminatory measure, because they are different sectors, participants are situated in different circumstances and they involve objective differences that arise from the application of the principle of service at cost in each industry.<sup>364</sup>

218. Costa Rica states that SyC's statement relating the absence of a technical report attached to Ruling 333 to an alleged political motivation by the State, is false. In this regard, Costa Rica has never denied that Ruling 333 was issued without such report, and the ruling of June 15, 2012 by which the above-mentioned Ruling 333 was revoked, indicated that expressly. However, Costa Rica argues that it is wrong to claim that not accompanying the resolution with a technical report involves purely political reasons that were not based on a legitimate interest, or that the State had no right to decide not to extend the Contract. Costa Rica argues it was a decision "*...that was made based on the legitimate interest in opening the market up to competition (in the public interest of benefitting the user) as was determined in Clause 4.2 of the Agreement and the provisions in the Transit Law of 2008.*"<sup>365</sup> Also, Respondent rejects SyC's demand that Costa Rica compensate it for that market opening, because Claimant has failed to prove the existence of damages, especially considering that the decision not to extend the contract was ultimately reversed and had no effect, furthered by Claimant acknowledging in its Reply that it was a decision legitimately protected by a State law.<sup>366</sup> Moreover, clause 4.2 of the Agreement grants the Administration the authority and discretion not to extend the Contract if the public interest requires so.<sup>367</sup>

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<sup>362</sup> Counter-Memorial §§ 502, 503.

<sup>363</sup> Counter-Memorial § 505.

<sup>364</sup> Counter-Memorial § 513.

<sup>365</sup> Rejoinder § 255.

<sup>366</sup> Rejoinder § 256-257.

<sup>367</sup> Rejoinder § 258.

219. Respondent's representatives, witnesses, and experts acknowledged that at no time were Riteve's operations interrupted.<sup>368</sup> Costa Rica mentions that Riteve's exclusivity right has not been infringed, having been confirmed by SyC's legal expert, Mr. Hernández Valle, that there is no other VTI service operator in Costa Rica.<sup>369</sup>
220. In relation to the Direct Agreement of July 20, 2012, and the publication of the attached executive order draft, the former minister Rivera stated in the Hearing that even prior to the signing of said agreement, he spoke with Ms. Rivera, Riteve's attorney, about the fact that the promulgation of the executive order would not be stipulated as an obligation.<sup>370</sup> So Claimant was aware that the draft would require several amendments and compliance with several requirements before being published.<sup>371</sup>
221. Costa Rica claims to have demonstrated that it did not fail to comply with its obligation to give fair and equitable treatment, because it was not proven that Costa Rica had infringed the high threshold of the fair and equitable treatment legal standard under the Treaty.

#### 1.4 Denial of Justice

##### (i) Position of SyC

222. Claimant asserts that a denial of justice arises when a court with competence and jurisdiction issues a ruling in violation of due process and where a court's decision is clearly inappropriate, causing unfair treatment to the investor.<sup>372</sup>

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<sup>368</sup> Post Hearing Brief of Costa Rica § 150.

<sup>369</sup> Post Hearing Brief of Costa Rica § 153; Corrected Transcript, Day 4 (ENG), Cross-examination of Rubén Hernández, p. 1919:13-20.

<sup>370</sup> Post Hearing Brief of Costa Rica § 165; Transcript, Day 3 (ENG), Direct examination of R. Rivera pp. 871-872.

<sup>371</sup> Post Hearing Brief of Costa Rica §§ 163-164; Transcript, Day 4 (ENG), Cross-examination of Laura Rivera, p. 124.

<sup>372</sup> Memorial § 474, quoting *Azinian v. Mexico*, ICSID Case No. ARB(AF)/97/2, Award, November 1, 1999, 39 ILM 537, 552 (1999), §§ 98-102; and *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, 42, Award, October 11, 2002, ILM 85, 109 (2003).

223. SyC cites *Saipem SpA v. the People's Republic of Bangladesh* as an example of a denial of justice by a domestic court annulling the jurisdiction of an arbitral tribunal, where the arbitral tribunal concluded that the standard for rejecting the jurisdiction and the manner in which the judge applied the standard to the rights constituted an abuse of law, given that domestic courts "... cannot use their jurisdiction to overturn arbitrators for reasons unrelated to misconduct because they generate large risks against the just resolution of the dispute ..."<sup>373</sup>
224. In light of the foregoing, SyC argues that the First Chamber of the Supreme Court's Judgment 906 A-04 dated October 21, 2004, deprived Riteve of access to justice by preventing the contractually agreed mechanism from being able to take effect.<sup>374</sup>
225. Claimant's allegations in this regard relate to access to justice, and imply that:
- a) There was an arbitration agreement;
  - b) Arbitration was valid under the law according to which it was agreed upon;  
and
  - c) The State subsequently invoked the incompetence of the arbitral tribunal based on aspects of its own domestic law.<sup>375</sup>
226. Regarding the judgment issued on November 18, 2012 by the Administrative Contentious Court, SyC states that said judgment may not be submitted by Costa Rica to support that there was not a breach of Contract by the State, since that judgment only discussed the claim of invalidity, not contractual issues. The parties expressly agreed in the Direct Agreement that in the event a contractual dispute arose, they would waive local forum and submit the dispute to international arbitration. Therefore, SyC argues the Administrative Contentious Court cannot rule *extra petita*, and could only make

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<sup>373</sup> Memorial § 478.

<sup>374</sup> Memorial § 320; Exhibit C-48.

<sup>375</sup> Memorial § 274; quoting *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, August 18, 2008, § 396 (Exhibit RL-32).

statements limited to declaring an executive order or an agreement null, but could not issue a decision on whether or not the PTC fulfilled its contractual obligations.<sup>376</sup>

(ii) Position of Costa Rica

227. In response to SyC's claim that the Supreme Court denied it justice by declaring that the local arbitral tribunal lacked jurisdiction to hear disputes concerning the interpretation and application of norms of public order, referring to the methodology for the readjustment of rates, Costa Rica considers that such claim has no legal or factual grounds.<sup>377</sup>
228. On the one hand, Costa Rica states that under International Public Law, and according to several awards,<sup>378</sup> the legal standard for denial of justice implies an extremely high and severe threshold that the investor must meet to prove that a State has denied justice.
229. Based on the provisions of various international tribunals, Costa Rica claims that "*...there is no denial of justice by the simple fact that the decision of a local tribunal (or the procedure that has been followed) is mistaken, not ideal, the result of a non-convincing rationale, unsatisfactory, shameful, or with irregularities...*"<sup>379</sup> It is noteworthy that the decision of the Supreme Court upheld the opinions of various authorities (the Comptroller, the Attorney General, and PTC) that argue that the establishment of rates is under the non-delegable jurisdiction of the State, and therefore cannot be delegated to an arbitral

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<sup>376</sup> Reply §§ 540-560.

<sup>377</sup> Counter-Memorial §§ 433,434.

<sup>378</sup> Mainly *Mondev International Ltd v. United States of America*, ICSID Case No. ARB (AF)/99/2, Award, October 11, 2002 (Exhibit RL-55); *Robert Azinian, et al. v. United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, November 1, 1999 (Exhibit RL-81); *Rumeli Telekom v. Kazakhstan*, ICSID Case No. ARB/5/16, Award, July 29, 2000 (Exhibit RL-82); *Pantechmiki S.A. Contractors & Engineers v. Albania*, ICSID Case No. ARB/07/21, Award, July 30, 2009 (Exhibit RL-63); *Chevron Corporation (USA) and Texaco Petroleum Companand USA v. Republic of Ecuador*, PCA Case No. 34877, Partial Award on the Merits, March 30, 2010 (Exhibit RL-18). Regarding the award *Saipem v. Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, June 30, 2009, § 159 (Exhibit RL-83), that SyC quoted as an example of denial of justice when a domestic court annuls the jurisdiction of an arbitral tribunal, Costa Rica states that it is a wrong reference given that in said case the issue of expropriation and not the issue of denial of justice was studied. As for the case *Duke Energy v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, August 18, 2008 (Exhibit RL-32), Costa Rica claims that the paragraph quoted by SyC corresponds to a summary of what the Claimant said in that case, and not of what the arbitral tribunal said, also the quoted section does not refer to denial of justice. Counter-Memorial §§ 439-440.

