GPF GP SÀRL

CLAIMANT

v.

THE REPUBLIC OF POLAND

RESPONDENT

FINAL AWARD

The Arbitral Tribunal:
Prof. Gabrielle Kaufmann-Kohler (Presiding Arbitrator)
Sir David A R Williams, KNZM QC
Prof. Philippe Sands, QC

Secretary of the Tribunal:
Ms. Eva Kalnina

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List of Abbreviations

1971 Decision	Warsaw Monuments Conservator Decision dated 30 June 1971
1994 Ordinance	President of Poland Order to recognize an area as a historical monument dated 8 September 1994
2002 Resolution	Board of Warsaw-Centrum Borough Resolution dated 15 October 2002
2004 WCA Judgment	Court of Appeal in Warsaw Judgment dated 19 December 2014
2005 Building Permit	Mayor of Warsaw Decision dated 11 July 2005
2005 WZ Decision	Mayor of Warsaw Decision dated 21 April 2005
2007 Recommendations	Letter from the Warsaw Monuments Conservator to [redacted] dated 12 April 2007
2009 Letter of the Provincial Conservator	Letter from the Provincial Monuments Conservator to Parkview Terrace dated 11 March 2009, which partially corrected the letter from the Provincial Monuments Conservator to Parkview Terrace dated 3 February 2009
29 Listopada	29 Listopada sp. z o.o., a company incorporated under the laws of Poland (renamed later as Park Residence sp. z.o.o.)
***Achmea* Declarations**	Declaration of the Representatives of the Governments of the Member States of 15 January 2019 on the legal consequences of the Judgment of the Court of Justice in Achmea and on investment protection in the European Union; Declaration of the Representatives of the Governments of the Member States of 16 January 2019 on the Enforcement of the Judgment of the Court of Justice in Achmea and on investment protection in the European Union
***Achmea* Judgment**	Judgment of the Court of Justice of the European Union in the *Republic of Slovakia v. Achmea* case (C-284/16) dated 6 March 2018
***Achmea* Objection**	Respondent's objection to the validity of the arbitration agreement enshrined in Article 9 of the Treaty
Administrative Court or WSA	Masovian Administrative Court
Amended SoC	Claimant's Amended Statement of Claim dated 3 December 2018

Amended SoD	Respondent's Amended Statement of Defense dated 21 March 2019
***Amicus Curiae* Brief**	The European Commission's *Amicus Curiae* Brief dated 8 February 2019
Annex	Annex to the Agreement for the Perpetual Usufruct of the Land and Sale of Buildings dated 25 October 2002
Arbitration Agreement	Arbitration agreement enshrined in Article 9.1 of the Treaty
Arbitration Costs	The fees of the Tribunal, the SCC's administrative fee and the expenses incurred by the Tribunal and the SCC
Award on Jurisdiction	Award on Jurisdiction of 15 February 2017
Barracks	A former military two-storey residential building located on Plot No.1 of the Property
BIT	Bilateral investment treaty
City	City of Warsaw
CJEU	Court of Justice of European Union
C-PHB	Claimant's Post-hearing brief dated 4 December 2019
CRJ Submission	Claimant's Submission on *res judicata* dated 3 December 2018
CS on *Achmea*	Claimant's Answer to the Submissions of Poland and the European Commission on the *Achmea* judgment dated 21 March 2019
CS on Costs	Claimant's cost submission dated 17 January 2019
CS on EC's Intervention	Claimant's Letter regarding the intervention of the European Commission dated 9 November 2018
Decision on Jurisdiction	Award on Jurisdiction, as modified by the English Court Judgment
Defined perimeter	Area defined by the 1971 Decision
EAA	English Arbitration Act 1996
EC	European Commission
Emergency Application	Request for Interim Relief of 30 December 2014
English High Court	High Court of Justice (England and Wales)
English High Court Judgment	*GPF GP Sàrl v. The Republic of Poland* [2018] EWHC 409 (Comm), Judgment of 2 March 2018

English Court of Appeal	Court of Appeal (England and Wales)
ER	Expert Report
EU	European Union
EU Treaties	Treaty on the European Union and Treaty on Functioning of the European Union of 13 December 2007
FET	Fair and equitable treatment
GPF Cyprus	GPF Cyprus Limited, a company incorporated under the laws of Cyprus and a 100% subsidiary of [redacted]
[redacted]	GPF GP S.à.r.l., a company registered under the laws of Luxembourg, the Claimant
[redacted] CV	[redacted] Property Finance C.V., a Dutch-law limited partnership, in which [redacted] is the managing general partner
[redacted] Group	A private equity group operating on the real estate market in Central and Eastern Europe; both [redacted] and [redacted] CV belong to the [redacted] Group
Hearing	The hearing that took place on 17-19 September 2019
ICJ	International Court of Justice
ICSID Convention	The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ILA	International Law Association
Limited Partnership Agreement	A limited partnership agreement of 17 December 2007, the constitutive act of [redacted] Property Finance CV
MC	Monument conservation
Mezzanine Facilities Agreement	A mezzanine facilities agreement entered into by PFS and Parkview Terrace on 30 October 2008
MoD	Ministry of Development
MoJ	Claimant's Second Memorial on Jurisdiction dated 4 March 2016
Museum	Łazienki Królewskie Museum
National Centre	National Centre of Monument Research and Documentation

Opinion of the National Centre	National Centre of Monument Research and Documentation Opinion dated 20 October 2008
Option Agreement	The Call and Put Option Agreement concluded on 30 October 2008 between GPF Cyprus and Mitsuke Limited
Parkview Terrace	Parkview Terrace sp. z.o.o., a company incorporated under the laws of Poland
Party Costs	Any reasonable costs incurred by another party, including costs for legal representation
Perpetual Usufruct Agreement or PUA	Perpetual usufruct agreement of 6 February 2001 that created 29 Listopada's Real Estate right and title to the Real Estate
PFS	Property Finance Sweden AB, a 100% subsidiary of [redacted]
PGRP	General Counsel to the Republic of Poland
PHB	Post-hearing brief
PO1	Procedural Order No. 1, dated 11 May 2015
PO2	Procedural Order No. 2, dated 12 January 2016
PO3	Procedural Order No. 3, dated 14 April 2016
PO4	Procedural Order No. 4, dated 13 May 2016
PO5	Procedural Order No. 5, dated 18 July 2016
PO8	Procedural Order No. 8, dated 26 August 2019
PO9	Procedural Order No. 9, dated 27 September 2019
Provincial Conservator	Provincial Monuments Conservator
Real Estate or Project or Property	The real estate property situated in Warsaw, at 29 Listopada No. 5, which lies at the heart of this dispute
Refusal	Mr. Justice Bryan's Refusal of Permission to Appeal, dated 2 March 2018
Register	Register of monuments
REM	Act on Real Estate Management
Request for Arbitration	Request for Arbitration of 4 December 2014
RER	Respondent's Expert Report

Revised Procedural Calendar	Procedural Calendar established on 1 October 2018
R-PHB	Respondent's Post-hearing brief dated 4 December 2019
RRJ Submission	Respondent's Submission on *res judicata* dated 14 December 2018
RS on *Achmea*	Respondent's Submission on the *Achmea* judgment dated 3 December 2018
RS on Costs	Respondent's statement of costs dated 17 January 2020
SCC	Stockholm Chamber of Commerce
SCC Rules	2010 Stockholm Chamber of Commerce Arbitration Rules
Supreme Administrative Court	Polish Supreme Administrative Court
TEU	Treaty on the European Union of 13 December 2007
TFEU	Treaty on Functioning of the European Union of 13 December 2007
ToA	Terms of Appointment dated 5 May 2015
Tr. [day/page/line]	Transcript of the Hearing
Transcript	Final transcript of the Hearing dated 17 October 2019
Treaty	Treaty between the Government of the People's Republic of Poland and the Government of the Kingdom of Belgium and the Government of the Grand Duchy of Luxembourg on the Promotion and Reciprocal Protection of Investments, signed in Warsaw on 19 May 1987
Usufruct	Perpetual usufruct right
VCLT	Vienna Convention on the Law of Treaties of 1969
Warsaw Conservator	Warsaw Monuments Conservator
WS	Witness Statement
Zoning Plan	Master Zoning Plan for Warszawa-Śródmieście District dated 9 February 1993

I. INTRODUCTION

a. THE PARTIES AND THE TRIBUNAL

1. The Claimant, GPF GP S.à.r.l. (the "Claimant" or [redacted]), is a company incorporated in accordance with the laws of Luxembourg with its registered office at:

   2-8, Avenue Charles de Gaulle
   L-1653 Luxembourg

2. [redacted]s a member of the [redacted]Group, a private equity firm active in real estate in Central and Eastern Europe.

3. Until 5 February 2015, the Claimant was represented by Kochanski Zieba Rapala & Partners, which was then replaced by Dentons Europe LLP, represented in this arbitration by:

   Mr. Barton Legum
   Mr. Wojciech Kozłowski
   Ms. Katarzyna Bilewska
   Mr. Jean-Christophe Honlet
   Mr. Michal Jochemczak
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   katarzyna.szczudlik@dentons.com

4. The Respondent is the Republic of Poland (the "Respondent" or "Poland"):

   Ms. Ewa Kopacz, Prime Minister
   Kancelaria Prezesa Rady Ministrów
   Al. Ujazdowskie 113
   00-583 Warsaw
   Poland

   Mr. Janusz Piechociński, Deputy Prime Minister, Minister of Economy
   PL Trzech Krzyży 3/5
   00-507 Warsaw
   Poland

Ms. Maria Wasiak, Minister of Infrastructure and Development
ul. Wspólna 2/4
00-926 Warsaw
Poland

5. The Respondent is represented in this arbitration by:

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Fax: +48 22 392 31 20
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Until 18 October 2016, the Respondent was also represented by:

Mr. Wojciech Sadowski[2]
Mr. Maciej Jamka
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Pl. Małachowskiego 2
00-066 Warsaw, Poland
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6. The Arbitral Tribunal is composed of:

Prof. Gabrielle Kaufmann-Kohler (President)
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1 On 26 August 2016, the Respondent informed the Tribunal that Ms. Barbara Kotlarek-Kmin from the State Treasury Solicitors' Office had been replaced by Ms. Katarzyna Prochnicka. In her email to the Tribunal of 1 September 2016, Ms. Prochnicka confirmed this fact. On 15 February 2017, Ms. Prochnicka further informed the Tribunal that Ms Elżbieta Buczkowska no longer acted as a counsel for the Respondent and that, as from 1 January 2017, the State Treasury Solicitors' Office had changed its name to General Counsel to the Republic of Poland.

2 On 19 October 2016, Mr Sadowski informed the Tribunal that the engagement of K&L Gates Jamka sp.k. to represent the Republic of Poland in this arbitration had ended with effect on 18 October 2016. He also specified that the Respondent would continue to be represented by counsel Ms. Elzbieta Buczkowska, Ms. Joanna Jackowska-Majeranowska and Ms. Katarzyna Prochnicka of the State Treasury Solicitors' Office (now General Counsel to the Republic of Poland).

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7. The Secretary of the Tribunal,[3] appointed with the consent of the Parties, is:

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b. OVERVIEW OF THE DISPUTE

8. The present dispute arises out of Poland's alleged breach of its Treaty obligations in relation to certain indirect investments made by private equity investor [redacted] in view of developing a real estate project in Warsaw. The facts of the case are summarized as follows.

1. The Perpetual Usufruct Agreement

a. Conclusion of the Perpetual Usufruct Agreement

9. In 1997, the City of Warsaw (the "City") decided to create a perpetual usufruct right (the "Usufruct") over a property that it owned in a prime location in the center of Warsaw, situated at 29 Listopada Street No. 5 (the "Property"). The detailed description of the Property is presented in paragraphs 26-33 of this Award.

10. In 2001, the City concluded a Perpetual Usufruct Agreement (the "PUA") with respect to the Property with a company by the name of Artodex.[4] The PUA was concluded for

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[3] The Secretary's tasks were outlined in the Tribunal's letter to Parties of 25 March 2015.

[4] Agreement for the Perpetual Usufruct of the Land and Sale of Buildings dated 6 February 2001 (C-9).

a period of 99 years. The perpetual usufructuary undertook to modernize and adapt the Property for residential and service functions, as specified in Section 9.2 of the PUA.

11. The Parties do not contest that, under Polish law, an usufruct is usually granted for a duration between 40 and 99 years,[5] and that the law permits the early termination of a perpetual usufruct agreement in case of its non-performance or improper performance, in particular, if the usufructuary did not develop the property within the prescribed time limit.[6] The interpretation and application of this provision is one of the key issues in the present case.

b. Time Limits under the Perpetual Usufruct Agreement

12. According to the terms of the PUA, the development of the Property was scheduled to commence by 2002 and cease two years later.[7] The construction, however, began only in 2005.[8] The Parties hold different views on the reasons for the late commencement of the works.[9]

13. The first request for extension of the deadlines was made in 2002 by Artodex, the perpetual usufructuary at the time.[10]

14. On 15 October 2002, in response to Artodox' request, the City of Warsaw decided that "[i]n the event of failure to keep to the deadlines specified [in the Perpetual Usufruct Agreement] an additional deadline shall be specified, and an additional annual fee referred to in Article 63 of the Act on Real Estate Development shall be determined" (the "2002 Resolution").[11] The Parties disagree as to whether the 2002 Resolution obliges the City to extend the deadlines under any circumstances, upon the usufructuary's request.[12]

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5 Amended SoC, § 36.

6 Act on Real Estate Management, Article 33(3) (RLA-83).

7 Agreement for the Perpetual Usufruct of the Land and Sale of Buildings dated 6 February 2001 (C-9).

8 Amended SoC, § 137.

9 Amended SoC, § 120; Amended SoD, §§ 76, 168.

10 Amended SoC, § 113.

11 Board of Warsaw-Centrum Borough Resolution dated 15 October 2002 (C-13).

12 Amended SoC, §§ 116-117; Amended SoD, §§ 68-70.

15. On 25 October 2002, Artodox and the City concluded an annex to the PUA (the "Annex"). They agreed that the construction would commence in February 2004 and end two years later, in February 2006.[13]

16. In 2004, another company, Polmos, purchased the Usufruct from Artodex and subsequently transferred it to a company by the name of 29 Listopada,[14] which thus became the new perpetual usufructuary of the Property.[15]

17. On 6 July 2005, Listopada 29 filed a request for extension of the deadlines set by the Annex.[16]

18. On 22 December 2005, the City asked whether 29 Listopada was ready to amend the PUA and set a separate rate of yearly fees.[17] As no response followed, the City sent a reminder to 29 Listopada and inquired about the status of the construction works, in September 2006.[18]

19. 29 Listopada responded in April 2007 by requesting to shift the deadline for completion of the works to May 2009.[19]

20. On 22 August 2007, the City reiterated its inquiry about the status of the works. The City informed 29 Listopada that it could not extend the deadlines without understanding the progress with the development of the Property.[20]

21. On 11 September 2007, 29 Listopada informed the City that the works temporarily "discontinued due to the change in the company's economic situation and the investment plans".[21] Less than a month later, 29 Listopada asked the City to change the use of the Property specified by the PUA and shift the deadline for completion of

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13 Annex to the Agreement for the Perpetual Usufruct of the Land and Sale of Buildings dated 25 October 2002, § 3 (C-14).

14 29 Listopada sp. z o.o., a company incorporated under the laws of Poland, which was at that time Polmos' special vehicle company.

15 Amendment to the Preliminary Sale Agreement and the Sale Agreement between Artodex, 29 Listopada and Polmos (C-15); Amended SoC, § 121 ff.

16 The Company's letter dated 6 July 2005, p. 1 (R-59).

17 The City of Warsaw's letter, 22 December 2005, p. 2 (R-60).

18 Amended SoD, § 151.

19 Letter from [redacted] to the Real Estate Department of the City of Warsaw, 17 April 2007, p. 4 (C-47).

20 The City of Warsaw's letter dated 22 August 2007, p. 1 (R-62).

21 Letter from [redacted] to the Real Estate Department of the City of Warsaw dated 11 September 2007, p. 3 (C-48).

the works to 31 December 2009.[22] On 23 November 2007, 29 Listopada asked for a further extension of the deadline until 31 June 2010.[23]

22. By letter of 19 February 2008, 29 Listopada cancelled the requests filed in July 2005, September and October 2007.[24]

23. In May 2009, the City asked 29 Listopada whether the latter obtained all necessary permits to develop the Property and inquired about the renovation of the Barracks.[25]

24. From 2009 until 2010, 29 Listopada and the City exchanged a few more letters regarding the status of the works on the Property. The last one was sent on 4 January 2010 whereby 29 Listopada requested to set the deadline for completion of the works on 30 June 2011.[26]

25. On 20 December 2011, the City called for termination of the PUA, invoking, *inter alia*, the failure of 29 Listopada to respect the time limits for development of the Property.[27]

2. Overview of the Property

26. The Property, which forms the subject matter of the PUA, consists of two plots, respectively 946,3 m² and 1,983 m² in size.[28]

27. Plot No.1 accommodated a former military two-storey residential building (the "Barracks"). Plot No. 2 held several single storey utility buildings.[29]

28. Pursuant to Section 9.2 of the PUA, the Usufructuary was obliged to modernize and adapt the Barracks for residual and service functions. The Respondent emphasizes that, at all relevant times, this provision was an essential condition for concluding the

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22 Letter from [redacted] to the Real Estate Department of the City of Warsaw dated 8 October 2007, p. 1 (C-49).

23 Letter from [redacted] to the Real Estate Department of the Śródmieście District of the City of Warsaw dated 23 November 2007, p. 1 (C-139).

24 Letter from [redacted] to the Real Estate Department of the Śródmieście District of the City of Warsaw, 19 February 2008, p. 1 (C-147).

25 The City of Warsaw's letter, 18 May 2009, p. 1 (R-63).

26 Letter from 29 Listopada to the Real Estate Department of the City of Warsaw dated 4 January 2010, p. 1 (C-50).

27 City of Warsaw Call for Termination of the Perpetual Usufruct Agreement dated 20 December 2011, p. 2 (C-204).

28 Agreement for the Perpetual Usufruct of the Land and Sale of Buildings dated 6 February 2001, § 1.1 (C-9).

29 *Ibid.*

PUA.[30] The evidence before the Tribunal does not indicate that the Claimant has contested this point.[31]

a. Introduction

29. As is well known, Warsaw was severely damaged during World War II. As a result, nearly 85% of the historical buildings, the significance of which was compared to the architectural heritage of Prague or Vienna at that time, were destroyed or later demolished. After the war, the City carried out extensive reconstruction works on the historical sites which had been damaged during the war.[32]

30. The Barracks, which date back to 1901, were one of the last remnants of a historic military quarter, most of which survived World War II.[33] Prior to the conclusion of the PUA, the Barracks were used as social housing, equipped with water, sewage and electric systems.[34]

31. The Respondent has submitted numerous photographs of the Barracks, including this one:[35]

30 Amended SoD, § 97.

31 Amended SoC, § 75.

32 Amended SoD, § 302, fn. 409.

33 Amended SoD, § 37; RWS-2, Witness Statement of [redacted] of 12 March 2019, § 19.

34 Agreement for the Perpetual Usufruct of the Land and Sale of Buildings dated 6 February 2001, § 1.1 (C-9).

35 Respondent's Opening Statement, p. 4.

32. The Parties disagree as to the historical value of the Barracks. [redacted] who prepared a report about the Barracks upon the instructions of the Claimant's predecessors (duly submitted to the Warsaw Conservator together with 29 Listopada's request for recommendations in 2007), has opined that the Barracks were of "low cultural value", and therefore it was permissible to replace them with a modern building.[36] On the other hand, the Respondent maintains that the Polish authorities have consistently underlined the importance of the Barracks in contemporary Polish history.[37]

33. The Parties also disagree as to the condition of the Barracks. The Claimant maintains that the Barracks were in poor shape since the conclusion of the PUA.[38] The Respondent asserts that, prior to the PUA, the Barracks were appropriate for living. The Respondent also underlines that since 2001 it was the usufructuary's responsibility to maintain the Barracks in decent condition.[39]

b. Monuments protection and the Barracks

34. One of the key disagreements between the Parties goes to the legal protection accorded to the Barracks. In this context, the Parties rely on several legal instruments governing monuments protection in Poland.

(i) The 1971 Decision by the Warsaw Monuments Conservator

35. On 30 June 1971, the Warsaw Monuments Conservator (the "Warsaw Conservator") added a certain area in the centre of Warsaw to the register of monuments (the "Register"), which accords the strongest form of protection under Polish law (the "1971 Decision").[40]

36. The Parties do not contest that the Property lies within the area defined by the 1971 Decision (the "defined perimeter"), but they disagree on the scope of application of the Decision.

37. First, the Parties hold divergent views on which buildings are covered by the 1971 Decision, which is somewhat ambiguous in its detail. The 1971 Decision indicates that

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36 Letter from the Warsaw Monuments Conservator to [redacted] dated 12 April 2007, Analysis Regarding the Possible Profile of Land Development on the Plot of Land located at ul. 29 Listopada 5, p. 4 (C-137).

37 Amended SoD, §§ 37-38.

38 Amended SoC, § 77.

39 Amended SoD, §§ 116, 122.

40 Warsaw Monuments Conservator Decision dated 30 June 1971 (CLA-53); see Amended SoD, § 181.

it applies to "bronze era, early medieval and medieval settlements; area of historical importance".[41] According to the Respondent, the 1971 Decision applies to any building of historical importance located within the defined perimeter.[42] By contrast, in the Claimant's interpretation, the 1971 Decision grants protection only to "bronze era, early medieval and medieval settlements" situated in the area defined therein.[43] For the Claimant, the "area of historical importance" mentioned by the Decision specifies the location of the "bronze era, early medieval and medieval settlements" and cannot be understood so as applying to any historical building in the defined perimeter.

38. Second, the Parties disagree on the type of monuments protected by the 1971 Decision. The Claimant asserts that the 1971 Decision applies only to archaeological monuments,[44] whereas the Respondent is of the view that it covers any movable and immovable monuments.[45]

39. Third, the Parties also diverge on the competence of the Warsaw Conservator accorded by the 1971 Decision, *i.e.* whether or not it is within the Warsaw Conservator's competence to give instructions on the design of the real estate located within the defined perimeter.[46]

(ii) The 1994 Ordinance by the President of Poland

40. On 8 September 1994, the President adopted an ordinance declaring the area "Warsaw – historical city complex with Royal Route and Wilanow" (the "1994 Ordinance") a protected historical monument.[47] The 1994 Ordinance states that the protected area "continues along" 29 Listopada Street.[48] The below map, submitted by the Respondent,[49] shows the position of the Property *vis-à-vis* the borders determined by the 1994 Ordinance.

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41 *Ibid.* The Respondent presented a slightly different version of this paragraph, which looks as follows:

"Justification: bronze era, early medieval and medieval settlements
Area of historical importance".

42 Amended SoD, § 181, pp. 63-64.

43 Amended SoC, § 81.

44 Amended SoC, § 240; Register of Archaeological Monuments (C-293).

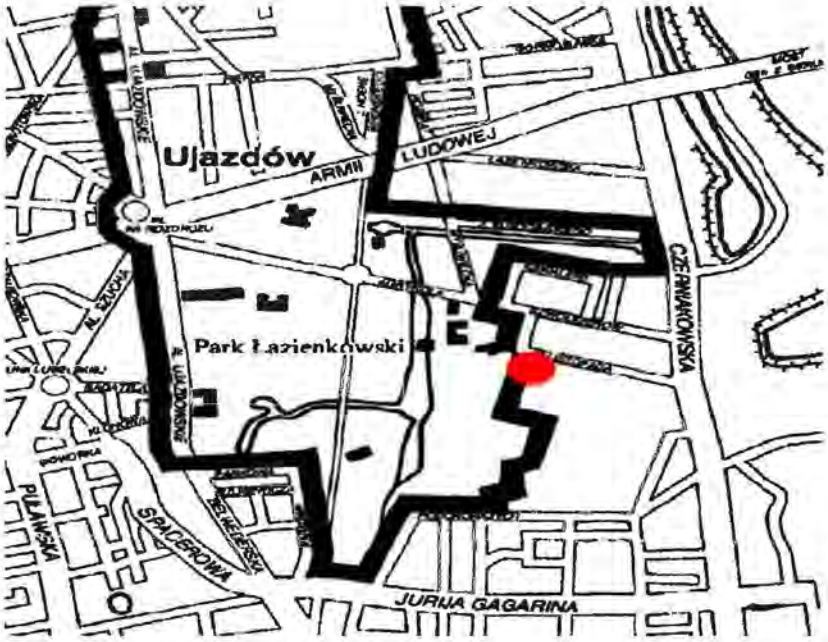
45 Amended SoD, § 181, pp. 63-64; Respondent's Comments on Exhibit C-293 of 27 September 2019.

46 Amended SoC, §§ 81, 83; Amended SoD, § 181, pp. 63-64.

47 President of Poland Order to recognize an area as a historical monument dated 8 September 1994 (C-130).

48 *Ibid.*, § 3.

49 Amended SoD, p. 64.



41. The Parties disagree whether the historical complex defined by the 1994 Ordinance includes the Property or merely adjoins it.[50]

(iii) Inventory of monuments

42. Between 2008 and 2009, the Polish authorities prepared a so-called "white inventory card" in order to commence proceedings aimed at entering the Barracks individually into the Register. The inventory card contained the information required for that purpose.[51]

43. The Parties dispute whether this created any legal obligation with respect to the Property.[52]

(iv) The Register

44. On 4 January 2011, the Provincial Monuments Conservator (the "Provincial Conservator") entered the Barracks into the Register,[53] which granted them the strongest form of protection under Polish law.

45. 29 Listopada challenged the Provincial Conservator's decision. On 19 April 2011, the Minister of Culture reversed the decision of the Provincial Conservator because

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50 Amended SoC § 227; Amended SoD, §181, pp. 63-65.

51 Monuments Evidence Card of the Property situated at ul. 29 Listopada 5 (R-118).

52 Amended SoD, § 181, pp. 65-67; Amended SoC, § 81.

53 MPMC Decision dated 4 January 2011 (C-54).

29 Listopada was denied the right to present fully its case in the proceedings aimed at entering the Barracks into the Register.[54] On 20 April 2011, the Provincial Conservator entered the Barracks to the Register once again.[55] On 11 October 2011, the Minister of Culture again reversed the Provincial Conservator's decision due to the same procedural defect.[56]

46. The proceedings were discontinued on 24 November 2011,[57] because of the demolition of the Barracks described in paragraphs 84-91 of this Award.

(v) The PUA

47. In the context of the PUA, two further observations should be made in the context of the question as to whether the Claimant and its predecessors were obliged to obtain the Warsaw Conservator's approval for the development of the Property.

48. First, it should be noted that Section 9.1 of the PUA requires the construction works to comply with the zoning plan in force on the date of the conclusion of the PUA (the "Zoning Plan"), which required consultations with the Warsaw Conservator.[58] The Parties agree that this Zoning Plan expired in 2003.[59]

49. It should also be noted that Section 9.2 of the PUA requires that "adaptation and modernisation of the given real estate requires arrangements with the Monument Conservator".[60] The Parties[61] and their experts[62] are in disagreement over the validity of this requirement. Specifically, the Parties disagree as to whether, under Polish law, a private contract (such as the PUA) may create an obligation of administrative character.

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54 Minister of Culture and National Heritage Decision dated 19 April 2011 (C-55).

55 MPMC Decision dated 20 April 2011 (C-56).

56 Minister of Culture and National Heritage Decision dated 11 October 2011 (C-57).

57 Mazowsze Monuments Conservator Decision dated 24 November 2011 (C-201).

58 Master Zoning Plan for Warszawa-Śródmieście District dated 9 February 1993, p. 11 (C-128).

59 Amended SoC, § 43, ft. 50; Amended SoD, §137.

60 Agreement for the Perpetual Usufruct of the Land and Sale of Buildings dated 6 February 2001, p. 8 (C-9).

61 Amended SoC, §§ 91-92; Amended SoD, § 137.

62 Expert Opinion of Professors Wierzbowksi and Krolikowski of 18 September 2015 (C); First Expert Report of [redacted] of 14 March 2019 (RER-7).

(vi) The 2008 Opinion of the National Centre

50. On 20 October 2008, the National Centre of Monument Research and Documentation (the "National Centre") summarised the legal regime governing the Property as follows:[63]

i. The building at ul. 29 Listopada 5 is not individually entered in the Register;

ii. The building is included in the conservatory records;

iii. The building is situated in the area of archaeological protection (extract from the Register dated 30.06.71, no. A-8680);

iv. The building is not situated in the area subject to legal protection of the 1994 Ordinance;

v. The land plot on which the building is situated is adjacent to the Łazienki Królewskie park area entered in the Register (reg. no. A-2/1).

51. The Parties diverge as to whether the 2008 Opinion of the National Centre represents an authoritative interpretation of Polish law, and it's binding effect, if any, on the Polish authorities.

(vii) The 2009 Letters of the Provincial Conservator

52. On 3 February 2009, in response to the request filed by Parkview Terrace, the Provincial Conservator made the following statements concerning the conservatory protection accorded to the Property: [64]

i. The Property is located in the area, which, under the 1971 Decision, is included in the Register "due to traces of settlements discovered dating back to the Bronze Age, Early Middle Age and the Middle Age";

ii. The Barracks are not separately recorded in the Register, but located in an area designated by the 1994 Ordinance;

iii. "Any activities concerning development of the area which affect the nature or form of the urban space (changes of color, size of the civil structure, building

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63 National Centre of Monument Research and Documentation Opinion dated 20 October 2008, pp. 2-3 (C-157).

64 Letter from the Provincial Monuments Conservator to Parkview Terrace dated 3 February 2009 (C-173).

layout, façade, form of roof, roof covering, etc.)" need to be agreed with the Warsaw Conservator.

53. On 11 March 2009, the Provincial Conservator issued one more letter correcting certain statements expressed in the letter of 3 February 2009, and stated as follows:[65]

    i. The Property is located outside of the perimeter drawn by the 1994 Ordinance;

    ii. The only form of protection accorded to the Property is that resulting from the 1971 Decision;

    iii. The Property is not accorded the kind of conservation protection which it would have, had it been entered in the Register on an individual basis.

3. Permits and Authorisations prior to 2005

54. It is common ground that, before applying for a building permit, the usufructuary is obliged to obtain the City's approval of the manner in which the Property should be developed (a "WZ decision").[66]

55. On 25 October 2002, the City issued a WZ decision in response to the request by Artodex.[67]

56. Similarly, after the extension of the PUA deadlines, on 21 April 2005, the City issued another WZ decision, this time in response to the request by 29 Listopada (the "2005 WZ Decision").[68] The City approved the construction of an additional building on Plot No. 2, but noted that the modernised Barracks and the new building could not be higher than 11 meters and no more than two storeys above the ground. The total usable area was estimated to be around 1,790 sq. m.[69]

57. The 2005 WZ Decision as well as all further WZ decisions were preceded by the decisions of the Warsaw Conservator.[70] The Parties disagree as to whether the

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65 Letter from the Provincial Monuments Conservator dated 11 March 2009 (C-25).

66 Amended SoC, § 47.

67 Mayor of Warsaw Decision dated 25 October 2002 (C-17).

68 Mayor of Warsaw Decision dated 21 April 2005 (C-18).

69 Amended SoC, § 127.

70 MPMC Decision dated 1 April 2005, pp. 1-2 (C-19).

Warsaw Conservator was competent to make such decisions in light of the ambiguity around the scope of monuments protection accorded to the Property.[71]

58. On 11 July 2005, the City, relying *inter alia* on the 2005 WZ Decision, granted 29 Listopada a building permit (the "2005 Building Permit").[72]

4. Development of the Property from 2006 until 2015

a. 2006-2007

59. In 2006, 29 Listopada decided to modify the plan for development of the Property. To that end, it applied to the Warsaw Conservator on 13 July 2006.[73] On 27 December 2006, the Warsaw Conservator refused to approve the modified plan, which aimed to construct two additional storeys above the Barracks, an additional five-storeys building on the Property, an underground parking and an additional perpendicular wing to the Barracks.[74]

60. In 2007, the White Star Property Group, a real estate group operating in Poland, began to develop an interest in the Project, with a view to maximizing the Property's commercial potential.[75] Thus, as opposed to the 2005 WZ Decision and the 2005 Building Permit, which involved the development of approximately 2000 sq. m., the White Star Property Group planned to considerably enhance the development of the Property by building approximately 30 apartments and 60 underground parking spaces.[76]

61. On 9 January 2007, the White Star Property Group applied to the Warsaw Conservator for recommendations on the new concept of the Property.

62. On 12 April 2007, the Warsaw Conservator issued recommendations approving the construction of one additional storey above the Barracks and the erection of a separate building with connecting link instead of an additional wing, provided it would

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71 Amended SoC, § 144.

72 Mayor of Warsaw Decision dated 11 July 2005, p. 1 (C-20).

73 2006 Monuments Conservator's recommendations dated 27 December 2006, p.1 (R-131).

74 *Ibid.*, p.2.

75 Amended SoC, § 139 ff.

76 Amended SoC, § 141, with reference to Mezzanine Facility Application dated 3 December 2007 (C-140).

not be higher than the building located on the area of the Łazienki Królewskie Museum (the "Museum").[77]

63. Apparently encouraged by these recommendations, the White Star Property Group decided to approach the [redacted] Group with a request to provide financing for the Project.

64. Having analysed the Project, on 19 February 2008, the Investment Committee of the [redacted] Group agreed to finance the acquisition of the Property by the White Star Property Group, as well as all the expenditures relating to the execution of the Project.[78]

65. The various transactions, as a result of which the Claimant became involved in the Project and acquired the investment, have already been summarized by the Tribunal in the Award on Jurisdiction.[79]

b. 2008-2009

66. In January 2008, Parkview Terrace, the new owner of 29 Listopada, applied for a new WZ decision,[80] proposing, *inter alia*, to develop 26 apartments and one commercial premise on the Property, with a total usable area of 6,618 sq. m.

67. On 12 March 2008, the Museum objected to the development plan proposed by Parkview Terrace, citing concerns of monument protection.[81]

68. On 16 July 2008, the Warsaw Conservator requested an opinion on the development plan of Parkview Terrace from the National Centre,[82] a state agency established by the Minister of Culture and National Heritage (the "Minister of Culture") responsible for implementing the State's policy concerning heritage protection.

69. On 20 October 2008, the National Centre issued its opinion (the "Opinion of the National Centre").[83] The experts of the National Centre opined that it was essential to preserve the front and side walls of the Barracks, while only the back (southern) wall

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77 Letter from the Warsaw Monuments Conservator to [redacted] dated 12 April 2007, pp. 2-3 (C-137).

