SCC No V 2014/169

FINAL AWARD

[redacted] **AND** [redacted]

Claimants

vs.

THE REPUBLIC OF CYPRUS

Respondent

Before the Arbitral Tribunal composed of

Yves Derains, Chairman

Prof. Andrea Giardina, Co-Arbitrator

Sophie Nappert, Co-Arbitrator

INDEX

I. PROCEDURE 3
II. FACTS 32
III. POSITION OF THE PARTIES 33
A. Claimants' position 33
a) Claimants' position on jurisdiction 33
b) Claimants' position on the merits 37
B. Respondent's position 40
a) Respondent's position on jurisdiction 40
b) Respondent's position on the merits 43
IV. DISCUSSION 50
A. Was there an expropriation of Claimants' investment? 53
a) Claimants' investment 53
i. Claimants' initial position regarding the investment at stake 54
ii. Claimants' latest position regarding the investment at stake 59
b) Claimants' expropriation of their investment 61
V. COSTS 65

I. PROCEDURE

1. On 5 December 2014, Messrs. [redacted] and [redacted] filed a Request for Arbitration against the Republic of Cyprus before the Arbitration Institute of the Stockholm Chamber of Commerce ("the SCC"). Claimants appointed Mr. Jakob Ragnwaldh, Mannheimer Swartling Advokatbyra Ab, Box 1711, SE-111 87 Stockholm, Sweden, as arbitrator. This Request for Arbitration was accompanied by powers of attorney dated 26 November 2014.

2. On 8 December 2014, the SCC acknowledged receipt of Claimants' Request for Arbitration and indicated that the persons in charge of the case at the SCC would be Ms. Lotta Knapp and Ms. Linda Herrlund.

3. On the same date, the SCC informed the Republic of Cyprus that Messrs. [redacted] and [redacted] had filed a Request for Arbitration against it and that it had until 5 January 2015 to submit its Answer to the Request for Arbitration (the "Answer").

4. On 30 December 2014, Mrs. Elena Zachariadou, attorney of the Republic of Cyprus, requested that Respondent be granted a 30-day extension to file its Answer.

5. On the same date, the SCC invited Claimants to submit their comments to Respondent's request for an extension by 2 January 2015.

6. On 1 January 2015, Claimants objected to the length of the requested extension and indicated that they were willing to agree to a 15-day extension.

7. On 2 January 2015, the SCC granted Respondent until 20 January 2015 to submit its Answer.

8. On 20 January 2015, Respondent provided its Answer in which it appointed Professor Avv. Andrea Giardina, Chiomenti Studio Legale, Via XXIV Maggio, 43, 00187 Rome, Italy, as arbitrator. Powers of attorney were also submitted.

9. On 5 February 2015, the SCC informed the parties that the arbitrators appointed by the parties had 21 days to appoint the Chairperson and that if no agreement was reached by 26 February 2015, the SCC Board would make the appointment.

10. On 5 February 2015, Claimants informed the SCC that the parties had agreed to give the party-appointed arbitrators a period of 21 days to agree, in consultation with them, on a Chairperson and that failing an agreement, the SCC Board would have to make the appointment.

11. On 26 February 2015, Claimants informed the SCC that the parties had agreed to extend for 14 days the period to agree on a Chairperson.

12. On 27 February 2015, Respondent confirmed the parties' agreement regarding the extension.

13. On the same date, the SCC granted the parties until 12 March 2015 to agree on the appointment of a Chairperson.

14. On 13 March 2015, the SCC requested the parties to inform it whether the arbitrators appointed by the parties had reached an agreement on a Chairperson.

15. On 15 March 2015, Respondent indicated that the parties were unable to reach an agreement on a Chairperson.

16. On 16 March 2015, Claimants confirmed the failure of the parties to agree on a Chairperson.

17. On 24 March 2015, the SCC informed the parties that the Board appointed as Chairman of the Arbitral Tribunal Mr. Yves Derains, Derains & Gharavi, 25 rue Balzac, 75008 Paris.

18. On 25 March 2015, the SCC submitted the file of the case to the Arbitral Tribunal and informed it that the award had to be rendered by 25 September 2015.

19. On the same date, the Chairman of the Arbitral Tribunal informed the parties that, in accordance with Article 23 of the Arbitration Rules of the Stockholm Chamber of

Commerce ("the Rules"), the Arbitral Tribunal would contact them promptly in order to establish a provisional time table for the conduct of the arbitration.

20. On 2 April 2015, the Arbitral Tribunal informed the parties of its will to organize a conference call with them to discuss a provisional timetable in accordance with Article 23 of the Arbitration Rules and accordingly proposed some dates. It also provided a Draft Procedural Order no. 1 for the parties' comments by 15 April 2015. Lastly, it proposed to appoint as Secretary to the Arbitral Tribunal, Ms. Catherine Schroeder, associate at Derains & Gharavi, 25 rue Balzac, 75008 Paris, specifying that she would not receive any remuneration from the parties and that only her reasonable costs would be refunded. Her resume was attached.

21. On 6 April 2015, Respondent provided dates for a conference call and indicated that it consented to the appointment of Ms. Catherine Schroeder as Secretary to the Arbitral Tribunal.

22. On 8 April 2015, Respondent wrote a letter to Mr. Ragnwaldh in which it requested that the later provide clarifications, by 10 April 2015, regarding his role as counsel in the Ioan Micula case against Romania and the European Commission and concluded that he should resign as arbitrator. Mr. Ragnwaldh subsequently resigned.

23. On 12 April 2015, Mr. Derains indicated to the parties that he was chairing an Arbitral Tribunal where the relationship between EU law and intra-EU investment treaties was among the issues involved but specified that, as he was not acting as counsel, he did not see it as a circumstance impacting his independence or impartiality.

24. On 13 April 2015, Claimants thanked the Chairman for its disclosure and requested, for the sake of good order that Professor Giardina disclose whether he was currently involved in any proceedings where the relationship between EU law and intra-EU investment treaties was among the issues to be resolved.

25. On the same date, and in the light of Mr. Ragnwaldh's resignation, Claimants also requested that the preparatory conference call be postponed until Mr. Ragnwaldh is replaced. They also requested a postponement of the deadline to provide comments to Procedural Order no. 1 and indicated that they consented to the appointment of Ms. Catherine Schroeder as Secretary to the Arbitral Tribunal.

26. On 14 April 2015, the Arbitral Tribunal indicated that it agreed to the postponement of the conference call as well as to the postponement of the deadline fixed to comment on the Draft Procedural Order no. 1.

27. On the same date, Professor Giardina confirmed to the parties not being involved in any proceedings where the issue of the relationship of EU law with intra-EU bilateral treaties was among the issues to be resolved.

28. On the same date, the SCC forwarded Claimants' letter of 13 April 2015 where they requested an extension of 7 days to the deadline by which they had to appoint a new arbitrator, i.e. until 24 April 2015. The SCC invited Respondent to provide any comments by 16 April 2015.

29. On the same date, Respondent indicated that it had no objection to Claimants' request for an extension until 24 April 2015 to appoint a new arbitrator.

30. On 5 May 2015, Claimants appointed Dr. Richard Happ as arbitrator.

31. On 8 May 2015, the SCC provided to the parties the confirmation of Dr. Richard Happ as well as his resume.

32. On the same date, the SCC submitted the file of the case to Dr. Richard Happ.

33. On 12 May 2015, Respondent sent a letter to Dr. Richard Happ requesting that he provide further information on certain cases where he was acting as counsel.

34. On 15 May 2015, Dr. Richard Happ provided explanations as to his activities as counsel.

35. On 18 May 2015, the Arbitral Tribunal indicated that it was time to schedule a conference call to organize further steps of the proceedings and proposed some dates to the parties. It also submitted a revised version of the draft Procedural Order no. 1 for the parties' comments by 26 May 2015.

36. On 25 May 2015, Respondent informed the SCC of its challenge to the appointment of Dr. Richard Happ as co-arbitrator.

37. On 26 May 2015, Claimants made two comments to the revised version of the Draft Procedural Order no. 1 and provided their availabilities for a conference call.

38. On the same date, the SCC invited Claimants and the members of the Arbitral Tribunal to comment on the challenge made by Respondent by 2 June 2015.

39. On 27 May 2015, the Arbitral Tribunal acknowledged receipt of Claimants' comments to the Draft Procedural Order no. 1 and indicated that they were duly taken into account. In the light of Respondent's challenge to the nomination of Dr. Richard Happ, the Arbitral Tribunal indicated that the conference call had to be postponed until the Arbitral Tribunal has been definitely constituted but specified that Respondent's comments on Draft Procedural Order no. 1 were still expected.

40. On the same date, Respondent provided its comments to draft Procedural Order no. 1.

41. On the same date, Claimants requested an extension until 9 June 2015 for filing their comments on Respondent's challenge of Dr. Richard Happ.

42. On the same date, the SCC granted Claimants an extension until 7 June 2015 to submit its comments to the challenge and indicated that the SCC Board would make a decision in this regard on 10 June 2015.

43. On 2 June 2015, Dr. Richard Happ wrote to the SCC regarding Respondent's letter dated 25 May 2015 as well as his challenge.

44. On 7 June 2015, Claimants provided their comments on Respondent's challenge of Dr. Richard Happ.

45. On 16 July 2015, the SCC indicated that Respondent's challenge of Dr. Richard Happ was sustained and that Claimants were requested to appoint an arbitrator by 23 July 2015.

46. On 23 July 2015, Claimants informed the SCC that they had appointed Ms. Sophie Nappert, 3 Verulam Buildings, Gray's Inn, London WC1R NT, United Kingdom, as arbitrator.

47. On 28 July 2015, the SCC transferred the case to Ms. Nappert and indicated that the award had to be rendered by 25 September 2015.

48. On the same date, the Chairman indicated that the Arbitral Tribunal being constituted that day, the award could not be rendered by 25 September 2015. It was added that the Arbitral Tribunal would establish a time schedule and asked the SCC to fix on this basis a date for rendering the Final Award.

49. On 10 August 2015, the SCC requested that the Arbitral Tribunal submit a timetable.

50. On 3 September 2015, the Arbitral Tribunal sent a Draft Procedural Order no. 1 to the parties (including the previous comments) for discussion during a conference call. Such conference call was held between the parties and the Arbitral Tribunal on 7 September 2015.

51. On the same date, the Arbitral Tribunal submitted to the parties Procedural Order no. 1 which reads:

> *"Whereas a conference call between the Parties and the Arbitral Tribunal was held on 7 September 2015;*
>
> *Whereas the Parties agreed that Me Catherine Schroeder be appointed as Secretary of the Tribunal;*
>
> *Whereas it was specified that Me. Catherine Schroeder will not receive any remuneration from the parties and that only her reasonable costs would be reimbursed as costs of the arbitration;*
>
> *Whereas the Secretary to the Arbitral Tribunal will only provide administrative and logistical tasks;*
>
> ***The Arbitral Tribunal hereby issues the following decisions and directions applicable as from the date of this Procedural Order:***
>
> ***1. <u>SEQUENCE OF THE PROCEEDINGS / PROVISIONAL TIMETABLE</u>***

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

DATE	*PARTY*	*DESCRIPTION*
30 October 2015	*Claimants*	• *Statement of Claim with Witness Statements if applicable (experts and witnesses of fact)*
16 November 2015	*Respondent*	• *Objections to the jurisdiction of the Arbitral Tribunal and request for bifurcation*
7 December 2015	*Claimants*	• *Comments on Respondent's objections to the jurisdiction of the Arbitral Tribunal and on request for bifurcation*
21 December 2015	*Tribunal Arbitral*	• *Decision on bifurcation of the proceedings*
11 January 2016	*Tribunal Arbitral/Parties*	• *Conference call to organise continuation of the proceedings*

1.2. Extensions of time shall be granted by the Arbitral Tribunal in its discretion, in exceptional cases only and provided that a request is submitted before or, if not possible, immediately after the event preventing a Party from complying with the deadline. The Parties may also grant between themselves short extensions of time, on the basis of mutual courtesy, as long as they do not materially affect the timetable and that the Arbitral Tribunal is informed.

Written pleadings and other formal submissions together with testimonial evidence shall be sent to each member of the Arbitral Tribunal and the opposing party simultaneously by email, followed by courier dispatched not later than the second business day following the electronic submission. The

written submissions and factual exhibits will be supplied in paper (A4 format). Electronic versions (on a USB drive) of all written submissions, testimonial evidence, factual and legal exhibits will also be sent by courier. The written submissions, witness statements and expert reports shall be submitted in their electronic form as searchable pdf documents. All other correspondence shall be sent to the Arbitral Tribunal and/or to the opposing party by e-mail only.

1.3. *All written communications shall be deemed to have been validly made only when they have been delivered in accordance with the above timetable.*

2. ***Written submissions and Documentary Evidence***

2.1. *The paragraphs of all written submissions shall be numbered consecutively and the submissions shall include a table of contents.*

2.2. *For each of their submissions, the Parties will clearly indicate the evidence they invoke in support thereto: documents (with indication of the page and paragraphs), expert reports, witness statements, etc.*

2.3. *All documentary evidence submitted to the Arbitral Tribunal shall be deemed true and complete, including evidence submitted in the form of copies, unless a Party disputes its authenticity or completeness.*

2.4. *The written submissions shall be accompanied by the documentary evidence and the testimonial evidence relied upon by the relevant Party, including the legal authorities relied upon by it/them. No new document, including legal evidence, may be presented at the hearing unless agreed by the Parties or authorized by the Tribunal, in exceptional circumstances.*

2.5. *The documents shall be submitted in the following form:*

a. *exhibits shall be contained in separate binders, each exhibit having a divider bearing on the tab the exhibit's identification number;*
b. *the exhibits shall be numbered consecutively throughout these proceedings;*

c. *the number of each exhibit containing a document submitted for the main claim by Claimants shall be preceded by the letter "C" for factual exhibits and "CL" for legal exhibits; the number of each exhibit containing a document submitted by Respondent shall be preceded by the letter "R" for factual exhibits and "RL" for legal exhibits;*

d. *each binder containing exhibits shall contain a list of these exhibits, setting forth for each one:*

(i) *the exhibit number;*

(ii) *its date; and*

(iii) *a brief description of the exhibit.*

e. *the lists of exhibits shall be updated with each new submission of documents in these proceedings.*

3. ***Document Production***

3.1. The Parties may request documents from each other at any time during the proceedings. Correspondence or documents exchanged in the course of this process should not be sent to the Arbitral Tribunal.

3.2 To the extent that the totality of the requests referred to in section 3.1 is not satisfied, the Parties will refer the matter to the Arbitral Tribunal.