<sup>379</sup> Counter-Memorial § 446.

tribunal.<sup>380</sup> Furthermore, Respondent relies on case law to argue that "*...international tribunals are not a court of appeals, nor do they have the task of assessing whether or not the decision of the local court was correct or adjusted to the municipal law...*"<sup>381</sup>

230. Likewise, Costa Rica states that SyC cannot claim that it has been denied access to the court system to resolve the dispute, given that the judgment of the Supreme Court established that the public authority to exercise setting and readjusting rates was not beyond the control of the contentious-administrative jurisdiction, evidenced by Claimant submitting the dispute to that jurisdiction after such judgment had been issued.<sup>382</sup>
231. As to the alleged denial of justice by the Supreme Court's decision regarding the domestic arbitration, Costa Rica notes that at the Hearing Claimant challenged the entire judicial system of Costa Rica, stating that the courts of Costa Rica are "*...not honest...*";<sup>383</sup> even though Claimant's own legal expert, Mr. Hernández Valle, disagreed with these allegations, considering that such courts act properly, and that those same courts have decided several actions in favor of SyC in the past.<sup>384</sup>
232. In light of the foregoing, Costa Rica states that when applying the standard of denial of justice under international law to the only fact on which SyC based its claim, it must be concluded that Costa Rica has not engaged in denial of justice.<sup>385</sup>

## 2. FULL PROTECTION AND SECURITY

### (i) Position of SyC

233. SyC argues that Costa Rica, through unilateral actions, breached its obligation to grant at all times full legal protection and security.<sup>386</sup>

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<sup>380</sup> Counter-Memorial § 454.

<sup>381</sup> Counter-Memorial § 447.

<sup>382</sup> Counter-Memorial §§ 463-464.

<sup>383</sup> Post Hearing Brief of Costa Rica § 149; quoting Transcript, Day 4 (SPA), G. Fowler, p. 53.

<sup>384</sup> Post Hearing Brief of Costa Rica § 149.

<sup>385</sup> Counter-Memorial § 449.

<sup>386</sup> Memorial § 363.

234. As to the acts that constitute a violation by Costa Rica of its obligation to grant full protection and security to SyC's investment, Claimant invokes Costa Rica's alleged violations of the obligation to grant fair and equitable treatment.

(ii) Position of Costa Rica

235. Respondent states that international courts agree that the legal standard of full protection and security does not impose strict liability on the States; therefore, it does not protect the investor from any possible decline in the investment's value,<sup>387</sup> and it is primarily an obligation of vigilance, a "...due diligence...,"<sup>388</sup> that "...is nothing but reasonable prevention measures that can be expected from a well-managed government under similar circumstances...,"<sup>389</sup> which must be determined on a case-by-case basis.

236. Further, Respondent asserts that SyC confuses the concepts of full protection and security with fair and equitable treatment, first quoting the provision of the Treaty that refers to full protection and security, but later citing case law related to fair and equitable treatment.<sup>390</sup> Respondent also points out that SyC only referred once to the standard of full protection and security, the award issued in the case of *Asian Agriculture Products v. Sri Lanka*, without mentioning that in the same award the tribunal concluded, like other tribunals, that such obligation cannot be interpreted as "...strict liability..."<sup>391</sup> and that the requirement of stability and predictability of the commercial legal system that SyC invokes as part of the obligation to give full protection and security is in fact part of the obligation to give fair and equitable treatment. Respondent also argues there is no legal basis for SyC's assertion that Costa Rica's breach of contract automatically involve the failure to give full protection and security or fair and

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<sup>387</sup> Counter-Memorial §§ 517-520; *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, § 154 (Exhibit RL-92); *Asian Agriculture Products v. Sri Lanka*, ICSID Case No. ARB/87/3 Award, June 27, 1990 (Exhibit RL-10); *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Award, September 3, 2001 (Exhibit RL-49).

<sup>388</sup> Counter-Memorial §§ 521, 522.

<sup>389</sup> Counter-Memorial § 523; *Asian Agriculture Products Ltd. v. Sri Lanka*, ICSID Case No. ARB/87/3, Award, June 27, 1990, §77 (Exhibit RL-10).

<sup>390</sup> Counter-Memorial § 528; Memorial §§ 345-346.

<sup>391</sup> Counter-Memorial § 529.

equitable treatment.<sup>392</sup> Similarly, SyC invokes various measures concerning the alleged infringement of its obligation to provide full protection and security, which Respondent states that:

*“Claimant does not analyze any of these measures in light of the legal standard of full protection and security under the Treaty. It does not explain how they constitute an omission by Costa Rica regarding its due diligence duty that consists in taking reasonable measures to protect the investment. Consequently, and just and with its other claims, the Claimant has not met its burden of proof to establish that the actions of Costa Rica were contrary to its obligation to grant full protection and security to the Claimant’s investment...”*<sup>393</sup>

237. In relation to each of the measures referred to by SyC, Costa Rica indicates the following:

- a) Regarding Executive Order 30573, the State exercised due diligence under the circumstances, taking reasonable measures to protect the investment. In case the automatic rate increase had been approved according to the methodology established in Executive Order 30185, *“...those increases would have had to be reverted and the tariff increase would have had to be reimbursed to the user ...”*, and that it *“...could have been a damage to Riteve SyC ...”*<sup>394</sup>
- b) With respect to the decision to open the market, this measure was not unfair, arbitrary or discriminatory. Despite the provisions of the Transit Law of 2008, Costa Rica has always respected SyC’s right to contractual exclusivity, since to date it remains the only provider of VTI service.<sup>395</sup>

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<sup>392</sup> Counter-Memorial §§ 530, 531.

<sup>393</sup> Counter-Memorial § 536.

<sup>394</sup> Counter-Memorial § 539.

<sup>395</sup> Counter-Memorial § 542.

- c) The decision not to extend the Contract was reasonable and rational, in addition to the fact that this decision was reversed.<sup>396</sup>
- d) Respondent claims it is false that Costa Rica was obligated to publish a particular methodology for rate readjustment before August 20, 2012, since that date was only mentioned in relation to Riteve waiving any additional rate claims if Costa Rica published this methodology before that date. Therefore, such obligation tied only Riteve, and did not require anything from Costa Rica.<sup>397</sup>

### 3. NATIONAL AND MOST FAVORED NATION TREATMENT

#### (i) Position of SyC

- 238. SyC claims that Costa Rica has breached its obligation to provide its investment a treatment no less favorable than the treatment given to its own investor's investments or incomes.
- 239. Claimant alleges that Costa Rica has arbitrarily failed to adjust the rates applicable to the VTI service between July 2002 and July 2012. The increase of the VTI service rates represented only 12.7%,<sup>398</sup> while in the case of other services (water, electricity, public transport, super petrol, diesel) PSRA approved rate increases over 250%.<sup>399</sup>

#### (ii) Position of Costa Rica

- 240. In its Counter-Memorial, Costa Rica challenged SyC's use of the applicable standard under the Central America Free Trade Agreement (CAFTA) through the most favored nation clause. In its Reply SyC decided to "*...reverse its course so that it could now invoke another fair and equitable treatment standard, rather than the one it had originally invoked...*"<sup>400</sup> now having the Arbitral Tribunal to focus on the standard referred to under the Treaty.

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<sup>396</sup> Counter-Memorial § 545.

<sup>397</sup> Counter-Memorial §§ 549-550.

<sup>398</sup> Memorial § 374; Statement of Fernando Mayorga § 28.

<sup>399</sup> Memorial §§ 368-369; Statement of Leonel Fonseca Cubillo §§ 24, 25.

<sup>400</sup> Rejoinder §§ 146-147.

Costa Rica states that the Arbitral Tribunal should not allow SyC to invoke a standard in its Memorial, and then invoke a different standard in its Reply, because it violates the Respondent's rights to defense.<sup>401</sup>

241. Costa Rica claims it did not violate its obligation to give fair and equitable treatment under the Treaty. Respondent mentions that under that autonomous standard of protection, any error or omission may not constitute an infringement, but it must be acts of State "...manifestly inconsistent, non-transparent, unreasonable (that is, not related to a rational policy), or discriminatory..."<sup>402</sup> factors Claimant has not demonstrated.

#### 4. MEASURES EQUIVALENT TO EXPROPRIATION

##### (i) Position of SyC

242. SyC asserts that Article V of the Treaty provides that for a measure tantamount to expropriation to be valid, it must be taken for public utility reasons, in accordance with legal provisions, in a non-discriminatory manner, and accompanied by prompt, adequate and effective compensation.<sup>403</sup> SyC also argues that "...the termination or arbitrary suppression of a right previously granted contractually is a measure equivalent to expropriation..."<sup>404</sup>
243. In light of the foregoing, SyC argues that Costa Rica has breached its obligation not to subject its investment to nationalization, expropriation or any other measure having equivalent effects, except if such measures were non-discriminatory, adopted for reasons of public utility or public interest, and accompanied by a prompt, adequate and effective compensation.
244. This is based on the grounds that the government adopted measures tantamount to expropriation when it unilaterally changed the rights previously agreed under the

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<sup>401</sup> Rejoinder § 148.

<sup>402</sup> Rejoinder § 152.

<sup>403</sup> Memorial § 501; Exhibit C-4, Article V.

<sup>404</sup> Memorial § 502; citing *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case ARB/99/6, Award, April 12, 2002.

