

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**IN THE MATTER OF AN ARBITRATION PROCEEDING UNDER THE
AGREEMENT BETWEEN THE REPUBLIC OF AUSTRIA AND THE REPUBLIC OF
POLAND CONCERNING THE ENCOURAGEMENT AND PROTECTION OF
INVESTMENTS**

(1) STRABAG SE

(2) RAIFFEISEN CENTROBANK AG

(3) SYRENA IMMOBILIEN HOLDING AG

Claimants

v.

THE REPUBLIC OF POLAND

Respondent

ICSID CASE NO. ADHOC/15/1

PARTIAL AWARD ON JURISDICTION

The Arbitral Tribunal:

V. V. Veeder, President

Professor Karl-Heinz Böckstiegel, Arbitrator

Professor Albert Jan van den Berg, Arbitrator

Secretary of the Arbitral Tribunal:

Lindsay Gastrell

TABLE OF CONTENTS

Abbreviations and Glossary	iii
Selected <i>Dramatis Personae</i>	vii
PART I: THE ARBITRATION	Part I - 1
A. The Claimants	Part I - 1
B. The Respondent	Part I - 3
C. The Tribunal	Part I - 4
D. The Administering Institution	Part I - 4
E. The Secretary of the Tribunal	Part I - 4
F. Legal Place or Seat of the Arbitration	Part I - 5
G. Language	Part I - 5
H. The Arbitration Agreement (as supplemented)	Part I - 5
I. The Arbitral Procedure	Part I - 6
PART II: THE UNDERLYING DISPUTE BETWEEN THE PARTIES	Part II - 1
A. Introduction	Part II - 1
B. The Claimants' Case	Part II - 1
C. The Respondent's Case	Part II - 11
PART III: THE PRINCIPAL ISSUES	Part III - 1
PART IV: PRINCIPAL LEGAL TEXTS	Part IV - 1
A. Introduction	Part IV - 1
B. The Treaty	Part IV - 1
C. The Polish Code of Administrative Procedure ("PCAP")	Part IV - 7
D. The Share Purchase Agreement ("SPA")	Part IV - 8
E. The Information Memorandum	Part IV - 10
F. The Supplement	Part IV - 12
G. The VCLT	Part IV - 12
PART V: PRIMA FACIE CASE	Part V - 1
A. Introduction	Part V - 1
B. The Respondent's Case	Part V - 1
C. The Claimants' Case	Part V - 4
D. The Tribunal's Analysis	Part V - 6
PART VI: ABUSE OF PROCESS	Part VI - 1
A. Introduction	Part VI - 1
B. The Respondent's Case	Part VI - 1
C. The Claimants' Case	Part VI - 2
D. The Tribunal's Analysis and Decision	Part VI - 3

PART VII: JUS STANDI	Part VII - 5
A. Introduction.....	Part VII - 5
B. The Respondent’s Case	Part VII - 5
C. The Claimants’ Case	Part VII - 6
D. The Tribunal’s Analysis and Decision.....	Part VII - 9
PART VIII: EU LAW AND THE ACHMEA JUDGMENT.....	Part VII - 1
A. Introduction.....	Part VIII - 1
B. The Respondent’s Position	Part VIII - 2
C. The Claimants’ Position.....	Part VIII - 8
D. The European Commission’s Written Observations.....	Part VIII - 15
E. The Tribunal’s Analysis and Decision.....	Part VIII - 20
PART IX: COSTS.....	Part IX - 1
A. Introduction.....	Part IX - 1
B. The Claimants’ Case	Part IX - 2
C. The Respondent’s Case.....	Part IX - 2
D. The Tribunal’s Analysis and Decision.....	Part IX - 3
PART X: OPERATIVE PART	Part X - 1

Abbreviations and Glossary

Accession Treaty	Accession Treaty of 2003 between Poland and the Member States of the European Union signed on 16 April 2003
<i>Achmea</i>	Case C-284/16 <i>Slowakische Republik v Achmea BV</i> before the CJEU
<i>Achmea</i> Declaration	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 <i>Achmea</i>
<i>Achmea</i> Judgment	CJEU's judgment in <i>Achmea</i> , issued on 6 March 2018
<i>Achmea</i> Opinion	Opinion of Advocate-General Wathelet on the questions before the CJEU in <i>Achmea</i> , dated 19 September 2017
Answer	Claimants' Answer to the Request for Arbitration, dated 10 November 2014
Annulment Decision	Decision of the Self-Government Appeal Council in Warsaw, dated 10 December 2003, annulling the Enfranchisement Decision
Bank Guarantee	Bank guarantee of EUR [REDACTED] obtained by Strabag in favour of the City of Warsaw as beneficiary to secure the investment obligation under the SPA
Board Declaration	Statement of Syrena Hotel's Management Board, dated 17 March 1997
C-[#]	Claimants' Exhibit [#]
CETA	Comprehensive Economic and Trade Agreement between Canada and the EU
CETA Opinion	Opinion of Advocate General Bot, dated 29 January 2019, in CJEU Case 1/17
CJEU	European Court of Justice
CL-[#]	Claimants' Legal Authority [#]
C-PHB	Claimants' Post-Hearing Brief
C-RPHB	Claimants' Reply Post-Hearing Brief
Claimants	(1) Strabag SE, (2) Raiffeisen Centrobank AG and (3) Syrena Immobilien Holding AG




Commission	European Commission
Christmas Decision	Decision No. 610/GK/DW/ 2012 issued by the City of Warsaw concerning Plot Nos 1582 J and 6688 on 24 December 2012, declaring [REDACTED] the legal owner of Hotel Polonia and granting her the right of perpetual usufruct for 99 years over the land
Declarations	The <i>Achmea</i> Declaration and two other interpretative Declarations dated 16 January 2019, one signed by five other EU Member States, and the other by Hungary
Division Proceedings	Proceeding initiated <i>ex officio</i> by the City of Warsaw concerning the division of land with Register No. WA4M/00143520/0
Enfranchisement Decision	Decision No. 489/93, dated 29 June 1993, by which the Board of the Union of Districts of Warsaw affirmed Syrena Hotels' acquisition of property rights
EU	European Union
EU Treaties	The TEU and the TFEU
Hearing	Oral hearing on jurisdiction held at the World Bank in Paris, France on 7 and 8 June 2017
ICSID	International Centre for Settlement of Investment Disputes, the Administering Institution
ICSID Additional Facility Rules	ICSID Arbitration (Additional Facility) Rules, in force as of April 2006
ICSID Convention	1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States
Information Memorandum	Information Memorandum, dated 15 May 1996, concerning the tender for 80% of the shares in Syrena Hotels
Jur. CM	Claimants' Jurisdictional Counter-Memorial, dated 7 December 2015
Jur. Memorial	Respondent's Jurisdictional Memorial, dated 27 July 2015
Jur. Rejoinder	Claimants' Jurisdictional Rejoinder Memorial, dated 7 June 2016
Jur. Reply	Respondent's Jurisdictional Reply Memorial, dated 7 March 2016

Municipalisation Decision	Decision No. 6817, dated 26 June 1991, by which the Province Governor of the City of Warsaw decided that the City of Warsaw had acquired Syrena Hotels and all its properties
Notice	Letter from Baier Law Firm (on behalf of the Claimants) to Poland, dated 19 December 2012
PCAP	Polish Code of Administrative Procedure
Poland (or the Respondent)	Republic of Poland
Privatisation Act of 1990	Polish Act of 13 July 1990 on the Privatisation of State-Owned Enterprises
R-[#]	Respondent's Exhibit [#]
R-PHB	Respondent's Post-Hearing Brief
R-RPHB	Respondent's Reply Post-Hearing Brief
Raiffeisen (or Second Claimant)	Raiffeisen Centrobank AG
Respondent (or Poland)	Republic of Poland
RL-[#]	Respondent's Legal Authority [#]
SIHAG (or Third Claimant)	Syrena Immobilien Holding AG
SIHOL	Syrena Immobilien Holding Limited
SPA	Share Purchase Agreement between Strabag and the City of Warsaw for 80% of the shares of Syrena Hotels, signed on 18 March 1997
Strabag (or First Claimant)	Strabag SE
Supplement	Supplement to the Information Memorandum, dated 9 October 1996
Syrena Hotels	Hotele Warszawskie "Syrena" Sp. z o.o.
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
Treaty	Agreement between the Republic of Austria and the Polish People's Republic concerning the Encouragement and Protection of Investments of 24 November 1988

Tribunal	Arbitral tribunal composed of Mr V.V. Veeder, President, Professor Albert Jan van den Berg, Professor Karl-Heinz Böckstiegel, constituted on 23 December 2014
VCLT	Vienna Convention on the Law of Treaties
Warsaw Decree	Decree of 26 October 1945, issued under the Polish Communist regime, which expropriated properties in Warsaw

Selected Dramatis Personae

Advocate-General Wathelet	Advocate-General of the CJEU issuing the <i>Achmea</i> Opinion
Bau Holdings AG	An Austrian joint stock corporation which purchased 80% of the shares in Syrena Hotels in 1997; legal predecessor to Strabag
Board of the Union of Districts of Warsaw	One of the two executive bodies of the City of Warsaw from 1991 to 1994; issued the Enfranchisement Decision on 29 June 1993, affirming Syrena Hotels’ acquisition of property rights
City of Warsaw	Government body of Warsaw, which owns Plot No 39 and founded Syrena Hotels (called “the Municipality” by the Respondent)
Deputy Mayor of the City of Warsaw	Heard [REDACTED] claims from 1992 to 1996 and then signed the SPA with Strabag
[REDACTED]	Owner of Plot No 6203, located next to Hotel Polonia, before the Warsaw Decree
[REDACTED]	Member of the [REDACTED] family who initiated proceedings to invalidate the Enfranchisement Decision
Hotele Warszawskie “Syrena” Sp. z o.o. (“Syrena Hotels”)	Polish limited-liability company with the right of perpetual usufruct to Plot No 39, on which Hotel Polonia and Hotel Metropol are located
Kubas, Andrzej	Claimants’ expert witness on Polish Law
[REDACTED]	Daughter and sole heir of [REDACTED]
[REDACTED]	Cousin and sole heir of [REDACTED] disputes Syrena Hotels’ legal title to Plot No 39
Minister of Internal Affairs	Consented to the SPA between Strabag and the City of Warsaw
Minister of Spatial Development and Construction	Administrative body that considered certain applications to declare Decree Decisions invalid; invalidated the Decree Decisions relating to the [REDACTED] family on 24 March 1993
President of the Office of Competition and Consumer Protection	Consented to the SPA between Strabag and the City of Warsaw

Province Governor of the City of Warsaw	Issued the Municipalisation Decision on 26 June 1991, deciding that the City of Warsaw had acquired Syrena and all its properties
	Founder and first owner of Hotel Polonia; father of  
Raiffeisen Centrobank AG (“Raiffeisen”)	Second Claimant, an Austrian joint stock corporation that owns 50% of the shares in SIHAG
Self-Government Appeal Council	Administrative body that hears appeals against decisions of self-government administrative bodies based in Warsaw
Simma, Judge Bruno	Claimants’ expert on international law (the Parties have agreed to treat his written submission as a submission of the Claimants)
Strabag SE (“Strabag”)	First Claimant, an Austrian company that owns 50% of the shares in SIHAG; legal successor of Bau Holdings AG
Supreme Administrative Court	The highest administrative court in Poland, which hears appeals against rulings of the province administrative courts
Syrena Immobilien Holding AG (“SIHAG”)	Third Claimant, an Austrian joint stock corporation which, through SIHOL, which owns 85% of the shares in Syrena Hotels
Syrena Immobilien Holding Limited (“SIHOL”)	Cypriot subsidiary of SIHAG, which holds 85% of the shares in Syrena Hotels

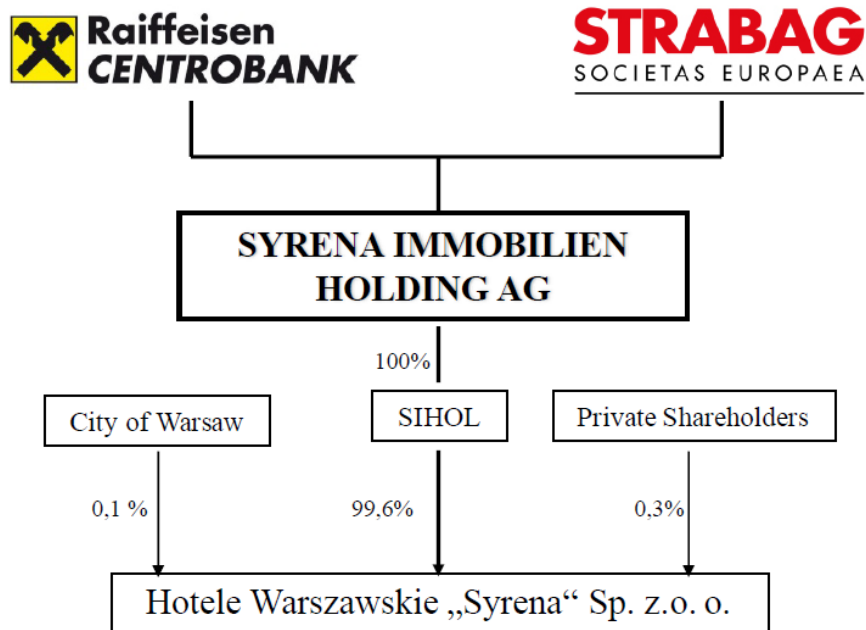
PART I: THE ARBITRATION

A. The Claimants

- 1.1. On 9 September 2014, this arbitration was commenced against the Republic of Poland as the respondent by the following legal entities as the claimants: Strabag SE, Raiffeisen Centrobank AG and Syrena Immobilien Holding AG. In this Award, the latter are collectively referred to as the “Claimants”. The former is referred to as the “Respondent” or “Poland”.
- 1.2. *Strabag*: Strabag SE, the First Claimant, is a company constituted in accordance with Austrian law, registered with the commercial register of the Commercial Court of Vienna under the registration number 88983h, with its corporate seat in Triglavstraße 9, 9500 Villach, Austria and its business address at Donau-City-Straße 9, 1220 Vienna, Austria (“Strabag”). Strabag is the legal successor of Bau Holdings AG, also an Austrian company.
- 1.3. *Raiffeisen*: Raiffeisen Centrobank AG, the Second Claimant, is a joint stock corporation constituted in accordance with Austrian law, registered with the commercial register of the Commercial Court of Vienna under the registration number 117507f, with its corporate seat and its business address at Tagetthoffstraße 1 1015 Vienna, Austria (“Raiffeisen”).
- 1.4. *SIHAG*: Syrena Immobilien Holding AG, the Third Claimant, is a joint stock corporation constituted in accordance with Austrian law, registered with the commercial register of the Commercial Court of Vienna under the registration number 160780t, with its corporate seat in Ortenburgerstraße 27, 9800 Spittal an der Drau, Austria and its business address at Donau-City-Straße 9, 1220 Vienna, Austria (“SIHAG”).
- 1.5. *The Claimants’ Corporate Structure*: As described by the Claimants, Raiffeisen and Strabag are the joint parent companies of SHIAG (each holding 50% of the shares). SIHAG wholly owns Syrena Immobilien Holding Limited, a Cypriot company (“SIHOL”). SIHOL in turn owns 99.6% of Hotele Warszawskie “Syrena” Sp. z.o.o., a Polish company with limited liability (“Syrena Hotels”). Syrena Hotels owns and operates, according to the Claimants, the Hotel Metropol and the Hotel Polonia in

Warsaw. Neither SIHOL nor Syrena Hotels is a party to these arbitration proceedings.

1.6. The corporate structure is shown in the following chart:¹



1.7. The Claimants are represented in this arbitration by:

Mr Anton Baier
Mr Erhard Böhm
Mr Gregor Grubhofer
Mr Marko Szucsich
Baier Rechtsanwälte KG
Kärntner Ring 12
1010 Vienna
Austria
baier@baierpartners.com
boehm@baierpartners.com
grubhofer@baierpartners.com
szucsich@baierpartners.com
Tel.: +43 1 515 50 0
Fax: +43 1 515 50 50
Until 18 January 2020
Ms Amelie Huber-Starlinger
Ms Marie-Christine Motaabbed
Baier Rechtsanwälte KG
Kärntner Ring 12
1010 Vienna
Austria
huberstarlinger@baierpartners.com

¹ Claimants' Hearing Presentation, Slide 71.

motaabbed@baierpartners.com

Tel.: +43 1 515 50 0

Fax: +43 1 515 50 50

- 1.8. The Claimants have jointly designated and authorised Baier Rechtsanwälte KG as their point of contact and communication in relation to this arbitration.

B. The Respondent

- 1.9. The Claimants' claims are made against the Republic of Poland.

- 1.10. The Respondent is represented in this arbitration by:

Mr Maciej Martynski
Ms Anna Mazgajska
Dr Marta Cichomska
Ms. Kamila Lipecka
Ms. Joanna Jackowska-Majeranowska
Ms. Agnieszka Kilanowska
Ms. Anna Kaczyńska
International and European Law Department
Office of the General Counsel
ul. Hoża 76/78
00-682 Warsaw Poland
maciej.martynski@prokuratoria.gov.pl
anna.mazgajska@prokuratoria.gov.pl
marta.cichomska@prokuratoria.gov.pl
kamila.lipecka@prokuratoria.gov.pl
joanna.jackowska-majeranowska@prokuratoria.gov.pl
agnieszka.kilanowska@prokuratoria.gov.pl
anna.kaczynska@prokuratoria.gov.pl
Tel: +48 22 392 32 85

Until 1 October 2017:

Mr Tomasz Wardyński
Mr Paweł Mazur
Mrs Monika Hartung
Mr Piotr Gołędzinowski
Mr Stanisław Drozd
Wardyński i Wspólnicy sp.k. Al. Ujazdowskie
1000-478 Warsaw Poland
tomasz.wardynski@wardynski.com.pl
pawel.mazur@wardynski.com.pl
monika.hartung@wardynski.com.pl
piotr.goledzinowski@wardynski.com.pl
stanislaw.drozd@wardynski.com.pl
Tel.: +48 22 437 82 00, 22 537 82 00
Fax: +48 22 437 82 01, 22 537 82 01

C. The Tribunal

1.11. The Arbitral Tribunal constituted in this arbitration (the “Tribunal”) consists of three arbitrators:

- a. Professor Karl-Heinz Böckstiegel, appointed jointly by the Claimants; of Parkstraße 38, D 51427 Bergisch-Gladbach, Germany; Tel: +49 22 046 62 68; Email: kh@khboeckstiegel.com.
- b. Professor Albert Jan van den Berg, appointed by the Respondent; of Hanotiau & van den Berg (HVDB), IT Tower, 9th Floor, 480, Avenue Louise, B.9, 1050 Brussels, Belgium Tel: +32 02 290 39 13; Email: ajvandenberghvdb.com.
- c. Mr V.V. Veeder, appointed by the Party-appointed Arbitrators to act as the President of the Tribunal; of Essex Court Chambers 24 Lincoln’s Inn Fields, London WC2A3EG, United Kingdom; Tel: +44 2078138000; Email: vvveeder@londonarbitrators.net.

1.12. The Tribunal was properly constituted on 23 December 2014. (The Parties’ agreement to such effect was made without prejudice to the Respondent’s objections to the jurisdiction of the Tribunal.)

D. The Administering Institution

1.13. By emails of 18 and 20 March 2015, the Parties confirmed their agreement to designate the Secretariat of the International Centre for Settlement of Investment Disputes (“ICSID”) as the administering authority. ICSID renders full administrative services in relation to this *ad hoc* arbitration, in accordance with the terms set forth in the Secretary-General’s letters of 17 and 23 March 2015.

E. The Secretary of the Tribunal

1.14. Further to the designation of ICSID as administering authority in this matter, Ms Lindsay Gastrell, Legal Counsel at the ICSID Secretariat, was designated as the Secretary of the Tribunal. The Secretary of the Tribunal undertook to be and to remain at all times impartial and independent of the Parties.

F. Legal Place or Seat of the Arbitration

1.15. The place and the seat of this arbitration is Paris, France (as agreed by the Parties).

G. Language

1.16. The language of the proceeding is English (as agreed by the Parties).

H. The Arbitration Agreement (as supplemented)

1.17. Article 8 (“Settlement of Investment disputes”) of the Agreement between the Republic of Austria and the Polish People’s Republic concerning the Encouragement and Protection of Investments of 24 November 1988 (the “Treaty”) provides in material part as follows (translated into English):

(1) If disputes should arise between one Contracting State and an investor from the other Contracting Party with regard to an investment, such disputes shall be resolved amicably between the parties themselves if possible. If such amicable resolution is not possible, then the investor shall exhaust all relevant domestic administrative and judicial remedies.

(2) If such a dispute cannot be settled in a manner provided for in paragraph 1 within 12 months from written notification of adequately specified claims, it shall at the request of the Contracting Party or of the investor from the other Contracting Party, be submitted for composition or arbitration: ...

(b) to an international arbitral tribunal, if either of the Contracting Parties is not a signatory to the Convention on the Settlement of Investment Disputes between States and nationals of other States. The international arbitral tribunal shall be constituted on an ad hoc basis in the following manner: each side shall appoint an arbitrator, and these arbitrators shall agree on a chairman, who shall be a national of a third State. The arbitrators shall be appointed within two months from the date on which the investors ha[ve] notified the other Contracting Party of his desire to submit the dispute to an arbitral tribunal and the chairman within a further two months. ...

1.18. The Claimants invoked Article 8 in their Request for Arbitration. The Claimants contend that through submitting such Request for Arbitration, they consented in writing to arbitration on the terms offered by the Respondent in Article 8 of the Treaty. The Claimants also contend that written notification of adequately specified claims was

provided to Poland on 19 December 2012 (the “Notice”) and that, consequently, more than one year had passed in which the Parties’ dispute could not be settled in a manner provided by Article 8(1) of the Treaty.

- 1.19. This arbitration is also to be conducted in accordance with the provisions of the Tribunal’s Procedural Order No 1 dated 9 July 2015, whereby Article 8 of the Treaty was materially supplemented by agreement of the Parties (as described later in this Award). Further, if any question of procedure arose which was not covered by Procedural Order No 1, the Tribunal was to decide the question. The Tribunal could seek guidance from (but was not bound by) the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the “ICSID Convention”) and the ICSID Arbitration (Additional Facility) Rules, in force as of April 2006 (the “ICSID Additional Facility Rules”).

I. The Arbitral Procedure

- 1.20. To commence this arbitration, as already indicated, the Claimants served upon the Respondent a Request for Arbitration dated 9 September 2014, accompanied by a copy of the Treaty.
- 1.21. In the Request for Arbitration, the Claimants referenced the Treaty’s provision governing the number of arbitrators and the method of their appointment. Article 8(2)(b) of the Treaty provides in relevant part:

The international arbitral tribunal shall be constituted on an ad hoc basis in the following manner: each side shall appoint an arbitrator, and these arbitrators shall agree on a chairman, who shall be a national of a third State. The arbitrators shall be appointed within two months from the date on which the investors ha[ve] notified the other Contracting Party of his desire to submit the dispute to an arbitral tribunal and the chairman within further two months.

- 1.22. In accordance with this procedure, the Claimants jointly appointed Professor Karl-Heinz Böckstiegel to serve as arbitrator.
- 1.23. On 10 November 2014, the Respondent served upon the Claimants its Answer to the Request for Arbitration (the “Answer”). In the Answer, the Respondent appointed Professor Albert Jan van den Berg to serve as arbitrator.

- 1.24. As contemplated in Article 8(2)(b) of the Treaty, Professors Böckstiegel and van den Berg consulted with the Parties regarding the appointment of the President of the Tribunal. They subsequently agreed to appoint Mr. V.V. Veeder to serve as the President. With all members appointed, the Tribunal was constituted on 23 December 2014.
- 1.25. By correspondence of 29 December 2014 and 4 January 2015, the Tribunal invited the Parties' proposals regarding the initial procedural steps, including the format of the first procedural conference and the content of the first procedural order.
- 1.26. By joint letter of 9 February 2015, the Parties responded to the Tribunal's invitation, and provided the Tribunal with a draft procedural order containing proposed procedural rules to govern the arbitration. The Parties agreed on most issues, but identified a limited number of disputed matters for resolution by the Tribunal.
- 1.27. After further consultation with the Parties, the Tribunal scheduled the first procedural meeting by telephone conference on 13 March 2015. It provided the Parties with an agenda for the meeting. The Tribunal invited each Party's observations on three agenda items: the legal place of arbitration, the potential for revision of the Award under the ICSID Convention, and the Tribunal's financial terms. On 6 March 2015, each Party submitted comments on these items. On 10 March 2015, the Tribunal circulated an updated agenda for the procedural meeting.
- 1.28. The Tribunal held this first procedural meeting by telephone conference with the Parties as scheduled on 13 March 2015. During the meeting, the Tribunal and the Parties discussed the agenda items, including the Parties' proposed procedural order, the order and scope of written submissions, and the overall procedural timetable. They also agreed that ICSID would serve as the administering authority for the arbitration.
- 1.29. Following the first procedural meeting, by correspondence of the same day, the Tribunal (a) confirmed the Parties' agreement that the arbitration would be "bifurcated" as between a first jurisdictional phase and a second merits phase; (b) reserved the question of "trifurcation" (i.e. splitting the merits phase into a separate liability phase followed by a separate quantum phase) to be addressed at a later appropriate date; and (c) decided that the next memorial would be submitted by the Respondent, pleading its jurisdictional objections to the Claimants' claims set out in the Request for Arbitration.

The Tribunal also invited the Parties' proposals as to the precise deadlines for the pleadings to be submitted in the jurisdictional phase.

- 1.30. By letter of 17 March 2015, the Secretary-General of ICSID informed the Parties that ICSID would be pleased to provide full administrative services, comparable to those provided in ICSID cases. After receiving both Parties' written agreement, the Secretary-General confirmed the arrangement by letter of 23 March 2015.
- 1.31. By joint letter of 27 March 2015, the Parties informed the Tribunal that they had reached an agreement on a timetable for written pleadings to be submitted in the jurisdictional phase. The Parties also stated that they agreed to Paris, France as the legal place of the arbitration.
- 1.32. On 18 May 2015, the Tribunal provided the Parties with a draft of Procedural Order No 1 and invited the Parties to confer and submit any written comments they had relating to the draft. Each side submitted comments on 1 June 2015 and then supplemented its comments on 2 June 2015. After considering those responses, on 4 June 2015, the Tribunal provided the Parties with a final draft order for their review and approval. The Parties submitted additional comments on 19 June 2015, and the Tribunal prepared a revised final draft of Procedural Order No 1 for the Parties' approval. On 3 July 2015, each side confirmed that it had no further substantive comments on the draft.
- 1.33. On 7 July 2015, the Tribunal issued Procedural Order No 1, governing the arbitral procedure. Given the *ad hoc* nature of the proceeding, Procedural Order No 1 provided rules on matters such as the powers of the Tribunal and the procedure for challenging a member; settlement and discontinuance; the content of awards; and the procedure for requesting supplementary decisions, rectification or interpretation of an award. Regarding the applicable law, Procedural Order No 1 provided that "the Tribunal shall apply the law determined by the conflict of laws rules which it considers applicable and such rules of international law and treaties as the Tribunal considers applicable".
- 1.34. Procedural Order No 1 also addressed the financial administration of the arbitration. As agreed by the members of the Tribunal and the Parties, Procedural Order No 1 stipulated that the fees and expenses of each member of the Tribunal would be paid in accordance with the ICSID Schedule of Fees and the Memorandum on Fees and Expenses of ICSID

Arbitrators (USD 375 per hour). Such fees were to be paid out of advance payments made by the Parties to ICSID in equal parts (as to the two sides).

- 1.35. Also on 7 July 2015, the Tribunal issued Procedural Order No 2, instructing the Parties to make the initial advance payment, which ICSID had requested by letter of 18 May 2015. Both sides subsequently made the requested payment.
- 1.36. On 27 July 2015, the Respondent filed its Jurisdictional Memorial, including a Chronology, a *Dramatis Personae*, Exhibits R-0002 to R-0022, and Legal Authorities RL-0001 to RL-0021 (“Jur. Memorial”).
- 1.37. On 7 December 2015, the Claimants submitted their Jurisdictional Counter-Memorial, including the Expert Report of Professor Andrzej Kubas (CE-01) (with Exhibits CE-01-1 to CE-01-34); the Expert Report of Judge Bruno Simma (CE-02); Exhibits C-0001 through C-0043; and Legal Authorities CL-0001 to CL-0012 (“Jur. CM”).
- 1.38. By letter of 29 January 2016, the Claimants informed the Tribunal of recent developments in a proceeding initiated by Strabag against the City of Warsaw in the Warsaw Regional Court: the Court had decided to reject Strabag’s claim without prejudice, and Strabag was appealing that decision. The Claimants stated their willingness to submit the court documents related to these developments. On 17 February 2016, upon the invitation of the Tribunal, the Respondent filed comments on the Claimants’ letter. The Respondent reserved its right to provide further observations in its next written pleading, and to that end, stated that if “the Claimants intend to submit any documents which they consider relevant in this regard, they are requested to do this as soon as possible, so that the Respondent can duly take them into account”.
- 1.39. On 22 February 2016, the Claimants requested the Tribunal’s permission to file the court documents from these Polish legal proceedings. On 26 February 2016, the Tribunal issued Procedural Order No 3, in which it granted the Claimants’ request and instructed the Claimants to submit the documents as soon as practicable, but no later than 4 March 2016.
- 1.40. In accordance with Procedural Order No 3, on 3 March 2016, the Claimants filed these court documents as Exhibits CL-0044 to CL-0050.

- 1.41. On 7 March 2016, the Respondent filed its Jurisdictional Reply Memorial, including Exhibits R-0023 to R-0037 and Legal Authorities RL-0023 to RL-0044 (“Jur. Reply”). In paragraph 64 of this submission, the Respondent requested that Judge Simma be precluded from acting in these proceedings and that the Tribunal disregard his expert report.
- 1.42. On 7 June 2016, the Claimants filed their Jurisdictional Rejoinder Memorial, including Exhibits C-0051 to C-0059 and Legal Authorities CL-0013 through CL-0020 (“Jur. Rejoinder”).
- 1.43. By email of 16 June 2016, the Claimants requested an adjournment of the hearing on jurisdiction scheduled to take place on 15 and 16 December 2016, in light of the pregnancy of one of the Claimants’ representatives. The Claimants noted that they had informed the Respondent in advance of this request and that the Respondent did not object.
- 1.44. The Tribunal responded the same day to inform the Parties that, in light of the circumstances, it had no objection to rescheduling the hearing. After consulting the Parties regarding their availability for the rescheduled hearing, on 11 July 2016, the Tribunal issued Procedural Order No 4, which confirmed that the rescheduled hearing would be held from 7 to 9 June 2017.
- 1.45. In advance of the rescheduled hearing, on 20 April 2017, the Tribunal wrote to the Parties to organise a pre-hearing organisational meeting by telephone conference in early May 2017.
- 1.46. By joint letter of 21 April 2017, the Parties informed the Tribunal of further developments in the domestic court proceedings: upon Strabag’s appeal, the Warsaw Court of Appeal had modified the Regional Court’s prior decision. The ruling was attached as Exhibit R-0038.
- 1.47. On 5 May 2017, the Respondent, through the Office of the General Counsel to the Republic of Poland, notified the Tribunal that the Respondent intended to raise an additional jurisdictional objection relating to the law of the European Union (“EU”). The Respondent referenced Case C-284/16 *Slowakische Republik v Achmea BV* (“*Achmea*”), pending before the European Court of Justice (the “CJEU”). In connection

with this new objection, the Respondent made two procedural proposals: (a) a further exchange of written pleadings between the Parties, and (b) an adjournment of the hearing on jurisdiction scheduled to take place in June. Regarding the timing of its objection, the Respondent stated that it could not have raised the objection sooner because its Jurisdictional Reply Memorial was submitted on 7 March 2016, before the German Federal Court had referred *Achmea* to the CJEU on 23 May 2016.

- 1.48. On 6 May 2017, the Tribunal invited the Claimants to respond as soon as possible regarding the Respondent's two procedural proposals. The Claimants responded on 8 May 2017, arguing that: (a) a further exchange of submissions on jurisdiction "would at least be premature", and (b) the Respondent's proposal to postpone the hearing would be disruptive and cause substantial delay. The Claimants also stated that the Respondent could have raised this further jurisdictional objection earlier.
- 1.49. At the same time, the Claimants raised a separate issue, related to the Share Purchase Agreement submitted as Exhibit R-0002. The Claimants stated that this exhibit was incomplete, as it did not include certain resolutions and decisions referred to in the Share Purchase Agreement. The Claimants attached these documents to their letter of 8 May 2017 as Exhibits C-0060 to C-0069.
- 1.50. On 8 May 2017, the Tribunal confirmed that the President would hold a pre-hearing procedural meeting by telephone conference with the Parties on 10 May 2017. The Tribunal provided the Parties with a draft agenda for the meeting, which indicated that the President and the Parties would address several issues relating to the hearing organization, as well as the Parties' letters of 6 and 8 May 2017.
- 1.51. The President held the pre-hearing meeting with the Parties on 10 May 2017. During the meeting, the Parties consented to holding the hearing on jurisdiction on the scheduled dates. It was further agreed that, during the hearing, the Parties would offer their respective proposals for the scope and timing of their post-hearing submissions concerning the Respondent's new jurisdictional objection, and that they would not address at the hearing the substance of the objection.
- 1.52. During the pre-hearing meeting, the Respondent indicated that it did not wish to call either of the Claimants' expert witnesses for cross-examination. The President and the Claimants confirmed that this decision would not be deemed an admission or

acceptance of the testimony of either expert, and that the Respondent's decision was without prejudice to its objection to the involvement of Judge Bruno Simma as an expert witness in the arbitration (raised in the Jur. Reply). The Respondent confirmed its decision in writing on 17 May 2017.

