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AWARD

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ICC INTERNATIONAL COURT OF ARBITRATION

CASE No. 23975/ FS (c. 23976/FS and 23977/FS)

Vamed MANAGEMENT UND SERVICE GmbH

(Austria)

vs/

The GABONESE REPUBLIC

This document is an original of the final award rendered in conformity with the Rules of Arbitration of the International Chamber of Commerce.

ICC 23975/FS (c. 23976/FS and 23977/FS) **March 21, 2022**

Vamed MANAGEMENT UND SERVICE GmbH (Austria)

Claimant

v/

The GABONESE REPUBLIC

Respondent

Final award

Seat of Arbitration: Zürich, Switzerland

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I. THE PARTIES AND THEIR REPRESENTATIVES

A. The Claimant

1. The Claimant is:

Vamed MANAGEMENT UND SERVICE GMBH
Sterngasse 5
P.O. Box 108 1232 Vienna
Austria

2. The Claimant is represented in this arbitration by:

Dr Christian W. Konrad
KONRAD & PARTNER RECHTSANWÄLTE GMBH
Rotenturmstrasse 13
1010 Vienna
Austria
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Peters Ortner Partners
Graben 12/1-3
1010 Vienna
Austria
p.peters@peters-ortner.partners.com
m.hackl@ peters-ortner.partners.com

B. THE RESPONDENT

3. The Respondent is:

THE GABONESE REPUBLIC
Agence Judicaire de l'Etat
B.P. 912 Libreville Gabon

4. The Respondent is represented in this arbitration by:

Mr Olivier Cren
Cabinet Cren
91, rue du Faubourg Saint-Honoré 75008 Paris
France
Tel: +33(0)1 40.73.88.88
Email: olivier.cren@wanadoo.fr

Mr François Fauvet
Cabinet Fauvet La Giraudière & Associés
91, rue du Faubourg Saint-Honoré 75008 Paris
France
Tel: +33(0)1 40.73.88.88
Email : ff@flg.fr

II. CONSTITUTION OF THE ARBITRAL TRIBUNAL

5. The Parties agreed to have a three-member Arbitral Tribunal. The Parties also agreed that the two Co-arbitrators should jointly nominate the President of the Arbitral Tribunal.

6. On 11 December 2018, pursuant to Article 13(2) of the ICC Rules of Arbitration (the "ICC Rules"), the Secretary General of the ICC International Court of Arbitration (the "Secretary General") confirmed as Co-arbitrator nominated by the Claimant:

Ms Domitille Baizeau
LALIVE
35, Rue de la Mairie
P.O. Box 6569
1211 Geneva 6 Switzerland
Tel: +41 58 105 20 00
Email: dbaizeau@lalive.law

7. On 11 December 2018, pursuant to Article 13(2) of the ICC Rules, the Secretary General confirmed as Co-arbitrator nominated by the Respondent:

Mr Pierre-Yves Gunter
BÄR & KARRER SA
12, Quai de la Poste
1211 Geneva 11
Switzerland
Tel: +41 58 261 57 00
Email: pierre-yves.gunter@baerkarrer.ch

8. On 8 February 2019, pursuant to Article 13(2) of the ICC Rules, the Secretary General confirmed as President of the Arbitral Tribunal jointly nominated by the Co-arbitrators:

Dr Charles Poncet
PONCET Sàrl
6 rue Saint-Léger
P.O. 5271
1211 Geneva 11
Switzerland
Email: charles@poncet.law

9. On 8 February 2019, the Arbitral Tribunal received the file of the ICC Secretariat and the proceedings before the Arbitral Tribunal were commenced.

III. JURISDICTION OF THE ARBITRAL TRIBUNAL

10. The Claimant commenced this arbitration on the basis of the arbitration agreements contained in nine Hospital Management Agreements concerning different hospitals in Gabon as described below (together the "Agreements"):

i. Hospital Management Agreement of the Regional Hospital of Tchibanga of December 24, 2008 (the "Tchibanga Agreement"):

> *26.5* ***Arbitrage****. Sauf s'ils concernent un redressement par voie d'injonction demandé relativement à la dénomination commerciale, la marque déposée, les marques de services et sujets similaires, les litiges, demandes, de dommages-intérêts ou controverses résultant du présent Accord, seront tranchés par arbitrage conformément au Règlement de Conciliation et d'Arbitrage de la Chambre de Commerce Internationale, et les dispositions suivantes s'appliqueront :*
>
> *26.5.1* ***Lieu de l'arbitrage****. Le lieu de l'arbitrage sera Genève et le nombre d'arbitres sera trois. Les langues utilisées seront le français et l'anglais ou l'allemand.*
>
> *26.5.2* ***Rapport écrit****. Toute sentence sera accompagnée d'un rapport écrit sur les conclusions et les raisons motivant la sentence.*

The translation from French into English of Clause 26.5 of the Tchibanga Agreement reads as follows:

> 26.5 **Arbitration**. Unless they concern an injunctive relief sought in respect of the trade name, the registered trademark, service marks and similar matters, disputes, claims for damages or controversies arising under this Agreement, shall be settled by arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, and the following provisions shall apply:
>
> 26.5.1 **Place of arbitration**. The place of arbitration shall be Geneva and the number of arbitrators shall be three. The languages used will be French and English or German.
>
> 26.5.2 **Written statement**. Any award shall be accompanied by a written statement of the findings and reasons for the award.

ii. Hospital Management Agreement of the Regional Hospital of Lambaréné of December 24, 2008 (the "Lambaréné Agreement"):

26.5 ***Arbitrage****. Sauf s'ils concernent un redressement par voie d'injonction demandé relativement à la dénomination commerciale, la marque déposée, les marques de services et sujets similaires, les litiges, demandes, de dommages-intérêts ou controverses résultant du présent Accord, seront tranchés par arbitrage conformément au Règlement de Conciliation et d'Arbitrage de la Chambre de Commerce Internationale, et les dispositions suivantes s'appliqueront :*

26.5.1 ***Lieu de l'arbitrage****. Le lieu de l'arbitrage sera Genève et le nombre d'arbitres sera trois. Les langues utilisées seront le français et l'anglais ou l'allemand.*

26.5.2 ***Rapport écrit****. Toute sentence sera accompagnée d'un rapport écrit sur les conclusions et les raisons motivant la sentence.*

The translation from French into English of Clause 26.5 of the Lambaréné Agreement reads as follows:

26.5 **Arbitration**. Unless they concern an injunctive relief sought in respect of the trade name, the registered trade mark, service marks and similar matters, disputes, claims for damages or controversies arising under this Agreement, shall be settled by arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, and the following provisions shall apply:

26.5.1 **Place of arbitration.** The place of arbitration shall be Geneva and the number of arbitrators shall be three. The languages used will be French and English or German.

26.5.2 **Written statement**. Any award shall be accompanied by a written statement of the findings and reasons for the award.

iii. Hospital Management Agreement of the Regional Hospital of Makokou of December 24, 2008 (the "Makokou Agreement"):

26.5 ***Arbitrage****. Sauf s'ils concernent un redressement par voie d'injonction demandé relativement à la dénomination commerciale, la marque déposée, les marques de services et sujets similaires, les litiges, demandes, de dommages-intérêts ou controverses résultant du présent Accord, seront tranchés par arbitrage conformément au Règlement de*

Conciliation et d'Arbitrage de la Chambre de Commerce Internationale, et les dispositions suivantes s'appliqueront :

26.5.1 ***Lieu de l'arbitrage****. Le lieu de l'arbitrage sera Genève et le nombre d'arbitres sera trois. Les langues utilisées seront le français et l'anglais ou l'allemand.*

26.5.2 ***Rapport écrit****. Toute sentence sera accompagnée d'un rapport écrit sur les conclusions et les raisons motivant la sentence.*

The translation from French into English of Clause 26.5 of the Makokou Agreement reads as follows:

26.5 **Arbitration**. Unless they concern an injunctive relief sought in respect of the trade name, the registered trade mark, service marks and similar matters, disputes, claims for damages or controversies arising under this Agreement, shall be settled by arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, and the following provisions shall apply:

26.5.1 **Place of arbitration**. The place of arbitration shall be Geneva and the number of arbitrators shall be three. The languages used will be French and English or German.

26.5.2 **Written statement**. Any award shall be accompanied by a written statement of the findings and reasons for the award.

iv. Hospital Management Agreement of the University Hospital of Angondjié of October 22, 2012 (the "Angondjié Agreement"):

14.5 ***Arbitrage****. Sauf s'ils concernent un redressement par voie d'injonction demandé relativement à la dénomination commerciale, la marque déposée, les marques de services et sujets similaires, les litiges, demandes, de dommages-intérêts ou controverses résultant du présent Accord, seront tranchés par arbitrage conformément au Règlement de Conciliation et d'Arbitrage de la Chambre de Commerce Internationale, et les dispositions suivantes s'appliqueront :*

14.5.1 ***Lieu de l'arbitrage****. Le lieu de l'arbitrage sera Genève et le nombre d'arbitres sera trois. Les langues utilisées seront le français et l'anglais ou l'allemand.*

14.5.2 ***Rapport écrit****. Toute sentence sera accompagnée d'un rapport écrit sur les conclusions et les raisons motivant la sentence.*

The translation from French into English of Clause 14.5 of the Angondjé Agreement reads as follows:

> 14.5 **Arbitration**. Unless they concern an injunctive relief sought in respect of the trade name, the registered trade mark, service marks and similar matters, disputes, claims for damages or controversies arising under this Agreement, shall be settled by arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, and the following provisions shall apply:
>
> 14.5.1 **Place of arbitration**. The place of arbitration shall be Geneva and the number of arbitrators shall be three. The languages used will be French and English or German.
>
> 14.5.2 **Written statement**. Any award shall be accompanied by a written statement of the findings and reasons for the award.