Contract, and issued these measures without due payment of a prompt, adequate and effective compensation.<sup>405</sup>

245. Claimant's allegations in this regard refer to:

- a) The termination or arbitrary suppression of a right previously awarded by contract is a measure tantamount to expropriation.
- b) The Contract granted SyC the exclusive right to provide the VTI service as sole contractor during the term of the Contract and its extensions.
- c) Act 8696 of 2008, which reformed Act 7331, affected Riteve's exclusive rights granted under the Contract to provide the VTI service.
- d) Ruling 333:
  - i. Terminated the Contract by deciding to prevent its automatic extension.
  - ii. Modified the exclusive right granted to SyC by ordering COSEVI to promote the greatest possible number of service providers through public tender.
  - iii. Was openly discriminatory, infringing the exclusive rights granted to SyC under the Contract in favor of any third party interested in the provision of VTI services.
  - iv. Did not order the payment of a prompt, adequate, and effective compensation.

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<sup>405</sup> Memorial § 423; Exhibit C-19; Exhibit C-49; Statement of Rubén Hernández Valle §§ 57-65.

- v. Was issued unfairly and arbitrarily, given that it did not comply with the report referred to in clause 4.2 of the Contract.<sup>406</sup>

(ii) Position of Costa Rica

246. Respondent argues that when applying the legal standard of indirect expropriation, SyC's claim that Costa Rica indirectly expropriated its investment lacks grounds. Although Claimant also states that there is indirect expropriation when there is interference with contractual rights, citing the award issued in *Sempra v. Argentina*, Respondent claims this is weak evidence since the *Sempra* tribunal dealt with the issue of direct expropriation rather than indirect, and held that the interference with contractual rights can under certain circumstances be tantamount to expropriation.<sup>407</sup>
247. Further, Respondent asserts that SyC bases its expropriation claim only on Ruling 333, which was reversed and annulled before the exhaustion of the Contract's first ten year term, and the provision of the service by Riteve was never interrupted.
248. In conclusion, Respondent argues that SyC has not proved the existence of an expropriation, so it is not relevant to consider whether the requirements for legal expropriation under Article V of the Treaty were met or not. Lastly, Costa Rica argues that Claimant has failed to prove that it ceased to receive a higher income because of actions adopted by the government.<sup>408</sup>

**C. EXISTENCE OF DAMAGES**

(i) Position of SyC

249. SyC asserts that in thirteen years no governmental authority has denied Riteve the rate readjustment based on the argument that its profits or returns are excessive. Claimant

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<sup>406</sup> Memorial §§ 417-423.

<sup>407</sup> Counter-Memorial §§ 560, 578, 579; Exhibit RL-87 §281.

<sup>408</sup> Counter-Memorial § 593.

remarks that the real reason the rates have not been adjusted is because there is a conflict of jurisdiction between the MPWT and the PSRA.<sup>409</sup>

250. SyC also notes that the compensation due to the Claimant amounts to €297.9 million euros. Applying Executive Order 30185, the damages are calculated as follows: *(i)* €85.7 million euros for SyC's loss for not receiving the rate readjustment during the initial term of the Contract; *(ii)* €41.5 million euros for SyC's loss due to the lack of rate readjustment between July 15, 2012 and July 14, 2014; and *(iii)* €170.7 million euros for SyC's loss due to the lack of rate readjustment between July 15, 2014 and July 14, 2022.<sup>410</sup>
251. Claimant also mentions that Costa Rica's expert, Timothy Hart, acknowledged at the Hearing that the Contract did not include a constraint on profitability or rate of return.<sup>411</sup>
252. With regard to the provisions on taxation, SyC states that expert Nicholas Good deducted the amounts corresponding to taxes that Riteve would have paid both in Costa Rica and when distributing dividends;<sup>412</sup> however, it is possible for Costa Rica to conclude that its national law allows it to tax compensations with a tax on foreign remittances of 30%. In this regard, SyC states that there would be double taxation, because *(i)* the figures calculated by the expert Nicholas Good already subtracted values for Costa Rican taxes; *(ii)* a 30% tax would be imposed regarding foreign remittances which would not be deductible in Spain; and *(iii)* in addition to the above, SyC would also be taxed in Spain at a rate of 30% when receiving the payment ordered by the Arbitral Tribunal, even if applying the provisions of the International Agreement on Double Taxation entered into by and between the Kingdom of Spain and Costa Rica.<sup>413</sup> In light of the foregoing, SyC requests the Arbitral Tribunal to order the payment of net amounts, considering that in the calculation of the amounts due, the taxes that would have been due to Costa Rica were already taken into account, and that under the

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<sup>409</sup> Post Hearing Brief of SyC § 81.

<sup>410</sup> Post Hearing Brief of SyC § 108.

<sup>411</sup> Post Hearing Brief of SyC § 112; Statement of Hart, p. 123.

<sup>412</sup> Reply § 561; Report of Nicholas Good, §§ 4.5.6 - 4.5.12.

<sup>413</sup> Reply § 563; Exhibit C-96.

Agreement between Spain and Costa Rica on Double Taxation the award should only be taxed in the State of the taxpayer's residence, i.e., only in Spain.<sup>414</sup>

(ii) Position of Costa Rica

253. Respondent claims that SyC is not entitled to the requested compensation of no less than €261.6 million euros, corresponding to the damage caused by the alleged breaches of Contract by Costa Rica, because it has proved that it did not breach any of its obligations under the Treaty.
254. Likewise, Respondent argues that even assuming that Costa Rica had violated any of the referred obligations under the Treaty, SyC has not been able to prove that it suffered indemnifiable material damage because of said breach, given that the economic and financial balance of the Contract has not been affected.<sup>415</sup> On the contrary, from 2004 through 2011 "*...Riteve SyC has had an exponential growth of 724% in its profits with respect to the initially invested capital...*"<sup>416</sup>
255. Furthermore, Costa Rica points out the inconsistency between the amount of damages estimated by Riteve in the local court proceeding of USD \$16,279,269 for damages allegedly suffered between July 2002 and December 2005, and the amount claimed in this arbitration, equivalent to about USD \$320 million.<sup>417</sup>
256. As for the Direct Agreement and the Contractual Addendum, both dated July 20, 2012, Costa Rica adds that assuming without conceding that the Direct Agreement had imposed an obligation on Costa Rica as alleged by SyC, this would not justify the significant compensation that SyC claims, since both the Direct Agreement and the Contractual Addendum were signed on July 20, 2012, and therefore any damage suffered by the Claimant in relation to those instruments must have occurred after that

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<sup>414</sup> Reply §§ 561-567.

<sup>415</sup> Counter-Memorial §§ 616, 617.

<sup>416</sup> Counter-Memorial §§ 668, 669.

<sup>417</sup> Counter-Memorial § 677.

date. Apart from the fact that such a large economic loss cannot be justified in such a short time, SyC has not detailed the full amount of the damages allegedly suffered.<sup>418</sup>

257. Relying on the findings of its expert Timothy Hart, Costa Rica specifies that from September 30, 2001 to December 31, 2011, Riteve's investors achieved a total return on their capital contribution of 644% (21.6% annually), paying dividends of CRC ₡18,301 million colons (about \$34.6 million), representing a return to investors in its second year of 679% (22.2% annually). Respondent also notes that the analysis provided by SyC through Mr. Good "*...takes into account the cost increase to Riteve SyC's operations, but completely ignores other changes that affect the economic balance of the company, including changes to earnings, income or return on investment. It is obvious and undeniable that it is impossible to assess the existence of a balance if one takes into account only one side of the scale; i.e., costs but not profits...*"<sup>419</sup>
258. Costa Rica also asserts that SyC's damages claim is deficient given that it does not take into account the principles of reasonableness and limits on profitability, which are an integral part of the rates for all public service in Costa Rica, including the VTI service.<sup>420</sup>
259. Costa Rica counters that SyC's request for the Arbitral Tribunal to deal with possible double taxation of SyC both in Spain and Costa Rica, in case the award is favorable to SyC *(i)* is a very late claim, considering that the Reply is the first document in which it is mentioned; *(ii)* is outside the jurisdiction of the Arbitral Tribunal, involving matters arising from the arbitral award that are subsequent to its issuance; *(iii)* SyC does not base its request on any provision of the Treaty, the ICSID Convention, its Arbitration Rules or case law; and *(iv)* the Arbitral Tribunal is exclusively responsible for deciding whether there has been a breach of the Treaty, and in such case, if the breach caused damages that should be compensated.<sup>421</sup>

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<sup>418</sup> Rejoinder §§ 273-292.

<sup>419</sup> Rejoinder §§ 339-342; Expert Report of Timothy Hart, of January 28, 2013, §§ 2, 3, 14, 17.

<sup>420</sup> Rejoinder § 344.

<sup>421</sup> Rejoinder § 353.

260. Costa Rica notes that in the Hearing it became clear that Claimant has not suffered losses. Whereas SyC's compensation claim requires proving that there has been an economic and financial imbalance of the Contract, Costa Rica states that the president of Riteve himself, Mr. José Luis López, explained that the Contract is in balance as long as the company is not suffering losses.<sup>422</sup> Costa Rica points out that neither Claimant nor its witnesses have argued that Riteve has suffered losses. Furthermore, Respondent points out that the damages expert appointed by the Claimant, Mr. Nicholas Good, acknowledged that the economic and financial balance of the Contract has not been affected.<sup>423</sup>

### IX. ANALYSIS OF THE TRIBUNAL

261. Before deciding on the issues of jurisdiction and admissibility, the Tribunal will first analyze Claimant's objection with respect to Respondent's Counter-Memorial filed four minutes late.