78 GPF GP S.à.r.l Investment Committee Decision dated 19 February 2008 (C-146).

79 Award on Jurisdiction, § 19.

80 Application for a decision on development conditions dated 3 January 2008, p.3 (C-145).

81 Letter from the Museum to the City of Warsaw dated 12 March 2008 (C-149).

82 National Centre of Monument Research and Documentation Opinion dated 20 October 2008 (C-157).

83 *Ibid.*

could be rebuilt, always subject to consultation with the Warsaw Conservator.[84] They also underlined that any new building must use "architectural forms that do not complete [*recte* compete] with historical neighbourhood".[85]

70. On 5 January and again on 2 March 2009, the Warsaw Conservator issued negative decisions on the proposed development of the Property.[86] This was arguably in disregard of the Opinion of the National Centre.[87]

71. On 1 June 2009, in reliance on the negative decisions by the Warsaw Conservator, the City refused to issue a WZ decision.[88]

72. Parkview Terrace challenged the 2009 Decisions of the Warsaw Conservator before the Minister of Culture.[89] On 8 December 2010, the Minister dismissed the challenge.[90] Subsequently, on 28 February 2011, the Minister also dismissed Parkview Terrace's requests for re-examination of the case and upheld his earlier decisions refusing to invalidate the Warsaw Conservator's decisions.[91]

73. Parkview Terrace then brought an appeal before the Masovian[92] Administrative Court (the "Administrative Court"). While it initially prevailed on appeal, on 22 March 2013 the Polish Supreme Administrative Court (the "Supreme Administrative Court") reversed the Administrative Court's decisions and remanded the case for reconsideration to such court.[93] After the re-examination, the Administrative Court dismissed Parkview Terrace's appeals.[94]

74. Subsequently, Parkview Terrace lodged cassation appeals before the Supreme Administrative Court against the Administrative Court judgments. On 2 June 2015, the

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84 *Ibid.*, p. 4.

85 *Ibid.*, p. 5.

86 Warsaw Monuments Conservator Decision dated 5 January 2009 (C-22); Warsaw Monuments Conservator Decision dated 2 March 2009 (C-23).

87 Amended SoC, §§ 216, 220, 421.

88 Mayor of Warsaw Decision dated 1 June 2009 (C-24).

89 Amended SoC, § 237.

90 Minister of Culture and National Heritage Decision dated 8 December 2010 (C-32).

91 Minister of Culture and National Heritage Decision dated 28 February 2011 (C-33).

92 Masovia is the province which includes Warsaw.

93 WSA Judgment dated 29 June 2011 (concerning the Monuments Conservator decision dated 5 January 2009; C-34); WSA Judgment dated 29 June 2011, (concerning the Monuments Conservator decision dated 2 March 2009; C-35); see also NSA judgments dated 22 March 2013 concerning the two WMC's decisions (C-36; C-37).

94 WSA Judgment dated 25 June 2013 (concerning the Monuments Conservator decision dated 5 January 2009; C-38); WSA Judgment dated 25 June 2013 (concerning the Monuments Conservator decision dated 2 March 2009; C-39).

Supreme Administrative Court agreed with Parkview Terrace and the case was remanded to the Minister. [95] The Minister refused to declare the Warsaw Conservator's decision invalid. Parkview Terrace filed two new appeals to the Voivodship Administrative Court in Warsaw, which were dismissed on 16 October 2018.[96]

75. In parallel to the legal actions against the 2009 Decisions of the Warsaw Conservator, Parkview Terrace also appealed the 2009 WZ decision before the Local Board of Appeal, the Administrative Court and the Mayor of Warsaw, without success.[97]

c. 2011-2014

76. In April 2011, 29 Listopada again applied for the Warsaw Conservator's recommendations. The company intended to construct two additional storeys above the Barracks and to erect an additional four-storeys building.[98] On 6 July 2011, the Warsaw Conservator endorsed the construction of one additional storey above the Barracks and emphasized that the additional building could not be higher than the Barracks.[99]

77. On 19 August 2011, 29 Listopada applied to the City for a new WZ decision.[100] Upon the City's request, on 29 February 2012, 29 Listopada submitted a revised application reducing the height of the proposed buildings to 11 m. On 1 June 2012, the City issued a positive WZ decision (the "2012 WZ Decision"),[101] which was, however, appealed by the Museum.

78. On 19 June 2013, the Administrative Court upheld the Museum's appeal and reversed the 2012 WZ Decision due to the City's failure to clarify the conservatory status of the Barracks.[102] 29 Listopada filed a cassation appeal against this judgment.

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95 NSA Judgment case no. II OSK 2508/13 dated 2 June 2015 (C-238); NSA Judgment case no II OSK 2507/13 dated 2 June 2015 (C-239).

96 WSA Judgment Case no. IV SA/Wa 3200/17 dated 16 October 2018 (C-293); WSA Judgment Case no. IV SA/Wa 3199/17 dated 16 October 2018 (C-292).

97 Amended SoC, §§ 251-262.

98 Letter from 29 Listopada to the Warsaw Monuments Conservator re: Conservatory Recommendations dated 27 April 2011 (C-189).

99 Letter from Warsaw Monuments Conservator to 29 Listopada re: Conservatory Recommendations dated 6 July 2011, p. 2 (C-192).

100 29 Listopada Petition for the Issuing of the Development Terms Decision dated 19 August 2011 (C-197).

101 Management Board of the Śródmieście Quarter of the City of Warsaw Decision dated 1 June 2012, p. 1 (C-42).

102 WSA Judgment dated 19 June 2013 (C-46), p. 4.

79. On 28 May 2015, the Supreme Administrative Court upheld the judgment and found that the 2012 WZ Decision should have been agreed with the Warsaw Conservator.[103]

80. On 10 July 2013, Park Residence applied for another set of recommendations.[104] On 4 September 2013, the Warsaw Conservator recommended erecting one building with only two floors, with a double-pitched roof, "of a height similar to that of the nearby buildings," which belong to the Museum and Iazienki Park.[105]

81. On 22 November 2013, Park Residence applied for another WZ decision.[106]

82. On 16 April 2014, Park Residence filed another application for recommendations.[107] The new concept envisaged the construction of a complex consisting of one main building and two smaller ones. The plan envisaged the reconstruction of three walls of the Barracks (the facade and two gable walls) and a further southern wall in the same style. The main building would have both residential and commercial functions. All three buildings would have two floors and an attic that could be used as living space.

83. On 16 June 2014, the Conservator approved the construction of only one residential building with ancillary service facilities on Plot no. 2, because, in the Conservator's view, the plan proposed by Park Residence was not in line with the PUA.[108]

5. Demolition of the Barracks from 2010 till 2011

84. In May 2010, 29 Listopada carried out certain limited demolition works on the basis of the 2005 Building Permit. It demolished the interior walls of the Barracks and the first floor slabs.[109]

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103 NSA Judgment dated 28 May 2015 (C-236).

104 Park Residence Motion for the Issue of Conservatory Recommendations dated 10 July 2013 (C-219).

105 Letter from the City of Warsaw to Park Residence re: Conservatory Recommendations dated 4 September 2013 (C-223).

106 Park Residence Application for a Decision on Development Conditions dated 22 November 2013 (C-224).

107 DIM'84 Domi Miasto Petition for the Issuing of Conservatory Recommendations dated 16 April 2014 (C-225).

108 Letter from the City of Warsaw to DIM'84 Domi Miasto re: Conservatory recommendations dated 16 June 2014 (C-226).

109 Amended SoC, § 267.

85. In the meantime, according to the Claimant, the condition of the Barracks was deteriorating.[110] It is unclear whether 29 Listopada ever informed the Respondent about the poor state of the Barracks.[111]

86. On Friday, 21 October 2011, 29 Listopada filed an application for a specific demolition permit with respect to the Barracks.[112] On the same date, 29 Listopada commenced the complete demolition of the Barracks, allegedly in order to prevent what the Claimant calls "a threat to public safety" and "a potential building catastrophe".[113]

87. The Polish authorities were able to review 29 Listopada's application for the demolition permit only on Monday, 24 October 2011. By that time the Barracks were completely destroyed.

88. The Respondent emphasizes that "the demolition works were supervised by a person without qualifications, the site of the demolition was not fenced off and there was no information board, although all of this is strictly required by Polish Building Law."[114]

89. The Respondent highlights that the demolition of the Barracks caused massive public outcry. Media called it "a prime example of barbarous destruction of Warsaw's heritage"[115] and "the most spectacular demolishment in years".[116] The demolition was also condemned by the Warsaw City Council on 17 November 2011.[117]

90. In response, the Claimant points to the fact that, on 3 November 2010, the Director of the Museum had admitted the poor condition of the Barracks by saying that "[t]he building is not secured and could result a construction disaster at any time... At any moment, the life and health of people walking down the street may be put at risk."[118]

91. The Parties dispute to whether 29 Listopada was permitted to demolish the Barracks and whether such demolition was justified.[119]

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110 *Ibid.*, § 269.

111 Amended SoD, § 289.

112 Petition for Demolition Permit dated 21 October 2011 (C-199).

113 Amended SoC, § 269.

114 Amended SoD, § 294.

115 Article "Dismantled historic building next to Łazienki. Three walls are left", Gazeta Wyborcza, 27 August 2011, p 1 (R-71).

116 Article "Demolished barracks: developer plywood fence", Gazeta Wyborcza, 5 January 2012 (R-150).

117 Position No. 9 of the Capital City Council of Warsaw on demolitions of historical monuments, 17 November 2011 (R-151).

118 Letter from the Museum to Poviat Building Supervision Inspector dated 3 November 2010 (C-185).

119 Amended SoC, § 269; Amended SoD, § 131.

6. The Process of Terminating the PUA from 2012 till 2016

92. On 20 December 2011, shortly after the demolition of the Barracks, the City called for the termination of the PUA.[120]

93. On 22 March 2012, the City filed an action for termination of the PUA before the Warsaw Regional Court.[121]

94. Following the default of Parkview Terrace,[122] on 17 September 2012, PFS acquired all the shares in 29 Listopada (which was renamed Park Residence).[123] Subsequently, on 24 October 2012, PFS also became the sole shareholder of Parkview Terrace. According to the Claimant, from that date onwards, [redacted] became the sole investor remaining in the project.[124]

95. On 4 June 2013, the PUA was terminated by the Warsaw Regional Court.[125] Park Residence and PFS (as the mortgagee) appealed that judgment.

96. On 19 December 2014, the Warsaw Court of Appeal dismissed the appeal and upheld the termination of the PUA (the "2014 WCA Judgment").[126] The Parties disagree whether the 2014 WCA Judgment properly applied Polish law.[127]

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120 City or Warsaw Call for Termination of the Perpetual Usufruct Agreement dated 20 December 2011 (C-204).

121 City of Warsaw Statement of Claim for the Termination of the Perpetual Usufruct Relationship Together with a Request to Secure a Claim dated 22 March 2012 (C-60).

122 The Claimant summarizes Parkview Terrace's default with respect to its obligations as follows:

"(i) Parkview Terrace did not present a valid and final building permit for the First Phase of the development of the Property despite the lapse of 3 months following the conclusion by PFS and Parkview Terrace of Annex No. 2, i.e. 26 July 2011 (Article 17.18.4 of the Mezzanine Facilities Agreement);

(ii) it did not commence the sale of the apartments for the First Phase of the Project with a minimum net sale price of PLN 20,000.00 per square meter despite the lapse of 3 months from the conclusion by Parkview Terrace and PFS of Annex No. 2, i.e. from 26 July 2011 (Article 17.18.6 of the Mezzanine Facilities Agreement); and

(iii) the Project was not implemented by Parkview Terrace in accordance with the terms and conditions of the Mezzanine Facilities Agreement and the Annexes and it was unlikely that the Project would be completed within the time limit specified therein, i.e. by 30 November 2012" (Amended SoC, § 318; footnotes omitted).

123 Statement regarding taking over by Property Finance Sweden AB ownership title over Shares of 29 Listopada dated 11 September 2012 (C-212).

124 Statement regarding taking over by Property Finance Sweden AB ownership title over Shares of Parkview Terrace dated 24 October 2012 (C-213); Amended SoC, § 320.

125 Regional Court in Warsaw Judgment dated 4 June 2013 (C-62).

126 Court of Appeal in Warsaw Judgment dated 19 December 2014 (C-232).

127 Amended SoC, § 359; Amended SoD, §§ 319-320.

97. In May 2015, Park Residence and PFS filed appeals from the 2014 WCA Judgment before the Polish Supreme Court, which dismissed these appeals on 2 June 2016.[128]

7. Involvement of the Museum

98. The Claimant invokes several facts, which are alleged to show that the City and the Museum, which was adjacent to the Property, had a hidden agenda, in the sense that the Museum was interested in taking over the Property.[129] In particular, on 12 March 2008, the Museum objected to 29 Listopada's application for a WZ decision and, *inter alia*, claimed that "the entire area should be bought back by the Warsaw Council Office or the Ministry of Culture and National Heritage and incorporated into the Royal Baths complex."[130]

99. On 15 December 2011, five days before the City called for the termination of the PUA, the Museum publicly supported the termination of the agreement.[131]

100. On 3 February 2012, the Museum asked that the City donate the Property to it,[132] a request which it renewed on 20 June 2012.[133]

101. On 16 May 2014, the Museum applied for a WZ decision concerning the development of the Property. In this request, the Museum proposed to use the Property for a ground-level car park composed of 152 parking spaces together with accompanying infrastructure.[134]

8. [redacted] Project on [redacted]

102. The Claimant also notes that in 2018 a company called [redacted] which is owned by two Polish companies, started to commercialize a residential development of the same nature as that contemplated by Parkview Terrace, located [redacted] from the Property, apparently without any hindrance by the Polish authorities.[135] The Respondent contends that the [redacted] project is located outside the protected area

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128 Supreme Court Judgment, 2 June 2016 (RLA-80).

129 Amended SoC, §§ 95-110.

130 Letter from the Museum to the City of Warsaw dated 12 March 2008 (C-149).

131 Museum Statement to the Polish Press Agency dated 15 December 2011, § 340 (C-43).

132 Museum Request for a Donation of the Property for Public Purposes dated 3 February 2012 (C-66).

133 Letter from the Museum to the Mayor of Warsaw dated 20 June 2012 (C-67).

134 City of Warsaw Notice in Institution of Proceedings re: WZ Decision dated 6 October 2014 (C-69).

135 Amended SoC, §§ 374-376.

and therefore any comparison between [redacted] project and the Property is unjustified.[136]

II. PROCEDURAL HISTORY

A. PRIOR TO THE AWARD ON JURISDICTION

103. The procedural history leading up to the Award on Jurisdiction has been summarized in that decision.[137] In brief, prior to the delivery of the Award on Jurisdiction, the Parties filed several written submissions as well as exhibits, witness statements ("WS") and expert reports ("ERs"). On its part, the Tribunal issued several procedural rulings and rulings and held a hearing for examination of witnesses and experts and oral arguments. The main ones among these procedural actions are mentioned in some more detail below.

104. On 4 December 2014, the Claimant submitted a Request for Arbitration against the Respondent (the "Request for Arbitration") pursuant to an arbitration agreement enshrined in Article 9 (the "Arbitration Agreement") of the Treaty between the Government of the People's Republic of Poland and the Government of the Kingdom of Belgium and the Government of the Grand Duchy of Luxembourg on the Promotion and Reciprocal Protection of Investments dated 19 May 1987 (the "Treaty" or the "BIT").

105. On 30 December 2014, the Claimant submitted a Request for Interim Relief (the "Emergency Application"). Following the appointment of an emergency arbitrator in the person of Mr. Georgios Petrochilos, the Respondent submitted its Response to the Emergency Application. On 6 January 2015, the Emergency Arbitrator dismissed the Emergency Application.

106. On 15 January 2015, the Respondent filed its Answer to the Request for Arbitration. On 27 January 2015, the Claimant submitted observations on the Answer.

107. On 10 February 2015, the tribunal comprising Prof. David Williams, QC, Prof. Philippe Sands, QC and Prof. Gabrielle Kaufmann-Kohler (presiding arbitrator) was duly constituted (the "Tribunal").

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136 Amended SoD, §§ 387-391.

137 Award on Jurisdiction, §§ 26-50.

108. On 5 May 2015, the Parties and the Tribunal held a first procedural hearing in London and signed the Terms of Appointment ("ToA"). Shortly thereafter, the Tribunal issued Procedural Order No. 1 together with the Procedural Calendar.

109. On 18 September 2015, the Claimant submitted its Statement of Claim. On 17 November 2015, the Respondent submitted its Memorial on Objections to Jurisdiction.

110. In December 2015, the Parties filed several requests concerning document production. On 12 January 2016, the Tribunal issued Procedural Order No. 2, determining the Parties' disputed document production requests.

111. On 4 March 2016, the Claimant submitted its Second Memorial on Jurisdiction, whereas the Respondent submitted its Rejoinder on Jurisdiction on 4 April 2016.

112. On 12 April 2016, the Tribunal held a pre-hearing telephone conference and issued Procedural Order No. 3 shortly thereafter.

113. The hearing on jurisdiction took place on 5 and 6 May 2016 in London. A few days later, the Tribunal issued Procedural Order No. 4 on post-hearing matters.

114. On 15 June 2016, the Parties filed their Submissions on Burden of Proof.

115. On 18 July 2016, after having consulted the Parties, the Tribunal confirmed the appointment of the Tribunal's legal expert. The Tribunal also issued Procedural Order No. 5 containing the terms of the expert's appointment, which took into account the Parties' suggestions.

116. On 5 September 2016, the Tribunal's legal expert rendered its opinion, first in draft and then in final form, whereby the Parties had an opportunity to comment on both versions.

117. On 10 October 2016, the Parties informed the Tribunal of their preference to "wait to file their cost submissions until after the jurisdictional decision of the Tribunal", which preference was acknowledged by the Tribunal.

B. FOLLOWING THE AWARD ON JURISDICTION

118. On 15 February 2017, the Tribunal issued the Award on Jurisdiction. The Tribunal decided that it had jurisdiction to rule on whether the 2014 WCA Judgment, as confirmed by the Polish Supreme Court, constituted "expropriation, nationalization or any other similar measure affecting investments" in violation of the Treaty. The

Tribunal denied jurisdiction over the other claims, including those related to the alleged breach of the fair and equitable treatment ("FET") and creeping expropriation.[138]

119. As to the Claimant's FET claim, the Tribunal noted that the Arbitration Agreement encompasses disputes relating to "any deprivation or restriction of property rights by state measures that lead to the consequences similar to expropriation".[139] It further held that the measures capable of violating the FET standard set out in Article 3.1 of the Treaty would not lead to consequences similar to expropriation. As a result, such measures fell outside the scope of the Tribunal's jurisdiction.[140]

120. As to the Claimant's creeping expropriation claim, the Tribunal essentially took the view that a creeping expropriation is comprised of a number of elements, none of which can – separately – constitute the international wrong. The Tribunal found that the permanent deprivation of property occurred exclusively as a result of the 2014 WCA Judgment,[141] while measures prior to the 2014 WCA Judgment were not expropriatory in character and therefore fell outside the Tribunal's jurisdiction.

121. Following the issuance of the Award on Jurisdiction, a calendar was set for the second phase of the arbitration and the Parties filed a number of submissions on quantum. They also made several document production requests, upon which the Tribunal ruled in Procedural Order No. 6.

122. On 17 March 2017, the Claimant advised the Tribunal that it had filed an action to set aside the Award on Jurisdiction in the High Court of Justice of England and Wales (the "English High Court"). Pursuant to Section 67(2) of the English Arbitration Act 1996 (the "EAA"), the proceedings in the English Court did not have suspensive effect on the arbitral proceedings. None of the Parties asked for the stay of arbitration.

123. On 20 February 2018, the Tribunal issued Procedural Order No. 7 on the organization of the hearing on merits. The hearing was scheduled to take place on 21 and 22 March 2018. However, it was subsequently cancelled due to the partial setting aside of the Award on Jurisdiction.

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138 Award on Jurisdiction, § 187.

139 Award on Jurisdiction, § 82.

140 Award on Jurisdiction, §§ 81-89.

141 Award on Jurisdiction, §§ 95-96.

C. THE ENGLISH HIGH COURT JUDGMENT

124. On 2 March 2018, the English High Court partially set aside the Award on Jurisdiction (the "English High Court Judgment") pursuant to Section 67 of the EAA.

125. Justice Bryan conducted a *de novo* review of jurisdiction[142] and, *inter alia*, assessed arguments concerning the drafting of the Treaty that were not invoked during the arbitral proceedings.[143]

126. First, Justice Bryan held that the interpretation of Article 9 of the Treaty, leading to the determination that the Tribunal lacked jurisdiction over the FET claim, was erroneous. He analyzed the ordinary meaning of the words used in Article 9(1)(b) of the Treaty and made the following conclusion:

> 98. Thus, an FET claim based on measures involving a deprivation or restriction of property rights and which leads to/causes consequences similar to expropriation does fall within the scope of disputes that can be submitted to arbitration under Article 9.1(b) on the ordinary meaning of the words used, and I so find.[144]

127. Second, Justice Bryan disagreed with the Tribunal's approach to creeping expropriation, which had led the Tribunal to deny jurisdiction over events prior to the 2014 WCA Judgment.[145] Specifically, Justice Bryan noted:

> [...] The possibility that the decision of Warsaw Court of Appeal might itself amount to an expropriation, does not preclude a consideration of the prior measures relied upon by [redacted] as part of its indirect expropriation claim based on an alleged creeping expropriation [...].[146]

128. Therefore, after having conducted a *prima facie* analysis of the Claimant's creeping expropriation claim, Justice Bryan determined that the Tribunal had jurisdiction over events which occurred before the 2014 WCA Judgment.[147]

129. In summary, Justice Bryan thus ordered that:

> 1. Paragraphs 187(ii) and 187(iii) of the Award be set aside.
>
> 2. In substitution for the aforesaid Paragraphs 187(ii) and 187(iii) of the Award, it is declared that the Tribunal has jurisdiction over:
>
> a. All of the factual matters, actions, allegations and/or measures relied upon in support of the Claimant's claim of direct and/or indirect expropriation contrary to Article 4.1 of the BIT, which claim is pleaded at paragraphs 466-479 of the Claimant's Statement of Claim dated 18 September 2015 ("the Statement of Claim") (which in turn cross-refers to

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142 English High Court Judgment (C-272), §§ 68, 70.

143 *Ibid.*, §§ 72, 81.

144 *Ibid.*, § 98.

145 Award on Jurisdiction, §§ 95-96.

146 English High Court Judgment (C-272), § 131.

147 *Ibid.*, § 142.

the entirety of the factual allegations set out earlier in the Statement of Claim);

b. All of the factual matters, actions, allegations and/or measures relied upon in support of the Claimant's claim of breach of fair and equitable treatment contrary to Article 3.1 of the BIT, which claim is pleaded at paragraphs 480-507 of the Statement of Claim dated 18 September 2015 (which in turn cross-refers to the entirety of the factual allegations set out earlier in the Statement of Claim).

c. The Tribunal will take the necessary steps for the continuation of the proceedings towards the liability phase dealing with the measures identified in paragraphs a. and b. above.[148]

130. On 2 March 2018, Justice Bryan refused to grant the Respondent the permission to appeal his judgment (the "Refusal").[149] He determined that the Respondent's application did not satisfy the requirements of Part 52.6 of the Civil Procedure Rules, as it had no prospects of success and there were no compelling reasons to grant the permission.

131. In March 2018, the Respondent appealed the Refusal pursuant to Section 54(4) of the Access to Justice Act of 1999 before the Court of Appeal (England and Wales) (the "English Court of Appeal").

132. On 3 April 2018, the Tribunal stayed the proceedings pending the English Court of Appeal's decision.

133. On 23 July 2018, the English Court of Appeal sustained the Refusal.[150]

134. On 30 July 2018, the Tribunal resumed the proceedings and invited the Parties to agree on the next procedural steps of the arbitration.

D. THE RESUMED PROCEEDINGS

135. In August and September 2018, the Parties and the Tribunal discussed the timeline of the resumed proceedings. On 1 October 2018, the Tribunal adopted the revised procedural calendar (the "Revised Procedural Calendar").

136. On 3 December 2018, the Claimant filed its Amended Statement of Claim ("Amended SoC") together with accompanying exhibits and legal authorities.

137. On 21 March 2019, the Respondent filed its Amended Statement of Defense ("Amended SoD") together with accompanying exhibits, legal authorities, WS and ER.

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148 Order by Mr. Justice Bryan, dated 2 March 2018, pp. 1-2.

149 Mr. Justice Bryan's Refusal of Permission to Appeal, dated 2 March 2018 (C-270).

150 Order by Lord Justice Lewison, dated 23 July 2018 (C-273).

138. On 29 March 2019, the Claimant noted that the Respondent had appended a new ER and WS on monument conservation ("MC") to the Amended SoD. The Claimant requested the opportunity to reply to these documents. On 3 April 2019, the Respondent objected to the Claimant's request.

139. On 5 April 2019, upon the invitation of the Tribunal, the Claimant briefly commented on the Respondent's letter of 3 April 2019. It asked the Tribunal either to grant it permission to file a rebuttal ER on MC or to strike the Respondent's ER ("RER") on MC from the record. On 9 April 2019, the Respondent objected to the Claimant's request.

140. On 12 April 2019, the Tribunal decided to keep the RER on MC on the record and to authorize the Claimant to file a rebuttal ER on MC. The Tribunal also invited the Respondent to file an additional ER on MC, if necessary.

141. On 15 May 2019, the Claimant filed the Expert Legal Opinion by [redacted] On 24 June 2019, the Respondent informed the Tribunal that it did not intend to submit an additional ER on MC. Instead, the Respondent filed additional legal authorities related to [redacted] ER.

E. INTERVENTION OF THE EUROPEAN COMMISSION AND THE *ACHMEA* JUDGMENT

142. On 16 October 2018, the European Commission (the "EC") filed an application to intervene as a non-disputing party. The EC wished to comment on the legal consequences of the judgment of the Court of Justice of the European Union (the "CJEU") in the *Achmea* case rendered on 6 March 2018 (the "*Achmea* Judgment").

143. On 9 November 2018, the Claimant objected to the EC's intervention ("CS on EC's Intervention"). The Claimant argued that the Respondent did not raise any objections based on the intra-EU nature of the Treaty and, in any event, the Award on Jurisdiction was *res judicata*. The Claimant also objected to the EC's request to access the record and attend oral hearings.

144. On the same day, the Respondent filed its position endorsing the EC's intervention.

145. On 26 November 2018, the Tribunal asked the Parties to present their submissions on the principle of *res judicata*, invoked by the Claimant on 9 November 2018.

146. On 3 December 2018, the Respondent filed the Submission on the *Achmea* Judgment ("RS on *Achmea*") together with accompanying legal authorities.

147. On 3 December 2018, the Claimant filed a supplementary submission on *res judicata* ("CRJ Submission") together with accompanying legal authorities.

148. On 14 December 2018, the Respondent filed its submission on *res judicata* ("RRJ Submission") together with accompanying legal authorities.

149. On 8 January 2019, the Tribunal allowed the EC's intervention, relying on Section 11 of the ToA, Section 34(1) of the EAA 1996 and Article 19 of the SCC Rules. However, the Tribunal denied the EC's request to access the record and attend the hearing.

150. On 8 February 2019, the EC filed its *amicus curiae* brief (the "*Amicus Curiae* Brief") on the application of the principle of *res judicata* and the consequences of the *Achmea* Judgment, together with accompanying legal authorities.

151. On 21 March 2019, the Claimant filed its Answer to the submissions of Poland and the European Commission on the *Achmea* Judgment ("CS on *Achmea*") together with accompanying exhibits and legal authorities.

F. THE HEARING

152. On 29 May 2019, the Parties informed the Tribunal of the witnesses and experts they wished to cross-examine during the hearing.

153. On 17 June 2019, the Claimant filed a draft hearing schedule agreed by the Parties. In the accompanying letter, the Claimant waived its right to cross-examination of [redacted] In light of this, the Respondent asked the Tribunal to decide whether [redacted] ought to attend the hearing.

154. On 25 June 2019, the Tribunal provided the Parties with a revised version of the hearing schedule, to which the Parties raised no objection. The Tribunal also indicated that the presence of [redacted] at the hearing was not necessary.

155. On 21 August 2019, the Tribunal held a pre-hearing telephone conference call. On 26 August 2019, the Tribunal adopted Procedural Order No. 8 on the organization of the hearing, incorporating the Parties' comments on the draft order and with due regard to the discussions during the pre-hearing telephone conference call.

156. On 2 September 2019, the Parties provided the Tribunal with the hearing bundle and the list of attendees.

157. The hearing took place as scheduled on 17-19 September 2019 (the "Hearing") at the International Dispute Resolution Center in London. In addition to the Tribunal, the Secretary and the Court Reporter, the following individuals attended the hearing:

    i. For the Claimant: [redacted] (of [redacted]; Jean-Christophe Honlet, Bart Legum, Michał Jochemczak, Agnieszka Różalska-Kucal and Jungmin Cho (of Dentons); [redacted] (experts) and [redacted] (fact witness).

ii. For the Respondent: Maciej Martyński, Marta Cichomska, Anna Kaczyńska, Agnieszka Kilanowska, Damroka Kościelak and Kamila Lipecka (of the General Counsel to the Republic of Poland); [redacted] (experts) and [redacted] (fact witness).

158. At the end of the Hearing, the Tribunal and the Parties discussed the further procedural steps. These discussions were subsequently reflected in Procedural Order No.9 on post-hearing matters, which the Tribunal issued on 27 September 2019.

159. On the same day, the Respondent submitted brief comments on Exhibit C-298 that the Claimant introduced at the end of the hearing.

160. On 17 October 2019, the court reporter delivered the final transcript of the Hearing ("Transcript"), which included the revisions proposed by the Parties.

G. POST-HEARING STAGE

161. On 4 December 2019, the Parties submitted their Post-hearing briefs (the "PHB").

162. On 20 January 2020, the Parties submitted their submissions on costs.

163. On 17 April 2020, the Tribunal declared the proceedings closed pursuant to Article 34 of the SCC Rules.

H. TIME LIMIT FOR RENDERING THE FINAL AWARD

164. The SCC extended the time limit for rendering the final award on 26 October 2016, from 31 October 2016 to 28 February 2017; on 16 February 2017, from 28 February 2017 to 31 October 2017, with due regard to the Award on Jurisdiction; on 16 October 2017, from 31 October 2017 to 31 July 2018, having considered the Tribunal's comments on the Procedural Calendar agreed by the Parties; on 19 April 2018, and in light of the set aside proceeding, from 31 July 2018 to 31 January 2019; on 11 January 2019, from 31 January 2019 to 31 January 2020, with due regard to the Tribunal's comments on the Revised Procedural Calendar; and on 21 January 2020, from 31 January 2020 till 15 May 2020, with due regard to the complexity of the issues raised in the present arbitration.

III. SUMMARY OF THE PARTIES' POSITIONS

165. The purpose of the present Section is to provide a brief overview of the Parties' positions on the open jurisdictional matters and the merits. The Parties' more specific arguments on the issues in this case are addressed in more detail in the Analysis part of the Award at Section IV.

A. THE POSITIONS OF THE PARTIES AND THE EC ON JURISDICTION

166. At the first stage of these proceedings, the Respondent raised several jurisdictional objections concerning the scope of the Arbitration Agreement, the existence of an investment, and the Claimant's standing.[151] These objections were analysed and resolved in the Award on Jurisdiction,[152] as modified by the English Court Judgment[153] (the "Decision on Jurisdiction").

167. Following the CJEU's judgment in *Achmea*, the Respondent raised a new jurisdictional objection, which relates to the validity of the Arbitration Agreement enshrined in Article 9 of the Treaty, which is an intra-EU BIT (the "*Achmea* Objection"). In response to the *Achmea* Objection,[154] the Claimant argued that the Tribunal may not revisit the jurisdiction because the Tribunal is *functus officio* and the Decision on Jurisdiction is *res judicata*. The Respondent disagreed with the Claimant's contentions. The EC supported the Respondent's position in its *Amicus Curiae* Brief.

168. For the sake of consistency and ease of reference, the summary of the Parties' and the EC's positions on *functus officio* and *res judicata* are presented first (1), followed by their respective positions on the *Achmea* Judgment (2).

1. On *functus officio* and *res judicata*

169. The Claimant argues that the Tribunal's jurisdiction has been determined by the Decision on Jurisdiction, which cannot be revisited under the SCC Rules, English or international law.[155] Specifically, it posits that the Decision on Jurisdiction (1) is final

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151 Award on Jurisdiction, §§ 51-54.

152 *Ibid.*, §§ 118, 155-157, 164, 169, 171, 175, 180, 183.

153 English Court Judgment (C-272), §142.

154 CS on EC's Intervention, p. 2.

155 *Ibid.*, p. 3.

and binding on the parties; (2) constitutes *res judicata*; and thus (3) cannot be revisited by the Tribunal, which is *functus officio* on issues of jurisdiction.[156]

170. In support of its position, the Claimant relies on Article 40 of the SCC Rules,[157] Section 58(1) of the EAA[158] and numerous decisions of arbitral tribunals.[159] The Claimant also argues, with reference to the CJEU judgment in the *EcoSwiss* case, that the *Achmea* Judgment has no impact on the *res judicata* effect of the Decision on Jurisdiction under EU law.[160]

171. It is the Claimant's further position that the Respondent had the opportunity to raise the objection regarding the validity of an arbitration agreement contained in an intra-EU investment treaty at the earlier stage of these proceedings, but failed to do so. The Claimant also emphasizes that the Respondent raised an identical objection in other arbitral proceedings in 2016, but chose not to do so in the present case.[161]

172. On the basis of the arguments, the Claimant asks the Tribunal to deny the Respondent's "new" jurisdictional objection.[162]

173. In response, the Respondent first argues that Article 40 of the SCC Rules[163] does not preclude the Tribunal from hearing the *Achmea* Objection because "[a]n investment tribunal draws its jurisdiction from Parties' consent and, hence, it has inherent jurisdiction enabling it to take such action as may be required to verify, at any stage of the proceeding, whether it possesses the jurisdiction over the subject-matter". According to the Respondent, "[s]uch inherent power can be always exercised even in the absence of a specific statutory provision".[164]

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156 *Ibid.*, p. 2.

157 According to Article 40 of the SCC Rules, "[a]n award shall be final and binding on the parties when rendered. By agreeing to arbitration under these Rules, the parties undertake to carry out any award without delay."

158 Section 58 of the EAA states that "[u]nless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them".

159 CRJ Submission, p. 2.

160 CS on EC's Intervention, p.4.

161 CRJ Submission, pp. 2-3.

162 CS on EC's Intervention, p.4; CRJ Submission, pp. 2-3; CS on *Achmea* §§ 3-110.

163 *Supra*, fn. 157.

164 RRJ Submission, p. 4.

174. Second, the Respondent contends that because neither the Tribunal nor the English Court decided the *Achmea* Objection, the principle of *res judicata* does not apply.[165] According to the Respondent, that principle requires identity of (i) the parties; (ii) the object of relief, and (iii) legal grounds. It also requires that (iv) the matter to be re-litigated has been raised and definitely settled, directly or by necessary implication, in the prior decision.[166] The latter element, so the Respondent observes, follows from the recent decision of the International Court of Justice in *Nicaragua v. Costa Rica*.[167] Thus, the critical issue here is whether the Tribunal or the English High Court decided the issues arising from the *Achmea* Judgment. In the Respondent's view, they clearly did not.