v. Hospital Management Agreement of the University Hospital of Libreville I of October 22, 2012 (the "Libreville Agreement"):

> *14.5 **Arbitrage**. Sauf s'ils concernent un redressement par voie d'injonction demandé relativement à la dénomination commerciale, la marque déposée, les marques de services et sujets similaires, les litiges, demandes, de dommages-intérêts ou controverses résultant du présent Accord, seront tranchés par arbitrage conformément au Règlement de Conciliation et d'Arbitrage de la Chambre de Commerce Internationale, et les dispositions suivantes s'appliqueront :*
>
> *14.5.1 **Lieu de l'arbitrage**. Le lieu de l'arbitrage sera Genève et le nombre d'arbitres sera trois. Les langues utilisées seront le français et l'anglais ou l'allemand.*
>
> *14.5.2 **Rapport écrit**. Toute sentence sera accompagnée d'un rapport écrit sur les conclusions et les raisons motivant la sentence.*

The translation from French into English of Clause 14.5 of the Libreville I Agreement reads as follows:

> 14.5 **Arbitration**. Unless they concern an injunctive relief sought in respect of the trade name, the registered trade mark, service marks and similar matters, disputes, claims for damages or controversies arising under this Agreement, shall be settled by arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, and the following provisions shall apply:

14.5.1 **Place of arbitration**. The place of arbitration shall be Geneva and the number of arbitrators shall be three. The languages used will be French and English or German.

14.5.2 **Written statement**. Any award shall be accompanied by a written statement of the findings and reasons for the award.

vi. Hospital Management Agreement of the University Hospital of Owendo of December 16, 2013 ("the Owendo Agreement"):

*14.5 **Arbitrage**. Sauf s'ils concernent un redressement par voie d'injonction demandé relativement à la dénomination commerciale, la marque déposée, les marques de services et sujets similaires, les litiges, demandes, de dommages-intérêts ou controverses résultant du présent Accord, seront tranchés par arbitrage conformément au Règlement de Conciliation et d'Arbitrage de la Chambre de Commerce Internationale, et les dispositions suivantes s'appliqueront :*

*14.5.1 **Lieu de l'arbitrage**. Le lieu de l'arbitrage sera Genève et le nombre d'arbitres sera trois. Les langues utilisées seront le français et l'anglais ou l'allemand.*

*14.5.2 **Rapport écrit**. Toute sentence sera accompagnée d'un rapport écrit sur les conclusions et les raisons motivant la sentence.*

The translation from French into English of Clause 14.5 of the Owendo Agreement reads as follows:

14.5 **Arbitration.** Unless they concern an injunctive relief sought in respect of the trade name, the registered trade mark, service marks and similar matters, disputes, claims for damages or controversies arising under this Agreement, shall be settled by arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, and the following provisions shall apply:

14.5.1 **Place of arbitration**. The place of arbitration shall be Geneva and the number of arbitrators shall be three. The languages used will be French and English or German.

14.5.2 **Written statement**. Any award shall be accompanied by a written statement of the findings and reasons for the award.

vii. Hospital Management Agreement relating to the Regional Hospital of Franceville of March 2003 (the "Franceville Agreement"):

26.5 ***Arbitrage****. Sauf s'ils concernent un redressement par voie d'injonction demandé relativement à la dénomination commerciale, la marque déposée, les marques de services et sujets similaires, les litiges, demandes, de dommages-intérêts ou controverses résultant du présent Accord, seront tranchés par arbitrage conformément au Règlement de Conciliation et d'Arbitrage de la Chambre de Commerce Internationale, et les dispositions suivantes s'appliqueront :*

26.5.1 ***Lieu de l'arbitrage****. Le lieu de l'arbitrage sera Zurich et le nombre d'arbitres sera trois. La langue utilisée sera l'anglais.*

26.5.2 ***Rapport écrit****. Toute sentence sera accompagnée d'un rapport écrit sur les conclusions et les raisons motivant la sentence.*

The translation from French into English of Clause 26.5 of the Franceville Agreement reads as follows:

26.5 **Arbitration.** Except as they relate to injunctive relief which may be sought in connection with trade name, trademark, service marks and similar matters, all disputes, claims or controversies arising out of this Agreement, shall be submitted for settlement by arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, and the following provisions shall apply:

26.5.1 **Place of Arbitration**. The place of arbitration shall be Zurich, and the number of arbitrators shall be three. The language to be used shall be English.

26.5.2 **Written Statement**. Any award shall be accompanied by a written statement of the findings and reasons for the award.

viii. Hospital Management Agreement of the Regional Hospital of Port-Gentil of December 13, 2001 (the "Port-Gentil Agreement"):

26.5 **Arbitration**. Except as they relate to injunctive relief which may be sought in connection with trade name, trade mark, service marks and similar matters, all disputes, claims or controversies arising out of this Agreement, shall be submitted for settlement by arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, and the following provisions shall apply:

26.5.1 **Place of Arbitration**. The place of arbitration shall be The Hague, Netherland (sic), and the language to be used in the arbitral proceedings shall be English.

26.5.2 **Written Statement**. Any award must be accompanied by a written statement of findings of fact and reasons for the decisions.

ix. Hospital Management Agreement of the Regional Hospital of Koulamoutou of December 13, 2001 (the "Koulamoutou Agreement"):

26.5 **Arbitration**. Except as they relate to injunctive relief which may be sought in connection with trade name, trade mark, service marks and similar matters, all disputes, claims or controversies arising out of this Agreement, shall be submitted for settlement by arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, and the following provisions shall apply:

26.5.1 **Place of Arbitration**. The place of arbitration shall be The Hague, Netherland (sic), and the language to be used in the arbitral proceedings shall be English.

26.5.2 **Written Statement**. Any award must be accompanied by a written statement of findings of fact and reasons for the decisions.

11. On September 19, 23 and 25 2019 the Parties entered into a Protocole d'Accord Portant Règlement de la Dette Due par l'Etat Gabonais à la Société Vamed Management und Services GMBH et Vamed Engineering GMBH au Titre des Contrats Relatifs à la Gestion, la Maintenance et la Formation dans les Hôpitaux du Gabon ("the Protocole"), governed by Swiss law and containing at Article 8 a dispute resolution clause worded as follows:

Tous les litiges découlant du relatif au présent Protocole, y compris toute question relative à son existence, sa validité, son exécution ou sa cessation, donneront lieu, en priorité, à la négociation d'un règlement amiable entre les Parties, diligentée à l'initiative de l'une d'entre elles par la notification écrite du litige. Si, en l'espace de deux (2) mois après l'envoi de la notification, les négociations n'ont pas abouti au règlement amiable du litige notifié, la tentative de négociation sera considérée comme échouée.

En cas d'échec de la tentative de négociation, tous les litiges découlant du ou relatif au présent Protocole, y compris toute question relative à son existence, sa validité, son exécution ou sa cessation, seront tranchés définitivement par voie d'arbitrage selon les

règles d'arbitrage de la Chambre de Commerce Internationale de Paris (CCI) par trois (3) arbitres.

La demanderesse à l'arbitrage nommera un arbitre dans la demande d'arbitrage, la défenderesse à l'arbitrage nommera un arbitre en l'espace de trente (30) jours après la notification de la demande d'arbitrage. Après la confirmation des deux arbitres conformément au règlement d'arbitrage de la CCI, les deux arbitres désigneront, en l'espace de 30 jours après la confirmation, un président du tribunal arbitral. Si l'un des arbitres n'est pas désigné dans le délai susmentionné, la Cour internationale d'arbitrage de la Chambre de Commerce Internationale désignera un arbitre de remplacement.

Dans la procédure de l'arbitrage la langue d'arbitrage sera l'anglais, l'acte de mission et la sentence arbitrale seront rédigés en anglais. Le siège de l'arbitrage sera à Zurich (Suisse).

Du fait de l'acceptation de la clause d'arbitrage ci-dessus, chacune des parties renonce irrévocablement à interjeter appel ou demander la révision de la sentence à intervenir.

12. Initially, the Claimant had brought its claims in three different arbitrations, i.e. ICC case 23975/FS, ICC case 23976/FS and ICC case 23977/FS. However, the Parties subsequently requested the consolidation of the three arbitrations into a single arbitration with the seat of the arbitration in Zurich. The consolidation of the three proceedings was confirmed by the ICC Secretariat on 27 November 2018 pursuant to the Parties' agreement and the ICC Court's standing decision on Article 10(a) of the ICC Rules.

IV. LANGUAGES

13. As per the subsequent agreement of the Parties, the language of the arbitration is English.

V. SEAT OF THE ARBITRATION

14. As per the agreement of the Parties, the seat of the consolidated arbitration is Zurich, Switzerland.

VI. APPLICABLE SUBSTANTIVE LAW

15. The Agreements relating to Tchibanga, Lambaréné, Makokou, Angondjié, Libreville and Owendo, provide for the application of Swiss law in the following terms:

> ***Droit applicable.*** *Que ce soit dans le cadre d'une procédure de redressement par injonction ou d'une procédure d'arbitrage, le présent Accord sera régi et interprété selon les lois de Suisse, nonobstant toute règle de droit international privé ou choix de droit au titre duquel une autre loi pourrait s'appliquer.*

16. The translation from French into English of the choice of law clauses in the Agreements relating to Tchibanga, Lambaréné, Makokou, Angondjié, Libreville I and Owendo reads as follows:

> **Applicable law.** Whether in injunctive relief proceedings or arbitration proceedings, this Agreement shall be governed by and interpreted in accordance with the laws of Switzerland, notwithstanding any rule of private international law or choice of law under which any other law may apply.

17. The Franceville Agreement relating to contains a choice of law clause also providing for Swiss law to be applicable, in the following wording:

> ***26.6 Loi applicable****. Que ce soit dans le cadre d'une procédure de redressement par injonction ou d'une procédure d'arbitrage, le présent Accord sera régi et interprété selon les lois de Suisse, nonobstant toute règle de droit international privé ou choix de droit au titre duquel une autre loi pourrait s'appliquer.*

18. The translation from French into English of the choice of law clauses in the Franceville Agreement reads as follows:

> **26.6 Governing Law.** Whether in a proceeding for injunctive relief or in arbitration proceedings, this Agreement shall be governed by and construed in accordance with the laws of Switzerland, which shall be the proper law hereof, notwithstanding any rules of private international law or choice of law under which any other law might otherwise be applicable.

19. The Port-Gentil Agreement and the Koulamoutou Agreement contain a choice of law clause in favor of Swiss law, worded as follows:

> **26.6 Governing law**. Whether in a proceeding for injunctive relief or in arbitration, this Agreement shall be governed by and construed in accordance with the laws of Switzerland, which shall be the proper law hereof, notwithstanding any rules of private international law or choice of law under which any other law might otherwise be applicable.

20. The *Protocole* entered into by the Claimant, Vamed Engineering GmbH and the Respondent and signed on September 25, 2019 (the "*Protocole*"), and further referred to below when considering the remaining claims for determination, is also governed by Swiss law. Accordingly, the law governing the entirety of the present dispute is Swiss law.

VII. INITIAL PROCEDURAL BACKGROUND

21. On October 8, 2018 the Claimant filed three requests for arbitration with the ICC Secretariat. The first request ("The Geneva Request") referred to six Hospital Management Agreements providing for ICC arbitration in Geneva. The second request ("The Zurich Request") referred to a Hospital Management Agreement concerning the Franceville hospital, including an arbitration clause providing for ICC arbitration in Zurich. The third request ("The Hague Request") referred to two Hospital Management Agreements providing for ICC Arbitration in The Hague (Netherlands). These Requests were served upon the Respondent on October 18, 2018. The arbitration clauses relied on in The Geneva Request and The Zurich Request provide for three arbitrators, but the arbitration clauses relied on in The Hague Request do not specify the number of arbitrators. The Parties have agreed for the number of arbitrators to be three.

22. On October 16, 2018, a first-time limit of 30 days was set by the Secretariat for Respondent to submit its Answers to the Requests for Arbitration. The Secretariat also set the provisional advance on costs in each arbitration (*i.e.* USD 132,000 for The Geneva Request, USD 88,000 for The Hague Request and USD 78,000 for The Zurich Request) and invited Claimant to pay the provisional advances by November 15, 2018. Payment of the requested amounts were made by Claimant in due time.

23. On November 23, 2018, the Parties informed the Secretariat of their agreement to consolidate the three arbitration proceedings into a single arbitration with seat in Zurich.

24. On November 27, 2018, the Secretariat informed the Parties as to the consolidation of the three arbitrations under reference N° 23975/FS (c. 23976/FS and 23977/FS), pursuant to the agreement of the Parties, and in accordance with the decision of the International Court of Arbitration pursuant to art. 10 (a) of the ICC Rules.

25. In the same correspondence of November 27, 2018, the Secretariat extended Respondent's time limit for its Answer to the Requests for Arbitration in the consolidated proceedings until February 18, 2019, also in accordance with the agreement of the Parties.

26. On December 11, 2018, the Secretary General confirmed Ms. Domitille Baizeau as co-arbitrator nominated by the Claimant and Mr. Pierre-Yves Gunter as co-arbitrator nominated by the Respondent.

27. On February 8, 2019, the Secretary General confirmed Dr. Charles Poncet as President upon the joint nomination of the co-arbitrators, and the file was sent to the Arbitral Tribunal.

28. On April 11, 2019, the Secretariat informed the Parties and the Arbitral Tribunal that the Court had fixed the deposit at USD 575,000, based on an amount in dispute in the consolidated arbitration quantified at USD 39,078,836 (*i.e.* EUR 33,929,609 for the principal claims) and three arbitrators. The Secretariat also invited Respondent to pay its share of the advance on costs of USD 287,500 by May 6, 2019.

29. On April 18, 2019, the Arbitral Tribunal and Counsel held the Case Management Conference ("CMC"). The participants agreed the Terms of Reference and Procedural Order No. 1, including the Procedural Calendar. The Parties also confirmed their agreement to Mr. Pritam Singh as Secretary of the Arbitral Tribunal. During the CMC, Respondent indicated that it would raise a counterclaim of EUR 50,000,000 in the summary of its position for the Terms of Reference, which it eventually did. The counterclaim was included in the Terms of Reference.

30. On May 17, 2019, the Arbitral Tribunal circulated a signed electronic copy of the Terms of Reference dated 30 April 2019, together with Procedural Order No. 1 dated May 16, 2019. Under the Procedural Calendar agreed with the Parties, Respondent was invited to submit its Statement of Defense (and Counterclaim) by July 10, 2019.

31. On May 24, 2019, the Secretariat took note of the amount in dispute at USD 96,669,253 (*i.e.* EUR 33,929,609 for the principal claims and EUR 50,000,000 for the counterclaim). However, since Respondent's counterclaim had been raised only in the summary of its position meant for the Terms of Reference, and not in a formal submission, the advance on costs previously established remained unchanged. A potential readjustment of the advance on costs was to be considered once Respondent would submit its Statement of Defense and Counterclaim.

32. On July 1, 2019, the Secretariat noted that the Respondent had failed to comply with the payment requests of April 11, May 13 and June 7, 2019 and therefore invited Claimant to pay the Respondent's share of the deposit.

33. On July 9, 2019, Respondent submitted Statement of Defense, including a counterclaim of EUR 50 million, yet without exhibits.

34. On July 17, 2019, the Secretariat confirmed receipt of USD 287,000 from Claimant paid in substitution for the Respondent.

35. On September 26, 2019, the Secretariat stated that the Court had fixed separate advances on costs.

36. On October 17, 2019, the Secretariat requested the Respondent to pay a separate advance on costs of USD 655,000, on account of its Counterclaim.

37. On December 16, 2019, the Parties jointly requested the suspension of the proceedings in accordance with the provisions of the *Protocole* transmitted to the Arbitral Tribunal.

38. On January 8, 2020, the Arbitral Tribunal issued Procedural Order No 2 suspending the arbitration proceedings until June 2021 at the latest and added that at any time, the Parties could apply for the issuance of the consent award contemplated in the *Protocole*.

39. On December 31, 2020, the Claimant applied for the resumption of the arbitration proceedings and the issuance of a consent award on the basis of the *Protocole*. Its request annexed two notices sent to the Respondent for payments due under the *Protocole* to which the Respondent had not responded.

40. On January 6, 2021, the Arbitral Tribunal issued PO 3 and reactivated the arbitral proceedings giving the Respondent until February 12, 2021 to submit its comments, if any, as to the issuance of an award by consent pursuant to the *Protocole*.

41. The Respondent submitted no comments.

42. On March 17, 2021 the Arbitral Tribunal closed the proceedings as of March 20, 2021 pursuant to Article 27 of the ICC Rules.

VIII. SIGNIFICANT DEVELOPMENTS SINCE THE SUMMER OF 2021

43. On June 8, 2021, the Arbitral Tribunal advised the Parties that, having consulted the ICC Secretariat, it had further questions for the Claimant, on the amounts claimed, on the amounts allegedly due to Vamed Engineering GmbH ("Vamed Engineering"), which is not a party to the

arbitration, and on whether, absent any comment by the Respondent, an award by consent could be issued.

44. On June 9, 2021, the Claimant confirmed that Vamed Engineering's principal claim had been paid in full (as envisaged would be the case with the first tranche to be paid under Article 4.1 of the *Protocole*) as has its interest claim since any payment received was first applied to any interest due. The Claimant requested a case management conference (CMC) to discuss outstanding issues and specifically the Tribunal's question with respect to an award by consent.

45. On June 11, 2021, the Arbitral Tribunal invited the Respondent to comment by 25 June 2021 and indicted its availability for a CMC on June 30, 2021.

46. On June 14, 2021, the Claimant filed further submission with respect to the form of the award and submitted that it was "*entitled to receive payment of the amounts set forth in its Request for Award by Consent. Such relief [...] either, in an award by consent or in a regular final award following the evaluation of the evidence.*"

47. On June 25, 2021, the Respondent submitted an exchange of correspondence with the Judiciary Agency of the Respondent indicating that a new payment of EUR 5'312'020.- had been made recently and that the remaining balance according to the Respondent, namely EUR 8'968'000.- would be paid "*among a new schedule which will be discussed, if agreed by the Complainant, the next couple of weeks in visioconference*". On that basis the Respondent applied for a new stay of the proceedings. The Respondent however did not address the Claimant's submission of June 9 and June 14, 2021.

48. On June 27, 2021, the Arbitral Tribunal acknowledged receipt of the Respondent's communication of June 25, invited the Claimant to state its position on the Respondent's proposal to seek to settle the dispute without the need for an award and accordingly cancelled the CMC.

49. On June 28, 2021, the Claimant indicated that confirmation of the payment announced on June 25 had not been received.

50. On July 2, 2021, the Claimant filed a Reduction of Claim and Modified Request for Relief pursuant to which the claim was reduced to EUR 21'546'089, 67.- with interest at 8 % yearly from July 2, 2021. The Claimant maintained its request for an award by consent but also, in the alternative, for a regular, final award. Annexed to the Claimant's submission was a letter from the Claimant addressed to the Respondent, in which the Claimant recalled the history of the matter, and stated

that it would be prepared to stay the arbitration for two months provided that the Respondent would make a payment of EUR 5 million by no later than August 16, 2021.

51. On July 7, 2021, the Respondent was invited to comment on the Claimant's July 2, 2021 submission.

52. On July 8, 2021, the Claimant acknowledged receipt of four distinct payments in the amount of EUR 1'328'003,50.- each received between June 30 and July 2, 2021 but pointed out that these amounts had already been accounted for in the July 2, 2021 submission.

53. On July 22, 2021, the Respondent responded and explained that it was not in a position to respond due to various problems nor make any payment of EUR 5 million by August 16, 2021 and sought an extension until September 17, 2021 to respond to the Claimant.

54. On July 23, 2021, the Claimant indicated that a postponement to September 17, 2021 was "*unacceptable for Vamed unless payment of* EUR *5 Mio took place by August 16, 2021*".

55. In a letter issued by Mrs. Nyana-Ekoume to the Claimant on August 6, 2021, the General Director of the State Judiciary Agency of the Ministry of Budget and Public Finances of the Respondent undertook to make a payment of EUR 5 Mio by August 16, 2021, and EUR 3'968'000.- by October 15, 2021, provided that (a) this new payment timeline would be agreed between the Parties, (b) the arbitration proceedings would be stayed and (c) Article 4.2 of the *Protocole* would not apply. On the same day, the Respondent requested an extension until September 20, 2021 to respond to the Claimant's submission of "*mid-July*".

56. On August 7, 2021, the Arbitral Tribunal advised the Parties that, under the circumstances, it was considering whether or not an award by consent could really be issued and that the Parties were to keep the Arbitral Tribunal informed of any developments.

57. On August 10, 2021, the Claimant reiterated its Request for Payment of the entire amount and asked that the Respondent's request for time to answer the Claimant's submission be rejected.

58. On August 17, 2021, the Claimant further advised the Arbitral Tribunal that no payment had been received, that it was willing to wait until August 20, 2021, but maintained its request for payment.

59. On August, 27 2021, the Respondent submitted "the swift of new account made by Gabon" on August 25 showing a payment of EUR 5'312'020, and reiterated its request for an extension until

September 20 "*to convince the Tribunal that Gabon only owns [sic] less than 4 millions which will be paid in a few weeks*".

60. On August 30, 2021, the Arbitral Tribunal issued PO 4 and decided that, while the Respondent was a signatory to the *Protocole*, a consent award could only be sought by both Parties, a position supported by pertinent legal writing. Since the Claimant had applied for a Consent Award but the Respondent could not be understood to have agreed, the proceedings had to be reopened. The Parties were given respective time-limits to September 23 and October 1st, 2021, to file their additional submissions.

61. On September 2, 2021, the Claimant advised the Arbitral Tribunal that it had received a further payment of "*roughly*" EUR 5'300'000.- from the Respondent and presented a table entitled "*Calculation of Outstanding Amount*" setting forth its claim with interest at EUR 16'497'412.-.

62. On September 23, 2021, the Respondent submitted its "*Position of the Gabonese Republic on the Requests Formulated by Vamed Management and Service GmbH*" dated September 24,2021 (the "Respondent's Position"). The Respondent pointed out that it had paid EUR 31'248'057, 50.- from the EUR 34'904'083.- due under the *Protocole* and invoked, among other grounds, Article 2 of the Swiss Civil Code ("CC") and unforeseeable (pandemic related) events to resist the Claimant's claim for an additional almost EUR 17 Mio through a strict application of Article 4.2, which the Respondent qualified as a penalty, and Article 12 of the *Protocole*. The Respondent asked that a final award be issued for only EUR 3'656'025,50.- "*acknowledging that this sum shall be paid by not later than October 15th 2021*", and that all other claims be rejected.

63. On October 1st, 2021, the Claimant submitted its Reply ("Claimant's Reply") and pointed out that the amounts sought were in accordance with the *Protocole* and not disputed by the Respondent. Therefore, the Claimant submitted, it was owed EUR 43'349'657.- with interest at 8 % yearly from which the payments made were to be deducted, leaving a balance of EUR 16'497'412, 27.- with interest at 8 % from August 26, 2021. The Respondent had failed to comply with the *Protocole* to which it had agreed and there was no change of circumstances or *force majeure* because the Respondent has been in default for several years. The Claimant's claim was neither exorbitant or unfounded and it is willingly that the Respondent had failed to comply with Article 4.1 the *Protocole.* As such Article 4.2 is not a penalty clause, as it does not impose a penalty in case of breach but only in case of non-fulfilment of a condition. The Claimant also stressed that the reinstatement by the Arbitral Tribunal of the payment plan under Article 4.1 of the *Protocole*, as sought by the

Respondent, would be a decision *ex aequo et bono* which the Arbitral Tribunal had no power to make.

64. On October 8, 2021, the Claimant submitted its Statement of Costs for EUR 37'170,20.- and indicated that EUR 1'328'003, 50.- had been paid by the Respondent on October 1st, 2021, thus reducing its claim to EUR 15'301'388, 06.- with interest at 8 % yearly from October 1st, 2021.

65. On October 8, 2021, the Respondent submitted its Statement of Costs seeking an award of EUR 50'000.- in costs for the charges incurred since the reopening of the proceedings.

66. On October 8, 2021, the Arbitral Tribunal invited the Respondent to state its position as to the reduction of the claim to EUR 15'301'388.- and on October 14, the Respondent advised the Arbitral Tribunal that an additional amount of EUR 3'656'010.- had been paid. The Respondent also attached a table setting forth its payments from November 2019 to October 2021 and added: "*The amount of* EUR *3'656'025, 50.- corresponds to the payment of the totality of the sums due by the Gabonese Republic under the Protocole*".

67. On October 18, 2021, the Claimant was invited to comment by October 29 and on the same day it submitted its confirmation that the two additional payments had been received. Accordingly, the total payments made by the Respondent amounted to EUR 34'904'083.- and the balance due according to the Claimant was EUR 13'017'570, 07.- with interest at 8 % yearly since October 14, 2021.

68. On October 27, 2021, after being duly invited to do so, the Respondent pointed out that the Claimant acknowledged having received EUR 34'904'083.-, that the Respondent was acting in good faith and entitled to claim unforeseeability under Swiss law to resist the Claimant's claim for what it qualified were "penalties".

69. No further submissions were made by the Parties.

70. The ICC Court regularly extended the time limit for rendering the final award, the last time on 6 January 2022 (extension until 29 April 2022).

71. On January 17, 2022, the Tribunal formally closed the proceedings pursuant to Article 27 of the ICC Rules.

IX. BACKGROUND TO THE PARTIES' CLAIM

72. The business relationship between the Claimant and the Respondent has a scope of almost two decades. In brief, by way of various contracts the Parties entered into between 2001 and 2013 (the Agreements, as defined in Section III above), the Claimant undertook to provide and did provide certain management and operation services in the regional hospitals of Port-Gentil, Koulamoutou, Franceville, Tchibanga, Lambaréné and Makokou, and the university hospitals of Angondgé, Libreville and Owendo. In exchange, the Respondent undertook to pay for the Claimant's services according to the payment schedules contained in the Agreements. The Respondent failed to meet its monetary commitments under the Agreements and the Claimant started this arbitration.

73. In the *Protocole*, which led to this arbitration being suspended in December 2019 and then reactivated just over a year later, the Claimant, Vamed Engineering and the Respondent agreed upon the Respondent's total debt toward the Claimant and Vamed Engineering as at August, 31 2019 as follows:

- EUR 36'049'609, split between EUR 33'929'609 due to the Claimant pursuant to the Agreements; and EUR 2'120'000 due to Vamed Engineering pursuant to a commercial agreement concerning a separate military hospital (Preamble, Article 2);
- EUR 5'318'658 in interest, split between EUR 5'255'206 due to the Claimant; and EUR 63451 due to Vamed Engineering (Preamble, Article 3); and
- EUR 1'981'391 in legal costs (Preamble, Article 3);

thus a total of EUR 43'349'658.

74. In the *Protocole*, Article 4.1, however, the Claimant, Vamed Engineering and the Respondent agreed that the Respondent would discharge its obligations to pay the amounts set out in Articles 2 and 3, detailed above, by paying a total, reduced amount of EUR 34'904'083 in accordance with the payment plan set out in Article 4.1, as follows:

- EUR 5'000'000 on 30 October 2019 (this amount including the sum of EUR 2'120'000 due to Vamed Engineering);

- EUR 5'000'000 on 29 November 2019; and

- The balance of EUR 24'904'083 in 18 instalments of EUR 1'328'005 from late December 2019.

75. In Article 4.2 of the *Protocole*, the Respondent unequivocally committed to pay the Claimant and Vamed Engineering GmbH the following amounts should it not comply with the payment plan in Article 4.1:

i. To the Claimant: EUR 41,166,206.00, plus interest at the rate of 8 percent *per annum* as of the signing of the *Protocole*, until payment is made in full;

ii. To Vamed Engineering: EUR 2,183,451.00, plus interest at the rate of 8 percent *per annum* as of the signing of the *Protocole*, until payment is made in full.

76. The Parties agree that, since the execution of the *Protocole* until the date of this final award, the Respondent has made the following payments, as per the Claimant's table of October 18, 2021, not contested by the Respondent:

Calculation of Outstanding Amount		
No	**Date of Partial Payment**	**Payment Received [EUR]**
1	13.11.2019	4,999,998.50
2	05.12.2019	4,999,998.50
3	30.12.2019	1,328,003.50
4	29.01.2020	1,328,003.50
5	27.02.2020	1,328,003.50
6	21.04.2020	1,328,003.50
7	18.05.2020	1,328,003.50
8	28.05.2020	1,328,003.50
9	29.06.2020	1,328,003.50
10	06.08.2020	1,328,003.50
11	30.06.2021	3,984,010.50
12	02.07.2021	1,328,003.50
13	26.08.2021	5,312,018.50
14	01.10.2021	1,328,003.50
15	14.10.2021	1,565,758.41
16	14.10.2021	762,243.59
17	14.10.2021	20.00
		34,904,083.00

77. It is not disputed either that the above amounts were not paid in accordance with the payment plan set out at Article 4.1 of the *Protocole*. The main delay occurred as of August 2020 with no payment made until June 2021, which caused the Claimant first to seek an award by consent pursuant to Article 12 of the *Protocole* already in December 2020, as explained above.

78. The Claimant now relies on Article 4.2 of the *Protocole* to seek an additional payment of EUR 13'017'570,07 based on the following calculation (as per the Claimant's table of October 18, 2021 to which the Arbitral Tribunal has added the total interest accrued):

Calculation of Outstanding Amount					
No	Date of Partial Payment	Interest Accrued [EUR]	Open Amount + Interest [EUR]	Payment Received [EUR]	Open Capital Amount [EUR]
1					43,349,657.00
2	13.11.2019	472,029.60	43,821,686.60	4,999,998.50	38,821,688.10
3	05.12.2019	189,794.92	39,011,483.02	4,999,998.50	34,011,484.52
4	30.12.2019	188,952.69	34,200,437.21	1,328,003.50	32,872,433.71
5	29.01.2020	219,149.56	33,091,583.27	1,328,003.50	31,763,579.77
6	27.02.2020	204,698.63	31,968,278.39	1,328,003.50	30,640,274.89
7	21.04.2020	367,683.30	31,007,958.19	1,328,003.50	29,679,954.69
8	18.05.2020	178,079.73	29,858,034.42	1,328,003.50	28,530,030.92
9	28.05.2020	63,400.07	28,593,430.99	1,328,003.50	27,265,427.49
10	29.06.2020	193,887.48	27,459,314.97	1,328,003.50	26,131,311.47
11	06.08.2020	220,664.41	26,351,975.88	1,328,003.50	25,023,972.38
12	30.06.2021	1,823,969.54	26,847,941.92	3,984,010,50	22,863,931.42
13	02.07.2021	10,161.75	22,874,093.17	1,328,003.50	21,546,089.67
14	26.08.2021	263,341.10	21,809,430.77	5,312,018.50	16,497,412.27
15	01.10.2021	131,979.30	16,629,391.56	1,328,003.50	15,301,388,06
16	14.10.2021	44,204.01	15,345,592.07	2,328,022.00	13,017,570.07
Total		4,571,996.09			13,017,570.07

79. The Respondent disputes the claim for the reasons summarized above, essentially that the application of Article 4.2 of the *Protocole* would constitute an abuse of right in view of the unforeseeable events that led the Respondent not to comply with the Article 4.1 payment plan.

X. PARTIES' PRAYERS FOR RELIEF

80. The Claimant seeks the following relief:

> "[...] *VAMED hereby requests the Arbitral Tribunal to render a Final Award, ordering the following:*
>
> 1. *The Respondent shall pay to the Claimant the amount of EUR 15,301'388.06 plus interest in the amount of 8% per annum, from 1 October 2021 until payment.*
> 2. *The Respondent shall pay to the Claimant the amount of EUR 37'170,20 for legal and other costs incurred in connection with the arbitration, plus interest in*

the amount of 8% per annum, from the date of the service of the award until payment.

3. *Any and all other claims and counterclaims by the Parties in this Arbitration are dismissed.*" (Claimant's Statement of Costs and Reduction of Claim dated 1 October 2021, para. 18.).

81. As noted above, the quantum of the Claimant's claim was reduced to EUR 13'017'570,07 following further payments made by the Respondent on October 14, 2021, with interest claimed from that date.

82. The Respondent seeks the following relief:

> "*In the light of the above, the Gabonese Republic asks the court of arbitration to hand down a final award:*
>
> *- Finding that the Gabonese Republic had to deal with an event of* force majeure;
>
> *- Applying the theory of unforeseeability enshrined in Swiss law, in the light of the new, unavoidable and unforeseeable circumstances that the Gabonese Republic has had to deal with which rendered the Protocole excessively onerous for it;*
>
> *- Dismissing the strict application of Articles 4.2 and 12 of the Protocole; - Consequently, ruling that the Gabonese Republic only owes the sum of €3,656,025.50 to Vamed and acknowledging that this sum shall be paid no later than October 15th 2021;*
>
> *- Rejecting all of the claims made by Vamed.*" (Respondent's Position dated September 24, 2021, p. 10)

83. As noted above, the Respondent then paid EUR 3'656'025.50 by October 14, 2021. The Respondent seeks costs in the amount of EUR 50'000.

84. In its Statement of Defense filed on July 9, 2019, the Respondent sought EUR 50'000'000 in damages from the Claimant to be set off against all sums considered as due by the Respondent to the Claimant (para. 21). That counterclaim however does not appear to have been pursued by the Respondent, but is nonetheless addressed briefly in this final award.

XI. ARBITRAL TRIBUNAL'S ANALYSIS

85. The Tribunal is required to address the following questions:

- Form of this award
- Jurisdiction
- Merits of the Claimant's remaining claim
- The Respondent's Counterclaim.

A. Form of the award

86. Given the procedural history of this matter; the Claimant's initial request in December 2020 for a consent award, and its submission in the Claimant's Reply on this point (paras. 33-35), the Arbitral Tribunal addresses first briefly the question whether the Claimant is entitled to an award by consent.

87. In Article 12 of the *Protocole* the Parties agreed that, if the Respondent would not comply fully with its payment obligations in accordance with Article 4.1, an award by consent would be issued for the payments due to the Claimant and Vamed Engineering as provided for in Article 4.2, without the Respondent having any claims against the Claimant.

88. In full, Article 12 reads as follows:

> **ARTICLE 12. SUSPENSION/ABANDON DES PROCEDURES EN COURS**
>
> Les parties contractantes s'accordent dans le présent Protocole sur le règlement de toutes les sommes réclamées dans le cadre de la procédure d'arbitrage de la CCI 23975/ FS (c. 23976/FS et 23977 FS).
>
> Dans ce contexte, l'Etat et Vamed conviennent de suspendre dans un premier temps cette procédure d'arbitrage après réception des deux premières échéances par Vamed prévues à l'article 4.1. Dès le règlement définitif par l'Etat de toutes les créances dues en vertu du présent Accord, l'Etat et Vamed conviennent de mettre fin à l'arbitrage d'un commun accord.
>
> Si l'Etat ne s'acquitte pas en temps voulu et intégralement des obligations de paiement prévues à l'article 4.1, l'Etat et Vamed conviennent de mettre fin à l'arbitrage par une sentence arbitrale rendue d'accord parties et dans laquelle les demandes de Vamed et Vamed Engineering eux sont attribuées dans toute la mesure prévue à l'article 4.2., et il est retenu qu'il n'existe aucune revendication contre Vamed et Vamed Engineering. Les parties s'engagent à soumettre les demandes nécessaires au tribunal arbitral et à ne prendre aucune mesure susceptible d'entrer en conflit avec la sentence arbitrale rendue d'accord parties.

89. Despite the unambiguous wording *"Les parties s'engagent…."* at the end of Article 12, the Arbitral Tribunal does not read that provision *as a whole* as entitling either Party – as opposed to *both*

Parties - to apply to the Arbitral Tribunal for an award by consent, in case the Respondent would not comply with its obligations under Article 4.1.

90. Factually – as already held in PO 4 – it is beyond discussion that there is no agreement between the Parties: one sought an award by consent under Articles 4.2 and 12 of the *Protocole* and the other asked for additional time to comply with what it considers to its only payment obligations as set out in Article 4.1 of the *Protocole*, and submits that the Claimant's claim for any amount additional to what the Respondent has now paid (EUR 13'017'570) should be rejected outright because it is allegedly abusive.

91. In its submission of October 1, 2021, the Claimant itself has confirmed that it seeks a *final* award and no longer a *consent* award.

92. Further, Article 33 of the ICC Rules (2017) clearly states that an award by consent must be sought *by the parties*. Article 33 furthermore provides that the agreement of the arbitral tribunal is required. Legal writing is clear in this respect: there is no obligation on the part of an arbitral tribunal to issue a consent award, but the very concept of such an award presupposes that it should be requested by *all* parties to the arbitration.[1]

93. For the above reasons, the Arbitral tribunal therefore issues its decision by way of a *final* award in this case.

B. Jurisdiction

94. The next question is whether the Claimant may rely on the *Protocole* for the relief it now seeks, against the Claimant, when the *Protocole* contains its own arbitration agreement (Article 8) and this Arbitral Tribunal has not been constituted under the *Protocole*.

95. Neither Party objects to the application of the *Protocole* as evidencing as a matter of fact the undisputed amounts due as of August 31, 2019 and the reduced amount agreed to be due as payable on the conditions set out in Article 4.1. Both Parties have pleaded their case on the basis of the *Protocole*. Where the Parties differ is only the application of the *Protocole* insofar as it determines the amounts *now* due to the Respondent, after the Respondent made some payments

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1 See e.g. Pierre Engel, *Traité des obligations en droit suisse*, Dispositions générales du CO, 2nd ed., 1997, pp. 468-469 and references cited.

but eventually failed to comply with the payment plan set out in Article 4.1. It is not disputed that this remains the only issue for determination by the Tribunal, together with the allocation of legal costs incurred since the *Protocole* was entered into.

96. The *Protocole* is not only an agreement between the Claimant and the Respondent but also with Vamed Engineering, which is not a party to this arbitration. However, as pointed out by the Claimant in its submission of June 9, 2021, based on Article 4.1, the very first amount paid by the Respondent (in the event on 13 November 2019) pursuant to the *Protocole* covered Vamed Engineering's principal debt of EUR 2'120'000. As such therefore, that debt is extinguished and cannot be considered as included in any amount now claimed by the Claimant. The same goes for the sum of EUR 63'450 identified as interest due to Vamed Engineering under Article 2 of the *Protocole* as at August 31, 2021.

97. Accordingly, the Tribunal concludes that it has jurisdiction both under the Agreements (as defined above) as well as under *the Protocole*. The Tribunal further concludes with respect to *the Protocole* that it is not prevented in any way from rendering an award based on the *Protocole* despite Vamed Engineering having been a party to that agreement.

98. The Tribunal stresses that the Parties never raised an objection to the jurisdiction of the Arbitral Tribunal in this arbitration both with respect to the Agreements as well as under *the Protocole*.

C. Merits

1. Respondent's position

99. As noted above, the Respondent has not disputed the amounts paid nor the dates on which they were paid. Nor has it engaged on the interest calculations made by the Claimant.

100. The Respondent essentially takes the position that the Claimant in bad faith seeks the strict application of the *Protocole* without taking into account the situation which the Respondent had to face as from 2020 due to the Covid-19 pandemic, a situation which was not and could not be anticipated when the *Protocole* was executed in September 2019. The Respondent further alleges that upholding the Claimant's claim would mean the Respondent paying over EUR 51 million "*i.e. almost 50% more than the total debt after negotiation*". According to the Respondent,

> *"This is sufficient to demonstrate that the unforeseeable and unavoidable consequences of the global health crisis that forced the Gabonese Republic to suspend the payments*

laid down in the Protocole d'Accord for a few months, rendered the performance of the Protocole d'Accord onerous for the Gabonese State." (Respondent's Position, p. 4, 3rd para).

101. The Respondent has made submissions on the impact of the pandemic on Gabon and its finances (Respondent's Position, pp. 4-8) and submitted some 23 exhibits in support of its submission, many of which also showing the loans granted to Gabon over this period by international financial institutions.

102. On the law, the Respondent first argues that Article 4.2 is a penalty clause that was only designed to apply in case of "*deliberate and unjustified failure to perform the Protocole*" when in fact the Respondent's failure arose out of "*an entirely unforeseeable event of force majeure, which partially and temporarily prevented it from fulfilling its commitments*" (Respondent's Position, p. 8, last three paras.). The Respondent submits that, based on the theory of unforeseeability under Swiss (and French) law and on Article 2 of the CC, Article 4.2 should not apply in the circumstances.

103. In its additional submissions of October 27, 2021, the Respondent clarified its position as follows:

> "*First at all, the line of defence invoked by the Gabonese Republic is the theory of unforeseeability, which is (i) different from the theory of 'force majeure' and (ii) enshrined in Swiss statutory contract law and by Swiss federal Court.*
>
> *Contrary to what has been argued by Vamed, which is based on 'force majeure' theory, the theory of unforeseeability requires only two cumulative conditions:*
>
> - *new, unavoidable and unforeseeable circumstances, and,*
> - *an excessive burden to the debtor party.*
>
> *There is no condition of a non-contradictory behaviour.*
>
> *Indeed, 'force majeure' makes impossible to perform the contract, whereas unforeseeability makes it excessively onerous.*"

2. Claimant's position

104. The Claimant first disputes the facts as presented by the Respondent. The Claimant points out that, by the time the Claimant started the arbitration, the Respondent had been owing payments for services rendered for as far back as 2015; that in the 2019 *Protocole*, the Respondent "unconditionally and unequivocally acknowledged" the amounts owed; that "*for the sole purpose of*

providing (considerable) incentive to Gabon on to follow a specific payment schedule to the letter, Gabon was granted a considerable discount on its debt accrued over years"; but that, however, in view of the Respondent's past failures to pay, that discount was conditional on the Respondent abiding by the payment schedule, failing which the Parties agreed "the *discount to Gabon's debt would not become effective and, instead, the entirety of the outstanding debt would become immediately payable*" (Claimant's Reply, para. 9).

105. The Claimant then points out that the Respondent's failure to meet the payment plan in Article 4.1 is not disputed and that the Respondent entirely ignored the Claimant's reminders in 2020 in this regard (Annexed to the Claimant's Request for an Award by Consent of December 31, 2020); that by the end of 2020 the Claimant had no choice but to seize the Arbitral Tribunal; and that by June 2021, when finally the Respondent indicated that it would make the remaining payments, under the *Protocole*, the condition for the discount had not been met and the entire debt was due under Article 4.2 (Claimant's Reply, paras. 11-14).

106. In this regard, the Claimant disputes that it now brings a new, additional or fresh claim (Claimant's Reply, paras. 31-32). The Claimant also highlights that the Respondent's delay was significant in that it failed to make any payment for eleven months (from 6 August 2020 to 30 June 2021) without any explanation, and that the last payment should have been made on 30 May 2021 according to the payment plan in Article 4.1 of the *Protocole* (Claimant's Reply, para. 18).

107. The Claimant also contests the Respondent's calculations in that the total payment made to the Claimant and Vamed Engineering under Article 4.2 would be EUR 47.7 million and not EUR 51.4 million and that, evidently, the amount claimed does not consists only in accrued interest (Claimant's Reply, para. 23). In this regard, the Claimant submits that the interest amount is simply the result of the high level of the Respondent's outstanding debt in the first place, and this does not make the amount claimed, including interest, unusual, unacceptable, unfounded or exorbitant as the Respondent alleges (Claimant's Reply para. 22).

108. As for the Covid-19 pandemic, from which the Claimant says it also suffered, the Claimant notes that the payment plan required only a monthly payment of EUR 1.3 million which, it submits, the Respondent could have afforded in view of the very significant financial support (over EUR 3.1 billion) it received from the African Development Bank in 2020, on the Respondent's own evidence (Claimant's Reply, para. 28). As such, the Claimant says, the Respondent was not unable to pay, it elected not to pay the Claimant's debt.

109. The Claimant finally contests that the Respondent acted in good faith since the Respondent ignored the Claimant's reminders, and never reached out to seek to adjust the payment plan in view of the pandemic (Claimant's Reply, para.30), and instead acted in breach of the *Protocole* by refusing to agree to an Award by Consent which the Claimant considers could and should have been issued based on the clear wording of Articles 2.1 and 12 of the *Protocole* (Claimant's reply, paras. 33-36).

110. On the legal grounds invoked by the Respondent, the Claimant's position can be summarized as follows:

- Article 4.2 of the *Protocole* is not a penalty clause because "*it does not impose for a penalty to be paid in case of a breach of the agreement by Gabon*". Instead "*the strict adherence to the payment plan was VAMED's condition for allowing Gabon to free itself from the debt owed under the [Agreements] by paying a reduced amount*"; "*the non-fulfilment of this condition does not require any fault on Gabon's side.*" (See Claimant' Reply, para. 38.)

- Under Swiss law, an event of force majeure may have consequences if it has an extreme effect on the balance of the contract, according to the Swiss law principle of *clausula rebus sic stantibus*, itself based on "*the prohibition of abuse of rights*" as per Article 2 of the Civil Code. The threshold for this remedy, however, is high as to the change in circumstances, the imbalance caused, the lack of foreseeability and unavoidability, and also requires that the party invoking the event has not engaged in any contradictory behaviour. Furthermore, under Swiss law, the theory does not apply when a debtor has simply run out of money as a result of an event of force majeure and lack of funds cannot be said to result in a true "*inability to perform, neither temporarily nor permanently*" (Claimant's Reply, para. 47; see also Claimant's Reply, paras. 39-43).

- In this case, there can be no imbalance or disturbance as the Respondent has received all that the Claimant was supposed to provide already under the Agreements; the Respondent outstanding payment obligation only arises because it failed to fulfil its initial and agreed payment obligations in the first instance. As a matter of fact, the Respondent was able to make payments as per the payment plan in Article 4.1 albeit belatedly - as such therefore this was no impossible; and the Respondent's obligation under the *Protocole* (Article 4.2) are unaffected. (See Claimant's Reply, paras. 44-47, 49.)

111. The Claimant submits in conclusion that it is not open for the Tribunal to reinstate the Article 4.1 payment plan nor to modify the provisions of the *Protocole* as this would entail acting *ex aequo et bono* which it has no power to do (Claimant's Reply paras. 49-52).

3. Analysis of the Arbitral Tribunal

112. As to *force majeure*, to the extent that this remains a line of defense put forward by the Respondent, which is unclear, Swiss statutory law does not encompass a clear definition of what it is, but legal commentators generally hold that only an unforeseen event, which cannot be overcome and is caused by external conditions independent from a person's will to perform a contract, is germane to *force majeure*. The event must cause an impossibility to perform and should not derive from human behavior or from anything under the influence of one of the parties to the contract. This explains why typical cases of *force majeure* encompass natural catastrophes, such as landslides, volcano eruptions, earthquakes, extreme meteorological conditions and also epidemics.[2] In and by itself, the Coronavirus pandemic too could constitute an event of *force majeure*.