262. The Tribunal considers that the delay of four minutes by the Respondent to submit its Counter-Memorial, in which Respondent objected the Tribunal's jurisdiction, cannot result in the declaration of default in appearance. Claimant argues in its Reply that the applicable legal consequences are derived from the Administrative Procedural Code and the Civil Procedure Code of Cost Rica. This argument must be rejected. The applicable rules to these arbitral proceedings are the Arbitration Rules, not Costa Rican procedural rules.

263. The Parties agreed that this arbitration is governed by the ICSID Arbitration Rules in force since April 10, 2006. Section 1.1 of the Procedural Order No. 1 establishes the following:

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<sup>422</sup> Post Hearing brief of Costa Rica §178, quoting Transcript, Day 2 (SPA), Cross-examination of José Luis López, p. 122.

<sup>423</sup> Post Hearing Brief of Costa Rica §178; quoting Transcript, Day 5 (ENG), Cross-examination of Nicholas Good, p. 1487.

*“1.1 These proceedings are conducted in accordance with the ICSID Arbitration Rules in force as of April 10, 2006...”*

264. Therefore, it is not possible to apply the consequences under the Costa Rican procedural laws to the current arbitral proceedings governed by the Arbitration Rules. Only the Arbitration Rules may be referred to in deciding on the late filing of the Counter-Memorial.
265. According to Rule 26 (3) of the Arbitration Rules, “[a]ny step taken after expiration of the applicable time limit shall be disregarded unless the Tribunal, in special circumstances and after giving the other party an opportunity of stating its views, decides otherwise.” The Tribunal may thus discretionally, after hearing the Parties, determine if a step taken after expiration shall be disregarded or not.
266. In this case, having heard the arguments of the Parties and in exercise of the discretionary authority granted to the Tribunal under Rule 26 (3) of the Arbitration Rules, the Tribunal reaches the decision that the Counter-Memorial shall be considered presented on time, given that the delay in its presentation was only four minutes, and did not cause prejudice to Claimant. Access to justice and the right to be heard should be given preference over procedural formalities, while always taking into account the standard of reasonableness.
267. Having decided on Claimant’s objection on the delay, analyzing the arguments of the Parties in light of the Arbitration Rules, the Treaty, and other applicable laws and principles of International Law, the Tribunal reaches the following conclusions with respect to the disputed issues:

**A. RELATIONSHIP BETWEEN JURISDICTION AND ADMISSIBILITY OF THE CLAIMS**

268. The Tribunal finds it necessary to clarify on a preliminary basis the relationship and the differences between the notions of jurisdiction and admissibility. While a lack of jurisdiction or a lack of admissibility may lead to the tribunal refusing to hear the case, each refusal is of a different nature and carries different consequences. Indeed, several

consequences arise from this distinction, such as the fact that a court may review whether an arbitral tribunal had jurisdiction over the dispute, but not review the admissibility of a claim.

269. An objection to jurisdiction refers to the ability of a tribunal to hear a case, while an objection to admissibility refers to the claim itself, assuming that the tribunal has jurisdiction. When a tribunal finds that a claim is inadmissible, the tribunal must dismiss said claim without going to its merits (even if the tribunal has jurisdiction).
270. Several consequences arise from the distinction between jurisdiction and admissibility:<sup>424</sup>
- a) There is greater procedural flexibility if the tribunal has jurisdiction.
  - b) There are possible waivers of objections to admissibility.
  - c) The tribunal is able to consider questions of jurisdiction *proprio motu*.
  - d) Questions of admissibility are more likely to be addressed with the merits.
  - e) Issues of admissibility generally cannot be reviewed.
  - f) A finding of inadmissibility does not become *res judicata*.
271. Whereas jurisdiction refers to the authority or the ability of the Tribunal to hear and decide upon a case, admissibility refers to the characteristics of the claims submitted to arbitration.
272. The characteristics of jurisdiction are the following: *(i)* it affects the dispute submitted to arbitration as a whole; *(ii)* as a general rule, the relevant date for its analysis is the

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<sup>424</sup> M. Waibel, *Investment Arbitration: Jurisdiction and Admissibility*, University of Cambridge, February 2014, pp. 67-70.

commencement of arbitration and the events posterior to it are not taken into account; *(iii)* its conditions or requirements cannot be renounced by the parties; and *(iv)* jurisdiction must be formally analyzed by the Tribunal.

273. On the other hand, admissibility's characteristics are the following: *(i)* it affects the claims themselves and not the entire dispute itself submitted to arbitration; *(ii)* the relevant time period for its analysis starts from the beginning of the arbitration proceedings until the rendering of the award; and *(iii)* in general, conditions and requirements can be renounced by the parties.
274. Because of this distinction, questions of jurisdiction must be analyzed before answering questions referring to admissibility, as the issues of jurisdiction refer to the Tribunal's power to hear this dispute overall, and not to specific claims.
275. Therefore, the Tribunal will first have to consider whether it has jurisdiction and analyze Respondent's objection on jurisdiction *ratione materiae*.
276. Once the Tribunal has decided upon its jurisdiction, the Tribunal will then consider the admissibility of the claims presented by Claimant.

## **B. JURISDICTION OF THE TRIBUNAL**

277. Objections to jurisdiction in the present case are related to the jurisdiction *ratione materiae*, meaning whether the substance or the object of the dispute falls under the Tribunal's jurisdiction.
278. The issue at stake is whether the claims presented by Claimant under Article III.2 of the Treaty are violations of the Treaty or mere contractual violations, which would fall outside the scope of the Treaty.
279. In general terms, according to International Law, the violation of a contract between a State and an investor of another State does not constitute by itself a violation of

International Law and the Treaty. Such principle has been adopted in various cases. For example in *SGS v. Pakistan*, the Tribunal held that “...under general international law, a violation of a contract entered into by a State with an investor of another State, is not, by itself, a violation of international law...”<sup>425</sup>

280. However, many investment treaties contain, in addition to the standard protection clauses, the so-called umbrella clauses or observation of commitments clauses which host States are required to observe as part of their obligations with foreign investors.
281. In *Noble Ventures v. Romania*, the Tribunal asserted that Investment Treaties may include clauses by virtue of which the host State is obligated to comply with its contractual obligations with the investors of another State and in case of breach, the contractual violation is internationalized and is assimilated to a breach of the Treaty.

*“...two States may include in a bilateral investment treaty a provision to the effect that, in the interest of achieving the objects and goals of the treaty, the host State may incur international responsibility by reason of a breach of its contractual obligations towards the private investor of the other Party, the breach of contract being thus ‘internationalized’, i.e. assimilated to a breach of the treaty...”*<sup>426</sup>

282. It is important to specify that not any contractual breach by the State signatory to an Investment Treaty that contains an umbrella clause can be alleged as a direct violation of the Treaty. In *El Paso Energy v. Argentina* the Tribunal stated that an umbrella clause cannot transform any contractual claim into a claim under the treaty, and held that the clause would only be applicable if in the specific case the State acts as sovereign entity not as a private party:

*“...[A]n umbrella clause cannot transform any contract claim into a treaty claim, as this would necessarily imply that any commitments of the State in respect to*

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<sup>425</sup> *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ABR/01/13, Decision on Objections to Jurisdiction, August 6, 2003, § 167.

<sup>426</sup> *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, October 12, 2005, § 54.

*investments, even the most minor ones, would be transformed into treaty claims ... It would be strange indeed if the acceptance of a BIT entailed an international liability of the State going far beyond the obligation to respect the standards of protection of foreign investments embodied in the Treaty and rendered it liable for any violation of any commitment in national or international law 'with regard to investments' ..."*<sup>427</sup>

283. Therefore in order to determine if a contractual breach can be alleged as a violation of an Investment Treaty, it is necessary to analyze in detail the text of the corresponding umbrella clause in order to identify the requirements for validity of the claim.
284. In other words, if the Investment Treaty has an umbrella clause, it is possible to claim the contractual violations by the State as Treaty violations, provided any requirements for validity established in the treaty itself are complied with.
285. In this case, according to Article III.2 of the Treaty, each Contracting Party is obligated to comply with any obligation it has contracted in relation to the investments of investors of the other Contracting Party.<sup>428</sup> This provision constitutes an umbrella clause or commitment observation clause.
286. Respondent argues that the Tribunal has no jurisdiction over the claims by SyC under the umbrella clause contained in Article III.2 of the Treaty due to the fact that the parties to the Contract are Costa Rica and Riteve, and not SyC. Since there is no direct contractual relationship, the contractual breaches cannot be considered violations of the Treaty.
287. However, the Tribunal considers that the protection of Article III.2 of the Treaty goes beyond the simple direct contractual relationship between the investor and the host State, because such provision establishes that the State shall comply with the obligations

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<sup>427</sup> *El Paso Energy International Company v. Republic of Argentina*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, April 27, 2006, § 82.