175. Finally, the Respondent underlines that it could not have raised the *Achmea* Objection earlier because the *Achmea* Judgment was only rendered in March 2018. It also clarifies that the objection raised in the other investment did not relate to the *Achmea* Judgment, which had not been hand down then.[168]

176. As a result, it is the Respondent's position that it did not waive abstraction the right to invoke the *Achmea* Judgment but rather repeatedly manifested its intention to do so, for instance, during the telephone conference which took place between the Parties and the Tribunal in February 2018.[169]

177. As a consequence, the Respondent submits that the Tribunal is not precluded from hearing the *Achmea* Objection.

178. The EC supports the Respondent's position in its *Amicus Curiae* Brief. It opines that the Tribunal is not *functus officio*, as it has an inherent power to determine its jurisdiction at any stage of the proceedings. Moreover, in the EC's view, the principle of *res judicata* does not apply because the *Achmea* Objection was never resolved by the Tribunal or the English High Court.

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165 *Ibid.*, p. 5.

166 RRJ Submission, §15, p. 4, with reference to case law.

167 *Maritime Delimitation in the Caribbean Sea and Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary in the Northern Part of the Isla Portillos (Costa Rica v. Nicaragua)* (CLA-333), § 68.

168 RRJ Submission, § 35.

169 *Ibid.*, §39. The PHTC took place on 16 February 2018. The Respondent noted that the *Achmea* Judgment (to be rendered in March 2018) might impact the Tribunal's jurisdiction. The Chair of the Tribunal replied that the Parties may address this question in their opening statements during the hearing, which was at the time scheduled to take place in March 2018, and in their PHBs. On 2 March 2018, the Award on Jurisdiction was partially set aside by the English High Court and the March 2018 hearing was cancelled. On 5 August 2018, the Tribunal adopted the Revised Procedural Calendar, in accordance with which the Respondent filed its submission on the *Achmea* Judgment on 3 December 2018.

2. On the *Achmea* Judgment

179. The Respondent argues that the Tribunal lacks jurisdiction over all claims before the Tribunal due to the invalidity of the Arbitration Agreement arising from the *Achmea* Judgment.[170]

180. According to the Respondent, the Treaty was terminated pursuant to Article 59(1) of the Vienna Convention on the Law of Treaties of 1969 (the "VCLT")[171] or, alternatively, the Arbitration Agreement was terminated by virtue of Article 30(3) of the VCLT.[172] In its submission, the requirements of these provisions are met because (i) the EU Treaties are the "later treaties" under the VCLT, since Poland acceded to the EU Treaties on 1 May 2004, many years after the conclusion of the BIT; (ii) the EU Treaties and the BIT relate to the same subject-matter; and (iii) the EU Treaties and the BIT are incompatible because the arbitration clauses in intra-EU BITs contradict the provisions of EU law safeguarding the integrity of the EU legal order contained in Article 19 of the Treaty on the European Union (the "TEU")[173] as well as Articles 267[174] and 344 of the Treaty on the Functioning of the European Union (the "TFEU").[175]

181. In sum, the Arbitration Agreement is thus invalid and/or inapplicable by virtue of Article 30 or Article 59 of the VCLT.[176]

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170 RS on *Achmea*, § 60.

171 Article 59(1) of the VCLT reads in the relevant part as follows: "1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and: (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty...".

172 According to Article 30(3) of the VCLT, "3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty".

173 Article 19 of the TEU reads in the relevant part as follows: "1.The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed [...] 3. The Court of Justice of the European Union shall, in accordance with the Treaties: (a) rule on actions brought by a Member State, an institution or a natural or legal person; (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions; (c) rule in other cases provided for in the Treaties."

174 Article 267 of the TFEU reads in the relevant part as follows, "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon..."

175 Article 344 of the TFEU holds that: "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein."

176 RS on *Achmea*, § 60.

182. Finally, the Respondent underlines that an award which disregards the findings of the *Achmea* Judgment will in any event be annulled at the seat of the arbitration.[177]

183. The EC fully supports the Respondent's position. It opines that Article 9 of the Treaty is inoperable by virtue of international and EU law. Consequently, the present arbitration lacks the Respondent's consent.

184. The Claimant opposes these arguments for the following three main raisons. First, it argues that the Tribunal's jurisdiction must be established on the date when the Request for Arbitration was filed. The *Achmea* Judgment, which was rendered in 2018, is therefore irrelevant for jurisdictional purposes.[178]

185. Second, the Claimant contends that the Treaty remains valid, since the requirements of Article 30 or Article 59(1) of the VCLT[179] are not met. More specifically, the Claimant contends that (i) the EU Treaties are not the "later treaties" under the VCLT, because their provisions repeat the provisions of EU treaties dating back to 1957; (ii) the EU Treaties and the BIT do not relate to the same subject-matter, as the EU Treaties deal with market principles, whereas the BIT offers a comprehensive investment protection scheme; and (iii) the Treaty is compatible with the EU Treaties, as there is no contradiction between the Arbitration Agreement enshrined in Article 9 of the Treaty and Articles 344 and 267 of the TFEU,[180] considering that the former does not relate to the application of EU law or the power of the CJEU to resolve disputes under EU law.[181]

186. Third, even if the requirements of Article 30 or Article 59(1) of the VCLT[182] were fulfilled, the Respondent's obligation to resolve the present dispute remain in force pursuant to Article 69(2)(b)[183] and Article 70(1)(b) of the VCLT.[184] The Claimant observes that it commenced this arbitration in good faith and thus these proceedings

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177 *Ibid.*, § 61.

178 CS on *Achmea*, §§ 114-118.

179 *Supra*, fns. 171, 172.

180 *Supra*, fns. 174, 175.

181 CS on *Achmea*, §§ 119-156.

182 *Supra*, fns. 171, 172.

183 According to Article 69(2)(b) of the VCLT, "1. A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force. 2. If acts have nevertheless been performed in reliance on such a treaty: [...] (b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty."

184 According to Article 70(1)(b) of the VCLT: "1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention: [...] (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination."

cannot be rendered unlawful as a result of the alleged invalidity of the Treaty by virtue of Article 69(2) of the VCLT.[185] Similarly, the Claimant notes that its right to resolve this dispute in arbitration was "created" through the "execution" of the Treaty, i.e. by filing the Request for Arbitration pursuant to Article 9(1) of the Treaty. This occurred before the Respondent raised its arguments about the termination/invalidity. [186] Consequently, under Article 70(1)(b) of the VCLT the Respondent's obligation under Article 9 of the Treaty to resolve the present dispute cannot be affected by the alleged termination/invalidity of the Treaty.[187]

187. Finally, the Claimant argues that any considerations related to the enforceability of the award in the EU cannot constitute grounds for refusing to exercise jurisdiction.[188] The Claimant also observes that the Declaration of the EU Member States is merely a political statement without legal force.[189]

B. The Parties' Positions on The Merits and Request for Relief

1. Claimant

a. Expropriation (Article 4(1) of the Treaty)

188. The Claimant alleges that the Respondent directly and indirectly expropriated the Claimant's investment in breach of Article 4(1) of the Treaty.[190] First, the Claimant invokes numerous measures adopted by the Respondent that allegedly prevented the construction on the Property from going forward and resulted in the termination of the PUA. In the Claimant's submission, this amounts to "indirect (including creeping) expropriation" contrary to Article 4(1) of the Treaty.[191]

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185 *Supra*, fn. 183.

186 CS on *Achmea*, §§ 157-160.

187 *Supra*, fn. 184.

188 CS on *Achmea*, §§ 165-174.

189 *Ibid.*, §§ 161-164.

190 According to Article 4(1) of the Treaty, "1. The investments made by investors of one of the Contracting Parties in the territory of the other Contracting Party shall not be expropriated or subjected to other measures of direct or indirect dispossession having a similar effect, unless the following conditions have been met: a) the measures were adopted in the public interest and in accordance with legal process; b) they are neither discriminatory, nor contrary to any special commitment such as that described in Article 7, section 2; c) they are accompanied by provision for the payment of compensation, the amount of which must correspond to the real value of the investments concerned on the day before the measures were adopted or were made public. Compensation shall be paid to the investors in a convertible currency, transmitted without delay and freely transferable".

191 Amended SoC, §§ 395-402.

189. Second, the Claimant alleges that the termination of the PUA by the Warsaw Court of Appeal, as a result of which the Claimant no longer retains any real property rights, amounts to direct expropriation in breach of Article 4(1) of the Treaty.[192] According to the Claimant, this expropriation was illegal, because the Respondent discriminated against the Claimant and breached special commitments *vis-a-vis* the Claimant, while paying no adequate and effective compensation.[193]

b. FET (Article 3(1) of the Treaty)

190. The Claimant also alleges that the Respondent breached Article 3(1) of the Treaty, which guarantees fair and equitable treatment.

191. The Claimant submits that the Respondent breached Article 3(1) by (i) frustrating the Claimant's legitimate expectations; (ii) acting in bad faith; and (iii) adopting discriminatory and unjustified measures against the Claimant.

192. First, as to the breach of its legitimate expectations, the Claimant relies on various administrative documents issued by the Polish authorities, which allegedly made it clear that all the necessary authorisations to develop the Property would be granted and the PUA would remain in force. However, the Claimant's expectations were frustrated when the City refused to issue a WZ decision in 2009 and the PUA was terminated by the Polish courts in 2014.[194]

193. Second, the Claimant alleges that Poland acted in bad faith on numerous occasions during the development of the Property. According to the Claimant, the Respondent misapplied Polish law in order to deny the relevant authorisations to the Claimant and its predecessors.[195]

194. Third, the Claimant contends that the Respondent breached the obligation not to adopt unjustified and discriminatory measures. It argues that the Polish authorities had a hidden agenda of favouring the Museum to the detriment of the Claimant, which amounts to unjustified conduct contrary to Article 3(1) of the Treaty. Moreover, the Claimant submits that Poland treated other investors in like circumstances more

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192 *Ibid.*, §§ 402-406.

193 *Ibid.*, §§ 409-426.

194 *Ibid.*, §§ 428-439.

195 *Ibid.*, §§ 440-449.

favourably than the Claimant, which constitutes discrimination in breach of Article 3.1 of the Treaty.[196]

c. Request for relief

195. For all these reasons, the Claimant requested the following relief in its Amended Statement of Claim:

> On the basis of the foregoing, [redacted] respectfully requests the following relief:
>
> (i) DISMISS the Republic of Poland's new objections to jurisdiction formulated following the Award on Jurisdiction and the 2 March 2018 decision of the High Court of Justice in London;
>
> (ii) DECLARE that the Republic of Poland has breached the Treaty and international law, and in particular, that it has:
>
> (i) expropriated [redacted]s investments without compensation, in breach of Article 4.1 of the Treaty;
>
> (ii) failed to accord [redacted]s investments fair and equitable treatment and impaired [redacted]s investments through unjustified and discriminatory measures, in breach of Article 3.1 of the Treaty;
>
> (iii) ORDER the Republic of Poland to compensate [redacted] for the Republic of Poland's breaches of the Treaty and international law in an amount no less than EUR 16,350,384.49, or such other amount that the Tribunal will deem appropriate, plus pre-award and post-award interest at a rate of 13% annually between 18 December 2014 and 23 December 2014, 8% annually between 24 December 2014 and 31 December 2015, and 7% annually subsequently, compounded quarterly until full payment of the Award is made (or any such other interest rate and/or compounding period as the Tribunal will deem appropriate);
>
> (iv) ORDER the Republic of Poland to pay the full costs of this arbitration, including the fees and expenses of the Tribunal, the fees and expenses of the SCC, the fees and expenses relating to [redacted]s legal representation, and the fees and expenses of any experts appointed by the Claimant or the Tribunal, if any, plus interest at the rate of 7% annually since the date of the Award; and
>
> (v) AWARD such other relief as the Tribunal considers appropriate.[197]

196. The Claimant confirmed its Request for Relief in the C-PHB.[198]

2. Respondent

197. As a preliminary observation, the Respondent underlines that the Claimant failed to comply with Polish laws and regulations and acted in a manner manifestly prejudicial to the public interest by demolishing the Barracks. For this reason, the Respondent

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196 *Ibid.*, §§ 450-456.

197 *Ibid.*, § 589.

198 C-PHB, § 112.

requests the Tribunal to find that the Claimant deserves no Treaty protection on the grounds of the clean hands doctrine.[199]

a. Expropriation (Article 4(1) of the Treaty)

198. In its defense against the expropriation claim, the Respondent distinguishes between the 2014 WCA Judgment and the measures adopted before the 2014 WCA Judgment.

The 2014 WCA Judgment

199. The Respondent's primary position is that only the 2014 WCA Judgment could at all constitute expropriation.[200] In its view, an asset cannot be expropriated twice. Thus, even if the Respondent's measures adopted before the 2014 WCA Judgment "had a deferred expropriatory potential, such effects never materialized because of the supervening acts in the form of the judicial termination of the Perpetual Usufruct Agreement".[201] Consequently, only the 2014 WCA Judgment could be considered as an expropriatory act.

200. That said, the Respondent underlines that the 2014 WCA Judgment does not amount to expropriation for the following three reasons. First, expropriatory acts of state courts are unlawful only if they qualify as denial of justice,[202] and the 2014 WCA Judgment does not qualify as such.[203] In other words, the absence of denial of justice precludes a finding of expropriation.[204]

201. Second, the Respondent argues that the risk of termination of the PUA was already present at the time the investment was made, and it is GPF which failed to act diligently. [205] Thus the termination of the PUA by the Polish courts was not expropriatory.

202. Third, the 2014 WCA Judgment was not expropriatory, because it was adopted in the valid exercise of the Respondent's police powers. The 2014 WCA Judgment pursued

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199 Amended SoD, § 407.

200 *Ibid.*, §§ 408-416.

201 *Ibid.*, § 411.

202 *Ibid.*, § 419.

203 *Ibid.*, §§ 420-429.

204 *Ibid.*, § 430.

205 *Ibid.*, § 438.

a legitimate public purpose and complied with the requirements of non-discrimination, proportionality and due process.[206]

203. In any event, even if the Tribunal were to decide that the 2014 WCA Judgment amounted to expropriation, Poland contends that it complied with Article 4(1) of the Treaty, as the 2014 WCA Judgment was non-discriminatory, proportional, adopted for a public purpose and in compliance with due process.[207]

Measures adopted prior to the 2014 WCA Judgment

204. In the event that the Tribunal were to decide that the measures adopted before the 2014 WCA Judgment can also have expropriatory effect, the Respondent argues that they do not amount to expropriation within the meaning of Article 4(1) of the Treaty for the following two reasons. First, the measures did not prevent the development of the Property, [208] were non-discriminatory, [209] and "did not breach any special commitments" vis-à-vis the Claimant's investment.[210] In addition, they were adopted in the valid exercise of the Respondent's police powers.[211]

205. Second and alternatively, the Respondent contends that the actions and omissions of the City of Warsaw relating to the performance of the PUA, including the negotiations with respect to extending the development deadlines, are not attributable to the Respondent.[212]

b. FET (Article 3(1) of the Treaty)

206. It is the Respondent's position that the Treaty does not guarantee FET beyond the international minimum standard.[213] Thus, unless the Claimant demonstrates that Poland's conduct was "wilfully and blatantly wrong, actually malicious, totally arbitrary, evidently discriminatory, or so far beyond the pale that it cannot be defended among

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206 *Ibid.*, §§ 469-483.

207 *Ibid.*, § 468.

208 *Ibid.*, §§ 498-520.

209 *Ibid.*, §§ 530-535.

210 *Ibid.*, §§ 521-529.

211 *Ibid.*, §§ 484-520.

212 *Ibid.*, § 512.

213 *Ibid.*, §§ 536-546.

the reasonable members of international community", the Respondent cannot be held in breach of Article 3(1) of the Treaty.[214]

207. The Respondent further argues that it did not frustrate the Claimant's legitimate expectations.[215] When making the investment, the Claimant was fully aware that the time limits for developing the Property were exceeded by over two years, and thus it could not have legitimately expected that the PUA would remain in force.[216] The Claimant was equally aware of its obligation to modernise and adapt the Barracks, and thus could not have legitimately expected to continue benefitting from the PUA after the demolition of the Barracks.[217]

208. Finally, the Respondent insists that it never acted in bad faith;[218] it had no "hidden agenda" in respect of the Museum; nor did it adopt any discriminatory or unjustified measures *vis-à-vis* the Claimant.[219] Instead, its only aim was to protect its cultural property.

c. Request for relief

209. For all these reasons, the Respondent requested the following relief in the Amended Statement of Defence:

> In light of the foregoing, the Respondent respectfully requests the Tribunal to decide that:
>
> I. The Tribunal does not have jurisdiction over the Claimant's claims as set forth in the Amended Statement of Claim.
>
> In particular:
>
> (i) The Tribunal does not have jurisdiction over the Claimant's claims related to the violation of Article 4(1) of the Treaty (Part V of the Amended Statement of Claim);
>
> (ii) The Tribunal does not have jurisdiction over the Claimant's claims related to the violation of Article 3(1) of the Treaty (Part VI of the Amended Statement of Claim);
>
> II. Should the Tribunal find that it has jurisdiction over the Claimant's claims and that these claims are not inadmissible, the Respondent respectfully requests the Tribunal to dismiss the Claimant's claims in their entirety.
>
> III. Order the Claimant to pay the full costs of the arbitration, including costs of the jurisdictional phase, merit phase and cost related to the Emergency Arbitration EA 2014/183, especially the costs of the arbitrators and the

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214 *Ibid.*, § 546.

215 *Ibid.*, §§ 547-563.

216 *Ibid.*, § 554.

217 *Ibid.*, § 555.

218 *Ibid.*, §§ 564-571.

219 *Ibid.*, §§ 572-573.

> SCC, as well as the fees and expenses relating to the Respondent's legal representation at all stages of the Arbitration, in-house costs of Poland's own employees, fees and expenses of any expert appointed by the Respondent or the Tribunal, and all other reasonable costs, with interest from the date of the Award to the date of payment.[220]

210. The Respondent confirmed the request for relief in its Post-hearing brief.[221]

IV. ANALYSIS

211. After dealing with certain preliminary matters (A), the Tribunal will address jurisdictional matters (B), followed by liability (C). The Parties' arguments, insofar as they are necessary to resolve the relevant issues in dispute, have been reproduced prior to the Tribunal's analysis of each issue, although the Tribunal may further develop the Parties' position in the analysis itself. Furthermore, while it has considered all of the Parties' arguments, for reasons of procedural economy, the Tribunal has reproduced only what it views as the most important arguments for its decision.

A. PRELIMINARY MATTERS

212. Before addressing the merits of the dispute, the Tribunal will set out preliminary observations, that concern the subject matter of this Award (1); the relevance of prior decisions (2); the law governing the proceedings (3); and the law applicable to the merits of the dispute (4).

1. Subject matter of this Award

213. This Award follows the Decision on Jurisdiction, and deals with the Respondent's newly raised jurisdictional objection and the merits of the dispute.

2. Relevance of prior decisions on international investment law

214. Both Parties have referred to a number of awards and decisions of international tribunals dealing with international investment law. The Claimant and the EC have also referred to a number of judgments of English courts dealing with the principles of *res judicata* and *functus officio*. The Tribunal considers that, while it is not bound by previous decisions of international tribunals, in its judgment, it should pay due

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220 *Ibid.*, § 731.

221 R-PHB, § 99.

consideration to such decisions and, subject to compelling contrary grounds, it should seek to give effect to principles that are applicable and generally established in a series of clear and consistent cases.

3. Law governing the proceedings

215. The Tribunal also recalls that the procedural matters of this arbitration are governed by the rules set out in paragraph 63 of the ToA, which reads as follows:

> This arbitration shall be governed by (in the following order of precedence):
>
> a) The procedural rules set out in the BIT;
>
> b) The mandatory rules of the law on international arbitration applicable at the seat of the arbitration;
>
> c) These Terms of Appointment and Procedural Order No. 1 and any subsequent procedural order;
>
> d) The SCC Rules.

216. In this context, the Tribunal also notes that the Respondent challenges the validity of Article 9 of the Treaty, which reads in the relevant part as follows:

> Article 9
>
> 1. [a)] Any dispute between one of the Contracting Parties and the investor of the other Contracting Party shall be the subject of a written notification which shall be accompanied by a detailed aide-mémoire, addressed by the investor of a Contracting Party to the other Contracting Party. As far as possible the dispute shall be amicably settled by the parties.
>
> b) As used in this article, the term 'disputes' shall mean disputes relating to expropriation, nationalization or any other similar measures affecting investments, and notably the transfer of an investment into public property, placing it under public supervision as well as any other deprivation or restriction of property rights by state measures that lead to consequences similar to expropriation.[222]
>
> 2. In the absence of an amicable settlement within six months from the date of the written notification mentioned in section 1, the dispute shall be submitted, at the investor's choice, to one of the following bodies:
>
> a) the Arbitration Institute of the Stockholm Chamber of Commerce;
>
> b) the International Centre for the Settlement of Investment Disputes (ICSID), established under the 'Convention on the Settlement of Investment Disputes between States and Nationals of Other States', signed in Washington on March 18, 1965, when each state Party to the present agreement has become a party to the said Convention;
>
> c) an 'ad hoc' tribunal, organized in accordance with the rules of the United Nations Commission on International Trade Law or of the United Nations Economic Commission for Europe, where the competent authority to

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222 As noted above, the translation of Article 9(1)(b) has been submitted separately as exhibit CLA-57 and has been explicitly agreed between the Parties. For the rest of the translation of Article 9, the Tribunal has referred to CLA-1.

> appoint the arbitrator(s) shall be, depending on the investor's choice, the UN Secretary General or the President of the International Court of Justice.
>
> [...]
>
> 5. The arbitral tribunal shall resolve the dispute based on:
>
> - The internal law of that Contracting Party, party to the dispute, on the territory the investment of which is located, including conflicts of laws principles,
>
> - The provisions of this Agreement,
>
> - The terms and conditions of any specific agreement concerning the investment,
>
> - The rules and principles of international law generally admitted.

4. Law governing the merits

217. The Tribunal applies the Treaty between the Government of the People's Republic of Poland and the Government of the Kingdom of Belgium and the Government of the Grand Duchy of Luxembourg on the Promotion and Reciprocal Protection of Investments dated 19 May 1987.[223]

218. The Treaty contains no choice of law clause. Being an international treaty, the BIT is governed by general international law, including the VCLT,[224] to which Poland and Luxembourg are parties.[225]

219. Articles 3 and 4 of the Treaty are particularly relevant to the merits of the dispute. Article 3(1) of the Treaty provides as follows: [226]

> Each Contracting Party shall accord in its territory to investments made by investors of the other Contracting Party fair and equitable treatment, excluding any unjustified or discriminatory measure that could impede the management, maintenance, use, enjoyment or liquidation thereof.

220. As for Article 4, the Tribunal recalls that the Parties have submitted two slightly different translations of that provision. For the sake of completeness, the Tribunal

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223 As noted in its letter to Parties of 1 June 2016, the Tribunal will refer to the Claimant's translation of the Treaty (CLA-1) as it finds it to be slightly more accurate than the translation submitted by the Respondent (R-2EN). In the same letter, the Tribunal invited the Parties to submit a joint English translation of Articles 1(1), 3(1) and 4(1). On 15 June 2016, the Parties provided an agreed translation of such articles (CLA-194). Thus the Tribunal will refer to exhibit CLA-194 for the translation of Articles 1(1), 3(1) and 4(1). Finally, the Tribunal will refer to exhibit CLA-57 for the translation of Article 9(1)(b), which was also agreed between the Parties (see MoJ, § 151 and Rejoinder, fn. 1).

224 Vienna Convention on the Law of Treaties dated 23 May 1969 (CLA-48).

225 Belgium acceded to the VCLT on 1 September 1992. Luxembourg signed it on 4 September 1969, but the entry into force only took place on 23 May 2003. Poland has been a party to the VCLT since 2 July 1990. See Vienna Convention on the Law of Treaty, Ratification Status of 26 August 2015 (CLA-157).

226 CLA-194, agreed translation by the Parties.

reproduces the two translations below, noting that these marginal divergences have no impact on its findings.[227]

> Article 4
>
> *[Claimant's version]*
>
> 1. The investments made by investors of one of the Contracting Parties in the territory of the other Contracting Party shall not be expropriated or subjected to other measures of direct or indirect dispossession having a similar effect, unless the following conditions have been met:
>
> a) the measures were adopted in the public interest and in accordance with legal process;
>
> b) they are neither discriminatory, nor contrary to any special commitment such as that described in Article 7, section 2;
>
> c) they are accompanied by provision for the payment of compensation, the amount of which must correspond to the real value of the investments concerned on the day before the measures were adopted or were made public. Compensation shall be paid to the investors in a convertible currency, transmitted without delay and freely transferable.
>
> *[Respondent's version, which differs from Claimant's version in respect of the first sentence]*
>
> 1. The investments made by investors of one of the Contracting Parties in the territory of the other Contracting Party shall not be expropriated or subjected to other measures having a similar effect of direct or indirect deprivation of ownership, unless the following conditions have been met: [...]]

221. The Tribunal will determine in its further discussion what law governs its jurisdiction and related issues.

B. JURISDICTIONAL MATTERS

1. *Functus Officio* and *Res Judicata*

222. As discussed in paragraphs 124-134 above, the Award on Jurisdiction was partially set aside by the English High Court, which extended the scope of the Tribunal's jurisdiction to include the Claimant's indirect expropriation claim arising out of Article 4 of the Treaty.

223. Several months after the decision of the English High Court, the Respondent raised the *Achmea* Objection, arguing that the Arbitration Agreement was not valid in

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227 For convenience, the Tribunal will refer to the Claimant's translation of Article 4.

application of the CJEU's decision that dispute resolution clauses in intra-EU BITs are incompatible with EU law.[228]

224. As discussed below, [229] the Claimant challenges the substance of the Respondent's arguments. In addition, the Claimant raises the following three preliminary objections regarding the Tribunal's ability to address the Respondent's newly raised jurisdictional objections at this stage. First, the Claimant argues that the Tribunal is incompetent to reconsider (or "revisit") the Decision on Jurisdiction because the Tribunal is *functus officio* (b). Second, it claims that the *Achmea* Objection must be dismissed because the Decision on Jurisdiction is *res judicata* (c). Third, the Claimant contends that the Respondent lost its right to raise the *Achmea* Objection under English law, because the Respondent could and should have raised it earlier (d).[230]

225. The Tribunal will consider these three preliminary issues first, after determining the law governing *res judicata* and *functus officio* (a) and before discussing the merits of the Respondent's *Achmea* Objection (2).

226. In this context, the Tribunal observes that the EC, which the Tribunal had invited to file an *Amicus Curiae* Brief "on the legal consequences of the *Achmea* Judgment",[231] also provided its views on the impact of *res judicata* and *functus officio* principles.[232] Strictly speaking, the EC exceeded the scope of its intervention by providing these views. The Tribunal is however inclined to take into account the EC's submissions on *functus officio* and *res judicata*, as these are linked to the legal consequences of the *Achmea* Judgment and the Claimant did not object to their admissibility, and commented extensively on them.

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228 RS on *Achmea*, §§ 57-61.

229 See paragraphs 328-338 of the Award.

230 CRJ Submission, pp. 1-5.

231 The Tribunal's letter of 8 January 2019, §12.

232 EC *Amicus Curiae* Brief, §§ 2-33.

a. Which law applies to *res judicata* and *functus officio*?

(i) The Positions of the Parties and of the EC

1. Claimant

227. The Claimant argues that the operation of *res judicata* and *functus officio* is governed solely by English law and the SCC Rules, because the present arbitration is seated in London and conducted under the SCC Rules.[233]

228. The Claimant further argues that, contrary to the Respondent's and the EC's submissions, there is no basis for applying only international law to the disputed issues. For the Claimant, international law may only supplement the rules chosen by the Parties.[234] At the same time, the Claimant highlights the absence of any transnational rules governing *res judicata.*[235]

2. Respondent

229. The Respondent is of the view that the principles of *res judicata* and *functus officio* are governed by international law and the SCC Rules. However, it denies any relevance to English law.

3. The EC

230. The EC notes that there is no clear doctrinal consensus on whether *res judicata* is a procedural or a substantive issue; as a result, there is no consensus on the applicable law. This said, it opines that *res judicata* is governed by international law, because "the question of jurisdiction turns on the legality of a Treaty governed by (i) international law". Alternatively, the EC considers that the application of English law leads to the same outcome.[236]

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233 CS on *Achmea*, §85, referring to C. Schreuer and A. Reinisch, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, Legal Opinion of 20 June 2002, UNCITRAL Arbitration Proceedings, Quantum Proceedings (CLA-308), § 19; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Dissenting Opinion Torres Bernárdez of 16 March 2001, I.C.J. Reports 2001 (CLA-306), § 303.

234 *Ibid.*, §§ 3, 85.

235 *Ibid.*, §§ 104-110.

236 EC *Amicus Curiae* Brief, §§ 2-3.

(ii) Analysis

231. The Tribunal notes that there is no consensus on the law governing the operation of *res judicata* and *functus officio*. The Parties have identified three sets of rules arguably applicable to these matters, namely international law (1), English law (2) and the SCC Rules (3). These rules are applicable to the present proceedings by virtue of paragraph 63 of the ToA, which provides that this arbitration shall be governed by (i) the procedural rules set out in the BIT; (ii) the mandatory rules of the law on international arbitration applicable at the seat of the arbitration, *i.e.*, London; (iii) the ToA, PO1 and any subsequent procedural order; and (iv) the SCC Rules.

1. International law

232. Subject to the *Achmea* Objection, the Parties do not dispute that the Treaty, including the Tribunal's jurisdiction provided in Article 9, is governed by international law. They are obviously correct.

233. The Tribunal will therefore review the application of the principles of *res judicata* and *functus officio* from the perspective of international law. In doing so, it will seek guidance from any relevant decisions of international courts and tribunals. It will, however, exercise caution when assessing ICSID decisions and awards, because of the specificity of the ICSID regime reflected in Article 48(3) of the ICSID Convention and ICSID Arbitration Rule 47,[237] which require final awards to deal with every question submitted to the tribunal, including jurisdictional objections that had already been resolved in an interim decision on jurisdiction.

234. This specificity was emphasized, for example, in *Burlington v. Ecuador*:[238]

> The Tribunal agrees with the tribunal in *SCB v. Tanesco* when it states that a preaward decision does not carry *res judicata* effects, for reasons essentially connected to the structure or architecture of the ICSID Convention. First, apart from orders on procedural matters under Article 44 and under other rules dealing with the organization of the proceedings and other than decisions on provisional measures, the ICSID framework contemplates that arbitration proceedings give rise only to (i) one decision on preliminary objections, if such objections are raised and are not joined

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237 Article 44 of the ICSID Convention provides that, generally, any arbitration proceeding under the ICSID Convention are conducted in accordance with the Arbitration Rules. Rule 41 of the Arbitration Rules gives ICSID tribunals the power to consider, on their own initiative, "whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence," at any stage of the proceeding. Article 48(3) of the ICSID Convention as well as Rule 47 of the Arbitration Rules require that the final award "shall deal with every question submitted to the Tribunal", including any jurisdictional objections raised by the Parties.

238 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award of 7 February 2017 (RLA-242), § 86.

to the merits (Arbitration Rule 41(4)), and to (ii) one (final) award (Article 48 ICSID Convention and Arbitration Rules 46 ff.). It provides further that the award must deal with "every question submitted to the Tribunal" (Article 48(3)) and contain the "decision of the Tribunal on every question submitted to it" (Arbitration Rule 47(1)(i)). To comply with these provisions, the practice is for tribunals to incorporate earlier decisions into their (final) award.

235. The Tribunal will keep this key particularity in mind when assessing the ICSID decisions and awards as part of the broader legal framework governing *res judicata* and *functus officio*.

2. English law

236. It is common ground that the present arbitration is seated in London; that the Decision on Jurisdiction was rendered in London; and that the scope of the Tribunal's jurisdiction was determined by the English High Court. It is not disputed either that the choice of the judicial seat of the arbitration triggers the application of the rules of the seat that govern international arbitrations. Therefore, in assessing it's the principles of *res judicata* and *functus officio*, the Tribunal will rely, in addition to international law, on the relevant provisions of the EAA and seek guidance from the decisions of English courts.

3. SCC Rules

237. Institutional arbitration rules apply when the parties have submitted their arbitration to such rules and to the extent that they are not in conflict with the mandatory arbitration laws of the seat.

238. This arbitration is subject to the SCC Rules, which merely provide that awards are final and binding on the parties.[239]

4. Conclusion

239. To conclude, the Tribunal will apply international law, English law and the SCC Rules in its assessment of whether it is *functus officio* and the Decision on Jurisdiction is *res judicata*. Doing so, it will seek to reconcile the application of these rules to avoid a conflict, if any.

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239 Article 40 of the SCC Rules provides as follows: "An award shall be final and binding on the parties when rendered. By agreeing to arbitration under these Rules, the parties undertake to carry out any award without delay".

b. Is the Tribunal *functus officio*?

(i) The Position of the Parties and of the EC

1. Claimant

240. The Claimant contends that neither the SCC Rules nor English law permit the Tribunal to "revisit" the Decision on Jurisdiction. In this respect, the Claimant mostly relies on Article 40 of the SCC Rules[240] and Section 58(1) of the EAA,[241] which stipulate that arbitral awards are final and binding upon the Parties.

241. The Claimant further argues that if arbitral tribunals were able to examine new jurisdictional objections after an award on jurisdiction was rendered, the purpose of Article 40 of the SCC Rules regarding the finality of arbitral awards[242] would be frustrated.[243] In this context, the Claimant relies on *Novenergia II v. Spain*, where the tribunal ruled that "upon rendering of the final award the arbitral tribunal becomes *functus officio* with no lingering power to determine any issues in dispute between the parties".[244] As opposed to the Respondent, the Claimant identifies no resemblance between Article 40 of the SCC Rules concerning the finality of arbitral awards[245] and Article 41 of the ICSID Convention concerning the principle of competence-competence.[246]

242. Unlike the EC, the Claimant fails to see a similarity between Article 40[247] and Article 25 of the SCC Rules.[248] It agrees with the EC that Article 25 of the SCC Rules allows the Parties to amend their claims, but argues that the *Achmea* Objection does not

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240 *Supra*, fn. 157.

241 *Supra*, fn. 158.

242 *Supra*, fn. 157.

243 CS on *Achmea*, § 75.

244 *Novenergia II – Energy & Environment (SCA), SICAR (Luxembourg) v. Kingdom of Spain*, SCC Case no. V 2015/063, Procedural Order No. 17 of 9 April 2018 (CLA-335).

245 *Supra*, fn. 157.

246 According to Article 41 of the ICSID Convention, "Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute."

247 *Supra*, fn. 157.