113. The foregoing is consistent with the contractual arrangements between the Parties. Article 26.2 of the Tchibanga Agreement hence provided as follows:

> *L'exécution par le Propriétaire ou le Gestionnaire de ses obligations aux termes du présent accord sera suspendue pendant toute la durée de l'un des faits suivants s'il empêche la partie concernée d'exécuter en tout ou partie ces (sic) obligations : grèves, incendies, inondations, guerres, troubles civils, mesures d'une autorité gouvernementale ou toute autre cause indépendante de la volonté de cette partie.*

114. The same - or substantially the same - provision can be found in the other Agreements: Article 26.2 of the Lambaréne Agreement and the Makokou Agreement, Article 14.2 of the Angondje Agreement, the Libreville Agreement and the Owendo Agreement. The *Protocole* itself does not contain a specific reference of *force majeure*, but refers in general terms to the Agreements in its Preamble.

115. The difficulties encountered by the Respondent in the performance of its obligation under Article 4.1 of the *Protocole* do not qualify as *force majeure* in the opinion of the Arbitral Tribunal. The

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2 See e.g. Pierre Engel, *Traité des obligations en droit suisse*, Dispositions générales du CO, 2nd ed., 1997, pp. 468-469 and references cited.

Respondent is a state, which, like many others, has certainly experienced additional difficulties and complications due to the pandemic creating adverse sanitary conditions, but there is no evidence that the Respondent found itself in a situation where performance of its financial obligations suddenly became impossible.

116. As to unforeseeability, it is generally held by commentators of the Swiss Civil Code[3] that the so-called *clausula rebus sic stantibus* applies only when the contractual circumstances prevailing at the time of the execution of a contract change subsequently in such a drastic manner that performance can no longer be reasonably expected from the debtor. A classical example of such a change of circumstances[4] is a contract under which the debtor undertook to pay a certain amount for the contractual right to build upon a certain piece of land for 100 years. This right – known in Swiss law as *Baurecht* or *droit de superficie* (*bail emphytéoti*que in French law) – is generally concluded for a long period of time. However, if local regulations change and it becomes impossible to build on the land as a result, for instance, of new zoning provisions, the Swiss Federal Tribunal has held that the tenant is no longer liable to pay the yearly contractual fee.

117. The Arbitral Tribunal takes the view that the situation at hand is clearly outside the scope of the strict requirements of Swiss law for *clausula rebus sic stantibus* to apply. While it can be considered that the pandemic rendered the Respondent's performance more difficult in 2020, it cannot in itself be considered as a change of circumstances so drastic (in comparison to those prevailing at the time of execution of the *Protocole*) that performance can no longer be reasonably be expected from the Respondent. Indeed, the Respondent did have funds available, but in the context of the Covid-19 pandemic chose to allocate such funds to other projects.

118. Nor can it be said that the pandemic rendered performance of the Respondent's obligations as per the Article 4.1 payment plan, if not impossible, "excessively onerous", as argued by the Respondent, such that the Respondent's undisputed failure to follow that plan should not bear the consequences set out in Article 4.2.

119. In other words, the Respondent has not established that the pandemic was an unforeseeable event which led to a situation where performance by the Respondent of its obligations under Article 4.1

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3 Christine Chappuis, in *Commentaire Romand*, Pichonnaz/Foëx (eds), 2010, ad Art. 2 CC, p. 59, para. 56; Heinrich Honsell, in *Basler Kommentar Zivilgesetzbuch*, 6th ed., Geiser/Wolf (eds), 2018, ad Art. 2 ZGB,p. 48, para. 19. See also ATF 127 III 300, consid 5b; ATF 135 III 1, consid 2.4).

4 ATF 127 III 300; also, in an older decision, ATF 45 II 351.

of the *Protocole* could no longer be expected from the Respondent. Accordingly the Claimant's insistence on the application of Article 4.2, cannot be held to be abusive based on the principle *clausula rebus sic stantibus.*

120. The Arbitral Tribunal will now examine whether the Respondent can nonetheless rely on Article 2 CC, namely on the well-established stand-alone principles of good faith and prohibition of abuse of right.

121. Article 2 (1) CC provides that each party is bound to perform its obligations in good faith, while Article 2 (2) CC provides that a manifest abuse of rights is not protected by law, the latter being a clause of last resort, which is invoked when a party to a contract is faced with the blatant abuse of the other party's rights and finds itself devoid of any legal recourse other than invoking abuse. Legal writings concur that the existence of an abuse of right needs to be considered in light of specific and extraordinary circumstances when one party invokes a right in circumstances where the enforcement of such right would lead to an inadmissible result.[5] Moreover, the restrictive application of Article 2(2) CC allows particular circumstances to be taken into account.[6]

122. As explained by a leading arbitration scholar,[7] in the international arbitration context, the principle of good faith applies throughout the performance of a contract and a finding of lack of good faith may be appropriate when a party is not justified in strictly relying on the law or on the contract.[8] More generally, the principles of good faith and prohibition of abuse of right allow some flexibility in the application of the law and/or of the contractual provisions, by instilling "a discrete form of equity". Therefore, its application in international arbitration is "perfectly justified".[9]

123. Article 4.2 of the *Protocole* gives the Claimant the right in principle to claim the amounts originally agreed as due and payable in Articles 2 and 3, plus interest from the signature of the *Protocole*,

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5 Christine Chappuis, in *Commentaire Romand*, Pichonnaz/Foëx (ed), 2010, ad Art. 2 CC, p. 47, para. 24. See also Heinrich Honsell, in *Basler Kommentar Zivilgesetzbuch*, 6th ed., Geiser/Wolf (eds), 2018, ad Art. 2 ZGB p. 51, para. 24; ATF 131 V 97, consid. 4.3.1; ATF 128 III 201, consid 1c

6 ATF 134 III 390, ATF 145 III 26.

7 Pierre Mayer, Le principe de bonne foi devant les arbitres du commerce international, in *Etudes de Droit International en l'Honneur de Pierre Lalive*, 1993, p. 544.

8 *Op.cit.*; p. 546.

9 *Ibidem.*

after accounting for any amount already paid, *i.e.* the amount of EUR 34'904'083.- pursuant to Article 4.1 of the *Protocole*.

124. The only question is whether the application of that right by the Claimant may be considered as abusive and should thus not be allowed.

125. The issue is not whether at the time of execution of the *Protocole* in September 2019 such agreement was fair and equitable, be it in relation to the amounts agreed upon as due, or in relation to the payment plan itself, or in relation to the agreed interest rate.

126. With respect to the interest rate, the Tribunal notes that the agreed rate seems high compared to the interest rates available in most financial markets over the last few years and in comparison to the applicable standard legal delay interest rate of 5% under Swiss law (Article 104 (1) CO). However, it is the rate that was specifically agreed in several of the Agreements (and under Swiss law - Article 104 (2) CO – parties may agree upon a lower or higher rate than the standard rate of 5%),[10] and a rate that would also have been agreed in September 2019 as a means to deter the Respondent from not complying with the payment plan agreed in Article 4.1 of the *Protocole*.

127. Moreover, the Respondent does not argue that the amounts as agreed in Articles 2 and 3 of the *Protocole* are wrong or excessive or, more generally disputes that, by the *Protocole*, the Parties settled their differences on the amounts due as at August 31, 2019. Nor does the Respondent argue that the Article 4.1 payment plan in itself also was unduly burdensome or excessive (at the time of execution of the *Protocole*), or that Article 4.2 in itself constitutes an excessive penalty clause under Swiss law that should be reduced. There is therefore no basis for the Arbitral Tribunal to consider those arguments.

128. The only remaining issue is whether or not it can be considered as abusive for the Claimant, *in view of the particular circumstances*, to claim an additional amount representing 37% of the (reduced) amount agreed to be payable under Article 4.1 of the *Protocole*, by reverting to the original debt amount and applying an interest rate of 8%, on the basis that the Respondent failed to strictly meet the agreed payment deadlines (pursuant to Article 4.2 of the *Protocole*).

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10 Including for the bulk of the Claimant's original claim (over EUR 26 million): para. 48 of the Request for Arbitration based on the Tchibanga, Lambarene and Makokou, Owendo, Angondje and Libreville Agreements (see sub-clause 1.1.65 of the Tchibanga, Lambarene and Makokou Agreements, and sub-clause 1.1.34 of the Owendo, Angondje and Libreville Agreements).

129. The Tribunal is obviously mindful of the principle of *pacta sunt servanda*, and of the mechanism agreed by the Parties in the *Protocole* which essentially involved an agreement to reduce an agreed debt as at August 31, 2019, conditional upon a timely payment.

130. The Tribunal nonetheless needs to examine whether, as a matter of Swiss law, by making the claim now made, the Claimant is breaching its good faith obligations and, as the case may be, whether the restrictive application of the prohibition of abuse of right under Article 2 CC is justified in the circumstances of this case. This is not a matter of *amiable composition* as contended by the Claimant, but merely the exercise of the duty of the Arbitral Tribunal to determine to what extent a claim is compatible with Swiss law, which includes an assessment of the requirements of Article 2(1) and Article 2(2) CC, the legal provisions relied upon by the Respondent, against all of the circumstances of this case.

131. In examining the relevant circumstances, the Tribunal cannot ignore important and relevant events such as the Covid-19 pandemic (which had not started at the time of execution of the *Protocole*) and the ensuing financial crisis that impacted everybody worldwide (States, companies, individuals), including in Africa. Moreover, there can be no doubt that the pandemic had even greater financial consequences on developing countries. In that respect, the Tribunal finds that the Respondent has shown the significant impact, including the financial impact, that the pandemic had on the country, including through its obligation to resort to additional external funding.[11]

132. Although the pandemic and the ensuing financial crisis did not render the payments (acknowledged as due in Article 4.1 of the *Protocole*) impossible for the Respondent to make, they clearly affected the ability of the Respondent to strictly comply with the agreed payment plan.

133. Moreover, while the Respondent may well have decided to allocate in priority available funds to other projects, it cannot be blamed for having done so and focused on the urgent health measures, as well as other measures required to be implemented to fight the Covid-19 and to protect its population. In its "Position" dated September 24, 2021 and 23 supporting exhibits, the Respondent convincingly established that it took a series of measures to combat the consequences of the pandemic, in particular in the health, economic and employment sectors. [12]The Respondent did

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11 Respondent's Position dated September 24, 2021 and its attached exhibits No. 1 to No. 23.

12 Ibidem.

among other invest a budget of around EUR 381 million in social aid (assistance for low-income households, paying water and electricity bills etc).[13]

134. Further, following the execution of the *Protocole* in September 2019, the Respondent did make *regular* payments to settle the amounts due under Article 4.1, save between August 2020 and June 2021, even if such payments were not made in compliance with the payment plan agreed upon in the *Protocole* (namely before the pandemic and ensuing economic crisis).

135. Last but not least, upon the Respondent's last payment in October 2021, the Claimant has been compensated for the full debt amount agreed in Article 4.1 of the *Protocole*, *i.e.*, EUR 34'904'083, despite the pandemic and financial crisis, and the dire financial situation that the Respondent, a developing country, found itself in.

136. Taking all the above circumstances into account, the Arbitral Tribunal finds that it is manifestly excessive for the Claimant to be claiming an additional total amount of EUR 13'017'570 based on a strict application of Article 4.2 of the *Protocole*, (a) ignoring the agreed debt amount in Article 4.1 and invoking instead the total debt amount of EUR 43'349'657, and (b) claiming interest on *that* amount. The Arbitral Tribunal finds that, in doing so, the Claimant is acting in a manner inconsistent with its good faith obligations and its behavior therefore falls within the purview of Article 2 (1) and (2) CC.

137. However, the Arbitral Tribunal cannot ignore the fact that the Respondent failed to fulfil its payment obligations in a timely manner already from September 2019 when the *Protocole* was signed, even outside the pandemic period. While the Covid-19 pandemic did have some effects outside China as from early 2020, this was not the case worldwide before March/April 2020, but payments were late before then also. Further, the Respondent did not make any payment at all in the period between 6 August 2020 and 30 June 2021, i.e., for nearly a year, and failed to provide any explanation to the Claimant, or even answering the Claimant's notices.

138. Therefore, the Tribunal finds that the Claimant is not acting in bad faith in claiming interest at the contractual rate of 8% (Article 4.2 of the *Protocole*) until the date of payment, but finds that such interest should only be applied on the agreed debt identified in Article 4.1 of the Protocole, i.e.

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[13] Respondent's Exhibit N° 14 attached to its Position dated September 2021.

EUR 34'904'083, and only as follows, based on the amounts paid that are set out in the table introduced by the Claimant and not disputed by the Respondent:

	Date of Partial Payment	Days of Delay Accrued [EUR]	Interest [EUR]	Payment Received [EUR]	Amount Due with Interest Applied [EUR]	Open Capital reduced Amount [EUR]
1	25/09/2019					34 904 083,00
2	13/11/2019	49	380 066,68	4 999 998,50	4 619 931,82	30 284 151,18
3	05/12/2019	22	148 055,85	4 999 998,50	4 851 942,65	25 432 208,53
4	30/12/2019	25	141 290,05	1 328 003,50	1 186 713,45	24 245 495,08
5	29/01/2020	30	161 636,63	1 328 003,50	1 166 366,87	23 079 128,21
6	27/02/2020	29	148 732,16	1 328 003,50	1 179 271,34	21 899 856,87
7	21/04/2020	54	262 798,28	1 328 003,50	1 065 205,22	20 834 651,66
8	18/05/2020		0,00	1 328 003,50	1 328 003,50	19 506 648,16
9	28/05/2020		0,00	1 328 003,50	1 328 003,50	18 178 644,66
10	29/06/2020		0,00	1 328 003,50	1 328 003,50	16 850 641,16
11	06/08/2020		0,00	1 328 003,50	1 328 003,50	15 522 637,66
12	30/06/2021	328	1 131 427,81	3 984 010,50	2 852 582,69	12 670 054,97
13	02/07/2021	2	5 631,14	1 328 003,50	1 322 372,36	11 347 682,60
14	26/08/2021	55	138 693,90	5 312 018,50	5 173 324,60	6 174 358,00
15	01/10/2021	36	49 394,86	1 328 003,50	1 278 608,64	4 895 749,36
16	14/10/2021	13	14 143,28	2 328 022,00	2 313 878,72	2 581 870,64
Total			**2 581 870,64**	**34 904 083,00**		

139. Therefore, the Arbitral Tribunal grants the claim for EUR 2'581'870.64 together with interest at 8% on that amount from October 14, 2021 until the date of payment.

D. Counterclaim

140. As noted above, in its initial "Statement of Case", the Respondent raised a counterclaim for EUR 50 million which it did not pursue thereafter (nor ever particularize or sought to prove). This is in line with the *Protocole*, Article 12 (3rd paragraph), which records that the Respondent has no claim against the Claimant or Vamed Engineering.

141. Accordingly, to the extent maintained, the Respondent's counterclaim should be rejected for lack of substantiation.

XII. COSTS

142. As to the ICC costs, the Claimant does not seek any order in relation to the costs of the arbitration despite the fact that it was required to pay the entirety of the advance on costs to the ICC. This is on the basis, as the Claimant itself explains in its Statement of Costs, that the sum of EUR 1'981'391 in legal costs agreed in the *Protocole* (Article 3) includes "an overall lump sum for the arbitration costs (including the costs of the ICC)" (para. 3). That amount however has not been awarded to the Claimant in this award.

143. Whilst the Arbitral Tribunal therefore is not asked to make any order with regard to the costs of the arbitration and the ICC costs, which were fixed by the ICC Court at USD 405'000, it understands that the balance of any amount paid by the Claimant and not used will be returned by the ICC to the Claimant in accordance with the normal practice of the ICC absent any agreement of the Parties to the contrary.

144. As to the legal costs incurred by the Parties, both have submitted their Statements of Costs. The Claimant is seeking an amount of EUR 37'170,20.- for additional legal and other costs incurred in connection with the arbitration since the *Protocole* was entered into, together with interest. The Respondent seeks EUR 50'000.- on the same account and is claiming its costs incurred since the reopening of the proceedings. The Arbitral Tribunal concludes that the legal costs claimed by both Parties are reasonable.

145. Under Article 38(5) of the ICC Rules, the Arbitral Tribunal has discretion in making any award of costs in favor of a party and may take into account several factors. Most arbitral tribunals "give particular attention to the outcome of the case when allocating costs" [14] under the principle the costs follow the merits. Some arbitral tribunals adopt a proportional approach and allocate costs with the degree to which each party was successful.[15]

146. In the case at hand, it is clear that the arbitral proceedings had to be initiated because the Respondent failed to comply with its contractual commitments to pay the Claimant for services

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14 *The Secretariat's Guide to ICC Arbitration*, 3-1488.

15 *Ibidem.*

rendered and that the Respondent only made the payments it made because these proceedings were initiated, which in turn led to the *Protocole* being entered into.

147. However, the majority of the Arbitral Tribunal considers that two important elements need to be taken into account. First of all, the Respondent was granted only a portion of its claims. Second, the Respondent did not pursue its counterclaim. Therefore, the Arbitral Tribunal, in its majority, concludes that a 90% (Respondent) – 10% (Claimant) allocation is justified and orders (i) the Claimant to pay to the Respondent EUR 5000.- as a contribution to its legal costs and (ii) the Respondent to pay to the Claimant EUR 33'453,18 as a contribution to its legal costs.

148. The minority of the Arbitral Tribunal considers that, in view of all the circumstances of this case, the Respondent should be liable for the entirety of the Claimant's costs for this last step in the proceedings and should not be awarded any amount towards its own costs. In particular the minority of the Arbitral Tribunal considers it a paramount factor that the Claimant was required to commence and pursue, with some perseverance, these proceedings, first to secure the *Protocole*, then to be paid the amount that it was paid as principal and finally to recover at least a portion of interest.

149. The Arbitral Tribunal rules that any amount awarded as contribution to either Party's costs shall bear a 5% yearly interest (Article 104(1) CO) starting from the receipt of the Award until full payment. The Arbitral Tribunal finds that the interest rate of 8% in Article 4.2 of the *Protocole* is not necessarily applicable to the Claimant's cost claim as such interest rate is only applicable to delay interest for the debt.

XIII. AWARD

150. Based on the foregoing and after deliberation, the Arbitral Tribunal issues the following Final Award:

(i) The Respondent is ordered to pay EUR 2'581'870.64 to the Claimant with interest at 8% yearly starting from 14 October 2021 until full payment.

(ii) The counterclaim is rejected.

(iii) The costs of the arbitration, USD 405'000 shall be borne by the Respondent in accordance with the *Protocole*.

(iv) The Respondent is ordered (by the Arbitral Tribunal in its majority) to pay EUR 33'453,18 to the Claimant as a contribution to its legal costs with interest at 5% yearly from receipt of the award until full payment.

(v) The Claimant is ordered (by the Arbitral Tribunal in its majority) to pay EUR 5'000 to the Respondent as a contribution to its legal costs with interest at 5% yearly from receipt of the award until full payment.

(vi) All other claims and counterclaims by the Parties in this Arbitration are dismissed.

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Seat of the arbitration: Zurich, Switzerland

Date: March 21, 2022

The Arbitral Tribunal

Domitille Baizeau
Co-arbitrator

Pierre-Yves Gunter
Co-arbitrator

Dr. Charles Poncet
President