<sup>428</sup> Exhibit C-3, Article III.2 of the Treaty: "... Each Party shall comply with any obligation that it has assumed related to investments by investors of the other Party ..."

undertaken “...related to investments by investors of the other Contracting Party ...”. Such drafting is sufficiently broad to interpret that the obligations contracted by Costa Rica with Riteve, a company controlled by the Claimant and created exclusively to hold the rights of the Contract, are included under the scope of protection of the Treaty. As a result, the Tribunal has jurisdiction *ratione materiae* over the dispute. Arbitrator Silva Romero respectfully disagrees with the preceding reasoning, which, in his view, incorrectly centers on the interpretation of the phrase “related to investments”. In his opinion, special weight must be given to the word “obligation” in the umbrella clause. This is what the *ad hoc* annulment Committee in *CMS v. Argentina* and the tribunal in *Burlington v. Ecuador* did when they concluded that privity in a contract between the investor-claimant and the respondent State is required for the breach of a contractual obligation to be elevated to the status of a treaty breach. Arbitrator Silva Romero, however, also comes to the conclusion that the Tribunal has jurisdiction over this case given that, as held by the Tribunal later on in this Award, Claimant and Riteve are to be considered as a single entity in this matter.

288. The criteria for interpreting the scope of the umbrella clause provided in an investment treaty, as in the present case, are outlined in Article 31 (1) of the Vienna Convention on the Law of the Treaties, according to which “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”
289. As a result, the Tribunal considers that the appropriate approach is to decide whether the consent of the State Parties was given in respect to the investor, or in respect to its investments. In the first case, the scope of the clause is more restricted and in principle it is limited to the obligations assumed by the State receiving the investment directly from the investor. In contrast, in the second case, if consent is given with respect to the investment, the scope of the clause is greater and the contractual relationship does not necessarily have to be between the host State and the investor, but can for example be through a subsidiary.

290. The opinion of the Tribunal is consistent with the approach adopted in *Enron v. Argentina*, where it was considered that “...while investors can claim in their own right under the provisions of the treaty, there is indeed a need to establish a cut-off point beyond which claims would not be permissible as they would have only a remote connection to the affected company. As this is in essence a question of admissibility of claims, the answer lies in establishing the extent of the consent to arbitration of the host State. If consent has been given in respect of an investor and an investment, it can be reasonably concluded that the claims brought by such investor are admissible under the treaty. If the consent cannot be considered as extending to another investor or investment, these other claims should then be considered inadmissible as being only remotely connected with the affected company and the scope of the legal system protecting that investment...”<sup>429</sup>
291. Consequently, the Tribunal has jurisdiction *ratione materiae*, and the claims asserted by Claimant alleging the application of Article III.2 of the Treaty would in principle be admissible. While the Tribunal finds jurisdiction over the dispute, all the claims asserted by SyC are inadmissible as explained in the following section on admissibility. Therefore, it is unnecessary to further analyze whether the alleged breaches of Article III.2 can be considered as contractual violations rising to the degree of violations of the Treaty.

### C. ADMISSIBILITY OF THE CLAIMS

292. Jurisdiction being established, in the following section the Tribunal analyzes the admissibility of Claimant’s claims under the fork in the road clause and the waiting period requirement under Article XI.1 and XI.2 of the Treaty.

#### 1. FORUM SELECTION CLAUSE CONTAINED IN ARTICLE XI.3 OF THE TREATY

293. The existence of national courts and international arbitration as mechanisms for resolving disputes can generate a significant risk of duplication of claims and a problem

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<sup>429</sup> *Enron Corporation and Ponderosa Assets, L.P. v. Republic of Argentina*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, January 14, 2004, § 52.

in determining what is the proper dispute resolution mechanism for disputes that may arise during the investment period.

294. In order to avoid the duplication of procedures and claims, and therefore to avoid contradictory decisions, Investment Treaties use two methods for limiting the selection of a dispute resolution mechanism by the investor. The first method consists of obligating the investor to select a dispute resolution mechanism *ab initio* through an irrevocable option clause, usually called “fork in the road”, which implies that once one of the routes is selected, the possibility of choosing the other is excluded. Under the second method, based on the concept of *waiver*, once the investor chooses international arbitration under the corresponding treaty, it must waive the exercise of any claim before another dispute resolution mechanism, including those already initiated and those it could initiate.
295. However, for the risk to be present, the disputes in both fora must be identical or have a significant overlap for the forum selection clause to be applicable.
296. In this case, Article XI.3 of the Treaty establishes that if the investor submits the dispute to the competent court of the Contracting Party in whose territory the investment was made, it may bring a claim before an arbitral tribunal, provided the national court has not issued a decision. Article XI.3 also establishes that the investor must adopt the necessary measures to definitively withdraw from the ongoing judicial proceeding.<sup>430</sup>
297. The Tribunal considers that Article XI.3 of the Treaty constitutes a forum selection clause corresponding to the second method, a waiver clause, for limiting the selection of dispute resolution mechanisms. Once an international arbitration is initiated, the investor is thereby required to waive or withdraw from the actions it has initiated or

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<sup>430</sup> Exhibit C-3, Article XI.3 of the Treaty “3. Once an investor has submitted the dispute to an arbitral tribunal, the award shall be final. If the investor has submitted the dispute to a competent court of the Party in whose territory the investment was made, it may, in addition, resort to the arbitral tribunals referred to in this article, if such national court has not issued a judgment. In the latter case, the investor shall adopt any measures that are required for the purpose of permanently desisting from the court case then underway.”

could initiate before national courts or an arbitral tribunal, in order to avoid conflicting decisions and eliminate the possibility of obtaining double recovery for the same acts.

298. By analogy, regarding forum selection clauses, in *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, the arbitral tribunal decided that "... [t]he question is whether a party should be allowed to rely on a contract as the basis of its claim when the contract itself refers that claim exclusively to another forum. In the Tribunal's view the answer is that it should not be allowed to do so, unless there are good reasons, such as force majeure, preventing the claimant from complying with its contract. **This impediment, based as it is on the principle that a party to a contract cannot claim on that contract without itself complying with it, is more naturally considered as a matter of admissibility than jurisdiction.**"<sup>431</sup>

[Emphasis added]

299. Additionally, it may be noted that the analogous rule of exhaustion of local remedies normally concerns admissibility rather than jurisdiction in the strictest sense. The Treaty requirement to submit a dispute to local courts is a question of admissibility of claims, and not of jurisdiction.
300. The selection of the forum is a requirement for the validity and admissibility of the claims of the Claimant in the arbitration, and therefore it is necessary to determine (i) whether or not the Claimant submitted the dispute to a competent court in Costa Rica; and, (ii) if it did, whether, once the arbitration initiated, Claimant took the necessary measures to withdraw definitively from the judicial proceeding in progress.
301. In relation to the first aspect, that is, whether the Claimant submitted the dispute to a competent court in Costa Rica, it is necessary to analyze the ordinary proceeding initiated by Riteve on February 28, 2006 against the State before the Administrative Contentious Court, a proceeding which Respondent considers to be a violation of the

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<sup>431</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, January 29, 2004, § 154.

forum selection clause. The Tribunal will have to determine subsequently if the actions of Riteve can be considered to be a selection of forum attributable to SyC.

302. Such test was similarly outlined by the Tribunal in *Alex Genin v. Estonia*, when it stated that “... the fundamental issue as regards the matter of the Tribunal’s jurisdiction in this case relates to whether the Claimants have submitted the dispute for resolution to the courts or administrative tribunals of Estonia or in accordance with any applicable, previously agreed dispute-settlement procedure. Two questions arise in this regard. First, to what extent were the issues litigated in Estonia and the United States identical to those raised by the Claimants in this arbitration? And second, is it proper to consider EIB and the Claimants as a ‘group’ and to view EIB’s legal acts in Estonia as an ‘election of remedy’ for the group as a whole?”<sup>432</sup>
303. To elucidate these questions, the Tribunal must perform a general analysis of the ordinary proceedings initiated by Riteve before the Administrative Contentious Court against the State, represented by the Attorney General’s Office.
304. Such proceeding, registered as case file no. 06-000159-0163-CA and the joint proceeding 06-000384-0163-CA, were filed by Riteve SYC, S.A. against the State and the PTC, the Comptroller appearing as coadjutor of the defendants.
305. In the claim related to case file no. 06-000384-0163-CA, Riteve requested the following:
- a) To declare the nullity of Executive Order No. 30573-MOPT of July 10, 2002, as contrary to law.
  - b) As a consequence of this declaration, to declare valid and effective Executive Orders No. 30185-MOPT, published in the Official Gazette No. 46 on March 6, 2002, and No. 30396-MOPT, published in the Supplement No. 51 of the Gazette No. 134 on July 12, 2002.