248 According to Article 25 of the SCC Rules: "At any time prior to the close of proceedings pursuant to Article 34, a party may amend or supplement its claim, counterclaim, defence or set-off provided its case, as amended or supplemented, is still comprised by the arbitration agreement, unless the Arbitral Tribunal considers it inappropriate to allow such amendment or supplement having regard to the delay in making it, the prejudice to the other party or any other circumstances."

qualify as an "amendment" of a claim and, moreover, falls squarely outside the scope of the Arbitration Agreement.[249]

243. In addition to the SCC Rules, the Claimant underlines that English law too precludes the Tribunal from reconsidering the Decision on Jurisdiction. It invokes the principle of finality of arbitral awards enshrined in Section 58(1) of the EAA,[250] and relies on the principle of *functus officio*, extensively discussed by English courts in *Emirates Trading v. Fomento*[251] and *Fidelitas v. Exportchleb*.[252] In view of that principle, the Tribunal's mandate to rule upon its jurisdiction expired when the Decision on Jurisdiction was issued.[253]

244. For the Claimant, none of the exceptions to the *functus officio* rule contained in Section 57(3) of the EAA[254] are relevant in the present case.[255] Thus, at this stage, the Respondent can only challenge jurisdiction in front of the courts of the seat of the arbitration.[256]

2. Respondent

245. The Respondent argues that neither international law nor the SCC Rules deprive the Tribunal from its power to consider the *Achmea* Objection, because an investment tribunal has the inherent power to verify its jurisdiction under the applicable treaty at any stage of the proceedings. According to the Respondent, "[s]uch inherent power can be always exercised even in the absence of a specific statutory provision".[257]

246. The Respondent further submits that Article 40 of the SCC Rules[258] does not bar the Tribunal from reconsidering the scope of its jurisdiction. For the Respondent, Article

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249 CS on *Achmea*, § 76.

250 *Supra*, fn. 158.

251 *Emirates Trading Agency LLC v. Sociedade De Fomento Industrial Private Limited* [2015] EWHC 1452 (Comm) (CLA-270), § 26.

252 *Fidelitas Shipping Co Ltd v. V/O Exportchleb* [1966] 1 QB 630 at 644 (CA) (CLA-266), p. 644.

253 CRJ Submission, p. 4.

254 Section 57(3) of the EAA provides as follows: "The tribunal may on its own initiative or on the application of a party - (a)correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, or (b) make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award. These powers shall not be exercised without first affording the other parties a reasonable opportunity to make representations to the tribunal."

255 CS on *Achmea*, § 16.

256 *Ibid.*, § 27.

257 RRJ Submission, § 12.

258 *Supra*, fn. 157.

40 of the SCC Rules[259] operates similarly to Article 41 of the ICSID Convention,[260] which permits the review of a tribunal's jurisdiction at any time.[261]

247. For completeness, the Tribunal also notes that the Respondent disputes that English law plays a role in this context, and thus has made no submissions on the principle of *functus officio* under such law.

3. The EC

248. The EC opines that the Tribunal is competent to revisit the Decision on Jurisdiction under English law and the SCC Rules.

249. First, in respect of English law, the EC states that Sections 30[262] and 31[263] of the EAA "confer the power on the Tribunal to rule on its own jurisdiction". In the EC's view, these provisions do not limit the powers of the Tribunal to do so "to one sole occasion", as Sections 30 and 31 of the EAA[264] expressly contemplate the possibility that "supervening issues of jurisdiction could arise"[265] and that a tribunal may decide an objection to its jurisdiction, in the award on the merits.

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259 *Supra*, fn. 157.

260 *Supra*, fn. 246.

261 RRJ Submission, § 11, referring to *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction of 1 December 2000 (RLA-248), § 169.

262 Section 30 of the EAA holds that: "(1)Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to - (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement. (2)Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part."

263 Section 31 of the EAA reads as follows in the relevant part: "An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction... (2) Any objection during the course of the arbitral proceedings that the arbitral tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised. (3) The arbitral tribunal may admit an objection later than the time specified in subsection (1) or (2) if it considers the delay justified. (4) Where an objection is duly taken to the tribunal's substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, it may — (a) rule on the matter in an award as to jurisdiction, or (b) deal with the objection in its award on the merits."

264 *Supra*, fns. 262-263.

265 EC *Amicus Curiae* Brief, § 18.

250. The EC further notes that Section 58 of the EAA[266] provides that the finality of arbitral awards is subject to challenge by any available arbitral process of appeal or review.[267] It concludes that the Respondent's right to bring a further challenge has not been exhausted and therefore the Tribunal is not *functus officio* in this respect. [268]

251. Second, when it comes to the SCC Rules, the EC submits that Article 25 allows the Tribunal to revisit its jurisdiction, [269] as it permits the Parties to amend and supplement their claims.[270]

252. The EC provides no opinion on the application of *functus officio* under international law.

(ii) Analysis

1. International law

253. Having considered the decisions of international tribunals cited by the Claimant and the EC, the Tribunal finds little guidance on the application of the principle of *functus officio* under international law, especially in circumstances similar to the present ones. It emerges, however, from the cases to which the Claimant refers that investment treaty tribunals consider themselves *functi officio* only after they have rendered a final award.

254. The Claimant cites *Novenergia II v. Spain,* which held that:[271]

> ...upon rendering of the final award the arbitral tribunal becomes *functus officio* with no lingering power to determine any issues in dispute between the parties.

255. The Claimant also refers to *Gold Reserve v. Venezuela*, which described certain exceptions to the principle of *functus officio.* In addition to the correction of the award provided in Article 56 of the ICSID Convention, the *Gold Reserve* tribunal mentioned the interpretation of an award and the issuance of an additional award:

> There are two other Articles in this Chapter providing for the Tribunal's intervention following the rendering of the Award: Article 55, dealing with

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266 *Supra*, fn. 158.

267 EC *Amicus Curiae* Brief, § 20.

268 *Ibid.*

269 *Supra*, fn. 248.

270 EC *Amicus Curiae* Brief, § 21.

271 *Novenergia II – Energy & Environment (SCA), SICAR (Luxembourg) v. Kingdom of Spain*, SCC Case no. V 2015/063, Procedural Order No. 17 of 9 April 2018 (CLA-335), p. 1.

> "Interpretation of the Award", and Article 57, dealing with "Supplementary Decisions". The three provisions represent exceptions to the principle, recognized by most national legal systems, according to which the arbitral tribunal is "*functus officio*" once it has rendered the award, meaning that it has no further power to revisit the award". [272]

256. The Tribunal notes that in both cases the principle of *functus officio* applied because the tribunals had rendered their final awards, which resolved all claims before them. In *Novenergia II v. Spain* the principle of *functus officio* was discussed in light of the Claimant's request for rectification, clarification and complement of the final award. [273] In *Gold Reserve v. Venezuela* the same principle was analysed in light of the Parties' joint request for correction of the award.[274] It is indeed generally accepted that a tribunal having rendered its final award still has the power to correct or interpret that award or to issue an additional award on claims raised in the arbitration but omitted from the final award.[275]

257. However, this is not the situation faced here. By the time the Respondent raised the *Achmea* Objection, the Tribunal had not yet rendered the final award and its mandate to resolve the dispute between the Parties remained in force. Hence, the Tribunal was not *functus officio* under international law, because it had not resolved all claims before it, and had not delivered a final award.

2. English law

258. The Tribunal notes that English law recognises the principle of *functus officio*. As clarified by several decisions of the English courts, the principle applies only to matters that have been considered and resolved by arbitral tribunals.

259. For instance, in *Fidelitas v. Exportchleb*, the English Court of Appeal held that:

> Once his final award is made, whether or not stated in the form of a special case, the arbitrator himself becomes *functus officio* as respects all the issues between the parties unless his jurisdiction is revived by the court's exercise of its power to remit the award to him for his reconsideration.[276]

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272 *Gold Reserve v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Decision Regarding the Claimant's and the Respondent's Requests for Corrections of 15 December 2014 (CLA-327), p. 1.

273 *Novenergia II – Energy & Environment (SCA), SICAR (Luxembourg) v. Kingdom of Spain*, SCC Case no. V 2015/063, Procedural Order No. 17 of 9 April 2018 (CLA-335), p. 1.

274 *Gold Reserve v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Decision Regarding the Claimant's and the Respondent's Requests for Corrections of 15 December 2014 (CLA-327), p. 1.

275 See e.g. Article 33 UNCITRAL Model Law on International Arbitration.

276 *Fidelitas Shipping Co Ltd v. V/O Exportchleb* [1966] 1 QB 630 at 644 (CA) (CLA-266), p. 644.

and concluded that:

> ... the arbitrator is *functus officio* as respects the issues to which his interim award relates.[277]

260. A similar finding was made by the English High Court in *Emirates v. Fomento*:

> The second consequence of an award being binding is that, subject to limited exceptions, the tribunal no longer has power to review or reconsider the subject matter of the award. There is a longstanding rule of common law that when an arbitrator makes a valid award, his authority as an arbitrator comes to an end and, with it, his powers and duties in the reference: he is then said to be *functus officio*.[278]

Importantly, the English High Court specified that:

> The principles of issue estoppel, and the *functus* doctrine, meant that it was not open to the Tribunal to revisit the question of jurisdiction on the same grounds of objection as previously advanced. [279]

261. Thus, under English law, an arbitral tribunal which has not issued a final award is not *functus* in respect of an issue within its jurisdiction that was not decided or otherwise ruled upon.

262. The Claimant contends that Sections 58 and 31 of the EAA prevent the Tribunal from considering the *Achmea* Objection. However, Section 58 of the EAA merely provides that "an award made by the tribunal pursuant to an arbitration agreement is final and binding [...] on the parties". This provision thus concerns the operation of *res judicata*, rather than *functus officio*.

263. Conversely, Section 31 of the EAA is relevant for the present purposes and it provides as follows:

> (1) An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction [...]
>
> (2) Any objection during the course of the arbitral proceedings that the arbitral tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.
>
> (3) The arbitral tribunal may admit an objection later than the time specified in subsection (1) or (2) if it considers the delay justified.

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277 *Ibid.*

278 *Emirates Trading Agency LLC v. Sociedade De Fomento Industrial Private Limited* [2015] EWHC 1452 (Comm) (CLA-270), § 26.

279 *Ibid.*, § 32.

> (4) Where an objection is duly taken to the tribunal's substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, it may —
>
> (a) rule on the matter in an award as to jurisdiction, or
>
> (b) deal with the objection in its award on the merits.

264. Section 31 thus gives arbitral tribunals the power to consider a "belated" jurisdictional objection, provided the arbitral tribunal considers the delay to be justified. Moreover, it allows an arbitral tribunal to join an objection to its substantive jurisdiction to the merits.

265. The Parties do not contest the applicability of Section 31 of the EAA, and rightly so as Section 31 of the EAA is a mandatory provision, which applies to the present case irrespective of the fact that the Tribunal's jurisdiction was modified by the English Court. This is in line with Section 71(2) of the EAA, which provides that "[w]here the award is varied, the variation has effect as part of the tribunal's award".

266. The Tribunal first recalls that the Decision on Jurisdiction resolved the Respondent's objections regarding the existence of an investment and the scope of the Arbitration Agreement. As varied by the English High Court, it determined that the Tribunal had jurisdiction over the claims arising out of Articles 3 and 4 of the Treaty.

267. At that time, neither Party questioned the validity of the Arbitration Agreement before the Tribunal or the English Court. Consequently, no express determination was made on the validity of the Arbitration Agreement.

268. The Claimant submits that, even though the Parties did not argue the validity of the Arbitration Agreement, this issue was determined in the operative part of the English High Court's judgment by necessary implication. The Claimant highlights the following paragraphs of the English Court Judgment:[280]

> ii) The Tribunal has jurisdiction over:
>
> (a) All of the factual matters, actions, allegations and/or measures relied upon in support of the Claimant's claim of direct and/or indirect expropriation contrary to Article 4.1 of the BIT, which claim is pleaded at paragraphs 466-479 of the Statement of Claim dated 18 September 2015 (which in turn cross-refers to the entirety of the factual allegations set out earlier in the Statement of Claim);
>
> (b) All of the factual matters, actions, allegations and/or measures relied upon in support of the Claimant's claim of breach of fair and equitable treatment contrary to Article 3.1 of the BIT, which claim is pleaded at paragraphs 480-507 of the Statement of Claim (which in turn cross-refers

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280 English High Court Judgment (C-272), § 144.

> to the entirety of the factual allegations set out in earlier in the Statement of Case).

269. One might argue that jurisdiction was affirmed and that any such affirmation necessarily implies a finding that the arbitration agreement is valid, because otherwise there could be no jurisdiction. This is particularly so when jurisdiction is based on a treaty and, as a consequence, the Tribunal must assess its jurisdiction *ex officio* even where no defence of lack of jurisdiction is raised. Be this as it may, in the present situation, the English High Court has expressly stated that the *Achmea* Objection was not part of its decision:

> MR SHACKLETON: My Lord, the suggestion is that you postpone your judgment until after 6th March. Why it is made this late, as my friend puts it, is because the European Court diarised the delivery of its judgment in the Achmea matter that same week.
>
> MR JUSTICE BRYAN: Yes, but, I mean, it's no part of this decision, it's nothing to do with what has been argued before me.
>
> MR SHACKLETON: I agree, my Lord.

270. In addition, as will be further discussed, the Tribunal notes Sections 31(3) and (4) quoted above, which allow it to admit a belated jurisdictional objection and to join it to the merits.

271. As a result, the Tribunal comes to the conclusion that is not *functus officio* under English law.

3. SCC Rules

272. The Claimant also argues that the Tribunal is *functus officio* pursuant to Article 40 of the SCC Rules. The Tribunal notes that this provision merely recognises the final and binding nature of arbitral awards, which relates to the principle of *res judicata* rather than to *functus officio*. The Tribunal will therefore analyse Article 40 as a part of the analysis of *res judicata*.

4. Conclusion

273. Under the three sets of applicable rules, the Tribunal is not *functus officio*. It must thus assess whether the *Achmea* Objection is *res judicata*.

c. Is the *Achmea* Objection precluded by *res judicata*?

(i) The Position of the Parties and of the EC

1. Claimant

274. The Claimant argues that the *Achmea* Objection is barred by *res judicata* under both English[281] and international law.[282] Therefore, jurisdiction as determined by the Tribunal and modified by the English Court cannot be reconsidered.[283]

275. The Claimant emphasizes that the Decision on Jurisdiction determines that the Tribunal has jurisdiction over the claims arising out of Articles 3 and 4 of the Treaty. The necessary implication of that decision is that the Treaty and the Arbitration Agreement are valid. The *Achmea* Objection, which pertains to the validity of the Treaty, was therefore implicitly resolved in the earlier stage of the proceedings.[284]

276. As to English law, the Claimant argues that the principle of *res judicata* has two strands – cause of action estoppel and issue estoppel.[285] Cause of action estoppel applies where the cause of action in the subsequent proceedings between the same parties is identical to that in the earlier proceedings.[286] Issue estoppel applies where the issue in the subsequent proceedings between the same parties is identical to that in the earlier proceedings, but the causes of action are different.

277. The Claimant submits that cause of action estoppel is applicable in the present case, because the Respondent attempts to re-litigate the same claim (*i.e.*, that the Tribunal lacks jurisdiction) before the same Tribunal.[287]

278. In respect of international law, the Claimant maintains that the Respondent cannot raise the *Achmea* Objection, because jurisdiction has been decided, expressly or by

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281 *Emirates Trading Agency LLC v. Sociedade De Fomento Industrial Private Limited* [2015] EWHC 1452 (Comm) (CLA-270), §§ 22, 24; *Westland Helicopters Ltd v. Sheikh Salah Al-Hejailan* (No 1) [2004] EWHC 1625 (Comm) (CLA-269), § 35; *Eco Swiss China Time Ltd v. Benetton International NV*, CJEU Case C-126/97, Judgment of the Court of 1 June 1999 (CLA-268), § 48.

282 *Methanex Corporation v. United States of America*, UNCITRAL, Final Award, 3 August 2005 (RLA-126), Part II, Chapter E, § 27; *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award, 23 September 2003 (RLA-286), §§ 89-90; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award (RLA-4), § 135.

283 CRJ Submission, p. 3.

284 CS on *Achmea*, § 89.

285 *Ibid.*, § 45.

286 *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* (formerly Contour Aerospace Ltd) [2014] AC 160 (CLA-325), §§ 22, 26.

287 CS on *Achmea*, § 51.

necessary implication, and *res judicata* attaches to this decision.[288] According to the Claimant, the principle of *res judicata* does not apply only to matters that were expressly reserved for later decision,[289] which is not the case of the *Achmea* Objection.

2. Respondent

279. In the Respondent's view, the Tribunal is not precluded from hearing the *Achmea* Objection by the principle of *res judicata*.

280. First, the Respondent argues that jurisdictional issues are not subject to the principle of *res judicata*.[290] In support, it cites to several ICSID awards, which held that under the ICSID Convention jurisdictional decisions become *res judicata* only after they are incorporated into final awards.[291] Similarly, the Award on Jurisdiction lacks the force of *res judicata*.

281. Second, the Respondent contends that under international law the principle of *res judicata* applies when (i) the triple identity test (*i.e.* same parties, same legal ground, and same relief) is satisfied; and (ii) the matter alleged to be *res judicata* had been raised and definitively settled, directly or by necessary implication.[292] The Respondent

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288 *Ibid.*, § 88, referring to *Maritime Delimitation in the Caribbean Sea and Pacific Ocean and Land Boundary in the Northern Part of the Isla Portillos (Costa Rica v. Nicaragua)*, Judgment of 2 February 2018 (CLA-333), § 68 (*endorsing Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 17 March 2016 (RLA-253), § 60, and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, Judgment of 27 February 2007, I.C.J. Reports 2007 (RLA-260), § 126.

289 *Ibid.*, § 91, referring to *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 17 March 2016 (RLA-253), § 83; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, Judgment of 27 February 2007, I.C.J. Reports 2007 (RLA-260), § 127; *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility of 13 July 2018 (CLA-323), § 211.

290 RRJ Submission, § 4.

291 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award of 7 February 2017 (RLA-242), §§ 82, 86, 89; *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20, Award of 12 September 2016 (RLA-243), §§ 310-314.

292 RRJ Submission, §§ 15-27, referring *to Interpretation of Judgments Nos. 7 and 8 Concerning the Case of The Chorzów Factory (Germany v. Poland)*, P.C.I.J., Publ., Series A. No. 13, Judgment No. 11 of 16 December 1927 (RLA-252), pp. 10-14, 20; *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award of 12 May 2005 (RLA-257), § 126; *Petrobart Limited v. Kyrgyz Republic*, ARB No. 126/2003, Arbitral Award of 29 March 2005 (RLA-258), § VIII.4.3; *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction in Resubmitted Proceedings, 10 May 1988 (RLA-261), § 30; *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award of 25 August 2014 (RLA-262), § 7.20; *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg, and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award of 10 December 2010 (RLA-263), § 7.1.1; Haya de la Torre (*Colombia v. Peru*), Judgment of 13 June 1951, I.C.J. Reports (RLA-269), § 79.

argues that the *Achmea* Objection is not precluded by *res judicata*, because it is "a new matter", which was not resolved by either the Tribunal or the English Court, either expressly or impliedly.[293] Moreover, according to the Respondent, the *Achmea* Objection is based on "a different legal ground", *i.e.* the relevant provisions of EU law as interpreted and applied by the CJEU in the *Achmea* Judgment.[294]

3. The EC

282. The EC observes that the principle of *res judicata* applies to jurisdictional issues "just as it applies to determinations on merits".[295] Therefore, the Decision on Jurisdiction could be *res judicata* if the prerequisites are satisfied.

283. Second, the EC agrees with the Respondent that the principle of *res judicata* applies if (i) the triple identity test is met; and (ii) the matter alleged to have the force of *res judicata* had been raised and definitively resolved in the prior proceedings.[296] Since the *Achmea* Objection has not been addressed or resolved by the Tribunal or the English High Court, the principle of *res judicata* does not preclude the Tribunal from considering the objection.[297]

(ii) Analysis

1. International law

284. The meaning of *res judicata* under international law is reflected in the recommendation of the International Law Association (ILA), upon which the Claimant relies. According to the ILA, *res judicata* is "[t]he general doctrine that an earlier and final adjudication by a court or arbitration tribunal is conclusive in subsequent proceedings involving the same subject matter or relief, the same legal grounds and the same parties (the so-called "triple-identity" criteria)".[298] The ILA further explains that *res judicata* has "a positive effect (namely, that a judgment or award is final and binding between the parties and should be implemented, subject to any available appeal or challenge); and, a negative effect (namely, that the subject matter of the

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293 RRJ Submission, § 41.

294 *Ibid.*

295 EC *Amicus Curiae* Brief, § 29(c).

296 *Ibid.*, § 25.

297 *Ibid.*, § 31.

298 International Law Association, Resolution No. 1/2006, Recommendations on *Lis Pendens* and *Res Judicata* and Arbitration (CLA-315), referring to the Final Report on *Res Judicata* and Arbitration as well as to the Report on *Lis Pendens* and Arbitration.

judgment or award cannot be re-litigated a second time, also referred to as *ne bis in idem*)".[299]

285. The Parties disagree whether awards on jurisdiction carry *res judicata*. The Claimant argues in favour, while the Respondent cites to several ICSID awards to support the opposite view. The Tribunal agrees with the Claimant and *inter alia* the *Oostergetel* tribunal[300] that jurisdictional awards, similarly to awards on the merits, have *res judicata* effects under international law. EU law also recognises that jurisdictional awards have *res judicata* effect and may not "be called in question by a subsequent arbitration award, even if this is necessary in order to examine" the validity of the parties' arbitration agreement under EU law.[301] ICSID awards constitute an exception to this general rule, because, as already discussed above,[302] the ICSID Convention contains unique rules on the force of jurisdictional awards, which cannot be transposed to non-ICSID awards.

286. Therefore, the Decision on Jurisdiction, which was rendered outside the framework of the ICSID Convention, has *res judicata* effect under international law. The next question is thus whether the *Achmea* Objection is precluded by the *res judicata* effect of the Decision on Jurisdiction.

287. The Parties agree that the principle of *res judicata* applies, if the so-called "triple identity" test is satisfied, which requires the identity of parties (*personae*), object (*petitum*) and cause of action (*causa petendi*). The Parties also agree that this test presupposes that the issue alleged to have *res judicata* effect must have been decided by the earlier adjudicative body, be it expressly or by necessary implication.[303] The ICJ in *Costa Rica v. Nicaragua* has recently addressed this requirement:

> However, for *res judicata* to apply in a given case, the Court "must determine whether and to what extent the first claim has already been definitively settled" (ibid., p. 126, paragraph 59), for "[i]f a matter has not in fact been determined, expressly or by necessary implication, then no force of res judicata attaches to it" (ibid., paragraph 60, quoting Application of the Convention on the Prevention and Punishment of the Crime of

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299 *Ibid.*

300 *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award (RLA-4), § 135.

301 *Eco Swiss v. Benetton International*, CJEU, Case No. C-126-97, Judgment of 1 June 1999 (CLA-268), § 48.

302 See paragraphs 234-235 of the Award.

303 RRJ Submission, § 30; CS on *Achmea*, § 88.

Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I), p. 95, paragraph 126).[304]

288. There is no dispute, and rightly so, that, the *Achmea* Objection is raised between the same parties (*i.e.* the Claimant and the Respondent) and relates to the same subject matter (*i.e.* the Tribunal's jurisdiction). Therefore, the first two prongs of the triple identity test are satisfied.

289. The Parties disagree, however, on the identity of the cause of action or legal basis of the claim. The Claimant maintains that the *Achmea* Objection is based on the Treaty, similarly to other jurisdictional objections raised by the Respondent. The Respondent replies that the legal basis of the *Achmea* Objection is EU law, rather than the Treaty. The Tribunal finds the Claimant's position more convincing. The legal basis of the Respondent's objection is the Treaty, rather than EU law, because the *Achmea* Objection challenges the validity of Article 9 of the Treaty and the Tribunal's jurisdiction stemming from this provision.

290. The Parties also hold different views on whether the *Achmea* Objection was resolved in the Decision on Jurisdiction. The Claimant maintains that the Decision on Jurisdiction determined the Tribunal's jurisdiction to hear the claims arising out of Articles 3 and 4 of the Treaty, and that this determination necessarily implies that the Arbitration Agreement underlying the Tribunal's jurisdiction is valid. The Respondent argues that the *Achmea* Objection was not and could not have been resolved in the Decision on Jurisdiction, since the *Achmea* Judgment was rendered afterwards.

291. The Tribunal has already noted that the Decision on Jurisdiction did not deal with the *Achmea* Objection or the objection of lack of jurisdiction based on intra-EU investment treaties more generally, because that objection was not debated or decided, as Justice Bryan expressly stated. [305]

2. English law

292. Similarly to international law, English law recognises the positive and negative effects of *res judicata*. The positive effect of *res judicata, i.e.* the principle of finality of arbitral awards, is contained in Section 58 of the EAA, which reads as follows:

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304 *Maritime Delimitation in the Caribbean Sea and Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary in the Northern Part of the Isla Portillos (Costa Rica v. Nicaragua)* (CLA-333), § 68.

305 See paragraph 269 of the Award.

> Unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them.

293. The negative effect of the principle of *res judicata* has been discussed by the English courts as part of issue estoppel and cause of action estoppel. For instance, in *Virgin Atlantic Airways v. Zodiac Seats,* the court held that:

> Where the existence or non-existence of a cause of action has been decided in earlier proceedings, to allow a direct challenge to the outcome, even in changed circumstances and with material not available before, offends the core policy against the re-litigation of identical claims.[306]

294. Similarly to the principle of *res judicata* under international law, the principle of finality of arbitral awards and issue estoppel under English law apply to questions that have been definitively resolved. In this respect, the Tribunal relies on the findings of the English High Court in *Emirates v. Fomento* which held that arbitral awards are final and give rise to issue estoppel only "as to what [they] decid[e]".[307] Consequently, if an issue has not been determined by an arbitral tribunal, it cannot be subject to the principle of finality of arbitral awards or issue estoppel.

3. SCC Rules

295. The Tribunal notes that Article 40 of the SCC Rules contains the principle of finality of arbitral awards, which reflects the positive effect of *res judicata*:

> An award shall be final and binding on the parties when rendered. By agreeing to arbitration under these Rules, the parties undertake to carry out any award without delay.

296. The SCC Rules contain no provision indicating that the SCC regime would differ from the principle of finality of arbitral awards under international law or English law. A possible argument could be made that, under the SCC Rules, a jurisdictional objection cannot be raised later than the outset of the arbitration and, therefore, a jurisdictional decision establishes jurisdiction even for matters not addressed therein. Whether that argument would be correct or not, can be left open for present purposes. Indeed, Section 31 EEA, which is a mandatory rule of the *lex arbitri*, would in any event prevail over the chosen institutional arbitration rules.

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306 *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* (formerly Contour Aerospace Ltd) [2014] AC 160 (CLA-325), § 26.

307 *Emirates Trading Agency LLC v. Sociedade De Fomento Industrial Private Limited* [2015] EWHC 1452 (Comm) (CLA-270), §§ 22, 24.

297. For the sake of completeness, the Tribunal also notes that it disagrees with the Respondent's argument that Article 40 of the SCC Rules operates similarly to Article 25 of the SCC Rules and Article 41 of the ICSID Convention.

298. According to Article 25 of the SCC Rules:

> At any time prior to the close of proceedings pursuant to Article 34, a party may amend or supplement its claim, counterclaim, defence or set-off provided its case, as amended or supplemented, is still comprised by the arbitration agreement, unless the Arbitral Tribunal considers it inappropriate to allow such amendment or supplement having regard to the delay in making it, the prejudice to the other party or any other circumstances.

299. In the Tribunal's view, the content of Article 40 and Article 25 of the SCC Rules is vastly different: the former contains the principle of finality of arbitral awards, while the latter refers to the amendment of claims. These two provisions thus operate differently, and, in any event, Article 25 of the SCC Rules is irrelevant to the Tribunal's analysis of the *Achmea* Objection, because it permits amending and supplementing claims, rather than jurisdictional objections.

300. As to Article 41 of the ICSID Convention, it reads as follows:

> Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

301. The content of Article 40 of the SCC Rules and Article 41 of the ICSID Convention is also different: the former contains the principle of finality of arbitral awards, while the latter refers to the principle of competence-competence, which allows ICSID tribunals to decide on their jurisdiction being specified that they can do so as a preliminary matter or together with the merits. In reality, the counterpart of Article 40 of the SCC Rules is found in Article 53(1) of the ICSID Convention, which provides that awards "shall be binding on the parties". As explained earlier,[308] this rule only applies to final awards, a specificity of the ICSID regime which is of no relevance here.

4. Conclusion

302. To conclude, in accordance with the applicable law the Tribunal is not precluded from analysing the *Achmea* Objection at this stage of the proceedings.

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308 See paragraphs 234-235 of the Award.

d. Has the Respondent lost its right to raise the *Achmea* Objection under English law?

(i) The Position of the Parties and of the EC

1. Claimant

303. The Claimant submits that the Respondent has lost its right to challenge the Tribunal's substantive jurisdiction pursuant to Sections 67(1),[309] 70(3)[310] and 73(1)[311] of the EAA.[312] It argues that the Respondent has no excuse for failing to raise the *Achmea* Objection before the Tribunal or the English Court at the appropriate time.

304. The Claimant underlines that the intra-EU objection was well known at the time of the commencement of these proceedings on 4 December 2014, as it had been raised by different States in previous arbitral proceedings and had been addressed in a number of public awards.[313] In particular, the Claimant observes that Poland itself raised the *Achmea* Objection in *PL Holdings v. Poland*[314] "at the same time as the jurisdictional phase of the present arbitration".[315]

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309 Section 67(1) of the EAA stipulates that: "A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court - (a)challenging any award of the arbitral tribunal as to its substantive jurisdiction; or (b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction. A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3)."

310 According to Section 70(3) of the EAA: "Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process."

311 Section 73(1) of the EAA reads in the relevant part as follows: "If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection - (a) that the tribunal lacks substantive jurisdiction [...] he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.

312 CS on *Achmea*, § 29.

313 *Eastern Sugar B.V. v. Czech Republic*, SCC Case No. 088/2004, UNCITRAL, Partial Award of 27 March 2007 (CLA-287); *Rupert Binder v. Czech Republic*, ad hoc, Award on Jurisdiction of 6 June 2007 (CLA-288); *Jan Oostergetel v. Slovak Republic*, UNCITRAL, Decision on Jurisdiction of 30 April 2010 (CLA-183); *Eureko B.V. v. Slovak Republic*, PCA Case No. 2008-13, UNCITRAL, Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010 (CLA-289); *European American Investment Bank AG v. Slovak Republic*, PCA Case No. 2010-17, UNCITRAL, Award on Jurisdiction of 22 October 2012 (CLA-290); *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award of 11 December 2013 (CLA-291).

314 *PL Holdings SAO. v. Republic of Poland*, SCC Case No. V 2014/163, Partial Award of 28 June 2017 (CLA-296), § 301.

315 CRJ Submission, p. 2.

305. The Claimant thus concludes that the Respondent lost its right to raise the *Achmea* Objection, as it could and should have done so earlier. [316]

2. Respondent

306. The Respondent replies that it never waived its right to raise the *Achmea* Objection. On the contrary, the Respondent explicitly reserved its right to do so during the teleconference between the Tribunal and the Parties, which took place in February 2018.[317]

307. The Respondent argues that the *Achmea* Judgment is a "new development of law", which is why it could not have presented such objection earlier.[318]

3. The EC

308. The EC's view is that the Respondent did not waive the *Achmea* Objection. First, the Respondent expressly reserved the right to invoke the objection during the English Court proceedings.[319]

309. Second, according to Section 72 of the EAA,[320] a party loses the right to challenge jurisdiction only if it fails to avail itself of the appropriate avenues. In the EC's view, this is not the Respondent's case.[321]

310. Finally, the EC suggests that denying the Respondent an opportunity to put forward the *Achmea* Objection would amount to denial of the citizen's right of access to a court under Article 6 of the European Convention of Human Rights[322] and common law principles.[323]

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316 *Ibid.*, p. 3; CS on *Achmea*, §§ 36-39.

317 RRJ Submission, § 39.

318 *Ibid.*, § 36.

319 *Ibid.*, § 11.

320 Section 72 of the EAA provides in the relevant part as follows: "(1) A person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question - (a) whether there is a valid arbitration agreement, (b)whether the tribunal is properly constituted, or (c) what matters have been submitted to arbitration in accordance with the arbitration agreement, by proceedings in the court for a declaration or injunction or other appropriate relief."

321 EC *Amicus Curiae* Brief, § 19.

322 *Ibid.*, § 8.

323 *Ibid.*, § 15.

(ii) Analysis

311. The Claimant argues that the Respondent forfeited its right to object to the validity of the Arbitration Agreement under English law because the *Achmea* Objection was untimely. In support, the Claimant refers to Section 67(1)(b) of the EAA, which in pertinent part reads as follows:

> A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

312. The Claimant also argues that the Respondent may raise the *Achmea* Objection only if it satisfies the test of Section 73 of the EAA,[324] *i.e.* it proves that it "did not know and could not with reasonable diligence have discovered the grounds"[325] for the *Achmea* Objection. The relevant part of Section 73 of the EAA provides as follows:

> (1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection—
>
> (a) that the tribunal lacks substantive jurisdiction,
>
> [...]
>
> he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.
>
> (2) Where the arbitral tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings who could have questioned that ruling —
>
> (a) by any available arbitral process of appeal or review, or
>
> (b) by challenging the award,
>
> does not do so, or does not do so within the time allowed by the arbitration agreement or any provision of this Part, he may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of that ruling.

313. The Claimant submits that the Respondent could have objected to the validity of the Arbitration Agreement earlier, as it did in other arbitrations.[326] By failing to do so, the Respondent lost its right to object under Section 73 of the EAA.

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324 CRJ Submission, p. 4.

325 Section 73(1)(a) of the EAA.

326 CS on *Achmea*, § 29, referring to *Eastern Sugar B.V. v. Czech Republic*, SCC Case No. 088/2004, UNCITRAL, Partial Award of 27 March 2007 (CLA-287); *Rupert Binder v. Czech Republic*, ad hoc, Award on Jurisdiction of 6 June 2007 (CLA-288); *Jan Oostergetel v. Slovak Republic*, UNCITRAL, Decision on Jurisdiction of 30 April 2010 (CLA-183); *Eureko B.V. v. Slovak Republic*, PCA Case No. 2008-13, UNCITRAL, Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010 (CLA-289);

314. It is true that the Respondent could have objected to the validity of the Arbitration Agreement before the CJEU rendered its judgment in the *Achmea* case. The Respondent did so in another arbitration.[327] In fact, the Respondent could also have raised the *Achmea* Objection during the English Court proceedings, but it did not do so. To be clear, the Respondent did ask Justice Bryan to postpone the delivery of his judgment until the CJEU makes the decision in the *Achmea* case; however, it did not formally raise the *Achmea* Objection.[328]

315. That said, the Tribunal can understand the Respondent's decision to raise the *Achmea* Objection only after the CJEU had delivered its judgment. The compatibility of intra-EU BITs with EU law has been extensively debated in EU and investment law for a long time. In light of this controversy, the Respondent's choice to wait until the CJEU had finally resolved the issue under EU law was not unreasonable. The Respondent reserved its rights in connection with the *Achmea* Objection and raised it promptly after the CJEU judgment was issued.

316. On this basis, the Tribunal resorts to its discretionary powers under Section 31 of the EAA and admits the *Achmea* Objection.