- 1.53. Also during the pre-hearing meeting, the Claimants were asked to state whether their submission of Exhibits C-0060 to C-0069 was an indication that they intended to raise new factual allegations. The Claimants responded to this question in writing on 15 May 2017, confirming that they did not intend to make additional allegations. The Claimants argued that the documents related to certain of their prior allegations. The Respondent addressed this matter in its letter of 17 May 2017, arguing that it remained unclear what facts the Claimants intended to prove with the new documents. In any event, the Respondent stated that it would leave the question of whether to admit those documents to the Tribunal's discretion.
- 1.54. On 23 May 2017, the Tribunal issued Procedural Order No 5, instructing the Parties to make a second advance payment, which both sides subsequently made to ICSID.
- 1.55. On 25 May 2017, the Tribunal issued Procedural Order No 6, governing the organisation of the hearing on jurisdiction on 7 and 8 June 2017. It also contained the Tribunal's decision to admit Exhibits C-0060 to C-0069 into the record.
- 1.56. The oral hearing on jurisdiction took place at the World Bank in Paris on 7 and 8 June 2017 (the "Hearing"). The Hearing was recorded by a verbatim transcript, later corrected jointly by the Parties.² The following persons were present at the Hearing:

Tribunal

Mr. V. V. Veeder, President
Professor Karl-Heinz Böckstiegel, Arbitrator
Professor Albert Jan van den Berg, Arbitrator

Secretary of the Tribunal

Ms. Lindsay Gastrell, ICSID Secretariat

Claimants

Counsel:

Mr. Anton Baier, BAIER Rechtsanwälte
Ms. Amelie Huber-Starlinger, BAIER Rechtsanwälte

² References to this transcript in this Award are made thus: "Hearing Transcript D1.2" signifies page 2 of the Hearing's first day.

Mr. Erhard Böhm, BAIER Rechtsanwälte
Mr. Gregor Grubhofer, BAIER Rechtsanwälte
Ms. Marie-Christine Motaabbed , BAIER Rechtsanwälte

Parties:

Mr. Michael Kalwil, Member of Executive Board of SIHAG; Member of Strabag
Ms. Gabriele Deffner, Member of Executive Board of SIHAG; Member of Strabag
Ms. Renate Koch-Habenbacher, Head Legal Department of Raiffeisen Centrobank
Ms. Monika Sitowicz, Dentons Europe Oleszczuk sp. k.

Respondent

Counsel:

Mr. Tomasz Wardyński, Wardyński & Partners
Mr. Stanisław Drozd, Wardyński & Partners
Mr. Piotr Gołędzinowski, Wardyński & Partners
Dr. Marta Cichomska, Office of the General Counsel to the Republic of Poland
Ms. Kamila Lipiecka, Office of the General Counsel to the Republic of Poland

- 1.57. At the close of the Hearing, the Tribunal and the Parties discussed various procedural matters, including the procedure for correcting the transcript, the preparation of a joint consolidated timeline, and the scope of any post-hearing submissions.
- 1.58. Following the Hearing, on 13 June 2017, the Tribunal issued Procedural Order No 7 recording the consensus between the Parties on these matters. With regard to the scope of post-hearing submissions, Procedural Order No 7 provided that the Parties could include their rebuttal to the oral arguments raised by the other Party during the Hearing (including any matters raised by the Tribunal), as well as their arguments on the Respondent's new jurisdictional objection relating to *Achmea*. The Parties were also instructed to confirm their positions on the document prepared by Judge Simma and submitted by Claimants with their Jurisdictional Counter-Memorial.
- 1.59. On 30 June 2017, the Parties submitted to the Tribunal their agreed corrections to the Hearing transcript, which the Tribunal subsequently confirmed. The court reporter entered the corrections into the transcript and provided the Tribunal and the Parties with the final Hearing transcript on 10 July 2017.
- 1.60. On 29 August 2017, the Parties submitted their joint consolidated timeline of relevant events (including their respective comments on those events).
- 1.61. On 19 September 2017, Advocate-General Wathelet delivered his Opinion on the questions before the CJEU in *Achmea* (the "*Achmea* Opinion").

- 1.62. On 10 October 2017, each Party submitted its first post-hearing brief. The Respondent's Post-Hearing Brief ("R-PHB") was accompanied by Legal Authorities RL-0045 to RL-0080. The Claimants' Post-Hearing Brief ("C-PHB") was not accompanied by additional Legal Authorities.
- 1.63. In accordance with Procedural Order No 7, each Party commented in its PHB on the status of the document prepared by Judge Simma. The Parties agreed to consider it as part of the Claimants' submission.
- 1.64. On 11 December 2017, the Respondent submitted its Reply Post-Hearing Brief ("R-RPHB") and the Claimants submitted their Reply Post-Hearing Brief ("C-RPHB").
- 1.65. On 6 March 2018, the CJEU issued its judgment in *Achmea* (the "*Achmea* Judgment"). Considering the Parties' previous submissions on *Achmea* in the context of the Respondent's jurisdictional objections, the Tribunal invited the Parties to submit brief written observations on the *Achmea* Judgment. The Tribunal noted that it would issue further instructions after reviewing the Parties' observations.
- 1.66. On 16 April 2018, the Parties simultaneously filed their Observations on the *Achmea* Judgment.
- 1.67. On 23 April 2018, the Tribunal informed the Parties that it had reviewed the Parties' Observations on the *Achmea* Judgment and determined that it would be useful to give each side an opportunity to respond to the other side's submissions. The Parties were invited to submit a brief written response of no more than ten pages by 15 May 2018.
- 1.68. Pursuant to the Tribunal's invitation, the Parties simultaneously filed their Replies on the *Achmea* Judgment on 15 May 2018.
- 1.69. On 15 October 2018, the European Commission (the "Commission") submitted to the Tribunal an Application to Intervene as a Non-Disputing Party. The Commission proposed to intervene on the subject of the legal consequences of the *Achmea* Judgment for the present proceeding.
- 1.70. On the following day, the Secretary of the Tribunal transmitted the Commission's Application to the Parties and, on behalf of the Tribunal, invited the Parties to comment on the Application.

- 1.71. On 30 October 2018, the Parties filed their observations on the Commission's Application to Intervene as a Non-Disputing Party. The Claimants opposed the Application, while the Respondent supported it.
- 1.72. On 2 November 2018, the Tribunal issued Procedural Order No 8, addressing the Commission's Application. The Tribunal decided to grant the Commission leave to file a single written submission limited in scope to the legal consequence of the *Achmea* Judgment. Given this limited scope, the Tribunal did not consider it necessary to grant the Commission access to any documents in the proceeding. The Tribunal instructed the Commission to file the submission within 30 days. It also set a schedule for the Parties' observations, inviting the Respondent to submit its observations on the Commission's submission by 1 January 2019 and the Claimants to submit their observations on the Commission's submission and the Respondent's observations by 1 February 2019.
- 1.73. The President of the Tribunal informed the Commission of the Tribunal's orders by letter of 2 November 2018.
- 1.74. On 30 November 2018, the Commission submitted its *Amicus Curiae* Brief.
- 1.75. On 1 January 2019, the Respondent submitted its observations on the Commission's *Amicus Curiae* Brief, and on 1 February 2019, the Claimants submitted their observations on the Commission's *Amicus Curiae* Brief.
- 1.76. Also on 1 February 2019, the Respondent sought permission from the Tribunal to submit into the record the *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*. The Claimants responded on 5 February 2019, asking the Tribunal to deny the Respondent's request.
- 1.77. On 8 February 2019, the Tribunal issued Procedural Order No 9, in which it (a) granted the Respondent's request for permission to submit the declaration into the record; (b) also admitted into the record the three other related declarations made by France, Finland (with other States) and Hungary on 16 January 2019; (c) also admitted into the record Opinion 1/17 of 29 January 2019 by the ECJ's Advocate General Bot, unless the

Parties were to object within three days; and (d) invited the Parties to present brief written observations on the filed materials (not to exceed ten pages), with the Respondent submitting its observations by 22 February 2019 and the Claimants submitting their observations by 8 March 2019.

- 1.78. On 22 February 2019, the Respondent submitted its observations on the newly admitted materials, and on 8 March 2019, the Claimants submitted their observations.
- 1.79. On 2 March 2020, the Tribunal informed the Parties that the proceeding had been declared closed in relation to jurisdiction, in accordance with paragraph 107 of Procedural Order No. 1.

PART II: THE UNDERLYING DISPUTE BETWEEN THE PARTIES

A. Introduction

- 2.1 The Parties' dispute ranges over many matters, spread over very many years. For present purposes, the Tribunal takes the following summaries of that dispute largely from the Claimants' Request for Arbitration (together with their oral submissions at the Hearing) and the Respondent's Jurisdictional Memorial (together with its oral submissions at the Hearing), respectively.
- 2.2 These summaries consist of the Parties' allegations and not findings by the Tribunal, albeit often citing from contemporary documentation. Moreover, these are only brief summaries made for the purpose of providing context for this Award on Jurisdiction. The Parties have developed their respective cases at much greater length. It should not be assumed, because any aspect of a Party's case is not expressly summarised below (or elsewhere in this Award), that it has not been considered by the Tribunal.
- 2.3 Where an English text is cited from a document originally in Polish, the Tribunal has used the English translations prepared by the Parties. Whilst certain of these translations differ, none of these differences are material for present purposes.

B. The Claimants' Case

- 2.4 In summary, the Claimants allege the following facts in support of their case under the Treaty, as regards both the Tribunal's jurisdiction and the merits of their claims.
- 2.5 In 1991, after the fall of the communist regime and based on the Polish Act of 13 July 1990 on the Privatisation of State-Owned Enterprises (the "Privatisation Act of 1990"),¹ the City of Warsaw began to privatise the Polish company Syrena Hotels (formerly Warszawskie Przedsiębiorstwo Turystyczne Syrena) and its assets.²
- 2.6 Syrena Hotels operated a number of hotels that formed an essential part of the privatisation process. Among these hotels were the Hotel Polonia (built in 1913 and almost undamaged during the Second World War) and the Hotel Metropol. Both hotels

¹ C-6, Privatisation Act 1990.

² Request for Arbitration, ¶ 25; see Parties' Joint Timeline, p. 5.

are located in the centre of Warsaw on the same Plot No 39.³ Plot No 39 comprised four historical plots: Plot Nos. 1582 J, 6688, 6203 and 5988,⁴ which had been expropriated from their former owners by the Polish Communist regime based on a decree dated 6 October 1945 (the “Warsaw Decree”).⁵

2.7 Article 20 of the Privatisation Act of 1990 provided:

*Prior to transfer to third parties, the Minister of State Treasury or the Privatization Agency decides to (1) make an analysis to determine a legal status of a corporation’s enterprise property, in particular any third party claims against such property.*⁶

2.8 Pursuant to the Polish Enfranchisement Act of 29 September 1990, Syrena Hotels had acquired as of 5 December 1990 ownership of the hotel buildings and the right of perpetual usufruct over the land upon which the hotel buildings are erected (which is owned by the City of Warsaw).⁷ This acquisition was confirmed by the Board of the Union of Districts of Warsaw in a decision of 29 June 1993 (the “Enfranchisement Decision”).⁸ Plot No 39 was then registered in the public land and mortgage register on 3 November 1993.

2.9 On 26 June 1991, in order to facilitate the privatisation process, the Province Governor of the City of Warsaw issued Decision No 6817, stating that the City of Warsaw had acquired Syrena Hotels and all its properties.⁹

2.10 In 1995, the City of Warsaw finalised the privatisation by preparing a public invitation to tender for the acquisition of 80% of the shares in Syrena Hotels (the “Municipalisation Decision”).¹⁰

2.11 In 1996, the City of Warsaw entered into negotiations with potential buyers on the basis of an Information Memorandum dated 15 May 1996 (the “Information Memorandum”)¹¹ and a Supplement to the Information Memorandum dated 9 October

³ Request for Arbitration, ¶ 26.

⁴ Request for Arbitration, ¶ 29.

⁵ **R-3T**, Warsaw Decree; Request for Arbitration, ¶ 53.

⁶ **C-6T**, Privatisation Act 1990.

⁷ **R-9T**, Act of 29 September 1990 amending the Act on management of land and expropriation of real properties (excerpt).

⁸ **R-10T**, Enfranchisement Decision.

⁹ **R-8T**, Municipalisation Decision.

¹⁰ Request for Arbitration, ¶ 30.

¹¹ **R-17T**, Information Memorandum.

1996 (the “Supplement”).¹² These documents contained information prepared by the City of Warsaw for potential buyers.¹³ The City of Warsaw warranted that the legal status with regard to the Hotel Polonia and the Hotel Metropol was clear. In particular, the documents gave an assurance that Syrena Hotels was the perpetual usufruct of the land and the owner of the buildings located on that land.

2.12 The Information Memorandum provided as follows:¹⁴

- Chapter I:

Having examined the legal, economic and financial situation of the Company, the experts recommend the acquisition of a majority stake in the Company to potential investors. The investment should have a long-term perspective.

- Article 3.12.2:

Real Properties: The Company is the perpetual usufructuary of the following plots of land and owns the buildings on the land ... Real property situated in Warsaw ... Plot No. 39 ... developed with two hotel buildings: Polonia Hotel and Metropol Hotel ...

- Article 3.12:

The Company holds and uses without a legal title the real property situated in Warsaw ... developed with a hotel building: MDM Hotel.

- Chapter IV:

All the buildings owned by the Company (except for the MDM Hotel...) have a regulated legal status. The owner of the plots of land indicated in point III ‘Real properties’ is the Capital City of Warsaw ... The owner of buildings and perpetual usufructuary of the plots of land is Hotels Warszawski Syrena ... In accordance with the notarial deed of 19 November 1991, as proven by Enfranchisement Decisions No. ... 489/93...

- Additional Information:

The formal and legal status of the land title is regulated.

¹² **R-18T**, Supplement.

¹³ The Respondent does not contest this statement (Hearing Transcript, D1.31).

¹⁴ **R-17T**, Information Memorandum.

2.13 The Supplement provided, as regards the Metropol Hotel, as follows:

The legal status of hotel Metropol is regulated. The Company is perpetual usufructuary of the land plot and the owner of the hotel building erected on the plot. Land and Mortgage Register has been established for the property. A reservation is made in the Register regarding the claims of former successors to the former owners of the property, whose application for temporary ownership of the property was declined in 1996 by the Minister of Spatial Development and Construction. The applicants can demand that the case be decided by the Supreme Administrative Court, to which they have already filed a complaint. Simultaneously, the successors have applied to the Self-government Appeal Council in Warsaw for invalidation of the administrative decision granting the Company perpetual usufruct of the land on which Metropol Hotel has been built.¹⁵

2.14 These were references to the claims made by previous property owners to the Metropol Hotel. There was nothing similar in regards to the claims made by the previous property owners to the Hotel Polonia.¹⁶

2.15 According to the Claimants, information provided at that time to potential buyers also suggested that the investments were extremely promising, secure and without legal obstacles.¹⁷

2.16 Based on the information provided, Strabag (by its predecessor Bau Holding AG) submitted the successful bid.¹⁸

2.17 Because Strabag was a foreign investor, the President of the Office of Competition and Consumer Protection and the Minister of Internal Affairs had to consent to the sale, and they both did so. The consent of the Minister of Internal Affairs dated 6 February 1997 states that Strabag acquired, through the takeover of shares of Syrena, “the perpetual usufruct of the land and the ownership of the buildings on this land”.¹⁹ These buildings were the Hotel Metropol and the Hotel Polonia.

¹⁵ **R-18T**, Supplement, Section 4.3.

¹⁶ The Respondent accepts that the Supplement does not address claims regarding the Polonia Hotel (Hearing Transcript, D1.31-33).

¹⁷ **R-17T**, Information Memorandum, Chapter IV.

¹⁸ Request for Arbitration, ¶ 32.

¹⁹ **C-61T**, Minister of Internal Affairs and Administration, Promise No 6/97 (Administrative Decision), 6 February 1997.

- 2.18 In preparation for the sale, on 17 March 1997, Syrena Hotel's management board issued a statement (the "Board Declaration"), which provided as follows:

*The Company Hotele Warszawskie 'Syrena' is the perpetual usufructuary of the land and ownership of the buildings on the land ... real property situated in Warsaw at Ul. Jerozolimskie 45 ... Plot No. 39 Developed with two hotel buildings: Polonia Hotel and Metropol Hotel, land and mortgage register No. 143520 ... the above real estates are free from mortgages and other encumbrances.*²⁰

- 2.19 On 18 March 1997, the Council of the City of Warsaw authorised its Deputy Mayor to sign a Share Purchase Agreement with Strabag (the "SPA"). The City of Warsaw (as "Seller") and Strabag (as "Buyer") signed the SPA on the same day, 18 March 1997.²¹ The SPA included the Information Memorandum and the Supplement.

- 2.20 Under the SPA, Strabag assumed the following obligations:

- (i) pay [REDACTED] million (approximately [REDACTED]) for the ownership of 80% of the shares in Syrena Hotels;
- (ii) purchase further shares in Syrena Hotels held by the City of Warsaw and of employees;
- (iii) invest ATS [REDACTED] ([REDACTED]) in Syrena Hotels' assets;
- (iv) provide the City of Warsaw with an investment guarantee in case of non-fulfilment of the investments paragraph (iii) above;
- (v) ensure for the future that the main object of the Buyer would be to provide services in the hotel business and not to change this main object without the prior consent of the City of Warsaw;
- (vi) not liquidate without the prior consent of the City of Warsaw;

²⁰ R-16T, Board Declaration (Attachment No 5 to the SPA).

²¹ R-2T, SPA.

- (vii) purchase for Syrena Hotels an unregulated part (31%) of the ownership of the MDM Hotel and the right of perpetual usufruct over of the land on which a part of the MDM Hotel is located; and
- (viii) accept the employment and social guarantee package agreed upon by contract of 4 September 1996 between the employees of Syrena Hotels and the City of Warsaw.

- 2.21 Strabag subsequently acquired another 14.615% of the shares in Syrena Hotels from the former employees of Syrena hotels for [REDACTED] (approximately [REDACTED]). Strabag then acquired another 5% of the shares in Syrena Hotels from the City of Warsaw for [REDACTED] (approximately [REDACTED]).²²
- 2.22 Since 1997, Strabag has paid an annual fee for the right of perpetual usufruct to an organ of Poland. The Claimants state that in relation to Plot No 39, on which Hotel Polonia and Hotel Metropol are erected, Strabag has already paid “the outrageously high sum” of [REDACTED] (approximately [REDACTED]) for this right.²³
- 2.23 The Claimants provide the following comparison between the situation at the time of the SPA in 1997 and 2014 to show the results of Strabag’s efforts to improve the hotels:²⁴

	Proportional value as of 18 March 1997	Valuation as of 1 February 2014
Hotel Polonia	[REDACTED] (then a 3-star hotel)	[REDACTED] (now a 4-star hotel)
Hotel Metropol	[REDACTED]	[REDACTED]

- 2.24 However, the Claimants submit that following their purchase of Syrena Hotels from the City of Warsaw, their “investments including all its components have been severely challenged and denied by Polish authorities, and still are”.²⁵ The Claimants describe a number of government actions that threaten their right to the perpetual usufruct of the

²² Request for Arbitration, ¶ 39.

²³ Request for Arbitration, ¶ 43.

²⁴ Request for Arbitration, ¶ 44.

²⁵ Request for Arbitration, ¶ 46.

land and ownership of the hotels. These events are briefly summarised in the following paragraphs.

- 2.25 Annulment Decision: On 10 December 2003, the Local Government Appeal Court annulled the Enfranchisement Decision of 29 June 1993, which had confirmed Syrena Hotel's rights (the "Annulment Decision").²⁶ According to Strabag, this was done without legal basis and without properly giving notice to Strabag and Syrena Hotels.²⁷
- 2.26 On appeal, the Provincial Administrative Court upheld the annulment of the Enfranchisement Decision on 10 November 2009.²⁸ Syrena Hotels then filed a cassation appeal, which was rejected on 19 October 2010.²⁹
- 2.27 According to the Claimants, although the Annulment Decision "was only declaratory" and "does not change the *ex lege* acquisition of the rights" of Syrena Hotels, it "clearly shows the lack of good faith on the part of Poland in its conduct towards the Investors".³⁰
- 2.28 Demands of former owners: According to the Claimants, Poland concealed the demands of former property owners during the privatisation process.³¹ Specifically, [REDACTED] (succeeded by [REDACTED] and [REDACTED] [REDACTED] had asserted claims as regards Hotel Polonia, and [REDACTED] (succeeded by his family) had asserted claims as regards the plot on which Hotel Metropol was erected.
- 2.29 Claimants allege that "the Capital City of Warsaw had been fully aware of the demands of the former owners and their successors at the time of privatization", and yet did not inform Strabag.³² With regard to the Hotel Polonia, the City of Warsaw did not reveal any knowledge of demands, even though successors of [REDACTED] had dispatched numerous letters to Polish authorities requesting restitution of Hotel Polonia. Indeed,

²⁶ C-22T/R-13T, Decision of the Self-Government Appeal Council in Warsaw, 10 December 2003.

²⁷ Request for Arbitration, ¶ 50.

²⁸ Request for Arbitration, ¶ 51; *see* Parties' Joint Timeline, p. 30.

²⁹ Request for Arbitration, ¶ 51; C-35, Decision of the Supreme Administrative Court regarding the invalidation of the Enfranchisement Decision, dated 19 October 2010; *see* Parties' Joint Timeline, p. 32.

³⁰ Request for Arbitration, ¶ 52.

³¹ Request for Arbitration, ¶¶ 53-64.

³² Request for Arbitration, ¶ 61.

one such letter was sent to officials of Warsaw just eight days before the privatisation was complete.³³ With respect to Hotel Metropol, the Claimants state that:

*The Capital City of Warsaw expressly confirmed that the legal status of the right of perpetual usufruct and the ownership right are regulated. The Capital City of Warsaw only mentioned demands of former owners concerning a part of the land underneath Hotel Metropol as theoretical and insignificant as they had, inter alia, already been officially rejected.*³⁴

- 2.30 *The Christmas Decision*: On 24 December 2012, the City of Warsaw issued a decision with regard to the Plots Nos 1582 J and 6688,³⁵ stating that [REDACTED] was the legal owner of Hotel Polonia, with the right of perpetual usufruct over the land for 99 years (the “Christmas Decision”). The Decision further states that it does not violate any third party’s rights, despite the fact that the lawfully registered rights of Strabag and Syrena Hotels were obviously harmed by this decision. The Claimants assert that the “absurdity of this Decision is obvious: it was issued by the same organ, institution and entity of Poland, which had previously assured the existence of these rights”.³⁶ Syrena Hotels and its mortgage creditors filed an appeal against this decision, which was dismissed on 9 September 2013.³⁷
- 2.31 *Certificates in favour of* [REDACTED]: The City of Warsaw also issued three certificates confirming the alleged ownership of [REDACTED] with regard to Hotel Polonia in 2009, 2012 and 2013.³⁸ The Claimants allege that these certificates unlawfully provided that Hotel Polonia was owned by [REDACTED] and that this building should have never been owned by either the City of Warsaw or the Polish State Treasury. The Claimants’ rights were not addressed, and Syrena Hotels was not even permitted to participate in these proceedings.³⁹
- 2.32 *Division Proceedings*: In 2012, the City of Warsaw initiated an *ex officio* proceeding concerning the division of the land on which both Hotel Polonia and Hotel Metropol

³³ C-16T, Letter of [REDACTED] to the Mayor of the Capital City of Warsaw dated 10 March 1997; Request for Arbitration, ¶ 63.

³⁴ Request for Arbitration, ¶ 62.

³⁵ C-24T, Decision No 610/GK/DW/2012 of the Mayor of the Capital City of Warsaw dated 24 December 2012

³⁶ Request for Arbitration, ¶ 67.

³⁷ Request for Arbitration, ¶ 68.

³⁸ C-44T, Petition of STRABAG dated 10 September 2015.

³⁹ Request for Arbitration, ¶¶ 70-71.

are erected (the “Division Proceedings”). It sought to separate the former Plot No 1582 J and a part of No 6688 in order to fulfil the claims of the former owners. Although Syrena Hotels substantially disputed the legal basis of this proceeding, the Mayor of the City of Warsaw approved the division on 25 April 2012.⁴⁰ Domestic proceedings relating to the decision are ongoing.⁴¹

2.33 Deletion of Syrena Hotels as Perpetual Lessee: In 2011, the City of Warsaw decided to delete Syrena Hotels from the building register as perpetual lessee of Plot No 39, without being notified in advance. This action has led to a number of administrative and court proceedings, which are partially ongoing. According to the Claimants, despite decisions in favour of Syrena Hotels, the City of Warsaw continues its efforts to delete Syrena Hotels from the building register.⁴²

2.34 Bank Guarantee: As set out above, Strabag was obliged to invest [REDACTED] ([REDACTED]) by 31 December 2003, and had to provide the City of Warsaw with a bank guarantee in the amount of [REDACTED] as a security for the fulfilment of its investment obligations (the “Bank Guarantee”).⁴³

2.35 The Claimants argue that Strabag fulfilled all these obligations by investing [REDACTED] (which is [REDACTED] in excess of the required amount) during the relevant period to refurbish and refurbish the hotel buildings, to operate the hotels, and to engage hotel activities. Yet the City of Warsaw drew upon the Bank Guarantee in its entirety in 2004 on the basis of what the Claimants consider “unlawful documents”.⁴⁴ Strabag initiated proceedings against the City of Warsaw for repayment of the Bank Guarantee, which are pending.⁴⁵ The Claimants allege that in these proceedings, certain judgments have been “unobjective”.⁴⁶

2.36 On the basis of the events described above and related actions of Polish authorities, the Claimants contend that the Respondent has committed numerous violations of the

⁴⁰ C-26T, Decision no 8/2012 of the Mayor of the Capital City of Warsaw approving the division of the land underneath Hotel Metropol and Hotel Polonia dated 25 April 2012.

⁴¹ Parties’ Joint Timeline, p. 44. These proceedings were suspended on 27 August 2015.

⁴² Request for Arbitration, ¶¶ 76-84.

⁴³ Request for Arbitration, ¶ 98.

⁴⁴ Request for Arbitration, ¶ 102.

⁴⁵ Request for Arbitration, ¶¶ 97-106.

⁴⁶ Request for Arbitration, ¶ 105.

Treaty. Specifically, the Claimants claim that the Respondent has breached the following provisions:

- Article 2: “Encouragement and Protection of Investments”;
- Article 3: “Treatment of Investments”;
- Article 4: “Compensation” for expropriation;
- Article 5: “Transfers”;
- Article 7: “Other Obligations”; and
- Article 8: Settlement of Investment Disputes.⁴⁷

2.37 These claims are described in further detail in Part V of this Award, which addresses the Respondent’s argument that the Claimants have failed to demonstrate that, *prima facie*, their claims fall under the relevant provisions of the Treaty.

2.38 The Claimants request an award granting the following relief:

(a) Declaring that Respondent has violated the Austria-Poland Bilateral Investment Treaty with respect to the Investors’ investments;

(b) Declaring that the actions and omissions of Respondent and those of its organs, institutions and entities for which it is internationally responsible, inter alia and by way of example and without limitation, are unlawful, arbitrary, discriminatory, unfair and inequitable, constitute an expropriation or measures tantamount to expropriation without compensation and a denial of justice and that Respondent and those of its organs, institutions and entities for which it is internationally responsible, inter alia and by way of example and without limitation, failed to provide fair and equitable treatment, failed to provide full protection and security and failed to provide most favoured nation treatment and treatment in accordance with international law and the Share Purchase Agreement;

(c) Dismissing the Intra-EU Jurisdictional objection advanced by Respondent and decides that it has jurisdiction of the dispute;

(d) Directing Respondent to re-establish the situation which existed before the breaches occurred;

(e) Directing Respondent to pay, in any case, damages or monetary refund equivalent to all damages incurred or to be

⁴⁷ Request for Arbitration, ¶¶ 133-142.

incurred in the future by the Investors and their investments, as set forth herein and as may be further developed and quantified in the course of this proceeding and in the future;

(f) Directing Respondent to pay Claimants the amount of [REDACTED] and to abandon or to prompt the Capital City of Warsaw to abandon the pending lawsuit for an additional amount of [REDACTED] before the Polish courts or to pay all damages or monetary refund equivalent to all damages incurred by the Investors due to Respondent's unlawful actions, as set forth herein and which may be further developed and quantified in the course of this proceeding;

(g) Directing Respondent to pay compound pre- and post-award interest until the date of full and effective payment of Respondent on all sums awarded;

(h) Directing Respondent to pay the Investors' costs associated with these proceedings, as far as Article 8 of the BIT provides therefore;

(i) Any other relief the Arbitral Tribunal may deem just, proper and appropriate.⁴⁸

2.39 The Claimants' responses to each of the Respondent's jurisdictional objections are summarised in the later Parts of this Award addressing those objections.

C. The Respondent's Case

2.40 In summary, the Respondent contends that this Tribunal has no jurisdiction to decide the Claimants' several claims on three principal grounds: (i) the Claimants have not demonstrated that, *prima facie*, their claims fall under the relevant provisions of the Treaty; (ii) the Claimants' use of the Treaty is an abuse of process; (iii) the Claimants do not have *jus standi* in these proceedings; and (iv) Article 8 of the Treaty is invalid or inapplicable because it conflicts with mandatory rules of EU law, as confirmed by the CJEU in the *Achmea* Judgment.

2.41 The Respondent also denies any liability on the merits to any of the Claimants. Here, the Tribunal will provide only a brief overview of the Respondent's main assertions for context, as this Award does not address the merits of the Parties' dispute.

⁴⁸ C-PHB, ¶ 125; *see* Jur. CM, ¶ 254.

- 2.42 Regarding the Claimants' complaints relating to Syrena Hotel's lack of title to the property on which Hotel Polonia and Hotel Metropol are situated, the Respondent does not deny the occurrence of the main events alleged by the Claimants.⁴⁹ However, the Respondent argues that these events cannot give rise to liability under the Treaty.
- 2.43 The Respondent asserts that prior to the signing of the SPA on 18 March 1997, all potential buyers of Syrena Hotels' shares were, or at least should have been, aware of the risk associated with possible reprivatisation claims.⁵⁰ With regard to Plot No 39, relevant proceedings were in fact pending before the Polish Courts. The Respondent highlights that the Supplement attached to the SPA expressly noted the proceedings directed against the Enfranchisement Decision, which concerned the entire property on which Hotel Metropol and Hotel Polonia were built.⁵¹ These were the proceedings pursued by the [REDACTED] family. The SPA nevertheless relied on the Enfranchisement Decision because, at the time, it was valid, binding and effective under Polish law. Therefore, according to the Respondent, the SPA correctly described the legal situation at the time.⁵²
- 2.44 The Respondent accepts that the SPA was silent about possible actions by the heirs of the other former property owner, [REDACTED] relating to the Hotel Polonia. However, according to the Respondent, this is because no formal actions by his heirs were initiated before the SPA was signed on 18 March 1997.⁵³ In fact, it was not until ten years later that [REDACTED] formally initiated proceedings in relation to her reprivatisation claims.⁵⁴
- 2.45 At the same time, the Respondent argues that the possibility of [REDACTED] heirs also initiating proceedings similar to those brought by the [REDACTED] family must have

⁴⁹ See Parties Joint Timeline.

⁵⁰ Jur. Memorial, ¶ 38.

⁵¹ **R-18T**, Supplement.

⁵² Jur. Memorial, ¶ 44.

⁵³ Jur. Memorial, ¶ 45.

⁵⁴ **C-46/33T**, Ruling on the acquisition of inheritance after [REDACTED] of 19 January 2006., Ref. II Ns 167/06; **C-46/34T**, Ruling on the acquisition inheritance after [REDACTED] of 30 November 2006, Ref. VI Ns 514/06; **C-46/35T**, Request of [REDACTED] from 26 June 2007 on declaration of invalidity of the negative decree decision of 7 May 1951; **R-14T**, Decision of the Self-Governing Appeal Council in Warsaw dated 17 August 2007 declaring invalid the decision of the National Council dated 13 August 1954; **R-15T**, Decision of the Self-Governing Appeal Council in Warsaw dated 23 April 2008 declaring invalid the decision of the National Council date 7 May 1951.

been obvious to any reasonable potential buyer, especially Strabag, one of the largest and most experienced players on the Warsaw real estate market at the time.⁵⁵

- 2.46 In these circumstances, the Respondent considers it inconceivable that Strabag, having been informed about the actions of the [REDACTED] family, would not conduct its own investigation and would not verify independently the legal situation of the property. In the Respondent's view, Strabag should have been aware of the risks associated with the existing and potential reprivatization claims and discounted these risks in the price.⁵⁶ In any event, the Respondent argues that Strabag should have met "the standard of prudence and diligence normally required from investors in such situations".⁵⁷
- 2.47 Regarding the Division Proceedings, the Respondent states that, in accordance with the administrative and judicial decisions issues in favour of the former property owners, the City of Warsaw had to prepare to grant them perpetual usufruct over the plots of land they previously owned, parts of which were joined into Plot No 39. Therefore, it had no choice but to initiate the proceedings for the formal division of Plot No 39 along the pre-War boundaries.⁵⁸
- 2.48 In relation to the Claimants' complaints relating to the Bank Guarantee, the Respondent considers that these complaints constitute no more than a claim for contractual damages under the SPA.⁵⁹ The Respondent recalls that this contractual claim is the result of a disagreement between Strabag and the City of Warsaw regarding how the investment obligation should be calculated under the SPA, and it has been (and it still being) heard in domestic proceedings.⁶⁰
- 2.49 Indeed, the Respondent contends that all the claims submitted by the Claimants are of a purely contractual nature and are, in any event, without merit.
- 2.50 Each of the Respondent's jurisdictional objections are summarised in more detail below in the Parts of this Award addressing those specific objections.

⁵⁵ Jur. Memorial, ¶ 47.

⁵⁶ The Respondent relies upon **R-20**, "10 Years 1985-1995 – Ilbau – Activities in Poland"; **R-21**, Commercial folder depicting major projects performed by Ilbau GmbH in Poland before 1997; *see* Hearing Transcript D1.67-69.

⁵⁷ Jur. Memorial, ¶ 49.

⁵⁸ Jur. Memorial, ¶ 57.

⁵⁹ Jur. Memorial, ¶ 108.

⁶⁰ Jur. Memorial, ¶¶ 59-68.

2.51 The Respondent requests that the Tribunal grant it the following relief:

I. Decide that the Tribunal does not have jurisdiction over the Claimants' claims as set forth in the Request for Arbitration, Claimants' Jurisdictional Counter-Memorial Claimants' Jurisdictional Rejoinder Memorial and Claimants' First Post-Hearing Brief and/or the Claimants' claims are inadmissible.