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<sup>432</sup> *Alex Genin, Eastern Credit Limited, INC. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, June 25, 2001, § 330.

c) To order the State to pay the damages and lost profits, present and future, caused as a consequence of the issuance of the challenged act and its subsequent applications, itemized as follows:

- i. Lost Profits: *"...The amount Riteve failed to receive from July 2002 to December 31, 2005, as the difference between the established rate and that which it would have received if the PTC and [MPWT] had complied with their contractual and constitutional obligations [of]: a) set[ing] in a timely manner the method for updating rates, pursuant to Clause 9.4 (within three months following the contract countersignature); b) updat[ing] the rates from the service startup (July 15, 2002); c) updat[ing] the rates annually, at least, pursuant to the provisions of the contract in Clause 9.4 (January 2003 and January 2004); d) set[ting] the rates for 2005 at a real time pursuant to the indicated method. Said amount is estimated at FIVE THOUSAND FIVE HUNDRED EIGHTEEN MILLION FIVE HUNDRED TWENTY-ONE THOUSAND ONE HUNDRED FORTY-NINE AND 00/100 COLONES (€ 5,518,521,149.00)..."*<sup>433</sup>
- ii. Damages: *"...The amount corresponding to the financial costs deriving from the receiving of amounts less than what should have been received, pursuant to the financial and economic balance the contract must have. At April 30, 2004, these costs reached TWO THOUSAND THREE HUNDRED SEVENTY MILLION SIX HUNDRED SIXTY-ONE THOUSAND NINE HUNDRED TEN AND 00/100 COLONES (€2,370,661,910.00). ... The damage sustained from the loss of new business opportunities stemming from the noncompliance of the PTC and the State, related as well to the deterioration of its corporate image, a damage estimated at one hundred million and 00/100 colones (€100,000,000.00). ... The objective moral damage, estimated at THREE HUNDRED MILLION AND 00/100*

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<sup>433</sup> Exhibit RL-88.

*COLONES (€300,000,000.00), which shall be set in a timely manner by a mathematical actuary ...”*<sup>434</sup>

- d) To declare that the State must pay the future damages and lost profits caused over time.
- e) To declare that the State shall pay legal interest on the amounts claimed, from the date the final ruling is issued until the time of actual payment to Riteve.
- f) To declare that hereinafter MPWT shall set the rates of the VTI service based on the conditions and the rate model established in the Terms of the Tender, the Consortium’s Offer and the Contract signed by the parties.

306. For its part, in the claim related to case file 06-000159-0163-CA, Riteve requested the following from the Tribunal:

- a) To declare the nullity of the resolution contained in article 2.1 *“Setting of Technical Vehicle Inspection Rates for the 2005 Period”*, adopted in the ordinary meeting number 19-2004 of the Board of Directors of the PTC on December 15, 2004, and consider unlawful other acts both preparatory and final, documents, reports and opinions attached and related that served as a basis.
- b) To order the State to pay the present and future damages and lost profits caused as a result of the issuance of the challenged act and the subsequent applications thereof. Such claim was itemized by Riteve as follows:
  - i. Lost Profits: *“...The amount Riteve failed to receive from January 1, 2005 to December 31, 2005, as the difference between the established rate and that which it would have received if the PTC and the [MPWT] had complied with their contractual and constitutional obligations and had agreed to an increase that would really guarantee the maintaining of the financial balance of the*

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<sup>434</sup> Exhibit RL-88.

*contract; such as the one we requested by means of the petition dated November 23, 2004. Said amount is estimated at two thousand two hundred ninety-seven million four hundred twenty-nine thousand eight hundred seventy-one and 00/100 colones (€2,297,429,871.00)...”<sup>435</sup>*

ii. *Material damages: “...The amount corresponding to the financial costs (interest and exchange rate difference) deriving from the receipt of amounts less than what it should have received during the period from January 1 to December 31, 2005, according to the financial and economic balance the contract must have. These costs add up to three hundred seventeen million five hundred forty-three thousand sixty-four and 00/100 colones (€317,543,064.00)...”<sup>436</sup>*

iii. *Non-pecuniary damages: “... estimated at two hundred thirty-five million twenty-seven thousand [sixty]-five and 00/100 colones (€253,027,065.00) [sic] which shall be set in a timely manner by a mathematical actuary ...”<sup>437</sup>*

c) Order the State to pay legal interest on the amounts claimed, from the date on which the final ruling is issued until the time of actual payment.

d) Declare that hereinafter the MPWT shall set the rates of the VTI service based on the conditions and the rate model established in the Terms of the Tender, the Consortium’s offer, and the Contract signed by the parties.

307. Those joined cases were resolved by the Administrative Contentious Court through decision issued November 28, 2012, in which the action filed by Riteve was declared invalid. The trial court decision was confirmed by an Appeals Court by a decision issued on August 19, 2013. Against such ruling, Riteve filed a cassation appeal, which the Supreme Court rejected by unanimous vote on December 5, 2013.

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<sup>435</sup> Exhibit RL-88.

<sup>436</sup> Exhibit RL-88.

<sup>437</sup> Exhibit RL-88.

308. In order to determine whether the proceedings before the local tribunals relate to the same dispute submitted to arbitration, the Tribunal will apply the *fundamental basis of a claim* test, used in various cases, among them *Pantechniki v. Albania*.<sup>438</sup>
309. In *Pantechniki v. Albania*, the tribunal held that “...[i]t is common ground that the relevant test is the one expressed by the America-Venezuela Mixed Commission in the Woodruff case (1903): whether or not ‘the fundamental basis of a claim’ sought to be brought before the international forum, is autonomous of claims to be heard elsewhere. This test was revitalized by the ICSID Vivendi annulment decision in 2002. It has been confirmed and applied in many subsequent cases. The key is to assess whether the same dispute has been submitted to both national and international fora.”<sup>439</sup>
310. Agreeing with the tribunal in *Pantechniki v. Albania*, the decisive factor to decide “...is to determine whether claimed entitlements have the same normative source...” as in if a claim “...truly does have an autonomous existence outside the contract...”<sup>440</sup> One can only consider that the dispute submitted before the national tribunals is the same as the one submitted to arbitration if both of them share the fundamental cause of the claim and seek for the same effects.
311. In a second approach to the fundamental basis of a claim test, the tribunal shall consider if the same claim is “on a different road.” In other words, whether a claim with the same object, parties, and cause of action has already been brought before a different judicial forum. Claims that arise out of a contract do not have the same cause of action as Treaty claims. This requires differentiating between contractual and treaty claims.
312. Claimant has argued the dispute in this arbitration is different than the one submitted before local courts for two main reasons: (i) a proceeding was filed before the

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<sup>438</sup> *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, July 30, 2009 (Exhibit RL-63).

<sup>439</sup> *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, July 30, 2009, § 61 (Exhibit RL-63).

<sup>440</sup> *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, July 30, 2009, §§ 62, 64 (Exhibit RL-63).

Administrative Contentious Court for nullifying administrative acts contrary to local law, while the arbitral proceeding pertains to the breach of international obligations under the Treaty; and, *(ii)* the claims in the local proceedings are related to annulments, while the claims in the arbitration are related to compensation.

313. The Tribunal observes that while it is true that in the proceeding before the Administrative Contentious Court the nullity of various administrative acts was requested, the payment of damages and lost profits and a judicial declaration on the manner in which the rates for the VTI services should be set were also requested. It is also alleged that such damages and lost profits arise essentially from the presumed breach by Costa Rica of its legal and contractual obligations, among others, to adjust the rates.
314. In the arbitration, Claimant requested compensation for lost profits arising from various acts and omissions by Costa Rica, the majority related to the adjustment of the rates for the VTI service.
315. The Tribunal considers that the actions filed in the local proceeding and in the arbitration share a fundamental normative source and pursue ultimately the same purposes. The fundamental normative source is the same because compensation was claimed for lost profits derived from the failure of Costa Rica to adjust the VTI service rates according to what Claimant alleges was established in the Contract, notwithstanding that the specific administrative acts alleged in each proceeding may not be exactly the same.
316. Since the claims were all based on the violation of the Contract and share the same normative source, based on the approach established in *Pantechniki v. Albania*, one can conclude that the claims presented before local tribunals are the same as the ones presented before this Tribunal. Even when applying the second approach directed to distinguish between contractual and treaty claims, the conclusion remains the same.