(iii) Conclusion

317. To sum up, the Tribunal concludes that it is not *functus officio* and the *Achmea* Objection is not *res judicata*. The Tribunal also finds that the Respondent did not lose its right to raise the objection under English law. The Tribunal therefore resorts to its powers under Section 31 of the EAA and will assess the *Achmea* Objection in the present final award on the merits.

2. The *Achmea* Objection

318. The Parties agree that Article 9 of the Treaty contains Poland's consent to arbitrate. The Parties dispute, however, whether that consent was rendered invalid by Poland's accession to the EU and its consequent ratification of the TEU and the TFEU (together the "EU Treaties").

European American Investment Bank AG v. Slovak Republic, PCA Case No. 2010-17, UNCITRAL, Award on Jurisdiction of 22 October 2012 (CLA-290); *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award of 11 December 2013 (CLA-291).

327 *PL Holdings SAO. v. Republic of Poland*, SCC Case No. V 2014/163, Partial Award of 28 June 2017 (CLA-296), § 301.

328 Transcript of the Hearing before Mr. Justice Bryan of 2 March 2018 (C-271), pp. 74-75.

a. Respondent's Position

319. As a preliminary remark, the Respondent contends that, when considering the *Achmea* Objection, the Tribunal must be guided by the *Achmea* Judgment,[329] and the so-called *Achmea* Declarations signed by 22 Member States on 15 January 2019.[330]

320. With respect to the *Achmea* Judgment, the Respondent emphasizes that the CJEU determined that the dispute resolution provisions in the investment treaties concluded between the EU Member States were contrary to the EU Treaties: [331]

> Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.

321. In the Respondent's view, the Tribunal should accept the position of the CJEU that Article 9 of the Treaty is incompatible with EU law and deny jurisdiction.

322. As to the *Achmea* Declarations, the Respondent argues that by signing these declarations Poland and Luxembourg confirmed that Article 9 of the BIT was rendered inapplicable when the States adhered to the EU Treaties. In the Respondent's view, the *Achmea* Declarations constitute an authentic interpretation of Article 9 of the Treaty within the meaning of Article 31(3)(a) of the VCLT.[332] The Respondent argues that the *Achmea* Declarations satisfy all requirements of Article 31(3)(a) of the VCLT,[333] because they (i) are written documents; (ii) embody the common intention of its signatories (including Poland and Luxembourg); and (iii) are signed by duly authorised representatives.[334] Consequently, the Tribunal must accept that Poland

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329 *Slovak Republic v. Achmea BV*, CJEU Judgment dated 6 March 2018 (RLA-221).

330 Declaration of the Representatives of the Governments of the Member States of 15 January 2019 on the legal consequences of the Judgment of the Court of Justice in Achmea and on investment protection in the European Union, p. 4 (RLA-322); Declaration of the Representatives of the Governments of the Member States of 16 January 2019 on the Enforcement of the Judgment of the Court of Justice in Achmea and on investment protection in the European Union, pp. 3-4 (RLA-323).

331 RS on *Achmea*, § 5.

332 Amended SoD, §§ 586-600.

333 Article 31(2)(b) of the VCLT provides in the relevant part as follows: " 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: [...] (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."

334 Amended SoD, § 606.

and Luxembourg have expressed that the application of Article 9 of the Treaty is precluded.

323. As regards the substance of the *Achmea* Objection, the Respondent argues that the Tribunal lacks jurisdiction over the present dispute for four alternative reasons.

324. First, the Respondent contends that the Treaty was terminated by virtue of Article 59(1) of the VCLT[335] on 1 May 2004, when Poland joined the EU. The Claimant commenced these proceedings in 2013, many years after the Treaty was terminated,[336] and therefore the Tribunal cannot base its jurisdiction on the arbitration clause of a treaty that was not in force anymore.

325. Second, even if the Treaty was not terminated, it is nevertheless inapplicable by virtue of Article 30(3) of the VCLT[337] as its subject matter overlaps with the subject matter of the TFEU.[338] The *Achmea* Judgment confirmed that Article 344 of the TFEU, which obliges EU Member States to submit disputes concerning the interpretation and application of the EU Treaties exclusively to the CJEU,[339] also applies to the disputes opposing EU Member States to private entities from other EU Member States. Consequently, there is a direct conflict with Article 9 of the Treaty,[340] where EU law prevails.

326. Third, the Respondent observes that the Treaty was terminated by Poland on 19 July 2018 through the Note Verbale,[341] whereby Poland stated its position that the arbitration agreement enshrined in Article 9 of the Treaty was invalid.[342]

327. Finally, the Respondent puts forward that if the Tribunal does not follow the *Achmea* Judgment, it would render an unenforceable award.[343] The Respondent refers to the cases of *Novenergia II v. Spain*,[344] *PI Holdings v. Poland*,[345] *Slovak Republic v.*

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335 *Supra*, fn. 172.

336 RS on *Achmea*, §§ 28-29.

337 *Supra*, fn. 172.

338 RS on *Achmea*, § 30.

339 *Supra*, fn. 175.

340 RS on *Achmea*, § 31.

341 According to Article 10(1) of the Treaty, "1. This Agreement shall enter into force one month after the date on which the Contracting Parties exchange their instruments of ratification."

342 Amended SoD, § 577, referring to Note verbale on the denunciation of the Treaty, 19 July 2018 (R-174).

343 RS on *Achmea*, §§ 35-36.

344 *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, Decision of the Svea Court of Appeals Suspending the Enforcement of the Award until Further Notice, 16 May 2018 (RLA-238).

345 Discussed in Joel Dahlquist, "Analysis: Now that first EU Court has set aside an intra-EU BIT award due to Achmea ruling, we look at the fate of three other awards" (2018), available at

Achmea,[346] in order to demonstrate that the *Achmea* Judgment is a major legal obstacle to the enforcement proceedings in EU.[347]

b. Claimant's Position

328. The Claimant maintains that neither the *Achmea* Judgment nor the *Achmea* Declarations are relevant to this Tribunal's analysis.

329. In connection with the *Achmea* Judgment, the Claimant argues that such decision rendered under EU law has no bearing on whether Article 9 of the Treaty is valid as a matter of international law.[348]

330. Regarding the *Achmea* Declarations, the Claimant argues that they bear no relevance to the merits of the Poland's objections because they cannot be used for the purposes of interpretation under Articles 31(2)(b)[349] and 31(3)(a) of the VCLT.[350] For the Claimant, the *Achmea* Declarations were not made "in connection with the conclusion of the treaty" nor do they qualify as a "subsequent agreement between the parties". In any event, in accordance with Article 31(1) of the VCLT,[351] the interpretation of the *Achmea* Declarations cannot go against the object and purpose of the Treaty, namely the protection of investments.[352]

331. In response to the Respondent's substantive arguments, the Claimant contends that the Tribunal can ground its jurisdiction on Article 9 of the Treaty for the following three reasons:

    i. Articles 59(1) and Article 30(3) do not apply in the present case and, alternatively, the Respondent's obligation to resolve the dispute in arbitration remains in force by virtue of Articles 69(2)(b)[353] and 70(1) of the VCLT;

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https://www.iareporter.com/articles/analysis-now-that-first-eu-court-has-set-aside-an-intra-eu-bit-award-due-to-achmea-ruling-we-look-at-the-fate-of-three-other-awards/ (RLA-239).

346 *Slovak Republic v. Achmea BV*, German Federal Supreme Court, Decision of 31 October 2018, reference I ZB 2/15 (RLA-241).

347 RS on *Achmea*, §§ 48-56.

348 CS on *Achmea*, § 130.

349 *Supra*, fn. 333.

350 Article 31(3)(a) of the VCLT reads in the relevant part as follows: "3.There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions...".

351 According to Article 31(1) of the VCLT, "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

352 CS on *Achmea*, §§ 161-164.

353 *Supra*, fn. 183.

ii. The termination of the Treaty in 2018 is irrelevant for the purposes of the Tribunal's jurisdiction;

iii. The potential obstacles to the enforcement of the Tribunal's award are equally without relevance.

332. First, the Claimant argues that neither Article 59(1) nor Article 30(3) of the VCLT render Article 9 of the Treaty inapplicable because "[t]he TFEU, in relation to the BIT, does not meet the threshold requirements (i) of being the 'later treaty', (ii) of relating to the 'same subject matter' under the VCLT, or (iii) of being 'incompatible'".[354]

333. In respect of the "later treaty", the Claimant argues that, contrary to the Respondent's contentions, the BIT was adopted after the EU Treaties. In the Claimant's view, the EU Treaties were *de facto* adopted on 25 March 1957, in the form of the Treaty Establishing the European Economic Community, whereas the BIT was signed in 1987. In support of its argument that the EU Treaties were in fact adopted in 1957, the Claimant refers to the findings of the *Vattenfall* tribunal and the opinions of scholars,[355] which have stated that Articles 244 and 344 of the TFEU "have existed [in] substantively similar form [...] and have only been renumbered in the successive versions of the EU Treaties, [...] existing originally [...] in 1957".[356]

334. Further, the Claimant submits that the TFEU and the Treaty do not deal with the same subject matter. Relying on the words of the EC, the Claimant argues that "EU law protects access to the market, operations on the market and retreat from the market", while the Treaty offers a comprehensive investment protection scheme, with the possibility to resort to investor-State arbitration.[357]

335. Moreover, the Claimant argues that there is no incompatibility between the TFEU and the BIT, as a matter of international law, because the treaties do not deal with the same subject matter. In the Claimant's submission, there is no "textual evidence" for stating that the investor-State arbitration clauses are incompatible with Articles 344 and 267 of the TFEU. [358] The alleged incompatibility stems from the CJEU's interpretation of the provisions under EU law, which must not be followed by a tribunal created by virtue of international law.[359]

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354 CS on *Achmea*, § 132.

355 *Ibid.*, §§ 136-145.

356 *Ibid.*, §§ 140-142.

357 *Ibid.*, §§ 146-150.

358 *Supra*, fn. 174, 175.

359 CS on *Achmea*, §§ 151-156.

336. Alternatively, should the Tribunal nonetheless decide that Articles 59(1) and/or 30(1) of the VCLT apply in the present case, the Claimant submits that the Respondent's obligation to arbitrate the present dispute remains in force by virtue of Articles 69(2)(b)[360] and 70(1) of the VCLT.[361] This is so because the Claimant triggered the Respondent's obligation under Article 9 of the Treaty by filing the Request for Arbitration, which it did in good faith. Thus, its right to arbitrate the present dispute cannot be affected by the alleged termination of the Treaty.

337. Second, the Claimant notes that it accepted the Respondent's offer to arbitrate contained in Article 9 of the BIT by instituting the present proceedings. By virtue of Article 4 of the SCC Rules,[362] this arbitration commenced on 9 December 2014, when the SCC received the Request for Arbitration. Therefore, the termination of the Treaty on 19 July 2018 is irrelevant.

338. Finally, relying on *Vattenfall v. Germany*,[363] *Marfin v. Cyprus*[364] and *PL Holdings v. Poland*,[365] the Claimant argues that the difficulties arising at the enforcement stage, whether perceived or real, cannot constitute grounds for refusing to exercise the jurisdiction.[366]

c. EC's Position

339. The EC fully supports the Respondent's position on the application of Article 59 the VCLT to the present case. It is of the view that the Treaty or at the very least the Arbitration Agreement was terminated pursuant to that provision[367] in 2004, when the Respondent joined the EU. The EC underlines that the types of investments listed in Article 1 of the Treaty fall within the ambit of fundamental freedoms guaranteed by EU law. Therefore, since 2004, the investments that were initially regulated by the Treaty came within the scope of the EU treaties.

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360 *Supra*, fn. 183.

361 *Supra*, fn. 184.

362 According to Article 4 of the SCC Rules, "Arbitration is commenced on the date when the SCC receives the Request for Arbitration."

363 *Vattenfall AB v. Germany*, ICSID Case No. ARB/12/12, Decision on Achmea Issue of 31 August 2018, § 230 (RLA-225).

364 *Marfin Investment Group Holdings S.A. v. Republic of Cyprus*, ICSID Case No. ARB/13/27, Award of 26 July 2018, § 596 (CLA-337).

365 Judgment of the Svea Court of Appeal of 22 February 2019, T 8538-17, T 12033-17, § 5.2.6 (CLA-339).

366 CS on *Achmea*, §§ 165-174.

367 *Supra*, fn. 172.

340. In any event, even if the Treaty remains in force, the Arbitration Agreement does not apply, because it conflicts with EU law (specifically with Article 19 of the TEU[368] and Articles 267 and 344 of the TFEU).[369] The incompatibility of the Arbitration Agreement with EU law was confirmed by the *Achmea* Declarations. Therefore, the present arbitration lacks the Respondent's valid consent.

d. Analysis

341. The Parties agree, and rightly so, that the question whether the EU treaties override Article 9 of the BIT must be assessed under international law. Indeed, the BIT's offer to arbitrate is enshrined in an international treaty, and its validity and interpretation is governed by the VCLT, of which both Luxembourg and Poland are contracting parties.

342. Before analyzing whether Article 9 of the BIT was rendered inapplicable pursuant to Articles 30(3) or 59(1) of the VCLT, the Tribunal will first determine the weight to be given to the *Achmea* Judgment (i) and the *Achmea* Declarations (ii).

(i) The relevance of the *Achmea* Judgment

343. In the *Achmea* Judgment of 6 March 2018, the CJEU held that "Articles 267 and 344 [of the TFEU] must be interpreted as precluding a provision in an international agreement concluded between Member States [...] under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept".[370]

344. According to the Respondent, the *Achmea* Judgment is an authentic interpretation of the EU Treaties. Therefore, it is binding for all EU Member States and investors established in those states.

345. Under Section 30 of the EAA, the Tribunal is competent to rule on its own jurisdiction in accordance with the principle of *Kompetenz-Kompetenz*. This provision empowers the Tribunal to independently assess whether the Parties consented to arbitrate the present dispute under Article 9 of the Treaty. Therefore, the Tribunal cannot disregard this mandate and uncritically follow the CJEU's determination that Article 9 of the Treaty has been rendered inapplicable under EU law. Rather, it must carry out its own

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368 *Supra*, fn. 173.

369 *Supra*, fns. 174, 175.

370 *Slovak Republic v. Achmea BV*, CJEU Judgment dated 6 March 2018 (RLA-221).

analysis. In doing so, it will consider the *Achmea* Judgment and its possible impact on the Tribunal's jurisdiction without, however, being bound by the CJEU's findings.

346. The Tribunal also observes that the CJEU has no exclusive or ultimate authority to interpret the Treaty or Articles 59(1) or 30(3) of the VCLT, which are central to the Respondent's *Achmea* Objection. The CJEU is competent to interpret and apply the EU Treaties, as follows from Article 263 of the TFEU [371] and the CJEU's jurisprudence.[372] However, in order to determine whether the Arbitration Agreement enshrined in Article 9 of the Treaty is inapplicable, the analysis cannot be limited to the interpretation of the EU Treaties. Interpretation of *both* the EU Treaties and the Treaty is necessary in order to determine (i) whether the Treaty and the EU Treaties govern the same subject matter as required by Articles 30(3) and 59(1) of the VCLT and, if so, (ii) whether there is a normative conflict between these treaties within the meaning of the VCLT.

347. The CJEU has no exclusive authority to answer these questions. What is more, it did not even purport to address them in the *Achmea* Judgment. The *Achmea* Judgment contains no analysis of Articles 30(3) and 59(1) of the VCLT, which have been invoked by the Parties in the present arbitration. These provisions are indisputably key to the Tribunal's analysis of the validity of Article 9 of the BIT as a matter of international law. The Tribunal finds confirmation of this observation *inter alia* in the recent case of *United Utilities v. Estonia*, according to which the *Achmea* Judgment "assume[s] that the issue must be considered through, and only through, the lens of EU law."[373]

348. For these reasons, the Tribunal does not consider itself bound by the CJEU's findings in the *Achmea* Judgment, and must perform its own analysis to determine whether the Respondent's consent to arbitration in Article 9 of the Treaty was valid under international law at the time the Claimant commenced the present proceedings.

(ii) The relevance of the *Achmea* Declarations

349. In January 2019, 23 EU Member States, including Poland and Luxembourg, made declarations on the legal consequences of the *Achmea* Judgment, affirming that "all

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371 According to Article 263 of the TFEU, "[the CJEU] shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers".

372 *Da Costa en Schaake N.V., Jacob Meijer N.V. and Hoechst-Holland N.V. v Nederlandse Belastingadministratie*, ECJ Cases 28, 29 and 30/62, 27 March 1963.

373 *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award, 21 June 2019, § 539.

investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to Union law and thus inapplicable."[374] The Parties dispute the relevance of the *Achmea* Declarations.

350. The Respondent argues that the *Achmea* Declarations must be regarded as a "subsequent agreement between the parties" under Article 31(3)(a) of the VCLT, which rendered Article 9 of the Treaty inapplicable between Poland and Luxembourg.[375] By contrast, the Claimant replies that "subsequent agreements" within the meaning of Article 31(3)(a) cannot be used in order to defeat the object and purpose of the Treaty. In its view, interpreting the *Achmea* Declarations so as to make Article 9 of the Treaty inapplicable would be contrary to the object and purpose of the Treaty.[376]

351. In the Tribunal's view, the *Achmea* Declarations do not qualify as a "subsequent agreement between the parties regarding the interpretation of the treaty" in the meaning of Article 31(3)(a) of the VCLT. The ILC's 1966 Commentaries on the Draft VCLT Articles, cited by the Respondent,[377] make it clear that "subsequent agreements" in the meaning of Article 31(3)(a) of the VCLT relate to understandings reached by States during negotiations of a relevant treaty.

352. According to the ILC, "[a] question of fact may sometimes arise as to whether *an understanding reached during the negotiations* concerning the meaning of a provision was or was not intended to constitute an agreed basis for its interpretation."[378] The *Achmea* Declarations do not reflect any "understanding" regarding the application of Article 9 of the BIT reached by Poland and Luxemburg "during the negotiations" of the BIT. Similarly, they do not indicate any concern regarding the incompatibility between Article 9 of the Treaty and EU law at the time the Treaty was concluded. Rather, the *Achmea* Declarations merely reflect the EU Member States' political will to terminate the existing BITs as of 2019.

353. There is a further reason why the *Achmea* Declarations do not constitute a joint interpretation of the Treaty within the meaning of Article 31(3)(a). Their title, i.e. in relevant part "Declaration [...] on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union,"

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374 *Supra*, fn. 330.

375 Amended SoD, §§ 601-610.

376 Amended SoC, § 163.

377 Amended SoD, § 593.

378 Commentary to 1966 Draft Convention on the Law of Treaties (RLA-334), p. 221, item 14 (emphasis added).

suggests that the EU Member States seek to explain the legal consequences of the *Achmea* Judgment, rather than interpret the dispute settlement clauses in intra-EU investment treaties. In reality, the EU Member States, including Poland and Luxembourg, record their intent to terminate their bilateral investment treaties, thereby acknowledging that they cannot modify the BITs by a mere declaration:

> Member States will make best efforts to deposit their instrument of ratification, approval or acceptance [...] of any bilateral investment treaty terminating bilateral investment treaties between Member States no later than 6 December 2019.

354. In any event, joint interpretive declarations or agreements are not an exclusive and dispositive method of treaty interpretation. Pursuant to Article 31(3) of the VCLT, they are one element that "shall be taken into account, together with the context" of the relevant treaty terms. What is more, context is itself one of the means of interpretation under Article 31(1) of the VCLT, together with the ordinary meaning and the object and purpose of the treaty. Thus, an interpretative declaration, as its name indicates, can only interpret the treaty terms; it cannot change their meaning.

355. Here the provision that is purportedly subject to interpretation is Article 9 of the Treaty, which was already quoted and reads as follows:

> Article 9
>
> 1. [a)] Any dispute between one of the Contracting Parties and the investor of the other Contracting Party shall be the subject of a written notification which shall be accompanied by a detailed aide-mémoire, addressed by the investor of a Contracting Party to the other Contracting Party. As far as possible the dispute shall be amicably settled by the parties.
>
> b) As used in this article, the term 'disputes' shall mean disputes relating to expropriation, nationalization or any other similar measures affecting investments, and notably the transfer of an investment into public property, placing it under public supervision as well as any other deprivation or restriction of property rights by state measures that lead to consequences similar to expropriation.[379]
>
> 2. In the absence of an amicable settlement within six months from the date of the written notification mentioned in section 1, the dispute shall be submitted, at the investor's choice, to one of the following bodies:
>
> a) the Arbitration Institute of the Stockholm Chamber of Commerce;
>
> b) the International Centre for the Settlement of Investment Disputes (ICSID), established under the 'Convention on the Settlement of Investment Disputes between States and Nationals of Other States', signed in Washington on March 18, 1965, when each state Party to the present agreement has become a party to the said Convention;
>
> c) an 'ad hoc' tribunal, organized in accordance with the rules of the United Nations Commission on International Trade Law or of the United Nations Economic Commission for Europe, where the competent authority to

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379 As noted above, the translation of Article 9(1)(b) has been submitted separately as exhibit CLA-57 and has been explicitly agreed between the Parties. For the rest of the translation of Article 9, the Tribunal has referred to CLA-1.

> appoint the arbitrator(s) shall be, depending on the investor's choice, the UN Secretary General or the President of the International Court of Justice.
>
> [...]
>
> 5. The arbitral tribunal shall resolve the dispute based on:
>
> - The internal law of that Contracting Party, party to the dispute, on the territory the investment of which is located, including conflicts of laws principles,
>
> - The provisions of this Agreement,
>
> - The terms and conditions of any specific agreement concerning the investment,
>
> - The rules and principles of international law generally admitted.

356. The ordinary meaning of the language of this provision leaves no doubt that it contains Poland's binding consent to arbitrate. If Poland and Luxembourg had intended to modify the meaning of an international treaty ratified by both of them, issuing an interpretative declaration of their governments was not a suitable means for achieving that purpose. If it had been their intent to amend the express language of the BIT, the States would have chosen a different course.

357. Had the 2019 Declarations been sufficient to change the BITs, then the envisaged termination of such treaties would be superfluous. In this respect, the Tribunal agrees with the tribunal in *United Utilities v. Estonia* that the language of the 2019 Declarations "necessarily implies [...] that the BIT remains in force and that its Article 9 can therefore constitute a valid offer to arbitrate, which Claimants accepted".[380]

358. For all these reasons, the *Achmea* Declarations are not relevant to the Tribunal's task of interpreting Article 9 of the Treaty.

(iii) Was Article 9 of the Treaty rendered inapplicable by Poland's and Luxembourg's accession to the EU Treaties?

359. The Respondent argues that by virtue of Articles 30(3) and 59(1) of the VCLT, Article 9 of the Treaty was terminated or became inapplicable due to the conflict with Articles 267 and 344 of the TFEU and Article 19(1) of the TEU.[381] In response, the Claimant submits that the Treaty does not have the same subject matter as the EU Treaties, nor does it contradict the EU Treaties, and therefore the requirements set forth by Articles 30(3) and 59(1) of the VCLT are not satisfied.[382]

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380 *United Utilities v. Estonia*, ICSID Case No. ARB/14/24, Award of 21 June 2019, § 559.

381 See paragraphs 321-325 of the Award.

382 See paragraphs 331-335 of the Award.

360. Article 30 of the VCLT provides rules to resolve conflicts between "successive treaties relating to the same subject matter" and reads as follows:

> 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.
>
> 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
>
> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
>
> 4. When the parties to the later treaty do not include all the parties to the earlier one:
>
> (a) as between States Parties to both treaties the same rule applies as in paragraph 3;
>
> (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations. [...]

361. Article 59(1) of the VCLT applies to the "[t]ermination or suspension of the operation of a treaty implied by conclusion of a later treaty" sharing the "same subject matter", and reads as follows:

> 1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and:
>
> (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
>
> (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

362. In application of these provisions, to determine whether the EU Treaties preclude the application of Article 9 of the Treaty, the Tribunal must examine whether (i) the Treaty and the EU Treaties have the same subject-matter; and, if so, (ii) whether there exists a normative conflict between the Arbitration Agreement enshrined in Article 9 of the Treaty, on the one hand, and Articles 267 and 344 of the TFEU and Article 19 of the TEU, on the other.

1. Same subject-matter

363. The Parties disagree on the interpretation of the same subject-matter requirement under Articles 59(3) and 30(3) of the VCLT. The Respondent argues that the Treaty and the EU Treaties share the same subject, i.e. all of them guarantee certain standards of protection to investors. The Claimant argues that the standards of

protection in the EU Treaties and the BIT are very different, and protection afforded to investors under the BIT is more favorable.

364. The requirement of sharing the same subject matter within the meaning of Articles 59(3) and 30(3) of the VCLT should be understood broadly.[383] At the same time, it cannot be reduced to a requirement that the two treaties potentially govern the same set of factual circumstances. Such a meaning would make the requirement useless. Indeed, if two treaties do not apply to the same set of circumstances, they cannot conceivably be in conflict. In other words, even if successive treaties potentially govern the same facts, they do not necessarily share the same subject matter. This was, for example, the tribunal's conclusion in *EURAM v. Slovak Republic*:

> Even if two different rules deal with issues arising from the same facts, it does not necessarily mean that they have the same subject matter. This can be seen from a simple example: a treaty on environmental protection and a treaty on trade may both apply to the same factual situation but the subject matter with which they deal is quite different.[384]

365. Investment treaty tribunals have defined the subject-matter of a treaty by reference to matters dealt with by the treaty's constituent provisions. For instance, the *Oostergetel* tribunal held that:

> The requirement [...] that the two treaties relate to the "same subject matter" has to be construed in line with the dominant view expressed in scholarly writings to the effect that two treaties can be considered to relate to the "same subject matter" only if the overall objective of these treaties is identical and they share a degree of general comparability.[385]

366. In respect of the EU Treaties, arbitral treaty tribunals have consistently held that investment treaties do not have the same subject-matter as the EU Treaties.[386] By contrast, the CJEU in *Achmea* is silent on this issue. Investment tribunals have repeatedly underscored that, unlike the EU Treaties, investment treaties allow foreign investors to resort to arbitration. Thus, in the words of the *Wirtgen* tribunal, "...Article 10 of the Treaty allows an investor to sue a host state. No parallel provision exists in

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383 K. Odendahl, Article 30. Application of successive treaties relating to the same subject matter in *Vienna Convention on the Law of Treaties: A Commentary* (O. Dörr and K. Schmalenbach, eds.), Berlin (CLA-322), 511, § 12.

384 *European American Investment Bank AG v. Slovak Republic*, PCA Case No. 2010-17, UNCITRAL, Award on Jurisdiction of 22 October 2012 (CLA-290), § 172.

385 *Jan Oostergetel v. Slovak Republic*, UNCITRAL, Decision on Jurisdiction of 30 April 2010 (CLA-183), § 75.

386 On this and other issues related to the interaction of the dispute settlement provision in investment treaties and EU law, the Tribunal is aware of the dissenting opinion of Prof. Marcelo Kohen, in *Theodoros Adamakopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49. While it can state that such dissent did not change its own view, it has not discussed it in this award because it was issued too late for the Parties to comment on it.

the TFEU".[387] To the same effect, the *Eastern Sugar* tribunal also held that "the BIT ... provides for a special procedural protection in the form [...] arbitration of a 'mixed' or 'diagonal' type between the investor and the host state". The *Eastern Sugar* tribunal emphasized that "[f]rom the point of view of the promotion and protection of investments, the arbitration clause is in practice the most essential provision of Bilateral Investment Treaties," and added that "EU law does not provide such a guarantee."[388]

367. In addition, as noted in *Magyar v. Hungary*; the conditions for the application of investment treaties and the EU treaties are different:

> The application of the BIT is contingent upon an investor of one State making a cross-border investment in the other State, while the EU Treaties give guarantees irrespective of the existence of an investment. As a result of this distinction, "the substantive protections afforded to a foreign investor under the Treaty are unsurprisingly not comparable to, or of the same nature as, those offered to the EU nationals under the BIT".[389]

368. Finally, the overarching goals of investment treaties and of the EU Treaties are also different, as noted by the *Oostergetel* tribunal and further endorsed in *Marfin* tribunal:

> "[T]he Tribunal sees no reason to depart from consistent case law finding that intra-EU BITs and the EU treaties deal with different subject matters. ... [T]he EU treaties' objective is to create a common market between the Member States, whereas the objective of BITs (including the Treaty) is to provide for specific guarantees in order to encourage the international flows of investment into particular States..." [390]

369. As a consequence, the Tribunal sees no reason to depart from the consistent line of investment treaty awards according to which the EU Treaties and investment treaties do not share the same subject matter. The consequence is that Articles 30(3) and 59(1) of the VCLT do not apply to decide whether Article 9 of the Treaty is precluded by the EU Treaties.

370. The Parties have not pointed to, and the Tribunal is not aware of, provisions in the VCLT or of norms of customary international law that would govern the resolution of

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387 *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic*, PCA Case No. 2014-03, Final Award of 11 October 2017 (RLA-234), § 253.

388 *Eastern Sugar B.V. v. Czech Republic*, SCC Case No. 088/2004, UNCITRAL, Partial Award of 27 March 2007 (CLA-287), §§ 164-165.

389 *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award of the Tribunal of 13 November 2019, § 234.

390 *Marfin Investment Group Holdings S.A. v. Cyprus*, ICSID Case No ARB/13/27, Award of 26 July 2018 (redacted), §§ 588, 589 (CLA-337), referring to *Eureko B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010, §§ 247-263 (CLA-289); *Eastern Sugar B.V. v. Czech Republic*, SCC Case No. 088/2004, UNCITRAL, Partial Award of 27 March 2007, §§ 159-164 (CLA- 287); *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Decision on Jurisdiction of 30 April 2010, §§ 74-79 (CLA-183) and *European American Investment Bank AG* (Austria) v Slovak Republic, PCA Case No. 2010-17, Award on Jurisdiction of 22 October 2012, §§ 178-184 (CLA-290).

possible conflicts where successive treaties do not share the same subject matter. Importantly, pursuant to Article 42(1) of the VCLT, "[t]he validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention." For these reasons, the conclusion that the BIT and the EU Treaties do not have the same subject matter, and thus that Article 30 of the VCLT does not apply, leads to the conclusion that the Treaty's offer to arbitrate was valid and applicable at the commencement of this arbitration. The Tribunal's analysis could stop here. However, for the sake of completeness and in view of the Parties' extensive submissions on this matter, the Tribunal will also briefly discuss whether there is a conflict between Article 9 of the BIT and Articles 267 and 344 of the TFEU and Article 19 of the TEU.

2. Conflict between the BIT and EU law

371. When States subscribe to successive treaties, without terminating or amending any of them, the interpreter should seek to give an interpretation of the treaties that avoids or at least minimizes conflicts of norms.

372. That position is supported by scholars. So for instance:

> There is a general principle under international law whereby the interpreter tries to smooth out or even to avoid conflict by way of 'harmonizing interpretation' (presumption of non-conflict). This rules is based on the assumption that when States wanted different rules to be applicable they could not at the same time have wanted normative contradiction.[391]

373. Or, as a leading commentary to the VCLT explains:

> If apparently conflicting treaty provisions can be interpreted in such a way that they are compatible with each other, this approach is the first to be chosen.[392]

374. This harmonious interpretation should not be understood as a suggestion to ignore outright conflicts. The Tribunal considers that "an outright conflict arises only where a Party to the two treaties cannot simultaneously comply with its obligations under both treaties",[393] or in different words:

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391 Kolb, *The Law of Treaties: An Introduction* (Elgar 2016) 183.

392 Dörr, Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Dörr and Schmalenbach, eds.), Berlin 2012 (CLA-322), 511, § 13.

393 Jenks, *The Conflict of Law-Making Treaties* (BYIL 1951) 403.

> Treaties are incompatible with each other if their obligations cannot be complied with simultaneously, *ie* if a State Party to both treaties cannot comply with one of them without breaching the other.[394]

375. With this in mind, the Tribunal will analyse whether there is a conflict between Article 9 of the BIT and Articles 267 and 344 of the TFEU and Article 19 of the TEU.

376. Pursuant to Article 344 of the TFEU:

> Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties.

377. This provision concerns the resolution of disputes between EU Member States in relation to the interpretation and application of the EU Treaties. It does not limit or prohibit the submission of disputes between a Member State and an investor based on an investment treaty to adjudicatory bodies other than those provided for in the EU Treaties.

378. In line with this distinction, Article 9 of the BIT provides for international arbitration of "any dispute between one of the Contracting Parties and the investor of the other Contracting Party". It does not regulate the settlement of disputes concerning the interpretation or application of the EU Treaties between EU Member States. It is true that an arbitral tribunal resolving a dispute in application of an investment treaty may have to address, as preliminary or incidental issues, matters involving the interpretation or application of the EU Treaties. Whether such a situation might give rise to a conflict can be left open, as the claims raised here include no such matters. In other words, the Tribunal can see no incompatibility between Article 9 of the Treaty and Article 344 of the TFEU.

379. The next provision that the Respondent considers to be in conflict with Article 9 of the BIT is Article 267 of the TFEU, which reads in relevant part as follows:

> The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of the Treaties;
>
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

380. Accordingly, the CJEU has the power to give preliminary rulings concerning the interpretation of EU law. It is unclear how that conflicts with the Claimant's right to resort to arbitration under Article 9 of the Treaty. It is true that the CJEU has decided

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394 K. Odendahl, Article 30. Application of successive treaties relating to the same subject matter in *Vienna Convention on the Law of Treaties: A Commentary* (O. Dörr and K. Schmalenbach, eds.), Berlin (CLA-322), 511, § 13.

long ago that arbitral tribunals cannot resort to the CJEU for a preliminary ruling. This alone does not create a normative conflict between Article 9 of the Treaty and Article 267 of the TFEU. Indeed, the language of Article 267 does not require that EU law may only be applied by adjudicatory bodies which may themselves, or the higher instances of which, may seek preliminary rulings from the CJEU. If that were the meaning of Article 267, the Member States would violate that provision by allowing commercial arbitration as well as arbitration under extra-EU investment treaties, since arbitral tribunals constituted under these mechanisms may be called upon to apply EU law and have no standing to request for preliminary rulings. Similarly, foreign courts, in the sense of judicial bodies in jurisdictions other than EU Member States, may also be called to apply and interpret EU law without having access to the CJEU.

381. In any event, as with Article 344, Article 267 of the TFEU might at most be understood as a carve out – as opposed to a complete preclusion – from the subject-matter scope of Article 9 of the BIT in respect of disputes that relate to the interpretation of the EU Treaties, or the validity and interpretation of acts of the EU institutions. Here again, the Tribunal leaves this issue open as the present dispute does not fall in that category.

382. Finally, the Respondent argues that Article 9 of the Treaty contradicts "the subsystem of international law offering a comprehensive, complete and exclusive system of legal remedies" contained, inter alia, in Article 19 of the TEU.[395] That provision states in the relevant part as follows:

> 3. The Court of Justice of the European Union shall, in accordance with the Treaties: (a) rule on actions brought by a Member State, an institution or a natural or legal person; (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions; (c) rule in other cases provided for in the Treaties.