II. Should the Tribunal find that it has jurisdiction over any of the Claimants' claims and that these claims are not inadmissible, the Respondent respectfully requests the Tribunal to dismiss the Claimants' claims in their entirety.

III. In any event, the Respondent respectfully requests the Tribunal to order the Claimants to pay the costs of this arbitration, as well as the fees and expenses relating to the Respondent's legal representation, in-house costs, fees and expenses of any expert appointed by the Respondent or the Tribunal, and all other reasonable costs, as far as Article 8 of the Treaty provides therefor.

IV. Order such other relief as the Tribunal, in its discretion, considers appropriate.⁶¹

⁶¹ R-RPHB, ¶ 90; see Jur. Memorial, ¶ 134.

PART III: THE PRINCIPAL ISSUES

3.1 The principal issues addressed in this Award all arise from the Respondent's challenges to the jurisdiction of the Tribunal under Article 8 of the Treaty. These issues are all contested by the Claimants, who assert the Tribunal's full jurisdiction over the Parties' dispute. For present purposes, the Tribunal is content to take these issues largely as formulated by the Respondent in its Jurisdictional Memorial, as supplemented by its oral submissions at the Hearing, and its post-hearing written submissions on the *Achmea* Judgment.¹

3.2 ***I – Prima Facie Case:*** Have the Claimants demonstrated that, *prima facie*, their claims fall under the relevant provisions of the Treaty? In particular:

- (1) Are the rights upon which the Claimants rely for their claims covered by the Treaty?
- (2) Are the facts alleged by the Claimants capable of coming within all or at least some of the Treaty's provisions invoked by the Claimants?
- (3) Are the Claimants' allegations "incoherent and conclusory"?

3.4 ***II – Abuse of Process:*** Is the Claimants' use of the Treaty for their claims in this arbitration an abuse of process?

3.5 ***III – Jus Standi and Ratione Personae:***

- (1) Are the Claimants "investors" under the Treaty?
- (2) Do the Claimants have *jus standi* in this arbitration despite having transferred their "investments" to a national of a third state (namely SHIOL, a Cypriot legal person)?

3.6 ***IV – EU Law and the Achmea Judgment:***

- (1) Does EU law apply to the determination of the Tribunal's jurisdiction?

¹ Jur. Memorial, ¶ 6; Hearing, Respondent's Written Outline, p. 2; Respondent's Observations on *Achmea*; Respondent's Reply on *Achmea*.

- (2) Is Article 8 of the Treaty invalid or inapplicable as a result of a conflict with EU law?

PART IV: PRINCIPAL LEGAL TEXTS

A. Introduction

- 4.1 For ease of reference later, the Tribunal reproduces here the relevant parts of the principal legal texts considered later below, including: the Treaty, the Polish Code of Administrative Procedure (“PCAP”), the SPA, the Information Memorandum, the Supplement and the VCLT.
- 4.2 Because these legal texts are in the German and/or Polish languages, the Tribunal has used the Parties’ English language translations (save where otherwise indicated). As noted above, any differences between the Parties’ translations are not considered material for present purposes.

B. The Treaty¹

- 4.3 Article 1(1) of the Treaty, which defines the term “investment”, provides:

(1) The term “investment” shall include all assets, in particular but not exclusively:

a) Ownership of movable and immovable property and other rights in rem, such as mortgages, rights of retention, pledges, rights of usufruct, and similar rights;

b) Participation rights and other types of participations in enterprises;

c) Claims to money provided in order to create an economic value or claims to performances having an economic value; and

d) Copyrights, industrial property rights such as inventor’s patents, trademarks and industrial designs and models, registered designs, technical procedures, know-how, trade names and good will.

- 4.4 Article 1(1)(b) of the Treaty defines the term “investor” as:

Any juridical person, organization or association, with or without legal personality, lawfully established in accordance with the legislation of one of the Contracting Parties, having its seat in the territory of that Contracting Party and undertaking

¹ The following excerpts are taken from the Claimants’ English translation, C-5T.

an investment in the territory of the other Contracting Party.

- 4.5 Article 1(3) of the Treaty defines “returns” as “those sums which are produced by an investment, in particular but not exclusively profits, interest, increases in capital, dividends, royalties, licence fees and other compensation”.

- 4.6 Article 2(1) (“Encouragement and Protection of Investments”) provides:

Each Contracting Party shall as far as possible promote in its territory investments of investors from the other Contracting Party, shall authorize such investments in accordance with its own legislation and shall treat them at any rate in a just and equitable manner.

- 4.7 Article 3 of the Treaty (“Treatment of Investments”) provides (in relevant part):

(1) Each Contracting Party shall treat investments of investors from the other Contracting Party undertaken on its territory in accordance with all legislation relevant to their establishment and utilization no less favourably than investments of its own investors or by investors from third countries.

(2) Within its own territory, each Contracting Party shall treat any activity by investors from the other Contracting Party, in relation to an investment, and in particular to its administration, application, use and enjoyment, no less favourably than the activity of its own investors or of investors from third countries.

- 4.8 Article 4 of the Treaty (“Compensation”) provides (in relevant part):

(1) Investments of investors from one Contracting Party may be expropriated on the territory of the other Contracting Party only in the public interest, on the basis of a lawful procedure and against compensation. Such compensation must represent the value of the investment immediately before the time at which the actual or imminent expropriation becomes publicly known. The compensation must be provided without unreasonable delay and until paid out must carry the normal banking interest rate of the State in whose territory the investment had been made; it must be actually realizable and freely transferable. No later than the time of expropriation suitable provision shall exist for the determination and payment of compensation.

(2) If one of the Contracting Parties expropriates the assets of a company which under article 1, paragraph 2 of this Agreement should be regarded as belonging to that Contracting Party, and in which an investor from the other Contracting Party has a

holding, than the Contracting Party shall apply the stipulations of paragraph 1 of this article in such a manner that appropriate compensation is guaranteed to that investors.

(3) The investor shall be entitled to have examined the legality of such expropriation by appropriate organs of the Contracting Party which has ordered the expropriation.

(4) The investor shall be entitled to have examined the amount of such compensation by either the appropriate organs of the Contracting Party which has ordered expropriation, or an international arbitral tribunal as provided for in article 8.

(5) With regard to the matters governed by paragraph 1, paragraph 2, paragraph 3 and paragraph 4 of this article, investors from one Contracting Party shall not be treated any less favourably than investors from the other Contracting Party or from third countries.

4.9 Article 5 of the Treaty (“Transfer”) provides (in relevant part):

(1) Each Contracting Party shall guarantee to investors from the other Contracting Party that they may transfer freely, without unreasonable delay, in a freely convertible currency the payments which relate to an investment, in particular but not exclusively:

a) Capital and additional sums to maintain or expand the investment;

b) Sums intended to cover expenditures relating to the administration of the investment;

c) Returns;

d) Loan repayments;

e) The yield in the event of the complete or partial liquidation or sale of the investment;

f) Compensation pursuant to article 4, paragraph 1.

4.10 Article 7 of the Treaty (“Other Obligations”) provides:

(1) If the legislation of either Contracting Party or international obligations of the two Contracting Parties, which presently apply in addition to this Agreement or which are established in the future, should give rise to a general or specific agreement which accords to the investments of investors from the other Contracting Party more favourable treatment than is provided

for by this Agreement, such arrangement shall have precedence over this Agreement, in so far as it is more favourable.

(2) Each Contracting Party shall comply with any contractual obligation it may have entered into with respect to investors from the other Contracting Party concerning investments which it has authorized in its territory.

4.11 Article 8 of the Treaty, which concerns the “Settlement of Investment Disputes”, provides (in relevant part):

(1) If disputes should arise between one Contracting Party and an investor from the other Contracting Party with regard to an investment, such disputes shall be resolved amicably between the parties themselves if possible. If such amicable resolution is not possible, then the investor shall exhaust all relevant domestic administrative and judicial remedies.

(2) If such a dispute cannot be settled in a manner provided for in paragraph 1 within 12 months from written notification of adequately specified claims, it shall at the request of the Contracting Party or of the investor from the other Contracting Party, be submitted for conciliation or arbitration:

a) to the International Centre for Settlement of Investment Disputes, if both Contracting Parties are signatories to the Convention on the Settlement of Investment Disputes between States and nationals of other States, opened for signature at Washington on 18 March 1965. In the event of arbitration, each of the Contracting Parties, by becoming a signatory to this Agreement, undertakes irrevocably and in advance, even if there should be no individual arbitration agreement between a Contracting Party and an investor, to submit such disputes to the Centre and to recognize the arbitration award as binding.

b) to an international arbitral tribunal, if either of the Contracting Parties is not a signatory to the Convention on the Settlement of Investment Disputes between States and nationals of other States. The international arbitral tribunal shall be constituted on an ad hoc basis in the following manner: each side shall appoint an arbitrator, and these arbitrators shall agree on a chairman, who shall be a national of a third State. The arbitrators shall be appointed within two months from the date on which the investors has notified the other Contracting Party of his desire to submit the dispute to an arbitral tribunal and the chairman within further two months.

If the time-limits given in the paragraph above are not observed

and if no other agreements reached, either side may request the President of the International Court of Justice to make the necessary appointments. If the President of the International Court of Justice is a national of either Contracting Party or if he is unable to act for any other reason, the Vice-President or, if he is unable to act, the longest-serving member of the International Court of Justice, may under the same conditions be asked to make the necessary appointments. The arbitral tribunal shall determine its rules of procedure by applying as appropriate the procedural rules of the Convention on the Settlement of Investment Disputes between States and nationals of other States of 18 March 1965; the decision shall include a statement of the basis on which it has been made, and supporting reasons shall be given if either side so requests.

(3) The decision of the tribunal shall be final and binding. It shall be enforced by domestic law, and each Contracting Party shall ensure the recognition and enforcement of arbitral awards in accordance with its relevant legislation.

(4) Each side shall bear the costs of its own arbitrator and the costs of its representation in the proceedings before the arbitral tribunal; the costs of the chairman and the other costs shall be borne in equal shares by both sides.

(5) A Contracting Party which is a party to a dispute shall not, at any stage of the conciliation or arbitration proceedings or enforcement of an arbitral award, raise an objection on the grounds that the investor who is the other party to the dispute has received compensation for all or some of its losses through an insurance policy.

4.12 Article 9 of the Treaty,² which concerns “Disputes between the Contracting Parties”, provides:

(1) Differences of opinion between the Contracting Parties concerning the interpretation or application of this Agreement shall as far as possible be settled by amicable negotiations.

(2) If a difference of opinion cannot be resolved within six months, it shall be submitted to an arbitral tribunal at the request of either Contracting Party.

(3) The arbitral tribunal shall be formed on a case-by-case basis by each Contracting Party appointing one member and both of members [=co-arbitrators] agree on a national of a third State as chairman who is to be appointed by the Governments of the

² The English translations of Articles 9 and (below) 11 of the Treaty were translated from its German original text by ICSID and confirmed by the Tribunal (being German-speakers).

two Contracting Parties. The members [=co-arbitrators] are to be appointed within 2 months after one Contracting Party notified the other Contracting Party that it intends to submit the difference of opinion to an arbitral tribunal; the chairman is to be appointed within a further two months.

(4) If the deadlines referred to in paragraph 3 are not complied with, any Contracting Party may, in the absence of any other agreement, request the President of the International Court of Justice to make the necessary appointments. If the President of the International Court of Justice is a national of either Contracting Party or is otherwise unable [to make the appointment], the Vice-President or, in the event of his hindrance, the senior member of the International Court of Justice may be invited to make the appointments under the same conditions.

(5) The Arbitral Tribunal determines the arbitration procedure.

(6) The arbitral tribunal shall decide on the basis of this Agreement as well as on the generally recognized rules of international law. It decides by majority of votes; the decision is final and binding.

(7) Each Contracting Party shall bear the costs of its member and its representative in the arbitral proceedings; the costs of the chairman and other costs shall be borne equally by the two contracting parties. The arbitral tribunal may, however, decide on a different cost allocation in its ruling.

4.13 Article 10 of the Treaty, which concerns the “Applicability of this Agreement,” provides:

Once entered into force, this Agreement shall apply to all existing and future investments undertaken by investors of one Contracting Party in accordance with the legislation of the other Contracting Party on the territory of the Contracting Party.

4.14 Article 11 of the Treaty, which concerns “Entry into Force and Duration”, provides:

(1) This Agreement requires ratification and will enter into force on the first day of the third month following the month in which the instruments of ratification have been exchanged.

(2) The Agreement will remain in force for ten years; after the expiration [of the 10-year period], it will be extended indefinitely, unless one of the two contracting parties terminates the agreement in writing with a notice period of twelve months. After ten years, the agreement can be terminated at any time, but

remains in effect for a further year after the termination notice.

(3) For investments made up to the date of termination of this Agreement, Articles 1 to 10 shall continue to apply for a further 10 years from the date of the termination of the Agreement.

C. The Polish Code of Administrative Procedure (“PCAP”)³

4.15 Certain provisions of the PCAP were cited by the Parties, as follows:

Article 156

§ 1. A public administration body shall invalidate any decision which:

- 1) was issued in breach of the regulations on jurisdiction,*
- 2) was issued without legal basis or in blatant breach of the law,*
- 3) concerns a case that has already been dealt with by a separate final decision,*
- 4) has been addressed to a person who is not a party to the proceedings,*
- 5) was unenforceable at the date of issue and such unenforceability is of a permanent nature,*
- 6) its enforcement would result in commitment of a criminal act,*
- 7) contains a defect which renders it invalid by law.*

§ 2. A decision may not be invalidated for the reasons given in § 1, (1), (3), (4) and (7), if 10 years have lapsed from the date of its service or publication, and also if the decision would have irreversible legal consequences.

Article 157

§ 1. In the cases referred to in Article 156 the jurisdiction to invalidate a decision belongs to a higher body, and if the decision was issued by a minister or a self-government appeal council – those bodies shall have jurisdiction.

§ 2. Proceedings for the invalidation of a decision can be commenced at the instigation of the party or ex officio. [...]

³ The following excerpts are taken from the Respondent’s English translation, **R-11T**.

Article 158

§ 1. The invalidation of a decision shall be made by way of a decision.

§ 2. If a decision cannot be invalidated because of the circumstances referred to in Article 156 § 2, the public administration body shall confine itself to declaring that the challenged decision breaches the law and indicating the circumstances for which it has been unable to declare the decision invalid.

Article 159

§ 1. The public administration body having jurisdiction to invalidate a decision shall suspend the enforcement of the decision ex officio or at the instigation of the party, if there is a likelihood that it contains one of the defects referred to in Article 156 § 1.

§ 2. A party has a right to make an interlocutory objection against a ruling suspending the enforcement of a decision.

D. The Share Purchase Agreement (“SPA”)⁴

4.16 Article 2 of the SPA sets out the “Representations and Warranties of the Seller”, relating to the organisation of Syrena Hotels (Article 2.1), the shares of Syrena Hotels (Article 2.2), the legal and financial standing of Syrena Hotels (Article 2.3) and certain amendments to the Articles of Incorporation of Syrena Hotels (Article 2.4).

4.17 In regard to the legal and financial standing of Syrena Hotels, Article 2.3.1 of the SPA provides:

The Seller represents and warrants to the Buyer that the additional information on legal and financial standing of the Company, as at the day of signing this Agreement, is provided in a statement of the Management Board of the Company and in the balance sheet for 1996, which are enclosed with this Agreement as Attachment No 5 and Attachment No 6.

4.18 Article 2.5 of the SPA provides that the “representations and warranties included in this Agreement are the only representations and warranties made by the Seller”.

⁴ The following excerpts are taken from the Respondent’s English translation, **R-2T**. Syrena Hotels is referred to as “the Company” in the SPA and related documents.

4.19 Article 3 of the SPA stipulates the “Warranties and Representations of the Buyer”. These relate to the Buyer’s authorisation to conclude the agreement (Article 3.1), its funds (Article 3.2), its joining the Company upon transfer of the shares (Article 3.3), and its line of business (Article 3.5).

4.20 In addition, Article 3.4, which sets out “Additional Representations of the Buyer”, provides, in relevant part:

the Buyer is familiar with all the documents and written information obtained from the Seller during the tendering procedure, in particular with the information included in the Information Memorandum of May 1996 and in the Supplement to the Information Memorandum of October 1996, concerning the legal and financial standing of the Company; the Buyer does not raise any objections or doubts towards the Seller in this respect.

4.21 Article 3.6 of the SPA (“Acquisition of the right to and the ownership of land”) provides:

The Buyer and the Board of the Capital City of Warsaw express their following intention: if the Capital City of Warsaw and/or Municipality of Centrum sell the rights to the plots of land where the buildings owned by the Company are located, the Company shall acquire this right, on terms and conditions separately agreed upon by the parties of the relevant real estate sales agreement.

4.22 Article 4.2 of the SPA, which sets out the Buyer’s “Investment obligations” provides, in relevant part:

4.2.1 The Buyer undertakes to make by 31 December 2003 investment outlays for buildings owned by the Company at the time of the acquisition of Shares; [...]

4.2.4 The total value of investments ... to be made by 31 December 2003, shall be at least an equivalent of [REDACTED], calculated at the ATS buying rate published by the National Bank of Poland and applicable on the day when a given expenditure is incurred by the Buyer.

4.2.5 The Buyer is deemed to have fulfilled the obligations specified in points 4.2.1 and 4.2.4 when the investment is financed by a combination of: own funds of the Company, funds

contributed to the share capital of the Company as a result of share capital increase, loans, bank credits, or loans provided by shareholders – on terms and conditions which the Buyer considers most economically viable.

4.2.6 In order to facilitate the control by the Seller of the Buyer's fulfilment of the obligations under points 4.2.1 to 4.2.5, the Buyer shall cause that the Management Board of the Company will instruct the auditors preparing the report from the audit of financial statements of the Company for the years when any of the said obligations are in force for the Buyer, to prepare a separate report on the Buyer's fulfilment of the said obligations; the fulfilment of the said obligations should be presented cumulatively, starting from the first year when they were in force, and copies of such reports will be delivered to the Seller not later than within one month after the balance sheet of the Company has been approved by the shareholders' meeting.

4.2.7 If the Buyer fails to make the investments in the Company within the deadline as provided for in points 4.2.1 to 4.2.5, the Buyer shall pay to the Seller a contractual penalty, calculated in accordance with the following principles. If the amount of investments which were not made is lower or equal to the equivalent of [REDACTED], the contractual penalty shall not be charged. If the amount of investments which were not made is higher than the equivalent of [REDACTED], the contractual penalty due to the Seller shall be calculated as the difference between the amount of [REDACTED] of [REDACTED] and the amount that has been invested.

E. The Information Memorandum⁵

- 4.23 The Introduction to the Information Memorandum first provides general information; and it then provides:

Having examined the legal, economic and financial situation of the Company, the experts recommend acquisition of a majority stake in the Company to potential investors. The investment should have a long-term perspective.

⁵ The following excerpts are taken from the Respondent's translation, **R-17T**.

- 4.24 Article 2.2 of the Information Memorandum addresses its purpose. It provides, in relevant part:

The Memorandum provides objective information on the Company, basic components of its assets and financial results for the previous year. The Memorandum aims to attract interest of investors in the Company. It is to serve as an impulse for making bids.

- 4.25 Article 2.4 of the Information Memorandum (“Legal basis, terms and purpose of share disposal”) provides, in relevant part:

Sale of shares is the final stage of ownership transformation of the Company. It will be effected pursuant to the Act of 13 July 1990 on the privatisation of state-owned enterprises (under the procedure established by Article 23(3) in conjunction with Article 45 and Article 24 – Journal of Laws No. 51, item 298) and pursuant to § 2 of resolution No. 12/84/91 of the Council of the Capital City of Warsaw of 24 June 1991 on the organisational and legal form of the Warsaw Tourism Enterprise SYRENA in Warsaw.

- 4.26 Article 3.12 of the Information Memorandum (“Real Properties”) provides, in relevant part:

2. Real property situated in Warsaw at Al. Jerozolimskie 45, marked in the land register in cadastral unit Warsaw-Sródmieście, cadastral district 5-05-01, plot No. 39 with surface area of 4,163 sq.m. developed with two hotel buildings: POLONIA hotel and METROPOL hotel;

[...]

In addition, the Company holds and uses without a legal title the real property situated in Warsaw at pl. Konstytucji 1, marked in the land register in cadastral unit Warsaw-Sródmieście, cadastral district 05-05-06, plots No. 54/1, 54/2, 56/1, 56/2, 56/3, 58/1, 59/1, 59/2, 59/3, 60/2, 60/3, 60/4 with total surface area of 2,489 m² developed with a hotel building: MDM hotel.

- 4.27 Chapter IV of the Information Memorandum, which concerns the legal status of Syrena Hotels, provides:

All the buildings owned by the Company (except for MDM hotel situated at pl. Konstytucji) have a regulated legal status. The owner of the plots of land indicated in point III “Real

properties” is the Capital City of Warsaw as the legal successor of the Union of Districts-Municipalities of Warsaw, pursuant to the Act of 25 March 1994 on the regime of the Capital City of Warsaw (Journal of laws No. 48, item 195). The owner of buildings and perpetual usufructuary of the plots of land is Hotele Warszawskie SYRENA sp. z o.o. as the legal successor of Warsaw Tourism Enterprise SYRENA, in accordance with the notarial deed of 19 November 1991, as proven by enfranchisement decisions No. 487/93, 488/93, 489/93, 490/93 and 491/93 of 29 June 1993. The municipalisation and enfranchisement proceedings concerning the plot of land and building of MDM hotel are pending.

- 4.28 The Information Memorandum goes on to provide information about each of the Company’s properties. With respect to Hotel Polonia, the Information Memorandum states that the “formal and legal status of the land title is regulated”. With respect to Hotel Metropol, it also provides that the “formal and legal status of the land title is regulated”.

F. The Supplement⁶

- 4.29 Article 4.2 of the Supplement, concerning the Hotel Metropol, provides:

The legal status of hotel Metropol is regulated. The Company is perpetual usufructuary of the land plot and the owner of the hotel building erected on the plot. Land and Mortgage Register has been established for the property. A reservation is made in the Register regarding the claims of former successors to the former owners of the property, whose application for temporary ownership of the property was declined in 1996 by the Minister of Spatial Development and Construction. The applicants can demand that the case be decided by the Supreme Administrative Court, to which they have already filed a complaint. Simultaneously, the successors have applied to the Self-government Appeal Council in Warsaw for invalidation of the administrative decision granting the Company perpetual usufruct of the land on which Metropol Hotel has been built.

G. The VCLT

- 4.30 Article 31 of the VCLT contains the general rule of treaty interpretation:

1. A treaty shall be interpreted in good faith in accordance with

⁶ The following excerpt is taken from the Respondent’s translation, **R-18T**.

the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

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;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

4.31 Article 30(3) of the VCLT provides:

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 latter treaty.

4.32 Article 59 of the VCLT, concerning “Termination or suspension of the operation of a treaty implied by conclusion of a later treaty”, provides:

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.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties

PART V: PRIMA FACIE CASE

A. Introduction

- 5.1 The Tribunal briefly sets out the contrasting positions of the Parties on this issue before recording its analysis and decision. In considering the Respondent's *prima facie* objection, the Tribunal is required to consider various alleged facts as they relate to the claims asserted by the Claimants. However, the Tribunal's analysis and decision on this objection are without prejudice to any later decision the Tribunal may take in relation to the merits of the Claimants' claims, and nothing in this Part should be read as an indication of the Tribunal's views on the merits, which will be formed only after the Parties have had a full opportunity to make submissions on the relevant issues.

B. The Respondent's Case

- 5.2 The Respondent contends that the Claimants' case must meet a "*prima facie* test" to establish the jurisdiction of the Tribunal to decide their claims.¹
- 5.3 According to the Respondent, under the "*prima facie* test", the Claimants must demonstrate that, *prima facie*, their claims fall under the relevant provisions of the Treaty. The rights relied on by the Claimants must be covered by the Treaty, and the facts alleged by the Claimants must be capable of coming within those provisions.²
- 5.4 The Respondent considers that, in discharging its task, the Tribunal may have to decide definitively the interpretation of the relevant provision of the Treaty in order to establish whether the facts alleged by the Claimants fall within the Treaty.³
- 5.5 Further, according to the Respondent, it is not enough for the Claimants to merely state facts and "label" them as violations of the Treaty. The Claimants' characterisation of

¹ R-PHB, ¶ 17, citing **RL-45**, *Saipem S.p.A. v People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, ¶ 91 ("To summarize, the Tribunal's task is to determine the meaning and scope of the provisions upon which Saipem relies to assert jurisdiction and to assess whether the facts alleged by Saipem fall within those provisions or would be capable, if proven, of constituting breaches of the treaty obligations involved. In performing this task, the Tribunal will apply a *prima facie* standard, both to the determination of the meaning and scope of the relevant BIT provisions and to the assessment whether the facts alleged may constitute breaches of these provisions. In doing so, the Tribunal will assess whether Saipem's case is reasonably arguable on its face. If the result is affirmative, jurisdiction will be established, but the existence of breaches will remain to be litigated on the merits").

² Jur. Memorial, ¶ 73.

³ Jur. Memorial, ¶ 73, citing **RL-3**, *Methanex Corporation v United States of America*, NAFTA/UNCITRAL, Partial Award, 7 August 2002, ¶ 122.

facts must be coherent and must explain how the facts alleged by them come logically within each of the invoked provisions of the Treaty.⁴ For the Respondent, this means that if the Claimants' statement of the facts is unreasonably vague, incoherent or vexatious, their case may be rejected at this jurisdictional stage under the *prima facie* test.

5.6 During the Hearing, the Respondent accepted that the Claimants “do have an arguable case”.⁵ However, according to the Respondent, Claimants' case, “is essentially contractual in nature” and not a case under the Treaty.⁶ Indeed, the Respondent contends that the Claimants' claims under the *Treaty* “are anything but ‘reasonably arguable on [their] face’”.⁷

5.7 In the Respondent's view, the Claimants' entire case consists of two components:

(i) the alleged breach by the Municipality of the representations and warranties contained in the SPA;

*(ii) the alleged unauthorised use by the Municipality of the bank guarantee.*⁸

5.8 The Respondent argues that the Claimants offer a broad, meticulous account of many court and administrative proceedings relating to the restitution claims against the Warsaw properties to “blur the picture”.⁹ However, according to the Respondent, the Claimants “have expressly admitted ... that, in principle, they do not question either the endeavours of the former owners to have their ownership restored or Poland's legal framework allowing for such restitution”.¹⁰

5.9 Therefore, in the Respondent's view, the essence of the Claimants' complaint is only the fact that their rights acquired under the SPA are affected by the restitution claims.

⁴ Jur. Memorial, ¶ 73, citing **RL-1**, *Pan American Energy LLC and BP Argentina Exploration Company v Argentine Republic*, ICSID Case No. ARB/03/13 and *BP America Production Co. and others v Argentine Republic*, ICSID Case No. ARB/04/8, Decision on Preliminary Objections, 27 July 2006, ¶ 50.

⁵ Hearing Transcript, D1.5 and D1.28.

⁶ *Ibid.*

⁷ R-PHB, ¶ 18, quoting **RL-45**, *Saipem S.p.A. v People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, ¶ 91.

⁸ R-PHB, ¶ 19.

⁹ R-PHB, ¶ 20.

¹⁰ R-PHB, ¶¶ 23-24, citing Jur. Rejoinder, ¶ 158 (“For the avoidance of doubt, Claimants, in principle, do not object as such to a state supporting former owners in their endeavour to have a wrong suffered at the hands of the same state corrected”).

The Respondent states that “it all boils down to the question of accuracy of the representations and warranties allegedly contained in the SPA and related documentation”, as acknowledged by the Claimants.¹¹

5.10 The Respondent further contends that the SPA is a purely commercial contract, which did not require the exercise of any “governmental powers” by the Minister of State Treasury or any other instrumentality of Poland.¹² According to the Respondent, all the actions of the City of Warsaw in relation to the conclusion of the SPA were undertaken in its capacity as the commercial owner of Syrena Hotels.¹³

5.11 Regarding the Bank Guarantee, the Respondent similarly argues that the Claimants’ allegations all relate to a purely commercial dispute. According to the Respondent, this dispute about the Bank Guarantee “rests exclusively on the proper interpretation of the contractual clause dealing with the calculation of investment outlays, which the buyer was obliged to make under the SPA”.¹⁴

5.12 Therefore, the Respondent concludes that:

*any and all controversies relating to the SPA should be dealt with between the parties to this agreement, i.e. between the Municipality (as the seller) and Strabag (as the legal successor of the buyer). The respective forum for deciding any and all disputes relating to the alleged breaches of the SPA are the Polish common courts. Such disputes should be decided under Polish law, which governs the SPA. The Respondent notes that such a dispute was initiated by Strabag in September 2015 and is currently pending before the Regional Court in Warsaw.*¹⁵

5.13 The Respondent rejects the Claimants’ reliance on the umbrella clause in Article 7(2) of the Treaty to “elevate” their contractual claims to the level of a treaty breach.¹⁶ In any event, the Respondent asserts that, even if the umbrella clause could be invoked,

¹¹ R-PHB, ¶¶ 28-29, *citing* Jur. Rejoinder, ¶ 23 (stating that the Claimants are “merely seeking redress for the consequence of the wrong information (including decisions and assurances), which Respondent provided deliberately and upon which Claimants relied”).

¹² R-PHB, ¶¶ 30-42.

¹³ R-PHB, ¶ 39.

¹⁴ R-PHB, ¶¶ 43-46.

¹⁵ R-PHB, ¶ 42.

¹⁶ R-PHB, ¶¶ 47 *et seq.* See subsection D(8) below.

the Claimants have failed to allege any valid claims under the SPA or Polish law. The Respondent has made extensive submissions on this point, both orally and in writing.¹⁷

5.14 In addition to the characterization of the Claimants' claims as contractual in nature, the Respondent further submits that the Claimants have "failed to demonstrate any breach of protective standards enshrined in the Treaty".¹⁸ The Respondent's main contentions in this context are the following:

- The Claimants' expectation that no further restitution claims would be pursued in relation to Hotel Polonia was neither reasonable nor legitimate.¹⁹
- The Claimants failed to establish that they suffered any discriminatory treatment.²⁰
- Neither the Claimants' investment nor the Bank Guarantee has been expropriated.²¹

5.15 For the above reasons, the Respondent concludes that in the interest of procedural economy, it is not appropriate to reach the merits of the Claimants' claims.²²

C. The Claimants' Case

5.16 In summary, the Claimants' primary position is that Article 8 of the Treaty does not require the Claimants to meet any *prima facie* test to establish the Tribunal's jurisdiction.²³ It is sufficient for a claimant to simply to characterise its claims as violations of the Treaty and to meet the formal requirements of the Treaty, which the Claimants have done in this case.²⁴

5.17 Alternatively, if the Tribunal considers it appropriate to apply a *prima facie* test, the legal standard is as follows:

The prima facie test requires a tribunal to accept the facts as pleaded by a claimant pro tem and then to determine whether those facts, on condition they can be proven in the subsequent stage, are sufficiently plausibly based on the Treaty or might, at

¹⁷ See, e.g., R-PHB, ¶¶ 77-135.

¹⁸ R-PHB, Section IV.C.

¹⁹ R-PHB, Section IV.C.1. See subsection D(2) below.

²⁰ R-PHB, Section IV.C.2. See subsection D(4) below.

²¹ R-PHB, Section IV.C.3. See subsection D(5) below.

²² R-PHB, ¶ 18.

²³ Jur. CM, ¶¶ 103-106.

²⁴ Jur. CM, ¶ 106

*least in theory, establish a Treaty breach. Issues as to whether a claim may be successful as a matter of law or whether a claimant only pretends to exercise a right (i.e. is abusing a “right”) properly belong to the merits phase.*²⁵

- 5.18 The Claimants further argue that the *prima facie* test must be limited to a summary examination in order to avoid prejudging the merits.²⁶
- 5.19 The Claimants deny that their claims are “purely contractual” as argued by the Respondent.²⁷ They contend that all their claims are made under the Treaty and that they are advancing no contractual claims under the SPA itself.
- 5.20 In particular, the Claimants contend that their claims are “based on the conduct of a privatisation of public property by Respondent (i.e. its State-organs) followed by actions of Respondent committed to set-aside the effects of the privatisation”.²⁸ The Claimants argue that acts of the State organs relating to the privatisation of Syrena Hotels were governmental, not commercial, acts.²⁹ Further, the Claimants allege that the City of Warsaw exercised *puissance publique* to interfere with Syrena Hotel’s title to property. In the Claimants’ view, that conduct is attributable to the Respondent and therefore must adhere to the standards of the Treaty.³⁰
- 5.21 Regarding the Bank Guarantee, the Claimants assert that they are “investors” with “investments” under Article 1(1) of the Treaty, and such “investments” include the Bank Guarantee as part of one inseparable package.³¹
- 5.22 Relying upon the decision in *Impregilo v Pakistan*, the Claimants assert that treaty and contract claims remain analytically distinct even if they perfectly coincide.³²

²⁵ C-PHB, ¶¶ 44-45, citing **RL-5**, *Impregilo S.p.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, ¶ 266.

²⁶ Jur. CM, ¶ 107.

²⁷ C-RPHB, ¶¶ 5 *et seq.*

²⁸ C-RPHB, ¶ 6.

²⁹ C-RPHB, ¶ 7, citing **CL-5**, *Eureko B.V. v Republic of Poland*, Partial Award, 19 August 2005; *Noble Ventures Inc v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005.

³⁰ C-RPHB, ¶¶ 45-51.

³¹ Hearing Transcript D1.159 *et seq.*

³² **RL-5**, *Impregilo S.p.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, ¶ 258.

5.23 Finally, the Claimants submit that they have pleaded a perfectly coherent case with respect to the alleged breaches of the Treaty, and therefore, the *prima facie* test is met.³³

D. The Tribunal's Analysis

5.24 The Tribunal begins with its decision on the *prima facie* test under international law applicable to the Treaty.

5.25 The Respondent relies on the decisions rendered in *Pac Rim Cayman v. El Salvador*³⁴ and *Trans-Global v. Jordan*³⁵ to argue for the application of a “broadly interpreted” *prima facie* test to the Treaty. The Respondent contends that in these cases, the arbitral tribunals did not, for the purposes of determining their jurisdiction, merely rely on the correctness of the facts asserted by the claimants in those cases. The Claimants dispute the relevance of the *Pac Rim* case and the *Trans-Global* case to the present case, contending that, unlike the present case, those cases were based on Article 10.20.4 CAFTA and ICSID Arbitration Rule 41(5) respectively, which concern expedited procedures to address preliminary objections to jurisdiction.

5.26 This is not an arbitration taking place under the ICSID Convention or CAFTA. The terms of the Parties’ arbitration agreement do not provide for preliminary objections such as the ones found in ICSID Arbitration Rule 41(5) or Article 10.20.4 CAFTA. Thus, that “*jurisprudence constante*” is inapplicable here.³⁶ It is therefore necessary to apply customary international law, so as to interpret the arbitration agreement in its context and in the light of the Treaty’s object and purpose under Article 31 of the VCLT.

5.27 In the Tribunal’s view, this jurisdictional test requires a claimant to establish jurisdiction definitively (i.e. not *prima facie* jurisdiction), but only a *prima facie* case on the merits of the claimant’s claim.

³³ C-PHB, ¶ 48. See subsection D below.

³⁴ **RL-27**, *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12.

³⁵ **RL-28**, *Trans-Global Petroleum Inc. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25.

³⁶ See A. Parra, “ICSID Arbitration Rule 41(5) Objections, *The First 50 Years* (2016), pp. 593 *et seq.*; M. Potestà, “Preliminary Objections to Dismiss Claims that are Manifestly Without Legal Merit under Rule 41(5) of the ICID Arbitration Rules”, *ICSID Convention after 50 Years* (2017), pp. 249 *et seq.*

- 5.28 This jurisdictional test is manifest from the classic statement of principle by Judge Higgins in *Oil Platforms* describing the test for preliminary jurisdictional objections under a treaty before the International Court of Justice:

31. Where the Court has to decide, on the basis of a treaty whose application and interpretation is contested, whether it has jurisdiction, that decision must be definitive ... It does not suffice, in the making of this definitive decision, for the Court to decide that it has heard claims relating to the various articles that are “arguable questions” or that are “bona fide questions of interpretation” (each being suggestions advanced in this case). This is so notwithstanding that the Interhandel case (with its passing reference to a ‘provisional conclusion’) and the Military and Paramilitary Activities in and against Nicaragua case do not fit easily into this approach. The treatment of the issue in the latter case contained so many remarkable elements and so many diverse views that it cannot be seen as a clear decision by the Court to move away from the approach so powerfully established in the Mavrommatis case. Nor, in my view, is the answer to be found in the establishment of a “reasonable connection” between the claims and the Treaty – that is a necessary but not sufficient condition.

32. There has been some suggestion that “plausibility” provides another test for determination of whether the Court has jurisdiction. It was said in the Ambatielos case that the Court must determine whether the arguments of the applicant State “in respect of the treaty provisions on which the Ambatielos claim is said to be based, are of a sufficiently plausible character to warrant a conclusion that the claim is based on a Treaty” (I.C.J. Reports 1953, p. 18. “Plausibility” was not the test to warrant a conclusion that the claim might be based on the Treaty. The only way in which, in the present case, it can be determined whether the claims of Iran are sufficiently plausibly based upon the 1955 Treaty is to accept pro tem the facts as alleged by Iran to be true and in that light to interpret Articles 1, IV and X for jurisdictional purposes - that is to say, to see if on the basis of Iran’s claims of fact there could occur a violation of one or more of them.³⁷

- 5.29 Thus, the test requires a “definitive” decision on jurisdiction, but it does not require any definitive decision on disputed facts where these meet the *prima facie* test. The Tribunal’s task is to determine whether the facts pleaded by the Claimants, if taken to

³⁷ *Oil Platforms (Islamic Republic of Iran v United States of America)*, ICJ, Judgment of 12 December 1996, Separate Opinion of Judge R. Higgins, ¶¶ 31-32.

be true, could possibly result in a breach of the provisions of the Treaty invoked by the Claimants.

5.30 It would be possible to add many more citations, including those cited by the Parties in this arbitration.³⁸ In the Tribunal's view, it is unnecessary to do. The above principle is well established and forms a well recognised "*jurisprudence constante*" for investment treaty arbitration. Any difficulties here arise from its application to the Claimants' pleaded factual case.

5.31 In the following sections, the Tribunal considers, first, the Respondent's submission that the Claimants' claims are merely contractual in nature. Then the Tribunal proceeds to consider each of the several claims advanced by the Claimants in light of the Claimants' factual allegations to determine whether, on the basis of those allegations, there could occur a violation of one or more of the provisions of the Treaty.

(1) *The Nature of the Claims*

5.32 As noted above, the Respondent's primary argument relating to the lack of a *prima facie* case is that, although the Claimants label their claims as treaty claims, they are in essence claims for breach of contract. Specifically, the Respondent considers that the Claimants' entire case boils down to an allegation that the City of Warsaw (i) breached the representations and warranties contained in the SPA and (ii) improperly drew on the Bank Guarantee in breach of the SPA.³⁹ In response, the Claimants insist that they are not advancing any claims under the SPA; rather, their claims are based on governmental actions taken in violation of the Respondent's obligations under the BIT.⁴⁰

5.33 In the Tribunal's view, the Respondent's argument is founded upon a mischaracterisation of the Claimants' claims. Although the SPA is clearly a central element of the relevant factual matrix in this case, it is not the *legal* basis of the Claimants' claims (with the exception of the claims under Article 7(2), which are addressed in subsection 8 below). For instance, the Claimants' claims relate to certain

³⁸ These include, e.g., **RL-5**, *Impregilo S.p.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, ¶ 266 ("Jurisdiction exists if one assumes *pro tem* that the investor can establish facts it relies upon, it is possible, at least in theory, that the investor might establish treaty breaches").

³⁹ See subsection B above.

⁴⁰ See subsection C above.

property rights allegedly acquired under the SPA, and the Claimants allege that the information provided with the SPA established legitimate expectations in relation to those property rights. However, the Claimants are not asserting contractual rights in this arbitration, and they are not seeking recovery in relation to any breach of the SPA.⁴¹ Instead, the Claimants claim that the actions of Polish State organs, in particular the City of Warsaw, after the SPA was concluded interfered with the property rights of Syrena Hotels and thereby violated the Claimants' rights as investors in Syrena Hotels under the Treaty.⁴² In this way, the Claimants have framed their case as treaty claims, not as contract claims.

- 5.34 The possibility that the alleged actions of the City of Warsaw may also give rise to contractual claims under the SPA does not serve to alter the nature of the claims asserted by the Claimants in this arbitration. The Tribunal agrees with the observation of the tribunal in *Impregilo v Pakistan* that:

*the fact that a breach may give rise to a contract claim does not mean that it cannot also – and separately – give rise to a treaty claim. Even if the two perfectly coincide, they remain analytically distinct, and necessarily require different enquiries.*⁴³

- 5.35 The Respondent too appeared to accept this reasoning during the Hearing.⁴⁴
- 5.36 Against this background, the Tribunal is persuaded that the claims presented by the Claimants in this proceeding do not constitute contract claims but instead concern the substantive obligations of the Respondent set forth in the Treaty and therefore constitute treaty claims.
- 5.37 In the following sections, the Tribunal will turn to the question of whether the factual matrix presented by the Claimants could *prima facie* result in a violation of the substantive obligations under the Treaty.

⁴¹ The Tribunal understands that the reference to the SPA in the Claimants' request for relief relates to the Claimants' "umbrella clause" claim under Article 7(2) of the Treaty and not a direct claim under the SPA. The Claimants have repeatedly confirmed that they "raise no contract claims". See, e.g., Claimants' Hearing Presentation, slide 83.

⁴² See, e.g., C-RPHB, ¶¶ 45-46.

⁴³ **RL-5**, *Impregilo S.p.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, ¶ 258.

⁴⁴ Hearing Transcript D.1:45-46.

(2) Article 2(1) (FET)

5.38 The Claimants contend that the Respondent breached Article 2(1) of the Treaty,⁴⁵ which provides:

Each Contracting Party shall as far as possible promote investments made in its territory by investors from the other Contracting Party, shall authorize such investments in accordance with its own legislation and shall treat them at any rate in a just and equitable manner.

5.39 The Claimants assert that Article 2(1) of the Treaty obligates the Respondent to provide fair and equitable treatment in respect of the Claimants' investments. More specifically, the Claimants consider that this provision protects investors, *inter alia*, "from the fundamental alteration of the investment framework which defeats the investor's legitimate expectations and, furthermore, provides for the duty of the host State to act in a consistent and transparent manner".⁴⁶

5.40 The Claimants allege that in the present case, the Respondent breached this obligation by, first, making numerous assurances to the Claimants regarding Syrena Hotel's ownership of the hotels and its rights in the property on which the hotels are erected. According to the Claimants, these assurances were critical to the Claimants' decision to invest in Poland. However, the Respondent then took actions subsequent to the privatisation of Syrena Hotels, which "lead to fundamental alterations of the investment framework and thereby frustrate the legitimate expectations of Claimants as the Investors".⁴⁷

5.41 The Claimants have alleged a number of assurances forming part of their claim under Article 2(1) of the Treaty. These include the following.⁴⁸

- By issuing the Enfranchisement Decision and the Municipalisation Decision and by conducting the privatisation of Syrena Hotels, the Respondent's authorities assured

⁴⁵ See, e.g., Hearing Transcript D1.175 *et seq.*

⁴⁶ Jur. CM, ¶ 116.

⁴⁷ Jur. CM, ¶ 122.

⁴⁸ See Hearing Transcript D1.141 *et seq.* and D1.185 *et seq.*; C-PHB, ¶¶ 61-75.

Strabag of the undisputable existence of the right of perpetual usufruct and the ownership of the hotels.⁴⁹

- The Capital City of Warsaw specifically assured and warranted to Strabag that Syrena Hotels had the right of perpetual usufruct and the ownership of the buildings in Article 3.6. of the SPA and related documents, including the Declaration of the Management Board of Syrena, Article 3.12 and Chapter IV of the Information Memorandum and the Supplement.⁵⁰
- The Board Declaration expressly stated that the real estate held by Syrena Hotels at the time of the SPA was “free from mortgages and other encumbrances”.⁵¹
- The Information Memorandum represented that “[n]o circumstances exist that could materially affect the legal, proprietary or financial situation of [Syrena Hotels]”.⁵²
- The City of Warsaw specifically assured and warranted to Strabag in the Information Memorandum that the “legal status of the hotels and land is regulated”.⁵³
- The Board Declaration assured Strabag that there were no pending proceedings with regard to Plot 39 and the buildings on it.⁵⁴

5.42 Regarding their reliance on these alleged assurances, the Claimants’ position, in sum, is the following:

Given the fact that the Investors would have to commit massive amounts of capital in the beginning and in the subsequent years of the hotel business and would only be repaid with an adequate return over a period of many years or even decades from the

⁴⁹ Jur. CM, ¶ 119; see **R-18T**, Enfranchisement Decision; **R-8T**, Municipalisation Decision. The Claimants state that the Respondent was required by the Privatisation Act of 1990, the Enfranchisement Act, Resolution No XIV/84/91 of 24 June 1991 of the Capital City of Warsaw and Resolution No 390/LXXI/95 of 12 December 1995 of the Capital City of Warsaw to investigate whether rights of third parties exist before proceeding with a privatisation.

⁵⁰ **R-2T**, SPA; **R-16T**, Board Declaration; **R-17T**, Information Memorandum.

⁵¹ **R-16T**, Board Declaration, part I. Article 3.2.1 of the SPA states: “The Seller represents and warrants to the Buyer that the additional information on legal and financial standing of the Company, as at the day of signing this Agreement, is provided in [the Board Declaration]”.

⁵² **R-17T**, Information Memorandum (containing a statement of the Board of Syrena Hotels).

⁵³ **R-17T**, Information Memorandum, Introduction, Chapter IV and Article 3.12.

⁵⁴ **R-16T**, Board Declaration, part V.

*business revenues, the undisputed right of perpetual usufruct of the land and the ownership of the hotel buildings were key factors for the Investors. The assets of the Company, i.e. the right of perpetual usufruct with regard to the respective plots of land as well as the ownership in the hotels built thereupon, were and are of crucial importance for the Claimants' decision to enter into the investment and to continuously contribute the economy of Poland.*⁵⁵

5.43 The Claimants allege that on the basis of the assurances of the Respondent's authorities, they had legitimate expectations in Syrena Hotel's rights, which were then frustrated by "numerous actions and measures" of the same authorities.⁵⁶ These include:

- The invalidation of the Enfranchisement Decision.
- The City of Warsaw's issuance of certificates in favour of [REDACTED] allegedly confirming her ownership of Hotel Polonia.⁵⁷
- The City of Warsaw's 24 December 2012 Christmas Decision, which held that [REDACTED] is the legal owner of Hotel Polonia and that she is granted the right of perpetual usufruct for the land underneath Hotel Polonia.⁵⁸
- The deletion of Syrena Hotels from the Land and Buildings Register.
- Actions of the Respondent's authorities during the proceedings initiated by [REDACTED]⁵⁹
- The improper drawing on the Bank Guarantee.

5.44 The Claimants allege that, through these actions, the Respondent frustrated the Claimants' legitimate expectations and also "placed a disproportionate and discriminatory burden on the Investors by shifting to the Investors its obligation to compensate the former owners for administrative decisions issued by the relevant Polish authorities".⁶⁰ The Claimants accept that Poland should redress the damage suffered by the former owners as a result of the Government's past blatant illegal acts,

⁵⁵ Jur. CM, ¶ 120.

⁵⁶ Jur. CM, ¶ 122.

⁵⁷ C-44T, Petition of STRABAG dated 10 September 2015.

⁵⁸ C-24, Decision No 610/GK/DW/2012 of the Mayor of the Capital City of Warsaw dated 24 December 2012.

⁵⁹ See Jur. CM, ¶ 89.

⁶⁰ Jur. CM, ¶ 124.

but the Claimants argue that this cannot be done at the Claimants' expense in violation of the rights they were granted under the Treaty.⁶¹

5.45 The Respondent refutes the Claimants' assertions regarding a breach of Article 2(1) of the Treaty, contending that the Claimants have not been able to demonstrate that their legitimate expectations were breached by a fraudulent misrepresentation given by the Respondent. Moreover, according to the Respondent, the Claimants should have known of the restitution claims by previous owners as an investment risk.

5.46 At the outset, the Tribunal agrees that the wording in Article 2(1) of the Treaty "shall treat them in a just and equitable manner" provide the same protection as the "fair and equitable treatment" (FET) required in many other BITs. Considering the Parties' submissions set out above, in the Tribunal's view, the Claimants have alleged each component of a FET claim in a coherent fashion that is objectively understandable. Indeed, the Respondent appeared to accept at the Hearing that the Claimants' FET claim is "coherently pleaded".⁶² Therefore, the Tribunal finds that the Claimants have met the *prima facie* test with respect to their claim under Article 2(1) of the Treaty.

(3) Article 2(2) (Full Protection)

5.47 The Claimants additionally claim that the Respondent breached Article 2(2) of the Treaty, which provides:

Investments ... and [the] returns thereon shall enjoy the full protection of this Agreement.

5.48 According to the Claimants, this provision guarantees "full protection and security of the investor and its investment" beyond physical protection; it requires legal protection and a secure investment environment.⁶³ The Claimants further assert that:

A well-established aspect of this standard is that host States must use "due diligence" to prevent wrongful injuries to the person or property of aliens caused by third parties or at least to remedy those that could not have been prevented. Claimants do not advocate that the standard may prevent the Investors from each and every injury. However, it does require States, and in the present case Respondent, to take reasonable actions within its

⁶¹ Jur. CM, ¶ 127.

⁶² Hearing Transcript, D1.64-66.

⁶³ Jur. Memorial, ¶ 157.

*power to avoid or remedy such injuries.*⁶⁴

5.49 Applying this standard in the present case, the Claimants argue that the Respondent violated its obligation under Article 2(2) by the course of acts and omissions described elsewhere in this Award.⁶⁵ In sum, the Claimants allege that the Respondent repeatedly denied the claims of former owners of Syrena Hotel's property and then abruptly changed course in 2003 by accepting and supporting those claims, at the Claimants' expense. The Respondent thereby shifted the burden of remedying its own past illegal acts on the Claimants. According to the Claimants, the Respondent could easily remedy the injury caused to the Claimants by the City of Warsaw and the restitution seekers, but has failed to do so.⁶⁶

5.50 For the purpose of the Respondent's *prima facie* objection, the Tribunal need not definitively decide whether the Claimants' interpretation of Article 2(2) is correct, as this could impinge on the Parties' opportunity to make a full presentation of their arguments on the issue. The relevant question is whether the Claimants' claim rests on a plausible interpretation of the provision, and the Tribunal considers that it does. In a later phase of this proceeding, the Claimants' interpretation will have to be assessed in light of the specific wording of the Treaty and the competing lines of prior arbitral jurisprudence in relation to the "full protection and security" standard. But that is an exercise for the merits.

5.51 Applying the Claimants' interpretation of Article 2(2) for the sole purpose of the *prima facie* objection, the Tribunal considers that the facts as alleged by the Claimants, if true, could potentially establish a violation of that provision. Therefore, the Tribunal finds that the Claimants have met the *prima facie* test with respect to their claim under Article 2(2) of the Treaty.

(4) Article 3 ("Treatment of Investments")

5.52 The Claimants contend that the Respondent breached Article 3 ("Treatment of Investments") of the Treaty. Article 3 provides:

(1) Each Contracting Party shall treat investment of investors

⁶⁴ Jur. Memorial, ¶ 163.

⁶⁵ See subsection (3) above; Jur. Memorial, ¶¶ 158-165.

⁶⁶ Jur. Memorial, ¶ 164.

from the other Contracting Party undertaken on its territory in accordance with all legislation relevant to their establishment and utilization no less favourably than investments of its own investors or by investors from third countries.

(2) Within its own territory, each Contracting Party shall treat any activity by investors from the other Contracting Party, in relation to an investment, and in particular to its administration, application, use and enjoyment, no less favourably than the activity of its own investors or of investors from third countries.

- 5.53 The Claimants here allege that in certain instances, the Respondent's treatment of other investors, in particular that of the French company Orbis SA for its Hotel Novotel was materially different from the treatment received by the Claimants.⁶⁷ The Claimants contend that both Syrena Hotels and Orbis SA were initially State-owned companies that were privatised in 1997 based on the Privatisation Act of 1990 through the sale of shares to foreign investors. As with Syrena Hotels, former owners asserted claims against the property of Orbis SA. However, in the case of Orbis SA, the courts repeatedly acknowledged the fact that the right to the property has been "disposed to third parties" and that the real estate was "covered by the right of perpetual usufruct [of] third parties", which led to a "irreversible legal consequence" that the property could not be subject to restitution.⁶⁸
- 5.54 The Claimants refer to several other cases, such as the company Hotel Atrium, which was established in 1998 by the City of Warsaw together with the Swedish company Skanska Holding to build the Hotel Westin. The City of Warsaw contributed a plot of land on which Hotel Westin was built, which had been expropriated from former owners under the Warsaw Decree in 1945. Initially, the claims of previous owners impeded the construction of Hotel Westin, but in 2002, in order to continue the project, the City of Warsaw paid approximately [REDACTED] (approximately [REDACTED]) to compensate the former owners.⁶⁹
- 5.55 According to the Claimants, the cases of these other investors "prove a certain pattern" in which the Respondent is able to help investors preserve their investments and at the

⁶⁷ Claimant's Jurisdictional Counter-Memorial (paragraphs 90-102); Hearing Transcript D1.171ff, citing C-29T to C-32T; Slide 88 of the Claimants' Presentation.

⁶⁸ Jur. CM, *quoting* C-32T, Decision no 338/GK/DW/2010 of the Mayor of the Capital City of Warsaw regarding the Novotel Hotel, 20 September 2010; C-31T, Decision no 1819/08 of the Governor of the Polish administrative unit Masovian regarding the Novotel Hotel dated 23 October 2008.

⁶⁹ Jur. CM, ¶ 93.

same time compensate the former owners of the properties in a fair manner; yet “there is an evident failure to apply this same treatment” to the Claimants.⁷⁰ The Claimants submit that this runs afoul of the Respondent’s obligation in Article 3 of the Treaty, and in particular its obligation to treat the activity of the Claimants “no less favourably than the activity of its own investors or of investors from third countries”.⁷¹

5.56 The Respondent refutes the allegation of differential treatment. With respect to Orbis, the Respondent asserts that the City of Warsaw did not establish a perpetual usufruct for the previous owners of Novotel Hotel because the relevant enfranchisement decision for Orbis SA was still in force at the time that the previous owners sought restitution.⁷² The Respondent contends that this is different from the situation in the case of the Claimants.⁷³ In addition, the Respondent asserts that any differential treatment was not based on the Claimants’ nationality and therefore cannot fall within Article 3 of the Treaty.

5.57 It is worth recalling that in assessing the Claimants’ claims for the purpose of the *prima facie* test, the Tribunal must not question the Claimants’ factual allegations on the basis of competing allegations by the Respondent. This is an exercise reserved for the merits of the proceeding. At this stage, it is sufficient that the Claimants have alleged a set of facts that *could* constitute a violation of Article 3 of the Treaty, as interpreted by the Claimants. Specifically, as noted above, they allege that domestic investors and investors of third countries were treated more favourably than the Claimants in similar circumstances. Neither the Claimants’ characterisation of the facts nor their interpretation of Article 3 is so doubtful or unfounded that the Tribunal should prevent the Claimants’ claim from proceeding to the merits.

5.58 For these reasons, the Tribunal finds that the Claimants have met the *prima facie* test with respect to their claim under Article 3 of the Treaty.

⁷⁰ Jur. CM, ¶ 100.

⁷¹ See Claimants’ Hearing Presentation, slides 87-88.

⁷² Hearing Transcript D2.5-9.

⁷³ *Ibid.*

(5) Article 4 (Expropriation)

5.59 The Claimants contend that the Respondent breached Article 4 (“Compensation”) of the Treaty by unlawfully expropriating their assets without compensation.⁷⁴ Article 4 provides:

(1) Investments by investors from one Contracting Party may be expropriated on the territory of the other Contracting Party only in the public interest, on the basis of a lawful procedure and against compensation. Such compensation must represent the value of the investment immediately before the time at which the actual or imminent expropriation becomes publicly known. Such compensation must be provided without unreasonable delay and until paid out must carry the normal banking interest rate of the State in whose territory the investment had been made; it must be actually realizable and freely transferable. No later than the time of expropriation suitable provision shall exist for the determination and payment of compensation.

(2) If one of the Contracting Parties expropriates the assets of a company which under article 1, paragraph 2 of this Agreement should be regarded as belonging to that Contracting Party, and in which an investor from the other Contracting Party has a holding, [then] the first Contracting Party shall apply the stipulations of paragraph 1 of this article in such a manner that appropriate compensation is guaranteed to that investor[.]

(3) The investor shall be entitled to have examined the legality of such expropriation by appropriate organs of the Contracting Party which has ordered the expropriation.

(4) The investor shall be entitled to have examined the amount of such compensation by either the appropriate organs of the Contracting Party which has ordered expropriation, or an international arbitral tribunal as provided for in article 8.

(5) With regard to the matters governed by paragraph 1, paragraph 2, paragraph 3 and paragraph 4 of this article, investors from one Contracting Party shall not be treated any less favourably than investors from the other Contracting Party or from third countries.

⁷⁴ Hearing Transcript D1.201 *et seq.*

- 5.60 In addition, the Claimants rely on Article 1(4) of the Treaty, which specifies that the “term ‘expropriation’ shall also include nationalization or any other measure with the same effect”.⁷⁵
- 5.61 Both Parties have offered extensive argumentation in connection with Article 4 of the Treaty, both in writing and at the Hearing. In the Tribunal’s view, these competing submissions have ventured beyond the *prima facie* test into the merits of the Parties’ dispute. For present purposes, the Tribunal will focus on the Claimants’ basic allegations and determine whether, if true, they could be understood, in a *prima facie* plausible manner, to give rise to an expropriation within the meaning of Article 4.
- 5.62 In sum, the Claimants’ position is that after they acquired Syrena Hotels, the Respondent’s authorities took a number of actions *ex officio* and supported the actions of third parties “with the aim to transfer ownership in the hotels and land usage rights (i.e. Claimants’ investment) to the third parties without any compensation to be expected by Claimants”.⁷⁶
- 5.63 According to the Claimants, these actions include:⁷⁷
- Invalidating the Enfranchisement Decision.
 - Issuing certificates in favour of [REDACTED] allegedly confirming her ownership of Hotel Polonia.⁷⁸
 - Supporting [REDACTED] in the Polish Court proceedings.⁷⁹
 - Issuing the 24 December 2012 Christmas Decision.⁸⁰
 - Deleting Syrena Hotels from the Land and Buildings Register.

⁷⁵ See Claimants’ Hearing Presentation, slide 126.

⁷⁶ Jur. CM, ¶ 134.

⁷⁷ Claimants’ Hearing Presentation, slide 127.

⁷⁸ C-44T, Petition of STRABAG dated 10 September 2015.

⁷⁹ Jur. CM, ¶ 89(e); C-43T, Request of supplementing the minutes dated 24 May 2013 filed by the Capital City of Warsaw on 4 June 2013.

⁸⁰ C-24, Decision No 610/GK/DW/2012 of the Mayor of the Capital City of Warsaw dated 24 December 2012.

- Accepting investments of approximately [REDACTED] million and collecting approximately [REDACTED] million under the Bank Guarantee for hotel buildings allegedly not owned by Syrena Hotels.
- Improperly drawing on the Bank Guarantee.

5.64 The Claimants allege that as a result of these actions, they have “already incurred actual indirect expropriation reflected by the massive devaluation of the property rights”.⁸¹

5.65 The Respondent contends, *inter alia*, that the Claimants still indirectly own and control the Hotel Polonia and are not in any way prevented from operating it. Even if the Claimants’ allegations of “material damage” to the value of their investment were accepted as true, they could not result in a finding of an expropriation because “the Claimants do not even argue that [Syrena Hotel’s] ownership title to the Hotel Polonia was completely ‘neutralized’ or ‘annihilated’”.⁸² The Respondent also considers that the Claimants’ claim of expropriation in relation to the Bank Guarantee is without legal basis.⁸³

5.66 Accepting the facts as stated by the Claimants *pro tem*, the Tribunal considers that the Claimants have sufficiently pleaded their claim under Article 4 of the Treaty for the purpose of the *prima facie* test. The central point to be understood from the Claimants’ claim is that without security in Syrena Hotel’s property rights, their investment in Poland’s hospitality sector has suffered a “massive” loss in value and ultimately may be destroyed.

5.67 Without prejudging the test to be applied on the merits, the Tribunal notes that certain factors, some of which have been raised in the Respondent’s submissions, would appear to be relevant to the ultimate determination of whether there has been a breach of Article 4 of the Treaty. For example, it may be necessary to consider the extent to which the alleged measures have substantially and permanently deprived the Claimants of the economic benefits attached to their shareholding in Syrena Hotels. One issue in this context would appear to be that Hotel Polonia has remained operative and in the

⁸¹ Jur. Memorial, ¶ 134.

⁸² R-PHB, ¶¶ 180-182, *quoting* **RL-50**, *El Paso Energy International Company v Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 256; **RL-73**, *Sempra Energy International v Argentine Republic*, Award, 28 September 2007, ¶ 285.

⁸³ R-PHB, ¶¶ 184-187.

Claimants' hands over the course of the Parties' dispute. Another question may be the extent to which certain specific assets or rights can be viewed separately from the Claimants' overall investment. The Tribunal will consider such questions as needed in the merits phase of the proceeding based on a definitive interpretation of Article 4 of the Treaty (in conjunction with Article 1(4)) and a full assessment of the pertinent facts.

(6) Article 5 ("Transfer")

5.68 In their Request for Arbitration, the Claimants contend that the Respondent breached Article 5 ("Transfer") of the Treaty, which provides:

(1) Each Contracting Party shall guarantee to investors from the other Contracting Party that they may transfer freely, without unreasonable delay, in a freely convertible currency the payments which relate to an investment, in particular but not exclusively:

(a) Capital and additional sums to support or expand the investment;

(b) Sums intended to cover expenditures related to the management of the investment;

(c) Returns;

(d) Loan repayments;

(e) The yield in the event of the complete or partial liquidation or sale of the investment;

(f) Compensation pursuant to article 4, paragraph 1.

[...]

(4) The treatment accorded under paragraph 1 and paragraph 2 of this article shall not be any less favourable than that accorded to investors from third countries.

5.69 The Claimants' claim under this provision is pleaded in a single sentence in the Claimants' Request for Arbitration: "Poland breached Article 5 ('Transfers') of the Investment Treaty".⁸⁴

⁸⁴ Request for Arbitration, ¶ 136.

5.70 Respondent contends that due to the lack of factual clarity in this allegation, it can be considered incoherent, and the Tribunal should not exercise jurisdiction over it.⁸⁵

5.71 The claim is, as pleaded, devoid of any factual allegation or even explanation. Indeed, it is not clear from the Claimants' later submissions whether they maintain this claim.⁸⁶ Therefore, the Tribunal finds that the Claimants, to the extent they assert a claim under Article 5 of the Treaty, have failed to meet the *prima facie* test.

(7) Article 7(1) (“Other Obligations”)

5.72 The Claimants contend that, by operation of Article 7(1) of the Treaty, they are entitled to rely on Article 6 (“Right to a fair trial”) of the European Convention on Human Rights (the “ECHR”) and Article 1 (“Protection of property”) of the First Protocol to the ECHR, and that the Respondent has breached those provisions.⁸⁷ Article 7(1) provides:

If the legislation of either Contracting Party or present or future mutual international obligations of the two Contracting Parties additional to this Agreement should give rise to a general or specific agreement which accords to the investments of investors from the other Contracting Party more favourable treatment than is provided for by this Agreement, such arrangement shall have precedence over this Agreement, in so far as it is more favourable.

5.73 The Claimants assert that Article 6 of the ECHR and Article 1 of the First Protocol to the ECHR grant more favourable treatment to the Claimants' investment than that already provided by the Treaty.⁸⁸ They then contend that the Respondent breached these protections by not permitting the Claimants or Syrena Hotels to participate in proceedings concerning their property rights, and by failing to make a determination on the Claimants' property rights over the last decades.⁸⁹

5.74 Until the Hearing, the Respondent did not appear to specifically challenge the Claimants' reliance on the ECHR through the operation of Article 7(1). Instead, it contended that the Claimants' arguments in relation to Article 6 of the ECHR and

⁸⁵ Hearing Transcript D1.46-48 and 65; D2.5.

⁸⁶ See, e.g., Jur. CM, Section F (“Treaty Breaches”), which does not mention Article 5.

⁸⁷ Jur. CM, Section F.5; Jur. Rejoinder, Section G.6.

⁸⁸ Jur. CM, ¶ 169.

⁸⁹ Jur. CM, ¶ 169; Jur. Rejoinder, ¶ 145.

Article 1 of the First Protocol to the ECHR were “unintelligible”.⁹⁰ Then, at the Hearing, the Respondent added the following:

it is unviable to say that the [EHCR] envisages a higher standard of protection than the BIT, which is specifically meant to protect the investments. So the Claimants would also have to explain what specifically is the standard that they alleged was breached, why is it different from the BIT standard.

In any case, we submit that the Tribunal should not be exercising jurisdiction over alleged violations of the [ECHR] on this rather invented interpretation of Article 7(1) of the BIT. This would lead to an unreasonable extension of the Tribunal's jurisdiction. The Tribunal should of course take the European Convention into account in interpreting the BIT standards, because investment law at the end of the day is also protection of human rights, right to property. But the Tribunal does not have jurisdiction to hold Poland responsible for alleged breaches of the European Convention on Human Rights even under the widest possible interpretation of Article 7(1) of the BIT.⁹¹

5.75 Whilst the Tribunal considers that human rights violations may be relevant to an investment dispute, and a tribunal constituted under a BIT is competent to decide them, the Tribunal finds that the Claimants did not make any further submissions on this claim during the Hearing, in their Post-Hearing Brief or in their Reply Post-Hearing Brief. Thus, it would appear that the Claimants are no longer pursuing this claim. If they did wish to maintain a claim under the ECHR, they would have needed to address the operation of Article 7(1) of the Treaty and the Tribunal’s mandate to apply international obligations set forth in other treaties. They also would have had to state in an understandable way how the ECHR’s “protection of property” and “the right to fair trial” constitute an “agreement which accords to the Claimants’ investments more favourable treatment than is provided for by” the Treaty. Moreover, the Claimants would need to provide a basic statement about how the alleged facts satisfy the elements of a breach under Article 6 of the ECHR and Article 1 of the First Protocol to the ECHR.

⁹⁰ Jur. Reply, ¶ 58 (“The Respondent accepts that cases dealing with restitution of property ... can raise other issues, such as e.g. delay of justice or denial of access to court. Some of the Claimants’ arguments seem to be referring to these issues. They are, however, unintelligible. When invoking the ECHR under the principle of most favorable treatment, the Claimants argue that ‘Poland should have determined Claimants’, respectively the Company’s, property rights within a reasonable time, which it obviously has not done over decades” and that “neither Claimants nor the Company were admitted as a party and offered the opportunity to present its case in several proceedings ...” The Respondent cannot be expected to meet a case formulated in this way”).

⁹¹ Hearing Transcript D.1:57-58.

Without these submissions from the Claimants, the Tribunal cannot conclude that it has jurisdiction to rule on the Respondent's obligations under the ECHR. Nor can the Tribunal conclude that the facts as pleaded by the Claimants, if true, would be capable of establishing a violation of Article 7(1) of the Treaty. Therefore, the Tribunal must find that, to the extent the Claimants maintain their claim under Article 7(1), they have failed to meet the *prima facie* test.

(8) Article 7(2) (Umbrella Clause)

5.76 The Claimants contend that the Respondent breached the “umbrella clause” in Article 7(2) of the Treaty,⁹² which provides:

*Each Contracting Party shall comply with any contractual obligation it may have entered into with respect to investors from the other Contracting Party concerning investments which it has authorized in its territory.*⁹³

5.77 According to the Claimants, the Respondent violated this provision of the Treaty by failing to comply with certain provisions of the SPA. The Claimants' position is summarised as follows:

Respondent breached contractual obligations within the meaning of Article 7 (2) of the BIT at least by:

- *Transferring the hotel businesses including the hotels Polonia, Metropol and the related land plots encumbered with third-party claims (Art. 2.3.1 of the SPA);*
- *Forcing the investors to invest into hotel buildings in a long-term perspective, despite the existence of encumbrances (Art 4.2 of the SPA);*
- *Granting pre-emptive ownership rights in relation to land plots that are encumbered with third-party claims (Art. 3.6 of the SPA).*⁹⁴

⁹² Hearing Transcript D1.185 *et seq.*

⁹³ This is the English translation provided on slide 115 of the Claimants' Hearing Presentation. During the Hearing, the Parties disagreed on the translation of Article 7.2. The Claimants read Article 7.2 to state “shall comply with” whereas the Respondent reads it as “shall respect” or “shall keep”. Hearing Transcript D1.189 and D2.21. This linguistic distinction does not affect the Tribunal's decision in this Award.

⁹⁴ Claimants' Hearing Presentation, slide 124. The specific factual allegations on which this claim is based are summarised in Section II.B above.

- 5.78 The Claimants argue that the obligations undertaken by the City of Warsaw in the SPA are attributable to the Respondent, because the City of Warsaw was acting as “an administrative State organ in exercise of its governmental authority with the purpose to give effect to Respondent’s privatisation policy in regard to State-owned enterprises”.⁹⁵
- 5.79 The Respondent has raised a series of objections in connection with this claim. First, the Respondent argues that it cannot bear responsibility for contractual obligations undertaken by the City of Warsaw, which is a fully independent unit with a separate legal personality. The Respondent states that under Polish law, which governs both the SPA and the status and legal capacity of the City of Warsaw, the City is a legal entity distinct from the Republic of Poland.⁹⁶ Therefore, according to the Respondent, Article 7(2) of the Treaty cannot apply “due to lack of any contractual arrangement concluded between the Respondent and any of the Claimants”.⁹⁷ The Respondent accepts that under international law, an action of the City of Warsaw that amounts to a breach of the protective standards of the Treaty might be attributable to Poland.⁹⁸ However, the Respondent submits that there is a “clear distinction exists between the responsibility of a State for the conduct of an entity that violates international law (*e.g.* a breach of Treaty), and the responsibility of a State for the conduct of an entity that breaches a domestic law contract (*e.g.* the SPA)”.⁹⁹ The Respondent considers that the international law on State responsibility does not apply to the latter. According to the Respondent, its position is confirmed “by plentiful arbitral precedent”.¹⁰⁰
- 5.80 In any event, even if the acts of the City of Warsaw could be attributed to Poland, the Respondent’s position is that Article 7(2) of the Treaty does not protect the Claimants against those acts.¹⁰¹ This is because, according to the Respondent, umbrella clauses in

⁹⁵ C-PHB, ¶ 98.

⁹⁶ R-PHB, ¶ 64; Hearing Transcript D1.85-86.

⁹⁷ R-PHB, ¶ 67.

⁹⁸ R-PHB, ¶ 53.

⁹⁹ R-PHB, ¶ 61.

¹⁰⁰ R-PHB, ¶¶ 60-62, citing **RL-14**, *Generation Ukraine Inc. v Ukraine*, ICSID Case No. ARB/00/9, Final Award, 16 September 2003, ¶ 8.12; **RL-48**, *Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, ¶ 96; **RL-5**, *Impregilo S.p.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, ¶ 216; **RL-49**, *European Media Ventures SA v Czech Republic*, UNCITRAL, Partial Award on Liability, 8 July 2009, ¶ 87; **RL-50**, *El Paso Energy International Company v Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶¶ 197-198; **RL-51**, *Ampal-American Israel Corporation and others v Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, ¶ 81.

¹⁰¹ R-PHB, ¶¶ 71-75.

investment treaties cover only breaches on contractual obligations that result from the State exercising imperium powers.¹⁰² The Respondent denies that any of the alleged actions of the City of Warsaw, which was acting as the “Seller” under the SPA, could qualify as acts of *puissance publique*.

- 5.81 Separately, the Respondent asserts that Raiffeisen and SIHAG “lack legal standing to pursue the claims relating to the SPA”.¹⁰³ According to the Respondent, only Strabag, as the legal successor to Bau Holdings (the signatory of the SPA), has rights in relation to the SPA and the Bank Guarantee provided thereunder, and indeed, only Strabag is involved in the domestic court proceedings concerning the SPA and the use of the Bank Guarantee. Therefore, in the Respondent’s view, Strabag alone is entitled to advance any claims in relation to the SPA and the Bank Guarantee. The Respondent notes that the Claimants have made various statements about the transfer of shares from Strabag to SIHAG, but for the Respondent, these statements are incoherent.¹⁰⁴ In any event, the Respondent asserts that there has never been a “formal assumption of obligations arising out of the SPA by SIHAG and/or [Raiffeisen] nor any assignment of the SPA”.¹⁰⁵ Thus, the Respondent concludes that the Claimants have failed to meet their burden of proof in relation to the standing of Raiffeisen and SIHAG.¹⁰⁶
- 5.82 In response, the Claimants contend that although some tribunals have focused on the requirement of privity under the umbrella clause, “there is also a strong notion that it may not be required”.¹⁰⁷ In the Claimants’ view, based on the specific facts of this case, a strict privity requirement should not be applied.
- 5.83 As noted above, the Claimants argue that the actions (and omissions) of the City of Warsaw are attributable to the Respondent under international law because the City is

¹⁰² R-PHB, ¶ 71, citing **RL-50**, *El Paso Energy International Company v Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011; **RL-54**, *CMS Gas Transmission Company v Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶ 299; **RL-55**, *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 9 May 2009, ¶ 125. See **RL-52**, *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, ¶¶ 169-170.

¹⁰³ R-PHB, Section IV.B.5(c).

¹⁰⁴ R-PHB, ¶¶ 138-140.

¹⁰⁵ R-RPHB, ¶ 69.

¹⁰⁶ R-PHB, ¶ 140.

¹⁰⁷ C-PHB, citing *Continental Casualty Company v Argentine Republic*, Award, 5 September 2008, ¶ 296 **R-13**, *Noble Ventures v Romania*, ICSID Case No. ARB/01/11, Award, October 12, 2005, ¶ 86; **CL-5**, *Eureko B.V. v Republic of Poland*, Partial Award of August 19, 2005, ¶ 260.

a State organ that was exercising governmental authority when entering into the SPA. The sale of Syrena Hotels was carried out pursuant to the Privatisation Act adopted by the Polish Parliament in 1990, and the purpose of the SPA was to accomplish the State policy of privatising State-owned enterprises. In the Claimants' view, these facts distinguish the present case from *Impregilo v Pakistan*, which concerned an ordinary private law contract for construction works.¹⁰⁸

- 5.84 Regarding the standing of Raiffeisen and SIHAG, the Claimants admit that neither company has signed the SPA. However, the Claimants' position is that Raiffeisen and SIHAG can assert claims in relation to the SPA and the Bank Guarantee because:

*(i) the obligations of the Buyer under the SPA have been fulfilled on equal parts by all three [Claimants]; (ii) this was known to Respondent and Respondent even approved it and most importantly (iii) Respondent was at all times aware that any violation of its obligations under the SPA would not only cause damage to STRABAG but to SIHAG and [Raiffeisen] as well.*¹⁰⁹

- 5.85 In this context, the Claimants allege that on 20 December 1999, the City of Warsaw and SIHAG entered into a separate share purchase agreement for the sale and purchase of additional 5% in Syrena Hotels, demonstrating that the City of Warsaw knew that SIHAG had relied on the promises contained in the SPA when making this investment, and that SIHAG would be responsible for fulfilling the "Buyer's" contractual obligations under the SPA.¹¹⁰

- 5.86 Specifically with regard to the Bank Guarantee, the Claimants contend that although Strabag provided the Guarantee, "it represents a subordinate and instrumental aspect with respect to Claimants' overall investment" as defined in the Treaty.¹¹¹ According to the Claimants, it is part and parcel of the investment, and the drawing of the Bank Guarantee is part of the Respondent's conduct toward the Claimants' investment. Moreover, all three Claimants have had to bear the costs and outlays connected with

¹⁰⁸ C-PHB, ¶ 106, citing **RL-5**, *Impregilo S.p.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, ¶ 33.

¹⁰⁹ C-PHB, ¶ 87; see ¶¶ 88-91.

¹¹⁰ C-PHB, ¶ 88.

¹¹¹ C-PHB, ¶ 95.

the Guarantee. Thus, the Claimants consider that they are all entitled to rely on the Bank Guarantee to establish their case.¹¹²

- 5.87 The Tribunal has considered these opposing submissions of the Parties and concludes that the Respondent's objections relating to the Claimants' claim under Article 7(2) and the standing of Raiffeisen and SIHAG should be joined to the merits of the Parties' dispute. This will ensure that both Parties have a full opportunity to make their respective cases on the proper interpretation of the legal framework and its application to the facts, taking into account the competing legal theories and lines of jurisprudence that the Parties have touched upon in this phase of the proceeding.

(9) Article 8 (Arbitration Agreement)

- 5.88 The Claimants contend that Poland breached Article 8(1) ("Settlement of Investment Disputes") of the Treaty, which provides in material part:

If disputes should arise between one Contracting Party and an investor from the other Contracting Party with regard to an investment, such dispute shall be resolved amicably between the parties themselves if possible...

- 5.89 According to the Claimants, they notified the Respondent of a dispute under the Treaty on 19 December 2012 and subsequently sent at least four additional letters to remind the Respondent of the issues in dispute. The Claimants state that in each of these letters, they "declared their willingness to resolve the dispute".¹¹³ Yet the Respondent took more than six months to inform the Claimants of the official who had been designated to look into the matter, and that Minister then "unlawfully denied the [Claimants'] rights".¹¹⁴
- 5.90 The Claimants do not mention the claim under Article 8(1) of the Treaty in their submissions following the Request for Arbitration. It thus appears that they do not maintain it.
- 5.91 In any event, the Tribunal considers that the claim does not meet the *prima facie* test. The Claimants' complaint appears to be based on the fact that the Respondent failed to

¹¹² C-PHB, ¶¶ 94-95.

¹¹³ Request for Arbitration, ¶ 140.

¹¹⁴ Request for Arbitration, ¶ 141.

engage in negotiations or make other efforts to reach an amicable settlement. However, Article 8(1) contains no mandatory obligation to resolve a dispute amicably. It only provides that the Parties shall resolve a dispute shall be resolved amicably “if possible”. Therefore, no violation of Article 8(1) is possible on the basis of the alleged facts.

- 5.92 As a final point, the Tribunal notes that the Respondent also objected to the Claimants’ request for relief in relation to the Respondent’s alleged violation of rights under international law in general, Polish law, and “other international obligations”.¹¹⁵ In their most recent request for relief,¹¹⁶ the Claimants have omitted these references. Therefore, the Tribunal considers this aspect of the Respondent’s objection moot.

(10) The Tribunal’s Decision

- 5.93 For the reasons stated above, the Tribunal has decided that the Claimants have met the threshold of presenting *prima facie* claims for breach of the following provisions of the Treaty: Article 2(1) (fair and equitable treatment), Article 2(2) (full protection), Article 3 (“Treatment of Investments”) and Article 4 (expropriation). The Tribunal therefore rejects the Respondent’s objections relating to a lack of *prima facie* claim under these provisions of the Treaty.
- 5.94 By contrast, the Tribunal has decided that the Claimants have not presented a *prima facie* claim for breach of Article 5 (“Transfer”), Article 7(1) (“Other Obligations”) or Article 8 (arbitration agreement) of the Treaty. The Tribunal therefore upholds the Respondent’s objections relating to a lack of *prima facie* claim under these provisions.
- 5.95 The Tribunal does not, in this Award, render any decision on the Respondent’s objections to the Claimants’ claim under Article 7(2) (umbrella clause) and the standing of Raiffeisen and SIHAG to assert claims in relation to the SPA and the Bank Guarantee. These objections shall be joined to the merits of the Parties’ dispute and decided by the Tribunal in the next phase of the proceeding.

¹¹⁵ Jur. Memorial, ¶ 79, *citing* Request for Arbitration, ¶ 159(1)-(3).

¹¹⁶ *See* Section II.C above.

PART VI: ABUSE OF PROCESS

A. Introduction

- 6.1 The Tribunal briefly sets out the contrasting positions of the Parties on this objection before recording its analysis and decision.¹

B. The Respondent's Case

- 6.2 In summary, the Respondent contends that the Claimants' case fails to meet the jurisdictional requirements imposed by the Treaty by reason of the Claimants' abuse of process.²
- 6.3 According to the Respondent, the Treaty's jurisdictional requirements require that the Claimants' claims must not be "abusive", meaning that the Treaty process must not be used by the Claimants for a purpose, or in a way, significantly different from its proper use.³ The Respondent submits that the Treaty process is being abused if:

the claimant uses it to achieve an undue "collateral advantage", e.g. by pursuing claims of a purely contractual nature under a BIT disguise, to avoid engaging in a good-faith contractual controversy with the respondent and to harass the respondent with demands which are clearly not available under the contract. The BIT process is also abused if it is treated as a "fourth instance", merely to unreasonably multiply proceedings and to retry the very matter which has already been resolved or is pending before the domestic court, while there are no specific allegations of any BIT provisions having been breached in the domestic proceedings.⁴

¹ In addition to the arguments discussed in this Part, the Respondent has accused the Claimants of improper "corporate manoeuvring". Jur. Memorial, ¶ 127. This issue is addressed in Part VII below.

² Jur. Memorial, ¶¶ 74, 117 *et seq.*; Hearing Transcript D1.34 *et seq.*

³ Jur. Memorial, ¶ 74.

⁴ *Ibid.*, citing **RL-6**, *ADF Group Inc. v United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, ¶ 190; **RL-7**, *Robert Azinian and others v United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, ¶ 99; **RL-8**, *Waste Management Inc. v United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 129.

6.4 The Respondent relies, in particular, upon the article by Professor Hervé, “Abuse of Process in International Investment Arbitration”,⁵ and the decision in *Azinian v Mexico*.⁶

6.5 According to the Respondent, the Claimants in the present case have committed an abuse of process by, *inter alia*:

- pursuing their essentially contractual claims in international arbitration to gain undue collateral advantage, by seeking to pressure the Respondent to deprive third parties of their rights arising from laws and policies that were in place at the time that the Claimants made their investment;⁷
- pursuing the claims relating to the Bank Guarantee before Polish and Austrian courts and then bringing the same claims in this arbitration.⁸

C. The Claimants’ Case

6.6 In summary, the Claimants contend that the Respondent’s abuse of process theory has no merit and is unsupported by any authority.⁹ According to the Claimants, it is perfectly legitimate for the same set of facts to give rise to both contractual claims and treaty claims. The Claimants state that, contrary to the Respondent’s submission, they have not invoked the provisions of the Treaty in any proceedings before the Polish Courts.¹⁰ Rather, “the domestic court proceedings in Poland are based on breaches of Polish domestic law only, whereas this arbitration case concerns the international responsibility of Respondent under international law for breaches of the BIT”.¹¹ The Claimants further deny that their arguments relating to the Bank Guarantee constitute a collateral attack.¹²

⁵ **RL-38**, H. Ascencio, Abuse of Process in International Investment Arbitration, Chinese Journal of International Law (2014), pp. 763- 785.

⁶ **RL-7**, *Robert Azinian and others v United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, ¶ 99.

⁷ Jur. Memorial, ¶ 120.

⁸ Jur. Memorial, ¶¶ 123-125.

⁹ C-PHB, ¶¶ 49 *et seq.*

¹⁰ Jur. Rejoinder, ¶¶ 109-111.

¹¹ C-PHB, ¶ 50.

¹² C-PHB, ¶¶ 55-59.

- 6.7 Therefore, in the Claimants' view, there has been no multiplication of the same legal proceedings and no collateral advantage.
- 6.8 The Claimants affirm that they "do not seek double-recovery and herewith declare bindingly and irrevocably to ensure that any compensation awarded in this arbitration will be respected in the proceedings under domestic law".¹³

D. The Tribunal's Analysis and Decision

- 6.9 As a preliminary matter, it is recognized, and the Tribunal agrees, that the threshold for finding an abusive initiation of an investment claim is high. It is equally accepted that the notion of abuse does not imply a showing of bad faith.¹⁴
- 6.10 Regarding the relationship between the contractual claims resulting from the SPA and the international law claims resulting from the BIT, the Tribunal recalls from the Hearing the following exchange:

THE PRESIDENT: Maybe I can put it another way. You know from cases like Vivendi, going up to a case like Bayindir v Pakistan, where Professor Böckstiegel was one of the arbitrators, the claim could be made in contract or in treaty, and yet both tribunals allowed the claim to go forward as a treaty breach, even though to -- and I will say "to a layman", because I was counsel in one of those cases -- it might seem to be an obvious contract claim, with an arbitration clause, a contract with applicable law, and so on and so forth. These tribunals draw a very clear distinction between a treaty breach and a contract breach. You can have a treaty breach without a contract breach, you can have a treaty breach with a contract breach, but of itself that doesn't make it an abuse of process to bring a treaty claim before an investment treaty tribunal. So the cases seem to be more against you than with you. But if you can think of a case in addition to the case you cited, Azinian, we'd like to hear it.

MR DROZD: Well, I have to clarify something, not to mislead the Tribunal. I did not quote the Azinian case as an authority supporting my submission, because it doesn't. It's not an authority to support this principle. It speaks of something completely different: it speaks of what I described as a collateral attack on a decision of a municipal court. To be frank, I think I might not be able to indicate the authorities which you enquire

¹³ C-PHB, ¶ 53.

¹⁴ See *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, ¶ 539.

*about, Mr President. But I would like to explain one thing. I do appreciate, and I completely agree, that conceptually there is a distinction between a contract claim and a treaty claim, and the same facts can lead to a contract claim or a BIT claim completely legitimately. It is just like the same facts could lead to a contract claim or a tort claim; the same facts could give the Claimants grounds for those two separate claims.*¹⁵

- 6.11 Thus, there seems to be agreement that, substantially, contract claims and treaty claims do not exclude each other. The same is true procedurally: claims allegedly resulting from the SPA based on Polish domestic law can be pursued in domestic court proceedings in Poland, and claims allegedly resulting from the Treaty concerning the international responsibility of the Respondent under international law and can only be pursued in the present arbitration.
- 6.12 On one hand, the Claimants have not submitted any claims alleging breaches of the Treaty in their proceedings before the Polish courts. On the other hand, the relief requested by the Claimants in the present arbitration is only based on alleged breaches of the Treaty, as confirmed in their request for relief, which opens with this introductory sentence: “Based on the foregoing, Respondent assumed liability under the BIT and is liable for the breaches and other violations of the BIT’s provisions caused by its authorities. Claimants request an award granting the following relief...”¹⁶
- 6.13 The Tribunal sees no reason why raising the claims under Polish domestic law before the Polish courts would make it an abuse to raise the alleged breaches of the Treaty as claims according to the dispute settlement provisions in Article 8 of the Treaty. These latter claims could not be raised to any other forum. Whether they are valid claims is a separate issue, which will have to be examined in the merits phase of this arbitration.
- 6.14 Therefore, the Tribunal holds that the Respondent has not established any basis for finding an abuse of process. The Respondent’s objection is dismissed.

¹⁵ Hearing Transcript D.1:45-46. *See also* Section V.D(1) above.

¹⁶ C-PHB, ¶ 125.

PART VII: JUS STANDI

A. Introduction

- 7.1 The Tribunal briefly sets out the contrasting positions of the Parties on this objection before recording its analysis and decision.

B. The Respondent's Case

- 7.2 In summary, the Respondent contends that the Claimants do not qualify as investors covered by the Treaty as they have transferred their investment in Syrena Hotels to SIHOL, a national of a third State, Cyprus, which is not a signatory to the Treaty.¹ The Respondent asserts that by virtue of this transfer, the Cyprus-Poland BIT is potentially applicable to the dispute and that the Treaty governing the present claim should no longer apply.²
- 7.3 The Respondent submits that the case law developed by investment tribunals on the issue of “corporate manoeuvring” states that as long as the transfer of investment is not abusive, investors may transfer their investments to nationals of third States, and render the new investment treaty applicable.³ However, the Respondent argues that consequently, such a transfer should also render the original treaty inapplicable.⁴
- 7.4 The Respondent has clarified that it does not question, as a matter of principle, that an indirect investor can claim treaty protection.⁵ Rather, it asserts that if two treaties are potentially applicable, this potential conflict of treaties should be resolved.⁶ The Respondent submits that the conflict should be resolved by considering the purpose and underlying values of both the treaties in order to determine which treaty should adequately apply to the investment.⁷

¹ Jur. Memorial, ¶ 126.

² Jur. Memorial, ¶ 129.

³ Jur. Memorial, ¶ 127.

⁴ Jur. Memorial, ¶ 128.

⁵ Jur. Reply, ¶ 66.

⁶ Jur. Reply, ¶ 67.

⁷ Jur. Reply, ¶ 68; Hearing Transcript D1.89:9-18.

- 7.5 In support of its argument, the Respondent cites the decisions in *Lauder v Czech Republic*⁸ and *CME v Czech Republic*,⁹ where the investors used both the United States-Czech Republic BIT and the Netherlands-Czech Republic BIT to initiate two parallel arbitration proceedings which led to conflicting decisions being rendered by the respective tribunals.¹⁰ The Respondent submits that multiplication of BIT proceedings is a “category of abuse of process”.¹¹ The Respondent further submits that rules on jurisdiction should prevent such situations, and that the transfer of an investment should either be effective from the viewpoint of applicability of a given treaty, or not.¹²
- 7.6 In sum, the Respondent requests that the Tribunal (i) decline jurisdiction on the ground that the Claimants no longer qualify as investors under the Treaty;¹³ or (ii) at the least, in the decision on jurisdiction, make the Claimants’ choice of treaty final such that any attempt by the Claimants to initiate proceedings under another treaty, in effectively the same case as the present, is considered abusive.¹⁴
- 7.7 As regards the final choice of treaty, the Respondent acknowledges the Claimants’ explanations from the Jurisdictional Counter-Memorial as a declaration that the Claimants will not bring a related claim under the Cyprus-Poland BIT if the Tribunal dismisses the Respondent’s objection on *jus standi*.¹⁵ However, at the Hearing, the Respondent has raised doubts as to the Claimants’ declaration and has sought that the Tribunal “arrive at some sort of a conflict of treaty rule which would establish which of the potentially applicable bilateral investment treaties should govern this case”.¹⁶

C. The Claimants’ Case

- 7.8 In summary, the Claimants contend that they have standing as investors under the Treaty. They argue that that even after the formation of SIHOL, the Claimants still have

⁸ This decision has been cited by the Respondent in the Jur. Memorial, ¶ 128, but has not been submitted on record by the Respondent. The Claimants have submitted it on record along with the Jur. CM as **CL-10**, *Ronald S. Lauder v The Czech Republic*, UNCITRAL, Final Award, 3 September 2001.

⁹ This decision has been cited by the Respondent in the Jur. Memorial, ¶ 128, but has not been submitted on record by the Respondent. The Claimants have submitted it on record along with the Jur. CM: **CL-11**, *CME Czech Republic v The Czech Republic BV*, UNCITRAL Partial Award, 13 September 2001.

¹⁰ Jur. Memorial, ¶ 128.

¹¹ Hearing Transcript, Day 1, page 88, lines 15-20.

¹² Jur. Memorial, ¶ 128.

¹³ Jur. Memorial, ¶ 134.

¹⁴ Jur. Memorial, ¶ 129.

¹⁵ Jur. Reply, ¶ 70.

¹⁶ Hearing Transcript, D1.88:21-25, 89:1-8.

the ultimate ownership and control of the investment in Syrena Hotels.¹⁷ The Claimants submit that the third Claimant (Austrian holding company SIHAG) is controlled together by the first Claimant (Austrian company Strabag) and the second Claimant (Austrian company Raiffeisen).¹⁸ SIHAG controls 100% of SIHOL, which in turn holds 99.615% of Syrena Hotels.¹⁹

- 7.9 The Claimants further submit that there has been no “transfer” of investment to SIHOL as SIHOL is only an “intermediary” and a “shell corporation” without having any active business operation or decision-making authority itself.²⁰
- 7.10 According to the Claimants, the purpose behind setting up SIHOL was to set up a fully controlled investment vehicle for tax optimization purposes.²¹ The Claimants also state that at all relevant times, they were and still are the true beneficial owners of the investment.²²
- 7.11 The Claimants contend that they “qualify as both direct and indirect Austrian investors”²³ which are “entitled to assert claims for breaches of the BIT concerning all investments including those which they indirectly own”.²⁴
- 7.12 The Claimants rely on the provisions of the Treaty to justify their standing as indirect investors. They submit that the definitions of “investment” and “investor” under Articles 1(1) and 1(2) respectively of the Treaty are broad and do not require the investor to be the direct owner of the investment.²⁵ They further assert that Article 4(1) of the Treaty “speaks of ‘Investments of investors’, and there is no sign that an investment of an investor under Article 4(1) is any different from an investment under Article 1(1)”.²⁶
- 7.13 The Claimants further submit that in order to be an investor under Article 1(2) of the Treaty, the requirement is that the investment should be “of” nationals of a Contracting

¹⁷ Jur. CM, ¶ 243.

¹⁸ Jur. CM, ¶ 242; Hearing Transcript, D1.157:8-13.

¹⁹ Jur. CM, ¶ 242.

²⁰ Jur. CM, ¶ 243; Hearing Transcript, D1.159:1-6.

²¹ Jur. CM, ¶ 152; Hearing Transcript, D1.159:1-6.

²² Jur. CM, ¶ 243; Jur. Rejoinder, ¶ 154.

²³ Jur. CM, ¶ 149.

²⁴ *Ibid.*

²⁵ Jur. Rejoinder, ¶¶ 149-151; Hearing Transcript, D1.159:23-25, 160:1-9.

²⁶ Hearing Transcript, D1.160:16-25, 161:1-5.

Party and it should be situated “in” the territory of a Contracting party.²⁷ The Claimants submit that they fulfil these requirements by being Austrian nationals that have an “investment” in a company which is located in Poland.²⁸ The Claimants also state that their participation in Syrena Hotels, cash inflows into the hotels, the investment guarantees etc., all amount to investments pursuant to Article 1(1) of the Treaty.²⁹

- 7.14 It is also the Claimants’ case that the “alleged transfer” of investment to SIHOL has not been abusive and consequently the Cyprus-Poland BIT would be rendered applicable.³⁰ The Claimants distinguish their case from that of “corporate manoeuvring” or “treaty-shopping” on the basis that they have chosen not to base their claim on the “new” Cyprus-Poland BIT but instead, have brought their claims under the original Treaty.³¹
- 7.15 In the Jurisdictional Reply Memorial, the Claimants “reassure” the Respondent that the Claimants will not initiate another arbitration proceeding under the Cyprus-Poland BIT.³² At the Hearing, the Claimants further stated that “SIHOL has no intention to commence treaty arbitration of its own”.³³
- 7.16 The Claimants contend that despite the applicability of the Cyprus-Poland BIT to the case at hand, the Tribunal is not deprived of its jurisdiction under the Treaty.³⁴ In this regard, the Claimants rely on the decision in *CME* where the tribunal concluded that the fact that another claim may exist under a different treaty, whether deriving from the same facts or otherwise, did not deprive either CME or Mr. Lauder of jurisdiction under the respective treaties.³⁵
- 7.17 The Claimants disagree with the Respondent’s submission that rules on jurisdiction should prevent situations of conflicting decisions as in the *CME* and *Lauder* cases.³⁶ The Claimants also disagree with the Respondent’s submission that the Tribunal has to

²⁷ Jur. CM, ¶ 244.

²⁸ *Ibid*; Jur. Rejoinder, ¶¶ 149-150.

²⁹ Jur. Rejoinder, ¶ 150.

³⁰ Jur. CM, ¶ 246.

³¹ Jur. CM, ¶¶ 245-246; Hearing Transcript, D1.159:7-18.

³² Jur. Rejoinder, ¶¶ 154 and 156.

³³ Hearing Transcript, D1.158:9-13.

³⁴ Jur. Rejoinder, ¶ 153.

³⁵ Jur. CM, ¶¶ 248-249; Hearing Transcript, D1.158:15-21.

³⁶ Jur. CM, ¶ 250.

look into the necessity and purpose of both treaties to determine which would apply more adequately to the Claimants' situation at hand.³⁷

7.18 The Claimants assert that both treaties are part of the laws of Poland and there is no such principle that one treaty should supersede the other.³⁸ They rely on the decision of the Svea Court of Appeal in *Czech Republic v CME*, which, according to the Claimants, “found that the fact itself that CME and Lauder were able to commence two arbitration proceedings under two different treaties ‘mitigates against these legal principles being applicable at all’”.³⁹

7.19 The Claimants argue that it is not for this Tribunal to finally decide on the applicability of the Cyprus-Poland BIT.⁴⁰ Further, according to the Claimants, any overlap between arbitrations under two different treaties should be a question of merits and not that of jurisdiction.⁴¹

D. The Tribunal's Analysis and Decision

7.20 In light of the Parties' positions set out above, the Tribunal has to decide whether or not the Claimants have standing as investors under the Treaty. In order to reach a conclusion on this issue, the Tribunal shall consider whether (1) the Claimants' corporate restructuring amounts to “corporate manoeuvring” such as to deprive them of standing in these proceedings; and (2) following the corporate restructuring, the Claimants remain “investors” with an “investment” under the Treaty.

(1) Whether the Claimants' corporate restructuring constitutes “corporate manoeuvring”

7.21 The Respondent submits that as long as the transfer of investment is not abusive, investors may transfer their investments to nationals of third states, and gain protection under a new investment treaty.⁴² While the Respondent does not contend that the Claimants' restructuring is abusive in itself, it alleges that the potential applicability of

³⁷ Jur. Rejoinder, ¶¶ 152-153.

³⁸ Hearing Transcript, D1.157:21-25, 158:1-8.

³⁹ Jur. CM, ¶ 250; CL-12: *Czech Republic v CME Czech Republic BV*, Svea Court of Appeal Case No. T 8735,01, p. 95.

⁴⁰ Jur. Rejoinder, ¶ 155.

⁴¹ Hearing Transcript, D1.158:15-21.

⁴² Jur. Memorial, ¶ 127.

the Cyprus-Poland BIT along with the Treaty could lead to abuse if the Claimants file multiple proceedings under the both treaties.⁴³ As an example, the Respondent cites the parallel arbitrations and conflicting decisions in *CME* and *Lauder*.⁴⁴

- 7.22 The Claimants agree with the Respondent that the transfer of their investment to SIHOL renders the Cyprus-Poland BIT potentially applicable.⁴⁵ However, they distinguish their case from that of a “corporate manoeuvring” or “treaty-shopping” exercise because the Claimants have chosen not to base their claim under the Cyprus-Poland BIT but instead, have brought their claims under the original Treaty.⁴⁶ The Claimants have reiterated this stance in several declarations that they do not intend to bring a claim through SIHOL under the Cyprus-Poland BIT.⁴⁷
- 7.23 The question before the Tribunal is whether the Claimants’ transfer of investment to SIHOL amounts to “corporate manoeuvring” or is abusive insofar as it may give SIHOL the opportunity to make a claim akin to the present claim under the Cyprus-Poland BIT, and if so, whether the Tribunal should decline its jurisdiction for this reason.
- 7.24 It is undisputed between the Parties that an investment may be legitimately restructured and accordingly render a new investment treaty applicable, as long as the restructuring is not abusive.⁴⁸
- 7.25 Abuse of process may arise, for example, where a corporate claimant makes or restructures its investment in order to gain access to treaty protection when the dispute has already arisen or is foreseeable. These are not the circumstances in the present case. Moreover, it is undisputed that the Claimants have, up to now, not sought to claim under the Cyprus-Poland BIT, but have only claimed under the original Treaty.
- 7.26 However, the Respondent still argues that abuse may occur due to the possible application of two different treaties, with the potential for multiple proceedings thereunder.⁴⁹

⁴³ Jur. Memorial, ¶ 129; Hearing Transcript, D1.88:15-20.

⁴⁴ Jur. Memorial, ¶ 128.

⁴⁵ Jur. CM, ¶ 246.

⁴⁶ Jur. CM, ¶¶ 245-246; Hearing Transcript, D1.159:7-18.

⁴⁷ Jur. Rejoinder, ¶¶ 154 and 156; Hearing Transcript, D1.158:9-13.

⁴⁸ Jur. Memorial, ¶ 127; Jur. CM, ¶ 246.

⁴⁹ Jur. Memorial, ¶ 129; Hearing Transcript, D1.88:15-20.

- 7.27 The Tribunal does not agree with the Respondent’s contention. The Claimants are correct to state that this Tribunal does not have to decide on the applicability of the Cyprus-Poland BIT in the present case.⁵⁰ Even if the Cyprus-Poland BIT is potentially applicable, the mere possibility of SIHOL bringing a related claim under the Cyprus-Poland BIT does not provide a basis for this Tribunal to abdicate its jurisdiction.⁵¹ Any question of abuse could only arise and be addressed if and when the Claimants actually sought the protection of both the Treaty and the Cyprus-Poland BIT. In that sense, any objection by the Respondent in this respect is premature.
- 7.28 The Respondent’s example of conflicting decisions in *CME* and *Lauder* does not further its cause. Unlike in *CME* and *Lauder*, the Claimants in the present case have not filed a parallel claim under the Cyprus-Poland BIT. Moreover, the Claimants have indicated that “SIHOL has no intention to commence treaty arbitration of its own.”⁵²
- 7.29 In the circumstances, and taking into account the Claimants’ repeated assurances that they only seek to avail themselves of the Treaty and not the Cyprus-Poland BIT, the Tribunal considers that the Claimants have made their “choice of treaty” clear, as sought by the Respondent.⁵³ The Tribunal does not consider further directions with respect to the Claimants’ choice of treaty to be necessary.
- 7.30 The Tribunal further disagrees with the Respondent’s submission that the potential application of two treaties has led to a “conflict of treaties”, and that a conflict of treaty rule should be applied in this case to resolve the conflict and determine which BIT is the more “adequate” for the present case.⁵⁴
- 7.31 In this case, no conflict between the two treaties has arisen that requires resolution by the Tribunal for the purpose of establishing its jurisdiction. The Tribunal wishes to emphasise that unlike the case in *CME* and *Lauder*, no second claim has been made by the Claimants under the Cyprus-Poland BIT, such that a question arises as to which one is a more “adequate” BIT.

⁵⁰ Jur. Rejoinder, ¶ 155.

⁵¹ Jur. CM, ¶¶ 248-249; Hearing Transcript, D1.158:15-21.

⁵² Hearing Transcript, D1.158:9-13.

⁵³ Jur. Memorial, ¶ 129; Jur. CM, ¶¶ 245-246; Jur. Reply, ¶ 70; Jur. Rejoinder, ¶¶ 154 and 156; Hearing Transcript, D1.158:9-13, 159: 7-18.

⁵⁴ Jur. Reply, ¶¶ 67-68; Hearing Transcript D1.89:9-18.

7.32 Accordingly, the Tribunal does not consider it necessary to look into the purpose and underlying values of both the treaties in order to determine which treaty most adequately applies to the investment.

7.33 Given these factors, the Tribunal concludes that Claimants have not indulged in “corporate manoeuvring” so as to abuse the Treaty mechanism; nor do they lose their standing as investors under the Treaty only because a claim through SIHOL could possibly lie, but has not been made, under the Cyprus-Poland BIT.

(2) Whether the Claimants remain investors with an investment under the Treaty

7.34 In the Jurisdictional Reply Memorial, the Respondent acknowledges that the Claimants can legitimately transfer their investment to nationals of third States, and render the Cyprus-Poland BIT applicable.⁵⁵ However, the Respondent submits that, as a corollary, this transfer should render the present Treaty inapplicable.⁵⁶

7.35 The Claimants submit that they have been and remain the true beneficial owners of the investment.⁵⁷ They argue that there has been no “transfer” of investment to SIHOL as it is only an “intermediary” and a “shell corporation” created for tax optimization purposes, without any active business operation or decision-making authority.⁵⁸ The Tribunal does not read the Claimants’ submission in the literal sense such that there was no actual transfer of shares to SIHOL, but understands it to mean that there has been no effective transfer of the investment away from the Claimants in favour of SIHOL. The Claimants also submit that they incur all profits, losses or financial consequences in connection with the operation of the investment.⁵⁹

7.36 The Respondent has not seriously challenged the Claimants’ explanation that SIHOL was created for tax optimisation purposes and operates as a shell corporation.⁶⁰ The Tribunal is satisfied that SIHOL is the Claimants’ shell corporation, which has only been interposed between the Claimants and the investment.

⁵⁵ Jur. Memorial, ¶ 127.

⁵⁶ Jur. Memorial, ¶ 128.

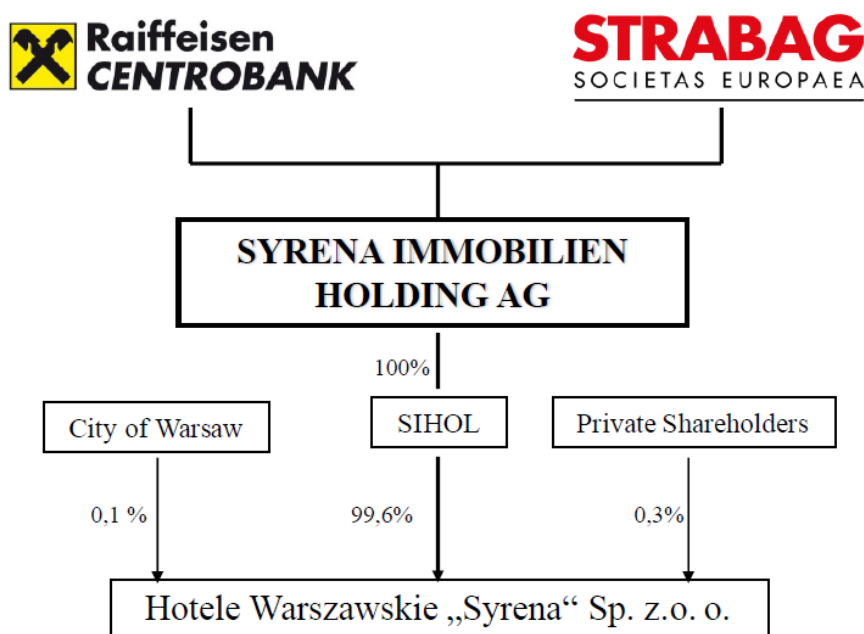
⁵⁷ Jur. CM, ¶ 243; Jur. Rejoinder, ¶ 154.

⁵⁸ Jur. CM, ¶ 243; Jur. Rejoinder, ¶ 152; Hearing Transcript, D1.159:1-6.

⁵⁹ Jur. CM, ¶ 243.

⁶⁰ Jur. Reply, ¶ 69.

7.37 With regard to their corporate structure, the Claimants further submit that Austrian entities Strabag and Raiffeisen jointly and wholly own and control the Austrian entity SIHAG. SIHAG wholly owns and controls the Cypriot company SIHOL, which in turn holds 99.615% of Syrena Hotels.⁶¹ At the Hearing, the Claimants presented the following chart to illustrate their current corporate structure (already reproduced in Part I above):⁶²



7.38 As illustrated in the corporate chart above, SIHOL is a wholly owned subsidiary of the third Claimant (SIHAG). According to the Claimants, which has not been disputed by the Respondent, SIHAG is owned 51% percent by the first Claimant (Strabag) and 49% by the second Claimant (Raiffeisen).⁶³

7.39 This corporate structure is not in dispute between the Parties. By virtue of this corporate structure, the Tribunal is satisfied that the Claimants directly (the third Claimant) and indirectly (the first and second Claimants) own SIHOL, and through SIHOL indirectly own the Company.

7.40 The relevant question is whether the Claimants, with this corporate structure, have standing as indirect investors under the Treaty.

⁶¹ Jur. CM, ¶ 242; Hearing Transcript, D1.157:8-13.

⁶² Claimants' Hearing Presentation, slide 71.

⁶³ Jur. CM, ¶ 4; Jur, Rejoinder, ¶ 12; also *see* Jur. Reply, ¶ 5.

7.41 The Respondent submits that it does not question, as a matter of principle, “the indirect investor’s ability to avail itself of its national investment treaty”.⁶⁴ Rather, the Respondent asserts that if two treaties are potentially applicable, it is an issue of “potential conflict” of treaties.⁶⁵ Even at the Hearing, the Respondent’s focus as regards the issue of the Claimants’ *jus standi* was that the Tribunal should arrive at a conflict of treaties rule.⁶⁶ This assertion has already been rejected by the Tribunal.⁶⁷

7.42 For the sake of completeness, the Tribunal shall nevertheless analyse whether the Claimants, as indirect holders of SIHOL, still hold an “investment” within the meaning of Article 1(1) of the Treaty, and can bring a claim as “investors” under Article 1(2) of the Treaty.

7.43 Article 1(1) of the Treaty defines “investment” as follows:

For the purpose of this Agreement:

(1) The term “investment” shall include all assets, in particular but not exclusively:

a) Ownership of movable and immovable property and other rights in rem, such as mortgages, rights of retention, pledges, rights of usufruct, and similar rights;

b) Participation rights and other types of participations in enterprises;

c) Claims to money provided in order to create an economic value or claims to performances having an economic value; and

d) Copyrights, industrial property rights such as inventor’s patents, trademarks and industrial designs and models, registered designs, technical procedures, know-how, trade names and good will.

7.44 Article 1(2) of the Treaty defines an “investor” as follows:

(2) The term “investor” shall mean:

a) Any individual possessing the nationality of one of the Contracting Parties and undertaking an investment in the

⁶⁴ Jur. Reply, ¶ 66.

⁶⁵ Jur. Reply, ¶ 67.

⁶⁶ Hearing Transcript, D1.89:4-18.

⁶⁷ See above ¶ 7.31.

territory of the other Contracting Party;

b) Any juridical person, organization or association, with or without legal personality, lawfully established in accordance with the legislation of one of the Contracting Parties, having its seat in the territory of that Contracting Party and undertaking an investment in the territory of the other Contracting Party.

- 7.45 With regard to the definition of the terms “investment” and “investor”, the Tribunal is guided by Article 31 of the VCLT, which provides that 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”.
- 7.46 Under Article 1(1) of the Treaty, the term “investment” covers all assets, including “ownership” of movable and immovable property and other rights in rem, such as mortgages, rights of retention, pledges, rights of usufruct, and similar rights.
- 7.47 With respect to the ordinary meaning of the term “ownership”, the question is whether ownership means direct ownership only, or also covers indirect ownership of an investment. This question is not resolved by the express language of the Treaty. In order to determine whether the Treaty contemplates direct ownership only, to the exclusion of indirect ownership, the Tribunal shall consider the context of the term and the object and purpose of the BIT.
- 7.48 “Ownership” of property is only one of the forms of investment listed in Article 1(1) of the Treaty. Article 1(1) also mentions a broad array of investments by way of participation rights, claims to money, etc.
- 7.49 Further, the object and purpose of the Treaty, as set out in its Preamble, is the creation of:

favourable conditions for enhanced economic cooperation between the Contracting Parties, Recognizing that the encouragement and protection of reciprocal investments may lead to greater willingness to undertake such investments and thus make an important contribution to the development of economic relationships.

- 7.50 Considering the broad categories of potential investments under Article 1(1), together with the stated object and purpose of the Treaty to create favourable conditions for

investment, the Tribunal finds no basis for a narrow reading of the term “ownership”, or for an implied requirement of “direct” ownership alone.

- 7.51 With respect to the definition of “investor” under Article 1(2) of the Treaty, the term includes any individual possessing the nationality of one of the Contracting Parties and undertaking an investment in the territory of the other Contracting Party.
- 7.52 Like Article 1(1), Article 1(2) is framed broadly, with no express or implied basis to require that only “direct” investors may claim protection under the Treaty, to the exclusion of indirect investors.
- 7.53 The Tribunal therefore finds that the Claimants fulfil the requirements of Articles 1(1) and 1(2) of the Treaty, in that they are Austrian entities that “own” the investment in the Company which is situated in Poland, albeit, indirectly through their Cypriot subsidiary SIHOL.
- 7.54 Accordingly, the Tribunal agrees with the Claimants that they remain “investors” with an “investment” within the meaning of the Treaty even after the Cypriot company SIHOL is interposed between the Claimants and the investment.
- 7.55 For the avoidance of doubt, the Claimants have submitted that the essential elements of the current dispute had already arisen in May 2008, prior to the establishment of SIHOL in October 2008.⁶⁸ The Tribunal is of the view that the fact that the Claimants owned the investment at the time of these alleged breaches should be sufficient for the Claimants to have a standing in the present arbitration under the Treaty.
- 7.56 There is no requirement in the Treaty that an investor must prove continuous direct ownership of its investment beyond the date of the alleged breach by the host State.⁶⁹ As the case may be, an alleged breach by the host State may actually deprive the investor of the ownership of the investment and the affected investor may no longer own the investment at the time of filing the claim. However, this does not and should

⁶⁸ Jur. Rejoinder, ¶ 154.

⁶⁹ In this respect, the Tribunal refers to the “continuous ownership” of an investment by an investor, and not to the issue of “continuous nationality” which was at stake in *Loewen v United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003.

not prevent the affected investor from claiming protection as an investor under the treaty.

- 7.57 In the same way, the formation of SIHOL as an intermediary company does not prevent the Claimants from claiming protection on the basis of alleged breaches of the Treaty pre-dating that restructuring.
- 7.58 Given these factors, the Tribunal concludes that the Claimants retain standing as investors under the Treaty.
- 7.59 For these reasons, the Tribunal rejects the Respondent's jurisdictional objection concerning the Claimants' standing, or *jus standi*, as investors under the Treaty.

PART VIII: EU LAW AND THE ACHMEA JUDGMENT

A. Introduction

- 8.1 In this Part VIII, the Tribunal begins by summarising the Parties' respective positions on the Respondent's jurisdictional objection under the laws of the EU, and in particular the consequences of the *Achmea* Judgment. Thereafter, the observations of the Commission on this matter are summarised. This is followed by the Tribunal's analysis and decision on the Respondent's jurisdictional objection.
- 8.2 As a preliminary matter, the Tribunal considers it useful to reproduce Article 8 of the Treaty, which is the investor-State dispute settlement ("ISDS") clause therein, in its relevant part:

Article 8

SETTLEMENT OF INVESTMENT DISPUTES

- (1) If disputes should arise between one Contracting Party and an investor from the other Contracting Party with regard to an investment, such disputes shall be resolved amicably between the parties themselves if possible. If such amicable resolution is not possible, then the investor shall exhaust all relevant domestic administrative and judicial remedies.*
- (2) If such a dispute cannot be settled in a manner provided for in paragraph 1 within 12 months from written notification of adequately specified claims, it shall at the request of the Contracting Party or of the investor from the other Contracting Party, be submitted for conciliation or arbitration:*
 - a) to the International Centre for Settlement of Investment Disputes, if both Contracting Parties are signatories to the Convention on the Settlement of Investment Disputes between States and nationals of other States, opened for signature at Washington on 18 March 1965. In the event of arbitration, each of the Contracting Parties, by becoming a signatory to this Agreement, undertakes irrevocably and in advance, even if there should be no individual arbitration agreement between a Contracting Party and an investor, to submit such disputes to the Centre and to recognize the arbitration award as binding.*
 - b) to an international arbitral tribunal, if either of the Contracting Parties is not a signatory to the Convention on the Settlement of Investment Disputes between States and nationals of other States. The international arbitral tribunal shall be constituted on an ad*

hoc basis in the following manner: each side shall appoint an arbitrator, and these arbitrators shall agree on a chairman, who shall be a national of a third State. The arbitrators shall be appointed within two months from the date on which the investors has notified the other Contracting Party of his desire to submit the dispute to an arbitral tribunal and the chairman within further two months.

If the time-limits given in the paragraph above are not observed and if no other agreement is reached, either side may request the President of the International Court of Justice to make the necessary appointments. If the President of the International Court of Justice is a national of either Contracting Party or if he is unable to act for any other reason, the Vice-President or, if he is unable to act, the longest-serving member of the International Court of Justice, may under the same conditions be asked to make the necessary appointments.

The arbitral tribunal shall determine its rules of procedure by applying as appropriate the procedural rules of the Convention on the Settlement of Investment Disputes between States and nationals of other States of 18 March 1965; the decision shall include a statement of the basis on which it has been made, and supporting reasons shall be given if either side so requests.

- (3) The decision of the tribunal shall be final and binding. It shall be enforced by domestic law, and each Contracting Party shall ensure the recognition and enforcement of arbitral awards in accordance with its relevant legislation.*
- (4) Each side shall bear the costs of its own arbitrator and the costs of its representation in the proceedings before the arbitral tribunal; the costs of the chairman and the other costs shall be borne in equal shares by both sides.*
- (5) A Contracting Party which is a party to a dispute shall not, at any stage of the conciliation or arbitration proceedings or enforcement of an arbitral award, raise an objection on the grounds that the investor who is the other party to the dispute has received compensation for all or some of its losses through an insurance policy.*

B. The Respondent's Position

- 8.3 In summary, the Respondent submits that Article 8 of the Treaty “should be deemed invalid and/or inapplicable” because it conflicts with mandatory rules of EU law, as

confirmed by the CJEU in the *Achmea* Judgment.¹ The Tribunal, therefore, lacks any jurisdiction under the Treaty to decide the Parties' dispute.

8.4 According to the Respondent, the *Achmea* Judgment is broad in scope and unquestionably applies to Article 8 of the Treaty. The CJEU provided an "abstract and general interpretation of EU law". It was not based on the wording of the arbitration clause there at issue (namely, Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic 1991 ("Netherlands-Slovak Republic BIT")) or the specific circumstances of that case.² Commentators, the Commission and EU Member States have recognised the far reaching effects of the *Achmea* Judgment.³

8.5 In the Respondent's submission, the *Achmea* Judgment applies to ISDS provisions in all intra-EU BITs, regardless of whether the treaty at issue refers to EU law or whether the case explicitly involves EU law.⁴ The Respondent interprets the *Achmea* Judgment as holding that, "even the mere possibility for the arbitral tribunal to adjudicate on the basis of EU law suffices to recognise the ISDS mechanism as incompatible with EU law".⁵

8.6 Thus, in the Respondent's view, it is irrelevant that the Treaty does not contain an applicable law clause.⁶ The Respondent cites the applicable law provisions in Article 54(1) of the ICSID Additional Facility Rules (Arbitration) and paragraph 116 of

¹ Respondent's Observations on *Achmea*, ¶ 51; see Respondent's PHB, ¶¶ 188-194; Respondent's Reply on *Achmea*, ¶ 44.

² Respondent's Observations on *Achmea*, ¶ 12.

³ Respondent's Observations on *Achmea*, ¶ 14, citing Nikos Lavranos, "Black Tuesday: the end of intra-EU BITs," Practical Law Arbitration Blog, 7 March 2018 (<http://arbitrationblog.practicallaw.com/black-tuesday-the-end-of-intra-eu-bits/>) ("Since the CJEU concluded that an investor state dispute settlement (ISDS) provision as contained in the Netherlands-Slovak BIT is incompatible with EU law, all 190 intra-EU BITs, which contain similar ISDS provisions, can no longer be invoked by European investors against EU member states"); Steffen Hindelang, "The Limited Immediate Effects of CJEU's *Achmea* Judgement," Verfassungsblog (<https://verfassungsblog.de/the-limited-immediate-effects-of-cjeus-achmea-judgement/>). See Respondent's Observations on the Written Submission of the Commission, 1 January 2019, and Respondent's Observations on the Documents Included in the Record of the Case, 22 February 2019.

⁴ Respondent's Observations on *Achmea*, ¶ 17, citing **RL-84**, B. Hess, *The Fate of Investment Dispute Resolution after the Achmea Decision of the European Court of Justice*, MPILux Research Paper Series, 2018(3), p 10 ("EU Member States cannot derogate from mandatory Union law by simply agreeing to an international investment treaty without referring to EU law, which is largely applicable to cross-border investments in the Internal Market. As a result, **the considerations of the Achmea Judgment apply to all intra-EU BITs regardless of whether they explicitly refer to EU law or not**" (Respondent's emphasis)).

⁵ Respondent's Observations on *Achmea*, ¶ 16.

⁶ Respondent's Reply on *Achmea*, ¶¶ 26-28.

Procedural Order No 1, neither of which provides a carve-out for EU law,⁷ to contend that “there is nothing that would prevent the Tribunal from applying EU law in case the Tribunal considers it applicable”.⁸ In this connection, the Respondent points to the Claimants’ own statement that the Tribunal may need to refer to EU law in the merits phase of this arbitration.⁹

- 8.7 The Respondent does not challenge the Claimants’ submission that the Parties’ dispute will be governed by the Treaty and generally recognised principles of international law. However, the Respondent asserts that “the principles of international law inevitably include also the principles of EU law”.¹⁰
- 8.8 The Respondent rejects the Claimants’ attempt to distinguish the present case from *Achmea* on the basis of the place of the arbitration (there Frankfurt, Germany and here Paris, France), contending that the CJEU answered general, abstract questions in the *Achmea* Judgment, which are unrelated to the domestic law applicable to set aside proceedings for an award.¹¹ The Respondent contends that, in any event, contrary to the Claimants’ assertion, Article 1520 of the French Code of Civil Procedure (“French CPC”), like Article 1059(2) of the German Code of Civil Procedure, permits the setting aside of an arbitral award that is not based on a valid arbitration agreement.¹²
- 8.9 For the Respondent, it is irrelevant that the Claimants’ investment was made prior to Poland’s accession to the EU. It contends that there is no temporal restriction in the *Achmea* Judgment, moreover, the Parties’ dispute arose after Poland’s accession to the EU.¹³
- 8.10 The Respondent contends that Article 8 of the Treaty is a clause “such as” the arbitration clause considered by the CJEU in *Achmea* and thus expressly falls within the scope of the *Achmea* Judgment. Thus, the Respondent concludes that, contrary to

⁷ Respondent’s Observations on *Achmea*, ¶ 19.

⁸ Respondent’s Observations on *Achmea*, ¶ 20.

⁹ Respondent’s Reply on *Achmea*, ¶ 35, citing Claimants’ Observations on the *Achmea* Judgment, ¶ 33.

¹⁰ Respondent’s Reply on *Achmea*, ¶ 30, citing *Electrabel S.A. v Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, ¶ 4.126 (“There is no fundamental difference in nature between international law and EU law that could justify treating EU law, unlike other international rules, differently in an international arbitration requiring the application of relevant rules and principles of international law”).

¹¹ Respondent’s Reply on *Achmea*, ¶ 15.

¹² Respondent’s Reply on *Achmea*, ¶¶ 15-16.

¹³ Respondent’s Reply on *Achmea*, ¶¶ 39-42.

the Claimants' case, there is no basis on which to distinguish the present case from *Achmea*.¹⁴

- 8.11 Regarding the temporal application of the *Achmea* Judgment, the Respondent submits that the Judgment has *ex tunc* effect, like all preliminary rulings of the CJEU. Therefore, the CJEU's interpretation of EU treaties must be applied from the time that the treaties came into force.¹⁵
- 8.12 The Respondent accepts that the *Achmea* Judgment does not expressly decide upon the invalidity of ISDS provisions in all intra-EU BITs.¹⁶ Instead, the CJEU left the assessment of the practical consequences of its Judgment to arbitral tribunals and courts of the EU Member States adjudicating individual cases. However, in the Respondent's submission, the consequence for the present case is obvious in light of the CJEU's clear, general pronouncement that ISDS provisions in intra-EU BITs are incompatible with EU law.
- 8.13 The Respondent's primary case is that the Treaty was terminated on 1 May 2004 in accordance with Article 59(1) VCLT.¹⁷ It provides:

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.

- 8.14 Austria and Poland entered into the Treaty in 1988. Subsequently, Poland acceded to the EU with effect from 1 May 2004 pursuant to the Accession Treaty of 2003 (the "Accession Treaty"). Austria and Poland became parties to the TEC (which was superseded on 1 December 2009 by the Treaty on the Functioning of the European

¹⁴ With regard to the Claimants' argument that the present case is different from *Achmea* because the Tribunal is part of the Polish judicial system, the Respondent contends that the Claimants are wrong as a matter of fact, and that their arguments are self-contradictory. Respondent's Reply on *Achmea*, ¶¶ 36-38.

¹⁵ Respondent's Observations on *Achmea*, ¶¶ 21-22, citing **RL-86**, *Amministrazione delle Finanze dello Stato v Denkavit Italiana S.R.L.*, Judgement of the Court of 27 March 1980, CJEU Case No. C-61/79, ¶ 16.

¹⁶ Respondent's Reply on *Achmea*, ¶ 20.

¹⁷ Respondent's Observations on *Achmea*, ¶¶ 24-25; Respondent's Reply on *Achmea*, ¶ 21.

Union (“TFEU”)), creating the conflict between the Treaty and EU law that was identified in the *Achmea* Judgment.

8.15 According to the Respondent, that conflict must be resolved by applying the *lex posterior* rule set forth in Article 59(1) VCLT, “resulting in the tacit termination of the Treaty.”¹⁸ Contrary to the Claimants’ case, the Respondent considers it irrelevant that the termination procedure in Article 11 of the Treaty has not been followed.¹⁹

8.16 Alternatively, the Respondent contends that even if the Treaty were not terminated, the arbitration clause in Article 8 of the Treaty is nonetheless inapplicable under Article 30(3) VCLT.²⁰ It provides:

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.

8.17 The Respondent submits that in the *Achmea* Judgment, the CJEU confirmed that ISDS provisions in intra-EU BITs are incompatible with Articles 267 and 344 TFEU. It follows that Article 8 of the Treaty was rendered inapplicable when Poland acceded to the EU in 2004.²¹

8.18 The Respondent also relies on the 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 (the “*Achmea* Declaration”),²² signed by 22 EU Member States (including the Treaty parties, Poland and Austria, and France, the place of this arbitration), as confirmation that the principles established in the *Achmea* Judgment were not specifically linked to the Netherlands-Slovak Republic BIT.²³ The Respondent contends that the *Achmea* Declaration constitutes a confirmation by the signatories that

¹⁸ Respondent’s Observations on *Achmea*, ¶ 50.

¹⁹ Respondent’s Reply on *Achmea*, ¶ 22.

²⁰ Respondent’s Observations on *Achmea*, ¶¶ 26-30; Respondent’s Reply on *Achmea*, ¶ 21.

²¹ Respondent’s Observations on *Achmea*, ¶ 30.

²² **RL-96**, 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.

²³ Respondent’s Observations dated 22 February 2019, ¶ 4.

“ISDS clauses contained in intra-EU BITs (including Article 8 of the Treaty) remain inoperative by virtue of the superiority of EU law”.²⁴

- 8.19 For the Respondent, the interpretation and commitments undertaken under the *Achmea* Declaration are *legally* binding and fully applicable to the Treaty.²⁵ The Respondent submits that the *Achmea* Declaration constitutes an authentic interpretation of the Treaty for the purposes of Article 31(3)(a) VCLT.²⁶ The Respondent contends that the two other interpretative Declarations dated 16 January 2019, one signed by five other EU Member States,²⁷ and the other by one EU Member State²⁸ (together with the *Achmea* Declaration, the “Declarations”) are irrelevant to this arbitration.
- 8.20 The Respondent considers the opinion of Advocate General Bot dated 29 January 2019 in CJEU Case 1/17 (“CETA Opinion”) to be irrelevant for the present case, as it was rendered in connection with the Comprehensive Economic and Trade Agreement (“CETA”) and not in relation to intra-EU BITs. In any event, the Respondent points out, the opinion is of a non-binding nature.²⁹
- 8.21 The Respondent *concludes* that, as a result of either the termination of the Treaty or the inapplicability of Article 8, there is no valid agreement to arbitrate between the Parties. The Tribunal therefore lacks jurisdiction to decide the Parties’ dispute.³⁰
- 8.22 In addition, the Respondent calls on the Tribunal to observe its “obligation to make every effort to ensure that *the* award is enforceable at law”.³¹ In the Respondent’s submission, because the place of the arbitration is Paris, France (an EU Member State),

²⁴ Respondent’s Observations dated 22 February 2019, ¶¶ 5-9, 17.

²⁵ Respondent’s Observations dated 22 February 2019, ¶¶ 11-12, 41-42.

²⁶ Respondent’s Observations dated 22 February 2019, ¶¶ 18-40; *citing, inter alia*, **RL-102**, *ILC Fragmentation Report*, 13 April 2006, paras 230, 320. Exhibit RL-0103, Joost Pauwelyn, *Conflict of Norms in Public International Law*, CUP Cambridge 2003, pp 330-331. **RL-104**, *Orakhelashvili, Article 30*, in: Corten/Klein, *Vienna Convention on the Law of Treaties. A Commentary*, vol. I, OUP Oxford 2011, ¶ 24. **RL-105**, *BG Group Plc. v Argentine Republic, UNCITRAL, Judgment of Supreme Court of United States*, 5 March 2014, p. 10; **RL-108**, *Commentary to 1966 Draft Convention on the Law of Treaties*, Article 27, ¶ 14. **RL-109**, *Guide to Practice on Reservations to Treaties*, 2011, p 11; **RL-110**, *Report of the International Law Commission*, Sixty-third session, 2011.

²⁷ **RL-97**, 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.

²⁸ **RL-98**, Declaration of the Representative of the Government of Hungary of 16 January 2019 on the legal consequences of the Judgment of the Court of Justice in *Achmea* and on investment protection in the European Union.

²⁹ Respondent’s Observations dated 22 February 2019, ¶¶ 43-48.

³⁰ Respondent’s Observations on *Achmea*, ¶¶ 50-51.

³¹ Respondent’s Observations on *Achmea*, ¶¶ 31-33.

any award on the merits rendered by the Tribunal would likely be set aside by the French courts and would not be enforced in any EU Member State, as being contrary to the EU *ordre public*.

- 8.23 Finally, the Respondent denies that its EU law jurisdictional objection is precluded as being untimely. The *Achmea* Judgment constituted a critical new development that could not have been raised *in* the Respondent’s initial pleadings on jurisdiction.³² In any event, “the Tribunal is both entitled and obliged to consider the issue of its jurisdiction *ex officio*”. In support of this proposition, Respondent relies on paragraph 28 of Procedural Order No 1 and Article 45(3) of ICSID Additional Facility Rules, as well as general international law.³³ There is no applicable principle or procedural rule that could serve as a basis to preclude the EU law objection at any stage of these arbitration proceedings.³⁴

C. The Claimants’ Position

- 8.24 In summary, the Claimants contend that the *Achmea* Judgment has no effect upon the Tribunal’s jurisdiction over the Parties’ dispute and that the Respondent’s EU law objection should be dismissed by the Tribunal.
- 8.25 First, according to the Claimants, the *Achmea* Judgment is not binding on international tribunals. Rather, the Tribunal is to determine its jurisdiction on the basis of Article 8(2) of the Treaty and the Parties’ arbitration agreement. In doing so, “the Arbitral Tribunal may consider the *Achmea* Judgement, if at all, merely as a fact”.³⁵
- 8.26 Second, the Claimants reject the Respondent’s arguments regarding the broad scope of the *Achmea* Judgment.³⁶ In their submission, the Judgment must be understood in light of the German Court’s *reference* to the CJEU and the CJEU’s reasoning, both of which

³² Respondent’s Reply on *Achmea*, ¶ 5.

³³ Respondent’s Observations on *Achmea*, ¶¶ 34-44; Respondent’s Reply on *Achmea*, ¶ 5; citing **RL-93**, *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v Czech Republic*, PCA Case No. 2014-03, Final Award, 11 October 2017, ¶ 250; **RL-94**, *PL Holdings S.à.r.l. v Republic of Poland*, Partial Award, 28 June 2017, ¶ 307.

³⁴ Respondent’s Reply on *Achmea*, ¶¶ 7-8.

³⁵ Claimants’ Observations on the Commission’s Written Observations, ¶ 27.

³⁶ Claimants’ Reply on *Achmea*, ¶¶ 3-5; *see* Claimants’ Observations on the Commission’s Written Observations, Section D.1.

were made specifically in relation to Article 8 of the Netherlands-Slovak Republic BIT.³⁷

- 8.27 According to the Claimants, there are several factors that distinguish the present case from *Achmea*.³⁸ First, the Netherlands-Slovak Republic BIT at issue in *Achmea* contained an applicable law clause *which required* an arbitral tribunal to “take into account in particular the law in force in the contracting party concerned”.³⁹ In contrast, the Treaty does not contain an applicable law clause or any reference to domestic law (including EU law).⁴⁰
- 8.28 In the Claimants’ submission, the Tribunal is under no obligation to interpret or apply Polish law. Article 9(6) of the Treaty provides that disputes between the Contracting Parties as to the interpretation or application of the Treaty are to be decided in accordance with the Treaty and international law. The same approach should apply to investor-State disputes under the Treaty.⁴¹
- 8.29 For the Claimants, paragraph 116 of Procedural Order No 1 “does not change anything” because it “does not have the legal quality of a treaty (like Art 8(6) of the Netherlands-Slovak Republic BIT)”.⁴² In any event, if the Tribunal were to consider Polish law as somehow relevant to the merits, “it would not have to apply or to interpret it but to treat it merely as a fact”.⁴³
- 8.30 According to the Claimants, this is a highly relevant distinction because the wording of the applicable law clause in the Netherlands-Slovak Republic BIT was decisive to the CJEU’s finding that an arbitral tribunal might be called on to interpret EU law.⁴⁴ For this reason, it is impossible to find that Article 8 of the Treaty is a clause “such as” the arbitration clause at issue in *Achmea*.⁴⁵
- 8.31 The other related distinction identified by the Claimants is that “in *Achmea* the application of core principles of EU law made the interpretation of the European

³⁷ Claimants’ Reply on *Achmea*, ¶¶ 3-5.

³⁸ Claimants’ Observations on *Achmea*, Section C.

³⁹ Claimants’ Observations on *Achmea*, ¶¶ 12-13, *quoting* Article 8(6) of the Netherlands-Slovak Republic BIT.

⁴⁰ Claimants’ Observations on *Achmea*, ¶ 14.

⁴¹ Claimants’ Observations on *Achmea*, ¶ 16.

⁴² Claimants’ Observations on *Achmea*, ¶ 17.

⁴³ Claimants’ Observations on the Commission’s Written Observations, ¶ 29.

⁴⁴ Claimants’ Reply on *Achmea*, ¶ 4.

⁴⁵ Claimants’ Observations on *Achmea*, ¶ 12.

Treaties necessary”, whereas no EU laws would have to be interpreted or applied in this arbitration.⁴⁶

8.32 At the same time, the Claimants appear to accept that “the Arbitral Tribunal might at the merits stage of the present arbitration have to consider or apply EU law”.⁴⁷ However, the Claimants reject the Respondent’s *submission* that such a hypothetical possibility of the application of EU law could deprive an arbitral tribunal of jurisdiction pursuant to the *Achmea* Judgment. According to the Claimants, the logical consequence of the Respondent’s argument would be that *all* investment treaties involving an EU Member State would be invalid.⁴⁸

8.33 Third, the Claimants emphasise that the place of arbitration and the corresponding *lex fori* in the present case differ from that in *Achmea*. The Claimants’ position is summarised as follows:

*... according to the [Achmea] Judgement, an award can be set aside pursuant to Art 1059(2) German Civil Procedure Code. The grounds for setting aside an award under that provision include the arbitration agreement being invalid under the law to which the parties have subjected it, and the recognition or enforcement of the award would be contrary to public policy. By contrast, in the present case, an application for setting aside will have to be brought before a French court which will have to apply Art 1520 of the French Civil Procedure Code. Under that provision, an award can be set aside if, amongst others, the arbitral tribunal wrongly upheld or declined jurisdiction. These are two entirely different sets of rules (already from a linguistic point of view).*⁴⁹

8.34 The Claimants contend that under French arbitration law, arbitration agreements derive their existence and validity from *international* law principles and are not rooted in any domestic law.⁵⁰ Thus, the Parties’ consent to investor-State arbitration is to be

⁴⁶ Claimants’ Observations on *Achmea*, ¶ 9; Claimants’ Observations on the Commission’s Written Observations, ¶¶ 31-32, *citing* CL-22, Opinion 2/13 of the Court (Full Court) of 18 December 2014, ¶¶ 182-184.

⁴⁷ Claimants’ Observations on *Achmea*, ¶ 33.

⁴⁸ Claimants’ Reply on *Achmea*, ¶¶ 27-29.

⁴⁹ Claimants’ Observations on *Achmea*, ¶ 21.

⁵⁰ Claimants’ Observations on the Commission’s Written Observations, ¶ 157, *citing* CL-32, *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan*, Partial Award, ICC Case No.9987, 26 June 2001.

examined under the applicable investment treaty, interpreted in accordance with the VCLT.⁵¹

- 8.35 Fourth, the Claimants submit that, unlike in the *Achmea* case, the Tribunal forms part of the Polish judicial system. The Claimants base this argument on a submission made by the City of Warsaw in the Polish courts that pursuant to Article 241(1) in conjunction with Articles 89(1), 87(1) and 91 of the Polish Constitution, “the laws (substantive and procedural) which are allocated to investors in the BIT are included in the category of matters governed by the [Polish] Constitution”.⁵² According to the Claimants, it must follow that the operative part of the *Achmea* Judgment does not apply in this case.
- 8.36 Fifth, according to the Claimants, the Parties’ relationship in the present case is more akin to the type of commercial arbitration agreement condoned by the CJEU in the *Achmea* Judgement, because the “Claimants and Poland have concluded another or individual arbitration agreement, which is entirely independent from the ISDS provision in the BIT”.⁵³ The Respondent gave its voluntary consent by participating in the formation of the Tribunal and agreeing to Procedural Order No 1.⁵⁴
- 8.37 Lastly, the Claimants distinguish the present case on the basis that the Claimants made their investment prior to Poland’s accession to the EU in 2004. In their view, even if the *Achmea* Judgment could be considered to apply to Article 8 of the Treaty, it could not apply to investments made prior to such accession; “otherwise the Investors would be deprived of their properly acquired rights pursuant to the BIT and this would further be discriminatory”.⁵⁵
- 8.38 In these circumstances, the Claimants conclude that the *Achmea* Judgment does not apply to the present case.
- 8.39 In addition, the Claimants reject the Respondent’s submission on the practical effects of the *Achmea* Judgment. They point out that the CJEU in the *Achmea* Judgment did *not* rule that arbitration clauses “such as” Article 8 of the Netherlands-Slovak Republic

⁵¹ Claimants’ Observations on the Commission’s Written Observations, ¶ 158, citing CL-27, *Eastern Sugar v Czech Republic* (SCC Case No. 0SS/2004), Partial Award, 27 March 2007.

⁵² Claimants’ Observations on *Achmea*, ¶ 24, quoting C-46T, Section “Justification,” Subsection I.B. ¶¶ 6-7.

⁵³ Claimants’ Observations on the Commission’s Written Observations, ¶ 37.

⁵⁴ Claimants’ Observations on the Commission’s Written Observations, ¶ 134; Claimants’ Observations on *Achmea*, ¶¶ 17-18; Claimants’ Reply on *Achmea*, ¶¶ 15-16.

⁵⁵ Claimants’ Observations on *Achmea*, ¶ 26.

BIT are invalid.⁵⁶ Nor did the CJEU provide guidance on the effect of its decision or engage in any analysis of the VCLT. Because the CJEU's competence is limited to EU law, it is unable to resolve any potential conflict between the TFEU and intra-EU BITs under international law.⁵⁷

- 8.40 In the Claimants' submission, the practical consequence of the *Achmea* Judgment may be that EU Member States need to take action to seek to terminate or amend certain investment agreements to eliminate any incompatibility with EU law.⁵⁸ However, the Judgment cannot compromise the jurisdiction of a tribunal in a pending investment arbitration. This is confirmed by the language of the *Achmea* Judgment, which states that certain agreements on investment arbitration are "precluded", but does not say that their *application* is precluded.⁵⁹
- 8.41 For the Claimants, the decision of the CJEU in the *Achmea* Judgment might, at most, raise a dispute "with regard to the interpretation or application" of the Treaty under Article 9 of the Treaty. However, *such* inter-State disputes are to be resolved between Austria and Poland, not between the Parties to this arbitration.⁶⁰
- 8.42 Thus, the Claimants conclude that "Poland's accession to the EU had not resulted in an amendment, modification or detracting from the application of the Austria/Poland BIT [the Treaty]".⁶¹
- 8.43 The Claimants further submit that, contrary to the Respondent's position, the Treaty is not terminated pursuant to Article 59 VCLT because the Treaty and the TFEU do not regulate "the same subject matter" or share the same object.⁶²
- 8.44 The Claimants contend that "Article 59 requires the clear intentions of the parties that a later treaty relating to the same subject matter should govern that same matter",⁶³ and

⁵⁶ Claimants' Reply on *Achmea*, ¶ 21; Claimants' Observations on the Commission's Written Observations, ¶ 158.

⁵⁷ Claimants' Observations on the Commission's Written Observations, ¶ 33.

⁵⁸ Claimants' Observations on *Achmea*, ¶ 10.

⁵⁹ Claimants' Observations on the Commission's Written Observations, ¶ 44.

⁶⁰ Claimants' Observations on *Achmea*, ¶ 8.

⁶¹ Claimants' Observations on *Achmea*, ¶ 28.

⁶² Claimants' Observations on *Achmea*, ¶ 32; Claimants' Observations on the Commission's Written Observations, ¶¶ 181-186, citing CL-21, *Eureko BV v The Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, dated 26 October 2010, PCA Case No. 2008-13, ¶¶ 249-263.

⁶³ Claimants' Observations on the Commission's Written Observations, ¶ 169.

neither Austria nor Poland displayed any such intention upon Poland's accession to the EU in 2004.⁶⁴

- 8.45 The Claimants argue that, in any event, as stated by the Respondent's own legal authority, Article 59 "does not entail the automatic termination of the treaty but triggers the termination procedure of Article 65 VCLT". That procedure has not been completed by Austria and Poland.⁶⁵
- 8.46 In this regard, the Claimants note that the prescribed procedure for terminating the Treaty set forth in Article 11 was not followed by Poland.⁶⁶ According to the Claimants, the provisions of the Treaty cannot "simply vanish by the effect of the mere existence of the TFEU or any decision by the CJEU, without any of the treaty law safeguards and mechanisms being triggered".⁶⁷
- 8.47 Moreover, the Respondent's arguments do not account for the 'survival clause' in Article 11(3) of the Treaty. Even if one were to accept that the Treaty was denounced in 2004, Poland's consent to arbitration would have remained valid when the arbitration was initiated on 19 December 2012.⁶⁸
- 8.48 The Claimants further contend that Article 8 of the Treaty could not have been rendered inapplicable by virtue of Article 30(3) VCLT. In the first place, the Claimants do not accept that Article 8 of the Treaty is incompatible with Articles 344 and 267 TFEU.⁶⁹ The Claimants submit that, even if there were a conflict, Article 7(1) of the Treaty provides a conflict rule which, as the *lex specialis*, overrides the *lex posterior* rule in

⁶⁴ Claimants' Observations on the Commission's Written Observations, ¶¶ 163, 170.

⁶⁵ Claimants' Reply on *Achmea*, ¶ 26, citing **RL-84**, B. Hess, *The Fate of Investment Dispute Resolution after the Achmea Decision of the European Court of Justice*, MPILux Research Paper Series, 2018(3), p 13.

⁶⁶ Claimants' Observations on *Achmea*, ¶ 31. The Claimants state that Poland terminated the BIT pursuant to Article 11 by written communication of 16 October 2018, "thereby implicitly recognizing the existence of an instrument in need of termination". Claimants' Observations on the Commission's Written Observations, ¶ 128.

⁶⁷ Claimants' Observations on *Achmea*, ¶ 31.

⁶⁸ Claimants' Observations on the Commission's Written Observations, ¶ 131.

⁶⁹ Claimants' Observations on the Commission's Written Observations, Section G.3.

Article 30(3) VCLT.⁷⁰ Under Article 7(1) of the Treaty, Article 8 of the Treaty would prevail because it is more favourable.⁷¹

- 8.49 The Claimants reject the Respondent's position regarding the value and authority of the *Achmea* Declaration.⁷² For the Claimants, the Declarations of 15-16 January 2019 are mere political statements and legally non-binding.⁷³ In the Claimants' view, the Declarations of 15-16 January 2019 not only demonstrate the lack of unanimity in the views of the EU Member States regarding the *Achmea* Judgment, but also display a complete contradiction by the EU Member States in relation to their pre-*Achmea* intention to remain bound by the intra-EU BITs.⁷⁴
- 8.50 The Claimants further contend that the *Achmea* Declaration is not applicable in the present case as it (i) addresses "investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States", whereas the Treaty had been executed when Austria and Poland were both not EU Member States; and (ii) is intended to govern cases of claims by intra-EU investors under EU law, whereas the Claimants are not pursuing a claim under EU law.⁷⁵
- 8.51 Moreover, for the Claimants, the intention of EU Member States as recorded in the *Achmea* Declaration, to terminate all intra-EU BITs by way of a plurilateral treaty, is evidence of the fact that until that is done, the Treaty remains in force.⁷⁶
- 8.52 The Claimants support the observations in the CETA Opinion as being applicable to the Treaty as, similar to the position under the CETA, (i) the Tribunal under the Treaty is not required to apply internal EU law but only the provisions of the Treaty; and (ii)

⁷⁰ Claimants' Observations on the Commission's Written Observations, ¶ 259. Article 7(1) of the Treaty states: "If the legislation of either Contracting Party or international obligations of the two Contracting Parties, which presently apply in addition to this Agreement or which are established in the future, should give rise to a general or specific agreement which accords to the investments of investors from the other Contracting Party more favourable treatment than is provided for by this Agreement, such arrangement shall have precedence over this Agreement, in so far as it is more favourable".

⁷¹ Claimants' Observations on the Commission's Written Observations, ¶ 260.

⁷² Claimants' Observations dated 8 March 2019, ¶¶ 15-30.

⁷³ Claimants' Observations dated 8 March 2019, ¶¶ 4, 6, 9, 18-21.

⁷⁴ Claimants' Observations dated 8 March 2019, ¶ 5.

⁷⁵ Claimants' Observations dated 8 March 2019, ¶ 8, 13.

⁷⁶ Claimants' Observations dated 8 March 2019, ¶ 10.

the Treaty offers additional protection to investors under international law and an effective dispute resolution mechanism.⁷⁷

8.53 Thus, according to the Claimants, the Respondent's offer to submit disputes to arbitration under Article 8 of the Treaty was and remains in force, and the Claimants accepted that offer by initiating this arbitration. The Tribunal is therefore obliged to decide the Parties' dispute. Should the Respondent attempt to challenge the Tribunal's award, the Claimants state that they are "not afraid of setting-aside proceedings in France".⁷⁸

8.54 Finally, and in any event, the Claimants submit that the Respondent's EU law objection is precluded as untimely. The Claimants' argument is summarised as follows:

*Respondent's EU law defence has not been submitted in due time and in a timely manner. Respondent has raised its defence only after the closing of the written phase of the present arbitration and (irrespective of this) shall be deemed to have waived its right to avail itself of such alleged irregularity pursuant to Section 1466 of the French Code of Civil Procedure. Respondent's EU law defence is, therefore, precluded.*⁷⁹

8.55 For all these reasons, the Claimants conclude that the Respondent's jurisdictional objection based upon EU law and the *Achmea* Judgment should be dismissed by the Tribunal.

D. The European Commission's Written Observations

8.56 According to the Commission, the legal consequence of the *Achmea* Judgment for the present case is that Poland's offer of consent to arbitration in the Treaty has been invalid since Poland's accession to the EU on 1 May 2004.⁸⁰

8.57 The Commission states that the *Achmea* Judgment has a broad scope of application: EU law precludes *any* treaty provision allowing for intra-EU investment arbitration. This broad scope is confirmed by the language of the Judgment's operative part ("a provision in an international agreement concluded between Member States") (emphasis added by

⁷⁷ Claimants' Observations dated 8 March 2019, ¶ 11-12.

⁷⁸ Claimants' Observations on *Achmea*, ¶ 21.

⁷⁹ Claimants' Observations on *Achmea*, ¶ 2.

⁸⁰ Commission's Written Observations, ¶ 5.

the Commission) and by the public statements of CJEU judges since the Judgment was issued.⁸¹

- 8.58 Like all CJEU judgments, the *Achmea* Judgment is an authoritative interpretation of EU law that is binding on all EU Member States and all investors of EU Member States. It also forms part of international law and therefore must be applied by arbitral tribunals deciding intra-EU disputes.⁸² Moreover, the CJEU's interpretation applies *ex tunc*, which in this case means from the date on which Poland acceded to the EU, i.e., 1 May 2004.⁸³
- 8.59 According to the Commission, there is an evident conflict between Article 8(2) of the Treaty and EU law.⁸⁴ The Tribunal is competent to resolve this conflict as part of its competence to determine its own jurisdiction.⁸⁵
- 8.60 Regarding the law applicable to the Tribunal's decision on jurisdiction, the Commission is of the view that, because the Treaty does not contain an applicable law clause, Article 42(1) of the ICSID Convention applies by analogy, pointing to the law of the host State.⁸⁶ As stated by the tribunal in *Zhinvali v Georgia*, Article 42(1) applies to the merits and jurisdiction.⁸⁷ In addition, applying the law of the host State would be consistent with the view of the German Federal Supreme Court in *Achmea*.⁸⁸
- 8.61 Thus, the Commission states that the Tribunal must apply Polish law, which includes EU law and its conflict rules, to the question of jurisdiction. If the Tribunal were to do so, the resolution of the conflict between Article 8(2) of the Treaty and EU law would be straightforward: "the general principle of primacy of Union law is part of the domestic legal order of Poland, and hence, EU law takes precedence over Article

⁸¹ Commission's Written Observations, ¶¶ 12-13, citing **Annex EC-4**, *Koen Lenaerts* at the FIDE Congress in Lisbon in May 2018, "The Court of Justice and the rule of law," p. 14; **Annex EC-5**, *Koen Lenaerts* in Warsaw in March 2018, "The Court of Justice and national courts, a dialogue based on mutual trust and judicial independence," p. 11; **Annex EC-6**, Thomas von Danwitz, speech in a hearing before the Committee on European Affairs of the French Parliament, 22 March 2018, p. 206; **Annex EC-7**, Opinion of Judge Fideima Macken, Svea Court of Appeal, *Poland v P L Holdings S.A.R.L.*, Case Nos. T 8538-17 and 12033-17.

⁸² Commission's Written Observations, ¶ 4, citing **Annex EC-1**, *Vattenfall and others v Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, ¶¶ 148, 150.

⁸³ Commission's Written Observations, ¶ 20.

⁸⁴ Commission's Written Observations, ¶¶ 7, 12 *et seq.*

⁸⁵ Commission's Written Observations, ¶¶ 31-35.

⁸⁶ Commission's Written Observations, ¶ 38.

⁸⁷ Commission's Written Observations, ¶¶ 39-40, citing **Annex EC-11**, *Zhinvali v Georgia*, Award of 24 January 2003, ¶¶ 296-301. The Commission considers it irrelevant that this case was not based on an investment treaty.

⁸⁸ Commission's Written Observations, ¶ 5.

8(2)”.⁸⁹ The Commission contends that if the Tribunal were to apply the *lex fori* to decide upon its jurisdiction, the result would be the same.⁹⁰

- 8.62 If, however, the Tribunal were to apply international law to its decision on jurisdiction, the Commission’s alternative case is that the Treaty (or at the very least Article 8(2) of the Treaty) was terminated in 2004 pursuant to Article 59 VCLT.⁹¹
- 8.63 The Commission’s position is that the condition under Article 59(1)(a) VCLT is met because, when Poland acceded to the EU in 2004, Poland and Austria intended that investment protection be governed by EU law going forward. Both States were well aware of the principle of the primacy of EU law and intended for that conflict rule to govern their reciprocal relationships.⁹²
- 8.64 The Commission states that the condition under Article 59(1)(b) VCLT is also met because the Treaty (including its substantive provisions) is entirely incompatible with EU law.⁹³ In case the Tribunal were to disagree with Commission on this point, the Commission notes that “Article 59 VCLT can also lead to partial termination of an international agreement”.⁹⁴
- 8.65 Regarding the phrase “relating to the same subject matter” in Article 59 VCLT, the Commission states that:

*... the test for deciding whether two treaties relate to the same subject matter is whether they govern the same legal situation. That is clearly the case: any investment made by an investor from one Member State in another Member State falls under the scope of application of the fundamental freedoms of EU law. Hence, both the intra-EU BIT and EU law have vocation to govern the treatment of that investment by the host State.*⁹⁵

⁸⁹ Commission’s Written Observations, ¶ 43.

⁹⁰ Commission’s Written Observations, ¶¶ 48-50.

⁹¹ Commission’s Written Observations, ¶¶ 58-67.

⁹² Commission’s Written Observations, ¶¶ 58-63.

⁹³ Commission’s Written Observations, ¶¶ 64-66.

⁹⁴ Commission’s Written Observations, ¶ 67, citing **Annex EC-18**, *Francois Dubuissou*, Commentary on Article 59 VCLT in Corten and Klein, pp. 2119- 2122, ¶¶ 47-50.

⁹⁵ Commission’s Written Observations, ¶ 72.

- 8.66 The Commission recognizes that previous tribunals have interpreted that phrase differently. Yet, it considers that those tribunals have offered “extremely superficial” reasoning and failed to engage with the relevant *travaux préparatoires*.⁹⁶
- 8.67 The Commission also disagrees with previous tribunals that have found that termination under Article 59 VCLT requires following the formal steps laid out in Article 65 VCLT. Those requirements do not apply because Article 59 VCLT addresses the *implied* termination of a treaty.⁹⁷
- 8.68 The Commission points out that, even if the Tribunal were not to accept that the Treaty was terminated under Article 59 VCLT, the Tribunal would still have to resolve the conflict between the Treaty and EU law. According to the Commission, “under all possibly applicable conflict rules, that conflict has to be solved in favour of EU law”.⁹⁸
- 8.69 The Commission’s position is that the applicable conflict rule is the primacy of EU law, whether the Tribunal applies the host State law, the *lex fori*, or international law to resolve the conflict.⁹⁹
- 8.70 Under international law, the residual conflict rule in Article 30 VCLT does not apply because international law encompasses EU law, which “provides for a special conflict rule, namely primacy of EU law vis-à-vis other international agreements concluded between Member States”.¹⁰⁰ The consequence for the present case is that the offer of arbitration in Article 8 of the Treaty is precluded by EU law. This was confirmed by the CJEU in the *Achmea* Judgment and by the German Federal Supreme Court, which found it necessary to annul the arbitral award rendered in *Achmea*.¹⁰¹

⁹⁶ Commission’s Written Observations, ¶ 70.

⁹⁷ Commission’s Written Observations, ¶ 74.

⁹⁸ Commission’s Written Observations, ¶ 76.

⁹⁹ Commission’s Written Observations, ¶¶ 77-78.

¹⁰⁰ Commission’s Written Observations, ¶ 78; *see* ¶¶ 79-88, *citing, inter alia*, Court of Justice, Judgment in *Commission v Italy*, 10/61, EU:C:1962:2, p. 1 (“in matters governed by the EEC Treaty, that Treaty takes precedence over agreements concluded between Member States before its entry into force”); *Electrabel v Hungary*, ICSID Case No. ARB/07/19, Award, 30 November 2012, ¶ 4.183 (“Under this ‘negative’ interpretation, Article 307 EC [now: Article 351 TFEU] means that between Member States, EU law prevails in case of inconsistency with another earlier treaty. [...] If Article 307 EC provides that treaty rights between Non-EU Members cannot be jeopardised by the subsequent entry of a Non-EU State into the European Union, it appears logical, taking into account the integration processes of the European Union, that the opposite consequence should be implied, i.e. the non-survival of rights under an earlier treaty incompatible with EU law as between Member States”).

¹⁰¹ Commission’s Written Observations, ¶¶ 86-87, *citing Annex EC-8*, German Federal Supreme Court, Decision of 31 October 2018, reference I ZB 2/15, ECLI:DE:BGFI:2018:311018BIZ2.15.0.

- 8.71 In the alternative, the Commission contends that even if the Tribunal were to decide not to apply the primacy principle as a conflict rule, the application of Article 30(3) VCLT leads to the same result: EU law prevails over the Treaty.¹⁰²
- 8.72 The conflict between the Treaty and EU law is clear, as the Treaty contains both substantive and procedural rules that are prohibited by Article 19 of the Treaty of the European Union (“TEU”), Articles 267 and 344 TFEU, and the principle of non-discrimination.¹⁰³ It follows that “under Article 30(3) VCLT, the arbitration clause and the sunset clause under the Austria-Poland BIT of 1989 are incompatible with the Accession Treaty of Poland to the EU, as the later treaty”.¹⁰⁴ According to the Commission, the Claimants cannot avoid this result by invoking “legitimate expectations” or Article 70 VCLT.¹⁰⁵
- 8.73 Nor can the Claimants rely on the sunset clause in Article 11 of the Treaty. That is triggered only in the case of *unilateral* termination of the BIT.¹⁰⁶ In the present case, termination was the result of the common will of both State parties (Poland and Austria), as reflected in the Accession Treaty. In any event, the sunset clause, which prolongs the life of the host State’s offer of consent to arbitration, “falls foul of EU law for the same reason as the offer of arbitration and hence is precluded for the same reason”.¹⁰⁷
- 8.74 Finally, the Commission states that any award in favor of the Claimants would be annulled and could not be enforced.¹⁰⁸ In this regard, the Commission points to its Communication “Protection of intra-EU investment,” which states that national courts are obligated to annul any arbitral award rendered on the basis of an investor-State arbitration clause in an intra-EU BIT.¹⁰⁹
- 8.75 The Parties take opposite positions on the Commission’s observations. The Respondent concurs with the Commission and “requests the Tribunal to consider European

¹⁰² Commission’s Written Observations, ¶¶ 89-96.

¹⁰³ Commission’s Written Observations, ¶ 95.

¹⁰⁴ Commission’s Written Observations, ¶ 96.

¹⁰⁵ Commission’s Written Observations, ¶¶ 97-98, citing **Annex EC-5**, Communication from the Commission to the European Parliament and the Council; “Protection of Intra-EU Investment” of 19 July 2018, COM(2018)547 final; Annex EC-20, ILC Yearbook 1966/11, p. 265.

¹⁰⁶ Commission’s Written Observations, ¶¶ 25-29.

¹⁰⁷ Commission’s Written Observations, ¶ 29.

¹⁰⁸ Commission’s Written Observations, ¶ 99.

¹⁰⁹ Annex EC-5.

Commission's position presented in the EC Amicus Curiae as part of the Respondent's case in the present arbitration".¹¹⁰ In contrast, the Claimants reject each of the Commission's observations and note that the Commission's statements have no legal effect under EU law.¹¹¹

E. The Tribunal's Analysis and Decision

8.76 In this Section, the Tribunal shall examine the Parties' submissions with respect to the Respondent's jurisdictional objection pertaining to EU law, and in the process, shall also analyse the Commission's written observations.

8.77 At the outset, the Tribunal shall determine the Claimants' allegations of untimeliness with respect to the Respondent's jurisdictional objection **(1)**. Thereafter, the Tribunal shall delineate the scope of the law applicable to this Tribunal's jurisdiction, in particular to examine the applicability of EU law **(2)**. Based on its findings on whether or not EU law forms part of the legal framework applicable to questions of the Tribunal's jurisdiction, the Tribunal shall determine, if and to the extent necessary, the Parties' other submissions on whether EU law limits or precludes this Tribunal's jurisdiction under Article 8 of the Treaty **(3)**. This shall be followed by the Tribunal's considerations on the Parties' submissions concerning the future enforceability of this Tribunal's award **(4)**, and the Tribunal's conclusion on this jurisdictional issue **(5)**.

(1) Timeliness of Respondent's Jurisdictional Objection

8.78 A preliminary matter for the Tribunal to resolve pertains to the timeliness of the Respondent's jurisdictional objection relating to EU law and the *Achmea* Judgment.

8.79 In this connection, the Tribunal notes that the first time the Respondent notified the Tribunal of its intention to supplement its arguments by raising an additional argument on EU law was by way of its letter dated 5 May 2017.¹¹² Prior to that date, the Respondent's written submissions before this Tribunal did not mention any objection to this Tribunal's jurisdiction based on EU law. In its letter dated 5 May 2017, the Respondent foresaw that the then impending judgment of the CJEU in *Achmea* could

¹¹⁰ Respondent's Letter to the Tribunal of 1 January 2019.

¹¹¹ Claimants' Observations on the Commission's Written Observations, ¶ 25. The Claimants' specific responses to the Commission's arguments are summarised in subsection C above.

¹¹² Respondent's Letter dated 5 May 2017.

have a “fundamental significance” on the present case, and accordingly requested the Tribunal to adjourn the Hearing on jurisdiction, such that the Parties could elaborate on this aspect of the Tribunal’s jurisdiction in their written submissions.

- 8.80 While the Hearing on jurisdiction was not adjourned, the Tribunal, during that Hearing, invited the Parties to elaborate on their respective positions on the jurisdictional objection relating to EU law, both as regards its timeliness and its substance, in their post-hearing submissions.¹¹³ The Parties did accordingly in their respective post-hearing briefs dated 10 October 2017.
- 8.81 Thereafter, the Tribunal informed the Parties, by way of its correspondence dated 24 October 2017 that it was minded to invite the Parties to address the EU law related jurisdictional objection after the CJEU rendered its decision in *Achmea* in early 2018, pending which the Parties need not address this issue in their reply post-hearing submissions due in the interim. Accordingly, after the CJEU rendered the *Achmea* Judgment on 6 March 2018, the Tribunal invited the Parties to provide brief written observations on the *Achmea* Judgment, if they wished to do so. The Parties made their written observations on 16 April 2018, which were followed by rebuttal/reply written observations dated 15 May 2018.
- 8.82 Subsequently, on 15 October 2018, the Commission submitted its Application for Leave to Intervene in these proceedings as a non-disputing party. After consulting the Parties on this matter, the Tribunal, by way of Procedural Order No 8 dated 2 November 2018, granted the Commission’s Application, while limiting the scope of the forthcoming submission by the Commission to “the legal consequences of the judgement of the Court of Justice in *Achmea*”.¹¹⁴ This was followed by the Parties submitting written observations on the Commission’s written submission in January and February 2019 respectively, and subsequently by further written observations on the EU Member States’ Declarations and the CETA Opinion in February and March 2019 respectively.
- 8.83 Throughout the above described procedural history of the Parties’ submissions relating to EU law, the Claimants have maintained their objection concerning the timeliness of

¹¹³ Hearing Transcript D1.215:23-216:8; *see also* Procedural Order No. 7, ¶ 4.1

¹¹⁴ Procedural Order No. 8, ¶ 27.

Respondent’s jurisdictional objection. In this connection, the Tribunal is not persuaded by the Respondent’s attempt to read the following statement in the Claimants’ post-hearing submission as a relinquishment of their allegations of untimeliness: “Claimants do not suggest that the Tribunal should disregard Respondent’s invocation of [all contra-BIT and, more specifically, all contra-ISDS arguments] for being out of time”.¹¹⁵ As clarified by the Claimants subsequently, this statement was included in their submission prior to the release of the *Achmea* Judgment, and was only intended to address the issue of whether the Tribunal, at that point in time, should have awaited the outcome of the CJEU’s judgment or should have disregarded it.¹¹⁶ The Tribunal accepts the Claimants’ clarification, and treats their untimeliness allegation as a properly advanced defence that warrants the Tribunal’s consideration.

- 8.84 The Claimants have invoked Section 1466 of the French CPC to argue that if a jurisdictional irregularity is not raised in a timely manner, it shall be deemed to have been waived by the objecting party.¹¹⁷ Per the Claimants, the Respondent had ample opportunities to raise the EU law related jurisdictional objection prior to 5 May 2017, since this objection has been known to EU Member States for “at least a decade”, and in any event, “the *Achmea* award and its path through the German courts [we]re well documented” prior to May 2017.¹¹⁸
- 8.85 The Respondent has justified the timeliness of its jurisdictional objection based on its fundamental importance and the Tribunal’s power and duty to determine its jurisdiction *ex officio*, and has further pointed out that the deemed waiver under Section 1466 of the French CPC only applies vis-à-vis annulment proceedings before French state courts.¹¹⁹ Further, according to the Respondent, the referral of *Achmea* by the German Supreme

¹¹⁵ C-PHB, ¶ 118; see Respondent’s Observations on *Achmea*, ¶ 44.

¹¹⁶ Claimants’ Reply on *Achmea*, n. 28.

¹¹⁷ Claimants’ Observations on *Achmea*, ¶ 2; Claimants’ Observations on the Commission’s Written Observations, ¶¶ 38-39.

¹¹⁸ Claimants’ Letter dated 8 May 2017; Claimants’ Reply on *Achmea*, ¶¶ 13-17.

¹¹⁹ Respondent’s Reply on *Achmea*, ¶¶ 9-10; citing D. Bensaude, *La récente réforme du droit de l’arbitrage international en France*, point IVA, <https://www.bensaude-paris.com/actualite/C3%A9s/>; J. Raibaut, *L’arbitrage, une justice citoyenne, émancipée et pragmatique*, p. 8 <https://www.arbitrage-toulouse.com/images/documents/Publications/L-arbitrage-une-justice-citoyenne-emanee-et-pragmatique-cactmp2014.pdf>; M. E. Ancel, *Le nouveau droit français de l’arbitrage : le meilleur de soi-même*, p. 16.

Court in May 2016, and/or the subsequent *Achmea* Judgment of 6 March 2018 constitute “new developments” that triggered the jurisdictional objection.¹²⁰

8.86 Having considered the Parties’ positions on this procedural aspect, the Tribunal finds the Respondent’s jurisdictional objection relating to EU law to have been made in a timely manner. This is for the following two reasons.

8.87 *First*, the Tribunal is convinced by the Respondent’s characterization of the CJEU’s *Achmea* Judgment as a “new development”.¹²¹ In this regard, the Tribunal notes Article 45(2) of the ICSID Additional Facility Rules, which guide the Tribunal’s dealing of procedural matters pursuant to paragraph 38 of Procedural Order No 1. Article 45(2) of the ICSID Additional Facility Rules, akin to Rule 41 of the ICSID Arbitration Rules, provides:

Any objection that the dispute is not within the competence of the Tribunal shall be filed with the Secretary-General as soon as possible after the constitution of the Tribunal and in any event no later than the expiration of the time limit fixed for the filing of the countermemorial or, if the objection relates to an ancillary claim, for the filing of the rejoinder – unless the facts on which the objection is based are unknown to the party at that time.
(emphasis added)

8.88 Thus, Article 45(2) of the ICSID Additional Facility Rules, while requiring that a jurisdictional objection be raised as soon as possible, also permits such objections to be raised later in the course of the proceedings if “the facts on which the objection is based [we]re unknown to the party” previously. In other words, a new factual development can prompt a jurisdictional objection to be raised subsequent to the submission of the counter-memorial and rejoinder.

8.89 The Respondent has emphasised two new factual developments that prompted its jurisdictional objection on EU law: (i) the referral of *Achmea* by the German Supreme Court to the CJEU in May 2016; and (ii) the subsequent *Achmea* Judgment of 6 March 2018. The Claimants dispute that these events qualify as new developments, since the Respondent was aware of the *Achmea* court proceedings long before it launched its

¹²⁰ Hearing Transcript D1.89:23-91:25; Respondent’s Reply on *Achmea*, ¶ 5.

¹²¹ Respondent’s Reply on *Achmea*, ¶ 5.

jurisdictional objection in the present arbitration proceedings, and should certainly have also been aware of the EU law related issues generally.

8.90 As mentioned above, the first time the Respondent advanced its jurisdictional objection in this connection was by way of its letter dated 5 May 2017. The Tribunal considers that this was not “as soon as possible” after it had become aware of the alleged new factual development, i.e., the referral of *Achmea* by the German Supreme Court to the CJEU, which occurred in May 2016.

8.91 However, the Tribunal considers the subsequent *Achmea* Judgment rendered by the CJEU on 6 March 2018 to be a new factual development that could potentially serve to trigger a jurisdictional objection. While it is true that the Respondent had alluded to its jurisdictional objection earlier on 5 May 2017, it had also requested at that time to adjourn the jurisdictional Hearing until after the *Achmea* Judgment was rendered by the CJEU. The Tribunal decided not to suspend the jurisdictional Hearing, but also subsequently granted both Parties the opportunity to provide written comments on the EU law issue after the *Achmea* Judgment was rendered by the CJEU in March 2018. Accordingly, the Respondent’s letter dated 5 May 2017, while it could not prompt a timely jurisdictional objection in and of itself, could and did prompt the procedural development of the present arbitration proceedings such that the Parties’ subsequent submissions on the EU law related jurisdictional objection would account for the *Achmea* Judgment.

8.92 Thereafter, when the CJEU rendered the *Achmea* Judgment on 6 March 2018, the Parties were given an opportunity to provide written comments on its implications. In its written comments, the Respondent argued, *inter alia*, that the *Achmea* Judgment itself was a new factual development that could prompt a timely jurisdictional objection.

8.93 The Tribunal notes that, as quoted in ¶ 8.87 above, Article 45(2) of the ICSID Additional Facility Rules, like Rule 41 of the ICSID Arbitration Rules, provides the exceptional admissibility of the objection if “the facts on which the objection is based are unknown to the party at that time” (emphasis added). The *Achmea* Judgement is not only a “legal” development such that it would not be covered by the term “facts” in Article 45(2) of the ICSID Additional Facility Rules. It is not the development of the

law that is relevant, but the factual existence of the *Achmea* Judgment itself that came into being only at that time. Therefore, the Tribunal is persuaded by the Respondent's characterization of the *Achmea* Judgment as a new development, since the factual existence of CJEU's judgment only became known on 6 March 2018, i.e., when it was rendered, and could not have been known earlier than that date. Further, this factual development was sufficient to appropriately resurrect a jurisdictional objection that the Respondent had alluded to for the first time on 5 May 2017.

- 8.94 In this regard, the Tribunal is not persuaded by the Claimants' argument that after having consented to arbitrate under the Treaty, the Respondent cannot unilaterally argue that it was not bound by the arbitration clause in the Treaty since its accession to the EU in 2004, i.e., on an *ex ante* basis. Whether the Respondent is bound by its consent to arbitrate under the Treaty is a matter that pertains to the legal implications of the *Achmea* Judgment and not its factual existence.
- 8.95 Similarly, the Tribunal does not consider the Respondent's general awareness about EU law issues prior to May 2017 to have any impact on the timeliness of the Respondent's jurisdictional objection. The fact that the Respondent could presumably have been aware of EU law issues in general does not obstruct the novelty of the *Achmea* Judgment as a triggering factual development.
- 8.96 In light of the above, the Tribunal considers the *Achmea* Judgment of 6 March 2018 to be a new development that could prompt a jurisdictional objection on issues of EU law, which would be rendered a timely jurisdictional objection under Article 45(2) of the ICSID Additional Facility Rules. Accordingly, the Respondent's jurisdictional objection relating to EU law and the *Achmea* Judgment is not precluded for being untimely.
- 8.97 *Second*, and on a related note, the Tribunal is also persuaded by the Respondent's characterization of the *Achmea* Judgment as a factual development, which is so important that it "cannot be ignored in the present case",¹²² and that "the relevance of this argument fully justifies" its consideration by this Tribunal.¹²³

¹²² Respondent's Observations on *Achmea*, ¶ 35.

¹²³ Hearing Transcript D1.90:15-90:21.

8.98 In this regard, the Tribunal also notes Article 45(3) of the ICSID Additional Facility Rules, to which the Respondent has pointed the Tribunal’s attention. Article 45(3) of the ICSID Additional Facility, emanates from the principle of *compétence-compétence*, and provides that “[t]he Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute before it is within its competence”. Accordingly, even in the absence of a specific or timely jurisdictional objection, the Tribunal would still have the authority, pursuant to this provision, to examine any jurisdiction matter on an *ex officio* basis.

8.99 That said, given that the Tribunal has already determined the Respondent’s jurisdictional objection to have been made in a timely manner, it need not invoke its *ex officio* power while determining the said jurisdictional objection.

(2) *Applicable Law*

8.100 The Parties and the Commission have advanced various propositions concerning the law applicable to this Tribunal’s jurisdiction, specifically directed towards whether EU law falls within this sphere of applicable law in these proceedings. In order to determine this issue, the Tribunal shall (a) first, determine what constitutes this Tribunal’s applicable law framework for questions of jurisdiction, in the absence of an applicable law provision in the Treaty; and (b) second, based on the determinations of the first issue, determine the applicability of EU law for questions of jurisdiction.

(a) The Applicable Legal Framework

8.101 It is undisputed that the Treaty does not contain an applicable law provision. While both Parties accept this uncontroversial proposition, the precise implications of the absence of an applicable law provision is disputed between them, in particular in relation to whether this absence, in and of itself, serves to distinguish the *Achmea* Judgment from the present case. The Tribunal shall examine this particular disputed matter subsequently, if necessary, subject to its determination of the more general issue of the applicable legal framework, and how that impacts the applicability of EU law. Thus, for the purposes of the current sub-Section, the only relevant question for the Tribunal to answer is what constitutes the applicable legal framework for questions of jurisdiction, in the absence of any indications thereof in the BIT.

8.102 The Respondent has pointed this Tribunal in two directions to fill this absence: paragraph 116 of Procedural Order No 1 and Article 54 of the ICSID Additional Facility Rules. According to the Respondent and the Commission, provisions such as Article 54(1) of the ICSID Additional Facility Rules and Article 42(1) of the ICSID Convention apply equally to the merits of a dispute and to questions of a tribunal’s jurisdiction. Further, pursuant to the application of “conflict of laws rules” under paragraph 116 of Procedural Order No 1, the Respondent and the Commission have advocated for the application of Polish law to questions of jurisdiction as well.

8.103 The Claimants are of the view that any questions relating to interpretation or application of the BIT, including the dispute resolution clause therein, should be resolved in accordance with international law principles (see ¶¶ 8.28-8.29 above). To this end, the Claimants are in disagreement with the Respondent’s position in two respects. Firstly, according to the Claimants, Article 54(1) of the ICSID Additional Facility Rules, like Article 42(1) of the ICSID Convention, does not apply to questions of jurisdiction, but only applies to questions of merits, and is thus, not relevant for this Tribunal’s analysis.¹²⁴ Secondly, the Claimants submit that paragraph 116 of Procedural Order No 1 cannot result in the applicability of Polish law, since the current arbitration proceedings have their place in Paris, France, and French arbitration law does not subject arbitration agreements to any national law but only to principles of international justice.

8.104 The Tribunal shall resolve both these disputed issues in turn. In this regard, as a preliminary matter, the Tribunal considers it appropriate to reproduce paragraph 116 of Procedural Order No 1 and Article 54 of the ICSID Additional Facility Rules for appropriate context. Paragraph 116 of Procedural Order No 1 provides:

The Arbitral Tribunal shall apply the law determined by the conflict of laws rules which it considers applicable and such rules of international law and treaties as the Arbitral Tribunal considers applicable.

Article 54 of the ICSID Additional Facility Rules, in its relevant part, provides:

(1) The Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing

¹²⁴ Claimants’ Observations on the Commission’s Written Observations, ¶ 30.

such designation by the parties, the Tribunal shall apply (a) the law determined by the conflict of laws rules which it considers applicable and (b) such rules of international law as the Tribunal considers applicable.

- 8.105 The *first* disputed issue between the Parties pertains to whether Article 54(1) of the ICSID Additional Facility Rules applies only to the merits of a dispute between an investor and a host State, or whether it also extends to questions of jurisdiction. With respect to this disputed issue, the Tribunal makes the following observations.
- 8.106 The Tribunal is persuaded by the Claimants’ submission that provisions such as Article 54(1) of the ICSID Additional Facility Rules and Article 42(1) of the ICSID Convention are applicable only to the merits of an investor-State dispute, and do not apply to questions of a tribunal’s jurisdiction. The text of Article 54(1) of the ICSID Additional Facility Rules makes this clear. The first sentence of Article 54(1) of the ICSID Additional Facility Rules defines its scope when it states that a tribunal “shall apply the rules of law . . . as applicable to the substance of the dispute” (emphasis added). Thus, the text itself denotes that it only addresses applicable law so far as the substance or merits of an investor-State dispute are concerned, and not the law applicable to questions of jurisdiction.
- 8.107 At this juncture, the Tribunal considers it appropriate to clarify that when the Tribunal refers to the law or the legal framework applicable to “questions of jurisdiction”, jurisdiction includes in particular the law that governs the arbitration agreement between the Parties. Within that perspective, the Tribunal uses the terms law applicable to “questions of jurisdiction” and law applicable to the “arbitration agreement” interchangeably.
- 8.108 The second disputed matter between the Parties pertains to the implications of paragraph 116 of Procedural Order No 1, and whether any conflict of laws rules that the Tribunal may consider applicable result in the application of Polish law to the Parties’ arbitration agreement.
- 8.109 In this regard, it must be noted that in the present case the place of the arbitration is Paris, France.¹²⁵ According to the French courts whose judgments are in the record of

¹²⁵ Procedural Order No. 1, ¶ 24.

the present case, the rules that govern the question of existence and validity of the arbitration agreement are transnational principles. As the arbitral tribunal in *Dallah v Pakistan* (which had also its place of arbitration in Paris) found, rules of law applicable to the arbitration agreement:

*need not be linked to a particular national law (French Cour de Cassation, 1er-civ., Dec. 20, 1993, Dalico), but may consist of those transnational general principles which the Arbitrators would consider to meet the fundamental requirements of justice in international trade.*¹²⁶ (emphasis added)

8.110 This position is also confirmed by the French *Cour de Cassation* in *Renault v V 2000*, which held that “la clause compromissoire devait recevoir application en vertu de l’indépendance d’une telle clause en droit international sous la seule réserve des règles d’ordre public international”.¹²⁷ This translates to “the arbitration clause must be applied by virtue of the independence of such a clause in international law, subject only to the rules of international public order” (emphasis added).

8.111 Therefore, the Tribunal determines that the law applicable to the arbitration agreement or to questions of jurisdiction in the present case includes (i) Article 8 of the Treaty; and (ii) international public order or international law principles which meet the fundamental requirements of justice in international trade.

(b) The Applicability of EU Law

8.112 With the applicable legal framework for questions of jurisdiction established, the Tribunal shall now determine whether and where EU law falls within this framework.

8.113 At the outset, the Tribunal notes that EU law is constituted by a number of legal instruments, which include, but are not limited to, the TEU and the TFEU (together referred to as the “EU Treaties”). Given that the *Achmea* Judgment contains an

¹²⁶ **CL-32**, *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan*, Partial Award, ICC Case No.9987, 26 June 2001, International Journal of Arab Arbitration 2010, Volume 2 Issue, p. 8.

¹²⁷ **CL-34**, *Renault v V 2000 (formerly Jaguar France)*, French *Cour de cassation*, First Chamber, Judgement of 21 May 1997. In this regard, see also the website of the French *Cour de Cassation*, which explains the legal position in French arbitration law, in particular in Section 1 of Chapter 3 (*La mondialisation de la justice arbitrale*): https://www.courdecassation.fr/publications_26/tude_annuelle_8869/tude_2017_juge_mondialisation_8661/juge_mondialisation_8662/partie_1_depassement_frontieres_8665/juge_mondialisation_8667/emergence_justice_38940.html.

interpretation of the EU Treaties, it also forms a constituent part of EU law. In the present case, both the Claimants and the Respondent contend that EU law has a “dual” or “hybrid” nature.¹²⁸ This nature of EU law is also alluded to by the EC.¹²⁹ Moreover, the CJEU¹³⁰ and several investment arbitration tribunals have also endorsed the dual or multiple nature of EU law.¹³¹ Pursuant to this *sui generis* nature, EU law, to the extent that it is sourced from the EU Treaties, forms a part of international law, and to the extent that it is incorporated within the domestic legal order of the EU Member States, also forms part of their national laws.

8.114 The Commission and the Respondent have endorsed the applicability of EU law in the present case through the French domestic legal order on the ground that EU law, due to its dual or dichotomous nature, forms part of the Member States’ domestic legal order as well.¹³² However, the Tribunal has already determined above that there is no place for a domestic legal order in the legal framework applicable to questions of this Tribunal’s jurisdiction, since French courts do not subject arbitration agreements to any such domestic legal order. Accordingly, the domestic nature of EU law cannot result in its applicability to the Parties’ arbitration agreement in the present case.

8.115 As stated above, the only constituents of the applicable law framework for questions of jurisdiction in the present case are (i) the dispute resolution clause of the Treaty; and (ii) international public order or international law principles which meet the fundamental requirements of justice in international trade. Thus, the only route through which EU law can theoretically enter the legal framework applicable to questions of the Tribunal’s jurisdiction is the case where it is established that EU law constitutes a part of international public order or such international law principles which meet the fundamental requirements of justice in international trade.

8.116 In this connection, it has been discussed above that, to the extent of the EU Treaties, EU law does constitute international law. However, this alone does not ensure the applicability of EU law in the present case. In order for EU law to be applicable to

¹²⁸ Claimants’ Observations on *Achmea*, ¶ 19; Respondents’ Reply on *Achmea*, ¶¶ 30-31.

¹²⁹ Commission’s Written Observations, ¶¶ 4, 15 and 18.

¹³⁰ See, e.g., *Achmea* Judgment, ¶¶ 33, 43.

¹³¹ *Electrabel S.A. v Hungary*, ICSID Case No. ARB/07/19, Award, ¶¶ 4.117-4.118 and *et seq.*; *AES Summit Generation Limited and AES-Tisza Erőmű Kft v Hungary*, ICSID Case No. ARB/07/22, Award, ¶ 7.6.6.

¹³² R-PHB, ¶¶ 203-206; Commission’s Written Observations, ¶ 17.

questions of this Tribunal's jurisdiction and in turn to impose any conditions relating to the existence or validity of the arbitration agreement, EU law should constitute a part of such international law principles that meet the fundamental requirements of justice in international trade.

8.117 The Respondent and the Commission, while advocating the applicability of EU law to questions of jurisdiction, have not established that EU law constitutes a part of international public order or international principles that meet the threshold of fundamental requirements of justice in international trade. This threshold is set very high by the case law of the French *Cour de Cassation*. For instance, as mentioned above, the French *Cour de Cassation* in *Renault v V 2000* has stressed on the exclusive status of the consent to arbitrate in the realm of the transnational or international legal order, finding that an arbitration agreement “must be applied . . . subject only to the rules of international public order” (emphasis added).¹³³ Similarly, the arbitral tribunal in *Dallah v Pakistan*, relying on the judgment of the *Cour de Cassation* in *Municipalité de Khoms El Mergeb v Société Dalico*, found that the threshold of “fundamental requirements of justice in international trade” is satisfied by “transnational general principles and usages”, such as “the concept of good faith in business”.¹³⁴ Accordingly, it is only principles of general and transnational application that can enter the applicable legal framework as part of the international public order or principles relating to consent that meet the threshold of fundamental requirements of justice in international trade. The Parties have not demonstrated that EU law, be it the EU Treaties or the *Achmea* Judgment or any other element of EU law which could be relevant in the present case, constitutes such principles of general and transnational application.

8.118 In light of the above, the Tribunal finds that EU law cannot form part of the law applicable to questions of this Tribunal's jurisdiction. Therefore, no rules or principles of EU law, be it the EU Treaties or the *Achmea* Judgment, may govern the Parties' arbitration agreement in the present case.

¹³³ **CL-34T**, *Renault v V 2000 (formerly Jaguar France)*, French Cour de cassation, First Chamber, Judgement of 21 May 1997.

¹³⁴ **CL-32**, *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan*, Partial Award, ICC Case No.9987, 26 June 2001, International Journal of Arab Arbitration 2010, Volume 2 Issue 4, pp. 7-8 of the pdf.

(3) *The Parties' Other Submissions*

- 8.119 The Tribunal's determination that EU law does not constitute a part of the law applicable to the arbitration agreement is dispositive of a number of incidental issues that have arisen in the context of the Respondent's jurisdictional objection relating to EU law. If EU law cannot be applied by this Tribunal at all for questions of jurisdiction, it is neither appropriate nor necessary for this Tribunal to examine the precise contours of the EU Treaties or the *Achmea* Judgment's interpretation of the EU Treaties.
- 8.120 Accordingly, the Tribunal need not address the issues relating to the scope and implications of the *Achmea* Judgment on the present case or on Article 8 of the Austria-Poland BIT in general. The Tribunal notes that, to this end, the Parties have made extensive submissions in relation to (i) whether Article 8 of the Austria-Poland BIT is a provision "such as" Article 8 of the Netherlands-Slovak Republic BIT, in light of the absence of an applicable law provision in the former; (ii) whether the date on which the Claimants made their investments in Poland is a relevant factor that distinguishes the present case from the *Achmea* Judgment; (iii) whether the Respondent's consent to arbitrate in the present case is comparable to consent given in commercial arbitrations; and (iv) whether this Tribunal is part of the Polish judicial system, as distinct from the tribunal established under the Netherlands-Slovak Republic BIT, which was not part of the Slovak judicial system. None of these disputed issues relating to the scope and implications of the *Achmea* Judgment requires this Tribunal's consideration, because EU law, including the *Achmea* Judgment, is not applicable to questions of this Tribunal's jurisdiction.
- 8.121 The only residual matters that this Tribunal shall make brief comments on pertain to the VCLT, specifically in respect of the Parties' submissions on (a) Article 31 VCLT; and (b) Articles 30 and 59 VCLT.

(a) Article 31 VCLT

- 8.122 With respect to Article 31 VCLT, the Tribunal notes that the Respondent and the Commission have advocated for the applicability of the EU Treaties to this Tribunal's interpretation of the Treaty as "relevant rules of international law applicable in the

relations between the parties” under Article 31(3)(c) VCLT.¹³⁵ Further, the Respondent has also argued that the *Achmea* Declaration that was signed by the governments of 22 EU Member States, including Austria, Poland and France, constitutes an authentic interpretation of the Treaty under Article 31(3)(a) VCLT.

8.123 On the contrary, the Claimants are of the view that according to Article 31 VCLT, “the treaty text must be given its ‘ordinary meaning’, implying that it is only when that meaning is ambiguous or manifestly absurd or unreasonable ..., that contextual ... criteria may prevail over the text”.¹³⁶ Similarly, the Claimants do not consider the *Achmea* Declaration to be a binding or authentic interpretative tool under Article 31(3)(a) VCLT that can influence the interpretation of the Treaty.

8.124 The Tribunal is convinced by the Claimants’ position. The Tribunal considers that the “general rule of interpretation” of international treaties, codified in Article 31 VCLT, requires that the starting point of the interpretation be the ordinary meaning of the text of the treaty under interpretation. In this regard, Article 31(1) VCLT provides that “[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”. The International Law Commission’s “Draft Articles on the Law of Treaties with commentaries”, which is extensively relied upon by the Respondent for its argument, endorses the view that the starting point of the interpretation process under Article 31 VCLT is always the text of the treaty under interpretation:

*The article as already indicated is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation ab initio into the intentions of the parties.*¹³⁷

8.125 Further, the International Law Commission’s commentaries also recognize that the tenets of interpretation under Article 31(3) VCLT are “extrinsic both to the text and to the ‘context’ as defined in paragraph 2” of Article 31 VCLT.¹³⁸ In particular, Article

¹³⁵ R-PHB, ¶¶ 203-206; Commission’s Written Observations, ¶¶ 48-50.

¹³⁶ Claimants’ Observations on Commission’s Written Observations, ¶ 211, citing CL-40, Beck, *The Macro Level: The Structural Impact of General International Law on EU Law - The Court of Justice of the EU and the Vienna Convention on the Law of Treaties*, Yearbook of European Law, Vol. 35, No. I (2016), p. 491.

¹³⁷ RL-108, *Commentary to 1966 Draft Convention on the Law of Treaties*, Article 27, ¶ 11.

¹³⁸ RL-108, *Commentary to 1966 Draft Convention on the Law of Treaties*, Article 27, ¶ 16.

31(3) VCLT requires “extrinsic” elements such as (i) “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” and (ii) “relevant rules of international law applicable in the relations between the parties” to be “taken into account, together with the context” (emphasis added). From the text of Article 31(3) VCLT, it is evident that such “extrinsic” elements, while informative to the context of a treaty, cannot be used to rewrite the ordinary meaning of the text of the treaty under interpretation.

8.126 Accordingly, the Tribunal is not persuaded by the Respondent’s argument that the EU Treaties, the *Achmea* Judgment or the *Achmea* Declaration can “trump over other methods of interpretation” in Article 31(1) VCLT or even “amend the text of the treaty”.¹³⁹ On the contrary, the Tribunal considers that since EU law is not applicable to questions of this Tribunal’s jurisdiction, no facets of EU law can enter the interpretative process to “trump” or “amend” the text of Article 8 of the Treaty. Since Article 31 VCLT states that the treaty text must be given its “ordinary meaning”, extrinsic factors that may be taken “together with” the context of a treaty cannot prevail over the ordinary meaning of the text of that treaty.¹⁴⁰

8.127 The Tribunal further notes that neither the Respondent nor the EC has disputed that the ordinary meaning of Article 8 of the Treaty, i.e., the dispute resolution clause, is clear in its import. The Claimants have also submitted that the ordinary meaning of the text of Article 8 of the Austria-Poland BIT is “clear, unambiguous, and undisputed”, and does not need any further interpretation than its ordinary meaning.¹⁴¹

8.128 The Tribunal agrees that the ordinary meaning of the text of Article 8 of the Treaty BIT, in light of its context and object and purpose, leaves no interpretative doubt. It is clear that this provision constitutes the Respondent’s consent to arbitrate either under the ICSID Convention “if both Contracting Parties are signatories to the [ICSID Convention]” or in an *ad hoc* set up “if either of the Contracting Parties is not a signatory to the [ICSID Convention]”. There is no contrary indication in the preamble

¹³⁹ Respondent’s Observations dated 22 February 2019, ¶ 29.

¹⁴⁰ **CL-40**, Beck, *The Macro Level: The Structural Impact of General International Law on EU Law - The Court of Justice of the EU and the Vienna Convention on the Law of Treaties*, Yearbook of European Law, Vol. 35, No. I (2016), p. 491.

¹⁴¹ Claimants’ Observations dated 8 March 2019, ¶ 22.

of the Austria-Poland BIT or in any other provision of the Treaty, which puts in doubt the clear import of the plain text of Article 8 thereof.

(b) Articles 30 and 59 VCLT

- 8.129 Concerning the resolution of any conflicts between the EU Treaties and the Treaty, the Parties have advanced different solutions. In this connection, the Respondent has invoked (i) Article 59(1) VCLT to argue that the Treaty should be “considered as terminated” based on Poland’s subsequent accession to the EC and the EU Treaties’ consequential entry into force on 1 May 2004, since the Treaty and the EU Treaties pertain to the “same subject-matter”; and (ii) alternatively, Article 30(3) VCLT to argue that the Treaty applies “only to the extent that its provisions are compatible” with the EU Treaties, and the ISDS provision therein is not applicable since it is incompatible with EU law.
- 8.130 The Commission has also advanced the above propositions, with the additional proposal to apply the conflict rule derived from an *a contrario* reading of Article 351(1) TFEU, i.e., the principle of primacy of EU law.
- 8.131 The Claimants argue, *inter alia*, that the termination procedure mentioned in Article 59 VCLT does not apply because the Treaty and the EU Treaties do not pertain to the “same subject-matter”. Further, in the event of a conflict, the Claimants prefer to use the *lex specialis* conflict rule in Article 7(1) of the Treaty, but alternatively argue that Article 30(3) VCLT does not render the Treaty inapplicable since there is no incompatibility between the Treaty and EU law.
- 8.132 The Tribunal makes the following observations with respect to the Parties’ submissions on the resolution of any conflicts between the EU Treaties and the Treaty.
- 8.133 In light of the Tribunal’s finding that EU law does not constitute a part of the legal framework applicable to the Tribunal’s jurisdiction under the Treaty, the Tribunal does not consider the conflict rule derived by the Commission from an *a contrario* reading of Article 351(1) TFEU, i.e., the principle of primacy of EU law, to be applicable in the present case. The Tribunal also does not consider it appropriate or necessary to examine whether and to what extent Article 7(1) of the Treaty, invoked by the Claimants,

constitutes a rule that could be used to resolve any conflicts between the Treaty and EU law.

- 8.134 With respect to the Respondent’s invocation of Articles 30(3) and 59(1) VCLT, the Tribunal observes that the precondition for both provisions to be applicable as techniques to resolve any conflicts between two international treaties is that the treaties in question should deal with the “same subject matter”.¹⁴² Article 59 VCLT provides conditions for a treaty to “be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter”. Article 30(3) VCLT deals with the scope of application of individual provisions of a prior treaty that is not considered terminated under Article 59 VCLT, and in this regard provides that the prior treaty “applies only to the extent that its provisions are compatible with those of the later treaty”.
- 8.135 The Tribunal is persuaded by the Claimants’ argument that the TFEU and the Treaty do not pertain to the same subject matter. In this regard, the Tribunal understands the precondition of “same subject matter” as requiring the subject matters of the two treaties in question to be “identical”.¹⁴³ In this connection, the ILC’s Report on Fragmentation of International Law provides that the “same subject matter” precondition requires the two treaties at issue to be “institutionally linked” or “part of the same regime”.¹⁴⁴
- 8.136 Investment arbitration case law has consistently found that the EU Treaties, specifically the TFEU, do not deal with the same subject matter as intra-EU BITs. For instance, the tribunal in *JSW v Czech Republic* found that:

*Article 59 of the VCLT will only come into play if the Treaty and the TFEU relate to the same subject matter. This is obviously not the case. To take but one example, Article 10 of the Treaty allows an investor to sue a host state. No parallel provision exists in the TFEU.*¹⁴⁵

¹⁴² See Commission’s Written Observations, ¶ 93; Annex EC-25, Jasper Finke, *Regime-collisions: tensions between treaties (and how to solve them)*, in: Christian J. Tams et al, Research Handbook on the Law of Treaties, pp. 422, 428.

¹⁴³ *EURAM Bank v The Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012

¹⁴⁴ **Annex EC-29**, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, 2006, ¶ 25.

¹⁴⁵ **CL-47**, *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v Czech Republic*, PCA Case No. 2014-03, Final Award, 11 October 2017, ¶ 253.

- 8.137 Other tribunals have made similar findings in the context of other ISDS clauses, after examining the provisions of the TFEU. All found that the TFEU had a different sphere of application than the intra-EU BITs, specifically because Articles 267 and 344 TFEU or any other provisions of EU law did “not provide investors with a right to initiate an arbitration against the host state”.¹⁴⁶ Along the same lines, with respect to the “compatibility” criterion in Article 30(3) VCLT (also found in Article 59(1)(b) VCLT), tribunals have consistently found that there is no “incompatibility” between intra-EU BITs and EU law.¹⁴⁷ In the words of the tribunal in *Electrabel v Hungary*, there was “no legal rule or principle of EU law that would prevent [it] from exercising its functions in this arbitration”.¹⁴⁸
- 8.138 Accordingly, the Tribunal is persuaded by the Claimants’ argument that the provisions of the EU Treaties, specifically the TFEU, do not contain any explicit or implicit prohibition on ISDS, as they do not “even mention arbitration, arbitration clauses or intra-EU BITs”.¹⁴⁹ Accordingly, there is no conflict between Article 8 of the Treaty and the TFEU to be resolved because they do not pertain to the same subject matter. Therefore, the Tribunal does not consider the precondition for the applicability of Articles 30 and 59 VCLT to have been satisfied.
- 8.139 The CJEU’s *Achmea* Judgment does not alter the above conclusions. In this regard, the Tribunal is convinced by the Claimants’ submission that the *Achmea* Judgment did not make any findings “on the public international law relationship between intra-EU BITs and the TFEU”.¹⁵⁰ The only findings that the CJEU made in the *Achmea* Judgment pertained to the interpretation of Articles 267 and 344 TFEU in light of principles of EU law. These findings do not change the public international law relationship between the TFEU and intra-EU BITs for the purposes of Articles 30 and 59 VCLT. The understanding of this public international law relationship has reached a jurisprudential consistency in investment arbitration case law, as mentioned above. The *Achmea*

¹⁴⁶ **RL-82**, *WNC Factoring Limited v The Czech Republic*, PCA Case No. 2014-34, Award, 22 February 2017, ¶ 298; see also **CL-46**, *Binder v Czech Republic*, Award on Jurisdiction, 6 June 2007; **CL-27**, *Eastern Sugar v Czech Republic*, Partial Award, 27 March 2007, ¶ 160.

¹⁴⁷ **CL-27**, *Eastern Sugar v Czech Republic*, Partial Award, 27 March 2007, ¶ 168.

¹⁴⁸ *Electrabel S.A. v Republic of Hungary*, ICSID Case No. ARB/07/19, Award, ¶ 4.166; see also ¶¶ 4.146 and 4.153 (“There is indeed no rule in EU law that provides, expressly or impliedly, that such an international arbitration is inconsistent with EU law.”).

¹⁴⁹ Claimants’ Comments on the Commission’s Written Observations, ¶ 160.

¹⁵⁰ Claimants’ Observations on Commission’s Written Observations, ¶ 33.

Judgment does not interfere with this consistent understanding, or with the conclusion that the TFEU and the Treaty between Austria and Poland do not deal with the “same subject matter”.

(4) *Enforceability of the Tribunal’s Award*

8.140 The Claimants, the Respondent and the Commission have all discussed the future implications of any award that this Tribunal may render, and they all recognize the role of French courts as the reviewing courts before which annulment proceedings may possibly be instituted after the arbitration proceedings.

8.141 However, they differ with respect to the substantive fate of any such annulment proceedings, and the Tribunal’s duty to render an enforceable award. Whereas the Respondents and the Commission are of the opinion that any award rendered without adherence to the *Achmea* Judgment would likely be annulled by French courts. The Claimants dispute this proposition and attempt to distinguish *Achmea* from the present proceedings on the premise that the grounds for annulment under Article 1520 of the French CPC are different from those under the German Civil Procedure Code.

8.142 At this juncture, the Tribunal does not consider it appropriate or necessary to examine the Parties’ disagreements about how French courts may review the Tribunal’s award in future, and, in turn, whether the Tribunal’s award will be considered valid or enforceable. The Tribunal is mindful of its duty to render an enforceable award. However, the Tribunal is not able to predict the future validity or enforceability of its award before French courts or other enforcing courts.

(5) *Conclusion on EU Law and the CJEU’s Achmea Judgment*

8.143 The Tribunal has found in the above Sections that (i) the Respondent’s jurisdictional objection relating to EU law and the *Achmea* Judgment was made in a timely manner; (ii) EU law, including the EU Treaties and their interpretation by the *Achmea* Judgment, do not form part of the law applicable to questions of the Tribunal’s jurisdiction; and (iii) no extrinsic elements of interpretation under Article 31(3) VCLT can trump the clear expression of the Parties’ common intention to arbitrate. For these reasons, the Respondent’s jurisdictional objection relating to EU law and the *Achmea* Judgment is rejected.

PART IX: COSTS

A. Introduction

- 9.1 For this jurisdictional phase of these arbitration proceedings, the costs of the arbitration, including the fees and expenses of the Members of the Tribunal and ICSID's administrative fees and direct expenses, amount to the following:

Description of Costs	Amount
The Tribunal's Fees and Expenses	
Mr V. V. Veeder QC	USD 203,406.57
Professor Albert Jan van den Berg	USD 157,957.86
Professor Dr. Karl Heinz-Böckstiegel	USD 151,850.98
ICSID's Administrative Fees	USD 180,000.00
Direct Expenses	USD 23,011.69
TOTAL	USD 716,227.10

- 9.2 In accordance with paragraph 18 of Procedural Order No 1, these costs have been paid out of advance payments made by the Parties in equal parts (50% by the Claimants and 50% by the Respondent). Each Party has advanced USD 350,000.00 to the case fund held by ICSID. The remaining balance in the case fund will be reimbursed to the Parties in equal parts at the conclusion of this arbitration.
- 9.3 The Parties have not submitted statements of their respective legal costs incurred in this phase of the proceeding.
- 9.4 Article 8(4) of the Treaty addresses the allocation of costs as follows:

Each side shall bear the costs of its own arbitrator and the costs of its representation in the proceedings before the arbitral tribunal; the costs of the chairman and the other costs shall be borne in equal shares by both sides.

- 9.5 Paragraphs 129-130 of the Tribunal's Procedural Order No 1 provide:

129. The costs shall be borne by the Parties in accordance with

Article 8.4 of the Treaty.

130. The Arbitral Tribunal shall decide the allocation of costs between the Parties in accordance with that provision. In the final award or, if it deems appropriate, in any other award, the Arbitral Tribunal shall determine any amount that a Party may have to pay to another Party as a result of its decision on allocation of costs.

B. The Claimants' Case

9.6 In their Post-Hearing Brief, the Claimants requested that the Tribunal order the Respondent to “pay the Investors’ costs associated with these proceedings, as far as Article 8 of the BIT provides therefore”.¹

9.7 However, the Claimants’ request for relief in their submissions on the *Achmea* Judgment did not include a request for costs,² and the Claimants opposed the Respondent’s claim for costs on the basis of Article 8(4) of the Treaty and paragraph 18 of Procedural Order No 1. They asserted that:

*Respondent’s request to order Claimants to pay the costs of this arbitration, as well as the fees and expenses relating to Respondent’s legal representation, etc. is, ... inadmissible and Claimant hereby requests the Arbitral Tribunal to dismiss Respondent’s application.*³

C. The Respondent’s Case

9.8 The Respondent requests that the Tribunal:

*order the Claimants to pay the costs of this arbitration, as well as the fees and expenses relating to the Respondent’s legal representation, in-house costs, fees and expenses of any expert appointed by the Respondent or the Tribunal, and all other reasonable costs, as far as Article 8 of the Treaty provides therefor.*⁴

9.9 The Respondent did not respond expressly to the Claimants’ assertion that its request is inadmissible under Article 8(2) of the Treaty.

¹ C-PHB, ¶ 124(h).

² Claimants’ Observations on the *Achmea* Judgment, ¶ 37.

³ Claimants’ Observations on the *Achmea* Judgment, ¶ 36.

⁴ R-RPHB, ¶ 90(III).

D. The Tribunal's Analysis and Decision

- 9.10 Considering the Parties' limited submissions addressing the costs incurred in this phase of the proceeding, the Tribunal has decided to reserve the issue of costs until the final award or other such time as the Tribunal deems appropriate.

PART X: OPERATIVE PART

- 10.1 For the reasons set out above in this Award, the Tribunal decides as follows:
- 10.1.1 The Tribunal declares that the arbitration agreement contained in Article 8 of the Treaty, as invoked by the Claimants for this arbitration, is legally valid.
 - 10.1.2 The Tribunal declares that the Parties were and remain legally bound by the arbitration agreement in Article 8 of the Treaty.
 - 10.1.3 The Tribunal declares that it has jurisdiction and may exercise such jurisdiction to decide the merits of the Claimants' claims under Articles 2(1), 2(2), 3 and 4 of the Treaty.
 - 10.1.4 The Tribunal decides that the Respondent's objections relating to the Claimants' claim under Article 7(2) of the Treaty and the standing of Second Claimant and Third Claimant to assert claims in relation to the SPA and the Bank Guarantee, shall be joined shall be joined to the merits phase of the proceedings.
 - 10.1.5 The Tribunal upholds the Respondent's objections relating to a lack of *prima facie* claim for breach of Article 5, 7(1) and 8 of the Treaty. The Claimants' claims under Articles 5, 7(1) and 8 of the Treaty are dismissed.
 - 10.1.6 The Tribunal dismisses the Respondent's objection concerning an alleged abuse of process by the Claimants.
 - 10.1.7 The Tribunal dismisses the Respondent's objection concerning the Claimants' standing, or *jus standi*, as investors under the Treaty.
 - 10.1.8 The Tribunal dismisses the Respondent's objection based on the alleged invalidity or inapplicability of Article 8 of the Treaty as a result of EU law and, in particular, the *Achmea* Judgment.
 - 10.1.9 The Tribunal will, accordingly, make the necessary order for the continuation of the proceedings on the merits.
 - 10.1.10 The Tribunal reserves its decision on costs.

[signed]

Karl-Heinz Böckstiegel
Arbitrator

Date: 03 MAR 2020

[signed]

Albert Jan van den Berg
Arbitrator

Date: 04 MAR 2020

[signed]

V.V. Veeder
President of the Arbitral Tribunal

Date: 02 MAR 2020