317. Moreover, the effects pursued in each proceeding are essentially the same, at least in part, since while they differ in relation to the nullity claims, they coincide in relation to the compensation claims, because Claimant seeks the payment of damages and lost profits arising from the breach attributed to Respondent.
318. Therefore, the Tribunal considers that the claims of Claimant coincide. They consist of the compensation for lost profits derived from the conduct or omissions of Costa Rica, which are alleged in the local proceeding as violating national law, while in the arbitration proceedings, the conduct of Costa Rica is alleged as contrary to the provisions of Treaty. In both cases Respondent's acts are essentially qualified as illegal because Claimant considers that the adjustment of rates was not done as agreed to in the Contract.
319. In relation to the timing, it is important to have in mind that the claim before the local courts was filed on February 28, 2006, while the Notice of Intent was not notified until June 10, 2011 and the Request for Arbitration was filed on December 21, 2011. However, in the judicial proceedings, damages and lost profits were claimed not only for those generated up to the filing of the claim, but also for all those generated in the future. Therefore, the coincidence of the claims is not just limited to the date of filing of the claim, but also to all the subsequent claims that substantially share the same cause.
320. The Tribunal considers that even claims pertaining to Respondent's conduct and alleged omissions posterior to the filing of the claim before the Administrative Contentious Court—provided they involve or are directly related to the adjustment of the rates for the VTI service—should be considered to have been submitted to the local court. Indeed, Claimant requested compensation not only for the lost profits already incurred, but also for all those that may occur in the future as a result of the alleged contractual breach of Costa Rica.
321. According to the standards established by the *fundamental basis of a claim* test, the dispute submitted in the proceedings before the local tribunals and the one submitted before this Tribunal coincide. The second step for the Tribunal is to determine whether

the dispute submitted before the local tribunals was submitted by Claimant in this arbitration or by another entity.

322. The aforementioned proceedings before the local tribunals was filed by Riteve prior to the initiation of the arbitration, but continued on different judicial instances and reached the Supreme Court in parallel with the arbitration. At no time was the withdrawal filed, neither by Riteve nor Claimant.
323. In order to determine if such proceedings constitute a breach of the forum selection clause established in Article XI.3 of the Treaty, it is first necessary to analyze whether Claimant submitted the dispute to local courts, or whether it was a different person not controlled by the Claimant.
324. The proceeding before the Administrative Contentious Court was filed by Riteve SYC, S.A., a Costa Rican company incorporated on February 8, 2001. Claimant holds 55% of its capital. By Addendum No. 1 to the Contract executed on April 26, 2004, Riteve acquired by assignment all the interest, rights and obligations held previously by the Consortium.
325. The Tribunal considers that Riteve is a corporate vehicle that acts according to the interests and instructions of Claimant, in view of the following:
  - a) In the Notification of Dispute made by Claimant to Costa Rica, SyC expressly recognized that “...corporation SUPERVISIÓN Y CONTROL S.A. is the owner of 55% of the stock in corporation RITEVE S.A. and effectively controls it...” and that “...ownership of 55% of the stock in corporation RITEVE, S.A. confirms as well the control of the majority of stock by Supervisión y Control that is its condition as shareholder that controls the corporation ...”<sup>441</sup>

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<sup>441</sup> Exhibit C-7 p. 6.

- b) In its Memorial, SyC stated that *“Riteve, SyC ... S.A. is effectively controlled by society Supervisión y Control S.A. because it still owns fifty-five percent (55%) of the shares comprising its share capital.”*<sup>442</sup>
- c) According to article 26 of the Corporate Bylaws of Riteve, *“...the Board of Directors will be composed of five members, who may or may not be partners of the company and who will hold the positions of Chairman, Vice Chairman, Treasurer, Secretary and Member. According to the current shareholding proportion, it will correspond to SUPERVISIÓN Y CONTROL, S.A. to elect three positions of the board (Chairman, Treasurer and Member) and to TRANSAL, S.A. to elect the two remaining positions (Vice Chairman and Secretary).”*<sup>443</sup>
- d) No element was provided during the proceeding to show that the minority shareholder, Transal, S.A., exercises control over Riteve.

326. Since Claimant is the majority shareholder of the capital stock of Riteve, it can designate three of the five members of the Board of Directors that manage the company and has powers to remove and give them instructions through the holding of a Shareholders Meeting.

327. It also cannot be ignored that the Consortium assigned all its rights with respect to the Contract to Riteve. SyC claims presumed violations by Costa Rica of its contractual obligations, which in principle would only affect the legal sphere of the holder of the Contract, which is Riteve. If the Claimant alleges that the effects suffered by Riteve should be considered suffered directly by SyC, it cannot validly argue at the same time that it is completely unrelated to a proceeding initiated by Riteve and that its interests are not represented therein.

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<sup>442</sup> Memorial § 223.

<sup>443</sup> Exhibit C-14.

328. Indeed, this Tribunal finds that there is a general presumption that a majority shareholder also controls the company, and this presumption can only be rebutted if there are special elements which create doubts about the owner's control.
329. For the above reasons, the Tribunal concludes that Claimant controls Riteve, and that the proceeding initiated by Riteve before the Administrative Contentious Court must be considered filed by Claimant.
330. Article XI.3 of the Treaty requires the investor to select the forum in which it will process its claim. Once it has selected arbitration, it must waive the exercise of its claims before the local courts. In this case, Claimant submitted the dispute involving the establishment of rates for the VTI service and the damages and lost profits derived from the conduct and omissions of Costa Rica to the local courts, and failed to withdraw from such proceeding once it initiated the arbitration. Therefore, the claims related to such dispute are inadmissible. In any event, the Tribunal is of the view that the strict application of the triple identity test (same parties; same object; and same normative source) applied by some investment tribunals removes all legal effects from fork in the road clauses, which contravenes the *effet utile* principle applicable to the interpretation of treaties. What, in the end, matters for the application of fork in the road clauses is that the two relevant proceedings under examination have the same normative source and pursue the same aim. This is, in the Tribunal's view, the case here.
331. As a result, the Tribunal concludes that, in view of Article XI.3 of the Treaty, all the claims arising from the conducts or omissions of Costa Rica related to the establishment of rates for the VTI service or the methodology for calculating them are inadmissible.
332. However, those claims that did not form part of the *litis* of the proceeding before the Administrative Contentious Court are not affected by the declaration of inadmissibility derived from Article XI.3 of the Treaty, since the forum selection clause only applies to disputes processed in parallel in different forums.

333. SyC's claims that do not refer to the adjustment of rates for the VTI service and the damages and lost profits arising from the actions or omissions of Costa Rica in relation to such adjustment and methodology cannot be considered submitted to the national courts and therefore are, in principle, admissible.
334. From the analysis of the Memorials, documents, declarations, and statements of Claimant, the Tribunal concludes that the claims unrelated to the establishment of rates for the VTI service are the following:
- a) Denial of justice for impeding, through a Ruling of the Supreme Court, that the arbitration mechanisms agreed to in the Contract may be processed.<sup>444</sup>
  - b) Giving a less favorable treatment to the investment of the Claimant in relation to other investors in public services.
  - c) Reforming of the Transit Law in 2008 and 2012, affecting the exclusivity rights granted to Claimant under the Contract, constituting in the opinion of Claimant a measure tantamount to expropriation.<sup>445</sup>
  - d) Terminating the Contract through Ruling 333 of May 9, 2011, constituting in the opinion of Claimant a measure tantamount to expropriation.<sup>446</sup>
335. Consequently, only these claims could be admissible in the arbitration, provided they comply with the other requirements on admissibility.

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<sup>444</sup> It should be pointed out that from the information provided by the Parties in relation to this claim, the Tribunal observes that notwithstanding that the processing of a local arbitration was not permitted, the Supreme Court left open the possibility of going before the national courts to resolve the dispute between the Parties.

<sup>445</sup> In relation to such claim, it is important to have in mind that the Parties indicated that Riteve continues being the sole provider of the VTI service in Costa Rica notwithstanding that Claimant alleges that the reforms to the Transit Law deprived it of the rights of exclusivity.

<sup>446</sup> With respect to this claim, the Tribunal observes from the information contributed by the Parties that Ruling 333 was revoked on June 15, 2012.

## 2. CONSULTATION AND WAITING PERIOD REQUIREMENT ESTABLISHED IN ARTICLE XI.1 AND XI.2 OF THE TREATY

336. According to Article XI.1 of the Treaty, any dispute must be notified in writing by the Investor to the host Party, including detailed information. The dispute notified can only be sent to the competent local courts or an arbitral tribunal if a friendly settlement is not reached within a term of 6 (six) months.<sup>447</sup>
337. The purpose of this provision is for the parties to exhaust a friendly negotiation process prior to initiating a judicial or arbitration proceeding, and it implies that before filing a claim or a request for arbitration, the Investor must inform the State in reasonable detail what conduct or omissions it considers are in violation of the Treaty.
338. In its Decision on Jurisdiction, the Tribunal in *Burlington Resources Inc. v. Republic of Ecuador* explains the purpose of this requirement: “...by imposing upon investors an obligation to voice their disagreement at least six months prior to the submission of an investment dispute to arbitration, the Treaty effectively accords host States the right to be informed about the dispute at least six months before it is submitted to arbitration. The purpose of this right is to grant the host State an opportunity to redress the problem before the investor submits the dispute to arbitration. In this case, Claimant has deprived the host State of that opportunity...”<sup>448</sup>
339. Additionally, the Tribunal would like to remind the importance of proper notice, which is an important element of the State's consent to arbitration. Indeed, proper notice allows the State to examine and possibly resolve the dispute through negotiation.

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<sup>447</sup> Exhibit C-3, Article XI of the Treaty “1. Notice of any investment-related dispute arising between one of the parties and an investor of the other Party with respect to matters governed by this Treaty shall be given in writing, including detailed information, by the investor to the Party receiving the investment. To the extent possible, the parties to the dispute shall try to settle such disputes by an amicable agreement.