383. Similarly to Articles 344 and 267 of the TFEU, this provision empowers the CJEU to resolve disputes in accordance with the EU Treaties. The Claimant's right to arbitrate disputes arising out of the Treaty does not conflict with the CJEU's power to resolve disputes related to the EU Treaties. This is particularly true in this case where no issues of EU law are before the Tribunal.

(iv) Conclusion

384. For the reasons set out above, the Tribunal concludes that, upon the initiation of these proceedings, the Respondent's offer to arbitrate contained in Article 9 of the Treaty

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395 RS on *Achmea*, § 34.

was standing and effective and that a valid arbitration agreement was formed when the Claimant accepted this offer, by filing the Request for Arbitration in 2015. Neither the adhesion to the EU Treaties by Poland, nor its unilateral termination of the Treaty in 2018 after the commencement of the present proceedings render the Parties' consent invalid. The enforcement concerns voiced by the Respondent similarly do not render the Parties' consent invalid.

385. The Tribunal thus rejects the *Achmea* Objection.

3. Clean Hands

386. For the sake of completeness, the Tribunal notes that it has considered the Respondent's argument that the Claimant "failed to uphold the Polish laws and regulations" and "acted in a manner manifestly prejudicial to the public interest by demolishing the historic Barracks". As a result, the Respondent requests the Tribunal to find that "the Claimant does not deserve the Treaty protection on the grounds of the clean hands doctrine.[396]

387. The Tribunal notes that the Respondent's submissions do not make it clear whether this objection is one of jurisdiction, admissibility, or merits. In any event, the Tribunal considers that the demolition of the Barracks pertains to the merits of this dispute. Therefore, it will analyse these arguments as a part of the claims arising for breach of Articles 3 and 4.

C. MERITS

388. The Claimant alleges that Poland committed several Treaty violations between 2007 and 2014.

389. According to the Claimant, several Polish authorities, and in particular the Warsaw Conservator and the City of Warsaw, prevented the development of the Property by refusing to issue the necessary authorisations.[397] Its resulting failure to perform the construction works on the Property, so says the Claimant, was subsequently used by the Polish courts as a pretext for terminating the PUA in 2014.

390. More specifically, the Claimant makes three more or less independent claims:

    i. First, the Respondent indirectly expropriated the Claimant's investment by adopting a number of measures that prevented the development of the

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396 Amended SoD, § 407.

397 See paragraph 393 of the Award.

Property, which were followed by the 2014 WCA Judgment, culminating in a breach of Article 4 of the Treaty. In other words, the Claimant's indirect expropriation claim is based on two cumulative elements: the measures leading up to the 2014 WCA Judgment and the latter judgment itself;[398]

ii. Second, the Respondent directly expropriated the Claimant's investment by terminating the PUA by means of the 2014 WCA Judgment in breach of Article 4 of the Treaty. In other words, the Claimant's direct expropriation claim is based exclusively on the illegality of the 2014 WCA Judgment under international law;

iii. Third, the Respondent failed to accord it fair and equitable treatment in breach of Article 3 of the Treaty, as a result of the Polish authorities' failure to issue the relevant authorisations and their overall forestalling of the development of the Property.

391. For the sake of consistency, the Tribunal will analyse the claims in the sequence proposed by the Claimant.

1. Indirect Expropriation Claim

a. Claimant's Position

392. According to the Claimant, the Respondent adopted a "multitude of illegal and unjustifiable measures" between 2007 and 2014, which, together with the 2014 WCA Judgment, resulted in an indirect expropriation of the Claimant's investment.[399]

393. More specifically, the Claimant refers to the following measures which, together with the 2014 WCA Judgment, illegitimately prevented the development of the Property (the "Prior Measures"):[400]

i. The Respondent did not extend the PUA deadlines, notwithstanding the obligation to do so under the 2002 Resolution;

ii. The Warsaw Conservator gave recommendations on the development of the Property between 2006 and 2014, although it had no authority to do so, as its mandate expired in 2003;

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398 Amended SoC, § 396.

399 *Ibid.*

400 *Ibid.*, § 398.

iii. The Warsaw Conservator repeatedly contradicted its own recommendations and disregarded the Opinion of the National Centre;

iv. The City relied on the Warsaw Conservator's contradictory recommendations in order to deny WZ decisions in response to 29 Listopada's requests;

v. The Museum continuously hindered the development of the Property and supported the termination of the PUA because of its own selfish interest in obtaining the Property;

vi. The Warsaw Conservator ordered a halt of the demolition works in 2010 despite the fact that they were being conducted in accordance with the 2005 Building Permit;

vii. The Provincial Conservator unlawfully entered the Barracks into the Register in 2011, which resulted in lengthy proceedings and several contradictory decisions by the Polish authorities;

viii. The Warsaw Conservator initiated criminal proceedings with respect to the demolition of the Barracks, which were subsequently discontinued for lack of evidence of any criminal offence;

ix. The Warsaw Conservator continuously refused to approve the development of the Property as proposed by 29 Listopada, as evidenced by its recommendations issued in 2009, 2011, 2013 and 2014;

x. The City requested the termination of the PUA, which was unlawfully granted by the Polish courts of all instances in 2013, 2014 and 2016;

xi. The City favoured the project run by [redacted] and thus discriminated against the Claimant.

394. The Claimant argues that the Tribunal should follow the definition of indirect (creeping) expropriation[401] articulated in *Crystallex v. Venezuela*:[402]

> It is generally understood that a 'direct' expropriation occurs where the investor's investment is taken through formal transfer of title or outright seizure, whereas an 'indirect expropriation' occurs where a state's action or series of actions result in the investor being deprived of the enjoyment or benefit of its investment, although title to the property or the rights remains with the original owner. Furthermore, the expression 'creeping expropriation' is used to refer to a specific form of [indirect] expropriation

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401 The Tribunal notes that the Claimant does not appear to draw a distinction between indirect and creeping expropriation in its submissions. The Claimant thus argues that "Poland committed an indirect (creeping) expropriation of [redacted]s investment" and applies the same legal test for indirect and creeping expropriations. See Amended SoC, §§ 390, 391.

402 Amended SoC, § 391, referring to *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award of 4 April 2016 (CLA-283), § 667.

> that results from a series of measures taken over time that cumulatively have an expropriatory effect, rather than from a single measure or group of measures that occur at one time.

395. Applied to the circumstances of the present case, this means, in the Claimant's view, that, taken together with the 2014 WCA Judgment, the Prior Measures constitute an indirect expropriation within the meaning of Treaty. The Claimant summarizes its case as follows:[403]

> The Tribunal must ... determine whether a creeping and/or direct expropriation took place in the present case, through the aggregate effect of the Prior Measures, including but not limited to all recommendations and decisions of the Warsaw Monuments Conservator until 2014, until "the straw that broke the camel's back" to use the words of the Siemens tribunal, i.e. the decision of the Warsaw Court of Appeal of 19 December 2014 in the present case.

396. In support of its aggregate effect theory, the Claimant also refers to the finding of Judge Bryan that "a claim for creeping expropriation is not precluded where there is a specific event in the chain of events that might ultimately be found to be itself a form of expropriation".[404]

397. In response to the Respondent's argument that a creeping expropriation cannot coexist with a direct expropriation because "the same asset cannot be expropriated twice", the Claimant emphasizes that its case is that "the end point of the creeping expropriation, following a causal chain of events (the Prior Measures in this case), *can be the same* as an event of direct expropriation, i.e the 19 December 2014 decision of the Warsaw Court of Appeal terminating the real property rights resulting from the Perpetual Usufruct Agreement in this case".[405]

398. More specifically as to the type of measures, the Claimant alleges that "the Polish authorities consistently misapplied Polish rules and legislation concerning the protection of monuments" and were wrong about the competence of the Warsaw Conservator to give recommendations on the development of the Property.[406]

399. Finally, the Claimant also contends that the termination of the PUA was prompted by the hidden agenda of City and the Museum.[407] According to the Claimant, the Respondent "engaged in an active campaign to delay and prevent any construction"

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403 C-PHB, § 97.

404 English Court Judgment (C-272), p. 41, § 125. See also paragraph 124 of the Award.

405 C-PHB, § 99, emphasis in the original.

406 Amended SoC, § 399.

407 *Ibid.*, § 400.

on the Property, and used the delay created by its own organs to terminate the PUA, in order to ultimately transfer the Property to the Museum.[408]

b. Respondent's Position

400. As a preliminary remark, the Respondent argues that the 2014 WCA Judgment has no "link" to the Prior Measures,[409] which, *arguendo*, could have prevented the development of the Property and resulted in an indirect expropriation. For this reason, the Respondent rebuts the Claimant's allegations regarding the indirect expropriation claim only in so far as they are based exclusively on the Prior Measures.

401. In connection with the Prior Measures, the Respondent advances two reasons as to why they do not qualify, in their own right, as indirect expropriation under the Treaty. First, the Respondent emphasizes that, in the Award on Jurisdiction, the Tribunal determined that an indirect expropriation cannot occur if there is a subsequent instance of direct expropriation. Acknowledging that the English High Court held a different view, the Respondent argues that the Court's pronouncements on expropriation do not bind the Tribunal.[410] Thus, according to the Respondent, if the termination of the PUA by the 2014 WCA Judgment qualifies as a direct expropriation, the Prior Measures (alone or together) cannot give rise to an indirect expropriation.

402. Second, and in any event, the Prior Measures were not expropriatory in nature, since they did not deprive the Claimant of its investment. For the Respondent, a measure amounts to an indirect expropriation only if the following three cumulative criteria are met:[411]

    i. The measure results in a total or near-total destruction of the investment's economic value, as clarified by *PSEG Global v. Turkey* and *European Media v. Czech Republic*;[412]

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408 *Ibid.*, §§ 400-401.

409 Amended SoD, § 498.

410 Amended SoD, §§ 408-416.

411 *Ibid.*, § 488.

412 *Ibid.*, §§ 489-490, referring to *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award of 19 January 2007, § 279 (RLA-303); *European Media Ventures SA v. The Czech Republic*, Partial Award on Liability of 8 July 2009, § 47 (RLA-304).

ii. The measure deprives a foreign investor of control over the investment, as confirmed by *Venezuela Holdings v. Bolivia* and *Sempra v. Argentina*);[413]

iii. The effects of the measure are permanent, as noted in *Tecmed v. Mexico*.[414]

403. In the Respondent's view, the Prior Measures did not affect the development of the Property for the following reasons:

i. The Claimant and its predecessors possessed all the relevant authorisations (namely, the 2005 WZ decision and the 2005 Building Permit), which enabled them to develop the Property;[415]

ii. The City never replied positively to any of the Museum's requests. Therefore, the allegations of a hidden agenda between the City and the Museum are entirely unjustified;[416]

iii. The City repeatedly replied to the Claimant's and its predecessors' requests for extension of the PUA deadlines, and "the sole reason for which the development deadlines were not extended" was "29 Listopada's indecision";[417]

iv. The Warsaw Conservator's recommendations were always consistent and the Claimant's distinction between allegedly "positive" and "negative" recommendations is artificial and misleading.

404. The Respondent also denies that the Polish authorities misapplied Polish law. The Respondent argues that the competence of the Warsaw Conservator derives from the 1971 Decision and/or the 1994 Ordinance. In any event, "the Claimant itself unequivocally confirmed the conservation protection of the Real Estate by repeatedly applying to the Warsaw Conservator for its recommendations throughout the years, even as late as in 2014".[418]

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413 *Ibid.*, §§ 491-492, referring to *Venezuela Holdings, B.V., et al. v. Bolivarian Republic of Venezuela*, ICSID Case no. ARB/07/27, Award of 9 October 2014, § 286 (RLA-305); *Sempra Energy International v. The Argentine Republic*, Award of 28 September 2007, § 285 (CLA-8).

414 *Ibid.*, § 493, referring to *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003, § 116 (CLA-22).

415 *Ibid.*, §§ 501-502.

416 *Ibid.*, § 500.

417 *Ibid.*, §§ 503-504.

418 *Ibid.*, § 505.

c. Analysis

(i) Scope of the Tribunal's analysis

405. Before turning to the merits of the claim, the Tribunal deems it important to clarify the scope of its analysis, with respect to the interplay between the Prior Measures and the 2014 WCA Judgment (1), and, specifically, those Prior Measures which were adopted before the demolition of the Barracks (2).

1. The Prior Measures and the 2014 WCA Judgment

406. The Claimant argues that the Prior Measures and the 2014 WCA Judgment resulted in an indirect expropriation of the Claimant's investment. For the Claimant, the aggregate expropriatory effect of the Prior Measures culminated in the 2014 WCA Judgment, which it argues "directly followed from" the Prior Measures.[419] The Claimant argues that the Tribunal cannot deny the expropriatory effect of the Prior Measures on the ground that the 2014 WCA Judgment may itself effect a direct expropriation of the investment. In this regard, the Claimant relies on the statement made by Justice Bryan that "a claim for creeping expropriation is not precluded where there is a specific event in the chain of events that might ultimately be found to be itself a form of expropriation".[420]

407. In response, the Respondent maintains that the Prior Measures do not amount to an indirect expropriation. For the Respondent, even if the Prior Measures "had a deferred expropriatory potential, such effects never materialized because of the supervenient acts in the form of the judicial termination" of the PUA.[421] The same asset, so argues the Respondent, cannot be expropriated twice.[422]

408. In light of the Parties' disagreement, the Tribunal will first assess whether the Claimant may argue that its investment was indirectly expropriated through the aggregate effect of the Prior Measures and the 2014 WCA Judgment. In this context, the Tribunal will also briefly assess the findings of the English High Court cited by the Claimant and their potential impact on the Tribunal's analysis.

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419 Amended SoC, § 396.

420 English High Court Judgment (C-272), § 125.

421 Amended SoD, § 411.

422 *Ibid.*

409. The Tribunal first notes that Justice Bryan's observation that "a claim for creeping expropriation is not precluded where there is a specific event in the chain of events that might ultimately be found to be itself a form of expropriation"[423] was made in the context of a jurisdictional matter, *i.e.* Justice Bryan held that it was not appropriate for the Tribunal to dismiss the claims related to the Prior Measures at the jurisdictional stage. Specifically, he stated as follows:[424]

> I consider that it will be generally inappropriate (save possibly in a very clear case) at an initial hearing in relation to jurisdiction for a tribunal to make any definitive findings as to whether particular acts amount to indirect expropriation (including creeping expropriation) or expropriation generally, or make any findings which would preclude consideration of all facts (including the Prior Measures) being explored at the merits stage in due course, especially where (as here) more than one category of investment is alleged to have been expropriated, and prior measures are being relied upon which may not immediately be obviously expropriatory, and the aggregate picture is best judged at the final merits hearing. Any other course is likely to result in injustice if it has the effect that a party cannot rely upon matters which form part of the overall picture, and may be part of the expropriatory conduct either in isolation, or in the aggregate.

410. According to Justice Bryan, the aggregate effect of the Prior Measures and the 2014 WCA Judgment should therefore be assessed by the Tribunal at the merits stage:[425]

> ... I am satisfied that [redacted] has pleaded what it needs to plead to establish a *prima facie* case of creeping expropriation for jurisdictional purposes on a pro tem approach. Whether in fact there was a creeping expropriation, having regard to the aggregate effect of the prior measures relied upon, and in what respects, will be a matter for the Tribunal at the merits stage.

411. He was also unambiguous that the merits of the dispute shall be determined by the Tribunal:[426]

> ...The ultimate determination of particular factual issues (assuming the Tribunal has jurisdiction in relation to any particular claim) will be a matter for the Tribunal at the merits stage of the Arbitration. It is common ground that the merits of the underlying disputes are not issues to be determined by this Court...

412. Justice Bryan was not in a position to reach any conclusive view as to whether or not there had been an indirect expropriation, and he did not do so. Thus, without prejudice to the views on the matter expressed by Justice Bryan at the jurisdictional stage, it is the Tribunal's task to determine the aggregate effect of the Prior Measures and the 2014 WCA Judgment on the Claimant's investment. In doing so, it must establish

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423 English High Court Judgment (C-272), § 125.

424 *Ibid.*, § 126.

425 *Ibid.*, § 142.

426 *Ibid.*, § 16.

whether these measures can be assessed together for the purposes of the indirect expropriation claim. In the Tribunal's view, this question must be answered in the negative, because the 2014 WCA Judgment is not part of the chain of events that allegedly prevented the development of the Property and could be said to have indirectly expropriated the Claimant's investment. The Tribunal disagrees with the Claimant that the 2014 WCA Judgment "directly followed from" the Prior Measures. It did not. In fact, it was adopted as a result of the Claimant's demolition of the Barracks, which were distinct from the Prior Measures. Neither the factual matrix, nor the Judgment itself, the focus of which – actually the *raison d'être* – is the demolition, contain sufficient indicia of any "links" to the Prior Measures.

413. Thus, in the context of the indirect expropriation claim, the Tribunal cannot agree with the Claimant that the 2014 WCA Judgment was "the straw that broke the camel's back". It will therefore focus its analysis on the measures adopted prior to the Judgment. This said, the Tribunal will assess the 2014 WCA Judgment independently in the context of the Claimant's direct expropriation claim. This approach is in line with the position adopted by the English High Court, which underlined the importance of assessing the potential expropriatory effect of all measures invoked by the Claimant.

2. Measures adopted before the demolition of the Barracks

414. In support of its indirect expropriation claim, the Claimant also invokes numerous acts of the Respondent's authorities that allegedly prevented the development of the Property between 2008 and 2016. In the Tribunal's view, the measures adopted by the Respondent after the demolition of the Barracks in late 2011 cannot have expropriatory effect because, even though the PUA was still in place, its economic purpose was frustrated and the development of the Property in accordance with the terms of the PUA was *de facto* impossible.

415. For the purposes of its analysis of the Claimant's indirect expropriation claim, the Tribunal will therefore only review those Prior Measures which were adopted *before* the demolition of the Barracks in 2011, as these are the only measures capable of having an expropriatory effect. Conversely, the measures adopted after the demolition of the Barracks have no such effect as they could not affect the development of the Property under the PUA.

(ii) Assessment of the Prior Measures until the demolition of the Barracks

416. The Tribunal held above that the effect of the 2014 WCA Judgment cannot form part of its analysis of the Claimant's indirect expropriation claim. It has also held that the

measures postdating the demolition of the Barracks can have no expropriatory effect.[427] Hence, it will now consider the facts underlying the Prior Measures until the demolition of the Barracks and determine whether these measures have resulted in an indirect expropriation of the Claimant's investment.

417. The Claimant argues that the following Prior Measures, which were adopted before the demolition of the Barracks, were illegitimate:

i. the City failed to extend the PUA deadlines;

ii. the Monument Conservator was not competent to opine on the development of the Property;

iii. the recommendations of the Monument Conservator were contradictory;

iv. the City conspired with the Museum to the detriment of the Claimant.[428]

418. The Respondent disputes the Claimant's qualification of the Prior Measures and requests the Tribunal to assess the accuracy of the Claimant's allegations.

1. Was the City under an obligation to extend the PUA deadlines?

419. The deadlines for the development of the Property were initially fixed by the PUA, according to which the construction works on the Property had to be completed by 2004. The Annex to the PUA[429] subsequently extended this deadline to February 2005.

420. The Claimant's predecessors applied to the City for extensions of this deadline several times between 2005 and 2010. They had no success and the Claimant highlights two instances of the City's alleged misconduct in this respect. First, the City simply ignored the applications made by its predecessors. Second, the City disregarded its obligation under the 2002 Resolution to extend the PUA deadlines.

421. Having carefully reviewed the correspondence between the City and the Claimant's predecessors between 2005 and 2010, and given due regard to the wording of the 2002 Resolution,[430] the Tribunal is not persuaded by the Claimant's contentions.

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427 See paragraphs 413 and 415 of the Award.

428 Amended SoC, § 398.

429 Annex to the Agreement for the Perpetual Usufruct of the Land and Sale of Buildings dated 25 October 2002, § 3 (C-14).

430 The City of Warsaw's letter, 22 December 2004 (R-56), p 1; The City of Warsaw's letter, 21 March 2005 (R-57), p 1; Letter from 29 Listopada to the Real Estate Department of the Śródmieście District of the

422. First, the City's letter of 22 December 2005[431] to 29 Listopada shows that the City was willing to extend the time limits under the PUA, provided that 29 Listopada accepted its proposal to increase the yearly fee payable by the usufructuary. The Tribunal also notes that in 2007 the Claimant's predecessors changed the strategy for the development of the Property,[432] but failed to update the City and provide a new time limit for the amended development. The Tribunal thus concludes that the City cannot be deemed to have been under an obligation to extend the PUA time limits in the absence of any definitive and economically feasible proposal from 29 Listopada.

423. Second, the Tribunal cannot agree with the Claimant's argument that the City was obliged to prolong the PUA deadlines pursuant to the 2002 Resolution. In relevant part, that resolution reads as follows:[433]

> [i]n the event of failure to keep to the deadlines specified herein an additional deadline shall be specified, and an additional annual fee referred to in Art. 63 of the Act on Real Estate Development shall be determined.

424. The Tribunal is of the view that the 2002 Resolution offers no basis for any supposed duty to extend the PUA time periods. In fact, paragraph 2 of the Resolution requires that amendments be recorded by a notary:[434]

> Extension of the deadlines of development referred to in Clause 1 above requires that respective amendments should be introduced to the existing notarial deed.

425. In spite of this requirement, neither the Claimant nor its predecessors ever sought to amend the existing notarial deed to effect the change of the PUA time limit.

City of Warsaw (C-133), 22 April 2005; The City of Warsaw's letter, 1 July 2005 (R-58), p 1; The Company's letter dated 6 July 2005 (R-59), p 1; Letter from the Real Estate Department Branch in the Śródmieście Quarter to the Director of the Real Estate Department of Warsaw, 11 July 2005 (C-53), p 9; The City of Warsaw's letter, 22 December 2005 (R-60), p 2; Letter from [redacted] to the City of Warsaw, 25 September 2007 (C-260), p 2; Letter from [redacted] to the Real Estate Department of the City of Warsaw, 17 April 2007 (C-47), p 4; The City of Warsaw's letter dated 14 June 2007 (R-61); The City of Warsaw's letter dated 22 August 2007 (R-62), p 1; Letter from [redacted] to the Real Estate Department of the City of Warsaw, 11 September 2007 (C-48), p 7; Letter from [redacted] to the Real Estate Department of the City of Warsaw, 8 October 2007 (C-49), p 6; Letter from [redacted] to the Real Estate Department of the Śródmieście District of the City of Warsaw, 23 November 2007 (C-139), p 1; Letter from [redacted] to the Real Estate Department of the Śródmieście District of the City of Warsaw, 19 February 2008 (C-147), p 1; The City of Warsaw's letter, 18 May 2009 (R-63), p 1; The Company's letter, 16 June 2009 (R-64), p 1; The City of Warsaw's letter, 26 October 2009 (R-65), p 1; The Company's letter, 7 December 2009 (R-66), p 2; The Company's letter, 1 January 2010, (C-50), p. 4.

431 Letter of 22 December 2005 from the City of Warsaw (R-60), p 2.

432 Letter from [redacted] to the Real Estate Department of the City of Warsaw, 11 September 2007 (C-48), p 7.

433 Board of Warsaw-Centrum Borough Resolution, 15 October 2002 (C-13), § 1.2.

434 *Ibid.*, § 3.

426. In this assessment one must also take account of the legal nature of the 2002 Resolution. The Supreme Administrative Court determined that the 2002 Resolution is merely an internal document, and therefore cannot be considered as a source of obligations between the City and the perpetual usufructuary:

> ... a resolution is only an internal act of the municipal authority (executive board) and as such cannot be a source of any obligation of that authority under the contractual perpetual usufruct relationship between the owner and the perpetual usufructuary. Thus, it cannot be perceived as a source of the obligation to apply Article 63(1) REM. The relations between the land owner and perpetual usufructuary are dependent on their agreement and applicable laws.[435]

427. This characterisation of the 2002 Resolution by the Supreme Administrative Court, as an instrument that does not create obligations of the authority vis-à-vis the usufructuary, serves to reinforce the conclusion just reached: the City had no duty to extend the time for development of the Property beyond the limits specified in the PUA and the Annex.

428. For completeness, the Tribunal observes that it has also noted the Respondent's alternative argument that the City's alleged failure to extend the deadlines is not attributable to the Respondent, because "when concluding and performing" the PUA, "the City of Warsaw acted in the *dominium* and not *imperium* sphere".[436] Given its finding that the City did not breach any duty to extend the PUA deadlines, the Tribunal can dispense with examining this argument.

2. Did the Warsaw Conservator exceed its competence?

429. The Parties have made numerous submissions on the competence of the Warsaw Conservator to make recommendations on the development of the Property. This topic was also extensively discussed during the Hearing and was the focal issue of the Parties' PHBs. The Tribunal is mindful that this matter is controversial under Polish law, as reflected in the helpful expert opinions of [redacted]

430. The Tribunal understands that, in its recommendations, the Warsaw Conservator relied on two instruments as the alleged basis of its competence to opine on the

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435 Supreme Court Judgment dated 2 June 2016 (RLA-80), pp. 15-16.

436 Amended SoD, § 512.

development of the Property, namely the 1971 Decision and the 1994 Ordinance. Therefore, the Tribunal will focus its analysis on these two instruments.

431. With respect to the first instrument, the Parties and their experts agree that the Property is situated within the perimeter designated by the 1971 Decision. However, due to the ambiguity of the wording used, they disagree on the scope of application of the 1971 Decision.

432. The 1971 Decision states the following with respect to its scope of application, in the Polish original:[437]

> Uzasadnienie: Osadnictwo z okr, brązu, wczesnośredniowieczne i średniowieczne
> Teren o znaczeniu historycznym

For which the Parties provide slightly different translations:

i. The Claimant's version:[438]

> Justification: Bronze era, early medieval and medieval settlements; area of historical importance.

ii. The Respondent's version:[439]

> Justification: Bronze era, early medieval and medieval settlements
> Area of historical importance.

433. The Claimant argues that the 1971 Decision is designed to protect only "bronze era, early medieval and medieval settlements" situated within its perimeter. It advocates that "area of historical importance" must be read conjunctively with "bronze era, early medieval and medieval settlements". Consequently, the Warsaw Conservator's competence is limited to the conservation of archaeological remnants of the "bronze era, early medieval and medieval settlements".[440] This implies that once excavations works were completed, the Warsaw Conservator no longer had any competence to give recommendations on the construction works conducted on the Property.

434. On the other hand, the Respondent submits that the 1971 Decision covers the entire area of historical importance situated within the designated perimeter. It claims that the terms "area of historical importance" and "bronze era, early medieval and medieval settlements" should be read disjunctively because in the original text (as translated by the Respondent) the phrase "area of historical importance" appears on

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437 Warsaw Monuments Conservator Decision dated 30 June 1971 (CLA-53), p. 1.

438 *Ibid.*

439 R-PHB, § 3.

440 [redacted] Expert Legal Opinion of 15 May 2019 (CER-6), p. 7; C-PHB, §§ 15-18, 21.

a separate line. Consequently, for the Respondent, the Warsaw Conservator's competence is not limited to the protection of archaeological remnants. Instead, the Warsaw Conservator is competent to give recommendations on practically any works conducted within the protected area.[441]

435. The Tribunal finds that the language employed in the 1971 Decision is indeed not entirely free from doubt. The grammatical interpretation of the 1971 Decision does not allow the Tribunal to conclusively determine whether the "bronze era, early medieval and medieval settlements" and "area of historical importance" should be read conjunctively or disjunctively. As this question is important for determining the scope of the Warsaw Conservator's competence, the Tribunal needs to consider how the 1971 Decision has been interpreted by the Polish judiciary and applied by the Polish authorities.

436. In a decision issued on 12 September 2017, the Supreme Administrative Court of Poland addressed the scope of the application of the 1971 Decision and held that it encompassed archaeological monuments as well as buildings and structures of historical importance: [442]

> ... In fact the above-mentioned decision is laconic, but it makes it clear that the area defined therein [...] is subject to protection. It follows from its justification that the reason for granting protection were both archaeological monuments and the historical significance of the area indicated therein. The reason for the refusal to agree on the decision on the conditions of development could therefore be the protection of archaeological monuments located in this area and the protection of the historical significance of this area. The latter aspect of protection, in the opinion of the Supreme Administrative Court, also covers the protection of buildings and other structures of historical importance, including their substance and view...

437. Thus, in the interpretation of the Supreme Administrative Court of Poland, the 1971 Decision is not limited to the protection of archaeological remnants. Rather, the decision protects all structures of historical importance located within the area, including their "structure and view". As a result, the competence of the Warsaw Conservator extends to giving recommendations about buildings of historical significance including their substance and view located within the area.

438. The Claimant voiced concerns about the relevance of the judgment of the Supreme Administrative Court to the present case,[443] and argued that the judgment does not

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441 First Expert Report of [redacted] of 14 March 2019 (RER-7), §§ 16-24.

442 Respondent's letter of 27 September 2019, referring to R-194.

443 C-PHB, §§ 27-30.

relate to the Property or involve the Parties.[444] For the Tribunal, this, on the contrary, enhances the credibility of the findings of Supreme Administrative Court, which reflect an interpretation of the 1971 Decision which is independent of the circumstances of the present dispute.

439. While the Claimant further contends that the Respondent has submitted an incomplete translation of the judgment,[445] it has failed to point to any substantial missing part or inconsistencies in the translation. The Tribunal therefore considers that the extract presented by the Respondent accurately reflects the interpretation of the 1971 Decision given by the Supreme Administrative Court.

440. Moreover, the Claimant submits that the Supreme Administrative Court's reasoning is "light". [446] The Tribunal disagrees. In the Tribunal's view, the Supreme Administrative Court determined with precision that the term "area of historical importance" is not connected or attached to the phrase "bronze era, early medieval and medieval settlements", which is sufficient for present purposes.

441. The Tribunal also observes that the interpretation of the 1971 Decision given by the Supreme Administrative Court corresponds to the manner in which the Warsaw Conservator interacted with the perpetual usufructuary during the relevant time. At all relevant times, the Warsaw Conservator and the perpetual usufructuary considered that the Barracks qualified as a protected monument. This is demonstrated by the following instances:

    i. The perpetual usufructuary applied to the Warsaw Conservator for recommendations several times between 2006 and 2014, and the Warsaw Conservator issued several sets of recommendations. If the Barracks were not considered to be protected, neither the Claimant's predecessors nor the Warsaw Conservator would have adopted this course of conduct; and

    ii. The necessity to consult with the Warsaw Conservator was evident to the Claimant, as it follows from the Mezzanine Facility Application of 3 December 2007[447] and as it was confirmed by [redacted] during the Hearing;[448] and

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444 *Ibid.*, § 27.

445 *Ibid.*, § 28.

446 *Ibid.*, § 29.

447 Mezzanine Facility Application, 3 December 2007 (C-140), p 10.

448 R-PHB, § 20, referring to Tr., Day 1, p. 145, lines 16-22.

iii. Neither the Claimant prior to this arbitration, nor its predecessors challenged the competence of the Warsaw Conservator to give recommendations on the design and structure of the Barracks.

442. The Tribunal also wishes to emphasize the importance of the testimony of the Warsaw Conservator, [redacted] during the Hearing. [redacted] gave wholly credible and convincing testimony, in explaining the importance of the preservation of cultural and historical heritage in Warsaw. The role of such preservation is particularly significant in a city which lost practically all of its historical monuments and buildings through the bombings and other destructive acts in World War II. Against this background, it makes perfect sense that the 1971 Decision granted the Warsaw Conservator ample and extensive competence to ensure the protection of Polish historical and cultural heritage. Moreover, having heard [redacted] the Tribunal has no doubt that the Warsaw Conservator performed her duties competently and in good faith.

443. The only document that the Claimant invokes against the competence of the Warsaw Conservator is the opinion of the Provincial Conservator dated 11 March 2009.[449] However, this opinion simply confirms that the Property fall within the scope of the 1971 Decision and does not support the Claimant's case that the Warsaw Conservator is not competent to opine on the development of the Property. Indeed, in pertinent part, the opinion reads as follows:

> ... the only form of the preservation maintenance [of the estate] is its entering in the register of archaeological monuments of the Mazovian Province in conformity with the decision of the Warsaw Heritage Monuments Protection Office *(Konserwator Zabytkaw m. st. Warszawy)* dated 30 June 1971 under registry No. A-48, which decision covers the area comprised among the streets [...] on account of the settlement relics dating back to the Bronze Age, and the early Medieval and Medieval periods, which, as you have justly noted, imposes restrictions at the stage of construction works on the owner or possessor of an estate in accordance with Articles 31 and 36 of Act dated 23 July 2003 on the Protection and the Guardianship of Historical Monuments (Oz. U. of 2003, No. 162, Item 1568, as amended).

444. To conclude, the Tribunal finds that the Warsaw Conservator was competent to opine on the development of the Property, including the design, view and structure of the Barracks, in accordance with the 1971 Decision. The Claimant and its predecessors were thus under an obligation to seek the recommendations of the Warsaw Conservator before applying a WZ decision.

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449 Amended SoC, §§ 226-227, referring to the letter of 11 March 2009 from the Provincial Monuments Conservator to Parkview Terrace (C-25).

3. Did the Warsaw Conservator make contradictory recommendations?

445. The Claimant alleges that its predecessors could not develop the Property because the Warsaw Conservator's recommendations were contradictory. In rebuttal, the Respondent has presented a detailed comparison of all the recommendations of the Warsaw Conservator seeking to demonstrate that such recommendations were consistent with each other. The Claimant did not challenge the accuracy of this comparison.

446. As already mentioned,[450] for the purposes of the indirect expropriation claim, the Tribunal will analyse the recommendations made by the Warsaw Conservator before 2011. Indeed, it considers that the recommendations rendered thereafter, namely in 2012 to 2014, are irrelevant, because the Barracks were already demolished and the purpose of the PUA was frustrated.

447. Having carefully considered the recommendations issued by the Warsaw Conservator between 2006 and 2011, the Tribunal finds no contradictions. The Tribunal also finds that the Claimant has failed to point to any substantial inconsistency, whereas the Respondent presented an accurate and helpful comparison of the positions taken by the Warsaw Conservator during the relevant time period.

448. The Tribunal has come to this conclusion after analysing the following parameters, which were all key to the development of the Property, namely: (i) the number of floors which the perpetual usufructuary was allowed to build above the level of the Barracks; (ii) the overall height of the modernised building; (iii) the height of the other buildings on the Property; and (iv) the use of the Museum's land.

449. Between 2007 and 2011, the Warsaw Conservator made the following recommendations:

- First, in 2007, the Warsaw Conservator recommended the construction of one additional storey, and specified that the new building should not overwhelm the Museum or encroach upon its land.[451]

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450 See paragraph 414 of the Award.

451 Letter from the Warsaw Monuments Conservator to [redacted] attaching [redacted] Analysis regarding the possible profile of land development on the plot of land located ul. at 29 listopada of 12 April 2007 (C-137).

- Second, in 2009, the Warsaw Conservator reiterated that the use of the Museum's land for the purposes of developing the Property was not allowed.[452]

- Third, in 2011, the Warsaw Conservator recommended the construction of just one additional storey above the Barracks and authorized the use of the area which belongs to the investor.[453]

450. These recommendations were not complied with in the applications filed by 29 Listopada to the Warsaw Conservator in 2007, 2009 and 2011:

- First, in 2008, the project of the development of the Property envisaged the construction of two additional storeys above the Barracks and the use of the Museum's land,[454]

- Second, in 2009, the project envisaged two additional storeys and the use of the Museum's land,[455]

- Third, in 2011, the project envisaged the construction of 2 additional storeys above the Barracks with a total height of 15.5 m.[456]

451. If one compares the recommendations of the Warsaw Conservator with the applications of 29 Listopada in each year, it is evident that the applications envisioned the development of the Property beyond the parameters recommended by the Warsaw Conservator in all three years.

452. More importantly, the review of the content of the Warsaw Conservator's recommendations consistently specified the same parameters for the development of the Property (*i.e.* the number of storeys above the Barracks, the height of the nearby erections, the prohibition of the use of the Museum's land, etc.) at all relevant times. By contrast, the Claimant and its predecessors failed to comply with these recommendations in their applications for the development of the Property.

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452 Warsaw Monuments Conservator Decision of 5 January 2009 (C-22); Warsaw Monuments Conservator Decision of 2 March 2009 (C-23).

453 Letter from Warsaw Monuments Conservator to 29 Listopada of 6 July 2011 (C-192).

454 Warsaw Monuments Conservator Decision of 5 January 2009 (C-22).

455 Parkview Terrace Application for determination of development conditions of 3 January 2008 (C-145).

456 29 Listopada Petition for the issuing of the development terms decision of 19 August 2011 (C-197).

4. Did the City and the Museum have a "hidden agenda"?

453. Finally, the Tribunal considers the Claimant's allegations that the City had a hidden agenda with the Museum. The Claimant invokes several letters and statements made by the Museum, which allegedly reveal the hidden agenda between the Museum and the City. The Tribunal will analyse them in turn.

454. In a letter of 12 March 2008, the Museum expressed its discontent with 29 Listopada's application for a WZ decision. The Tribunal can see no trace or confirmation of a hidden agenda. On the contrary, the Tribunal understands the Museum's opposition to the project of development of the Property, which encroached upon the Museum's land.[457] In any event, the Claimant failed to prove that the Claimant's predecessors would have obtained a WZ decision if it had not been for the Museum's letter of 12 March 2008. The application for the WZ decision made in 2008 was unsuccessful, because it envisaged the use of the Museum's land, which was incompatible with the recommendations of the Warsaw Conservator.[458]

455. Further, in December 2011 the Museum made statements calling for the termination of the PUA. The Tribunal is not convinced that the City terminated the PUA based on these statements. The City's call for the termination of the PUA was justified by the demolition of the Barracks in 2011.

456. Finally, the Museum requested transfer of the Property to itself following the demolition of the Barracks. The Tribunal considers that these requests lack relevance here. After the frustration of the PUA's object and purpose, the Museum's statements could not have had any impact on the Claimant's performance of the PUA. Moreover, the Tribunal notes that the City never satisfied the Museum's requests.

457. Thus, the Tribunal concludes that the Claimant failed to prove the existence of any hidden agenda between the Museum and the City, be it one which would have prevented the Claimant or its predecessors from developing the Property, or otherwise.

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457 Amended SoD, § 371 referring to Parkview Terrace Application for determination of development Conditions of 3 January 2008 (C-145).

458 Warsaw Monuments Conservator Decision dated 5 January 2009 (C-22); Warsaw Monuments Conservator Decision dated 2 March 2009 (C-23); Mayor of Warsaw Decision dated 1 June 2009 (C-24).

(iii) Did the Respondent indirectly expropriate the Claimant's investment?

458. The Tribunal has established above that, contrary to the Claimant's allegations, (i) the City was not obliged to extend the PUA deadlines; (ii) the Warsaw Conservator was competent to opine on the development of the Property; (iii) the Warsaw Conservator's recommendations were not contradictory; and (iv) the City had no "hidden agenda" with the Museum.

459. The Tribunal will now analyse whether, notwithstanding these conclusions, the Respondent's other measures may be said to have caused an indirect expropriation of the Claimant's investment.

460. The Tribunal first observes that it agrees with the legal test of indirect expropriation set forth by the Respondent, according to which a State's measures qualify as indirect expropriation if (i) they result in a total or near-total destruction of the investment's economic value; (ii) they deprive a foreign investor of the control over the investment; and (iii) the effect of these measures is permanent.[459]

461. In support of this three-prong test, the Respondent relied on *Venezuela Holdings v. Venezuela*, which held that:

> [...] a measure which does not have all the features of a formal expropriation may be equivalent to an expropriation if it gives rise to an effective deprivation of the investment as a whole. Such a deprivation requires either a total loss of the investment's value or a total loss of control by the investor of its investment, both of a permanent nature [...][460]

462. The Respondent also invoked *Sempra Energy v. Argentine*, where an indirect expropriation was described as follows:

> [m]any of the measures discussed in the instant case have had a very adverse effect on the conduct of the business concerned. This is, however, again a question that the Treaty addresses in the context of other safeguards for protecting the investor. A finding of indirect expropriation would require more than adverse effects. It would require that the investor

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459 Amended SoD, §§ 488-493, referring to *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award of 19 January 2007 (RLA-303) , § 279; *European Media Ventures SA v. The Czech Republic*, Partial Award on Liability of 8 July 2009 (RLA-304), § 47; *Venezuela Holdings, B.V., et al. v. Bolivarian Republic of Venezuela*, ICSID Case no. ARB/07/27, Award of 9 October 2014 (RLA-305), § 286; *Sempra Energy International v. The Argentine Republic*, Award of 28 September 2007 (CLA-8), § 285.

460 *Venezuela Holdings, B.V., et al. v. Bolivarian Republic of Venezuela*, ICSID Case no. ARB/07/27, Award of 9 October 2014 (RLA-305), § 286.

> no longer be in control of its business operation, or that the value of the business have been virtually annihilated [...].[461]

463. A similar pronouncement on the effects of indirect expropriation was made in *Telenor v. Hungary*:

> Though different tribunals have formulated the test in different ways, they [...] all agreed that the interference with the investor's rights must be such as substantially to deprive the investor of the economic value, use or enjoyment of its investment. [...][462]

464. The Tribunal finds no reason to depart from the existing line of jurisprudence. Therefore, the Tribunal will now assess whether (i) remaining the Prior Measures resulted in a total or near-total destruction of the investment's value; or (ii) they deprived the Claimant of control over its investment; and (iii) the effect of the Prior Measures was permanent. In view of the cumulative nature of this test, failure to prove any one of the three requirements would lead to the dismissal of the Claimant's indirect expropriation claim.

465. First, the Prior Measures did not result in the total or near-total destruction of the Claimant's investment. Before it demolished the Barracks, the Claimant was perfectly able to develop the Property in accordance with the 2005 WZ Decision, *i.e.* the perpetual usufructuary was authorized to build one or two storeys over ground with a maximum height of 5 -11m.[463] The Claimant's investments (the mortgage, the shares, the loans, the option agreement) therefore was not "valueless", as the Claimant was able to develop the Property and eventually derive profit from it.

466. The Claimant and its predecessors failed to develop the Property in accordance with the PUA and the 2005 WZ Decision, because of their aspiration to pursue a more ambitious project.[464] Thus, any alleged damage resulting from the Claimant and its predecessors' change of development strategy is not caused by the Respondent. The City legitimately refused to issue a new WZ decision in 2009,[465] because the project contemplated by Parkview Terrace between 2007 and 2009 did not comply with the PUA and the recommendations of the Warsaw Conservator. Thus, the Prior Measures did not result in the total deprivation of the investment's value. In other words, the

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461 *Sempra Energy International v. The Argentine Republic*, Award of 28 September 2007 (CLA-8), § 285.

462 *Telenor Mobile Communications A.S. v. The Republic of Hungary*, Award of 13 September 2006 (CLA-97), § 65.

463 Mayor of Warsaw Decision dated 21 April 2005 (C-18), § 1.3.

464 [redacted] Second Expert Report of 22 September 2017 (CER-4), §§ 111, 118.

465 C-PHB, § 82.

Claimant has failed to satisfy the first prong of the test set out in paragraph 460 above. This is sufficient to dismiss the Claimant's indirect expropriation claim.

467. For the sake of completeness, the Tribunal notes that the second prong of the test is not met either, as the Prior Measures did not deprive the Claimant of control over its investment. Prior to the termination of the PUA, the Claimant and its predecessors were in full control of the Property and were able to develop of the Property in accordance with the 2005 WZ Decision.

(iv) Conclusion

468. To sum up, even though the Prior Measures inhibited the Claimant's ambitions with respect to the development of the Property, they did not prevent its development in accordance with the terms agreed between the City and the perpetual usufructuary by means of the 2005 WZ Decision. Nor did the Prior Measures deprive the Claimant of control of its investment. As a result, the Prior Measures do not amount to an indirect expropriation.

2. Direct Expropriation Claim

a. Claimant's Position

469. The Claimant argues that the Respondent directly expropriated its investment through the 2014 WCA Judgment, which transferred the Claimant's usufructuary rights over the Property to the City.[466] Similarly to its argument in the context of indirect expropriation, the Claimant argues that the 2014 WCA Judgment was the "straw that broke the camel's back",[467] *i.e.* the measure that destroyed what was left of the Claimant's investment after the adoption of the Prior Measures.

b. Respondent's Position

470. The Respondent first underlines that the 2014 WCA Judgment has no expropriatory character because judgments of local courts can potentially only breach treaty provisions granting investors protection against denial of justice, and the Claimant was never denied justice. On the contrary, the proceedings regarding the termination of the PUA passed through three court levels,[468] all of which applied Polish law

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466 Amended SoC, § 403.

467 *Ibid.*, § 404.

468 Amended SoD, §§ 420-422.

correctly, as evidenced *inter alia* by the detailed expert report of [redacted] Moreover, the proceedings did not involve any breaches of due process.[469]

471. In reliance on *Liman Caspian Oil v. Kazakhstan*, *Azinian v. Mexico*, *Helnan v. Egypt* and *MNSS v. Montenegro*,[470] the Respondent submits that local courts have a certain margin of appreciation when it comes to the application of local law and that, as a general rule, investment tribunals cannot revisit issues determined by the courts.

472. Alternatively, the Respondent argues that, under international law (as confirmed by *Middle East Cement v. Egypt*, *Arif v. Moldova*, *Liman Caspian v. Kazakhstan*, *Swisslion v. Macedonia* and *Garanti Koza v. Turkmenistan*),[471] the termination of a contract by a local court amounts to a valid exercise of police powers, which precludes the finding of expropriation. According to the Respondent, the 2014 WCA Judgment was a valid exercise of the Respondent's police powers, because it (i) pursued legitimate public interest; (ii) was non-discriminatory; (iii) and was adopted under due process of law.[472]

c. Analysis

473. Both Parties have provided extensive submissions on the compatibility with Polish law of the 2013 judgment of the Warsaw Regional Court, which terminated the PUA, and of the 2014 WCA Judgment, following which the termination of the Claimant's rights became effective. The Tribunal will now analyse these submissions. It will do so with a degree of restraint for the following reasons.

474. The Tribunal agrees with a number of investment tribunals, which have underscored that investment treaty tribunals are not courts of appeal and their role is not to assess

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469 *Ibid.*, §§ 423-424.

470 *Ibid.*, §§ 427-429, referring to *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award of 22 June 2010, §§ 274, 289, 346-347 (RLA-75); *Robert Azinian, Kenneth Davitian & Ellen Baca v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award of 1 November 1999, § 99 (RLA-134); *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, 7 June 2008 (RLA-79), §§ 106-107; *MNSS v. Montenegro*, § 370 (RLA-169).

471 *Ibid.*, §§ 477-482, referring to *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award of 12 April 2002, § 139 (RLA-131); *Mr Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award of 8 April 2013, § 417 (CLA-25); *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award of 22 June 2010, §§ 274, 289, 346-347 (RLA-75); *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award dated 6 July 2012 (RLA-132), §§ 312, 314.

472 *Ibid.*, § 496.

the correctness of local judgments, as courts of appeal normally do.[473] For instance, in *Helnan v. Egypt,* it was held that:

> ... An ICSID Tribunal will not act as an instance to review matters of domestic law in the manner of a court of higher instance. Instead, the Tribunal will accept the findings of local courts as long as no deficiencies, in procedure or substance, are shown in regard to the local proceedings which are of a nature of rendering these deficiencies unacceptable from the viewpoint of international law, such as in the case of a denial of justice.[474]

475. Bearing its role in mind, the Tribunal will review whether the 2014 WCA Judgment was expropriatory under international law, and will avoid elaborating on the compatibility with Polish law of the 2014 WCA Judgment.

476. As a general rule, judgments of domestic courts are not expropriatory if they enforce or give effect to a State's legitimate contractual rights. Indeed, such judgments merely implement the general principle of law *pacta sunt servanda*. It is indeed a fundamental tenet of any legal order that, subject to narrow exceptions linked to changed circumstances, e.g. in situation of force majeure or frustration of contracts, contractual commitments must be respected.

477. This was for instance recognized in *Swisslion v. Macedonia,* the tribunal held that a State's legitimate exercise of its contractual rights, including the right to terminate a contract, does not amount to expropriation:[475]

> The contract was terminated and the effect of this order was to transfer the shares back to the selling party [...].
>
> The Ministry was entitled to form the view that the contract had not been complied with and to put that view before the courts. The fact that the courts accepted that view and the judicial decisions have not been successfully challenged before this Tribunal means that the argument that the court effected an expropriation must fail [...]
>
> [o]therwise, a State could not exercise the ordinary right of a contractual party to allege that its counterparty breached the contract without the State's being found to be in breach of its international obligations. Since there was no illegality on the part of the courts, the first element of the Claimant's expropriation claim is not established.

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473 *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award of 22 June 2010, §§ 274, 289, 346-347 (RLA-75); *Robert Azinian, Kenneth Davitian & Ellen Baca v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award of 1 November 1999, § 99 (RLA-134); *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, 7 June 2008 (RLA-79), §§ 106-107; *MNSS v. Montenegro*, § 370 (RLA-169).

474 *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, 7 June 2008 (RLA-79), §§ 106-107.

475 *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award dated 6 July 2012 (RLA-132), §§ 312, 314.

478. In the same vein, the tribunal in *Garanti Koza v. Turkmenistan* held as follows:

> Actions by state courts to enforce contract rights, including rights to terminate a contract, have generally not been held by investment arbitration tribunals to amount to expropriation, regardless of whether the state or an instrument of the state is the contract party enforcing its rights.[476]

479. The Tribunal sees no reason to depart from this line of jurisprudence which implements a general and consistent approach. Consequently, it reaches the conclusion that State measures are not expropriatory if adopted in the legitimate exercise of the protection of the State's contractual rights.

480. The question is thus whether the Respondent properly enforced its right to terminate the PUA. In this regard, the Tribunal will first determine the conditions for the termination of the PUA under Polish law and then consider whether these conditions were fulfilled.

481. The conditions for terminating the PUA are specified in Section 10 of the PUA, Article 240 of the Polish Civil Code, and Article 33 Real Estate Management Act ("REM"). Section 10 of the PUA provides for the termination of the PUA if the land is used in a manner obviously contrary to its intended purpose:

> This Agreement for the perpetual usufruct of the land can be terminated in accordance with Art. 240 of the Polish Civil Code before the deadline specified herein should the perpetual usufructuary use the land in a manner obviously contrary to its intended purpose or fail to fulfil the obligations specified herein.

482. Article 240 of the Polish Civil Code in turn allows the termination of a perpetual usufructuary agreements, if the perpetual usufruct is used in a manner obviously contrary to such agreement:

> [a] contract of letting the State Treasury's land or the land which is owned by the entities of local government or their unions as perpetual usufruct may be terminated before the lapse of a time limit specified in it, if a holder of perpetual usufruct uses the land in a manner which is obviously contrary to its purpose specified in the contract, in particular where the holder, in contradiction with the contract, has not erected specified buildings or installations.[477]

483. Finally, Article 33 of REM contains a similar rule:

> The competent authority may demand the termination of a perpetual usufruct agreement before the expiry of the agreed period, pursuant to Article 240 of the Civil Code, if the usufructuary uses the property in a

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476 *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award dated 19 December 2016 (RLA-133), § 365.

477 Polish Civil Code, Article 240, p. 34 (CLA-52).

> manner inconsistent with the agreement, in particular, if the usufructuary did not develop the property within the prescribed time limit.[478]

484. The Claimant's expert [redacted] notes that in order to determine that the perpetual usufruct is used in a manner obviously inconsistent with the applicable perpetual usufruct agreement, (i) the breach of the perpetual agreement must be beyond doubt; and (ii) there should be no justified excuse for such breach.[479]

485. Thus, with due regard to [redacted] observations, in order to assess the correctness of the Polish courts' termination of the PUA, the Tribunal will analyse (i) whether the Property was used in a manner inconsistent with the PUA; and (ii) if so, whether the use of the Property in such inconsistent manner was justified.

486. The Tribunal finds that by destroying the Barracks, which formed the subject matter of the PUA, the Claimant did use the Property in a manner that was "obviously contrary" to the PUA's purpose. In this respect, the Tribunal concurs with the 2014 WCA Judgment, which held that:

> "now that the building is demolished, the agreed development is simply not possible".[480]

487. It seems evident to the Tribunal that, after the demolition of the Barracks, the PUA irreparably lost its "specific economic purpose", inherent to perpetual usufructuary agreements under Polish law.[481] To recall, the purpose of the usufruct was the adaptation and modernization of the Barracks. Consequently, by demolishing the Barracks, the Claimant used the Property in a manner obviously inconsistent with the PUA, within the meaning of Section 10 of the PUA, Article 240 of the Polish Civil Code, and Article 33 of the REM. The Tribunal will now assess whether such breach was justified.

488. The Claimant explains the demolition by the poor condition of the Barracks, which allegedly represented a threat to public safety. The Tribunal notes that the technical report of [redacted] on which the Claimant relies as a justification for the destruction of the Barracks, was prepared on 27 May 2010,[482] eighteen months before the demolition took place. Assuming that [redacted] accurately described the deteriorating conditions of the Barracks at the time, the Tribunal notes that the Claimant took no action to improve the condition of the Barracks. The Claimant did

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478 Act on Real Estate Management, Article 33(3) (RLA-83).

479 [redacted] Second Expert Report of 22 September 2017 (CER-4), § 27.

480 Court of Appeal in Warsaw Judgment of 19 December 2014 (C-232), p. 9.

481 [redacted] First Expert Report of 17 September 2015 (B), § 10.

482 [redacted] Technical Appraisal dated 27 May 2010 (C-183).

not perform any substantial preservation works between 2008 and 2011, even though it was under an obligation to do so pursuant to the PUA.[483] Neither did it take any action after [redacted] report in the one year and a half between the latter's report and the decision to demolish the Barracks.

489. In the Tribunal's view, the Claimant should at the very least have explored options to eliminate any threat to public safety that the Barracks allegedly presented. It should also have consulted with the City and the Warsaw Conservator before deciding to demolish the Barracks. Quite to the contrary, the Claimant applied to the City for the demolition permit[484] on Friday 21 October 2011. Then, without waiting to receive any response to its application, it immediately proceeded to the demolition. What is more, the demolition works were conducted in an obviously reckless manner: the site of the works was not fenced off, and there were no warning or information signs. Given that the Polish authorities were not informed of the demolition, they understandably could not supervise the process. From its side, it seems that the Claimant did not ensure the presence of any qualified person overseeing the safety of the process either. In any event, the Claimant has presented no convincing evidence that in October 2011 the Barracks indeed represented a real and imminent threat to public safety. Their demolition, depicted in the below photograph submitted by the Respondent[485], was therefore unjustified. In the view of the Tribunal, on the basis of the evidence before it, the demolition of the Barracks was a deliberate act of destruction of cultural and historical heritage, apparently motivated by the desire to maximize financial gain.

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483 R-PHB, § 45, referring to Transcript, Day 1, pp. 151-152.

484 Petition for Demolition Permit dated 21 October 2011 (C-199).

485 Amended SoD, p. 112.

490. In conclusion, by demolishing the Barracks, the perpetual usufructuary used the Property in a manner obviously inconsistent with the PUA. The demolition of the Barracks was not justified, and therefore the City was entitled to seek the termination of the PUA. It follows that the 2014 WCA Judgment properly enforced the Respondent's rights under the PUA and Polish law. Thus there has been no direct expropriation in breach of Article 4 of the Treaty.

3. FET Claim

a. Claimant's Position

491. The Claimant argues that under the FET standard "foreign investors are entitled to transparency, consistency and non-arbitrariness in a State's administrative treatment".[486] Relying on *Saluka v. Czech Republic*, *EDF v. Romania*, *CMS v. Argentina* and *Occidental v. Ecuador, Tecmed v. Mexico*, the Claimant further argues that legitimate expectations are a dominant element of the FET standard.[487] On this basis, it submits that:

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486 Amended SoC, § 431.

487 *Ibid.*, §§ 429-430, referring to *Saluka Investments BV v. the Czech Republic*, UNCITRAL, Partial Award of 17 March 2006, (CLA-30), § 302; *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award of 8 October 2009 (CLA-32), § 216; *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award of 12 May 2005 (RLA-257), 274-276; *Occidental Exploration and Production Co. v. The Republic of Ecuador*, UNCITRAL, Award of 1 July 2004, § 191 (CLA-31); *Tecnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003, § 154 (CLA-22).

i. The Respondent frustrated the Claimant's legitimate expectations;

ii. The Respondent acted in bad faith; and

iii. The Respondent discriminated against the Claimant.

492. The Claimant also notes that, contrary to the Respondent's assertions, Article 3(1) of the Treaty is not limited to customary international law. For the Claimant, the clarifying phrase "excluding any unjustified or discriminatory measure" shows a clear intention of the Contracting Parties to go beyond the requirements of customary international law.[488]

(i) Legitimate expectations

493. The Claimant submits that it possessed certain legitimate expectations regarding the development of the Property. In particular, it expected that:

i. the Polish authorities would allow to develop the Property for a sellable surface area of approximately 4,000 m2, and in any event 2,000 m2 at a minimum);

i. "the required authorizations would be granted according to the preliminary assurances that already existed at that point";

ii. the operation of its investment "would be unhindered by any hidden agenda"; and

iii. the PUA underpinning the real property rights "would not be terminated for reasons under the responsibility of the City itself". [489]

494. The Claimant asserts that the above legitimate expectations arose from a number of instruments and statements emanating from the Polish authorities, such as the 2002 Resolution, the 2007 Warsaw Conservator's recommendations, the 2008 Opinion of the National Centre, the 2009 Letter of the Provincial Conservator and the PUA itself.

495. The Tribunal notes, however, that the Claimant does not specify how exactly the alleged expectations were frustrated. Rather, without entering into any comprehensive analysis, the Claimant merely makes the broad statement that all Prior Measures constituted a breach of its legitimate expectations. [490] Therefore, in

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488 Transcript, Day 1, p. 52, lines 20-22.

489 Amended SoC, § 438.

490 *Ibid.*, § 439.

summarizing the Claimant's position below, the Tribunal has not only stated the Claimant's case on the sources of its expectations, but also, to the extent possible, reflected the Claimant's perception of the alleged breach.

1. The 2002 Resolution

496. The Claimant argues that it could legitimately expect that the PUA time limits would be extended because of the Respondent's promise recorded in the 2002 Resolution,[491] which provides in the relevant part as follows:

> [i]n the event of failure to keep to the deadlines specified herein an additional deadline shall be specified, and an additional annual fee referred to in Art. 63 of the Act on Real Estate Development shall be determined. [492]

497. The Claimant notes that, just like its predecessors, it filed numerous requests for extension of the time limits to extend the deadlines between 2005 and 2010, to which the Respondent never gave a positive reply, whereas the 2002 Resolution gave rise to the Claimant's legitimate expectations that the PUA deadlines would be extended upon the filing of a relevant request. Therefore, the Claimant appears to argue that, when the City ignored its requests and terminated the PUA, it frustrated the Claimant's legitimate expectations arising out of the 2002 Resolution.

2. The 2007 Warsaw Conservator's recommendations

498. The Claimant alleges that, according to the recommendations given by the Warsaw Conservator in 2007, the scope of the development of the Property extended to 4,000 sq.m. According to the Claimant, the Warsaw Conservator approved the proposed development plan, which envisaged the construction of a wing located perpendicularly to the Barracks, which was to have five ground floors above.[493]

499. For the Claimant, this was a binding "administrative promise" under Polish law, which is confirmed by [redacted] the Claimant's expert on administrative law. Thus, the Claimant could legitimately expect that further recommendations emanating from the Warsaw Conservator would be no less favourable than the ones given in 2007.

500. The Tribunal understands that it is the Claimant's case that its legitimate expectations created by the 2007 Warsaw Conservator's recommendations were frustrated by all

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491 *Ibid.*, § 437.

492 Board of Warsaw-Centrum Borough Resolution, 15 October 2002 (C-13), § 1.2.

493 Amended SoC, §§ 144-145.

subsequent Warsaw Conservator's recommendations, as well as by the City's refusal to grant the WZ decision in 2009.

501. The Tribunal also understands the Claimant to allege that the 2009 recommendations contradicted the conditions of the development of the Property stipulated in the 2005 WZ decision and the Building Permit.[494]

3. The 2008 Opinion of the National Centre

502. The Claimant further alleges that the Opinion of the National Centre was favorable to the development concept, which envisaged 4000 sq. m. of sellable area, pursued at the time. The Claimant appears to argue that its expectations were frustrated when the Warsaw Conservator failed to adequately consider the Opinion of the National Center in its recommendations of 5 January 2009 and 2 March 2009.

4. The 2009 Letter of the Provincial Conservator

503. The Claimant stresses that, on 11 March 2009, the Provincial Conservator stated that no building on the Property was entered into the Register, when the same Conservator entered the Barracks into the Register in January 2011. Such entry, which frustrated its legitimate expectations regarding the status of the Property, amounted to the violation of Article 3(1) of the Treaty.[495]

5. The PUA

504. Relying on its previous successful cooperation with the City, the Claimant contends that it could legitimately expect that cooperation to continue when it came to the development of the Property.[496] The Claimant argues that it had a legitimate expectation that the PUA would not be terminated as a result of the City's own failure to grant the necessary authorisations and to extend the deadlines stipulated by the Annex to the PUA.[497]

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494 *Ibid.*, § 437.

495 *Ibid.*

496 *Ibid.*, § 438.

497 *Ibid.*

(ii) The principle of good faith

505. In the Claimant's submission, the Respondent acted in bad faith throughout the operation of the Claimant's investment. First, the Respondent used the 1971 Decision and the Warsaw Conservator's recommendations "as a tool to deny the relevant authorisations to the Claimant".[498] The Claimant also suggests that the Provincial Conservator entered the Property into the Register in order to give the City a valid pretext to terminate the PUA.[499]

506. Second, the Claimant alleges that the City and the Museum located next to the Property had a hidden agenda, which prompted the City to terminate the PUA to the benefit of the Museum.[500] To prove the existence of the hidden agenda, the Claimant relies on the following facts:[501]

i. On 12 March 2008, the Museum objected to the issuance of a WZ decision, citing concerns of monument protection;

ii. On 15 December 2011, the Museum sent a public statement, which indicated its support for the termination of the PUA;

iii. On 3 February 2012, approximately one month before the commencement of those Court proceedings, the Museum formally requested that the City donate the Property to it;

iv. On 20 June 2013, the request was renewed;

v. On 26 February 2014, the Museum filed a request for suspension of the proceedings concerning the issuance of a WZ decision to the Claimant, because the Property was to be transferred to the Museum as soon as the decision on the termination of the PUA would become final;

vi. On 16 May 2014, the Museum applied for a WZ decision, in order to be able to use the Property as a car park for the Museum's visitors.

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498 *Ibid.*, §§ 442-443.

499 *Ibid.*, § 444.

500 *Ibid.*

501 *Ibid.*, §§ 95-110.

507. Third, the Claimant asserts that the Respondent could not invoke the demolition of the Barracks as the ground to terminate the PUA, since the demolition process was justified by the threat to human safety that the Barracks posed.[502]

(iii) The prohibition of discrimination

508. The Claimant alleges that the Respondent's conduct towards the Claimant was discriminatory and unjustified.[503] As to the latter, the Claimant invokes the hidden agenda between the City and the Museum described above. The Claimant relies on *EDF v. Romania* to argue that instances of "prejudice or personal preference" violate the FET standard.[504]

509. As to the discriminatory conduct, Claimant submits that [redacted] a company involved in similar real estate activities, obtained a WZ decision and a building permit for the development of a property located on [redacted] without difficulties. The Claimant underlines that [redacted] has started to commercialize a residential development of the same nature as that contemplated by Parkview Terrace, except that it is twice as big (over 9,400 sq. m), much higher (23 meters) and ultra-modern in design".[505]

510. The Claimant also refers to the case of [redacted] another real estate company, as an example of discrimination against the Claimant. [redacted] failed to meet the deadlines set by the relevant perpetual usufructuary agreement. In spite of that failure, the City did not call for the termination of the agreement.[506]

511. Finally, the Claimant submits that the Warsaw Conservator discriminated against the Claimant because she adopted two contradictory decisions.[507]

512. Relying on *Saluka*, the Claimant concludes that the Respondent discriminated against the Claimant in violation of Article 3(1) of the Treaty.

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502 *Ibid.*, § 445.

503 *Ibid.*, §§ 450-456.

504 *Ibid.*, §§ 451, 453.

505 *Ibid.*, § 398.

506 C-PHB, § 88.

507 *Ibid.*, § 102.

b. Respondent's Position

513. The Respondent argues that the FET standard enshrined in Article 3(1) of the Treaty does not go beyond the international minimum standard.[508] The Respondent relies on *Neer v. Mexico*, *Genin v. Estonia*, *Waste Management v. Mexico*, *Thunderbird v. Mexico*, *Mondev v. US*, *Lauder v. Czech Republic*, *CMS v. Argentina*, *Biwater Gauf v. Tanzania*, *Glamis Gold v. US*[509] to argue that the applicable FET standard encompasses only "a gross denial of justice, manifest arbitrariness, complete lack of due process, evident discrimination, a manifest lack of reason, or the protection of only basic, legitimate and reasonable expectations".[510]

514. In the Respondent's view, the conduct alleged to violate the Treaty falls short of reaching this threshold.[511]

(i) Legitimate expectations

1. The 2002 Resolution

515. The Respondent alleges that the 2002 Resolution could not create expectations for a mandatory extension of the PUA deadlines. First, the Respondent clarifies that the 2002 Resolution was an internal act, not addressed to any particular perpetual usufructuary.[512] Therefore, it could not be a source of expectations.

516. Second, the Respondent notes that, in order to extend the time for completion, the parties to the PUA must conclude an annex, similar to the one signed by the City and Artodex in 2002.[513] For this reason, a single request filed pursuant to the 2002 Resolution is not enough to amend the PUA.

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508 Amended SoD, § 536.

509 *Ibid.*, §§ 538-544, referring to *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States*, 15 October 1926, IV UNRIAA 61-62, § 4 (RLA-308); *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award of 25 June 2001, § 367 (RLA-309); *Waste Management v. Mexico* (No. 2), ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, § 98 (CLA-23); *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award of 26 January 2006, § 194 (RLA-310); *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award of 11 October 2002, § 127 (RLA-312); *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Award of 3 September 2001, § 292 (CLA-169); *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award of 12 May 2005, § 284 (CLA-28); *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, § 592 (CLA-36); *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award of 9 June 2009, § 627 (RLA-281).

510 *Ibid.*, § 544.

511 *Ibid.*, § 546.

512 *Ibid.*, § 448.

513 *Ibid.*, § 452.

517. Third, the Claimant's interpretation of the 2002 Resolution contradicts the law governing perpetual usufruct agreements in Poland, as confirmed by the Respondent's expert [redacted][514]

518. Fourth, the Respondent submits that, except in these proceedings, the Claimant never relied on the 2002 Resolution in order to extend the deadlines, neither did its predecessors.[515]

519. Finally, the Respondent alleges that the Claimant did not conduct an adequate risk assessment.[516] In 2008, when it invested in the Property, the Claimant knew that the time limits provided in Annex to the PUA had elapsed. Yet, it nevertheless decided to invest in the Property.[517] The Respondent relies on *Anderson v. Costa Rica* and *National Grid v. Argentina* to argue that any losses arising out of the Claimant's decision to invest in the Property must be borne solely by the Claimant.[518]

2. The 2007 Warsaw Conservator's recommendations

520. The Respondent contends that the Warsaw Conservator's recommendations do not qualify as administrative promise under Polish law, as they are mere guidelines that investors should follow in order to obtain WZ decisions and building permits.[519] As a result, they cannot give rise to any expectations, as confirmed by the testimony of [redacted] and the reports of [redacted] the Respondent's experts on monuments protection in Poland.

521. In any event, the Respondent posits that the recommendations issued by the Warsaw Conservator were never contradictory. The Respondent provides a detailed comparison of the requests made by the Claimant and its predecessors[520] and the

514 *Ibid.*, § 453.

515 *Ibid.*, § 455.

516 *Ibid.*, §§ 548-549.

517 *Ibid.*, § 85.

518 *Ibid.*, §§ 548-549.

519 *Ibid.*, § 187.

520 *Ibid.*, §§ 214, 218.

recommendations issued by the Warsaw Conservator in 2006,[521] 2007,[522] 2009,[523] 2011[524] and 2013.[525]

522. The Respondent specifically notes that the 2007 Recommendations as well as all later ones only authorized the construction of one additional floor above the Barracks, whereas the Claimant and its predecessors presented constantly changing development plans, which assumed the construction of two additional floors.[526]

523. The Respondent also asserts that the 2007 Recommendations do not contain any assurances that the Property's sellable area would amount to 4,000 sq. m. In respect of the Property's sales potential, the Claimant could rely only on the 2005 WZ Decision and the 2005 Building Permit, which allowed the development of only 1,790 sq. m. of sellable area.[527]

524. Overall, the Respondent alleges that the requests for WZ decisions filed by the Claimant and its predecessors ignored the 2007 Recommendations. For this reason, the Claimant could not expect the requests to be granted. Nor could it expect a successful development of the Property of up to 4,000 sq. m., when the 2005 WZ Decision and the Building Permit authorized only 1,790 sq. m.

3. The 2008 Opinion of the National Centre

525. The Respondent submits that not only is the Opinion of the National Centre not binding upon the Warsaw Conservator, but it also postdated the investment.[528] As a consequence, the Claimant could not derive any expectations from this opinion.

4. The 2009 Letter of the Provincial Conservator

526. The Respondent argues that in its 2009 Letter, the Provincial Conservator did not "promise" that the Barracks would never be entered into the Register.

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521 *Ibid.*, § 204.

522 *Ibid.*, § 208.

523 *Ibid.*, § 221.

524 *Ibid.*, § 254.

525 *Ibid.*, § 267.

526 *Ibid.*, § 190.

527 *Ibid.*, § 559.

528 *Ibid.*, § 562.

527. The Respondent alleges that the Claimant was aware at all relevant times that the Property was subject to conservation protection.[529] In this context, it refers to the facility application prepared by [redacted] Advisors and Section 3.2 of the PUA, which requires the Warsaw Conservator's approval. The Respondent emphasizes that, because the Claimant and its predecessors applied for the Warsaw Conservator's recommendations several times, they must have been aware that the Barracks were subject to protection and that the Warsaw Conservator's recommendations were in fact necessary.

528. Moreover, the Respondent notes that the 2009 Letter was issued on 11 March 2009, five months after the Claimant made its investment. Hence that opinion could not create any legitimate expectations forming the basis for the Claimant's investment.[530]

5. The PUA

529. The Respondent maintains that, at the time the Claimant made its investment, the PUA deadlines had been exceeded by almost two years. As a result, so points the Respondent, Article 240 of the Polish Civil Code and Article 33 of the REM, allowed the City to terminate the PUA. Moreover, the Respondent emphasizes that the Claimant could in any event not expect the PUA to remain valid after the demolition of the Barracks, the renovation and adaptation of which was precisely the purpose of the PUA.[531]

(ii) The principle of good faith

530. According to the Respondent, the Claimant's submissions do not reach the threshold of bad faith under international law.[532] In any event, the Respondent's authorities always acted in good faith.

531. First, the Respondent contends that the 1971 Decision was applied within the scope of the Warsaw Conservators' discretion and in accordance with Polish law. This was confirmed by the Polish courts on numerous occasions.[533]

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529 *Ibid.*, §§ 552-553.

530 *Ibid.*, § 563.

531 *Ibid.*, § 438.

532 *Ibid.*, § 566.

533 *Ibid.*, § 565.

532. Second, the Respondent maintains that the City did not terminate the PUA arbitrarily on its own motion. Rather, the City had to argue the termination of the PUA in front of three courts, none of which the Claimant ever accused of acting in bad faith. [534]

533. Third, the Respondent points to the fact that the PUA was terminated only after the complete demolition of the Barracks, which was contrary to the PUA and the 2005 Building Permit.[535]

534. Finally, the Respondent argues that the City did not have any "hidden agenda" to favor the Museum to the Claimant's detriment. The Museum's concerns were justified by the Claimant's reckless development of the Property.[536]

(iii) The prohibition of discrimination

535. The Respondent makes two submissions in respect of discrimination.[537] First, the Respondent reiterates that the City never had any hidden agenda with the Museum.[538] Second, the Respondent submits that [redacted] project is significantly different from that of the Claimant, as the property is located further away from the Lazienki park, and the project does not involve preservation of a historical building. In the Respondent's words, [redacted] develops an empty plot of land, without any premises, not to mention historical objects".[539] Furthermore, the perpetual usufruct agreement with [redacted] does not impose an obligation to consult the Warsaw Conservator. Thus, [redacted] project is different from the Claimant's and no discrimination has occurred.[540]

c. Analysis

536. First, the Tribunal will determine the content of the FET standard contained in Article 3 of the Treaty (i). Second, the Tribunal will analyse whether the Respondent frustrated the Claimant's legitimate expectations, if any (ii). Third, the Tribunal will assess whether the Respondent ever acted in bad faith *vis-à-vis* the Claimant's investment (iii). Finally, the Tribunal will determine whether the Respondent discriminated against the Claimant (iv).

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534 *Ibid.*, § 566.

535 *Ibid.*, §§ 568-569.

536 *Ibid.*, § 571.

537 *Ibid.*, §§ 572-573.

538 *Ibid.*, §§ 369-386.

539 R-PHB, § 24.

540 Amended SoD, §§ 387-391.

(i) FET Standard

537. Article 3 of the Treaty has the following content:

> Each Contracting Party shall accord in its territory to investments made by investors of the other Contracting Party fair and equitable treatment, excluding any unjustified or discriminatory measure that could impede the management, maintenance, use, enjoyment or liquidation thereof.

538. A threshold question is whether Article 3(2) of the Treaty reflects the so-called customary international law minimum standard of treatment, as the Respondent argues, or whether it embodies an autonomous broader standard, as the Claimant submits. The Tribunal observes that the BIT does not refer to "international minimum standard" or similar formulations, unlike other treaties.[541] The Treaty speaks of "fair and equitable treatment" and adds the phrase "excluding any unjustified or discriminatory measure that could impede the management, maintenance, use, enjoyment or liquidation" of the investment. The questions are thus what "fair and equitable" means,[542] and whether that meaning is restricted by the wording "excluding any unjustified and discriminatory measures".

539. In light of the rules of treaty interpretation as codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) and in particular of the primacy of the text, the Tribunal first notes, like a number of tribunals, that the plain meaning of the terms "fair and equitable" does not provide much assistance.[543] The tribunal in *S.D. Myers v. Canada* stated that unfair and inequitable treatment meant "treatment in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective".[544] As noted in *Saluka*, "[t]his is

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541 See, e.g. NAFTA, Article 1105, which is entitled "Minimum Standard of Treatment".

542 The Tribunal further considers that, even if FET were to be equated to the customary international law minimum standard, the public international law principles concerning the treatment of aliens have undergone significant developments since the *Neer* case, on which the Respondent relies as the applicable benchmark to define FET. In this sense, see, e.g., *ADF v. United States*, Award, § 179, in the context of NAFTA (holding that "what customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 when the Award in the *Neer* case was rendered. For both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development"); *RDC v. Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, § 218, in the context of the DRCAFTA (concluding that the minimum standard of treatment is "constantly in a process *of* development", including since *Neer's* formulation). The Tribunal also agrees with the *El Paso* tribunal that this discussion is "somewhat futile" and "the issue is not one of comparing two undefined or weakly defined standards; it is to ascertain the content and define the BIT standard of fair and equitable treatment". See *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, § 335.

543 See, e.g., *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award of 11 December 2013, § 504.

544 *S.D. Myers Inc. v. Government of Canada*, UNCITRAL (NAFTA), Partial Award of 13 November 2000, § 263.

probably as far as one can get by looking at the 'ordinary meaning' of the terms of Article 3.1 of the Treaty".[545]

540. To elucidate the ordinary meaning of similarly worded FET provisions in investment treaties, arbitral tribunals have identified a number of inherent components of the standard. For instance, the tribunal in *Rumeli v. Kazakhstan* held that:

> "The parties rightly agree that the fair and equitable treatment standard encompasses inter alia the following concrete principles: - the State must act in a transparent manner; - the State is obliged to act in good faith; - the State's conduct cannot be arbitrary, grossly, unfair, unjust, idiosyncratic, discriminatory, or lacking in due process; - the State must respect procedural propriety and due process. The case law also confirms that to comply with the standard, the State must respect the investor's reasonable and legitimate expectations."[546]

541. A number of tribunals have insisted on the notion of legitimate expectations as the "dominant element" of the FET standard. So for example *Saluka*:

> 302. The standard of "fair and equitable treatment" is therefore closely tied to the notion of legitimate expectations which is the dominant element of that standard. By virtue of the "fair and equitable treatment" standard included in Article 3.1 the Czech Republic must therefore be regarded as having assumed an obligation to treat foreign investors so as to avoid the frustration of investors' legitimate and reasonable expectations. As the tribunal in Tecmed stated, the obligation to provide "fair and equitable treatment" means: to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.[547]

542. In the same vein, the tribunal in *EDF v. Romania* held that:

> 216. The Tribunal shares the view expressed by other tribunals that one of the major components of the FET standard is the parties' legitimate and reasonable expectations with respect to the investment they have made.[548]

543. While formulations vary across awards and the Tribunal does not necessarily endorse every nuance set out in prior decisions, a consensus emerges about the core components of FET, which include the protection of legitimate expectations, the protection against conduct that is arbitrary, unreasonable, disproportionate and lacking in good faith, and the principles of due process and transparency.

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545 *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award of 17 March 2006 (CLA-30), § 297. See also *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award of 11 December 2013, § 504.

546 *Rumeli Telekom A.S. and Telsim Mobil TElekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, § 761; See also eg. *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, § 284.

547 *Saluka Investments BV v. the Czech Republic*, UNCITRAL, Partial Award of 17 March 2006, (CLA-30), § 302.

548 *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award of 8 October 2009 (CLA-32), § 216.

544. The next question for the Tribunal to answer is whether the addition in Article 3 of the Treaty of the words "excluding any unjustified or discriminatory measure that could impede the management, maintenance, use, enjoyment or liquidation" of the investment limits the meaning of FET as described. In this vein, the Respondent argues that the standard is restricted to gross violations.[549] In application of Article 31 of the VCLT, the Tribunal cannot adopt this understanding of Article 3. First, the ordinary meaning of the words "fair and equitable" cannot simply be ignored and replaced by "unjustified" and "discriminatory". Second, the concept of an "unjustified measure" is quite broad and appears to confirm rather than do away with the notion of "fair and equitable" treatment. This conclusion is further corroborated by the awards in *Saluka* and *EDF* which interpreted provisions similar to Article 3 of the Treaty and adopted the same conclusion.

(ii) Legitimate expectations

545. In line with the standard set out above, a State fails to grant FET if it does not respect the investor's legitimate expectations. The main components of the doctrine of FET and legitimate expectations is helpfully summarised by the tribunal in *Antaris GmbH and Göde v. Czech Republic*.[550] To qualify as legitimate, the investor's expectations must be based on assurances (or representations) (i) given by the State in order to encourage the making of the investment; (ii) addressed specifically to the investor; (iii) sufficiently specific in content. In addition, an investor must establish that it placed reliance upon the assurance (or representation). While some arbitral decisions may have chosen a broader definition of legitimate expectations, the cumulative three-pronged test just referred to is confirmed by the jurisprudence cited by the Parties[551] and numerous other investment treaty awards.[552]

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549 See paragraph 513 of the Award.

550 *Antaris GMBH and Göde v. Czech Republic,* Award of 2 May 2018, § 360.

551 *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award of 18 August 2008 (CLA-35), § 340; *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No ARB(AF)/99/1, Award of 16 December 2002 (CLA-192), §§ 148-149; *Frontier Petroleum Services Ltd v The Czech Republic*, UNCITRAL/PCA, Final Award of 12 November 2010 (CLA-184), § 287.

552 *Cargill, Incorporated v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, Award of 5 March 2008, § 490; El *Paso Energy International Company v. The Argentine Republic*, Award of 31 October 2011, §§ 375–377; *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award of 30 November 2011, § 10.3.17; *Peter A. Allard v. The Government of Barbados*, PCA Case No. 2012-06, Award of 27 June 2016, §§ 194, 220-225, 287; *Venezuela Holdings B.V. and others (formerly Mobil Corporation and others) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award of 9 October 2014, § 256; *BG Group Plc v The Republic of Argentina*, UNCITRAL, Final Award of 24 December 2007, § 310; *Antaris GmbH and Göde v. Czech Republic,* Award of 2 May 2018, § 360.

546. The Claimant relies on several documents issued by the Polish authorities as a source of its alleged legitimate expectations. The Tribunal will review each one individually and assess whether it gave rise to legitimate expectations with respect to the development of the Property.

547. In doing so, the Tribunal will pay particular attention to the chronology. Indeed, the Claimant argues that it could legitimately expect the development of the Property with a sellable area of 4,000 sq. m., when it made the investment in 2008. However, several of the documents invoked as basis for that expectation were issued after 2008.

1. The 2002 Resolution

548. As the Tribunal determined earlier,[553] the 2002 Resolution provides no representation or other assurance that the PUA time limits would be extended, because these limits could only be changed by entering into an annex to the PUA.

549. Moreover, the Tribunal recalls that the 2002 Resolution is an internal document, which was not addressed to usufructuaries and *a fortiori* not addressed specifically to the Claimant. In the judgment of 2 June 2016, quoted above (para. 426 of the Award), the Supreme Court characterized a resolution as "an internal act of the municipal authority" which "cannot be a source of any obligation" in connection with the perpetual usufruct relationship.[554]

550. Furthermore, the Claimant did not take the 2002 Resolution into account when it decided to invest in the Property, as [redacted] confirmed during the Hearing.[555]

551. Thus, the 2002 Resolution is incapable of being characterized as a representation that could give rise to any legitimate expectations about the development of the Property.

2. The 2007 Warsaw Conservator's recommendations

552. The Tribunal will now examine whether the Claimant could have legitimately expected the Warsaw Conservator not to change her position on the development of the Property as it was reflected in the 2007 recommendations.

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553 See paragraphs 419-427 of the Award.

554 Supreme Court Judgment dated 2 June 2016 (RLA-80), pp. 15-16.

555 R-PHB, § 86, referring to Transcript, Day 1, p. 131, lines 16-23.

553. As was already established, the recommendations of the Warsaw Conservator were consistent with each other at all relevant times.[556] This finding makes it unnecessary for the Tribunal to analyse the Parties' arguments on whether the Warsaw Conservator was obligated to maintain her views about the development of the Property as a matter of Polish law. In any event, the Tribunal finds that she did. That said, for the purposes of the FET claim, the Tribunal's determination that the Warsaw Conservator's recommendations were not inconsistent is sufficient to dismiss the Claimant's allegations about the frustration of its expectations.

554. Moreover, the Tribunal notes that the Warsaw Conservator recommended the construction of no more than one to two floor above the Barracks.[557] Thus, the Claimant had no basis to expect that the Property would permit the development of 4,000 sq.m of sellable surface. None of the Warsaw Conservator's recommendations mentions such a figure.

555. Finally, during the Hearing, [redacted] confirmed that [redacted] did not properly review the 2007 recommendations before the decision to invest in the Property.[558]

556. In light of these facts, the Claimant cannot be said to have received – or placed reliance upon - a representation from the 2007 recommendations of the Warsaw Conservator, from which any legitimate expectation could be derived.

3. The 2008 Opinion of the National Centre

557. The next document on which the Claimant relies is the Opinion of the National Center rendered in 2008, which in pertinent part reads as follows:

> ... it would be better to leave the former barracks building in its historical height only with the possibility of introduction of a usable attic with roof windows. If the planned superstructure is added to the building it is also important that the superstructure does not damage significant architectural and aesthetic properties of the building presented to the West - as viewed from the Łazienki Królewskie park and from the east as viewed along ul. 29 Listopada from ul. Szwoleżerów.
>
> The adding of one storey to the building and adaptation of the attic, conducted in accordance with the recommendations of the Warsaw Monuments Conservator - using modern forms, according to the Team of Experts, must be conducted using very modest architectural forms that visually do not overwhelm the original two-storey block of the building.
>
> According to the Team of Experts the fact that planned investment is located in immediate vicinity of the historical complex of Łazienki Królewskie does not prevent construction of new buildings but imposes the

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556 See paragraphs 445-452 of the Award.

557 See paragraphs 445-452 of the Award.

558 R-PHB, § 88 referring to Transcript, Day 1, p. 135, lines 16-21.

> need to use architectural forms that do not complete with the historical neighbourhood and the use of shapes with neutral, clam tectonics.

558. The National Centre is a public expert body of consultative character, not forming part of the conservation authority in Poland.[559] As such, its opinion could not give rise to legitimate expectations. Neither was the Claimant (and its predecessors) entitled to expect that the Warsaw Conservator or the City would follow that opinion.

559. Further, the Opinion of the National Centre corresponds to the recommendations of the Warsaw Conservator made in 2009. The National Centre also underlined that the perpetual usufructuary was allowed to build only one additional storey and one additional attic, which could not overwhelm the Museum. The same recommendations were made by the Warsaw Conservator in 2007 and 2009.

560. Finally, the Opinion of the National Centre postdates the Claimant's decision to invest. Therefore, the Claimant could not rely on it at the critical time.

561. Here again, the Claimant cannot be said to have received – or placed reliance upon - a representation from which any legitimate expectation could be derived.

4. The 2009 Letter of the Provincial Conservator

562. The Claimant further invokes the 2009 letter of the Provincial Conservator, arguing that it essentially confirmed that the Barracks were not included individually in the Register and, therefore, lacked protection.

563. It is indeed correct that the Provincial Conservator stated that the Barracks were not individually entered into the Register. At the same time, the Provincial Conservator noted that the Barracks were located within the area covered by the 1971 Decision. He expressly drew Parkview Terrace's attention to existing restrictions:

> This decision imposes certain restrictions to be complied with by the owner or holder of the property at the construction stage.[560]

564. Thus, even though the Provincial Conservator stated that the Barracks were not recorded in the Register, that statement did not imply that the Barracks were not otherwise protected. Neither did it mean that the Barracks would never be entered

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559 First Expert Report of [redacted] of 14 March 2019 (RER-7), § 36.

560 Letter from the Provincial Monuments Conservator to Parkview Terrace, 11 March 2009 (C-25).

into the Register, as [redacted] the expert engaged by the Claimant, did confirm.[561]

565. Finally, here again the chronology of events defeats the Claimant's argument. Indeed, the Provincial Conservator issued the letter in question five months after the Claimant made its investment.

566. As a result, once more, the evidence before the Tribunal indicates that the Claimant cannot be said to have received – or placed reliance upon - a representation in relation to the 2009 letter from the Provincial Conservator.

5. The PUA

567. Finally, the Claimant relies on the PUA and claims that it had a legitimate expectation that it would not be terminated.

568. The Tribunal has held that there was a valid ground for termination of the PUA, as the Barracks had been demolished in 2011 and the purpose of the PUA was merely frustrated.[562] By demolishing the Barracks, the Claimant used the Property in a manner obviously inconsistent with the PUA.[563] In the circumstances, there can be no question of legitimate expectations of non-termination.

6. Conclusion

569. On this basis, the Tribunal concludes that the Claimant has failed to demonstrate that it had any legitimate expectations on the basis of the documents and statements by the Polish authorities in connection with the development of the Property.

(iii) The principle of good faith

570. The Claimant argues that the Polish authorities acted in bad faith by using the 1971 Decision as a tool to deny the Claimant and its predecessors the necessary authorizations for the development of the Property. In support of its position, the Claimant relies on Prof. Schreuer who has written that "[b]ad faith action by the host

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561 R-PHB, § 95, referring to Transcript, Day 2, p. 94, lines 9-14.

562 See paragraphs 473-490 of the Award.

563 See paragraphs 473-490 of the Award.

State includes the use of legal instruments for purposes other than those for which they were created".[564]

571. The Tribunal sees no instance of bad faith on the Respondent's side. On the contrary, as already established,[565] the Warsaw Conservator and the City properly applied Polish law when refusing to issue a new WZ decision in 2009, because the proposed development encroached upon the Museum's land and did not comply with the building height restrictions as set forth by the Warsaw Conservator's recommendations.

572. It should also be noted that the Claimant's predecessors were in the possession of the 2005 WZ Decision and Building Permit, which enabled them to develop the Property, which is another aspect of the Claimant's bad faith submission, had they chosen to do so.

573. As to the Museum's involvement, the Tribunal has already established that the City had no hidden agenda with the Museum.[566] The termination of the PUA was prompted by the demolition of the Barracks,[567] nor by a conspiracy between the City and the Museum.

(iv) The prohibition of discrimination

574. The Claimant contends that the projects of [redacted] and [redacted] which are supposedly similar to the Claimant's, were afforded better treatment.

575. As a general matter, the Tribunal notes that the Claimant has provided rather limited information about the alleged similarities between the Property and these two other projects. However, even such limited information reveals that these projects were markedly different from the Claimant's.

576. It is true that [redacted] also failed to comply with the time limits set in its perpetual usufructuary agreement and that this failure did not cause the termination of such agreement. However, [redacted] situation cannot be compared to the Claimant's circumstances. What triggered the termination of the PUA was not the delay in completion, but the demolition of the Barracks, a critical fact not found in [redacted] situation,

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564 C. Schreuer, Fair and Equitable Treatment in Arbitral Practice, Journal of World Investment and Trade, Vol. 6, Issue 3, 2005, p. 385 (CLA-24).

565 See paragraph 445-452 of the Award.

566 See paragraphs 453-457 of the Award.

567 See paragraphs 473-490 of the Award.

577. As to [redacted] project, even though it is located close to the Property, it cannot reasonably be compared with the Claimant's because it does not involve the use or modernization of a protected historical building. As a consequence, it was not subject to similar requirements and recommendations from the authorities.

578. As a result, the Tribunal is bound to conclude that the Respondent did not discriminate against the Claimant by favouring other investors in like circumstances, as the circumstances cannot said to have been 'like'.

(v) Conclusion

579. In light of the foregoing discussion and of the conclusions set forth in paragraphs 569, 573 and 578, the Tribunal holds that the Respondent did not breach its obligations to accord the Claimant and its investment fair and equitable treatment under Article 3 of the Treaty. The claim based on such provision is therefore dismissed.

D. OVERALL CONCLUSION

580. On the basis of its analysis, the Tribunal reaches the result that it has jurisdiction over the claims arising out of Articles 3 and 4 of the Treaty. However, on the evidence before the Tribunal these claims are not well-founded and must necessarily therefore be dismissed. Consequently, there is no requirement for the Tribunal to address the Respondent's argument that the Claimant does not deserve Treaty protection on the ground of the clean hands doctrine.

V. COSTS

A. CLAIMANT

581. The Claimant requests that the totality of its costs in the arbitration be borne by the Respondent. The Claimant seeks the sum of EUR 3,542,543.21 and GBP 12,100.00.[568]

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[568] CS on Costs, § 3.

582. A breakdown of the costs claimed is reflected in the table below:[569]

CATEGORY	JURISDICTION	MERITS	TOTAL
A. SCC ADVANCES ON COSTS			
B. LEGAL FEES			
C. EXPERT FEES			
D. TRANSLATION FEES			
E. EXPENSES (DISBURSEMENTS)			
		GRAND TOTAL	€3,542,543.21 £12,100.00

583. Should the Tribunal decide that the Respondent is not obliged to bear the entirety of the costs of the present proceedings and that they should be allocated between the Parties, the Claimant requests that, at the very least, the Respondent should bear the costs incurred as a result of its various jurisdictional objections.[570]

584. Finally, the Claimant also requests interest on the foregoing amounts at the rate of 7% annually from the date of the award, [571] compounded quarterly.[572]

B. RESPONDENT

585. The Respondent requests that the Claimant pay the full costs of arbitration, including costs related to the emergency arbitration, which the Claimant lost.[573]

586. The Respondent requests the reimbursement of the costs incurred by the Ministry of Development of PLN 1,937,675.93 and by the General Counsel to the Republic of Poland of PLN 1,875,151.20 and GBP 7,232. [574]

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569 CS on Costs, Annex A, p. 2.

570 These costs equal EUR 1,097,849.53 and GBP 12,100.00; *Ibid.*, § 5.

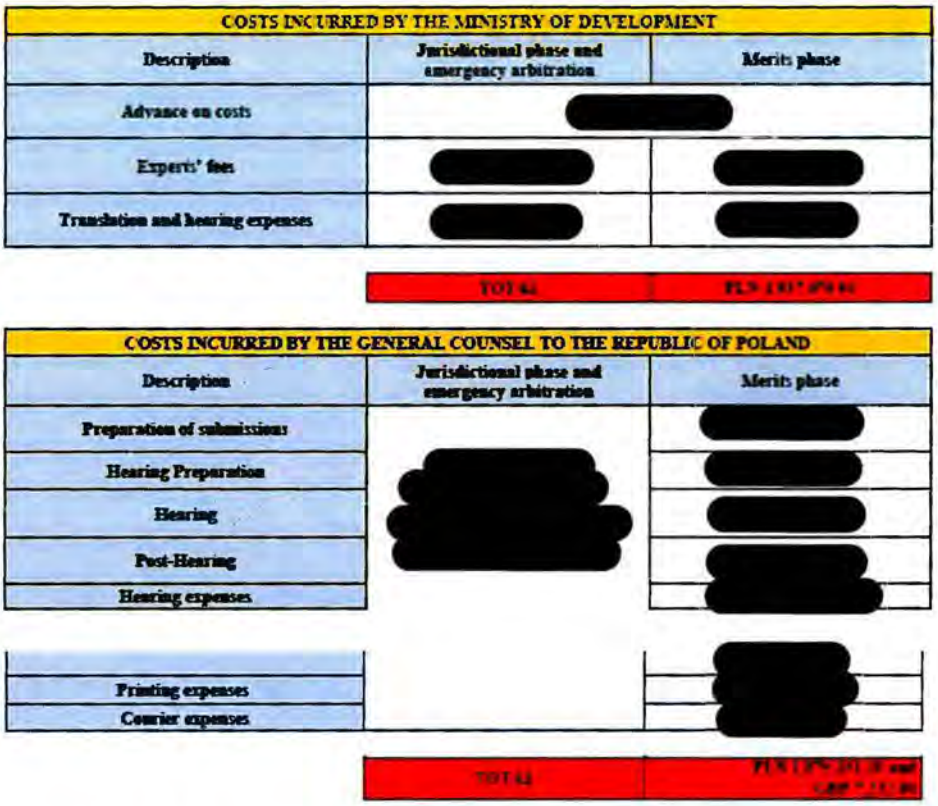
571 *Ibid.*, § 5.

572 Amended SoC, §§ 587-588.

573 RS on Costs, §§ 2-3.

574 *Ibid.*, § 10.

587. A breakdown appears in the table below:[575]



COSTS INCURRED BY THE MINISTRY OF DEVELOPMENT		
Description	Jurisdictional phase and emergency arbitration	Merits phase
Advance on costs		[redacted]
Experts' fees	[redacted]	[redacted]
Translation and hearing expenses	[redacted]	[redacted]
TOTAL		

COSTS INCURRED BY THE GENERAL COUNSEL TO THE REPUBLIC OF POLAND		
Description	Jurisdictional phase and emergency arbitration	Merits phase
Preparation of submissions	[redacted]	[redacted]
Hearing Preparation		[redacted]
Hearing		[redacted]
Post-Hearing		[redacted]
Hearing expenses		[redacted]
		[redacted]
Printing expenses		[redacted]
Courier expenses		[redacted]
TOTAL		

588. The Respondent seeks interest at an annual interest rate of 2.1%, compounded annually.[576]

C. ANALYSIS

1. Legal Framework

589. Both Parties seek an award of the entirety of the costs related to this arbitration, including the legal fees and expenses incurred in connection with these proceedings, the Arbitrators' fees and expenses and the SCC administrative costs. The Tribunal notes that the SCC Rules applicable by virtue of paragraph 63 of the ToA grant the Tribunal certain discretion when awarding costs, which the Parties do not dispute. Neither do the Parties dispute that the allocation of costs is governed by the SCC Rules, specifically Articles 43 and 44.

590. Article 43 of the SCC Rules defines the costs of the arbitration as the fees of the Tribunal, the SCC's administrative fee and the expenses incurred by the Tribunal and

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575 RS on Costs, p. 3.

576 Amended SoD, § 730.

the SCC (the "Arbitration Costs"). Article 44 of the SCC Rules governs the allocation of "any reasonable costs incurred by another party, including costs for legal representation" (the "Party Costs"). Articles 43 and 44 of the SCC Rules also provide the following guidance on cost allocation:

> Article 43
>
> ... 5. Unless otherwise agreed by the parties, the Arbitral Tribunal shall, at the request of a party, apportion the costs of the Arbitration between the parties, having regard to the outcome of the case and other relevant circumstances.
>
> Article 44
>
> Unless otherwise agreed by the parties, the Arbitral Tribunal may in the final award upon the request of a party, order one party to pay any reasonable costs incurred by another party, including costs for legal representation, having regard to the outcome of the case and other relevant circumstances.

591. Thus, the SCC Rules grant the Tribunal a wide discretion in determining the allocation of costs among the Parties, as long as the Tribunal has "regard to the outcome of the case and other relevant circumstances".

592. During the first stage of these proceedings, the Respondent invoked a number of jurisdictional objections with respect to the scope of the Arbitration Agreement, the existence of a protected investment and protected investor. All of these objections were denied in the Award on Jurisdiction, as varied by the judgment of the English High Court.

593. During the second phase, the Respondent raised a new jurisdictional objection on the basis of the *Achmea* Judgment. The Claimant objected to the admissibility of this objection, relying *inter alia* on the principles of *functus officio* and *res judicata*. As a result, in addition to the merits of the dispute, this Award deals with the Respondent's *Achmea* Objection as well as the defences raised by the Claimant. After analysis of a number of submissions by the Parties and the EC, the Tribunal eventually denied the jurisdictional objection and proceeded to the assessment of the merits of the case.

594. However, despite the determination that jurisdiction covered potential violations of Article 3 and 4 of the Treaty, the Claimant's claims that the Respondent expropriated its investment and failed to accord it fair and equitable treatment turned out not to be well-founded in fact and law. More specifically, the Respondent was successful in its defense and demonstrated that its measures were justified in light of the Claimant's demolition of the Barracks, which enjoyed a high level of protection under Polish law. The Tribunal thus dismissed the claims in their entirety.

595. In these circumstances, mindful of its wide discretion afforded in cost allocation and with due regard to the Parties' relative success and failure in submitting their claims and defenses, the Tribunal considers that the cost allocation that most appropriately reflects the outcome of the proceedings is for the Claimant to bear the entirety of the Arbitration Costs, its own Party Costs and contribute towards the Respondent's Party Costs.

2. Arbitration Costs

596. The SCC has fixed the Tribunal's and the SCC's fees and expenses as follows:

Arbitrators' Fees

Prof. Gabrielle Kaufmann-Kohler (including Tribunal Secretary compensation) - EUR 250,000;

Sir David A R Williams, KNZM QC - EUR 150,000;

Prof. Philippe Sands QC - EUR 150,000.

Courier Expenses

Prof. Gabrielle Kaufmann-Kohler - EUR 150;

Sir David A R Williams, KNZM QC - EUR 150;

Prof. Philippe Sands QC - EUR 150.

Administrative Fee

Stockholm Chamber of Commerce - EUR 30,229.

Costs

Stockholm Chamber of Commerce - EUR 83,327.48.[577]

597. It follows that the total amount of the Arbitration Costs equals EUR 664,006.48.

598. In light of the earlier determination that the Claimant shall bear the entirety of the Arbitration Costs,[578] the Claimant shall thus reimburse the Respondent the amount of

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577 The amount of EUR 83 327,48 includes the following expenses:

- Prof. Gabrielle Kaufmann-Kohler and Eva Kalnina (expenses) - EUR 11,784.7;
- Sir David A R Williams KNZM QC (expenses) - EUR 13,929.96;
- Fee to the Tribunal's expert (Prof. ML Lennarts) - EUR 16,500;
- Hearing facilities - EUR 24,343.90;
- OPUS 2 - EUR 16,768.91.

578 See Paragraph 595 of the Award.

PLN 1,434,300.28 towards the Arbitration Costs, which the Respondent paid as an advance on costs.[579]

3. Party Costs

599. At the outset, the Tribunal observes that Party Costs include the entirety of the costs associated with legal representation (i.e., costs of external legal counsel, expert costs, associated expenses (travel, translation, courier)), etc. The Parties appear to have the same understanding in this respect.

600. According to the Respondent, its Party Costs are composed of (i) the work performed by the General Counsel to the Republic of Poland (the "PGRP") and (ii) the various expenses incurred by the Ministry of Development (the "MoD"). The PGRP paid the legal fees of external counsel and incurred its own costs of legal representation, all in the amount of PLN 1,875,151.20 and GBP 7,232.00.[580] The MoD paid the experts' fees, the hearing expenses, the translation costs, and other expenses in the amount of PLN 503,375.65.[581] The total amount of the Respondent's Party Costs incurred by the MoD and PGPR thus amounts to GBP 7,232.00 and PLN 2,378,526.85 (i.e., PLN 1,875,151.20 (costs incurred by the PGRP) + PLN 503,375.65 (costs incurred by the MoD)).

601. The Tribunal also notes that the PGRP has claimed "in-house" costs as a result of the work performed by its employees at the average hourly rate of PLN [redacted] approx. EUR[redacted] per hour.[582] In principle, the Tribunal finds the Respondent's request for reimbursement of these costs to be reasonable, and the Claimant too has raised no objection in this regard.

602. For completeness, the Tribunal also notes that the Parties have not challenged the reasonableness of the costs incurred by the other side, nor pointed to any conduct that would have led to time or cost inefficiencies in this arbitration. Indeed, the Tribunal considers that both sides conducted this arbitration fairly and professionally, which

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579 RS on Costs, p. 3.

580 *Ibid.*

581 The amount of PLN 503,375.65 includes:

- Experts' fees incurred by the MoD at all stages of this arbitration = [redacted] +
- Translation and hearing expenses incurred by the MoD at all stages of this arbitration = [redacted] (see RS on costs, p.3).

582 RS on Costs, § 6.

permitted the Tribunal to focus its efforts on a fair and efficient adjudication of this dispute.

603. In sum, having due regard to the Parties' relative success and failure over the course of this arbitration, the Tribunal finds it appropriate and reasonable to order the Claimant to pay the Respondent a lump sum of PLN 850,000 as a contribution towards the Respondent's Party Costs.

4. Interest

604. The Tribunal further observes that both Parties seek the reimbursement of costs with interest from the date of the Award.[583] However, the Parties disagree as to the applicable interest rate. The Claimant puts forward a rate of 7% annually,[584] compounded quarterly.[585] The Respondent claims a rate based on two-year Polish government bonds, with annual interest rate of 2.1%, compounded annually.[586]

605. In light of the interest rates which have prevailed in the financial markets for some time now, which are very low and sometimes even negative, the Tribunal considers that the Respondent's claimed interest rate of 2.1% compounded annually is appropriate. Applying the fixed rate of 7% proposed by the Claimant would result in significant overcompensation, as rightly pointed out by the Respondent.

D. Conclusion

606. In light of the above, the Claimant shall reimburse the Respondent's share of the Arbitration Costs in the amount of PLN 1,434,300.28 and contribute PLN 850,000 towards the Respondent's Party Costs. The Claimant shall thus pay to the Respondent PLN 2,284,300.28.

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583 CS on Costs, § 7; Amended SoD, §§ 730-731.

584 CS on Costs, § 7.

585 Amended SoC, §§ 587-588.

586 Amended SoD, § 730.

VI. OPERATIVE PART

607. In light of all the foregoing analysis of the facts and the law, the Tribunal:

(i) NOTES that its jurisdiction over the claims arising out of Articles 3 and 4 of the Treaty has been established;

(ii) DISMISSES the Claimant's claims;

(iii) ORDERS the Claimant to bear the entirety of the Arbitration Costs and its own Party Costs, and contribute towards the Respondent's Party Costs. The Claimant shall thus pay to the Respondent the amount of PLN 2,284,300.28 (i.e., PLN 1,434,300.28 + PLN 850,000) together with interest at a rate per annum of 2.1%, compounded annually, from the date of the Award until payment in full.

Seat of the arbitration: London, the United Kingdom

Date: 29 April 2020

Sir David A R Williams, KNZM QC
Arbitrator

Prof. Philippe Sands, QC
Arbitrator

Prof Gabrielle Kaufmann-Kohler
Presiding Arbitrator

Seat of the arbitration: London, the United Kingdom

Date:

Sir David A R Williams, KNZM QC

Arbitrator

Prof. Philippe Sands, QC

Arbitrator

29 April 2020

Prof. Gabrielle Kaufmann-Kohler

Presiding Arbitrator

Seat of the arbitration: London, the United Kingdom

Date: 24 April 2020

Sir David A R Williams, KNZM QC

Arbitrator

Prof. Philippe Sands, QC

Arbitrator

Prof. Gabrielle Kaufmann-Kohler

Presiding Arbitrator