4. ***Evidence of fact witnesses***

4.1. If a Party wishes to adduce testimonial evidence in respect of its allegations, it shall so indicate in its submissions and submit written witness statements together with these submissions, as provided in Section 1.1.

4.2. Any person may present evidence as a witness, including a Party, a Party's officer, employee or other representative.

4.3. Each witness statement shall:

a. *contain the name and address of the witness, his or her relationship to any of the Parties (past and present, if any) and a description of his or her qualifications;*

b. *contain a full and detailed description of the facts, and the source of the witness' information as to those facts, sufficient to serve as that witness' evidence in the matter in dispute;*

c. *contain an affirmation of the truth of the statement;*

d. *be signed by the witness and give the date and place of signature; and*

e. *identify with specificity any document or other material relied on. As a general rule, no documents or other material should be attached to the Witness Statement.*

4.4. *If a Party wishes to cross-examine a witness whose statement has been filed by the other Party, it should request the presence of this witness at the hearing referred to in section 1.1. for cross-examination, as provided in section 4.5 ; otherwise, the witness statement will be considered admissible evidence, subject to the decision of the Arbitral Tribunal, as provided in section 4.9.*

4.5. *On or before the date mentioned in paragraph 1.1. supra, each Party shall notify the other Party, with a copy to the Arbitral Tribunal, of the names of the witnesses of the other Party whom that Party wishes to cross-examine at the witness hearing.*

4.6. *Being duly informed of the date of the hearings, the Parties will immediately after the receipt of this Order, or at least, as quickly as possible, inform their potential witnesses of these dates to secure their presence at the hearings and avoid any disruption of the procedural calendar.*

4.7. *The witnesses shall, in principle, be summoned by the Party which relies on their evidence. Where the witness should ultimately not be able to attend for a valid reason, the Arbitral Tribunal shall hear the Parties on this issue and decide after taking into account all relevant circumstances, including the Parties' legitimate interests, what weight should be given to the testimony of said witness, if any.*

4.8. *The Arbitral Tribunal, at the request of one Party, may invite the other Party to ensure, or to use its best efforts to ensure, the appearance for testimony at an Evidentiary Hearing of any person, including one whose testimony has not yet been offered.*

4.9. The admissibility, relevance, weight and materiality of the evidence offered by a witness or a Party shall be determined by the Arbitral Tribunal.

4.10. The costs of a witness's appearance shall be borne by the Party summoning him, without prejudice to the decision of the Arbitral Tribunal as to which Party shall ultimately bear those costs and to which extent.

5. Evidence of expert witnesses

5.1. The provisions of Section 4 of this Order are applicable, mutatis mutandis, to expert witnesses if any, with the exception of the last sentence of Article 4.3 e). The expert shall identify his or her area of expertise. The expert's report will contain the expert's opinion including a description of the method, evidence and information used in arriving at the conclusions.

5.2. The Arbitral Tribunal may also appoint one or more experts pursuant to Article 29 of the SCC Rules.

6. Witness hearing

6.1. Each Party will first make an opening statement.

6.2. The procedure for examining witnesses at the witness hearing shall be the following:

a. Claimants' witnesses will be examined first, followed by Respondent's witnesses.

b. Each witness shall first be invited to confirm or deny his or her written statement.

c. The Party presenting the witness will have the right to make a short direct examination of that witness on new facts or developments, if any, which would have taken place since the date of filing of his/her last witness statement. Such examination should not exceed five minutes.

d. The opposing Party shall then proceed to cross-examine the witness, followed by a re-examination by the first Party. The scope of the cross-examination will be strictly limited to the content of the witness

statement, any issue regarding the credibility of the witness and any other topic specified by the party proceeding to the cross-examination at the time such party asked that the witness be heard. The scope of the re-examination shall be limited to matters that have arisen in the cross-examination. The Arbitral Tribunal may authorize re-cross examination under certain circumstances.

e. The Arbitral Tribunal shall have the right to examine the witnesses and exceptionally to interject questions during the examination by counsel. It shall ensure that each Party has the opportunity to re-examine a witness with respect to questions raised by the Arbitral Tribunal.

f. The Arbitral Tribunal shall at all times have complete control over the procedure in relation to a witness giving oral evidence, including the right to limit or exclude any question when it considers that the particular question is irrelevant or unnecessarily burdensome or duplicative.

6.3. Witnesses will not be heard under oath but the Chairman shall draw their attention to the fact that the Arbitral Tribunal requests them to tell the truth, the entire truth and nothing but the truth and shall ask them to confirm that they will comply with this request.

6.4. Witnesses of fact may not be present in the hearing room during the examination of other witnesses of fact, unless the Parties agree otherwise. However, this rule does not apply to Parties' representatives (no more than two on each side, unless the Parties agree otherwise) or to witnesses of fact who have already given their testimony, who have the right to remain in the hearing room at all times. If Parties' representatives are also witnesses, they should be cross-examined first. Experts, if any, may be present in the hearing room at any time.

6.5. At the end of the hearing, the Parties may make closing statements or, on a date following the hearing, file post-hearing briefs on their conclusions of evidence gathered during the hearing and on their legal arguments. A decision as to whether there will be closing statements and/or post-hearing briefs is reserved.

6.6. *The hearing shall be transcribed by court reporters, the costs of which are to be advanced by each Party in equal shares, without prejudice to the decision of the Arbitral Tribunal as to which Party shall ultimately bear these costs and to which extent. The hiring of the court reporters will be done by the Parties themselves.*

6.7. *The use of demonstrative exhibits (such as charts, presentations, etc.) is allowed at the witness hearing, provided that no new evidence is contained therein. A hard copy of any such exhibit shall simultaneously be provided by the Party submitting such exhibit to the other Parties and to each member of the Arbitral Tribunal. The Parties shall exchange copies of proposed demonstrative exhibits no later than three days before the first day of the hearing.*

7. ***Translations and interpretation***

7.1. *Documents and authorities in another language than English will be filed with an English translation. For documents and authorities, only the relevant parts have to be translated. Each translation shall be deemed to be correct unless a Party disputes its correctness.*

7.2. *Oral testimonies in another language than English will have to be interpreted in English. The cost of interpretation will be advanced by the Party presenting the witness but will be included in the costs of the arbitration.*

8. ***Amendments***

8.1. *This Procedural Order No. 1 may be amended or supplemented, and the procedures for the conduct of this arbitration modified, pursuant to such further directions or Procedural Orders as the Arbitral Tribunal may issue in the future*".

52. On the same date, the Arbitral Tribunal indicated to the SCC that a provisional timetable had been agreed upon and requested that the time limit for issuing the award be extended.

53. On 17 September 2015, after having given the parties the opportunity to express their views, the SCC indicated that the Final Award was to be rendered by 1 February 2017.

54. On 30 October 2015, Claimants submitted their Statement of Claim.

55. On 16 November 2015, Respondent submitted its Objections to the jurisdiction of the Arbitral Tribunal and Request for Bifurcation.

56. On 7 December 2015, Claimants provided their comments on Respondent's Objections to the jurisdiction of the Arbitral Tribunal and Request for Bifurcation.

57. On 10 December 2015, the Arbitral Tribunal issued Procedural Order no. 2 which reads:

> *"Whereas in accordance with Procedural Order no. 1, Respondent provided on 16 November 2015 its Objections to the jurisdiction of the Arbitral Tribunal and its request for bifurcation;*
>
> *Whereas, in accordance with Procedural Order no. 1, Claimants provided on 7 December 2015 their comments to Respondents' objection to the jurisdiction and request for bifurcation;*
>
> *Whereas Respondent indicated that it had four jurisdictional objections but that it requested bifurcation only with regard to the first jurisdictional objection which is based on the limited scope of the Treaty's dispute resolution clause;*
>
> *Whereas Respondent explained that Article 9 of the Agreement between the Republic of Cyprus and the Republic of Poland dated 4 June 1992 (the "Treaty" or the "BIT") provides only for arbitration of disputes "concerning expropriation of an investment", showing the Contracting Parties' consent to arbitration of expropriation claims only;*
>
> *Whereas it added that such clause limiting the consent to arbitrate is commonly used and that Cyprus and Poland have utilized it in their BIT's with other countries;*
>
> *Whereas Respondent stated that as "(...) Article 9 allow[s] for one ordinary meaning and do not leave the meaning "ambiguous or obscure" or lead to a result which is "manifestly absurd or unreasonable" when interpreted in accordance with Article 31 of*

the VCLT, the Tribunal is required to give effect to that ordinary meaning and cannot resort to supplementary means of interpretation to justify an alternative reading";

Whereas it was also argued that arbitral tribunals have consistently enforced similar dispute resolution clauses and rejected claimant's attempt to expand the scope of the dispute resolution clause by invoking the Treaty MFN clause;

Whereas case law was brought in support of the latter argument;

Whereas Respondent also asserted that Claimants' attempt to circumvent the limitations of Article 9 by relying on a purported MFN clause in Article 7 of the BIT has no basis as Article 7 does not constitute a MFN provision but a "preservation of rights" or "without prejudice" clause which provides for investors from the home State under the BIT to receive the more favourable treatment that is actually provided to them by the provisions of the host State's law but do not convert obligations of the host State to third-party nationals into obligations owed to the home State's nationals;

Whereas additionally, Respondent indicated that in fact the parties had contemplated for an MFN Clause in Article 3 (2) of the BIT which is very limited and which prevents the parties from relying on it to expand the scope of Article 9;

Whereas, in any case even, if Article 7 of the Treaty was to provide MFN treatment to Claimants, Claimants could only enforce that right by bringing a claim for breach of Article 7;

Whereas finally Respondent concluded that its request for bifurcation should be granted by the Arbitral Tribunal as its preliminary objection is correct, would result in efficiency gains if granted and is not intertwined with the merits;

Whereas the Arbitral Tribunal finds that this issue is not intertwined with the merits and that it will not have a considerable impact on the proceedings as the parties have already substantiated their arguments and the Arbitral Tribunal does not anticipate a hearing which length would exceed one day;
Whereas, in addition, Claimant indicated that it is leaving to the Arbitral Tribunal the discretion to decide whether to bifurcate, specifying that if "the members of the Tribunal consider that bifurcation of the proceedings is in the interest of this arbitration, Claimant do not object to bifurcation";

Whereas in view of the above, the Arbitral Tribunal considers that the bifurcation of the proceedings is appropriate;

Whereas consequently, for the time being, the arguments on the merits developed by Claimant in response to Respondent's first objection do not need to be developed;

Whereas by Procedural Order no. 1, it was decided that a Conference call would be held on 11 January 2016 among the parties and the Arbitral Tribunal in order to discuss further steps of the proceedings;

The Arbitral Tribunal hereby issues the following decisions and directions applicable as from the date of this Procedural Order:

1. *The proceedings are bifurcated in order to deal first with Respondent's objection based on the limited scope of the Treaty's dispute resolution clause (article 9 of the BIT);*

2. *Further steps of the proceedings will be discussed at the conference call of 11 January 2016*".

The Arbitral Tribunal also indicated that, in order to speed up the procedure, it would be willing to hold the conference call on 21 December 2015 if the parties were available and invited the parties to indicate whether it was the case. It added that it wished the parties to liaise with regard to further steps of the proceedings and revert to the Arbitral Tribunal in that regard before the conference call.

58. On 15 December 2015, Respondent indicated that it would be available on 21 December 2015 and added that if Claimants were available they would liaise before with them.

59. On 17 December 2015, the Arbitral Tribunal recalled to Claimants that they had to indicate whether they would be available for a conference call on 21 December 2015.

60. On the same date, Claimants indicated that they had not been able to reschedule previous meetings and thus that they preferred to preserve the originally agreed time for the call.

61. On 18 December 2015, the Arbitral Tribunal confirmed the conference call scheduled on 11 January 2016 at 2.00 pm (Paris time).

62. On 6 January 2016, the Arbitral Tribunal reminded the parties that it expected them to liaise with regard to further steps of the proceedings before the conference call to be held on 11 January 2016 and invited them to do so by 8 January 2016.

63. On 7 January 2016, the parties indicated that they had liaised and that they would share their thinking with the Arbitral Tribunal at the conference call of 11 January 2016.

64. On the same date, the Arbitral Tribunal thanked the parties and confirmed its agreement to the proposal of the parties to indicate their thoughts at the conference call.

65. On 11 January 2016, a conference call was held between the parties and the Arbitral Tribunal.

66. On the same date, the Arbitral Tribunal confirmed that:

- Respondent had to submit by 25 January 2016 its comments to Claimants' comments dated 7 December 2015 relating to the jurisdictional issue object of the decision of bifurcation;

- Claimants had to submit by 8 February 2016 their comments to Respondent's submission of 25 January 2016.

- As the parties had declared that they did not request a hearing on the jurisdictional issue object of the bifurcation, the Arbitral Tribunal would render its award on jurisdiction thereafter but reserved the right to ask specific questions to the parties possibly in a teleconference.

- It was also recalled that the week of 17 October 2016 had been provisionally booked for a hearing on the merits.

67. On 15 January 2016, the Chairman of the Arbitral Tribunal indicated having discovered that he had a previous commitment for the week starting 17 October 2016 and proposed

alternative dates, specifying that in case it would be impossible to change, he would try to reschedule his previous commitment.

68. On 22 January 2016, the Chairman of the Arbitral Tribunal indicated having noted that Claimants and Professor Giardina would be available for a hearing from 10 to 14 October 2016 and asked whether it would also be the case for Respondent and Ms. Sophie Nappert.

69. On the same date, Ms. Sophie Nappert confirmed her availability for such period.

70. On 25 January 2016, Respondent provided its Rejoinder on Preliminary Objection to jurisdiction of the Arbitral Tribunal.

71. On 26 January 2016, Respondent confirmed its availability for a hearing from 10 to 14 October 2016.

72. On the same date, the Chairman of the Arbitral Tribunal thanked his colleagues and the parties for accepting that change and confirmed that a hearing would take place from 10 to 14 October 2016.

73. On 8 February 2016, Claimants indicated that all assertions regarding the first objection to jurisdiction were uttered in their Reply to Respondent's Objections to Jurisdiction and Request for Bifurcation dated 7 December 2016 and that they were accordingly leaving the issues exposed to the consideration of the Arbitral Tribunal.

74. On 10 February 2016, the parties proposed a timetable. Respondent however specified that the schedule was conditional upon the acceptance of its objection and that it could request an alternative schedule if the objection was denied.

75. On 16 February 2016, the Arbitral Tribunal confirmed its agreement to the proposed schedule which reads:

DATE	***PARTY***	***DESCRIPTION***
30 October 2015	*Claimants*	*Statement of Claim with Witness Statements if applicable (experts and witnesses of fact)*

DATE	*PARTY*	*DESCRIPTION*
25 January 2016	*Respondent*	*Rejoinder on the Preliminary Objection*
8 February 2016	*Claimants*	*Further Comments on Preliminary Objection*
~ 4 March 2016	*Tribunal*	*Decision on the Preliminary Objection*
29 April 2016	*Respondent*	*Statement of Defence with Witness Statements if applicable (experts and witnesses of fact)*
6 May 2016 (1 week after Statement of Defence)	*Claimants / Respondent*	*Either or both Parties may request an order for production of documents from the Tribunal if any (see paras 3.4 to 3.6 below)*
13 May 2016 (1 week after Request for production of documents)	*Claimants/ Respondent*	*Comments on the Request for production of documents*
20 May 2016 (1 week after Comments on the Requests)	*Claimants/ Respondent*	*Replies to the comments on the Request for production of documents*
27 May 2016 (1 week after Replies to Comments)	*Tribunal*	*Decision on the Parties' requests for production of documents*
10 June 2016 (2 weeks after Tribunal's decision)	*Claimants / Respondent*	*Production by Claimants / Respondents of documents whose production has been ordered by the Arbitral Tribunal*
29 June 2016 (2,5 weeks after Production of documents)	*Claimants*	*Reply to the Statement of Defence and Rebuttal Witness Statements if applicable (experts and witnesses of fact)*
9 September 2016 (2 – 2.5 months after Reply)	*Respondent*	*Rejoinder to the Reply and Rebuttal Witness Statements if applicable (experts and witnesses of fact)*
19 September 2016	*Claimants / Respondent*	*Notification of names of the witnesses to be cross-examined*
23 September 2016	*Claimants/ Respondent*	*Cut-off Date for Submitting New Evidence (that could not have been submitted earlier)*
10-14 October 2016	*Parties/ Arbitral Tribunal*	*Witness Hearing and Oral arguments*

76. As the Parties waived their right to a hearing on the issue of jurisdiction, it was within the framework of that schedule agreed by the parties that the Arbitral Tribunal rendered its Partial Award on jurisdiction.

77. On 4 March 2016, with the parties' agreement, the Arbitral Tribunal provided them with an unsigned electronic copy of the Partial Award on jurisdiction.

78. On 8 March 2016, the Arbitral Tribunal provided the parties with the signed version of the Partial Award on jurisdiction.

79. On 29 April 2016, Respondent submitted its Statement of Defense and its Memorial on jurisdiction.

80. On 3 May 2016, the Arbitral Tribunal acknowledged receipt of Respondent's submissions.

81. On 6 May 2016, Claimants indicated that they had received Respondent's Exhibits per mail on 4-6 May 2016 but requested an extension of the deadline for requesting production of documents as they did not have the opportunity to review the material.

82. On the same date, Respondent indicated that the parties agreed to propose that the requested extension be granted, that the other dates relating to the document requests and production be pushed by one week with the 29 June 2016 date for Claimants' Reply and that the other dates retained as currently scheduled.

83. On the same date, the Arbitral Tribunal indicated that if it was agreed by the parties, it had no objection.

84. On 9 May 2016, the Arbitral Tribunal sent to the parties Procedural Order no. 3 which reads as follows:

> *"Whereas by email dated 16 February 2016, the Arbitral Tribunal confirmed to the parties that it was in agreement with the schedule proposed by the parties on 10 February 2016;*
>
> *Whereas pursuant to the said schedule, the parties were to submit any request for documents production by 6 May 2016;*

Whereas by email dated 6 may 2016, Claimants explained that they had received Respondent's Statement of Defence electronically on 29 April 2016 but the exhibits per mail only on 4-6 May 2016 due to public holidays affecting the postage of the exhibits;

Whereas accordingly Claimants requested an extension for requesting documents production until 13 May 2016;

Whereas on the same date, Respondent indicated that, having discussed with Claimants, it was agreed by the parties that the requested extension be granted and that the other dates relating to documents requests and production be also pushed back for one week with the 29th June for Claimant's Reply and all the following dates retained as currently scheduled;

Whereas in light of the parties' agreement, the Arbitral Tribunal confirms that the parties should submit their Request for documents production by 13 May 2016, their comments on the Request for documents production by 20 May 2016, their Replies to the comments on the Request for documents production by 27 May 2016. The decision of the Tribunal will accordingly be provided by 3 June 2016 and the Parties will produce the documents by 17 June 2016;

Whereas the following dates of the schedule remain unchanged:

Whereas consequently Claimants will provide their Reply to the Statement of Defence by 29 June 2016 and Respondent its Statement of Rejoinder to the Reply by 9 September 2016;

Whereas all the subsequent dates remain unchanged as well;

The Arbitral Tribunal hereby issues the following decisions and directions applicable as from the date of this Procedural Order:

1. *The parties will submit their Request for Documents Production by 13 May 2016;*

2. *The parties will submit their Comments to the Request for Documents Production by 20 May 2016;*

3. *The parties will submit their replies to the Comments on the Request for Documents Production by 27 May 2016;*

4. *The Arbitral Tribunal will render its decision on the Request for Documents Production by 3 June 2016;*

5. *The parties will provide the ordered Documents by 17 June 2016;*

6. *All other dates of the time schedule remain unchanged*".

85. On 27 May 2016, the Arbitral Tribunal pointed out that the parties were supposed to submit their Request for documents production by 13 May 2016, which it did not receive, and inquired on the status of this question.

86. On the same date, Respondent provided its completed Redfern Schedule.

87. On the same date, Claimants indicated that [redacted] and [redacted] were no longer representing Claimants and that all correspondence should be addressed to the lead counsel, Mr. [redacted]

88. On 3 June 2016, the Arbitral Tribunal sent to the parties Procedural Order no. 4 which reads:

> *"Whereas pursuant to the timetable agreed by the parties and accepted by the Arbitral Tribunal on 16 February 2016, the parties had to provide by 6 May 2016 their respective order for production of documents;*
>
> *Whereas on 6 May 2016, Claimants indicated that having received Respondent's Statement of Defence electronically on 29 April 2016 and the attached exhibits per mail only on 4-6 May 2016, they had not the chance to review all the material submitted by Respondent and accordingly requested an extension of the deadline for requesting production of documents, if any, until 13 May 2016;*

Whereas on the same date, Respondent indicated that having discussed with Claimants' counsel, it was decided to propose to the Arbitral Tribunal that the requested extension be granted and that the other due dates relating to the document requests and production be pushed by one week maintaining at the same time the 29 June 2016 for Claimants' Reply;

Whereas on the same date, the Arbitral Tribunal indicated that if the requested extension was agreed by both parties, it had no objections;

Whereas on 9 May 2016, the Arbitral Tribunal sent to the Parties Procedural Order no. 3 which reads as follows:

> *Whereas by email dated 16 February 2016, the Arbitral Tribunal confirmed to the parties that it was in agreement with the schedule proposed by the parties on 10 February 2016;*
>
> *Whereas pursuant to the said schedule, the parties were to submit any request for documents production by 6 May 2016;*
>
> *Whereas by email dated 6 may 2016, Claimants explained that they had received Respondent's Statement of Defence electronically on 29 April 2016 but the exhibits per mail only on 4-6 May 2016 due to public holidays affecting the postage of the exhibits;*
>
> *Whereas accordingly Claimants requested an extension for requesting documents production until 13 May 2016;*
>
> *Whereas on the same date, Respondent indicated that, having discussed with Claimants, it was agreed by the parties that the requested extension be granted and that the other dates relating to documents requests and production be also pushed back for one week with the 29th June for Claimant's Reply and all the following dates retained as currently scheduled;*
>
> *Whereas in light of the parties' agreement, the Arbitral Tribunal confirms that the parties should submit their Request for documents production by 13 May 2016, their comments on the Request for documents production by 20 May 2016, their Replies to the comments on the Request for documents production by 27 May 2016.*

The decision of the Tribunal will accordingly be provided by 3 June 2016 and the Parties will produce the documents by 17 June 2016;

Whereas the following dates of the schedule remain unchanged;

Whereas consequently Claimants will provide their Reply to the Statement of Defence by 29 June 2016 and Respondent its Statement of Rejoinder to the Reply by 9 September 2016;

Whereas all the subsequent dates remain unchanged as well;

The Arbitral Tribunal hereby issues the following decisions and directions applicable as from the date of this Procedural Order:

1. *The parties will submit their Request for Documents Production by 13 May 2016;*

2. *The parties will submit their Comments to the Request for Documents Production by 20 May 2016;*

3. *The parties will submit their replies to the Comments on the Request for Documents Production by 27 May 2016;*

4. *The Arbitral Tribunal will render its decision on the Request for Documents Production by 3 June 2016;*

5. *The parties will provide the ordered Documents by 17 June 2016;*

6. *All other dates of the time schedule remain unchanged.*

Whereas on 27 May 2016, the Arbitral Tribunal, having received no request for documents production from the parties, inquired on the status of such request;

Whereas on the same date, Respondent sent to the Arbitral Tribunal a complete Redfern Schedule;

Whereas no request for documents production was received from Claimants;

The Arbitral Tribunal hereby issues the following decisions and directions applicable as from the date of this Procedural Order:

1. The decisions of the Arbitral Tribunal regarding Respondent's request for documents production are incorporated in the Redfern Schedule submitted by Respondent and annexed hereto as Annex".

89. On 6 June 2016, Claimants submitted their Request for Documents Production, indicating that due to external factors they had not been able to provide it timely.

90. On the same date, the Arbitral Tribunal acknowledged receipt of Claimants' email and invited Respondent to comment by 8 June 2016.

91. On the same date, Respondent indicated that it had no comment other than that Claimants' requests were extremely broad and that production would impose a significant burden on Respondent that could not be complied with by 17 June 2016, as contemplated in the timetable.

92. On 9 June 2016, the Arbitral Tribunal sent to the parties Procedural Order no. 5 which reads:

"*Whereas pursuant to Procedural Order no. 3, the parties had to provide their Request for Documents Production by 13 May;*

Whereas on 27 May 2016, date where the parties were to submit their comments to the Request for Documents Production, the Arbitral Tribunal inquired on the status of the Requests for Documents Production having received nothing so far;

Whereas on the same date, Respondent sent to the Arbitral Tribunal a complete Redfern Schedule but Claimants did not send anything, as recalled in Procedural Order 4;

Whereas on 6 June 2016, Claimants submitted to the Arbitral Tribunal their Request for Documents Production, indicating that due to external factors they had not been able to provide it timely;

Whereas on the same date, the Arbitral Tribunal invited Respondent to comment on Claimants' untimely Request for Documents Production by 8 June 2016;

Whereas on 8 June 2016, Respondent indicated that it had no comment but reiterated that Claimants' requests were extremely broad and that production of the said documents would impose a significant burden on Respondent which could thus not complied with the 17 June 2016 deadline;

Whereas the Arbitral Tribunal notes that Respondent does not object to the admissibility of the Request but seeks its dismissal;

Whereas accordingly the Arbitral Tribunal will declare Claimants' Request for Documents Production admissible;

The Arbitral Tribunal hereby issues the following decisions and directions applicable as from the date of this Procedural Order:

1. *The Request for documents production submitted by Claimants on 6 June 2016 is admissible;*

2. *The decisions of the Arbitral Tribunal regarding Claimants' Request for documents production are incorporated in the Redfern Schedule submitted by Claimants and annexed hereto as Annex 1".*

93. On 30 June 2016, Claimants submitted their Reply to the Statement of Defense.

94. On 9 September 2016, Respondent submitted its Rejoinder.

95. On the same date, Claimants indicated that Mr. [redacted] from [redacted] would also act as Counsel for Claimants.

96. On 10 September 2016, the Arbitral Tribunal acknowledged receipt of Respondent's Rejoinder.

97. On 12 September 2016, the Arbitral Tribunal informed the parties of its will to schedule a conference call with them in order to organise the hearing to take place on the week of 10 October 2016 and proposed dates in that regard.

98. On 14 September 2016, Claimants informed the Arbitral Tribunal of mutual arrangements made by the parties regarding the hearing.

99. On the same date, the Arbitral Tribunal thanked the parties and indicated that it would revert shortly to them as to the proposed agenda.

100. On 15 September 2016, the Arbitral Tribunal proposed some modifications to the proposed agenda.

101. On the same date, Claimants indicated that the parties agreed to the agenda proposed by the Arbitral Tribunal but proposed a slight modification.

102. On 20 September 2016, the Arbitral Tribunal requested to have information on the venue of the hearing, which was provided on the same day by Claimants.

103. On 22 September 2016, the Arbitral Tribunal confirmed that a conference call would take place on 28 September 2016.

104. On 23 September 2016, Claimants provided a submission on evidence. On the same date, Respondent also provided new documents, among which the Court of Justice of the European Union's decision dated 20 September 2016.

105. On 28 September 2016, a conference call took place between the parties and the Arbitral Tribunal.

106. On 29 September 2016, the Arbitral Tribunal confirmed to the parties that, in accordance with the discussion at the conference call, they were expected to provide their respective positions on the impact of the decision of the Court of Justice of the EU

dated 20 September 2016 by 7 October 2016. It further provided a modified agenda and recalled that the parties were to provide to the Arbitral Tribunal and to its Secretary copies of the documents on which they would rely during their openings as well as during the cross-examination of the witnesses.

107. On 7 October 2016, the parties provided their respective positions on the decision of the Court of Justice of the EU dated 20 September 2016.

108. On 12 and 13 October 2016, a hearing took place in Stockholm.

109. On 14 October 2016, the Arbitral Tribunal sent to the Parties Procedural Order no. 6 which reads as follows:

> *"Whereas a hearing was held in Stockholm on 12 and 13 October 2016;*
>
> *Whereas the Parties had the opportunity to express their respective positions on jurisdiction as well as on the merits;*
>
> *Whereas Claimants changed their position on some specific points;*
>
> *Whereas in that light, the Arbitral Tribunal indicated that the submission by the Parties of Post-Hearing Briefs would be useful;*
>
> *Whereas in light of those circumstances the Arbitral Tribunal indicated that it would be more efficient if Claimants would submit their Post-Hearing Brief first, followed by Respondent;*
>
> *Whereas the Parties did not have any objection to submitting Post-Hearing Briefs nor to submitting them one after the other;*
>
> *Whereas the parties agreed to the proposed dates for submitting their Post-Hearing Briefs;*
>
> *Whereas the Parties must also submit their Statement on Costs;*

Whereas the Arbitral Tribunal specified that it only needed the Parties to indicate how the costs were allocated but did not need them to provide any supporting documents;

The Arbitral Tribunal hereby issues the following decisions and directions applicable as from the date of this Procedural Order:

1. *Claimants shall submit their Post-Hearing Brief by 10 November 2016.*

2. *Respondent shall submit its Post-Hearing Brief by 1 December 2016.*

3. *The Parties shall simultaneously submit their Statement on Costs by 15 December 2016.*

4. *The Parties may comment, if necessary, the Statement on Costs provided by the other party, by 22 December 2016*".

110. On the same date, the Arbitral Tribunal wrote to the SCC Secretariat and requested an extension until 1 March 2017 for rendering its Final Award.

111. On 17 October 2016, the SCC Secretariat granted the requested extension and thus confirmed that the Final Award was due by 1 March 2017.

112. On 20 October 2016, Claimants submitted the documents presented at the hearing with Exhibits numbers.

113. On 10 November 2016, Claimants submitted their Post-Hearing Brief ("Claimants' PHB").

114. On 2 December 2016, Respondent submitted its Post-Hearing Brief ("Respondent's PHB").

115. On 15 December 2016, the parties submitted their respective Statements on Costs.

116. On 19 December 2016, the Arbitral Tribunal acknowledged receipt of the parties' respective Statements on Costs.

117. On 22 December 2016, Respondent submitted its reply to Claimants' Statement on Costs.

118. On 31 January 2017, the Arbitral Tribunal declared the proceedings closed, in accordance with Article 34 of the Rules.

II. FACTS

119. Messrs [redacted] and [redacted], Polish citizens, are the only shareholders of [redacted], a Cypriot Limited Company based in Nicosia and registered in February 2011. This company is particularly active in the fields of pharmaceuticals and biotechnology.

120. Claimants explain that in late March 2013, the Republic of Cyprus enacted a series of legislative measures aimed at restructuring two Cypriot banks, Laiki Bank and Bank of Cyprus. They add that around the same time, Claimants instructed the Bank of Cyprus to make two payments for the purchase of shares in the Polish company [redacted]. The Bank of Cyprus executed only the first payment but the remaining funds to be transferred were blocked as a result of various legislative measures. They argue that the legislative acts of the State and the restrictive measures undertaken by the organs of the Cypriot State and its dependents limiting and partially blocking the transfer of the Company's capital deposited in the Bank of Cyprus ("bail-in measures") resulted in expropriation of the business of the Claimants' Company.

121. Alleging that the Republic of Cyprus has deprived them of their investments, the Claimants introduced a Request for Arbitration on 5 December 2014 before the SCC on the basis of Article 9 of the agreement concluded on 4 June 1992 between the Republic of Cyprus and the Republic of Poland for the Promotion and Reciprocal Protection of Investments ("The Treaty" or the "BIT"). Claimants seek a declaration that measures taken by the Republic of Cyprus to prevent the collapse of the Bank of Cyprus

constituted breaches of Respondent's obligations under Article 4(1) (expropriation) of the Treaty. They also seek compensation by Respondent of the alleged losses resulting from the alleged breaches.

122. Respondent states that the legislative measures, which aimed at recapitalizing the Bank of Cyprus and avoiding its collapse, were not expropriatory, unreasonable or discriminatory.

123. There is thus a dispute among the parties regarding the existence of an expropriation of Claimants' investment under Article 4 of the Treaty.

III. POSITION OF THE PARTIES

A. Claimants' position

a) Claimants' position on jurisdiction

124. The Arbitral Tribunal has jurisdiction to hear the case and decide on the claims for compensation for expropriation of an investment on the basis of the arbitration clause contained in Article 9 of the BIT and must decide on its jurisdiction pursuant to the competence-competence doctrine, as provided in Article 16 of the UNCITRAL Model Law. The following arguments justify the Arbitral Tribunal's jurisdiction.

125. Article 9 of the BIT is the basis for the Arbitral Tribunal's decision since the parties are free to determine freely the applicable law. In case they do not settle this issue, Article 8.5 of the BIT would be applicable by analogy[1]. In fact, the scope of the applicable law should be determined by the parties by interpreting the BIT and, in case of disagreement among them, by the Arbitral Tribunal. In the present dispute, the parties acted in a manner that expresses their mutual agreement to consider the provisions of the BIT as the primary source of the applicable law. Tribunals have in that light decided that the bilateral treaty on investment protection is the basis for both the jurisdiction of the Arbitral Tribunal and the applicable law. Here, the applicable law is the BIT itself as well as other relevant agreements existing between the two contracting states, the

[1] Claimants' PHB, 10 November 2016, para 7, pages 4 and 5.

Arbitral Tribunal having the power to modify the scope of the applicable law without limiting it[2].

126. The Arbitral Tribunal has jurisdiction despite the accession of Poland and Cyprus to the European Union. Even though, Claimants may, because of their Polish citizenship, enjoy the protection of the Court of Justice ("ECJ"), they may also be party to the proceedings before the Arbitral Tribunal constituted on the basis of the BIT. The two paths exist and do not overlap[3]. The essence of this proceeding is to determine whether the activity of the State was harmful to the investment made by Claimants. The core of the claims is the legal situation of the investor and their investment while proceedings before the ECJ aim at securing individual basic rights[4].

127. The BIT remains in force as neither the Republic of Cyprus nor the Republic of Poland have filed a notice of termination on the basis of Article 13 of the BIT[5]. Further, it was not either terminated tacitly in accordance with Article 59 of the Vienna Convention on the Law of Treaties ("VCLT"), the condition being that the two treaties relate to the same subject matter. Further, Article 207 of the Treaty on the Functioning of the European Union ("TFEU") does not include intra-EU investment. The exclusive competence of the EU over Foreign Direct Investment deals only with extra-EU BITs. A decision of the Frankfurt Court of Appeals has decided in that light that Article 344 of the TFEU applies only to Member States and thus does not prohibit investment arbitration between a private investor and an EU Member State. Further, the European Commission's proposal of Common European Investment Policy expressly also excludes intra-EU BITs. Finally, there is no case law in which an arbitral tribunal denies its jurisdiction based on the EU Membership of the parties to the BIT[6].

128. In any case, the intra-EU BITs do no result in discriminatory treatment of Nationals of different EU Members. The Frankfurt Court of Appeals in its decision *Eureko v. Slovakia* did not see any violation of Article 18 TFEU which prohibits discrimination of

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2 Claimants' PHB, 10 November 2016, para 11, page 6.
3 Claimants' PHB, 10 November 2016, para 12, page 6.
4 Claimants' PHB, 10 November 2016, para 13, page 6.
5 Claimants' PHB, 10 November 2016, para 16, page 7.
6 Claimants' PHB, 10 November 2016, paras 17-22, pages 7-8.

EU citizens by Member States. But a potential breach of Article 18 would not render the arbitration clauses in investment treaties invalid as it would frustrate the investors' legitimate expectations[7].

129. Further, the arbitration clause of Intra-EU BITs is compatible with the institutional and judicial framework of the European Union, the Court system of the European Union being exclusive only to matters of the European Union. The BIT and obligations deriving from it belong to a different legal regime, which cannot be included in the European Union's jurisdiction. Additionally, standards of investment in the BIT and in the TFEU differ as the latter is not specifically aimed at protecting investment and does not, for instance, provide for arbitration proceedings[8].

130. In fact, the compatibility of the BITs with the *acquis communautaire* has been debated for a long time and the European Commission initiated, in 2004, proceedings against Denmark, Austria, Sweden and Finland requesting that they remove alleged inconsistencies between the TFEU and a number of BITs with non-EU countries concluded prior to the accession to the European Union. Such proceedings were not introduced before Poland which concluded the BIT in 1992 and signed the accession treaty in 2003. This is because no inconsistencies exist. Further, pursuant to Article 351 of the TFEU, treaties concluded before the date of accession of the Member State remain binding and shall not be affected by the provisions of the TFEU. There is thus no conflict between the BIT and capital transfer provisions of the TFEU[9].

131. As to the source of the claim, it is the value of Claimants' investment in the company in Cyprus – [redacted] which received a certain amount of money that was supposed to be transformed in another form of investment, a number of shares in a public company [redacted] This would have benefited Claimants. These actions taken by Claimants prior to 15 March 2013 can thus be described as investment operations. [redacted] was in fact a transparent financial vehicle which allowed enlarging its value by investing in other sectors. Eventually, the value of the investments made by [redacted] would be crystallized in

7 Claimants' PHB, 10 November 2016, paras 23-24, pages 9.
8 Claimants' PHB, 10 November 2016, paras 26-27, pages 9-10.
9 Claimants' PHB, 10 November 2016, paras 28-31 pages 10-11.

the value of [redacted] to the benefit of Claimants as shareholders and would benefit the Cypriot economy[10].

132. The BIT defines "*investment*" in a broad manner as it encompasses "*every kind of asset*". It does not provide any exclusions and restrictions from the definition of investment. It would thus be contrary to the BIT wording to conclude that the rights to funds gathered in the company's bank account are outside the scope of the BIT. Further, the BIT states that "*title to money, goodwill and other assets and to any performance having an economic value*" constitute an investment. Yet, it is undoubtful that the right of only the shareholders to dispose the money of their company is the title to money. The money gathered on the account of [redacted] came from another company of Claimants, [redacted], which shows who was really managing the funds. In that respect, the case brought by Respondent - *Enkev v. Republic of Poland* - is not applicable as it was decided that claimant could not claim in the name of a subsidiary, the latter being a different person. In the present case, Claimants are actually the company and there is no doubt as to the validity of the ownership over [redacted] However, the ruling in *Eureko B.V. v. Poland* should apply here[11].

133. By 15 March 2013, Claimants had complied with the requirements put forth by the Bank of Cyprus. The money was ready to be forwarded and constituted an investment. It is the imposition of the bail-in measures which rendered this investment impossible to be executed. This form of expected gain and business opportunity also constitute a protected investment under the Treaty. Further, there is no objection that the other transfer amounting to 7,000,000 PLN, which was executed, constituted an investment. The request for payment of the remaining 3,000,000 PLN should also be considered as a valid and protected investment. The request for payment made on 15 March 2013 thus fits the broad definition of investment[12].

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10 Claimants' PHB, 10 November 2016, paras 32-35, page 12.
11 Claimants' PHB, 10 November 2016, paras 36-41, pages 12-13.
12 Claimants' PHB, 10 November 2016, paras 42-44, pages 14-15.

b) Claimants' position on the merits

134. In March 2013, the government of Cyprus agreed on conditions of financial aid aimed at recapitalizing the Cypriot banking system amounting to EUR 10 billion bail-out. The plan also included bail-in measures for recapitalizing of two Cypriot banks, among which the Bank of Cyprus. The bail-in consisted of the conversion of part of the deposits held by the banks into shares of those banks and a partial freeze of capital. This applied to deposits exceeding EUR 100,000. In March 2013, Claimants planned an acquisition by [redacted] of shares in the capital of [redacted], a Polish company, of which [redacted] was already a shareholder. Claimants subscribed a certain amount of stock-shares and, in order to complete the investment, transferred PLN 10,000,000 to the [redacted] account managed by the Bank of Cyprus. Two transfers were then supposed to be made: one amounting to PLN 7,000,000 for the acquisition of [redacted] shares offered in retail tranche and the other one amounting to [redacted] 3,000,000 for the acquisition of 200,000 [redacted] shares publicly offered in investors' tranche. The purpose of this purchase was that [redacted] would continue to be the main shareholder of [redacted]. The Bank of Cyrpus executed the first transfer for PLN 7,000,000 but the second one for PLN 3,000,000 was never made. As a result, [redacted] was not able to pay for and acquire the [redacted] shares. Additional documents for the second transfer were requested by the Bank of Cyprus, which were provided the same day. The Bank also requested a translation into English of such documentation, which was provided by [redacted] on 18 March 2013. It remains that the second transfer was never made, the Bank of Cyprus having explained that the payment for 3,000,000 PLN was not executed on 15 March 2013 because the bank instructions were received to the Bank after the cut-off time. In fact, the payment was not made because of Respondent's restrictive measures[13].

135. The acts of Respondent, especially issuance of the Decree 103/2013 ("the Decree"), were not undertaken in any public interest but aimed at remedying the poor financial conditions of two private banks. It was also not conducted with due process as the investors were not informed about the incoming legal changes. There was no possibility for Claimants to appeal the effects of the Decree. Further, the acts of the State were discriminatory as, even if it was not the intent of the State, the result was that only two

[13] Claimants' Statement of Claim, 30 October 2015, paras 13, 18, 19, 26-33, 41-43.

out of 40 banks were affected by the legal changes and only the clients of those banks were concerned. Further, only those clients holding deposits of more than EUR 100,000 were directly affected by the Decree[14].

136. No single moment can be pointed out as to the moment when the expropriation took place; it is rather a long process starting with the imposition of extraordinary bank holidays and ending and combined with the Decrees being issued by the Central Bank of Cyprus ("CBC"). If there had been no Bank holidays, the request for payment of PLN 3,000,000 made on 15 March 2013 would have been executed on 19 March 2013. The brokerage house should have received the payment of PLN 3,000,000 on 20 March and could have proceeded with the purchase of 200,000 [redacted] shares. Mr. [redacted] testimony confirms that the expropriation started as early as 16-17 March 2013 when the Government was discussing steps to be taken with the Troika. Further, he confirmed at the hearing that unlawful expropriation took place. He also confirmed that it was the first time that bank holidays were declared in Cyprus in this manner. Respondent thus bears responsibility for each action that affected directly or indirectly Claimants' investment understood as funds gathered in the Bank of Cyprus' account or the request for payment that was made on 15 March 2013[15].

137. The measures that were taken by Respondent were retroactive as they embraced the money that would not have been on the Bank of Cyprus' account if the bank holidays had not been introduced. The bail-in measures could have affected only the funds that were in the Bank of Cyprus as of the entry into force of the Decree 103/2013 but it was not the case. As a result, Claimants lost their business opportunity as the shares in [redacted] would have produced the value to the shareholding interest of Claimants that they had in [redacted] The resolution law affected the transaction that was pending until 25 March 2013, encompassing the money that was destined to be transferred on 15 March 2013[16].

138. Claimants are entitled to receive compensation for lost profits deriving from the loss of business opportunity. This results from Respondent's blocking of Claimants' payment

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14 Claimants' Statement of Claim, 30 October 2015, paras 136, 159, 165, pages 52, 59 and 60.
15 Claimants' PHB, 10 November 2016, paras 46-53, pages15-17.
16 Claimants' PHB, 10 November 2016, paras 55-58, page 17.

that could be executed on 19 or 20 March 2013 but that did not occur because of the instructions of the CBC which ordered the Bank of Cyprus not to process any international payments. And then, the Bank of Cyprus was closed because of the bank holidays. The amount of compensation requested with regard to a loss of business opportunity is set at PLN 16,720,000.00 as updated on 10 October 2016[17].

139. This was a unique situation. The PLN 3,000,000 was to purchase 200,000 shares of the company set up by Claimants as a start-up in order to ensure their major shareholding position, which was crucial as it would have protected their investment from external hostile takeovers. The request for payment should have been made on 15 March or 19 March 2013 but was not due to the retroactivity of the measures undertaken by Cyprus. This was probably not foreseen by the Government as the situation is unique but it has caused a major prejudice to Claimants in any case. Ruling in favour of Claimants will not create any precedent because of the uniqueness of the situation with respect to the consequences of bail-in measures[18].

140. *In summary, Claimants respectfully request the Tribunal to:*

(i) declare that Respondent is liable for expropriation of Claimant's investment under Article 4 of the BIT;

(ii) declare that Respondent is liable to compensate Claimants for Respondent's breaches of the BIT and international law resulting in the loss of funds in the amount of PLN 1,319,794;

(iii) declare that Respondent is liable to compensate Claimants for Respondent's breaches of the BIT and international law resulting in the loss of profit in the amount of PLN 16,720,000;

(iv) declare that Claimants are entitled to compound interest on the sum of PLN 1,319,794 from 25 March 2013 until the date of rendering of the Award by the Tribunal and thereafter until the day of payment at the rate of EUR 3M LIBOR + 3% compounded on a quarterly basis;

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17 Claimants' PHB, 10 November 2016, paras 60-63, pages 18-19.

18 Claimants' PHB, 10 November 2016, paras 64-69, pages 19-20.

(v) declare that Claimants are entitled to compound interest on the sum of PLN 16,720,000 from 10 October 2016 until the date of rendering of the Award by the Tribunal and thereafter until the date of payment at the rate of EUR 3M LIBOR + 3% compounded on a quarterly basis;

(vi) order Respondent to pay compensation in the amount of PLN 18,039,974;

(vii) order Respondent to pay the amount of compound interest resulting from points [iv-v]; and

(viii) order Respondent to compensate Claimants for their costs of arbitration in an amount to be specified later together with interest thereon, and, as between the parties, alone to bear the compensation to the Arbitral Tribunal and to the SCC Institute.[19]

B. Respondent's position

a) Respondent's position on jurisdiction

141. Following the Partial Award on Jurisdiction dated 7 March 2016, Respondent focused its jurisdictional objection on the alleged incompatibility of the BIT and European Law. For the European Commission, the bilateral investment treaties between EU Members States ("intra-EU BITs") are incompatible with EU law as the treaties establishing the EU (Lisbon Treaty, Treaty of the European Union ("TEU") and Treaty on the Functioning of the European Union ("TFEU")) have created a new framework for the treatment of cross-border investment with the EU. Claimants are challenging the policies made by Respondent. However, the right of EU Member States to impose restrictions on the transfer of capital in connection with the supervision of financial institutions is established by Article 65.1 of the TFEU. Insofar as Claimants' expropriation claims are based on the Republic laws and decrees restricting the transfer of funds, the provisions of the BIT are incompatible with the EU Treaties. The bail-in is a critical component of the EU Bank Recovery and Resolution Directive ("the BRRD"). However, Claimants have invoked the BIT's dispute resolution clause to ask the

[19] Claimants' PHB 10 November 2016, para 72, page 21.

Arbitral Tribunal to find that the expropriation clause of the BIT precludes the bail-in tool because it constitutes an uncompensated taking of property. Moreover, the European Council approved the terms of the economic adjustment program and mandated the Republic to implement it, in accordance with Article 136 (1) of the TFEU. Claimants cannot render the provisions of the TFEU and BRRD ineffective in invoking a BIT entered into between Cyprus and Poland before those States became EU Member States. That would defeat the principles of primacy, unity and effectiveness of EU law[20].

142. On the basis of Article 59 of the Vienna Convention on the Law of the Treaties ("the Vienna Convention"), the BIT should be deemed terminated or superseded pursuant to Article 30. Cyprus and Poland acceded to the EU on 1 May 2014 and became subsequently parties to the Lisbon Treaty which superseded the TEU and the TFEU. By doing so, the two States have agreed to transfer certain competencies to the EU, namely the direct effect of EU law and the primacy of EU law. The BITs concluded between Member States before their accession, such as in the instant case, covering areas governed by EU law, are subject to the principle of primacy of EU law. Pursuant to Article 351 of the TFEU, only the treaties concluded between a Member State and a third country prior to the accession of the Member State to EU are valid. EU Treaties include substantive protections for intra-EU Investments, replacing the standards of treatment set forth in intra-EU BITs. For instance, Article 4 of the BIT which protects investment against uncompensated expropriations has been superseded by Article 17 of the EU Charter of Fundamental Rights ("EU Charter") and Article 1 of the Protocol of the European Convention of Human Rights ("ECHR")[21].

143. In any case, if the intra-EU BIT provisions were deemed not to have been superseded by EU Treaties, they would still be unenforceable as they are irreconcilable with the Member States' obligations deriving from the EU Treaties. The BIT is indeed incompatible with EU law as it offers Polish and Cypriots citizens benefits that are not conferred upon investors from other EU Members. This is for instance the case of the right to arbitrate. This discrimination violates Articles 49 to 55, 63 to 66 but also Article 18 of the TFEU. Indeed, the EU Treaties prohibit the EU Member States from granting more favorable treatment to only some EU nationals. Yet, the arbitration clause of intra-

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20 Respondent's Memorial on Jurisdiction, 29 April 2016, paras 1-7, pages 1 to 4.

21 Respondent's Memorial on Jurisdiction, 29 April 2016, paras 19-23, pages 8-10, para 34, pages 14-15.

EU BITs is incompatible with the institutional and judicial framework of the EU. Article 344 of the TFEU excludes any method of settlement not provided by the TFEU itself[22].

144. In the instant case, there is no doubt that the BIT conflicts with the TFEU's capital transfer provisions (Articles 63 and 65). The TFEU constitutes a successive treaty to the BIT that relates to the same subject matter. Further, there is a clear incompatibility between the two treaties because the BIT excludes transfer restrictions and provides for disputes over this question to be resolved by arbitration, which is not the case with the TFEU. This question has not been addressed yet by the CJEU but it has already decided that Member States BITs with non-Member States are incompatible with EU Treaties. It is not doubtful that it will decide that intra-EU BITs are incompatible with EU Treaties. Article 59 of the Vienna Convention should thus apply and if not, Article 30 should[23]. Further, Claimants' claim conflicts with the EU BRRD as they allege that the Republic breached the BIT because of the bail-in, which constituted an expropriation for which they were not compensated. However, the bail-in was a policy measure established by the BRRD. By relying on the BIT to challenge the validity of the bail-in tool, Claimants have demonstrated the incompatibility of the BIT with the EU Treaties[24]. In any case, if EU nationals with access to an intra-EU BIT were allowed to submit disputes over resolution measures, including the application of the bail-in, to arbitral tribunals, that would undermine the EU's ability to regulate the financial sector in a coordinated manner[25]. Finally, Claimants' claim challenges the economic adjustment programme developed pursuant to the TFEU and approved by the European Council pursuant to Article 136 (1) of the TFEU. The Republic of Cyprus indeed implemented the programme in accordance with a decision of the European Council of 25 April 2013 directing it to do so[26]. Yet, if Claimants' claims were declared admissible, the award would violate the "*ordre public*" of Sweden, the State of the *lex arbitri*, together with the EU public policy, which would lead to an award annullable in Sweden under the Swedish Arbitration Act[27].

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22 Respondent's Memorial on Jurisdiction, 29 April 2016, paras 39-40, pages 16-17, paras 48-49, page 20.

23 Respondent's Memorial on Jurisdiction, 29 April 2016, paras 54-63, pages 22-25.

24 Respondent's Memorial on Jurisdiction, 29 April 2016, paras 64-65, 70-71, pages 25-26, 30-31, paras 48-49, page 20.

25 Respondent's Memorial on Jurisdiction, 29 April 2016, para 70, page 30.

26 Respondent's Memorial on Jurisdiction, 29 April 2016, para 72, page 31, para 77, pages 32-33.

27 Respondent's Memorial on Jurisdiction, 29 April 2016, para 80, page 35.

As to Respondent's objection on jurisdiction regarding the "intra-EU" character of the Treaty, Claimants did not address the issue in its Reply and only did so at the hearing, ignoring however key aspects of Respondent's argumentation. Similarly, they expanded on that question in their Post-Hearing Brief, making however irrelevant points regarding the differences between ECJ proceedings and investment treaty arbitrations and the fact that the BIT had not been formally terminated. In fact, they referred to a decision of the Frankfurt Court of Appeals as being decisive without mentioning that the Federal Supreme Court of Germany did not follow that decision and made a request for a preliminary ruling before the ECJ[28]. Further, Claimants did not properly engage with Respondent's reference to the decisions of the ECJ that affirmed that the transfer provisions of extra-EU BITs are incompatible with EU law. Claimants ignored the fact that the European Commission has taken a clear position and initiated infringement proceedings against the EU Member States that maintain intra-EU BITs. Thus, Respondent's key point that Claimants' claims raise irreconcilable incompatibilities between the BIT and the TFEU and EU law remains unrebutted. However, it cannot be denied that the provision of the TFEU allows EU Member States to take actions such as bank holidays and restrictive measures in connection with the prudential supervision of banks and reasons of public policy. The EU Commission in fact confirmed that the restrictions imposed by Respondent were necessary[29].

b) Respondent's position on the merits

145. The dispute arises from the legislative acts and regulatory measures initiated by the Republic of Cyprus in March-July 2013 to carry out the restructuring of the country's financial sector, and in particular the two largest banks, the Bank of Cyprus ("BoC") and Cyprus Popular Bank. Pursuant to the economic adjustment programme announced on 25 March 2013 by the Troika, i.e the Eurogroup and the European Commission, the International Monetary Fund ("IMF") and the European Central Bank ("ECB"), the recapitalization of BoC was one of the key elements. The bail-in measures were implemented by the Central Bank by decrees issued on 29 March 2013, in the exercise of its authority as the Resolution Authority pursuant to laws enacted by Respondent on

[28] Respondent's PHB, 1 December 2016, para 5, pages 3-4.
[29] Respondent's PHB, 1 December 2016, paras 11-12, pages 8-9.

22 March 2013. The transfer restrictions were also issued on the same date by the Finance Minister. This new approach aimed at ending bailouts at taxpayers' expense[30]. It was the result of the 2007/2008 global financial crisis and of long discussions with representatives of the Troika. Taking into consideration the risks of implementing the 16 March 2013 according to which the Republic would receive up to EUR 10 billion in loans from the ESM and IMF in exchange, *inter alia*, of the imposition of a levy to resident and non-resident bank depositors which would have for consequence that people would have rushed to withdraw cash, the Ministry of Finance declared a bank holiday for 19 and 20 March 2013. The bailout agreement was then rejected on 19 March 2013 and on 22 March 2013 the Parliament adopted the Resolution Law which terms reflected the rules and principles of the BRRD. Another agreement was then reached with the Eurogroup on 25 March 2013 regarding the terms of the economic adjustment programme. A series of decrees were then taken[31].

146. Following the Decree 103/203, the funds over EUR 100,000 that [redacted] held as deposits with BoC were subject to the bail-in measure i.e. 37.5% were converted into class A shares of BoC, 22.5% of the funds were temporarily frozen according to the restrictions of the decree and the remaining 40% were frozen temporarily pursuant to the restrictions arising from the Restrictive Measures on Transactions Law[32]. On 30 July 2013, the Governor of the Central Bank indicated to the Bank of Cyprus that it was necessary to have an additional 10% of the bailed-in eligible deposits to be converted to equity, which conducted to apply equity to 47.5% on deposits over EUR 100,000[33].

147. Claimants have changed their positions at the hearing and elaborated a new theory by which they state that the declaration of public holidays over the weekend of 16-17 March 2013, combined with the subsequent application of resolution measures, constituted a retroactive expropriation of the funds transferred to the BoC by [redacted] and [redacted]'s attempt to purchase shares in [redacted]. According to Respondent, this theory is to be disregarded[34].

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30 Respondent's Statement of Defence, 29 April 2015, para 9, page 3.
31 Respondent's Statement of Defence, 29 April 2015, paras 111-122, pages 49-55.
32 Respondent's Statement of Defence, 29 April 2015, para 186, page 78.
33 Respondent's Statement of Defence, 29 April 2015, para 187, page 78.
34 Respondent's PHB, 1 December 2016, para 3, page 1.

148. In their Statement of Claim, Claimants identified two investments that were to be protected by the Treaty: the property right to the funds of [redacted] deposited with the BoC and the rights derived from their shareholding in [redacted][35].

Respondent explained in its Reply that Claimants' only protected investment was their shareholding in [redacted] but that they could not have property rights on the funds deposited as they could not "step in the shoes" of [redacted], bringing cases confirming that position, notably *Enkev Beheer B.V. v. Republic of Poland*. As a result, Respondent concluded that the protected investment held by Claimants was their shareholding in [redacted] and that the restrictive measures taken by Respondent did not deprive Claimants of their shares or render them valueless[36]. Claimants never answered to that argument.

Further, Claimants disavowed their prior claim that the property rights to the funds of [redacted] deposited with BoC were protected investment under the BIT and confirmed that their investment was their shares in [redacted]. This is also confirmed by Claimants' Post-Hearing Brief where it is indicated that "*the source of the claim is the value of the investments of the Claimants in the company in Cyprus* [redacted]." This has very significant consequences as Claimants must prove that Respondent caused "*a substantial deprivation*" of their shares in [redacted] to establish an expropriation claim. Yet, it is undisputed that Claimants retained control of their shares in [redacted] and that the value of their shares interest was not destroyed. This has been confirmed at the hearing by Mr. [redacted] who indicated that [redacted] owned other valuable assets apart from [redacted], that [redacted] was able to retain its 20% majority holding in [redacted] and that [redacted]'s current shareholding in [redacted] was worth [redacted] 250 million[37].

149. In its Statement of Defence, Respondent has emphasized that Claimants' damages claim was based on the fact that they made the orders for funds to be transferred from the account of [redacted] held with the BoC for the purchase of the [redacted] shares on 25 March 2013 and that the second transfer was blocked as a result of the legislative measures taken in the context of the bail-in measures. Respondent added that this account of events was inaccurate as the transfer orders were actually made on 15 March 2013 and

35 Respondent's PHB, 1 December 2016, para 13, page 9.
36 Respondent's PHB, 1 December 2016, paras 14-17, pages 9-11.
37 Respondent's PHB, 1 December 2016, paras 22-25, pages 14-15.

that the various legislative measures came into effect on 29 March 2013, which shows that these measures were not the cause of the failure of the purchase transaction, which, according to Claimants, needed to be completed by 20 March 2013. In fact, the second transfer could not occur as Respondent had not received the relevant supporting documentation (contracts, agreements etc....) needed for purpose of anti-money laundering laws and directives[38]. Further, BoC's handling of [redacted]s transfer orders appeared reasonable as Mr. [redacted] was advised by his Cypriot counsel that BoC was entitled to request an English copy of the call for payment before processing the transfer. Despite being invited to acknowledge these points and withdraw that claim, Claimants did not do so[39].

150. Instead, Respondent argues that Claimants raised a new claim at the hearing by which they hold Respondent responsible for the failure of the transaction, due to the bank holidays. Revising their claims as such was not justified and it deprived Respondent of the opportunity to submit documentary evidence or witness/expert testimony with regard to the decision to announce additional bank holidays. Moreover, Respondent adds that Claimants' new claim can be dismissed as the decision to impose bank holidays was justified by the need to preserve and protect the stability of the Cypriot financial sector from a bank-run caused by a public announcement of a political agreement with the Eurogroup on 16 March 2013 and the application of a levy on all bank deposits in Cyprus, as confirmed by Mr. Stylianou at the hearing. The European Commission confirmed that the restrictions taken by the Republic of Cyprus were justified and lawful. Even a few months later, the Commission explained that the Republic of Cyprus declared bank holidays to avoid bank-run. The need for the imposition of bank holidays was also confirmed by the IMF's May 2013 country report on Cyprus. Undoubtedly, there was nothing improper in declaring bank holidays over the weekend of 16 and 17 March 2013. Further, bank holidays do not have the features to establish an expropriation, i.e. character and duration. They were on the contrary time-limited, non-discriminatory and taken for a proper regulatory purpose. Finally, according to Respondent, Claimants have failed to establish why the decision to announce bank holidays was expropriatory. This is not surprising as the notion that

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38 Respondent's Statement of Defence, 29 April 2016, paras 184-185, page 77.

39 Respondent's PHB, 1 December 2016, paras 26-28, pages 16-17.

bank holidays could constitute an expropriation is absurd, bank holidays being a necessary component of financial regulation[40].

151. As to Claimants' statement that their damages consist in the loss of business opportunity to acquire, through [redacted], an additional 200,000 shares on [redacted] at a purchase price of PLN [redacted] per share, which was assessed by the expert proffered by Claimants, Mr. [redacted] at a loss of PLN 12,333,000. Respondent has emphasized that no evidence has been brought as to the additional shares that have been brought by [redacted], in the absence of which neither Respondent nor the Arbitral Tribunal can properly assess the actual costs incurred by Claimants in acquiring those additional shares. This information was requested by Respondent on 4 April 2016 and in the absence of an answer in the reply, was repeated in the second request for documents production. Yet, even though it was granted by the Arbitral Tribunal in its Procedural Order no. 4, nothing was produced by Claimants before 23 September 2016. The document produced showed two transactions and that [redacted] held 1,315,157 shares in [redacted] at an estimated value of [redacted]. At the hearing, Claimants provided an update of their claims (not signed by Mr. [redacted] which determined the lost profits to PLN 16,720,000. However, they did not disclose the additional acquisition of 100,000 [redacted] shares by [redacted] as revealed later by Mr. [redacted] when being cross-examined[41].

152. According to Respondent even if it would have been liable for expropriating [redacted]'s opportunity to acquire [redacted] shares, the standard for assessing compensation for that expropriation would be the fair value of the protected investment at the time of the taking. Moreover, if Claimants were able to cover or mitigate their loss, this situation should have been taken into account. Yet, Claimants concealed the purchase by [redacted] of approximately 100,000 shares in [redacted] made, according to Mr. [redacted] at an additional cost of 20% over the applicable purchase price of PLN [redacted] for the failed transaction in March 2013. The fact that Claimants have not referred to this transaction is particularly shocking as neither Respondent nor the Arbitral Tribunal would have been aware of it if Mr. [redacted] had not mentioned it. Claimants concealed this information so that they could seek damages far in excess of a 20% premium on PLN [redacted] In fact, they based their case on the current six-month average of the share price,

40 Respondent's PHB, 1 December 2016, paras 29-40, pages 15-24.
41 Respondent's PHB, 1 December 2016, paras 41-46, pages 24-29.

which is allegedly PLN[redacted] If this strategy had worked, it would have created a massive windfall on Claimants[42].

153. Respondent states that Claimants have failed to establish that the application of the bail-in and restrictive measures to [redacted] deposits constituted an expropriation. Yet, the shares have not been destroyed or substantially deprived of their value.

154. Moreover, Respondent notes that BoC was insolvent and the resolution was the only alternative to conventional insolvency procedures allowing the preservation of the bank while ensuring that the insolvent bank's creditors receive no less in resolution than what they would have received in liquidation. This was the case for [redacted]. Claimants again have not challenged these points and Claimants ignored the fact that the liquidation proceedings are time consuming, are very costly and deprive creditors of the access to their funds. They suggested instead that Respondent could have done more to bail-out BoC and its creditors and could have accepted the "*€ 10 billion bailout deal with the Eurogroup*". Claimants however ignored the consequences that a bailout would have had and that there was no obligation upon the Republic of Cyprus to provide funding to support insolvent banks. Claimants, in addition, have provided no authority that would suggest that States have an obligation to use public resources to bail out and that Respondent committed a breach of the BIT by not doing so[43].

155. Respondent concludes that the bail-in and the imposition of temporary restrictive measures were not discriminatory, unlawful or adopted without necessary due process. Further, these actions were taken in close consultation with the European Commission and the restrictions were approved. Even the ECJ recently confirmed that the Republic's acts were non-expropriatory, non-discriminatory and taken in the public interest. Likewise, Professor Landau, an expert proffered by Respondent, also explained that the bail-in was not discriminatory and that there was no evidence that depositors would have been better off under a liquidation of BoC. Claimants have not responded to these points[44].

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42 Respondent's PHB, 1 December 2016, paras 47-49, pages 29-30.
43 Respondent's PHB, 1 December 2016, paras 56-62, pages 33-35.
44 Respondent's PHB, 1 December 2016, paras 63-65, pages 36-37.

156. In this respect, Respondent notes that Claimants advanced two new theories at the hearing: first, that the funds of [redacted] held with BoC were not a deposit but a sort of funds in transfer, not subject to the bail-in and, second, that the bail-in measures were applied retroactively. As to the first argument, Claimants brought no evidence that the funds were not deposits and the fact that the monies were to be transferred quickly does not alter that conclusion, as underlined by Mr. [redacted] at the hearing. His testimony is also consistent with the decree published on 29 March 2013. The alleged retroactivity also lacks merits. It is likewise not supported by any documentary evidence or legal authority. Claimants appear to invoke this construction to overcome the fundamental defect in their original claim for lost profits which relied on the bail-in measures which came into effect on 29 March 2013. However, the Resolution law was not retroactive, as confirmed again by Mr. [redacted]. Further, the transfer request was not in the hands of BoC on 15 March 2013 due to [redacted] failure to provide the requested supporting documentation requested for anti-money laundering purposes. Indeed, it was confirmed that all banks operated on 15 March 2013 with no restrictions. Additionally, 18 March 2013 was already a bank holiday in Cyprus. Thus, [redacted] transfer could only have been processed by BoC on 19 or 20 March 2013 to meet the 20th March 2013 cut-off date for the purchase of the [redacted] shares. The banks were closed due to additional bank holidays on 16 March 2013. As explained above, these actions were not expropriatory, discriminatory or unlawful[45].

157. Respondent requests that Claimants be jointly and separately condemned to bear the costs of the arbitral proceedings[46].

158. *"For all these reasons stated above and in Respondent's prior submissions, the claims asserted by Claimants in this Arbitration, should be dismissed, and Respondent should be awarded all costs incurred in connection with this Arbitration."*[47]

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45 Respondent's PHB, 1 December 2016, paras 66-80, pages 37-42.

46 Respondent's Statement of Defence, 29 April 2016, para 372, page 163.

47 This is part of Respondent's PHB. However, in its Memorial on jurisdiction dated 29 April 2016, Respondent indicated the following: "*For all these reasons stated above and to be developed further during the court of these proceedings, the claims asserted by Claimants should be dismissed for lack of jurisdiction. Respondent should be awarded all costs incurred in connection with this Arbitration, including, without limitation, the fees and expenses of the arbitrators and the SCC administrative fees, as well as the legal and other costs incurred by Respondent in connection with this Arbitration.*" Further, in its Statement of Defense of the same date, it indicated: "*For the reasons stated above and to be developed further during the course of the proceedings, the claims asserted by Claimants in this Arbitration should be dismissed, and Respondent should be awarded all costs incurred in connection with this Arbitration*".

IV. DISCUSSION

159. The Arbitral Tribunal preliminarily notes that in accordance with Procedural Order no. 1, the Parties were to deal with Respondent's Objections to the Jurisdiction of the Arbitral Tribunal separately from the merits. Indeed, after Claimants filed their Statement of Claim on 30 October 2015, Respondent submitted its Objections to the Jurisdiction of the Arbitral Tribunal and its request for bifurcation on 16 November 2015, to which Claimants replied on 7 December 2015.

160. In its Memorial on Objections to Jurisdiction[48], Respondent raised four objections which were the following:

> *"a. Claimants' claim alleging breach of Article 3(1) of the Treaty should be dismissed because the Treaty's dispute resolution provision, Article 9, provides only for arbitration of disputes "concerning expropriation of an investment".*
>
> *b. Claimants' claim should be dismissed because the Treaty was superseded by European law and became inoperative when Cyprus and Poland became Member States of the European Union ("EU").*
>
> *c. Claimants' claims should be dismissed because they call for the Tribunal to adjudicate a matter that it is not arbitrable under Swedish and EU law, and to make an award that would directly contravene Swedish and EU policy.*
>
> *d. To the extent that Claimants base claims on alleged breaches of customary international law, which no longer appear to be the case, they should be dismissed because such claims are outside the scope of the Tribunal's jurisdiction and Claimants lack standing to enforce the Republic's obligations under customary international law."*

161. Respondent requested bifurcation in order for the Arbitral Tribunal "*to resolve the first jurisdictional objection based on the limited scope of the Treaty's dispute resolution clause*" as this question was in fact well separated from the merits. Claimants indicated in their Reply that they left the decision on the request for bifurcation to the discretion of the Arbitral Tribunal.

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[48] Respondent's objections to the jurisdiction of the Arbitral Tribunal and request for bifurcation, 16 November 2015, para 3, page 2.

162. By its Procedural Order no. 2, the Arbitral Tribunal decided that the proceedings were bifurcated in order to deal with Respondent's objection based on the limited scope of the Treaty's dispute resolution clause, i.e. Article 9 of the Treaty. Thus, only the first preliminary objection to jurisdiction was in fact dealt with at that first stage of the proceedings which was then concluded with the Partial Award on jurisdiction of 7 March 2016.

163. In the second phase of the proceedings, Respondent submitted by 25 January 2016 its Rejoinder on the preliminary objection to the jurisdictional objection of the Arbitral Tribunal. Further, as agreed during the conference call held on 11 January 2016, Claimants were to submit, by 8 February 2016, their comments on Respondent's submission.

164. In the event, Claimants merely indicated that all their assertions were included in their Reply to Respondent's Objections to Jurisdiction and Request for Bifurcation dated 7 December 2015.

165. In its Partial Award dated 7 March 2016, the Arbitral Tribunal decided that it did "*not have jurisdiction over Claimants' claim alleging a breach of Article 3 (1) of the Treaty on the basis of Article 7 of the Treaty*".

166. Following the Partial Award, Respondent submitted its Memorial on Jurisdiction as well as its Memorial on the Merits on 29 April 2016. In its Memorial on Jurisdiction, it stated that "*this submission addresses the Republic's additional objection to jurisdiction concerning the incompatibility of the Agreement between the Republic of Cyprus and the Republic of Poland for the Promotion and Reciprocal Protection of Investments dated 4 June 1992 (...) and European Union law, including provisions of the foundational treaties of the EU*". It did not pursue any of its other jurisdictional objections. This jurisdictional objection is closely linked with the merits, which explained why it was dealt with at the merits stage. Respondent stated that the Treaty had been terminated or substantially superseded and that consequently the Arbitral Tribunal lacked jurisdiction. Claimants however did not reply to this objection within their Reply of 29 June 2016 but did so at the hearing and in their Post-Hearing Brief.

167. In any event, the outcome is that the only jurisdictional objection which remains to be dealt with by the Arbitral Tribunal, following the Partial Award, concerns the applicability of the Treaty in the light of its alleged incompatibility with the European treaties and law[49].

168. Neither party disputes that the Arbitral Tribunal has jurisdiction to decide on its own jurisdiction and in particular whether the Treaty has been superseded by a subsequent treaty. As underscored by Respondent at the hearing, "*the Tribunal is competent to decide its jurisdiction, and to resolve a full range of issues, and that is necessarily part of resolving a dispute under Article 9 concerning an expropriation, so that would encompass deciding whether the BIT has been superseded*".[50]

169. As rightly pointed out by Claimants, neither the Republic of Cyprus nor the Republic of Poland filed a notice of termination on the basis of Article 13 of the BIT[51]. Consequently, the Treaty is *prima facie* in force and binding and the Arbitral Tribunal may *prima facie* conclude that it has jurisdiction under Article 9 of the Treaty to decide a dispute concerning the expropriation of an investment of an investor of a Contracting Party by the other Contracting Party.

170. It may be that such *prima facie* conclusion would be reversed if it were established by the Court of Justice of the European Union ("CJEU") that the Treaties for the protection of investments between EU member States are superseded by the EU Treaties and laws or are incompatible with such Treaties and laws. However this issue is presently pending before the CJEU and has yet to be decided[52].

171. The Arbitral Tribunal notes in this regard that in the present dispute the issue whether EU law supersedes the Treaty arises only if the Arbitral Tribunal concludes that Claimants' investment in Cyprus was subject to expropriation under the Treaty.

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49 This was also confirmed at the hearing, see transcript day one, page 2, lines 10 to 15.

50 Transcript, Day 2, lines 1-6, page 58.

51 Claimants' PHB, 10 November 2016, para 16, page 7.

52 CJEU, Case C-284/16, Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice, *Achmea B V v. Slovak Republic*, dated 22 June 2016.

172. The Arbitral Tribunal has been requested, on the basis of the arbitration clause contained in the Treaty, to determine whether there was an unlawful expropriation pursuant to its Article 4 and to draw the financial consequences of such decision.

173. For the above considerations and reasons, the Arbitral Tribunal finds that it has *prima facie* jurisdiction to decide the case submitted to it. Such *prima facie* decision might have to be revisited should the Arbitral Tribunal decide that there was an expropriation of Claimants' investment under the Treaty. Otherwise, it will be a final decision.

174. The Arbitral Tribunal will consequently first examine whether there was an expropriation of Claimants' investment under the Treaty.

A. Was there an expropriation of Claimants' investment?

175. In order to decide whether Claimants' investment was or was not expropriated, the Arbitral Tribunal first needs to analyze the investment itself to determine whether Claimants owned an investment protected under the Treaty (A). It will subsequently be in a position to establish whether this investment was expropriated (B).

a) Claimants' investment

176. Claimants' allegations as to the nature of their protected investment have evolved in the course of the proceedings.

177. Their initial position was that they were deprived of their ownership of [redacted]s deposits in its bank account at the Cyprus bank. Mention was also made of the shares in [redacted].

178. Claimants however changed their views at the hearing as they no longer referred to the deposits in the bank account but only to the shares in [redacted].

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53 "*Claimants have owned at the time of investing and continue to own property rights to the funds deposited with the Bank of Cyprus. The BIT expressly states that title to money, goodwill and other assets and to any performance having an economic value constitutes an investment. The investors also hold 50% of shares in* [redacted] *According to Article 1 (1) (b) of the BIT, shares in the Company amount to a protected investment*", Statement of Claim, para 66, page 27.

179. The Arbitral Tribunal will thus examine successively both positions in order to determine whether Claimants effectively held a protected investment.

i. Claimants' initial position regarding the investment at stake

180. In accordance with Article 2 of the Treaty, "*the agreement applies to investments made into the territory of either Contracting Party by investors of the other Contracting Party*".

181. Further, pursuant to Article 3 (1) "*Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures, the operation, management, maintenance, used, enjoyment or disposal thereof of those investors*".

182. One of the objectives of the Treaty, as of every BIT, is thus to protect the investment of a national of a Contracting Party on the territory of the other Contracting Party.

183. At the beginning of these proceedings, Claimants contended that their investment consisted in the bank deposits themselves. They clearly stated that their "*fundamental rights in regard to their investment have been affected, starting with the Investors' property rights to the funds held on the bank accounts managed by the Bank of Cyprus*"[54].

184. Respondent objected to this, alleging that [redacted] was the holder of the Bank of Cyprus deposit account and that, as such, Claimants had no standing to raise this claim. It added that in any case the deposits were not intended to be kept in the said account[55].

185. The Arbitral Tribunal finds that this characterization of the investment raises two issues:

- Whether the funds were transferred by Claimants on [redacted]s account at the Bank of Cyprus; and

54 Statement of Claim, para 130, page 51.
55 Statement of Defence, 29 April 2016, paras 210 and 211, pages 88 and 89.

- Whether the deposits constituted an investment protected by the Treaty.

186. As to the first question, the Arbitral Tribunal notes that Claimants specified in their Post-Hearing Brief that the money gathered on the bank account came from [redacted], a company indirectly owned by Claimants[56]. However, according to the testimony of Mr. [redacted] was a Polish company established in 2002 by Claimants.

187. This was not challenged by Respondent. Nonetheless, Respondent observed at the hearing that the funds were transferred by [redacted] and not Claimants[57]. Consequently, although [redacted] was established and is controlled by Claimants, the question whether Claimants are entitled to seek protection of the funds under the Treaty would have to be resolved should the Arbitral Tribunal find that the funds constitute an investment.

188. Whether the funds constitute an investment is a question of the utmost relevance. Claimants contended that the funds transferred to the bank account in the Bank of Cyprus were an investment pursuant to Article 1 (3) of the Treaty, which reads as follows:

> *"The term "investment" shall comprise every kind of asset and in particular, though not exclusively:*
>
> *(a) Movable and immovable property as well as any other property rights in respect of every kind of asset,*
> *(b) Rights derived from shares, bonds, and other kinds of interests in companies;*
> *(c) Title to money, goodwill and other assets and to any performance having an economic value".*

189. In Claimants' view, the broad reference to "*every kind of asset*" and to "*title to money, goodwill and other assets and to any performance having an economic value*" encompassed the "*funds deposited at the Bank of Cyprus*". Claimants conclude that they had an investment falling within the definition of Article 1(3) of the BIT and that there

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56 Claimants' PHB, para 39, page 13.
57 Transcript hearing, day 1, 12 October 2016, page 28, lines 1 to 3.

was no need to examine further requirements to establish the existence of this investment.

190. However, although many awards and scholars sustain that it is sufficient for the party claiming to have an investment to show that its asset falls into the categories listed as "investments" within the applicable BIT, this subjective approach has not been unanimously adopted. Other awards and authors have found that additional objective requirements had to be satisfied.

191. It is indeed a fact that in the absence of a uniform definition in the applicable texts, be it multilateral treaties, BITs or national laws on the protection of investments, there has been, and still is, controversial debate on what constitutes an investment. Case law in that regard is consequently contradictory and deserves a review.

192. Beside the "subjective" notion of investment, which rests on the will of the parties as expressed under the BITs to define the investment, some arbitral tribunals rely on the criteria established in the 2001 case of *Salini Construtorri S.p.A.et Italstrade S.p.A.c. Maroc*[58], pursuant to which an investment usually requires a certain "*contribution*", a certain "*duration of the performance of the contract*", the participation in the "*risk*" of the transaction and a "*contribution to the economic development of the host State of the investment*".

193. The Arbitral Tribunal notes that the *Salini* criteria were established in the context of ICSID case law to the extent that Article 25 of the ICSID Convention did not provide a definition of an investment. Arbitral tribunals relying on the *Salini* criteria thus consider that they should be used to find out whether an investment exists when the ICSID Convention applies. For some of those taking this view, in such a case a double test applies: the first test is to verify that the operation at stake is contemplated by the Treaty, and the second test is that there is an investment pursuant to the ICSID Convention by applying the different criteria.

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58 ICSID No. ARB/00/4.

194. The Arbitral Tribunal further notes that the *Salini* criteria are not unanimously applied. Not only have they been subsequently reduced[59] or, considered insufficient[60], but they have also been disputed by arbitral tribunals on the ground that they are mere examples of the features of an investment, without being conditions necessary to prove its existence[61]. Some arbitrators have consequently distanced themselves from the *Salini* criteria[62].

195. As mentioned above, arbitral tribunals applying the *Salini* test usually did so when the arbitration was conducted under the aegis of the ICSID Convention. Nevertheless, in the case of *Romak S.A. vs the Republic of Uzbekistan*[63] which was conducted in accordance with the UNCITRAL Arbitration Rules, the arbitral tribunal took into consideration the objective criteria in order to appreciate the existence of an investment. It decided that it did not have jurisdiction in the absence of an "*investment*", refusing the literal construction of the term "*investment*" under the Swiss-Uzbekistan BIT, considered that the kind of investment contemplated under the BIT was not exhaustive, and analyzed whether there existed an investment under the BIT i.e. "*whether they involved a contribution that extended over a certain period of time and entailed some risk*".[64] In other words, it extended the *Salini* criteria somehow to a non-ICSID dispute.

196. The Arbitral Tribunal concludes from the above that there is no uniform definition or understanding of the notion of investment and that arbitral tribunals have at their disposal the possibility to use a subjective, or objective, approach in their analysis of the question whether there exists an investment under a given BIT, in the absence of which they do not have jurisdiction.

197. Notwithstanding the above, the Arbitral Tribunal finds that it need not enter into that debate in the instant case. Pursuant to Article 2 of the Treaty, "*the agreement applies to investments made into the territory of either Contracting Party by investors of the other Contracting Party*". The Arbitral Tribunal is satisfied that the funds transferred on

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59 The criteria were reduced to 3 in *L.e.s.i. S.p.A. and Astald S.p.A. v. Algeria*, ICSID No. ARB/05/3. See also *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID No. ARB/98/2.

60 The criteria were increased to 6 in *Phoenix Action Ltd cl Czech Republic*, ICSID No. ARB/06/5.

61 *M.C.I. Power Group L.C. and New Turbine Inc. C. Equator*, ICSID No. ARB/03/6.

62 *Biwater c. Tanzania*, ICSID No. ARB/05/22.

63 *https://www.pcacases.com/web/sendAttach/491*.

64 Romak SA v. Ukzbekistan, paragraph 212, page 55.

[redacted]'s account with the bank of Cyprus were not intended to be invested in Cyprus and that, in actual fact, they were not so invested.

198. The Arbitral Tribunal acknowledges that those funds, pertaining to Polish citizens, were transiting via the Bank of Cyprus pending their investment in the Polish company [redacted] within a very short time period. [redacted] account was used as the vehicle allowing the investors to acquire shares in [redacted]. It was to this end that they transferred PLN 10,000,000 to [redacted] account in order for two other transfers to occur: one amounting to PLN 7,000,000 for the acquisition of [redacted] shares offered in a retailed tranche (which transfer was made); and the other amounting to PLN 3,000,000 to buy shares offered in the institutional investors' tranche (which transfer was never effected).

199. The fact that [redacted] was a Cypriot company is irrelevant as the funds were not aimed at being invested in Cyprus, but in [redacted]. This is not denied by Claimants, who indicated in their Opening Statement at the hearing on 13 October 2016 that "*this case is not about the—let's say the protection of bank deposits, this case is about the protection of investment. This investment takes a form of the money kept at the bank account but at the same time the money was intended to be forwarded to buy the shares (....)*".[65] The Bank of Cyprus where the funds were located was a go-between pending transfer of the funds to Poland. Claimants even referred to the Bank as an "*economic bearer*" of the investment[66]. There was no investment value in Cyprus. For this reason, there is no doubt that these funds, subsequently subject to the bail-in, did not constitute an investment, irrespective of what definition might be used for the notion of "*investment*", either in the Treaty or the criteria related to the objective definition.

200. Consequently, the Arbitral Tribunal finds that the funds held in [redacted]'s account in the Bank of Cyprus cannot be characterized as an investment protected by the Treaty and that it need not examine whether they were expropriated by Respondent.

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65 Transcript Day one, page 51, lines 3 to 7.

66 « *This case is not about the bank deposit, or the money that was kept in the bank account, just as a sort of economic bearer of the investment* », Transcript day 1, October 12, 2016, page 49, lines 5 to 7.

ii. Claimants' latest position regarding the investment at stake

201. Claimants subsequently appeared to change their position in the course of the hearing. When asked by the Arbitral Tribunal to elaborate on the notion of investment and its source, Claimants indicated that:

> "*As regard the notion of investment and definition, and the source of the claim, this is a rather complex issue in this case, since the claim is based around different types of investment, and we believe that a general concept of investment is the source, and also the definition in Article 1 of the BIT, it begins with the general description of investment, and then the forms that are listed as examples of possible form of investment in the other country, so coming from the concept that here the case is somehow focused on the monetary—the money that were kept with the bank account, it is not the money, it is not the deposit held with the bank account that is the source here of the claim. The source of the claim is the value of the investment of the claimants is in the company in Cyprus, this is* [redacted]"

202. The Claimants then explained that "*by transforming the money obtained by* [redacted] *into the shares of* [redacted] *the claimant would benefit, would make an investment*", adding that "*(...) the economic effect for the investment would be the value created for* [redacted]" and concluding that "*we think that the general notion of the investment being either money, or, - - well, yes shares are - - I have already mentioned it, it would be the best way to describe this investment*"[67].

203. After Respondent objected to the ambiguous position of Claimants and tried to summarize it, Claimants specified again that "(...) *the general notion of investment, that is every kind of asset, and of course claimants, as they stand here, they are the Polish citizens who have title, shareholder title in* [redacted] *so what is generated for them is the value of the shareholding interest* (...)"[68].

204. In their Post-Hearing Brief the Claimants were more specific and explained that "*The source of the claim is the value of the investment of the Claimants in the company in*

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67 Transcript day 2, pages 61 and 62.
68 Transcript day 2, pages 65 and 66.

Cyprus- [redacted] *received certain amount of money from the Claimants that was supposed to be transformed in other form of investment, the financial instrument in a form of the shares in a public company* [redacted]"[69]. Thus. Claimants' subsequent argumentation regarding "*the rights to funds*"[70] is irrelevant.

205. In that light, the Arbitral Tribunal understands that Claimants' latest position is that they owned an investment through their shareholding in [redacted].

206. It cannot be denied that the holding of the shares in [redacted] constitutes an investment. The "*shares*" are encompassed in Article 1 (b) of the Treaty which provides that the term investment shall compromise every kind of asset and in particular "*rights derived from shares.*" The acquisition of the shares in [redacted] is also a contribution for a certain duration and carries a risk associated with the company's business. This is not denied by Respondent[71] and Respondent's observation that [redacted]s assets do not constitute assets of Claimants is irrelevant with regards to the shares in [redacted] which belong to Claimants and not to [redacted].

207. The Arbitral Tribunal finds that Claimants' shares in [redacted] therefore constitute an investment in accordance with both the subjective and objective definitions of the notion of investment.

208. However, the Arbitral Tribunal notes that in the present case the essence of the operation envisaged by Claimants was not an additional acquisition of shares in [redacted] in Cyprus or an injection of additional capital in [redacted] but rather the acquisition of shares in [redacted] a Polish company seated in Poland. Thus, Claimants intended to transform a Polish investment in a Polish company into an investment by a foreign investor, [redacted] Cyprus, in Poland, with all related consequences as to fiscal and financial treatment, as well as the international protection to which such 'foreign' investment would have been entitled.

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69 Claimants' PHB, para 32, page 12.

70 Claimants' PHB, para 37, page 13.

71 "*While Respondent has never contested that Claimants' shares in* [redacted] *would prima facie constitute an investment pursuant to the Treaty, Respondent has been clear from the outset that Claimants are wrong to assume that* [redacted]*'s assets constitute assets of Claimants*", Respondent's PHB, para 52, page 31.

209. In such context not exhaustively clarified by the Parties, the Arbitral Tribunal finds appropriate to examine also the question whether the Cypriot bail-in measures, resulting in the impossibility for Claimants to proceed to the operation envisaged, could be assessed as expropriation measures by Respondent, affecting not only the deposit made in [redacted] account (which the Arbitral Tribunal already denied to be an investment), but also the value of Claimants' shares in [redacted] (which the Arbitral Tribunal has found to be an investment).

b) Claimants' expropriation of their investment

210. Article 4 of the Treaty provides the following:

> *"1. Neither Contracting Party shall take any measures depriving directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with:*
>
> *(a) The measures are taken in the public interest and under due process of law;*
> *(b) The measures are not discriminatory;*
> *(c) The measures are accompanied by provision for the payment of prompt, adequate and effective compensation".*

It is a classical clause prohibiting direct and indirect expropriation measures unless they are taken in the public interest, are not discriminatory and are promptly, adequately and effectively compensated. However the Treaty provides no definition of expropriation.

211. In the absence of such a definition, the Arbitral Tribunal turns to the case law dealing with these issues for guidance.

212. The decisions taken by various arbitral tribunals show that one of the most important elements to take into consideration when evaluating the existence of an expropriation is the economic impact that the measures may have on the investment. For an expropriation to exist, a very substantial interference must take place, leading to the

deprivation of the investor's fundamental right of ownership. Interference with the investment lasting for a significant period may also amount to expropriation.

213. For instance, it has been found that in order for an expropriation to occur, the investor must have lost the control of its investment (*Pope & Talbot v. Canada*[72]). In *PSGE v. Turkey*[73], it was underscored that *"there must be some form of deprivation of the investor in the control of the investment, the management of day-to day-operations of the company, interfering in the administration, impeding the distribution of dividends, interfering in the appointment of officials and managers, or depriving the company of its property or control in total or in part."* This deprivation has been appreciated by the "(...) *degree of possession taking or control over the enterprise the disputes measures entail*"[74]. In other words, if the investor loses control over its investment, the measures cannot be applied without compensation.

214. Moreover, the deprivation of the investment must be permanent or complete (*LG&E v. Argentina, Azurix v. Argentina*[75]) and a distinction is made between a partial deprivation of value (which does not constitute an expropriation) and a complete or near complete deprivation of value, which constitutes an expropriation (*Vivendi v. Argentina*[76]). In that light, the arbitral tribunal in *Total v. Republic of Argentina* has specified that *"An effective deprivation requires, however, a total loss of value of the property such as when the property affected is rendered worthless by the measure, as in case of direct expropriation (...) and concluded that Total has not shown that the negative economic impact of the Measures has been such as to deprive its investment of all or substantially all its value."*[77]

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72 Pope and Talbot Inc.v. The Government of Canada, UNCITRAL, Interim Award, 26 June 2000 : para 102 "*While it may sometimes be uncertain whether a particular interference with business activities amounts to an expropriation, the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been "taken" from the owner*".

73 PSEG Global Inc., the North American Coal Corporation and Konya Ingin Electrik Uretim ve. Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Award dated 19 January 2007.

74 *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC Award dated 16 December 2003.

75 *LG&E v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006; *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006

76 *Suez, Socieded General de Aguas de Barcelona S.A., and Vivendi Universal Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB 03/19, Decision on Liability dated 30 July 2010.

77 Paras 194 and 196, *Total S.A. v. Argentine Republic*, 27 December 2010, Decision on Liability, ICSID Case No. ARB/04/1.

215. Taking into consideration the above elements, the Arbitral Tribunal has to determine whether there was an expropriation of Claimants' shares in [redacted] as a result of the bail-in measures undertaken in Cyprus.

216. The Arbitral Tribunal is satisfied that, as Claimants have neither attempted to prove that they were deprived totally of these shares nor proved that a substantial deprivation of the value of their shares occurred, it cannot be said that the shares were expropriated.

217. Claimants sustain that their investment was indirectly expropriated by Respondents' actions, starting with the imposition of extraordinary bank holidays and combined with the issuance by the Central Bank of Cyprus of Decree No. 103/2013 and Decree No. 104/2013 on 29 March 2013. They explain that as a result, 37.5% of the funds, namely those funds exceeding 100, 000 Euros kept on accounts at the Bank of Cyprus were converted into shares of the Bank, and 22.5% of the excess amount was temporarily frozen on interest-free deposit accounts. Claimants indicate that it was decided on 30 July 2013 that a further bail-in of 10% would occur, which meant that 47.5% of the excess amount would be converted into shares of the Bank of Cyprus.

218. Claimants then add that as regards their specific funds, among the PLN 10,000,000 in [redacted]s account at the Bank of Cyprus, only PLN 7,000,000 was transferred to the Offering Agent of the [redacted] Shares - [redacted], while, contrary to Claimants' instructions, the amount of PLN 3,000,000 was not transferred. The amount of PLN 3,000,000 was the object of the bail-in measures and Claimants consider that their resulting inability to purchase the shares in [redacted] led to an important decrease of the value of their shares in [redacted].

219. The Arbitral Tribunal first notes that it is not the Claimants' case that they were deprived of their investment, i.e. their shares in [redacted]. In their Post-Hearing Brief, Claimants assert that their 15 March 2013 request for the transfer of PLN 3,000,000 was blocked because of the imposition of the bail-in measures and that they "*lost control of their investment on 20 March 2013 when they could no longer transfer the funds from the BoC accounts*"[78]. However this does not concern the shares in [redacted] but the funds on

[78] Claimants' PHB, para 48, pages 15 and 16.

[redacted]s account which, as decided above, do not amount to an investment protected by the Treaty.

220. For Claimants, indirect expropriation also occurred as a result of the impossibility for [redacted] to invest in a Polish company, thereby diminishing the value of their shares in [redacted] They request compensation "*for lost profits resulting from the loss of business opportunity.*"[79]

221. The Arbitral Tribunal is not convinced, on the evidence before it, that the value of the shares in [redacted] was so significantly affected as to reach the level of expropriation.

222. As underscored by Respondent, for there to be an instance of expropriation, Claimants have to prove that there existed a "*substantial deprivation*" of value. The Arbitral Tribunal finds that Claimants did not show that this was the case. They alleged that their shares had reduced in value given the impossibility of buying [redacted]'s shares at the negotiated price of PLN [redacted] per share, but not that their shares had been rendered valueless. Moreover, Claimants' statement that the value of their shares in [redacted] was reduced remains unsupported by any evidence.

223. On this point, the Arbitral Tribunal finds extremely relevant that the value of [redacted] was in fact very high and that Claimants were able to buy additional shares, as was revealed at the hearing. Indeed, Mr. [redacted] indicated during cross-examination that he had been able to maintain the 20 per cent shareholding in [redacted] that he was targeting by subsequently buying 100,000 shares in [redacted] for approximately 20% more than the agreed PLN [redacted] per share, through a sister company[80]. He also indicated that the value of [redacted] shareholding in [redacted] was accordingly worth around 60 million euros. This statement undermines Claimants' allegations that the value of their shares in [redacted] was substantially affected by the disputed measures.

224. Accordingly, the Arbitral Tribunal cannot conclude that Claimants lost a substantial value of their investment. The issue whether or not the announcement of the bank holidays and the bail-in measures were lawful, necessary and non-expropriatory

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79 Claimants' PHB, para 60, page 18.

80 Transcript Day 2, 13 October 2016, cross examination of Mr. [redacted], pages 26 and 27.

therefore becomes moot. What matters is that Claimants were not deprived of their shares in [redacted] and that they did not lose a substantial part of their value, quite the contrary. The Arbitral Tribunal concludes that the bail-in measures did not constitute an expropriation of Claimants' shares in [redacted]

V. COSTS

225. Pursuant to Articles 43 (4) and 43 (5) of the Rules, the Arbitral Tribunal shall include the costs of the arbitration in its Final Award and shall apportion the costs between the parties "*having regard to the outcome of the case and other relevant circumstances*". The SCC Board has fixed the costs of the arbitration as follows:

- The fees of Mr. Yves Derains of EUR 68,047, his expenses of EUR 1,803.09 and his per diem of EUR 1,500, plus VAT at 20% applicable to his fees and expenses.
- The fees of Prof. Andrea Giardina of EUR 40,828, his expenses of EUR 501.11 and SEK 1,195, his per diem of EUR 1,500, his Mandatory Contribution to the Italian Lawyer's Fund EUR 1,658.20 plus VAT at 22% applicable to his fees, his expenses and the Mandatory Contribution to the Italian Lawyer's Fund.
- The fees of Ms. Sophie Nappert of EUR 40,828, her expenses of GBP 1,023.55 and her per diem of EUR 1,500, plus VAT at 20 % applicable to her fees.
- The expenses of Ms. Catherine Schroeder of EUR 2,737.78 and per diem of EUR 1,500 plus VAT at 20% on her expenses.
- The administrative fees of the SCC of EUR 20,869 as well as the hearing venue's costs of EUR 7,410 plus VAT at 25% on these amounts.

226. Pursuant to Procedural Order no. 6, the parties provided their respective Statements on Costs on 15 December 2016.

227. Claimants indicated having incurred 286,579.76 EUR in total for their costs divided as follows:

- 80,000 EUR for [redacted] legal fees;
- 63,142.72 EUR for [redacted] legal fees;
- 21,000 EUR for [redacted] expert fees;
- 7,192.76 EUR for [redacted] out-of-pocket expenses for attending the oral hearing;

- 944.28 EUR for Mr. [redacted] attendance of the oral hearing;
- and 114,300 EUR for the arbitration advance fees.

228. Claimants have thus incurred [redacted] EUR for their legal costs [redacted]. Claimants insisted that tribunals in other cases under the SCC Rules had taken into consideration the circumstances of the case, such as the conduct of the parties, and that they were reluctant to order full apportionment when the losing party was the claimant. Claimants added that tribunals also looked at the disadvantageous situation of some claimants and weighed the reasonableness of the costs of legal representation.

229. Respondent indicated on its side having paid 114,300 EUR as advance on costs and incurred legal costs divided as follows:

- USD 1,401,057.71 and SEK 35,000 as legal fees;
- Euros 61,500 and USD149,134.69 as expert fees;
- GPB 5,001.24 and SEK 3,201 as Administrative costs;
- Euros 5,553.17 and USD 44,402.23 as expenses.

230. Respondent specified that if it were awarded its costs, those costs that are not in USD would have to be converted into USD at the prevailing exchange rate on the date of the award.

231. On 22 December 2016, Respondent commented on Claimants' Statement on costs. Respondent denied that the Arbitral Tribunal should have reluctance in awarding it all its costs, adding that the Arbitral tribunal should be guided by the relevant facts, including the submissions and positions taken by the parties, but that it should also take into consideration the conduct of the parties.

232. Both parties requested that the other party bear their legal costs and the costs of the arbitration[81]. Respondent also requested that Mr. [redacted] and Mr. [redacted] be jointly and severally declared liable for the full amount on costs.

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[81] Claimants' PHB, page 21 « *order Respondent to compensate Claimants for their costs of arbitration in an amount to be specified later together with interest thereon and, as between the parties, alone to bear the*

233. The Arbitral Tribunal first notes that Claimants have failed in all their claims, be it on the jurisdictional issue by way of the Partial Award dated 7 March 2016, or on the merits by the present Final Award.

234. The Arbitral Tribunal refers to Articles 43(5) and 44 of the SCC Rules whereby, in its apportionment of the Costs of the Arbitration and party costs, it has regard to the outcome of the case and other relevant circumstances.

235. The Arbitral Tribunal considers that Claimants, having failed in their claims, are to bear the Costs of the Arbitration and consequently refund Respondent the amount of EUR 114,300 that they paid to the SCC as advance on costs. The Arbitral Tribunal also considers it justified to order both Claimants jointly and severally to pay this amount as Claimants did not object to this request and the arbitration proceedings were introduced jointly by both Claimants.

236. The Arbitral Tribunal would be minded to apply the same principle to the legal costs borne by the parties, even more so in light of the conduct of the Parties in the proceedings. The Arbitral Tribunal finds that Claimants' procedural position in the course of the proceedings was not always loyal, particularly in choosing not to answer some of Respondent's arguments in their Reply, waiting instead until the hearing on the merits to put forward new arguments and informing Respondent and the Arbitral Tribunal of the latest purchase of 100,000 [redacted] shares at the very end of these proceedings.

237. Nevertheless, the Arbitral Tribunal notes that there is a huge difference between the amounts claimed on both sides, Respondent's legal fees amounting to almost 10 times the Claimants'.

238. Even though Respondent incontestably put more hours in its submissions, it remains that the difference is substantial and its legal costs disproportionate to the amounts at

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compensation to the Arbitral Tribunal and to the SCC' Institute ». Respondents' Post-Hearing Brief, page 46:" (...) *Respondent should be awarded all costs incurred in connection with this Arbitration*".

issue. Similarly, the difference between the experts' fees and the expenses incurred by both sides is significant. For this reason, the Arbitral Tribunal decides that Claimants are to bear their own costs as well as 70% of Respondent's costs. Claimants must accordingly reimburse Respondent the following amounts: USD 980,740.39 and SEK 24,500 for its legal fees, 43,050 EUR and 104,394.28 USD for its expert fees, 3,500.86 GBP and 2,240.7 SEK for administrative costs, and 3,887.2 EUR and USD 31,081.56 for its expenses, i.e. a total of USD1,173,134.56.

ON THE BASIS OF THE ABOVE, THE ARBITRAL TRIBUNAL UNANIMOUSLY DECIDES THAT:

1) The Arbitral Tribunal has jurisdiction to decide on the existence of an expropriation under the Treaty;

2) There is no expropriation of Claimants' investment under Article 4 of the Treaty;

3) All other claims of Claimants are dismissed;

4) Claimants are, jointly and severally, condemned to bear the Costs of the Arbitration as follows:

- The fees of Mr. Yves Derains of EUR 68,047, his expenses of EUR 1,803.09 and his per diem of EUR 1,500, plus VAT at 20% applicable to his fees and expenses.
- The fees of Prof. Andrea Giardina of EUR 40,828, his expenses of EUR 511.11 and SEK 1,195, his Mandatory Contribution to the Italian Lawyer's Fund of EUR 1,658.20 and his per diem of EUR 1,500, plus VAT at 22% applicable to his fees expenses and Contribution.
- The fees of Ms. Sophie Nappert of EUR 40,828, her expenses of GBP 1023.55 and her per diem of EUR 1,500, plus VAT at 20% applicable to her fees.
- The expenses of Ms. Catherine Schroeder of EUR 2,737.78 and per diem of EUR 1,500 plus VAT at 20% on her expenses.
- The administrative fees of the SCC of EUR 20,869 as well as the hearing venue's costs of EUR 7,410 plus VAT at 25% on these amounts.

These amounts will be paid out of the advances on costs paid by the Parties to the SCC.

Consequently, Claimants are jointly and severally condemned to refund Respondent EUR 114,300.

5) Claimants shall bear their own legal costs as well as 70% of Respondent's legal costs and are consequently jointly and severally condemned to pay Respondent USD 1,173,134.56.

Made on 17February 2017

Place of arbitration: Stockholm, Sweden

Mr. Andrea Giardina
Arbitrator

Ms. Sophie Nappert
Arbitrator

Mr. Yves Derains
Chairman

HOW TO APPEAL IN RESPECT OF CERTAIN COSTS

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