2. If the dispute cannot be settled in such manner within a period of six months after the date of the written notice referred to in Paragraph 1, the investor may submit the dispute:

a) to the competent courts of the Party in whose territory the investment was made;

b) to an international arbitral tribunal from among those cited below:

i) the International Centre for Settlement of Investment Disputes (ICSID), created by the ‘Convention on the Settlement of Investment Disputes between States and Nationals of Other States’, opened for signature on March 18, 1965, when each State party to this Treaty adhered to such; ...”

<sup>448</sup> *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, § 315 (Exhibit RL-14).

340. The failure to duly notify the State receiving the investment of the existence of a dispute constitutes a violation of Article XI.1 of the Treaty. This implies that any claim that has not been notified is inadmissible in the respective proceeding, because the prior negotiation process agreed to by the parties has not been exhausted.
341. In the event that the Investor notifies certain claims to the State, but upon presenting the Request for Arbitration or its Claim Memorial it adds claims different and not directly related to those previously presented, all the claims not notified will be inadmissible. Thus, the proceeding will only address the previously notified claims under the requirement set forth in Article XI.1 of the Treaty.
342. In this case, in the notice of the dispute by Claimant to Costa Rica, the following actions of the Costa Rican State were indicated as cause of the dispute:

*“a. Failure to give to the investment performed by Supervisión y Control a fair and equitable treatment guaranteeing its full protection.*

*b. Arbitrarily breaching its obligations with an investor and through which it was obliged to approve tariff readjustments under the service contract for [V]ehicle [T]echnical [I]nspections executed with corporation Riteve.*

*c. Abrogating through Executive Decree from the Ministry of Transportation the tariffs readjusted which the Council for Public Transportation had approved to make payments under the service contract for Vehicle [T]echnical [I]nspection with corporation Riteve.*

*d. Failing to approve and publish in the Official Gazette, arbitrarily and unfairly over more than eight years a procedure for tariff readjustment and the tariff readjustments when it should have done so within a three month term.*

*e. Amend through a Resolution and against a contract the terms and conditions agreed with the investor which precisely led it to perform significant capital investments...*<sup>449</sup>

343. Claimant alleged that such conduct and omissions by Costa Rica were contrary to articles III, IV and V of the Treaty, in relation to the obligations of granting fair and equitable treatment, full protection, national treatment and most favored nation treatment, and the prohibition of nationalization and expropriation.
344. In its Memorial, Claimant expanded its claims, some of them being directly related to the dispute notified to Respondent and others not. The claims coinciding with the notice or directly linked to the issued raised therein, are the following:
- a) Not granting at all times to SyC's investment fair and equitable treatment by seriously breaching obligations undertaken in the Contract.
  - b) Giving unjust and discriminatory treatment by not issuing a decision on the request for rate readjustments, preventing SyC from fully enjoying its investments.
  - c) Violation of the obligation of granting at all times fair and equitable treatment and full protection and security to SyC's investment by repealing Executive Order 30185-MOPT through which the methodology for the readjustment of rates had been approved and published.
345. However, in its Claim Memorial, SyC added the following four claims that were not mentioned in the Notice of Intent, nor are directly linked to the issues in the notification made to Costa Rica:

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<sup>449</sup> Exhibit C-07.

- a) Denial of Justice in view of the fact that Ruling 000906-A-04 issued by the Supreme Court on October 21, 2004, prevented the arbitration mechanism agreed to in the Contract from being processed.
- b) Measures tantamount to expropriation consisting of reforms to the Transit law of 2008 and 2012, affecting the exclusivity rights granted to the Claimant under the Contract.
- c) Measures tantamount to expropriation consisting of having unilaterally terminated the Contract through Ruling 333 of May 9, 2011, without ordering the payment of prompt and adequate compensation.
- d) Violation of the obligation to grant national treatment or most favored nation treatment with respect to what is granted to other investments in public services.

346. The new claims not notified to Respondent nor directly related to those included in the Notice of Intent are inadmissible in these arbitration proceedings because Claimant has not complied with the aforementioned requirement established in Article XI.1 of the Treaty.

347. The Tribunal observes that the claims duly notified to Costa Rica are precisely those related to the adjustment of rates for the VTI service and the damages and lost profits derived from the actions or omissions of Costa Rica in relation to such adjustment and its methodology, which were already declared inadmissible because the respective dispute has been submitted to the domestic courts.

348. Thus, all the claims of Claimant are inadmissible, in view of the fact that, as explained before, some were already submitted to a local court, and those that are not considered part of the dispute submitted to domestic courts were not duly notified to Costa Rica as required by Article XI.1 of the Treaty.

#### D. CONCLUSIONS ON JURISDICTION AND ADMISSIBILITY

349. The Tribunal concludes that it has jurisdiction over this investment dispute, which includes the power to decide over issues covered by Article III.2 of the Treaty. However, the Tribunal finds that all the claims raised by Claimant are inadmissible. The Tribunal thus finds no need to analyze the merits of the case.
350. All the claims related to the adjustment of rates for the VTI service and the methodology for carrying it out, as well as the contractual breaches attributed to Costa Rica regarding such questions and the damages and lost profits that may have been generated as a consequence, are inadmissible under the forum selection clause contained in Article XI.3 of the Treaty, because they have already been submitted to local courts.
351. All the claims asserted by Claimant in its Memorial that were not duly notified to Respondent at least six months before the initiation of the arbitration are inadmissible because the Claimant failed to comply with the requirement set forth in Article XI.1 of the Treaty.
352. As a result, all of Claimant's claims are inadmissible, either because of the forum selection clause contained in Article XI.3 of the Treaty, or because of the failure to comply with the notification requirement established in Article XI.1 of the Treaty.
353. The Tribunal therefore rejects all the claims presented by Claimant on the basis of inadmissibility.

#### X. COSTS

354. Claimant requested with its Memorial that Costa Rica be declared responsible for breach of its obligations under the Treaty and in view thereof be ordered to pay all the costs and expenses incurred for the arbitration, plus interest.

355. For its part, Costa Rica requested in its Counter-Memorial that Claimant be ordered to pay all the procedural costs and the professional fees of the lawyers, plus the compounded interest on these amounts. Furthermore, reiterating its request to the Arbitral Tribunal in its Post Hearing Brief, Costa Rica argued that:

*“...the deplorable conduct of the Claimant during the Hearing would by clearly justify ordering payment of all costs and legal fees and expenses incurred by Costa Rica in this arbitration. Costa Rica invites the Tribunal to consider, for example, the reckless accusations and statements of the Claimant during the Hearing; the abuse by the Claimant of the witnesses and experts of Costa Rica during the Hearing; the fact that – on the few occasions it quoted a legal standard to support general claims – the Claimant quoted the incorrect standard, only to then take it back; the fact that the Claimant quoted portions of awards from other cases as if they were judgments of the arbitral tribunal when in fact they were simply narrations by the relevant tribunal [of] the allegations of the contending parties; the fact that Claimant outright stated that there are no precedents to dismiss the case on the grounds of given jurisdictional objections, when they do exist. These are only some of examples; there are many more that will not be identified due to lack of space.”<sup>450</sup>*

356. In this respect, Costa Rica argues that the conduct of SyC is analogous to that of the investor in the case *Generation Ukraine, Inc. v. Ukraine*, whose conduct led the arbitral tribunal to order the investor to pay the costs.<sup>451</sup>
357. The Tribunal considers that notwithstanding that the claims of Claimant were inadmissible in view of the terms of articles XI.1 and XI.3 of the Treaty, its arguments were not frivolous, and therefore the Parties shall cover the costs of the arbitration in equal parts and each of them will cover the processing costs they have incurred.

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<sup>450</sup> Post Hearing Brief of Costa Rica § 183.

<sup>451</sup> Post Hearing Brief of Costa Rica § 184; citing *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, September 16, 2003, § 24.8 (Exhibit RL-106).

## XI. DECISION

358. FOR THE REASONS EXPLAINED, the Tribunal, by majority, decides the following:

- a) The Tribunal has jurisdiction over the dispute submitted before it in this arbitration.
- b) The Tribunal rejects all of the claims raised by Claimant on the basis of inadmissibility, in accordance with Articles X1.1 and X1.3 of the Treaty.
- c) Each Party shall cover its own costs.
- d) The costs of the Tribunal will be paid in equal parts by the Parties.
- e) In accordance with Article 48(2) of the ICSID Convention and ICSID Arbitration Rule 47(2), the Award is signed by President Claus von Wobeser and Arbitrator Eduardo Silva Romero, the arbitrators who voted for it. Arbitrator Joseph P. Klock Jr. dissents without appending reasons.

Signed in Spanish and in English, both versions being authentic.



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Claus von Wobeser

President of the Tribunal

Date: *9 January 2017*



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Eduardo Silva Romero

Arbitrator

Date: *4 January 2017*

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Joseph P. Klock Jr.

Arbitrator

Date: