

**IN THE MATTER OF AN ARBITRATION UNDER THE TREATY BETWEEN THE
UNITED STATES OF AMERICA AND THE REPUBLIC OF POLAND CONCERNING
BUSINESS AND ECONOMIC RELATIONS SIGNED ON 21 MARCH 1990**

- and -

THE UNCITRAL ARBITRATION RULES 1976

- between -

MANCHESTER SECURITIES CORP.

the "Claimant"

and

THE REPUBLIC OF POLAND

the "Respondent" and together with the Claimant, the "Parties"

AWARD

7 December 2018

Tribunal:

Judge Charles N. Brower

Professor Brigitte Stern

Dr. Andrés Rigo Sureda, Presiding Arbitrator

Registry:

Permanent Court of Arbitration

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LIST OF DEFINED TERMS

Apartment Buyer Protection Act	Act on the Protection of Rights of Buyers of Apartments and Single-Family Houses adopted by the Polish Parliament on 16 September 2011
Bankruptcy Proceedings	liquidation bankruptcy proceedings opened by the Regional Court on 5 May 2009
Bankruptcy Trustee	The bankruptcy trustee appointed in the Bankruptcy Proceedings
BISE Bank	
BIT	<i>Treaty between the United States of America and the Republic of Poland Concerning Business and Economic Relations</i> dated 21 March 1990
Bond Purchase Agreement	Bond Issue Cooperation Agreement between Manchester and dated 2 November 2006
CCP	Polish Code of Civil Procedure
Claimant (or Manchester)	Manchester Securities Corp.
Compulsory Mortgages	Mortgages over the Property granted to the Claimants by the Regional Court in 2008 and 2009
FET	Fair and equitable treatment
First Injunction	Interim relief injunction issued by the Regional Court on 5 December 2008
First Instance Ruling	Ruling of the Regional Court of 24 June 2010, invalidating the Mortgage
ILC Articles	International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, 2001
case	Case brought by Manchester against the estate of for the enforcement of the Mortgage, in which the Supreme Court rendered a judgment on 26 April 2012
Apartments	Apartments built on the Property
Harm	Damage allegedly arising from the Supreme Court's decision in the case
Mortgage	Three mortgages established over the Property in favor of Manchester to secure payment under the Bond Purchase Agreement
Property	Property at Street in

LMR	Land and Mortgage Register
Manchester (or Claimant)	Manchester Securities Corp.
Mortgages	The [REDACTED] and [REDACTED] Mortgages
MP (or MPs)	Member or members of the Polish Parliament
Non-Registration Clauses	Clauses in the Preliminary Agreements stipulating that the registration of the Prospective Buyers' claims with the LMR would require [REDACTED] consent
[REDACTED]	[REDACTED]
Parliament	Polish Parliament
Payment Order	Judgment of the [REDACTED] Regional Court of 3 October 2008, ordering [REDACTED] to pay Manchester [REDACTED]
[REDACTED]	[REDACTED]
[REDACTED] Harm	Damage allegedly arising from Poland's confirmation of the validity of the [REDACTED] Mortgage
[REDACTED] Mortgage	[REDACTED] mortgage over the [REDACTED] Property registered in the LMR on 10 July 2006
PLN	Polish Zloty
Poland (or the Respondent)	Republic of Poland
Preliminary Agreements	Preliminary agreements concluded between [REDACTED] and the Prospective Buyers
Preliminary Agreement Enforcement Proceedings	Court proceedings on the application for performance of the Preliminary Agreements by certain Prospective Buyers
PSC	Principles of social coexistence
Prosecutor (or Public Prosecutor)	[REDACTED] Public Prosecutor
Prosecutor's Order	Order issued on 26 October 2009 by the Prosecutor, seizing the [REDACTED] Property as evidence
Prospective Buyers	Prospective [REDACTED] Buyers and Prospective [REDACTED] Buyers
Prospective [REDACTED] Buyers	Prospective Buyers of the [REDACTED] Apartments
Prospective [REDACTED] Buyers	Prospective Buyers of the [REDACTED] Apartments
Public Prosecutor (or Prosecutor)	[REDACTED] Public Prosecutor
Registry Court	Registry court in [REDACTED]
Respondent (or Poland)	Republic of Poland
Restructuring Agreement	Debt Restructuring Agreement concluded between [REDACTED] and Manchester dated 28 November 2007

Second Injunction	Interim relief injunction issued by the [REDACTED] Regional Court on 25 February 2009
Second Instance [REDACTED] Ruling	Ruling of the Court of Appeal in [REDACTED] of 9 February 2011, overturning the First Instance [REDACTED] Ruling
Supreme Court	Supreme Court of the Republic of Poland
Third Injunction	Third interim relief injunction issued by the [REDACTED] Regional Court on 30 March 2009
Transfer Harm	Damage allegedly arising from the transfer of the [REDACTED] Property to the Prospective [REDACTED] Buyers
UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law, 1976
VCLT	<i>Vienna Convention on the Law of Treaties</i> , 1969
[REDACTED]	[REDACTED]
[REDACTED] case	Case brought by Manchester against [REDACTED] for the enforcement of the [REDACTED] Mortgage, in which the Supreme Court rendered a judgment on 24 April 2014
[REDACTED] Apartments	Apartments built on the [REDACTED] Property
[REDACTED] Association	Association of the Victims of Developers [REDACTED]
[REDACTED] Case	Case filed with the [REDACTED] Regional Court on 18 December 2008 by the [REDACTED] Claimants, requesting invalidation of the [REDACTED] Mortgage
[REDACTED] Claimants	A group of 58 of the Prospective [REDACTED] Buyers who filed a claim with the [REDACTED] Regional Court requesting invalidation of the [REDACTED] Mortgage on 18 December 2008
[REDACTED] Harm	Damage allegedly arising from the invalidation of the [REDACTED] Mortgage
[REDACTED] Mortgage	Three mortgages established over the [REDACTED] Property in favour of Manchester to secure payment under the Bond Purchase Agreement
[REDACTED] Property	Property at [REDACTED] Street in [REDACTED]
[REDACTED] Supreme Court Ruling	Ruling of the Supreme Court of 9 February 2012 overturning the Second Instance [REDACTED] Ruling

I. INTRODUCTION

1. The Claimant is Manchester Securities Corp., a private investment firm incorporated under the laws of the State of New York, U.S.A. (the “**Claimant**” or “**Manchester**”).¹ The Claimant’s address is 40 West 57th Street, 4th Floor, 10019 New York, NY, U.S.A. The Claimant is represented by Mr. Bartosz Krużewski, Mr. Audley Sheppard, Mr. Marcin Ciemiński, Ms. Christina Schuetz, Ms. Adelina Prokop and Ms. Monika Diehl of Clifford Chance, Janicka, Krużewski, Namiotkiewicz i wspólnicy Sp.k., ul. Lwowska 19, 00-660 Warsaw, Poland and Clifford Chance, 10 Upper Bank Street, E14 5JJ London, United Kingdom.
2. The Respondent is the Republic of Poland (the “**Respondent**” or “**Poland**” and, together with the Claimant, the “**Parties**”). For the purposes of these proceedings, the Respondent’s address is Minister of Justice of the Republic of Poland, Al. Ujazdowskie 11, 00-950 Warsaw, Poland. The Respondent is represented by Mr. Krzysztof Zakrzewski, Ms. Julita Zimoch-Tuchołka and Dr. Marek Świątkowski of Domański Zakrzewski Palinka Sp.k., Rondo ONZ1, 00-124 Warsaw, Poland, as well as by Ms. Kinga Szczepańska and Ms. Joanna Jackowska-Majeranowska, General Counsel to the Republic of Poland, ul. Hoża 76/78, 00-682 Warsaw, Poland.
3. A dispute has arisen between the Parties in respect of which the Claimant commenced this arbitration pursuant to the *Treaty between the United States of America and the Republic of Poland Concerning Business and Economic Relations* dated 21 March 1990 (the “**BIT**”).
4. The dispute principally concerns the Claimant’s inability to enforce mortgages over certain properties in Poland, which secured its claims under bonds issued by a Polish real estate developer. The Claimant seeks declarations that through the actions of, *inter alia*, the Polish courts, Parliament and a bankruptcy trustee, which prevented the enforcement of its claims and mortgages, Poland breached the BIT by failing to provide the Claimant with fair and equitable treatment (“**FET**”), protection for its legitimate expectations, full protection and security and effective means of enforcing rights; by denying the Claimant justice; by subjecting the Claimant to arbitrary and discriminatory measures; and by expropriating the Claimant’s investment without prompt, adequate and full compensation. The Claimant seeks compensation for the loss suffered as a result of the alleged BIT violations, together with interest and costs.
5. The Respondent denies that the Tribunal has jurisdiction and further denies that certain of the actions referred to by the Claimant are attributable to Poland. Even if the Tribunal does find that it has jurisdiction, the Respondent submits that the Claimant’s claims are without merit. The Respondent argues that the Claimant is a “disappointed litigant” seeking to persuade the present

¹ Certificate of Incorporation of Manchester Securities Corp., 22 September 1986 (C-1).

Tribunal to act as a court of appeal to the Polish courts. The Respondent thus requests the Tribunal to dismiss the claims and order the Claimant to pay all costs of the arbitration.

II. PROCEDURAL HISTORY

6. By its **Notice of Arbitration** dated 9 March 2015, the Claimant commenced these proceedings against Poland pursuant to Article IX(3) of the BIT and Article 3 of the 1976 Arbitration Rules of the United Nations Commission of International Trade Law (the “**UNCITRAL Rules**”).
7. By its Notice of Arbitration, the Claimant notified the Respondent of its appointment of The Hon. Charles N. Brower as arbitrator in these proceedings. Judge Brower’s address [REDACTED]
[REDACTED]
8. On 8 April 2015, the Respondent submitted its **Reply to the Notice of Arbitration** and appointed Professor Brigitte Stern as arbitrator in these proceedings. Professor Stern’s address [REDACTED]
[REDACTED]
9. On 8 June 2015, Judge Brower and Professor Stern jointly appointed Dr. Andrés Rigo Sureda as the Presiding Arbitrator in these proceedings. Dr. Rigo Sureda’s address is [REDACTED]
[REDACTED]
10. On 7 July 2015, the Tribunal held its first session with the Parties by video conference. During the session, the Respondent requested bifurcation of the proceedings between a first phase on jurisdiction and liability, and a second phase on quantum. The Claimant opposed bifurcation.
11. On 22 July 2015, the Tribunal issued **Procedural Order No. 1**, containing, *inter alia*, procedural rules for the arbitration and fixing Brussels as the place of arbitration.
12. On 24 July 2015, the Tribunal issued **Procedural Order No. 2**, rejecting the Respondent’s request for bifurcation and adopting a procedural timetable.
13. On 4 September 2015, the Tribunal and the Parties signed the **Terms of Appointment**.
14. On 9 November 2015, the Claimant submitted its **Statement of Claim**.
15. On 9 March 2016, the Respondent submitted its **Statement of Defense**.
16. On 20 April 2016, after an exchange of views with the Respondent, the Claimant submitted document production requests on which the Parties had been unable to reach agreement to the Tribunal for its decision.
17. On 19 May 2016, the Tribunal issued **Procedural Order No. 3**, ruling on the contested document production requests. In respect of some of the contested requests, the Tribunal ordered the Respondent to support the Claimant’s application to the relevant judge-commissioner for access to specific bankruptcy files.

18. On 25 May 2016, the Respondent informed the Tribunal that the Parties had jointly agreed on certain outstanding requests, as well as on a methodology for the Respondent to support the Claimant's application for access to bankruptcy files. In addition, the Respondent informed the Tribunal that the Parties had agreed to submit separate submissions containing any arguments arising from the bankruptcy files requested by the Claimant.
19. Following the Tribunal's rulings set out in Procedural Order No. 3, and the Parties' agreement communicated to the Tribunal on 25 May 2016, the Respondent produced certain documents and explained why it could not produce others by letters of 8 and 13 June 2016.
20. On 9 June 2016, an *Application for Admission of a Third Party (Amicus Curiae) to the Arbitration Proceedings* dated 27 May 2016 was received from applicants [REDACTED] and [REDACTED]. The applicants described themselves as being "persons injured both by the activities of [Manchester] and the activities of [REDACTED]." They requested that the Parties consent to the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (Rules on Transparency) and thereby allow the applicants to file a written submission in these proceedings. In the alternative, they requested permission to be involved as *amicus curiae* under Article 17(1) of the 2013 UNCITRAL Arbitration Rules.
21. On 24 June 2016, the Respondent submitted its comments on the third party application, in which it objected to the application of the Rules on Transparency, but argued that "the Applicants should be granted the right to participate in the arbitral proceedings on the basis of Article 15(1) of the UNCITRAL Arbitration Rules 1976."
22. On the same day, the Claimant also provided its comments on the third party application, objecting both to the admission of the applicants as *amici curiae* and to the proposed application of the Rules on Transparency.
23. On 13 July 2016, the Claimant submitted its **Reply**.
24. On 14 July 2016, the Tribunal issued **Procedural Order No. 4**, rejecting the third party application. This decision was separately communicated to the applicants.
25. On 13 October 2016, the Respondent submitted its **Rejoinder**.
26. On 13 January and 19 April 2017, the Claimant and the Respondent filed their respective submissions pursuant to the Parties' agreement of 25 May 2016.
27. On 5 July 2017, the Parties confirmed the witnesses and experts that they wished to examine at the hearing.
28. On 19 July 2017, a pre-hearing organizational meeting was held between the Parties and the Tribunal via teleconference.

29. On 10 August 2017, the Tribunal issued **Procedural Order No. 5**, containing, *inter alia*, procedural rules for the hearing and adopting a hearing timetable.
30. On 11 September 2017, the Claimant requested leave to introduce new evidence into the record.
31. On 18 September 2017, having invited the Respondent to comment but having received no reply, the Tribunal granted the Claimant's request to introduce new evidence into the record.
32. On 20 September 2017, the Respondent requested leave to introduce new evidence into the record, concerning the issue of possible double recovery by the Claimant.
33. On 22 September 2017, the Claimant objected to the introduction of new evidence, stating, *inter alia*, that the Respondent's request had been made out of time and that the new evidence was not relevant to the issues in dispute.
34. On 23 and 26 September 2017, the Respondent and the Claimant made further submissions on the Respondent's request.
35. By letter dated 27 September 2017, the Tribunal granted the Respondent's request to admit new evidence. It also accepted the Claimant's proposal to provide updated damages calculations at the appropriate time.
36. An oral hearing was held on 25-28 September 2017 at the Peace Palace in The Hague, the Netherlands. In addition to the Members of the Tribunal and the Secretary of the Tribunal, the following individuals participated in the hearing:

For the Claimant:

Mr. Audley Sheppard QC	Clifford Chance, London
Mr. Bartosz Krużewski	Clifford Chance, Warsaw
Ms. Christina Schuetz	Clifford Chance, London
Ms. Monika Diehl	Clifford Chance, Warsaw
Ms. Adelina Prokop	Clifford Chance, Warsaw
Mr. Wojciech Barański	Debenedetti Majewski Szczesniak
Mr. Christopher Leonard	Elliott's Global Assistant General Counsel/Senior EU and Compliance Counsel

For the Respondent:

Ms. Joanna Jackowska-Majeranowska	General Counsel to the Republic of Poland
Ms. Kinga Szczepańska	General Counsel to the Republic of Poland
Ms. Joanna Maciejowska	Ministry of Justice
Mr. Radosław Młyński	Ministry of Justice
Dr. Marek Świątkowski	Domański Zakrzewski Palinka sp.k.
Mr. Maciej Orkus	Domański Zakrzewski Palinka sp.k.
Ms. Magdalena Krzysztoporska	Domański Zakrzewski Palinka sp.k.

37. The following individuals were examined:

On behalf of the Claimant:

Witness of fact:

[REDACTED]

Expert witnesses:

Prof. Wojciech Sadurski

Prof. Bartłomiej Swaczyna

Mr. Brian O'Brien

Mr. Krzysztof Grzesik

On behalf of the Respondent:

Witness of fact:

[REDACTED]

Expert witnesses:

[REDACTED]

38. After the hearing, by letter dated 11 October 2017, the Tribunal invited the Parties to address a list of questions in their post-hearing briefs.
39. On 29 November 2017, the Claimant and the Respondent each submitted their respective Post-Hearing Brief.
40. By letter dated 19 December 2017, the Respondent objected to various allegations and claims made by the Claimant in its **Post-Hearing Brief**, arguing that these allegations and claims were new and therefore inadmissible, and requesting the Tribunal to disregard them.
41. By letter dated 5 January 2018, the Claimant requested the Tribunal to "dismiss the Respondent's objections as unfounded."
42. By letter dated 16 January 2018, the Tribunal rendered its decision on the Respondent's application, ruling that some but not all of the Claimant's allegations and claims identified by the Respondent were inadmissible, and granting the Respondent permission to provide its observations on the Claimant's re-calculation of damages.
43. By letter dated 7 February 2018, the Respondent provided a calculation of alternative damages in respect of a portion of the Claimant's claim, as well as information regarding the status of the Claimant's claims in the bankruptcy proceedings.
44. By letter dated 19 February 2018, the Claimant replied to the Respondent's letter of 7 February 2018.

45. On 19 February 2018, the Parties filed their respective **Costs Submissions**.
46. By letter dated 16 March 2018, the Respondent updated its Costs Submissions and objected to some of the Claimant's claims for costs reimbursement. By letter dated 23 March 2018, the Claimant replied to the Respondent's letter of 16 March 2018.
47. By letter dated 13 August 2018, the Tribunal declared the hearings in this matter closed, in accordance with Article 29 of the UNCITRAL Rules.

III. STATEMENT OF FACTS

A. THE PARTIES AND OTHER KEY ENTITIES

48. The Claimant, Manchester, is a private investment firm based in New York City, U.S.A. It is a subsidiary of [REDACTED] and [REDACTED] ("[REDACTED]"), a global hedge fund.²
49. The Respondent, Poland, is a sovereign State with executive, legislative and judicial branches of Government.³ The Polish Parliament ("**Parliament**") is composed of a lower chamber (the Sejm) and an upper chamber (the Senate), which together promulgate Poland's laws.⁴ The Polish courts are comprised of courts of general jurisdiction (e.g. district courts, regional courts and courts of appeal), within which specialized divisions are dedicated to certain types of cases (e.g. registry courts and bankruptcy courts).⁵ The Supreme Court of Poland (the "**Supreme Court**") sits at the top of Poland's common court system.⁶ It hears cassation appeals – extraordinary appeals from final judgments rendered by the common courts – and can adopt resolutions on points of law.⁷
50. Other key entities in this matter include [REDACTED] ("[REDACTED]"), a privately owned Polish real estate developer, from which the Claimant purchased bonds secured by mortgages over property in [REDACTED] and which went bankrupt in 2009.⁸
51. Another key entity is [REDACTED] ("[REDACTED]"), [REDACTED] and which also granted [REDACTED] loans secured by mortgages. [REDACTED]

² Statement of Claim dated 9 November 2015 ("Statement of Claim"), ¶11.

³ Constitution of Poland (C-164), Article 10.

⁴ Statement of Claim, ¶14.

⁵ Statement of Claim, ¶15.

⁶ Statement of Claim, ¶16, referring to Constitution of Poland (C-164), Article 183.

⁷ Statement of Claim, ¶16.

⁸ [REDACTED] Business Plan, February 2006 (C-8), pp. 8-10.

[REDACTED]
[REDACTED]
[REDACTED]⁹

B. THE [REDACTED] AND [REDACTED] DEVELOPMENT PROJECTS

52. In the mid-2000s, [REDACTED] planned several development projects on properties in [REDACTED] that it either already owned or intended to acquire,¹¹ including a property at [REDACTED] street (the "[REDACTED]") and a property at [REDACTED] street (the "[REDACTED]").¹² [REDACTED] intended to build residential apartments at both locations (the "[REDACTED]" and the "[REDACTED]" respectively and, together, the "Apartments").¹³ The [REDACTED] Property would include 178 apartments, as well as shops and garages.¹⁴
53. To implement these projects, [REDACTED] 1) entered into preliminary agreements with prospective buyers; (2) took out loans from State banks; and (3) concluded a bond purchase agreement with the Claimant secured by mortgages over the [REDACTED] and [REDACTED] Properties.

1. The Preliminary Agreements

54. Starting in 2005, [REDACTED] entered into preliminary agreements (the "Preliminary Agreements") with the prospective buyers of the [REDACTED] Apartments (the "Prospective [REDACTED] Buyers"), and, between January 2006 and August 2006, with the prospective buyers of the [REDACTED] Apartments (the "Prospective [REDACTED] Buyers" and, together with the Prospective [REDACTED] Buyers, the "Prospective Buyers").¹⁵
55. [REDACTED]
[REDACTED]¹⁶
56. The Claimant describes the Preliminary Agreements as typically including the following terms:

- (a) Agreement on a per square metre purchase price for a given Apartment (the "Purchase Price"), which was typically below the then-current market price and

⁹ Statement of Claim, ¶24, referring to M. Samcik, "The State Treasury sold its shares in [REDACTED] but it did not give up control," wyborcza.biz, 19 July 2012 (C-90); "Who wants to buy [REDACTED]," bankier.pl, 19 July 2012 (C-93).

¹⁰ Statement of Claim, ¶24, referring to Information on the shareholding structure of [REDACTED] (C-88).

¹¹ Statement of Claim, ¶26.

¹² Statement of Claim, ¶27.

¹³ Statement of Claim, ¶27.

¹⁴ Claimant's Post-Hearing Brief dated 29 November 2017 ("Claimant's Post-Hearing Brief"), ¶¶59, 66; Respondent's Post-Hearing Brief dated 29 November 2017 ("Respondent's Post-Hearing Brief"), ¶¶23, 26.

¹⁵ Statement of Claim, ¶29; Statement of Defense dated 9 March 2016 ("Statement of Defense"), ¶4.

¹⁶ Claimant's Post-Hearing Brief, ¶¶60-62; Respondent's Post-Hearing Brief, ¶23.

therefore attractive to the Prospective Buyers;

[REDACTED]

57. The Claimant asserts that, initially, most Preliminary Agreements were concluded in a simple written form, with only a few of them being notarized.¹⁸ While in principle notarized agreements under Polish law can be registered in the Land and Mortgage Register (the “LMR”), giving the creditor a priority over other unsecured creditors in the event of a bankruptcy,¹⁹ in the present case the Preliminary Agreements provided that the registration of claims in the LMR would require [REDACTED] consent (the “Non-Registration Clauses”).²⁰

2. Loans from State banks

58. [REDACTED]
[REDACTED]²¹ This credit facility was secured, *inter alia*, by a mortgage over the

¹⁷ Statement of Claim, ¶30, referring to [REDACTED] Valuation, 11 January 2013 (“[REDACTED] Valuation”) (C-50), p. 51; [REDACTED] Regional Court, case file ref. [REDACTED] 24 June 2010 (“First Instance [REDACTED] Ruling”) (C-63), pp. 5, 9; Preliminary Agreement concluded with [REDACTED] on 10 January 2006 (“Sample Preliminary Agreement”) (C-14), Clauses IX, X, XII.3, XIV, XV; Preliminary Agreement with B. [REDACTED] and T. [REDACTED] on 18 July 2005 (“Sample [REDACTED] Preliminary Agreement”) (C-15), Clauses X, XII.3, XIII, XIV; [REDACTED] Court of Appeal, case file ref. [REDACTED] 0, 9 February 2011 (“Second Instance [REDACTED] Ruling”) (C-65), p. 41; Preliminary Agreement in a notarized form concluded with M. [REDACTED] on 20 September 2007 (“Sample Notarized Preliminary Agreement 2007”) (C-16), Clause XIV; Preliminary Agreement in a notarized form concluded with T. [REDACTED] on 29 September 2008 (“Sample Notarized Preliminary Agreement 2008”) (C-17), Clause XIV.

¹⁸ Statement of Claim, ¶32, referring to Second Instance [REDACTED] Ruling (C-65), p. 40.

¹⁹ Statement of Claim, ¶32.

²⁰ Statement of Claim, ¶35, referring to Sample [REDACTED] Preliminary Agreement (C-14), clause XIX; Sample [REDACTED] Preliminary Agreement (C-15), Clause XIX.

²¹ Statement of Claim, ¶39, referring to [REDACTED] See also, Statement of Defense, ¶75.

Property (the "Mortgage"), which was registered in the LMR by the registry court in the "Registry Court") on 10 July 2006.²²

59. In October 2006, declared that the Apartments would be released from the Mortgage if the Prospective Buyers paid their full purchase price.²³ However, according to the Claimant, when certain Prospective Buyers later paid the full price, did not release its mortgage over the respective apartments.²⁴

60.
5

3. The Bond Purchase Agreement and the Mortgages

61. On 2 November 2006, entered into a "Bond Issue Cooperation Agreement" with Manchester (the "Bond Purchase Agreement"),²⁶ which provided that it would sell bonds (the "Bonds") to Manchester.²⁷

62. and Manchester initially agreed
8

63. annum.²⁹ undertook to
32

64. The Claimant's claims under the Bond Purchase Agreements were secured by mortgages.³³ In particular,
33

²² Statement of Claim, ¶40, referring to Regional Court, ref. 9 July 2014 (C-101), p. 10; Claimant's Reply dated 13 July 2016 ("Reply"), ¶18.

²³ Statement of Claim, ¶41, referring to Statement of on releasing Mortgage, 10 October 2006 (C-97).

²⁴ Statement of Claim, ¶41, referring to Letter from to Bankruptcy Trustee, 3 June 2014 (C-98).

²⁵ Statement of Claim, ¶64.

²⁶ Statement of Claim, ¶45, referring to Bond Issue Cooperation Agreement, 2 November 2006 ("Bond Purchase Agreement") (C-2).

²⁷ Statement of Claim, ¶45, referring to Bond Purchase Agreement (C-2), Article 4.1.

²⁸ Statement of Claim, ¶46, referring to Bond Purchase Agreement (C-2), Articles 5.1.1, 5.2 and 6.

²⁹ Bond Purchase Agreement (C-2), Article 7.1. *See also*, Statement of Claim, ¶44; Reply, ¶¶38-39.

³⁰ Statement of Claim, ¶45, referring to Bond Purchase Agreement (C-2).

³¹ Statement of Claim, ¶53.

³² Statement of Claim, ¶45, referring to Bond Purchase Agreement (C-2), Article 14.

³³ Reply, ¶37.

65. On 19 January 2007, [REDACTED] and Manchester signed a mortgage deed before a notary,³⁵ in which [REDACTED] declared that the [REDACTED] Properties were:

66. So as to allow [REDACTED] to transfer the [REDACTED] and [REDACTED] Apartments encumbrance-free to the Prospective Buyers, an early release mechanism was included in the Bond Purchase Agreement. Under this mechanism, release of the Mortgages was possible without full redemption of the Bonds, provided there had been no event of default under the Bond Purchase Agreement.³⁷
67. On 19 March 2007, the [REDACTED] and [REDACTED] Mortgages were registered in the LMR by the [REDACTED] Registry Court in second priority to the [REDACTED] Mortgage.³⁸

C. [REDACTED] DEFAULT UNDER THE BOND PURCHASE AGREEMENT

68. In February 2007, [REDACTED] signed an agreement with [REDACTED] concerning the purchase of a further development project.³⁹ [REDACTED] undertook to pay the purchase price in instalments and agreed to [REDACTED]
[REDACTED]
[REDACTED] to pay the first instalment of the purchase price.⁴¹ By

³⁴ Statement of Claim, ¶51, referring to Act on Land Register and Mortgages, 6 July 1982, consolidated text of 11 October 2012 (C-151), Article 76(2)-(3). *See also*, Statement of Defense, ¶22.

³⁵ Statement of Claim, ¶52, referring to Mortgage Deed, 19 January 2007 (C-3).

³⁶ Statement of Claim, ¶52, referring to Mortgage Deed, 19 January 2007 (C-3), Point VI (1).

³⁷ Statement of Claim, ¶53, referring to Bond Purchase Agreement (C-2), Article 10.5. *See also*, First Witness Statement of [REDACTED] dated 12 July 2016 ('[REDACTED] Witness Statement'), ¶33; Rejoinder dated 13 October 2016 ('Rejoinder'), ¶¶49-50.

³⁸ Notice of Arbitration dated 9 March 2015 ('Notice of Arbitration'), ¶21; Statement of Claim, ¶55, referring to [REDACTED] District Court registering the [REDACTED] Mortgage on the Property KRIP [REDACTED] 19 March 2007 (C-4); [REDACTED] District Court registering the [REDACTED] Mortgage on the Property KRIP [REDACTED] 19 March 2007 (C-5).

³⁹ Claimant's Post-Hearing Brief, ¶F.155, referring to Letter of Intent between [REDACTED] and [REDACTED] 6 February 2007 (E.14) (WS-6).

⁴⁰ Claimant's Post-Hearing Brief, ¶F.156, referring to Letter of Intent between [REDACTED] and [REDACTED] 6 February 2007 (E.14) (WS-6), p. 3.

⁴¹ Claimant's Post-Hearing Brief, ¶F.160, referring to Rebuttal Witness Statement of [REDACTED] dated 12 January 2017 ('Rebuttal [REDACTED] Witness Statement'), ¶15.

June 2007, [REDACTED] also took out another loan from [REDACTED] in the amount of PLN [REDACTED] in respect of this project.⁴²

69. In late 2007, the construction of the [REDACTED] Apartments was incomplete and, consequently, [REDACTED] was unable to conclude the property sale agreements with the Prospective Buyers.⁴³ At around the same time, [REDACTED] also failed to pay the first interest coupons on the Bonds, thus defaulting under the Bond Purchase Agreement.⁴⁴ As a result, the entire outstanding amount under the Bond Purchase Agreement became immediately due and payable.⁴⁵
70. On 28 November 2007, Manchester and [REDACTED] entered into a restructuring agreement (the "Restructuring Agreement"), by which [REDACTED] acknowledged its debt to Manchester in the amount of PLN [REDACTED] and agreed to pay it in four instalments [REDACTED].⁴⁶ Manchester agreed that [REDACTED] would sell some of its assets, excluding the [REDACTED] and [REDACTED] Properties, in order to finance the debt repayment.⁴⁷ In return, the Claimant would release the [REDACTED] Mortgage and a significant portion of the [REDACTED] Mortgage upon payment by [REDACTED] of PLN [REDACTED] and PLN [REDACTED] respectively.⁴⁸
71. Ultimately, [REDACTED] was unable to raise the funds necessary to pay its debt to the Claimant and consequently failed to perform its obligations under the Restructuring Agreement. For that reason, the Claimant did not release its Mortgages.⁴⁹
72. On 4 June 2008, the Claimant demanded that [REDACTED] pay the full amount of the Bonds and interest coupons for a total of PLN [REDACTED].⁵⁰ On 15 July 2008, [REDACTED] acknowledged its debt to Manchester in this amount by notarial deed.⁵¹
73. Following [REDACTED] failure to perform the Restructuring Agreement, in or around August 2008, most of the Prospective [REDACTED] Buyers entered into agreements with [REDACTED] providing for

⁴² Claimant's Post-Hearing Brief, ¶F.161, referring to Rebuttal [REDACTED] Witness Statement, ¶16.

⁴³ Statement of Claim, ¶66, referring to [REDACTED] Witness Statement, p. 13; Letter from [REDACTED] to a Prospective Buyer, 30 September 2008 (C-24).

⁴⁴ Notice of Arbitration, ¶24; Statement of Claim, ¶66, referring to Second Instance [REDACTED] Ruling (C-65), p. 13. *See also*, Statement of Defense, ¶5.

⁴⁵ Notice of Arbitration, ¶24; Statement of Claim, ¶66, referring to Bond Purchase Agreement (C-2), Article 14.1.

⁴⁶ Statement of Claim, ¶67, referring to Restructuring Agreement between [REDACTED] and Manchester, 28 November 2007 (C-20) ("Restructuring Agreement"), Articles 4(e) and 5; Expert Report of Brian O'Brien dated 12 July 2016 ("Expert Report of Brian O'Brien"), ¶3.23.

⁴⁷ Statement of Claim, ¶67, referring to Restructuring Agreement (C-20), Article 6(2).

⁴⁸ Statement of Claim, ¶67, referring to Restructuring Agreement (C-20), Article 7.

⁴⁹ Statement of Claim, ¶68, referring to Second Instance [REDACTED] Ruling (C-65), p. 13; Record of [REDACTED] Testimony in [REDACTED] Regional Court case file ref. [REDACTED] 27 April 2010 (C-64), p. 11.

⁵⁰ Statement of Claim, ¶69, referring to Letter from Manchester to [REDACTED] 4 June 2008 (C-21).

⁵¹ Statement of Claim, ¶70, referring to Notarial Deed No. 8697/2008, 15 July 2008 (C-22).

additional payments to [REDACTED] in return for the release of the [REDACTED] Mortgage by Manchester.⁵²

D. THE START OF COURT PROCEEDINGS IN RESPECT OF THE [REDACTED] MORTGAGE

74. Following [REDACTED] second default, Manchester filed suit against [REDACTED] for the payments due to it.⁵³ On 3 October 2008, the Regional Court in [REDACTED] issued a judgment ordering [REDACTED] to pay Manchester PLN [REDACTED] (the "Payment Order").⁵⁴
75. [REDACTED] failed to comply with the Payment Order and, on 24 November 2008, Manchester initiated enforcement proceedings against it, including with respect to the [REDACTED] Property.⁵⁵
76. On 18 December 2008, a group of 58 Prospective [REDACTED] Buyers (the "[REDACTED] Claimants") filed a claim with the [REDACTED] Regional Court (the "[REDACTED] Case"), requesting the invalidation of the [REDACTED] Mortgage on the ground that, by establishing this mortgage, [REDACTED] had violated "principles of social coexistence" ("PSC") under Article 58 of the Polish Civil Code.⁵⁶
77. Pending the determination of the case, the [REDACTED] Claimants were granted interim relief by the [REDACTED] Regional Court and the [REDACTED] Court of Appeal, which the Claimant describes as follows:
- (a) On 5 December 2008, the [REDACTED] Regional Court issued an interim relief prohibiting [REDACTED] from disposing of or encumbering the [REDACTED] Property (the "First Injunction").
 - (b) On 25 February 2009, the [REDACTED] Court of Appeal broadened the scope of the First Injunction, now prohibiting Manchester from exercising its rights under the [REDACTED] Mortgage (the "Second Injunction").
 - (c) On 30 March 2009, following a refusal by the court bailiff to suspend enforcement proceedings against the [REDACTED] Property in favour of Manchester, the [REDACTED] Regional Court suspended Manchester's enforcement proceedings with respect to the [REDACTED] Property (the "Third Injunction").⁵⁷

⁵² Statement of Claim, ¶¶71-72, referring to Second Instance [REDACTED] Ruling (C-65), p. 14; [REDACTED] Witness Statement, p. 15; Loan agreement in a notarized form concluded with [REDACTED] on 9 September 2008 (C-23).

⁵³ Notice of Arbitration, ¶27; Statement of Claim, ¶76.

⁵⁴ Notice of Arbitration, ¶27; Statement of Claim, ¶77, referring to [REDACTED] Regional Court, case file ref. 1 No. 229/08, 3 October 2008 (C-6).

⁵⁵ Statement of Claim, ¶78, referring to Notification of the Initiation of Enforcement Proceedings against [REDACTED] 24 November 2008 (C-27).

⁵⁶ Statement of Claim, ¶80, referring to Polish Civil Code (C-162), Article 58.

⁵⁷ Statement of Claim, ¶81, referring to [REDACTED] Regional Court, case file ref. [REDACTED] 5 December 2008 (C-30); [REDACTED] Court of Appeal, case file ref. [REDACTED] 25 February 2009 (C-31); Court Bailiff, case file ref. [REDACTED] 6 March 2009 (C-32); Court Bailiff, case file ref. [REDACTED] 17 March 2009 (C-33); [REDACTED] Regional Court, case file ref. [REDACTED] 30 March 2009 (C-34).

78. The Claimant also notes that, on 17 July 2009, the [REDACTED] Public Prosecutor (the “**Prosecutor**” or “**Public Prosecutor**”) joined in the [REDACTED] Case in support of the [REDACTED] Claimants’ claims.⁵⁸

E. THE COMMENCEMENT OF [REDACTED] BANKRUPTCY PROCEEDINGS

79. On 5 May 2009, after it became clear that [REDACTED] would not be able to repay its creditors, the [REDACTED] Regional Court accepted [REDACTED] application for a declaration of bankruptcy and opened liquidation bankruptcy proceedings (the “**Bankruptcy Proceedings**”).⁵⁹

80. The Court highlighted that:

When declaring the debtor’s bankruptcy, the Court does not lose sight of the situation of those creditors who do not hold security interest *in rem* over the debtor’s assets, including its contractors and those who were to become the buyers of the constructed premises. The bankruptcy proceedings, as a general enforcement, give theoretical chance of at least a partial satisfaction of their claims (the conduct of individual enforcement proceedings by the particular creditors does not provide any real opportunity in this respect).⁶⁰

81. The Claimant states that because it had, until then, been prevented from enforcing its claims against [REDACTED] by the First, Second and Third Injunctions, it was now forced to pursue these claims in the Bankruptcy Proceedings.⁶¹
82. On 5 June 2009, the Bankruptcy Trustee filed an application with the District Court in Cracow to “consider the possibility of performing the preliminary agreements for the establishment of separate ownership titles to apartment and for sale,” justifying the request on the ground that many of the Apartments had been “handed over” to the Prospective [REDACTED] Buyers.⁶²
83. The Claimant asserts that, on 26 June 2009, members of the Polish Parliament (“MP” or “MPs”) filed a written appeal with the Bankruptcy Court, calling upon it to protect the Prospective Buyers.⁶³

⁵⁸ Statement of Claim, ¶96, referring to Notification of the [REDACTED] Public Prosecutor, case file ref. [REDACTED] 17 July 2009 (C-60); Manchester’s Brief in the [REDACTED] Case, case file ref. [REDACTED] 24 February 2010 (C-62), p. 20.

⁵⁹ Statement of Claim, ¶¶83-84, referring to [REDACTED] Regional Court, case file ref. [REDACTED] 5 May 2009 (C-35); Expert Report of Brian O’Brien, ¶3.37.

⁶⁰ [REDACTED] Regional Court, case file ref. [REDACTED] 5 May 2009 (C-35), p. 6.

⁶¹ Statement of Claim, ¶85.

⁶² Expert Report of Brian O’Brien, ¶3.41, referring to Bankruptcy’s Motion, 5 June 2009 (C-36), p. 1.

⁶³ Statement of Claim, ¶93.

84. On 27 July 2009, the Bankruptcy Trustee presented a liquidation plan according to which the [REDACTED] and [REDACTED] properties would be sold by the end of the Bankruptcy Proceedings in 2011.⁶⁴

F. THE PROSECUTOR'S ORDER PROHIBITING THE SALE OF THE [REDACTED] PROPERTY

85. The previous year, on 27 November 2008, the Prosecutor had initiated a criminal investigation against [REDACTED] representatives in response to allegations made by some of the Prospective Buyers, including some of the [REDACTED] Claimants, that [REDACTED] representatives had misled them by saying that [REDACTED] would develop the Apartments to fulfil the Preliminary Agreements.⁶⁵
86. In the context of these proceedings, on 26 October 2009, the Prosecutor issued an order seizing the [REDACTED] Property as evidence and prohibiting the Bankruptcy Trustee from selling it during the Bankruptcy Proceedings (the "Prosecutor's Order").⁶⁶
87. The Bankruptcy Trustee and the Claimant appealed against the Prosecutor's Order on 4 and 24 November 2009, respectively. The Prosecutor's Order remained in effect during the appeals, until it was quashed by the Regional Court in [REDACTED] on 31 May 2010.⁶⁷

G. THE PRELIMINARY AGREEMENT ENFORCEMENT PROCEEDINGS AND THE COMPULSORY MORTGAGES

88. The Claimant asserts that, prior to the start of the Bankruptcy Proceedings, certain Prospective Buyers, including some of the [REDACTED] Claimants, sought a court order that [REDACTED] enter into property sale agreements with them in performance of the Preliminary Agreements (the "Preliminary Agreement Enforcement Proceedings"). To secure the claims pending the outcome of the proceedings, at the end of 2008 and in the first half of 2009, the [REDACTED] Regional Court granted those claimants mortgages over the [REDACTED] Property (the "Compulsory Mortgages").⁶⁸

⁶⁴ Statement of Claim, ¶89, referring to Bankruptcy Trustee's Reports, 27 July 2009 (C-40), pp. 3-4.

⁶⁵ Statement of Claim, ¶98, referring to Response of the Ministry of Justice to Zbigniew Wassermann Interpellation, 28 May 2009 (C-104).

⁶⁶ Notice of Arbitration, ¶37; Statement of Claim, ¶100, referring to Decision of the [REDACTED] Public Prosecutor, 26 October 2009 (C-43).

⁶⁷ Notice of Arbitration, ¶38; Statement of Claim, ¶¶101-102, referring to [REDACTED] District Court, case file ref. [REDACTED] 31 May 2010 (C-45), pp. 12-13.

⁶⁸ Statement of Claim, ¶104, referring to Second Instance [REDACTED] Ruling (C-65) pp. 29-30; Report of the Bankruptcy Trustee, case file ref. [REDACTED] 22 December 2010 ("Report of the Bankruptcy Trustee") (C-46), containing list of Compulsory Mortgages; Bankruptcy Trustee's list of all claims against the [REDACTED] Property, 12 November 2012 (C-49); Reply, ¶27.

89. While the Preliminary Agreement Enforcement Proceedings were discontinued upon the commencement of [REDACTED] Bankruptcy Proceedings,⁶⁹ the Supreme Court upheld the Compulsory Mortgages in a decision dated 28 April 2010.⁷⁰

H. THE DECISIONS OF THE [REDACTED] REGIONAL COURT AND THE COURT OF APPEAL IN THE [REDACTED] CASE

90. On 24 June 2010, the Regional Court in [REDACTED] rendered its judgment in the [REDACTED] Case (the “First Instance [REDACTED] Ruling”), invalidating the [REDACTED] Mortgage on the ground that it was contrary to PSC.⁷¹
91. On 9 February 2011, the Court of Appeal in [REDACTED] overturned the First Instance [REDACTED] Ruling and dismissed the [REDACTED] Claimants’ claims (the “Second Instance [REDACTED] Ruling”).⁷²
92. The Claimant notes that the Court of Appeal stated that: (i) it was not a violation of PSC to take measures to safeguard claims by entering into a mortgage with priority over prospective buyers;⁷³ (ii) the [REDACTED] Claimants themselves had neglected to protect their own interests, but that “fact cannot burden another creditor such as Manchester”;⁷⁴ and (iii) the effect of certain historical problems had made the [REDACTED] Claimants aggrieved, but the reason for this was the “lack of systemic security for the clients of real estate developers, and not the invalidity of the acts to which these proceedings relate.”⁷⁵

I. THE APARTMENT BUYER PROTECTION ACT

93. According to the Claimant, the Second Instance [REDACTED] Ruling “was met with a highly negative political response,” and changing the law to protect clients of real estate developers became a priority of the Polish State.⁷⁶ The Respondent opposes this characterization, stating that developers’ bankruptcies were a nationwide problem and that legislative amendments to protect developers’ clients were conceived “long before the [REDACTED] Case.”⁷⁷

⁶⁹ Statement of Claim, ¶105, referring to Polish Code of Civil Procedure (C-163), Article 182: § 1.

⁷⁰ Statement of Claim, ¶106, referring to Resolution of the Supreme Court, case file ref. III CZP 2/10, 28 April 2010 (C-44).

⁷¹ First Instance [REDACTED] Ruling (C-63).

⁷² Second Instance [REDACTED] Ruling (C-65).

⁷³ Statement of Claim, ¶118.

⁷⁴ Statement of Claim, ¶118, referring to Second Instance [REDACTED] Ruling (C-65), p. 43.

⁷⁵ Statement of Claim, ¶119, referring to Second Instance [REDACTED] Ruling (C-65), p. 47.

⁷⁶ Statement of Claim, ¶127.

⁷⁷ Statement of Defense, ¶¶36-37, referring to Constitutional Tribunal of Poland, case file ref. S 3/10, 2 August 2010 (C-107), p. 5.

94. On 20 June 2011, an organization created by the [REDACTED] Claimants – the Association of the Victims of Developers ‘[REDACTED]’ (the ‘[REDACTED] Association’)⁷⁸ – appealed to various Polish authorities, including the President, the Prime Minister and various MPs, asking them to pay “attention to the gross injustice resulting from the actions of the administration of justice with regard to persons who have fallen victim of unfair property developers.”⁷⁹ According to the Claimant, the [REDACTED] Association sent over a thousand letters demanding protection in the Bankruptcy Proceedings⁸⁰ and “participated in the work of the Sejm committee” regarding proposed legislative amendments.⁸¹
95. Between 2009 and 2011, several MPs made parliamentary interpellations requesting that legislative measures be taken to protect injured parties.⁸²
96. Additionally, on 28 September 2009, MP Zbigniew Matusczak submitted an interpellation to the Minister of Justice in his capacity as supervisor of the Polish courts. Specifically, he urged the Minister of Justice to “take the initiative in terms of legislative changes to strengthen the position of clients of a dishonest developer in court proceedings.”⁸³ The Minister of Justice initially responded by noting that “any attempts to introduce privileges for one of the groups may cause

⁷⁸ Statement of Claim, ¶22, referring to Information from the [REDACTED] Associations website [REDACTED] downloaded on 26 October 2015 (C-12); Excerpt from the Polish register of companies and associations for the [REDACTED] (C-13).

⁷⁹ Statement of Claim, ¶129, referring to *Wiadomości24.pl*, “Open letter of the [REDACTED] Association,” 24 June 2011 (C-111).

⁸⁰ Statement of Claim, ¶129.

⁸¹ Hearing Transcript (26 September 2017), 225:17-22, referring to Letter from the [REDACTED] Association to Prime Minister Donald Tusk dated 4 October 2011 (C-210).

⁸² Notice of Arbitration, ¶52; Statement of Defense, ¶47; Reply, ¶259, referring to Appeal of the Polish MPs to the Bankruptcy Court, 25 June 2009 (C-37); Notification of the [REDACTED] Public Prosecutor, 17 July 2009 (C-60); Motion of the [REDACTED] Public Prosecutor, 19 February 2010 (C-61); *Ekonomia.rp.pl*, “Executives of a development company detained,” 8 February 2012 (C-67); *Gazeta Krakowska*, “The Presidents of [REDACTED] detained and charged,” 8 February 2012 (C-68); *Typ.info*, “Executives of a development company detained,” 8 February 2012 (C-69); *Gazeta.pl*, “[REDACTED] Charges for the investment project on [REDACTED] Street,” 9 February 2012 (C-70); *Wprost*, “Former executives of [REDACTED] development company arrested,” 9 February 2012 (C-71); *Rmf24.pl*, “Cracow: Executives of the development company [REDACTED] detained,” 8 February 2012 (C-72); Zbigniew Wassermann Interpellation, 14 April 2009 (C-103); MP Andrzej Adamczyk, Question No. 5734, 8 January 2010 (C-108); MPs Jarosław Gowin, Witold Kochan and Tadeusz Arkit, Question No. 17645, 5 August 2010 (C-109); MP Tadeusz Arkit, Question No. 10233, 29 June 2011 (C-112); MP Sylwester Pawłowski, Interpellation No. 23470, 4 July 2011 (C-113); Statement of Senator Grażyna Sztark, 7 July 2011 (C-114); MP Ewa Wolak, Interpellation No. 23737, 8 July 2011 (C-115); MP Arkady Fiedler, Interpellation No. 23517, 11 July 2011 (C-116); MP Czesław Hoc, Interpellation No. 23808, 26 July 2011 (C-117); MP Jarosław Rusiecki, Interpellation No. 24168, 11 August 2011 (C-118); MP Łukasz Zbonikowski, Interpellation No. 24121, 15 August 2011 (C-119); MP Wiesław Rygiel, Question No. 10515, 17 August 2011 (C-120); Response of the Ministry of Justice to Senator Grażyna Sztark’s Statement, 4 August 2011 (C-121); Response of the Ministry of Justice to Tadeusz Arkit Question, 8 August 2011 (C-122); Response of the Ministry of Justice to Arkady Fiedler Interpellation, 12 August 2011 (C-123); Response of the Ministry of Justice to Sylwester Pawłowski Interpellation, 12 August 2011 (C-124); Response of the Ministry of Justice to Ewa Wolak Interpellation, 16 August 2011 (C-125).

⁸³ Statement of Claim, ¶91; Statement of Defense, ¶48, referring to MP Zbigniew Matusczak, Parliamentary Interpellation No. 11936, 28 September 2009 (R-10).

negative reactions and allegations of a breach of the Constitution on the part of [an]other social group.”⁸⁴

97. On 9 June 2011, a group of MPs filed a legislative bill “setting out a number of measures intended to protect clients of real estate developers from the latter’s possible bankruptcy.”⁸⁵ Under this bill, a real estate development agreement would only be valid if executed in a notarized form and developers’ clients would be treated as a distinct class of creditors in bankruptcy proceedings.⁸⁶
98. The Claimant asserts that the [REDACTED] Association actively participated in the process relating to the draft bill and that, on 14 August 2011, it filed a plea to the Polish Senate to urgently adopt the bill.⁸⁷ For its part, the Respondent denies that the [REDACTED] Association actively participated in the legislative process, and notes that several “governmental officials and representatives of several business organisations and NGOs” were heard by the Parliamentary Infrastructure Committee.⁸⁸
99. On 16 September 2011, the Polish Parliament adopted the bill as the Act on the Protection of Rights of Buyers of Apartments or Single-Family Houses (the “**Apartment Buyer Protection Act**”).⁸⁹ The Apartment Buyer Protection Act entered into force on 29 April 2012.⁹⁰

J. THE SUPREME COURT RULING INVALIDATING THE [REDACTED] MORTGAGE

100. On 9 February 2012, following an extraordinary cassation appeal by the [REDACTED] Claimants, the Supreme Court overturned the Second Instance [REDACTED] Ruling (the “[REDACTED] Supreme Court Ruling”), thereby reinstating the nullification of the [REDACTED] Mortgage ordered by the first instance Regional Court in [REDACTED].⁹¹

⁸⁴ Statement of Claim, ¶192, referring to Response of the Ministry of Justice to Zbigniew Wassermann Interpellation, 28 May 2009 (C-104).

⁸⁵ Statement of Claim, ¶134, referring to Draft Act on the Protection of the Rights of the Buyers of Apartments and Single-Family Houses, 9 June 2011 (Paper No. 4349) (excerpts) (C-126).

⁸⁶ Statement of Claim, ¶136, referring to Act on the Protection of Rights of Buyers of Apartments or Single-Family Houses, 16 September 2011, 232 Journal of Laws 1377 (C-137), Article 36.

⁸⁷ Statement of Claim, ¶137.

⁸⁸ Statement of Defense, ¶56.

⁸⁹ Statement of Claim, ¶144.

⁹⁰ Notice of Arbitration, ¶54; Reply, ¶265, referring to Act on the Protection of Rights of Buyers of Apartments or Single-Family Houses, 16 September 2011 (C-137), Article 37; R. Strzelczyk (ed.), *Protection of rights of buyers of apartments or single-family houses (property development act). Commentary*, C.H. Beck, 2013, Commentary on Art. 36 (excerpts) (C-143), p. 2.

⁹¹ Supreme Court of Poland, case file ref. III CSK 181/11, 9 February 2012 (C-73) (“[REDACTED] Supreme Court Ruling”).

101. *Inter alia*, the Supreme Court made the following findings:

The merits of the situation in fact established by the Courts enabled – contrary to the view of the Court of Appeal – a finding that the three challenged mortgages were created in breach of the principles of social co-existence (Art. 58 §2 of the Civil Code).

Firstly, the Court of Appeal's general assumption that the claimants should bear in full the consequences of the "lack of systemic security interests for the customers of property developers". When the developer was declared bankrupt (in 2009) and when the judgment under appeal was delivered (February 2011), the solutions now provided for in the [Apartment Buyer Protection Act] were indeed non-existent in Polish law, especially those concerning the content of the property development agreement itself (Art. 22 et seq.) and the legal effects of a developer's being declared bankrupt after the conclusion of a preliminary agreement (Art. 4 and Art. 36 of the Act). In that Act, legal solutions were accepted that are to protect the counterparties of property developers against the risk of an investment's failing and, in particular, the risk of the developer's going bankrupt. The justification to the draft of the Act (draft of 22 April 2011) shows that "Poland is one of the countries in the EU in which the risk of a property development project is borne by the buyer". It is possible that this state of affairs is primarily the result of a specific contractual practice (standard contractual clauses) and the investment policy of property developers. This does not mean, however, that in special cases the Polish courts should not – under the law in force at the time a judgment is given (Art. 58 §2 and Art. 3531 of the Civil Code) – strive to ensure an appropriate level of legal protection for the buyers of separate residential premises (primarily if a dishonest developer goes bankrupt, with considerable sums of investment capital involved), especially as the need for such protection also arises from relevant constitutional standards (Art. 64 sec. 3 and Art. 76 of the Constitution). It should also be stressed that in judgments of the Supreme Court there has been a correct tendency, which has gained the approval of legal writers, to take into account at least the fundamental aim of the protective legal solutions accepted by the legislative authorities in an assessment of certain events (acts in law and their effects) that occurred before such solutions came into force [...].

If one takes into account the clearly protective purpose of the provisions of the Act of 16 September 2011, it should be held that the problem does not therefore consist, as the Court of Appeal deduces, only in "granting privilege to the claimants in the current proceedings" because they are consumers, but in adopting legal protection for them that is justified by the clearly dishonest conduct of the developer or even the ill-considered (risky) conduct by the developer of its own economic activity, which threatened not only the implementation of the investment but also the possibility of returning the buyers' money. This meant, therefore, that it was necessary to carry out an appropriately thorough examination of the circumstances in which the developer established the mortgages being challenged, from the point of view of the principles of social co-existence, while also taking into consideration the rules of professional ethics of property developers. In the justification to the judgment of the Supreme Court of 21 June 2011, I CSK 559/10 (OSNC 2012, vol. 2, item 25, p. 87), it was accepted that the rules of ethics of professional entities (banks) may be taken into account when classifying a bank's conduct as a tort, even though those rules are not directly cited in the standpoints given in the cassation appeal.

Secondly, it is impossible to share the standpoint of the Court of second instance, which rejects the argument that the creation of the challenged mortgages was in violation of the principles of social co-existence, while arguing that the defendant US entity "took action to protect its claims" against the developer and therefore demonstrated neutral – from the point of view of the principles of social co-existence – "diligence in protecting its own rights" as a creditor of the bankrupt entity. Such an opinion does not take into account the circumstances leading to precisely such special protection that clearly worsens the situation of the developer's original creditors (initially with regard to the price of the premises by a demand that additional payments be made for the premises and then with regard to priority of satisfaction), with both defendants being fully aware of this state of affairs, after contractually "blocking" the possibility of the original creditors' (claimants'), who were interested in the most effective end to the construction investment, taking action to secure their claims. The preliminary agreements contained, accordingly, so-called negative clauses ruling out disclosure of the claimants' rights to transfer ownership title to separate premises in a land and mortgage register. Those clauses undoubtedly

served to ensure that the developer maintained an appropriate level of "creditworthiness" in legal transactions, that creditworthiness enabling it to expand its business without restriction. It is clear that defendant [Manchester] was aware of those clauses during the contractual cooperation between the two defendants that was aimed at creating a basic form of financing for the developer. Therefore, it should be noted that the action taken by defendant [Manchester] to secure its interests as a new creditor of the developer was one of the planned results of the dishonest conduct of the developer, with that defendant being aware of that dishonesty.

Thirdly, when examining whether the challenged mortgages were created in breach of the principles of social co-existence, the absence of a direct legal relationship between the claimants and defendant [Manchester], an entity contractually working with the developer, is irrelevant. This does not mean, however, that to apply Art. 58 §2 of the Civil Code one should not take into account appropriate events (acts in law) between those entities and their conduct in connection with the creation of the mortgages even though the claimants did not challenge the effectiveness of those acts in law that created, *inter alia*, a considerable receivable for defendant [Manchester] from the developer. From the point of view of those cooperating entities, it was indeed, as the Court noted, a "typical business transaction" initiated by [redacted]. However, defendant [Manchester] knew the content of the preliminary agreements for the transfer of ownership title to the premises and the developer's investment covenants. The findings of fact show that defendant [Manchester] analyzed the said agreements during the audit conducted at FI [redacted]; appropriate terms were even added to the bond issue cooperation agreement of 2 November 2006, based on which, *inter alia*, the amounts payable under the bonds (of all issues) acquired could become immediately due and payable on condition the preliminary agreement of a specific group of the developer's customers (claimants) was rescinded. Therefore there is no doubt that creating a mortgage over the real property to which the investment related, with priority before the initial creditors (claimants) was an element of an appropriate legal and economic calculation by defendant [Manchester].

Fourthly, also as the law currently stands it would be inappropriate to burden the claimants with the full risk of the failure of the real estate investment undertaken on the property on [redacted] Street with the motivation adopted by the Court of Appeal, because it is one thing for the developer's counterparties to accept the risk of an investment's failing if the developer complies with the terms of the preliminary agreements and conducts normal business activity in such a way and on such a scale that is testament to its concern for its counterparties' interests and the success of the investment project (model of a developer's rational service and commercial activity), and something else entirely when there is the matter of the spreading the development investment risk in a situation where the developer is conducting business on a wide scale, taking on even more risk, *inter alia* by issuing bonds with a high interest rate per annum (25%), with a high level of security for the claims under those bonds over its own assets (amounts payable under the bonds becoming immediately due and payable, irrevocable power of attorney for that creditor to transfer title to the developer's real property). The original counterparties of the developer, which has significant capital provided by the claimants in order to achieve the investment aim provided for in the agreement, cannot be burdened in full with the risk of such extensive (and by nature somewhat carelessly conducted) business. The claimants had already borne the risk of the failure of the investment (currently they are trying only to protect their pecuniary claims, Art. 91 sec. 2 of the Bankruptcy Law). The developer's irresponsible and irrational economic activity that led to the creation of mortgages for the benefit of a single, major creditor contrary to the terms of the preliminary agreements and as a consequence permission for defendant [Manchester] to "take the initiative" with regard to finalizing the investment project (in the form of a proposal to increase the price of flats for the claimants) may therefore be seen as dishonest conduct that is inconsistent with the principles of social co-existence and professional ethics of property developers (Art. 58 § 2 of the Civil Code).⁹²

⁹² [redacted] Supreme Court Ruling (C-73), pp. 15-18.

K. THE SUPREME COURT DECISION UPHOLDING THE VALIDITY OF THE [REDACTED] MORTGAGE

102. Following the [REDACTED] Supreme Court Ruling, on 7 September 2012, Manchester filed a claim for the invalidation of the [REDACTED] Mortgage, arguing that it was also contrary to PSC.⁹³
103. Manchester's claim was dismissed by the [REDACTED] Regional Court on 9 July 2014 and the [REDACTED] Court of Appeal on 23 April 2015.⁹⁴
104. On 14 September 2016, the Supreme Court rejected Manchester's cassation appeal, upholding the validity of the [REDACTED] Mortgage.⁹⁵

L. THE POLISH COURT DECISIONS IN RESPECT OF THE [REDACTED] MORTGAGE

105. According to the Claimant, the few Prospective [REDACTED] Buyers who had not agreed to make additional payments in return for the release of the [REDACTED] Mortgage (see paragraph 73 above) bought the [REDACTED] Apartments encumbered with that mortgage. When [REDACTED] went bankrupt, Manchester attempted to enforce the [REDACTED] Mortgage against these Prospective Buyers.⁹⁶
106. The first such case was against the estate of a Mr. [REDACTED] (the "[REDACTED] case"). In that case, on 26 April 2012, the Supreme Court held that the [REDACTED] Mortgage was "unenforceable against Mr. [REDACTED] successors" as "it would be contrary to 'principles of social coexistence' to enforce [REDACTED]
[REDACTED]"⁹⁷
107. The second case was brought by Manchester against [REDACTED] ("[REDACTED]"), a Polish company (the "[REDACTED] case"). In a decision dated 24 April 2014, the Supreme Court held that the [REDACTED] Mortgage over the apartment bought by [REDACTED] did not violate PSC and was therefore valid.⁹⁸
108. Notwithstanding the Supreme Court decision, [REDACTED] commenced new proceedings before the District Court in [REDACTED] requesting that the [REDACTED] Mortgage be removed from the LMR. In

⁵³ Statement of Claim, ¶166.

⁹⁴ Statement of Claim, ¶168, referring to [REDACTED] Regional Court, case file ref. [REDACTED] 9 July 2014 (C-101); [REDACTED] Court of Appeal, case file ref. [REDACTED] 23 April 2015 (C-102).

⁹⁵ Claimant's Post-Hearing Brief, p. 101, ¶F.333, referring to Supreme Court, case file III CSK 339/15, 14 September 2016 (Attachment 41 to Rebuttal Expert Opinion of Professor Wojciech Sadurski dated 12 January 2017)).

⁹⁶ Statement of Claim, ¶173.

⁹⁷ Statement of Claim, ¶182, referring to Supreme Court of Poland, case file ref. III CSK 300/11, 26 April 2012 (“[REDACTED] Supreme Court Ruling”) (C-80), p. 21; Notice of Arbitration, ¶60.

⁹⁸ Supreme Court of Poland, case file ref. III CSK 178 '13, 24 April 2014 ("Supreme Court Ruling")(C-81).

April 2017, the District Court granted the application, finding that the [REDACTED] Mortgage over [REDACTED] apartment violated PSC under Article 58(2) of the Civil Code.⁹⁹

M. THE TRANSFER OF THE APARTMENTS TO THE PROSPECTIVE BUYERS

109. According to the Claimant, the vast majority of the Prospective [REDACTED] Buyers (including some of the [REDACTED] Claimants) moved into the [REDACTED] Apartments during the Bankruptcy Proceedings. The Bankruptcy Trustee and Bankruptcy Court did not evict them¹⁰⁰ or demand rental payments.¹⁰¹

110. On 14 December 2012, a group of eight Prospective [REDACTED] Buyers filed a claim in the [REDACTED] Regional Court requesting that it transfer the ownership of the [REDACTED] Apartments to them. On 27 March 2014, the [REDACTED] Regional Court held that “the Prospective Buyers could be satisfied in the Bankruptcy Proceedings only by way of damages” and dismissed the claim. However, the judge stated in *obiter* that the ownership of the [REDACTED] Apartments could be transferred to the Prospective Buyers by the Bankruptcy Trustee.¹⁰²

111. In April 2014, the Bankruptcy Trustee applied for the transfer of the [REDACTED] and [REDACTED] Apartments to their Prospective Buyers.¹⁰³ On 29 April 2014, this application was confirmed by the Judge-Commissioner of [REDACTED] bankruptcy estate.¹⁰⁴ It was agreed that the Prospective Buyers would make any outstanding payments for the Apartments to the [REDACTED] Association, which would carry out necessary renovations and finalize the [REDACTED] development.¹⁰⁵

⁹⁹ Claimant's Post-Hearing Brief, pp. 98-99, ¶¶F.318-F.321, referring to [REDACTED] District Court, 7 April 2017 (E4/157a), pp. 15-16.

¹⁰⁰ Statement of Claim, ¶195, referring to Bankruptcy's Motion dated 5 June 2009 (C-36), p. 4.

¹⁰¹ Statement of Claim, ¶195, referring to Manchester's Brief in the Bankruptcy Proceedings, case file ref. [REDACTED] 7 May 2014 (excerpts) (C-54). *See also*, Reply, ¶30.

¹⁰² Statement of Claim, ¶197, referring to [REDACTED] Regional Court, case file ref. [REDACTED] 27 March 2014 (C-52).

¹⁰³ Statement of Claim, ¶198.

¹⁰⁴ Notice of Arbitration, ¶62; Statement of Claim, ¶200, referring to Decision of the Judge-Commissioner, case file ref. [REDACTED] 29 April 2014 (C-53).

¹⁰⁵ Statement of Claim, ¶¶202-203, referring to Order of the Judge-Commissioner, case file ref. [REDACTED] 8 August 2014 (C-55); Report of the Bankruptcy Trustee, case file ref. [REDACTED] 19 February 2015 (C-56), p. 2). *See also*, Reply, ¶30; Rejoinder, ¶271, referring to Letter from the Residents' Association of the [REDACTED] Property regarding the Value of Construction Work, 4 October 2016 (R-57).

N. THE PARTIES' POSITIONS ON SELECTED DISPUTED FACTUAL ISSUES

1. The identity and characteristics of the Prospective Buyers

The Claimant's Position

112. The Claimant contends that the Prospective Buyers were affluent individuals typically buying residential premises for investment purposes.¹⁰⁶ According to the Claimant, this fact is confirmed by [REDACTED] business plan, which described its target client as "already hav[ing] an apartment, and frequently a house, and want[ing] to invest further."¹⁰⁷
113. The Claimant asserts that the status of the six individuals specifically referred to by the Respondent as allegedly buying their first homes, is not reflective of the status of the remaining Prospective Buyers, in particular the [REDACTED] Claimants.¹⁰⁸ The Claimant submits a summary of the [REDACTED] Claimants' financial standing, showing that more than 81% of them already had an apartment, house or land, while nearly 50% had two or more properties.¹⁰⁹

The Respondent's Position

114. The Respondent contends that the Prospective Buyers were consumers and, as with any big group, were diversified in terms of wealth and status. Most of them were purchasing the premises to meet their own and their families' housing needs and were either "using their savings or taking out loans in order to pay the purchase price."¹¹⁰ The Respondent also asserts that, for some, the apartments were going to be their first own homes,¹¹¹ with many of them only affording the apartments through "hard work and sacrifice."¹¹²
115. The Respondent asserts that, of the group of 56 [REDACTED] Claimants, 16 did not possess their own home.¹¹³ It also asserts that "a further 15 of the [REDACTED] Claimants were ordinary people

¹⁰⁶ Reply, ¶49, referring to [REDACTED] Regional Court, case file ref. [REDACTED] 23 January 2009 (C-11); Hearing Transcript (26 September 2017), 198:2-6, referring to M. Paluch, "Developer went bankrupt. Buyers left without flats, that's no way to live," [REDACTED] 25 May 2013 (R-2).

¹⁰⁷ Reply ¶53, referring to the [REDACTED] Business Plan, February 2006 (C-8), p. 13; Report of the Management Board on the Activity of [REDACTED] in 2005 (C-178).

¹⁰⁸ Reply, ¶¶50-51; Statement of Defense, ¶18.

¹⁰⁹ Reply, ¶52, referring to Appeal of Manchester dated 22 October 2010 against the Judgment of the [REDACTED] Regional Court, case file ref. [REDACTED] 24 June 2010 (excerpts), together with Summary of the [REDACTED] Claimant's Financial Standing ("Appeal of Manchester dated 22 October 2010") (C-10).

¹¹⁰ Statement of Defense, ¶18, referring to First Instance [REDACTED] Ruling (C-63).

¹¹¹ Statement of Defense, ¶18, referring to Appeal of Manchester dated 22 October 2010 (C-10), Nos. 15, 29, 47 and 50.

¹¹² Statement of Defense, ¶18.

¹¹³ Rejoinder, ¶19, referring to Appeal of Manchester dated 22 October 2010 (C-10).

with a small suburban house or flat and average income,”¹¹⁴ and that the majority of the Prospective Buyers financed their credit facilities at 100% spread over decades.¹¹⁵

116. The Respondent contends that the passage from [REDACTED] business plan quoted by the Claimant merely reflected “[REDACTED] expectations and wishful thinking” as to the financial standing of its future clientele. The Respondent adds that [REDACTED] itself confirmed that most of the Prospective Buyers “designated all their life savings to buy off the apartment.”¹¹⁶
117. The Respondent finally contends that many of the Prospective Buyers were not included in the summary of the [REDACTED] Claimants’ financial position submitted by the Claimant because they could not afford to participate in the [REDACTED] Case.¹¹⁷

2. The degree of collateralization and the risks inherent in the Bond Purchase Agreement

The Claimant's Position

118. The Claimant submits that its claims under the Bond Purchase Agreement were not over-collateralized.¹¹⁸ It cites in support the [REDACTED] Supreme Court Ruling,¹¹⁹ which states that “there were no grounds for finding an oversecured status.”¹²⁰ The Claimant also states that it is incorrect for the Respondent to add up the face value of all of the mortgages securing each Bond issue and to suggest that the total value of the mortgages was higher than the actual claim secured by those mortgages. The Claimant explains that the mortgages jointly secured Manchester’s claims, such that Manchester could not receive more than the actual amount of its claim from all of the mortgages jointly or from each of them individually.¹²¹ Further, the value of the mortgages “cannot be compared to the face value of each Bond issue, as the mortgages also secured interest and enforcement costs.”¹²²

¹¹⁴ Rejoinder, ¶19, referring to K. Janiszewska, “People cheated by ‘Żubr’ and [REDACTED] lost all they had,” *Gazeta Krakowska*, 11 March 2011 (R-1); M. Paluch, “Developer went bankrupt. Buyers left without flats, that’s no way to live,” *Gazeta Krakowska*, 25 May 2013 (R-2).

¹¹⁵ Rejoinder, ¶19.

¹¹⁶ Rejoinder, ¶22, referring to Letter from [REDACTED] to the Minister of the Economy dated 4 December 2008 (C-170), p. 2. See also, Witness Statement of Mr. [REDACTED] dated 12 October 2016 (“[REDACTED] Witness Statement”), ¶22.

¹¹⁷ Rejoinder, ¶20, referring to Radio Interview Transcript, 21 July 2011 (C-128), p. 10.

¹¹⁸ Statement of Defense, ¶22.

¹¹⁹ Reply, ¶47(a).

¹²⁰ Reply, ¶47, referring to [REDACTED] Supreme Court Ruling (C-73), p. 11.

¹²¹ Reply, ¶47; Statement of Claim, ¶51.

¹²² Reply, ¶47; J. Ignatowicz, K. Stefaniuk, *Property Law*, Lexis Nexis 2009, Chapter XIV Mortgage (excerpts) (C-149), p. 9.

119. The Claimant further submits that the Bond Purchase Agreement was not a particularly risky investment. The Claimant states that it “conducted a careful financial due diligence of [REDACTED]” which confirmed that the latter was in a position to service its debts.¹²³ The Claimant nevertheless points out that, since risk is entailed in every investment, “any prudent financial investor will take into account the possibility that its counterparty may default, and it will secure itself against that risk.”¹²⁴ The Claimant states that the [REDACTED] interest rate under the Bond Purchase Agreement was “not an unusual expectation as to the rate of return in comparison to [REDACTED] [REDACTED].”¹²⁵ The Claimant also submits that it had in fact proposed to finance [REDACTED] [REDACTED].¹²⁶ Further, the Claimant notes that the [REDACTED] [REDACTED].¹²⁷ Finally, given that [REDACTED] a loan in April 2007, the Claimant submits that it also “considered [REDACTED] to be a reliable business partner.”¹²⁸

The Respondent's Position

120. The Respondent submits that the Bond Purchase Agreement was over-collateralized, as the value of the security under the Mortgages significantly exceeded the amount due under the Bond Purchase Agreement.¹²⁹

121. In addition, the Respondent asserts that “[t]o agree to a [REDACTED] interest rate Claimant must have been aware that there would be a risk in its dealings with [REDACTED].”¹³⁰ The Respondent notes that “[t]he average interest rate offered by banks on the market in 2006 was around 6% per annum, i.e. [REDACTED] times lower than that accepted by Claimant in the Bond Purchase Agreement.”¹³¹ The Respondent adds that the “different types of security requested by Claimant prove that it

¹²³ Reply, ¶¶41-43, referring to [REDACTED] Witness Statement, ¶¶23-25; Bond Purchase Agreement (C-2), Attachment No. 2.20 – Manchester's Business Plan. Position “Net Income” (consolidated with [REDACTED] *Puls Biznesu*, “Business Gazelles Ranking: [REDACTED] (C-172); Second Instance [REDACTED] Ruling (C-65), pp. 41-42.

¹²⁴ Reply, ¶¶33, 46.

¹²⁵ Reply, ¶40, referring to [REDACTED] Witness Statement, ¶22.

¹²⁶ Statement of Claim, ¶44, referring to Second Instance [REDACTED] Ruling (C-65), p. 8; Bond Purchase Agreement (C-2), Article 7; Record of [REDACTED] Testimony in [REDACTED] Regional Court case file ref. [REDACTED] 27 April 2010 (C-64), p. 3.

¹²⁷ Statement of Claim, ¶44, referring to Settlement Agreement No. 3/2008 between [REDACTED] and [REDACTED] 29 February 2008 (C-99), Article 5.2.

¹²⁸ Reply, ¶44.

¹²⁹ Statement of Defense, ¶24.

¹³⁰ Statement of Defense, ¶¶21-22, referring to Bond Purchase Agreement (C-2), Article 7.

¹³¹ Statement of Defense, ¶22. *See also*, Rejoinder, ¶59. *See also* Respondent's Post-Hearing Brief, ¶¶42-44.

considered it an option that [REDACTED] would be unable to meet its payments obligations,” noting that Mr. [REDACTED] a portfolio manager at [REDACTED] who took part in Manchester’s negotiations with [REDACTED] in 2006, testified at the hearing that the [REDACTED] Property was considered to be a major asset, without which the Claimant would not have invested in [REDACTED].¹³² The Respondent contends that, while the Claimant asserts that it conducted a careful financial due diligence of [REDACTED],¹³³ it is also telling that the Claimant did not submit the due diligence report in this arbitration (instead solely relying on the witness statement of Mr. [REDACTED]). The Respondent adds that Mr. [REDACTED] described the Bond Purchase Agreement as “very risky”.¹³⁴ The Respondent submits that it is incorrect to assimilate the [REDACTED] rate under the Bond Purchase Agreement to the rate under [REDACTED] agreement, as the latter was [REDACTED]
[REDACTED]¹³⁵

3. The source of financing of the Apartments

The Claimant’s Position

122. The Claimant contends that the Prospective Buyers did not finance the construction of the Apartments. It submits that, under the Preliminary Agreements, each of the instalments of the purchase price was payable after a given stage of the construction was completed.¹³⁶ This was confirmed by the [REDACTED] Court of Appeal, which found that the Prospective Buyers did not make payments in advance of the construction works, but rather *refinanced* those works.¹³⁷ The Claimant also asserts that the payments by the Prospective Buyers were made into [REDACTED] general bank account and that [REDACTED] was free to use the funds as it saw fit.¹³⁸
123. The Claimant asserts that Manchester “injected considerable new capital, enabling [REDACTED] to complete its investment projects, including the [REDACTED] and [REDACTED] Apartments.”¹³⁹

¹³² Statement of Defense, ¶¶23-24; Respondent’s Post-Hearing Brief, ¶¶45-50, referring to Hearing Transcript (25 September 2017), 154:15-25; 156:1-2; 169:13-18.

¹³³ Reply, ¶41.

¹³⁴ Rejoinder, ¶¶52-58.

¹³⁵ Hearing Transcript (25 September 2017), 91:14-19, referring to Settlement Agreement No. 3/2008 between [REDACTED] and [REDACTED] 29 February 2008 (C-99), Articles 4.1 and 5.2.

¹³⁶ Reply, ¶59, referring to Sample [REDACTED] preliminary Agreement (C-14), Clause X.

¹³⁷ Reply, ¶59, referring to Second Instance [REDACTED] ruling (C-65), p. 29.

¹³⁸ Reply, ¶59.

¹³⁹ Statement of Claim, ¶47; Statement of Defense, ¶30.

124. The Claimant adds that, under Polish law, identifying the purpose for which a mortgage is given is “wholly irrelevant” to the assessment of its validity.¹⁴⁰ The Claimant also contends that in bankruptcy proceedings, it “doesn’t matter whether funds for a mortgage would be invested in the property of the developer under development or into any other estate of this developer because, in the end, the entire property or liquidated estate would be the same.”¹⁴¹

The Respondent's Position

125. The Respondent asserts that, under the Preliminary Agreements, approximately [REDACTED] of the purchase price was paid shortly after the execution of each Preliminary Agreement, while further instalments were paid in accordance with a schedule linked to construction work progress.¹⁴² The Respondent takes this to mean that [REDACTED] used the funds from the Prospective Buyers to finance each stage of the construction. The Respondent also asserts that the Preliminary Agreements clearly stipulated that the purchase price was to be paid into [REDACTED] bank account for developing, establishing and selling the Apartments to the Prospective Buyers.¹⁴³
126. The Respondent asserts that, at the time the Claimant requested the establishment of the mortgages over the [REDACTED] and [REDACTED] Properties, buildings were already being erected on those properties¹⁴⁴ and [REDACTED] clients had already partially financed the construction. By the time Manchester decided to enforce the Mortgages, the Prospective Buyers had paid 100% of the price for their apartments in buildings B, C and D and 98% for the apartments in building A. According to the Respondent, Manchester therefore decided to enforce its rights, not against [REDACTED] but against the Prospective Buyers.¹⁴⁵
127. The Respondent further contends that there was no relation between the Claimant’s funds and the [REDACTED] and [REDACTED] Properties.¹⁴⁶ In this regard, the Respondent argues that “the funds stemming from the Bond issues were intended for the development of other real estate projects and for operational purposes.”¹⁴⁷ Tranche A was earmarked for purchasing and refinance real estate in [REDACTED]. Tranche B served to refinancing real estate in [REDACTED].

¹⁴⁰ Reply, ¶66, referring to Expert Opinion of Professor Bartłomiej Swaczyna dated 11 July 2016 (“Expert Opinion of Professor Swaczyna”), ¶¶28-29.

¹⁴¹ Hearing Transcript (27 September 2017), 340:15-21.

¹⁴² Rejoinder, ¶¶36-37, referring to Sample [REDACTED] Preliminary Agreement (C-14), Clause X.

¹⁴³ Rejoinder, ¶42, referring to Sample [REDACTED] Preliminary Agreement (C-14), Clauses VIII and XI(4).

¹⁴⁴ Statement of Defense, ¶29, referring to Second Instance [REDACTED] Ruling (C-65), p. 18.

¹⁴⁵ Statement of Defense, ¶29.

¹⁴⁶ Statement of Defense, ¶¶30 and 32. *See also*, Rejoinder, ¶¶35 and 40-41, referring to Bond Purchase Agreement (C-2), Article 5.

¹⁴⁷ Statement of Defense, ¶30, referring to Bond Purchase Agreement (C-2), Articles 5.1.1 and 5.2.

Tranche C was to purchase real estate in [REDACTED] and Tranche D to finance [REDACTED] day-to-day operations.¹⁴⁸

IV. REQUESTS FOR RELIEF

128. In its Statement of Claim, the Claimant requests the Tribunal to:

- (a) declare that Poland has breached the BIT;
- (b) order the Respondent to pay to the Claimant compensation in the amount not less than PLN [REDACTED];
- (c) order the Respondent to pay the entire costs of this arbitration, including the arbitrator[s'] fees and the fees of the PCA, along with all legal costs incurred by the Claimant;
- (d) order the Respondent to pay interest pre- and/or post-award; and
- (e) order any such further relief as it may deem appropriate.¹⁴⁹

129. In its Reply, the Claimant expands upon its claim for compensation (point (b) above), requesting:

- (a) [REDACTED], which includes the main claim in respect of the [REDACTED] Harm, the legal costs in respect of all Harms and pre-award interest for those amounts until end of March 2016, as calculated by Claimant's Damages Expert or, in the alternative, such sum as the Tribunal considers appropriate in light of the Claimant's submissions in section VI [of the Reply];
- (b) pre-award interest for the main claim in respect of the [REDACTED] Harm and the legal costs in respect of all Harms from April 2016 until the date of the award, at the rate of return of [REDACTED] from April 2016 until the date of the award, which will be calculated at the appropriate juncture in this arbitration, or, in the alternative, at such commercial rate the Tribunal may deem appropriate; and
- (c) post-award interest at such commercial rate the Tribunal may deem appropriate.¹⁵⁰

130. In its Post-Hearing Brief, the Claimant requests the Tribunal to:

- (a) declare that Poland has breached the BIT;
- (b) order the Respondent to pay the Claimant compensation of [REDACTED], which includes the pre-award interest until 30 September 2017, as calculated by Claimant's Expert Mr Brian O'Brien, or, in the alternative, such sum as the Tribunal considers appropriate in light of the Claimant's submissions in Section VII [of the Claimant's Post-Hearing Brief];
- (c) order the Respondent to pay the Claimant pre-award interest from 1 October 2017 until the date of the award for the awarded damages, at the rate of return of [REDACTED] or, in the alternative, at such commercial rate the Tribunal may deem appropriate; and [sic]
- (d) order the Respondent to pay the Claimant post-award interest at such commercial rate the Tribunal may deem appropriate;
- (e) order the Respondent to pay the entire costs of this arbitration, including the arbitrator[s'] fees and the fees of the PCA, along with all legal costs incurred by the Claimant; and
- (f) order any such further relief as it may deem appropriate.¹⁵¹

131. In contrast, the Respondent requests the Tribunal to:

- (i) dismiss all the claims submitted by the Claimant, and
- (ii) order Claimant to pay all the costs, disbursements and expenses incurred by Respondent in defending against the claims submitted by Claimant, including, but not limited to, legal,

¹⁴⁸ Statement of Defense, ¶30, referring to Bond Purchase Agreement (C-2), Article 5.1.1.

¹⁴⁹ Notice of Arbitration, ¶107; Statement of Claim, ¶401.

¹⁵⁰ Reply, ¶338.

¹⁵¹ Claimant's Post-Hearing Brief, ¶398.

consulting and witness fees and expenses, travel and administrative expenses, and the costs of the Tribunal.¹⁵²

V. POSITIONS OF THE PARTIES

A. JURISDICTION

132. Dispute resolution by arbitration is provided for in Article IX of the BIT, which states, in relevant part:

ARTICLE IX

Settlement of Disputes Between a Party and an Investor of the Other Party

1. For purposes of this Article, an investment dispute is defined as a dispute involving [...] (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment. A decision of a Party which denies entry if an investment shall not constitute an investment dispute within the meaning of this Article.
2. In the event of an investment dispute between a Party and a national or company of the other Party, the parties to the dispute shall initially seek to resolve the dispute by consultation and negotiation, which may include the use of non-binding, third party procedures. Each Party shall encourage its nationals and companies to resort to local courts, especially for the resolution of disputes relating to administrative actions. [...]
3. (a) At any time after six months from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by conciliation or binding arbitration to the International Centre for the Settlement of Investment Disputes ("Centre") or to the Additional Facility of the Centre or pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL") or pursuant to the arbitration rules of any arbitral institution mutually agree[d] between the parties to the dispute. Once the national or company concerned has so consented, either party to the dispute may institute such proceeding provided:
 - (i) The dispute has not been submitted by the national or company for resolution in accordance with any applicable previously agreed dispute-settlement procedures; and
 - (ii) the national or company concerned has not brought the dispute before the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Party that is a party to the dispute. If the parties disagree over whether conciliation or binding arbitration is the more appropriate procedure to be employed, the opinion of the national or company concerned shall prevail.
- (b) Each Party hereby consents to the submission of an investment dispute for settlement by conciliation or binding arbitration:
 - (i) To the Centre, in the event that the Republic of Poland becomes a party to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States done at Washington, March 18, 1965 ("Convention") and the Regulations and Rules of the Centre, and to the Additional Facility of the Centre, and
 - (ii) to an arbitral tribunal established under the UNCITRAL Rules, as those Rules may be modified by mutual agreement of the parties to the dispute, the appointing authority referenced therein to be Secretary General of the Centre.

¹⁵² Statement of Defense, ¶255; Rejoinder, ¶367; Respondent's Post-Hearing Brief, ¶417.

133. Article I(1) of the BIT sets out the following definitions:

[...]

- (b) “investment” means every kind of investment, in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other party, and includes:
 - (i) tangible and intangible property, including rights, such as mortgages, liens and pledges;
 - (ii) a company or shares of stock, or other interests in a company or interests in the assets thereof;
 - (iii) a claim to money or a claim to performance having economic value, and associated with an investment;
 - (iv) intellectual property which includes, rights relating to: literary and artistic works, including sound recordings, patent rights, industrial designs, semiconductor mask works, trade secrets, and trademarks, service marks, and trade names; and
 - (v) any right conferred by law or contract, and any licenses and permits pursuant to law;

[...]

- (e) “associated activities” are activities associated with an investment, such as the organization, control, operation, maintenance and disposition of companies, branches, agencies, offices, factories or other facilities for the conduct business; the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds including intellectual property rights; the borrowing of funds; the purchase and issuance of equity shares and other securities; and the purchase of foreign exchange;

[...]

- (i) “commercial activity” means activities carried on by nationals or companies of a Party related to the sale or purchase of goods and services and the granting of franchises or rights under license, which are not investments or related activities;

[...]

134. The Respondent argues that the Claimant’s claims fall outside the jurisdiction of the Tribunal because: (1) the Claimant has no investment protected under the BIT; (2) the Claimant has acted in bad faith; and (3) the Tribunal is not competent to review the decisions of domestic courts in this case. The Parties’ arguments in respect of these objections are set out below.

1. Whether the Claimant had protected investments under the BIT

The Respondent’s Position

135. The Respondent submits that the Claimant had no protected investment under the BIT.

136. First, noting that the BIT contains different definitions for the terms “investment”, “associated activities” and “commercial activity”, the Respondent argues that, within the meaning of the BIT, the Claimant did not make an investment in Poland, but only conducted commercial activity.¹⁵³ Accordingly, the Claimant is not entitled to access the BIT dispute settlement mechanism, which is available for investment only.¹⁵⁴

¹⁵³ Statement of Defense, ¶98.

¹⁵⁴ Statement of Defense, ¶¶93-97.

137. Second, the Respondent submits that, because the BIT does not contain “a precise definition” of the term investment (the BIT states that “investment” means “every kind of investment”), it is necessary to take into account the meaning of investment in international law.¹⁵⁵ In this regard, the Respondent argues that the criteria set out in the ICSID case *Salini v. Morocco* are applicable. According to the Respondent, these criteria are: (i) a contribution; (ii) a certain duration; (iii) an element of risk; and (iv) contribution to the economic development of the host State.¹⁵⁶ The Respondent submits that the so-called *Salini* test is relevant even outside the ICSID system and argues that it reflects customary law.¹⁵⁷ It also notes that other tribunals have added further criteria: for example, the tribunal in *Phoenix Action v. The Czech Republic* required that the investment be made in good faith and in accordance with the law of the host State.¹⁵⁸
138. The Respondent submits that, in the present case, the rights that the Claimant identifies as its investments (that is, claims for money to be paid in connection with the Bond Purchase Agreement and rights under the [REDACTED] and [REDACTED] Mortgages) do not meet the “contribution”, “risk” and “duration” criteria.¹⁵⁹ The Respondent also submits that the alleged investments were made in bad faith (see paragraphs 157-165 below) and did not contribute to the economic development of Poland.¹⁶⁰
139. Relying on *Romak v. Uzbekistan* and *Poštová banka v. Greece*, the Respondent argues that the “contribution” criterion requires “the creation of value” to the host State economy.¹⁶¹ In the present case, the Respondent submits that the Claimant’s purchase of Bonds was a mere “financial transaction” that did not encompass a contribution element. According to the Respondent, while the Claimant paid PLN [REDACTED] for the Bonds, none of the cases cited by the Claimant support its assertion that monetary transfers on a standalone basis can meet the “contribution” criterion.¹⁶²

¹⁵⁵ Statement of Defense, ¶100; Rejoinder ¶95.

¹⁵⁶ Statement of Defense, ¶¶100-106, referring to *Salini Costruttori S.p.A. and Italstrade S.p.A v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001 (“*Salini v. Morocco*”) (RA-2), ¶52. See also, Rejoinder, ¶¶95-99.

¹⁵⁷ Rejoinder, ¶¶96-99, referring to *Alps Finance and Trade AG v. The Slovak Republic*, UNCITRAL Arbitration, Award, 5 March 2011 (“*Alps Finance v. Slovakia*”) (CA-50), ¶240.

¹⁵⁸ Statement of Defense, ¶101, referring to *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 (“*Phoenix Action v. Czech Republic*”) (RA-3), ¶114.

¹⁵⁹ Statement of Defense, ¶¶107 and 123-124.

¹⁶⁰ Statement of Defense, ¶124; Rejoinder, ¶132.

¹⁶¹ Statement of Defense, ¶¶108-109, referring to *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. 2007-07, Award, 26 November 2009 (“*Romak v. Uzbekistan*”) (RA-1), ¶¶214-215; *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015 (“*Poštová banka v. Greece*”) (RA-4), ¶361.

¹⁶² Rejoinder, ¶¶120-125.

140. The Respondent also denies that the Claimant's alleged investment meets the "risk" criterion. Again relying on *Romak* and *Poštová banka*, the Respondent submits that for purposes of identifying an investment it is necessary to distinguish between general commercial risk and investment risk. Thus, "an investment risk would be an operational risk," whereas a commercial risk would only cover, *inter alia*, "the risk that one of the parties might default on its obligations,"¹⁶³ which exists in any economic relationship and is not useful for identifying an investment. In the present case, the Respondent argues that the Claimant's purchase of Bonds did not entail any element of operational risk as the Claimant merely "assumed the ordinary commercial risk of the counterparty failing to perform its contractual obligation."¹⁶⁴
141. With regard to the "duration" criterion, the Respondent dismisses the Claimant's characterization of the financing project as "long-term", noting that the Claimant could terminate the Bond Purchase Agreement and accelerate the Bond repayments at any time if [REDACTED] defaulted on payments (which it is precisely what Manchester eventually did).¹⁶⁵
142. Third, the Respondent argues that the Claimant's rights do not fall within any of the categories expressly listed in Article I(1)(b) of the BIT. The Respondent notes that Article I(1)(b)(iii) of the BIT provides that the term "investment" includes a "claim to money or a claim to performance having economic value, and associated with an investment."¹⁶⁶ The Respondent accordingly argues that a "claim to money" can only be qualified as an investment within the meaning of the BIT if there is a prior investment with which that claim is associated. In other words, it is necessary for the Tribunal not only to analyze the wording of the BIT,¹⁶⁷ but also the relationship between the Parties *in toto*.¹⁶⁸
143. In this regard, the Respondent notes that the Claimant was not a [REDACTED] shareholder and had no other interest in the company. The financing by the Claimant of [REDACTED] activities therefore does not qualify as an investment under the BIT.¹⁶⁹ The Respondent also denies that the "debt interest" alleged by the Claimant is an investment under Article I(1) of the BIT as it is a "claim to money" rather than "interest in a company."¹⁷⁰

¹⁶³ Statement of Defense, ¶116.

¹⁶⁴ Statement of Defense, ¶117, referring to *Romak v. Uzbekistan* (RA-1), ¶¶229-230; *Poštová banka v. Greece* (RA-4), ¶¶361, 367 and 369. *See also*, Rejoinder, ¶127.

¹⁶⁵ Rejoinder, ¶¶129-130.

¹⁶⁶ Rejoinder, ¶117 (emphasis added by the Respondent).

¹⁶⁷ Rejoinder, ¶¶114 and 116, referring to *Ambiente Ufficio S.P.A. & others v. Argentina*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013 ("*Ambiente v. Argentina*") (CA-54), ¶462.

¹⁶⁸ Rejoinder, ¶¶105-113.

¹⁶⁹ Rejoinder, ¶¶81-83.

¹⁷⁰ Rejoinder, ¶¶83-85.

144. As to the rights under the [REDACTED] and [REDACTED] Mortgages, the Respondent states that the fact that “mortgages” are listed in Article I(1)(i) as an example of an investment, does not mean that any mortgage is an investment. An analysis has to be carried out to determine whether it is connected with an investment.¹⁷¹ In the present case, the Mortgages were established in connection with the Claimant’s commercial activity and thus do not qualify as an investment.¹⁷²

The Claimant's Position

145. The Claimant submits that its investment in Poland consists of:

- a) In relation to the Bond Purchase Agreement concluded with [REDACTED]
 - (i) The payment of PLN [REDACTED] to [REDACTED] in exchange for the Bonds issued at such face value, as financing for [REDACTED] real estate projects in Poland; and
 - (ii) Claims, arising under the terms of the Bond Purchase Agreement, for the payment of money on presentation of coupons and at maturity of the Bonds, which were crystallised in the Payment Order and acknowledged in the Bankruptcy Proceedings; and
- b) Manchester’s rights arising out of the [REDACTED] and [REDACTED] Mortgages, which were acquired to secure the receivables under the Bond Purchase Agreement.¹⁷³

146. The Claimant further submits that its investment falls within “several of the enumerated categories of investment set out in Article I(1)(b),” as follows:

- a) The Bonds, in conjunction with the terms of the Bond Purchase Agreement, evidence a debt interest in [REDACTED] pursuant to Article I(1)(b)(ii) of the BIT, which would not have arisen but for the purchase of the Bonds;
- b) The Bonds and their coupons constitute “a claim to money” pursuant to Article I(1)(b)(iii) of the BIT. They also constitute a “right (to payment) conferred by contract” pursuant to Article I(1)(b)(v) of the BIT.
- c) The [REDACTED] and [REDACTED] Mortgages, which were acquired to secure the receivables under the Bond Purchase Agreement, are “mortgages” pursuant to Article I(1)(b)(i) of the BIT. The rights arising out of them are a “right conferred by law or contract” pursuant to Article I(1)(b)(v) of the BIT.¹⁷⁴

147. In the alternative, the Claimant submits that its investment also falls within the ordinary meaning of the term “investment”, as used in the phrase preceding the enumeration of specific categories in Article I(1)(b) of the BIT. In this regard, the Claimant argues that the ordinary meaning of the verb “to invest” is “to employ (money) in the purchase of anything from which interest or profit is expected.”¹⁷⁵ Pursuant to the Bond Purchase Agreement, the Claimant purchased the Bonds

¹⁷¹ Statement of Defense, ¶¶122-123; Rejoinder, ¶86.

¹⁷² Rejoinder, ¶87.

¹⁷³ Statement of Claim, ¶216; Reply, ¶83.

¹⁷⁴ Reply, ¶86.

¹⁷⁵ Reply, ¶87, referring to W. Little, *The Shorter Oxford English Dictionary on Historical Principles* (CA-69), p. 1040.

from [REDACTED] at a price of PLN [REDACTED] with the expectation of a return on the Bonds over time. Accordingly, the purchase of the Bonds was an “investment”.¹⁷⁶

148. The Claimant submits that its interpretation of the ordinary meaning of the term “investment” is consistent with the object and purpose of the BIT, which is to stimulate the flow of private capital. The Claimant adds that the Bond Purchase Agreement “provided a flow of private capital into Poland enabling [REDACTED] real estate development in the territory of Poland.”¹⁷⁷
149. The Claimant disputes the Respondent’s use of the *Salini* test, arguing that it is contrary to Article 31 of the *Vienna Convention on the Law of Treaties* (the “VCLT”), which requires that “a treaty should be interpreted in good faith (i) in accordance with its ordinary meaning, (ii) in its context and in the light of the treaty’s object and purpose.”¹⁷⁸
150. The Claimant states that the Respondent is thus importing case law that is not connected with the BIT, but rather with a specific provision in the ICSID Convention. The Claimant considers this methodology to be “misplaced in the context of this arbitration,” given that the ICSID Convention is not applicable to UNCITRAL arbitrations and that Poland is not a party to the ICSID Convention. Furthermore, the Claimant notes that the practice of turning to ICSID case law in non-ICSID cases, as occurred in *Romak v. Uzbekistan*, is “fact-specific” and “exceptional”.¹⁷⁹
151. Alternatively, the Claimant states that, even if the Tribunal were to apply the criteria set out in *Salini*, these criteria would be fulfilled in the present case.
152. With regard to the “contribution” criterion, the Claimant argues that it should be interpreted “in broad terms” and that investment tribunals have “regularly found that monetary transfers constitute a contribution.”¹⁸⁰ Thus, according to the Claimant, the monetary transfer of PLN [REDACTED] for the purchase of Bonds sufficed to satisfy this requirement. The Claimant denies the Respondent’s assertion that the Bond purchase was a “purely commercial” transaction, noting that the Bond Purchase Agreement provided for long-term cooperation and would allow [REDACTED] to issue bonds up to PLN [REDACTED] for the purposes of developing housing and commercial properties.¹⁸¹ Through the Bond Purchase Agreement, the Claimant obtained “a debt

¹⁷⁶ Reply, ¶87(b).

¹⁷⁷ Reply, ¶87(d); Claimant’s Post Hearing Brief, ¶¶81-93.

¹⁷⁸ Reply, ¶89(a), referring to *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. 126/2003, Arbitral Award, 29 March 2005 (“*Petrobart v. Kyrgyzstan*”) (CA-34), pp. 69-70; Vienna Convention on the Law of Treaties, 23 May 1969 (“VCLT”) (CA-58), Article 31.

¹⁷⁹ Reply, ¶89(b) and (c); Claimant’s Post-Hearing Brief, ¶¶94-97.

¹⁸⁰ Reply, ¶93, referring to *Hassan Awdi, Enterprise Business Consultants Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015 (CA-59), ¶¶200-201.

¹⁸¹ Reply, ¶96.

- interest in [REDACTED] specific business activity” and a right to appoint two members to [REDACTED] supervisory board.¹⁸²
153. The Claimant also submits that the “duration” criterion is fulfilled, as the financial relationship between the Claimant and [REDACTED] was “long-term.” Noting that “there is consensus in the case law that a two-year period is a sufficient duration for purposes of the *Salini* test,” the Claimant points out that “each tranche of the Bonds was to be redeemed within two years from the date of issuance.”¹⁸³
154. In relation to the “risk” criterion, the Claimant submits that the “presence of the credit, political and market risks has been recognized as indicative of an investment (and by implication, of investment risk) in other cases.”¹⁸⁴ The Claimant’s venture to provide long-term financing for [REDACTED] real estate projects implied several risks: (i) the credit risk that [REDACTED] would be unable to pay part or all of its interest obligations and that part or none of the capital invested would be returned; (ii) the political risk that the Claimant’s rights as a bondholder would not be recognized by the Polish authorities; (iii) the market risk that the value of [REDACTED] properties might drop; and (iv) interest rate and inflationary risk, namely the risk that the fixed interest rate associated with the Bonds would not compensate for the erosion of the value of the invested capital due to inflation.¹⁸⁵
155. The Claimant argues that a “contribution to the economic development” of the host State may not be required even under the *Salini* test, but states that this criterion is in any event met in the present case, as the financing provided by Manchester enabled [REDACTED] to engage in real estate development in southern Poland, creating jobs and housing infrastructure.¹⁸⁶
156. Finally, the Claimant objects to the Respondent’s description of the Claimant’s activity in Poland as the provision of “financial services” and “a purely commercial activity.”¹⁸⁷ The Claimant argues that, to be a “commercial activity” under Article I(1)(i) of the BIT, an activity must be “related to the sale ... of ... services,” which is not the case here. Thus, the Claimant submits that its investment “was not purely a sale of financial services, but a long-term financial investment

¹⁸² Reply, ¶¶95-97.

¹⁸³ Reply, ¶¶99-100, referring to *Salini v. Morocco* (RA-2), ¶54; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012 (“*Deutsche Bank v. Sri Lanka*”) (CA-63), ¶¶303-304; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006 (“*Jan de Nul v. Egypt*”) (CA-72), ¶¶93-95.

¹⁸⁴ Reply, ¶104, referring to *GEA group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011 (CA-64), ¶152; *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007 (“*Kardassopoulos v. Georgia*”) (CA-16), ¶117.

¹⁸⁵ Reply, ¶103.

¹⁸⁶ Reply, ¶¶106-107.

¹⁸⁷ Reply, ¶¶109-111.

in [REDACTED] based on mutual cooperation.”¹⁸⁸ Moreover, the Claimant contends that the BIT definition of “commercial activity” carves out activities which are themselves investments. Accordingly, since its investment, including the purchase of the Bonds, falls within the definition of “investment” in the BIT, it cannot constitute a “commercial activity”.¹⁸⁹

2. Whether the Claimant acted in bad faith

The Respondent's Position

157. The Respondent submits that the Claimant is not protected under the BIT because it acted in bad faith when establishing and enforcing the [REDACTED] and [REDACTED] Mortgages.
158. Referring to various arbitral awards, the Respondent argues that it is “well established in investment law that in cases where an investor has breached fundamental host state laws or acted in bad faith or in a corrupt manner, protection under an investment treaty should be denied to that investor.”¹⁹⁰ According to the Respondent, the standard of good faith “should be interpreted with reference to the universal standards that have been developed in both domestic and international law,” which require that a party deal “fairly and honestly” and “refrain[] from taking unfair advantage.”¹⁹¹
159. The Respondent submits that the Claimant’s bad faith is evidenced by the following facts:

Claimant agreed that [REDACTED] would establish the Mortgages in favour of Claimant despite being fully aware that (i) the Prospective Buyers had paid the full or a substantial portion of the purchase price for the [REDACTED] and [REDACTED] Apartments, (ii) [REDACTED] had agreed to transfer to the Prospective Buyers the ownership rights to these Apartments without any encumbrances, and (iii) enforcement of the Mortgages would deprive the Prospective Buyers of any rights to the [REDACTED] and [REDACTED] Apartments. Moreover, Claimant was aware that [REDACTED] discouraged the Prospective Buyers from registering their rights to acquire the [REDACTED] and [REDACTED] Apartments in the LMR. This means that in the process to establish the Mortgages Claimant acted unethically and in bad faith and was fully aware and accepted that the establishment and enforcement of the Mortgages would harm the Prospective Buyers.¹⁹²

¹⁸⁸ Reply, ¶116.

¹⁸⁹ Reply, ¶¶116-118.

¹⁹⁰ Statement of Defense, ¶¶137 and 152; Rejoinder, ¶¶145-146. The Respondent makes reference to the following arbitral awards: *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006 (“*World Duty Free v. Kenya*”) (RA-7); *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006 (RA-8); *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela*, Decision on Jurisdiction, 10 June 2010 (RA-25); *Gustav F. W. Hamster GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010 (“*Hamster v. Ghana*”) (RA-12); *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011 (RA-26).

¹⁹¹ Rejoinder, ¶¶153-154, referring to *Phoenix Action v. Czech Republic* (RA-3), ¶107.

¹⁹² Statement of Defense, ¶125.

160. With respect to the latter point, the Respondent notes that Mr. [REDACTED] testified at the hearing that Manchester reviewed the Preliminary Agreements during its due diligence exercise, and that it would not have agreed to invest the full PLN [REDACTED] in [REDACTED] had the Prospective Buyers' claims ranked ahead of its own in the LMR.¹⁹³
161. The Respondent also asserts that in this case the Claimant used a *modus operandi* similar to that of its parent company, [REDACTED], which frequently invests "in sovereign bonds of distressed states or corporations, without considering that [its] exorbitant profits are made at the expense of ordinary people."¹⁹⁴ The Respondent describes several such investments by [REDACTED].¹⁹⁵
162. The Respondent dismisses the Claimant's argument that the Prospective Buyers themselves failed to secure their rights, emphasizing that, under the Non-Registration Clauses in the Preliminary Agreements, they were prevented from entering their rights in the LMR. The Respondent asserts, additionally, that the Preliminary Agreements were standard form contracts, with the terms being presented to the Prospective Buyers on a "take-it-or-leave it" basis. As such, the Respondent views the Prospective Buyers as having been forced to agree that their right to purchase the apartments would not be registered in the LMR.¹⁹⁶
163. The Respondent also asserts that the Prospective Buyers were not informed of the establishment of the Claimant's Mortgages.¹⁹⁷ In the Respondent's view, [REDACTED] and Manchester took advantage of the fact that the Prospective Buyers were mostly consumers who "did not understand the legal complexities and consequences of the Non-Registration Clauses or mortgage law."¹⁹⁸ The Respondent asserts that [REDACTED] and the Claimant "jointly decided to shift the risks to the Prospective Buyers by encumbering their [REDACTED] and [REDACTED] Apartments with mortgages, thus bringing about a situation where the Prospective Buyers involuntarily underwrote a highly risky venture."¹⁹⁹
164. In respect of the Claimant's reliance on the Restructuring Agreement as a sign of its good faith, the Respondent states that it was a "façade" with an "unrealistic" payment schedule offering "no real chance for [REDACTED] to pay off its debt," given that the first payment of PLN [REDACTED] was due only two months after the agreement was entered into.²⁰⁰

¹⁹³ Respondent's Post-Hearing Brief, ¶46; Hearing Transcript (25 September 2017), 152:1-5, 155:22-156:2.

¹⁹⁴ Statement of Defense, ¶¶127-136 and 151; Rejoinder, ¶¶156-157.

¹⁹⁵ Statement of Defense, ¶¶127-136.

¹⁹⁶ Statement of Defense, ¶4; Rejoinder, ¶¶6 and 27, referring to [REDACTED] Witness Statement, ¶¶8-9.

¹⁹⁷ Rejoinder, ¶¶140-142.

¹⁹⁸ Rejoinder, ¶¶9 and 32, referring to [REDACTED] Witness Statement, ¶11. *See also*, Statement of Defense, ¶18.

¹⁹⁹ Statement of Defense, ¶32. *See also*, Rejoinder, ¶¶5 and 49.

²⁰⁰ Rejoinder, ¶¶67-73, referring to Restructuring Agreement (C-20), Article 5(1); Record of the Hearing of

165. The Claimant's conduct, the Respondent concludes, was unethical and contrary to the principle of good faith. Accordingly, the Tribunal should decide that the dispute is not within its jurisdiction.²⁰¹ Alternatively, if the Tribunal considers that the issue of good faith should be examined in connection with the merits, the Respondent requests the Tribunal "to deny Claimant any substantive protection" under the BIT.²⁰²

The Claimant's Position

166. The Claimant maintains that its investment was made in good faith: it "secured its rights, while the Prospective Buyers chose not to do so."²⁰³ In the Claimant's view, "[i]t would be an absurd outcome for the Tribunal to conclude that securing one's rights demonstrates bad faith."²⁰⁴
167. The Claimant further argues that the Respondent's allegations of bad faith are "contrary to the factual record."²⁰⁵ Specifically, the Claimant submits that:

(i) the Prospective Buyers made the majority of payments after ... Manchester's Mortgages were established and Manchester's Mortgages did not make it impossible for ██████████ to transfer the ownership title to the Apartments to Prospective Buyers encumbrance-free in due course; (ii) the Non-Registration Clauses were freely agreed between ██████████ and the Prospective Buyers; and (iii) the Prospective Buyers did not have any property rights in the Apartments.²⁰⁶

168. In respect of the latter point, the Claimant submits that "the Preliminary Agreements did not create a right of ownership of the Apartments or any other property interest in the Apartments."²⁰⁷ It asserts that the Preliminary Agreements constituted only a contractual undertaking by ██████████ to eventually enter into property sale agreements with the Prospective Buyers on the agreed terms.²⁰⁸
169. The Claimant contends that, under Polish law, if a developer goes bankrupt before the conclusion of the property sale agreements, prospective buyers only have monetary claims in bankruptcy proceedings, regardless of whether or not their preliminary agreements have been notarized. The prospective buyers are then able to satisfy their claims on a *pro rata* basis out of the general

Mr. ██████████ case file ref. ██████████ 13 July 2009 (R-43), p. 3; Letter from ██████████ to ██████████ dated 12 September 2008 (R-46); ██████████ Witness Statement, ¶19; Respondent's Post-Hearing Brief, ¶¶69-70.

²⁰¹ Statement of Defense, ¶¶154-155.

²⁰² Rejoinder, ¶¶146-147.

²⁰³ Reply, ¶123.

²⁰⁴ Reply, ¶123.

²⁰⁵ Reply, ¶123.

²⁰⁶ Reply, ¶124.

²⁰⁷ Statement of Claim, ¶31.

²⁰⁸ Statement of Claim, ¶31; Statement of Defense, ¶35.

bankruptcy estate with the same priority as other unsecured creditors.²⁰⁹ In the present case, therefore, the Prospective Buyers did not have a legitimate claim to the Apartments, but only to “contractual claims for the transfer of title to the Apartments in future.”²¹⁰

170. The Claimant adds, in response to the Respondent’s contention that Prospective Buyers were not informed about the establishment of the Claimant’s Mortgages, that the “owner of the real property ha[d] no obligation to inform that they were going to establish a mortgage.”²¹¹ The Claimant points to the Restructuring Agreement as proof of its willingness to act in good faith.²¹²
171. The Claimant also observes that “the Respondent’s allegation of bad faith focuses solely on the establishment and enforcement of the Mortgages,” while “the other components of Manchester’s Investment (Manchester’s payment of PLN [REDACTED] under the Bond Purchase Agreement and its claims to payment of money) are not even tainted by allegations of bad faith.”²¹³
172. The Claimant further remarks that the “conduct that the Respondent alleges constituted Manchester’s bad faith substantially differs from the conduct that investment arbitration tribunals have found to constitute bad faith ...”²¹⁴
173. In any event, the Claimant asserts that making an investment in good faith is not a jurisdictional requirement under the BIT.²¹⁵ The Claimant “does not deny the gravity of the principle of good faith in public international law,” but submits that “the principle cannot be read into the wording of a treaty as an implicit term.”²¹⁶ In this regard, the Claimant notes that the BIT also does not require that the investment shall be made or performed “in accordance with the host State’s laws.”²¹⁷ Moreover, “in none of the cases cited by the Respondent did a tribunal decline jurisdiction solely on account of the investor’s lack of good faith in making its investment.”²¹⁸ In fact, “[m]any investment tribunals, including those cited by the Respondent, have reserved

²⁰⁹ Statement of Claim, ¶33; Statement of Defense, ¶35.

²¹⁰ Reply, ¶¶55-58, referring to Expert Opinion of Professor Swaczyna, ¶¶9-17.

²¹¹ Hearing Transcript (27 September 2017), 342:20-24.

²¹² Reply, ¶78, referring to [REDACTED] Witness Statement, ¶¶49-53.

²¹³ Reply, ¶126; Claimant’s Post-Hearing Brief, ¶106.

²¹⁴ Reply, ¶120(d).

²¹⁵ Reply, ¶120(b); Claimant’s Post-Hearing Brief, ¶¶108-109.

²¹⁶ Reply, ¶128(a), referring to *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010 (CA-70), ¶112.

²¹⁷ Reply, ¶128(a).

²¹⁸ Reply, ¶128(b)-(c).

consideration of alleged breaches of the good faith standard for the merits phase of proceedings.”²¹⁹

174. Finally, the Claimant asserts that the Respondent’s comments on the strategy of [REDACTED] are irrelevant to this case.²²⁰ In any event, the Claimant objects to the Respondent’s characterization of [REDACTED] investment strategy, stating that “investment in distressed debt is by no means [REDACTED] ‘modus operandi’,” as “[REDACTED] employs a trading program that encompasses a wide range of strategies.”²²¹

3. Whether the Tribunal can review decisions of domestic courts

The Respondent's Position

175. According to the Respondent, the Claimant’s claim is “outside the jurisdiction of this Tribunal because the Claimant is requesting a substantial review of the Polish court decisions and a determination of whether these decisions were issued in accordance with Polish law.”²²²
176. The Respondent submits that the Claimant’s request is not in accordance with international law and hence is not covered by the Respondent’s consent to arbitration under Article IX of the BIT.²²³ The Respondent adds that, “if the Tribunal decides that a review of local court decisions falls within its jurisdiction, the Respondent submits that, absent a denial of justice, this review is not encompassed by any BIT standard, particularly the fair and equitable treatment standard.”²²⁴ And in this case, the Claimant has failed to prove a denial of justice (as seen in paragraphs 288-293 below).
177. In support of its view that only a denial of justice can justify a review of domestic judicial decisions, the Respondent asserts that the parties to the BIT, Poland and the U.S.A., clearly intended this to be the case.²²⁵ In the Respondent’s view, the U.S.A. confirmed this intention in its submission in *Eli Lilly v. Canada*.²²⁶

²¹⁹ Reply, ¶¶128(d)-129, referring to *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 (“*Plama v. Bulgaria*”) (RA-11), ¶¶144-146; *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF) 04/6, Award, 16 January 2013 (CA-74), ¶113; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, Final Award, 18 July 2014 (CA-75), ¶1355.

²²⁰ Reply, ¶137.

²²¹ Reply, ¶139, referring to [REDACTED] Witness Statement, ¶¶3, 9 and 10.

²²² Rejoinder, ¶161.

²²³ Rejoinder, ¶161.

²²⁴ Rejoinder, ¶162.

²²⁵ Rejoinder, ¶¶167-174.

²²⁶ *Eli Lilly and Company v. The Government of Canada*, Submission of the United States, UNCITRAL, ICSID

178. Further, the Respondent submits that investment tribunals have confirmed that decisions of domestic courts can breach international law only if a denial of justice has occurred. It relies on *Arif v. Moldova*, where the tribunal stated that arbitral tribunals cannot “put themselves in the shoes of international appellate courts.”²²⁷
179. Additionally, the Respondent contends that international law provides for “a very high threshold” in order for an act to be regarded as a denial of justice, as stated in *Mondev v. United States of America*.²²⁸ The Respondent argues that, contrary to the Claimant’s assertions, the tribunals in *Saipem v. Bangladesh* and *Arif v. Moldova* applied the test for denial of justice.²²⁹
180. The Respondent admits that in one case, *Tatneft v. Ukraine*, the tribunal held that judicial conduct which is arbitrary and unreasonable can breach the FET standard even if it does not amount to a denial of justice, but emphasizes that the tribunal in that case stated that it was “not an appellate court” and concluded that “the mere misapplication of domestic law is not enough to give rise to liability absent some kind of adverse intention.”²³⁰

The Claimant’s Position

181. The Claimant first denies that it is requesting that the Tribunal act as an appellate court or find that the decisions of the Polish courts breached Polish law. Instead, the Claimant states that it:
- claims that acts of [the] Polish judiciary breached Poland’s international obligations under the BIT and customary international law, and in particular that they were arbitrary, discriminatory, resulted in expropriation of Manchester’s Investments and amounted to the denial of justice.²³¹
182. Second, the Claimant submits that it is a settled rule of customary international law that the State is responsible for the acts of all its organs, including the judiciary, and that acts of the judiciary may violate international law and an investment treaty.²³²

Case No. UNCT/14/2, 18 March 2016 (RA-29), ¶¶20-21.

²²⁷ *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013 (“*Arif v. Moldova*”) (CA-7), ¶441.

²²⁸ Rejoinder, ¶¶179-180, referring to *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (“*Mondev v. United States of America*”) (RA-31), ¶127.

²²⁹ Respondent’s Post-Hearing Brief, ¶¶13-14, referring to *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009 (“*Saipem v. Bangladesh*”) (CA-40) and *Arif v. Moldova* (CA-7).

²³⁰ Respondent’s Post-Hearing Brief, ¶16, referring to *OA O Tatneft v. Ukraine*, UNCITRAL, PCA, Award, 29 July 2014 (“*Tatneft v. Ukraine*”) (CA-84), ¶¶474 and 411.

²³¹ Reply, ¶155.

²³² Reply, ¶152(a).

183. Third, the Claimant submits that, in accordance with the BIT and investment treaty case law, “the Tribunal may review the decisions of the Polish courts under treaty standards of protection other than denial of justice.”²³³
184. According to the Claimant, Article II(6) of the BIT refers both to “the standards of treatment required by customary international law,” including the prohibition of denial of justice, and to “specific obligations” such as the FET standard and full protection and security.²³⁴ Accordingly, in the Claimant’s view, the BIT “does not limit its protections to those required under customary international law (such as the prohibition of denial of justice).”²³⁵ The Claimant argues that the phrase “in no case be accorded treatment less than that required by international law” in Article II(6) of the BIT is intended “to set a floor, not a ceiling, in order to avoid a possible interpretation of [the FET and full protection and security standards] below what is required by international law.”²³⁶
185. The Claimant also notes that Article II(7) of the BIT further requires the Contracting Parties to provide effective means of legal recourse for asserting claims and enforcing rights under the BIT and that the BIT does not limit the liability of a State for the acts of its judicial organs. The Claimant concludes that the BIT protection is broader than that traditionally required under international law (such as the prohibition against denial of justice).²³⁷
186. The Claimant rejects the Respondent’s reliance on the U.S.A.’s submission in *Eli Lilly v. Canada*, arguing that a Contracting Party’s declaration in another arbitration does not constitute a binding interpretation of the BIT.²³⁸
187. In addition to its analysis of the BIT, the Claimant cites investment case law: (i) *Arif v. Moldova*, where the tribunal ruled that the decisions of the Moldovan courts invalidating a lease agreement violated the FET standard, without amounting to a denial of justice;²³⁹ (ii) *ATA Construction v. Jordan*, where the tribunal ruled that a judgment of the Jordanian Court of Cassation violated the bilateral investment treaty at hand without finding a denial of justice, due to the Court’s application of a new law retrospectively;²⁴⁰ (iii) *Deutsche Bank v. Sri Lanka*, where the tribunal

²³³ Claimant’s Post-Hearing Brief, ¶9(a).

²³⁴ Claimant’s Post-Hearing Brief, ¶¶11-12.

²³⁵ Claimant’s Post-Hearing Brief, ¶13.

²³⁶ Claimant’s Post-Hearing Brief, ¶14, referring to *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006 (“*Azurix v. Argentina*”) (CA-44), ¶361.

²³⁷ Claimant’s Post-Hearing Brief, ¶¶15-19.

²³⁸ Claimant’s Post-Hearing Brief, ¶15.

²³⁹ *Arif v. Moldova* (CA-7), ¶547 b)-c).

²⁴⁰ *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010 (“*ATA Construction v. Jordan*”) (CA-22), ¶128.

found that an interim order of the Supreme Court breached the FET standard in the form of a due process violation, although a denial of justice was not pleaded;²⁴¹ and (iv) *Tatneft v. Ukraine*, where the tribunal found that a series of decisions issued by the Ukrainian courts invalidating the investor's shareholding in a local company violated the FET standard, but did not meet the higher threshold for a denial of justice.²⁴²

188. The Claimant further submits that the decisions of local courts can amount to expropriation, citing to *Sistem Mühendislik v. Kyrgyz Republic* and *Saipem v. Bangladesh*.²⁴³ The Claimant also argues that the decisions of local courts can breach the effective means, and full protection and security standards. It relies on *White Industries v. India*, as well as *Chevron v. Ecuador*, where the tribunal ruled that "the effective means standard is separate from the denial of justice standard" and that "[a]lthough both standards overlap and are directed at the same potential wrongs, the threshold for finding a breach of the effective means standard is lower than for a denial of justice ..."²⁴⁴

B. ATTRIBUTION

The Claimant's Position

189. The Claimant submits that the Respondent breached its obligations under the BIT through the acts of its courts, the Public Prosecutor, the Bankruptcy Trustee and Parliament.²⁴⁵ According to the Claimant, the acts of all of these entities are attributable to Poland.²⁴⁶
190. In particular, the Claimant submits that the acts of the Bankruptcy Trustee (such as his decision to transfer the Apartments to the Prospective Buyers) are attributable to the Respondent under Articles 4 and 8 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (the "ILC Articles"). Noting that under Article 4(2), an organ of the State includes any person or entity which has that status in accordance with the internal law of that State, the Claimant points out that bankruptcy trustees are specifically identified as State

²⁴¹ *Deutsche Bank v. Sri Lanka* (CA-63), ¶478.

²⁴² *Tatneft v. Ukraine*, (CA-84), ¶¶480-481.

²⁴³ Claimant's Post-Hearing Brief, ¶¶32-33, referring to *Sistem Mühendislik İnşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009 ("*Sistem Mühendislik v. Kyrgyz Republic*") (CA-39), ¶¶117-118; *Saipem v. Bangladesh* (CA-40), ¶¶189-190, 201.

²⁴⁴ Claimant's Post-Hearing Brief, ¶¶37-38, referring to 1. *Chevron Corporation and 2. Texaco Petroleum Corporation v. The Republic of Ecuador*, PCA Case No. 2007-02, Partial Award on the Merits, 30 March 2010 ("*Chevron v. Ecuador*") (CA-41), ¶¶242 and 244; *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award, 30 November 2011 ("*White Industries v. India*") (CA-49). The Claimant also refers to *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Final Award, 12 November 2010 (CA-43), ¶273.

²⁴⁵ Whereas the Claimant initially claimed that Poland had also breached the BIT through the acts of individual MPs (Statement of Claim, ¶226), it clarified in its Post-Hearing Brief, ¶120 that "it does not claim that the acts of various MPs are also attributable to Poland ..."

²⁴⁶ Statement of Claim, ¶226. See also, Reply, ¶164.

officials in Article 115 of the Polish Criminal Code.²⁴⁷ Additionally, the Claimant submits that the Bankruptcy Trustee acted under the control of the Polish State, as required for attribution under Article 8 of the ILC Articles, given that he: (i) was appointed by a Judge-Commissioner (a member of the Bankruptcy Court); (ii) reports to the Judge-Commissioner; and (iii) is supervised by the Judge-Commissioner, who may dismiss him if he does not perform his obligations.²⁴⁸

191. Additionally, the Claimant submits that the acts of the Bankruptcy Court (such as the approval of the transfer of the Apartments to the Prospective Buyers) are attributable to the Respondent because the Bankruptcy Court is an organ of the State. In the Claimant's view, whether or not a specific act is taken within the exercise of the Court's judicial function is therefore irrelevant.²⁴⁹

The Respondent's Position

192. The Respondent submits that the acts of the Bankruptcy Trustee are not attributable to the Respondent.²⁵⁰ First, the Respondent argues that the Bankruptcy Trustee is not an organ of the Respondent under Polish law, as required for attribution under Article 4 of the ILC Articles.²⁵¹ According to the Respondent, a bankruptcy official takes steps on his or her own behalf or for the bankrupt entity, and is liable for any damage as a consequence of undue performance of his or her duties, as was held by the [REDACTED] Court of Appeal.²⁵² The Polish Criminal Code, upon which the Claimant relies to classify the Bankruptcy Trustee as a public official, cannot be used as a valid reference, as its definitions depart from the general understanding of terms and are usually much wider.²⁵³ The Bankruptcy Trustee should also not be considered a *de facto* organ of the Respondent as the Trustee is autonomous and the Judge-Commissioner exercises only "general supervision" over the Trustee's activities.²⁵⁴
193. Further, the Respondent asserts that attribution under Article 8 of the ILC Articles "requires the instructions, direction or control to relate to the conduct which is said to have breached the international obligation."²⁵⁵ In the present case, the conduct of the Bankruptcy Trustee cannot be

²⁴⁷ Reply, ¶170(a), referring to Polish Criminal Code (C-197).

²⁴⁸ Claimant's Post-Hearing Brief, ¶¶122-124.

²⁴⁹ Claimant's Post-Hearing Brief, ¶¶125-126.

²⁵⁰ Statement of Defense, ¶88; Rejoinder, ¶190.

²⁵¹ Rejoinder, ¶¶193-194, referring to *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 (RA-35), ¶190.

²⁵² Rejoinder, ¶201, referring to Judgment of the Court of Appeal in [REDACTED] I Civil Department, case file no. [REDACTED] 3 March 2011 (R-49).

²⁵³ Rejoinder, ¶¶191 and 201.

²⁵⁴ Rejoinder, ¶¶195-200, referring to *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL, Final Award, 12 June 2012 (RA-6), ¶128; *Jan de Nul v. Egypt* (RA-34), ¶¶161-162.

²⁵⁵ Rejoinder, ¶206.

attributed to the Respondent under Article 8, as the Claimant has “failed to establish that Respondent gave any specific instruction to or specifically controlled the Bankruptcy Trustee in connection with the transfer of the Apartments to the Prospective Buyers.”²⁵⁶

194. The Respondent also submits that the Judge-Commissioner’s approval of the transfer of the Apartments to the Prospective Buyers was not a judicial decision. In the Respondent’s view, the Judge-Commissioner was acting in lieu of a creditors’ committee (which was not set up in ██████████ Bankruptcy Proceedings).²⁵⁷ The Respondent avers that had the Judge-Commissioner denied the approval, the Prospective Buyers, believing that such transfer was in their interest, would have likely appointed the creditors’ committee and obtained consent.²⁵⁸

C. ALLEGED BREACHES OF THE BIT

195. The Claimant claims that the Respondent breached (1) the FET standard under Article II(6) of the BIT, including the prohibition on denial of justice, and (2) several other BIT obligations.

1. The fair and equitable treatment standard

196. Article II(6) of the BIT provides:

ARTICLE II

Treatment of Investment

[...]

6. Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law. Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investments. Each Party shall observe any obligation it may have entered into with regard to investments.²⁵⁹

197. The Claimant contends that the Respondent breached the FET standard under Article II(6) of the BIT by: (i) failing to maintain a stable legal and business framework for Manchester’s investment; (ii) frustrating Manchester’s legitimate expectations; (iii) acting arbitrarily; (iv) discriminating against Manchester; (v) acting inconsistently; and (vi) denying justice to Manchester. The Parties’ arguments in respect of each of these contentions are summarized in turn below. As a preliminary matter, however, the Tribunal set out the Parties’ general

²⁵⁶ Rejoinder, ¶207.

²⁵⁷ Statement of Defense, ¶89; Rejoinder, ¶¶190 and 208-209, referring to Bankruptcy and Reorganisation Law, 28 February 1982, Journal of Laws of 9 April 2003, as amended (R-19), Articles 205(1) and 213; Respondent’s Post-Hearing Brief, ¶¶18-22.

²⁵⁸ Hearing Transcript (25 September 2017), 115:18-22.

²⁵⁹ Emphasis added.

submissions regarding the FET standard (with the exception of their discussion of the relationship between the FET standard and denial of justice, which is set out at paragraphs 175-188 above).

(a) The general scope of the standard

The Claimant's Position

198. The Claimant notes that the FET standard is not defined in the BIT. Referring to investment case law and legal commentators, the Claimant submits that the FET standard encompasses several legal principles, including: (i) protection of investor's legitimate expectations; (ii) transparency; (iii) compliance with contractual obligations; (iv) procedural propriety and due process; (v) good faith; (vi) freedom from coercion and harassment; (vi) prohibition of discrimination, arbitrary treatment, inconsistent State conduct and denial of justice; and (vii) obligation to maintain a stable legal and business framework.²⁶⁰ According to the Claimant, breach of any of these principles entails a breach of the FET standard.²⁶¹ An act need not be "egregious and shocking or involve bad faith" to amount to a violation of the FET standard.²⁶² Rather, the FET standard "ensures that the foreign investor is not unjustly treated, in light of all the circumstances of the case."²⁶³

199. The Claimant further submits that the FET standard is an embodiment of the rule of law, which has been described as consisting of equality, generality, proportionality and (legal) certainty.²⁶⁴ Although the State is free to introduce new laws and regulations and to establish its own public policies,²⁶⁵ the rule of law requires that Governments act in accordance with the rules that have been previously fixed and announced, to make it possible for investors to "foresee how authority

²⁶⁰ Statement of Claim, ¶¶229-232, referring to R. Dolzer, C. Schreuer, *Principles of International Investment Law*, 2d Edition (2012) (CA-52), pp. 143 *et seq*; *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005 ("*CMS Gas Transmission Company v. Argentina*") (CA-5), ¶290; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 ("*MTD Equity v. Chile*") (CA-6), ¶163 *et seq*; *Arif v. Moldova* (CA-7), ¶¶436 and 538; *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 (CA-11), ¶99.

²⁶¹ Statement of Claim, ¶232.

²⁶² Statement of Claim, ¶233, referring to *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003 ("*Tecmed v. Mexico*") (CA-8), ¶153; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 ("*Duke Energy v. Ecuador*") (CA-9), ¶341; *CMS Gas Transmission Company v. Argentina* (CA-5), ¶280.

²⁶³ Statement of Claim, ¶233, referring to *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 ("*Bayindir Insaat v. Pakistan*") (CA-14), ¶181; *National Grid plc v. The Argentine Republic*, UNCITRAL, Award, 3 November 2008 ("*National Grid v. Argentina*") (CA-17), ¶168.

²⁶⁴ Statement of Claim, ¶234, referring to A. Diehl, *The Core Standard of International Investment Protection*, International Arbitration Law Library, Vol. 26 (Kluwer) ("A. Diehl Commentary I") (CA-10), pp. 335-336.

²⁶⁵ Statement of Claim, ¶236.

will use its coercive powers.”²⁶⁶ The Claimant thus concludes that it “is inconsistent with the requirements of the FET standard for a State to act upon public pressure to achieve short-term goals” and that, where that happens, the judicial branch should “be a guardian of the rule of law and ensure that the law is applied fairly and not arbitrarily.”²⁶⁷

200. The Claimant further submits that even if the Tribunal were to find that the Respondent’s individual acts did not breach the FET standard, these acts *cumulatively* amount to a breach.²⁶⁸

The Respondent’s Position

201. The Respondent submits that, “since the FET standard under Article II(6) of the BIT requires treatment not less than the treatment accorded by international law, Claimant has the burden of proving that international law recognises that the FET standard encompasses all the elements listed by Claimant.”²⁶⁹ The Respondent argues that the Claimant “has failed to submit any evidence of state practice or *opinio juris* to confirm that international law recognises the alleged elements of the FET standard listed by Claimant, particularly that the FET standard encompasses a prohibition on inconsistent state conduct, the obligation to maintain a stable legal and business framework and the protection of investors’ legitimate expectations.”²⁷⁰
202. The Respondent views the Claimant’s allegations that the Respondent breached the FET standard as being “baseless”.²⁷¹ For the avoidance of doubt, the Respondent additionally submits that because Poland did not breach the FET standard, there was also “no composite effect of any alleged measures that cumulatively breached the FET standard.”²⁷²

(b) Stable legal and business framework

The Claimant’s Position

203. The Claimant submits that, pursuant to the FET standard, the host State must maintain a stable legal and business framework, such that “[a]ny changes to the host State’s legislation, and even the host State’s policies, after the investment is made, [are] done fairly, consistently and predictably.”²⁷³ In the present case, the Claimant is of the view that the Respondent impermissibly

²⁶⁶ Statement of Claim, ¶234, referring to A. Diehl Commentary I (CA-10), p. 329 (citing to F. A. Hayek); *Tecmed v. Mexico* (CA-8), ¶154.

²⁶⁷ Statement of Claim, ¶236, referring to A. Diehl Commentary I (CA-10), p. 330.

²⁶⁸ Statement of Claim, ¶341; Reply, ¶¶171 and 283; Claimant’s Post-Hearing Brief, ¶299.

²⁶⁹ Rejoinder, ¶211.

²⁷⁰ Rejoinder, ¶211.

²⁷¹ Statement of Defense, ¶169.

²⁷² Rejoinder, ¶345.

²⁷³ Statement of Claim, ¶238, referring to *Tecmed v. Mexico* (CA-8), ¶154; *Bayindir Insaat v. Pakistan* (CA-14),

changed the legal framework by adopting the Apartment Buyer Protection Act, and by retroactively applying the new policies underlying that Act to Manchester's Mortgages.

204. The Claimant asserts that, when its Mortgages were registered in 2006 and 2007, the Polish legal framework provided that:

- (a) Mortgages could be taken over real property on which development activities were being carried out;
- (b) Provided they were duly registered with the LMR, mortgages taken over real property were enforceable against that property;
- (c) In a bankruptcy scenario, the secured claims of mortgagees would enjoy priority over the claims of the mortgagor's unsecured creditors;
- (d) Mortgages established first in time would enjoy priority over mortgages established later in time;
- (e) Mortgages of the same seniority in a bankruptcy proceedings would be equal before the law; and
- (f) Clients of real estate developers would not be subject to preferential treatment in those developers' bankruptcy proceedings.²⁷⁴

205. However, according to the Claimant, when [REDACTED] went bankrupt and the [REDACTED] Court of Appeal refused to invalidate the [REDACTED] Mortgage, the Respondent yielded to public pressure and changed its policy.²⁷⁵ Specifically, on 16 September 2011, it adopted the Apartment Buyer Protection Act, which: (i) prioritized developers' clients in bankruptcy proceedings and treated them as a "super privileged" class of creditors; (ii) envisaged the transfer of apartments from the developers' bankruptcy estates to their clients; and (iii) was unclear and did not expressly regulate how mortgagees would be satisfied upon the transfer of apartments to developers' clients.²⁷⁶

206. In the Claimant's view, the evidence shows that the Prospective Buyers and, in particular, the [REDACTED] Association, lobbied for protection to the Polish authorities and had a "significant impact" on the adoption of the Apartment Buyer Protection Act.²⁷⁷ The Claimant also maintains that the Act was passed too quickly, following inadequate public consultation,²⁷⁸ and was "heavily criticised" both before and after it was enacted.²⁷⁹

^{¶177}; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 (CA-15), ¶7.79.

²⁷⁴ Statement of Claim, ¶240.

²⁷⁵ Statement of Claim, ¶¶241-245.

²⁷⁶ Statement of Claim, ¶242. See also Hearing Transcript (25 September 2017), 43: 8-14; Claimant's Post-Hearing Brief, ¶266.

²⁷⁷ Reply, ¶¶256-261.

²⁷⁸ Reply, ¶262; Statement of Claim, ¶144, referring to M. Żuralska (ed.), *Analysis of the legislative activity of the 6th term of the Sejm*, Warsaw 2012 (excerpts) (C-138).

²⁷⁹ Statement of Claim, ¶139, referring to L. Bosek, "Legal Opinion Regarding Compliance of the Draft Act on the Protection of the Rights of the Buyers of Apartments and Single-Family Houses (paper 4349) with the Constitution of the Republic of Poland, in particular with regard to the Equality of the Parties (the Bankrupt's Creditors) in the

207. The Claimant further asserts that the policies underlying the Apartment Buyer Protection Act were applied retroactively to Manchester's Mortgages, in particular in the [REDACTED] Supreme Court Ruling, the Supreme Court ruling in the [REDACTED] case, and when the Bankruptcy Court approved the transfer of the Apartments to the Prospective Buyers.²⁸⁰ According to the Claimant, the Respondent thus used the new policies "to shift the financial burden of rescuing the Prospective Buyers to a foreign investor – Manchester."²⁸¹
208. Finally, the Claimant illustrates the lack of a stable legal framework by asserting that the provisions of the Apartment Buyer Protection Act privileging developers' clients over other creditors were annulled in May 2015, after the needs of the Prospective Buyers had been satisfied.²⁸²

The Respondent's Position

209. The Respondent submits that it provided the Claimant with a stable legal and business framework as required by international law.²⁸³
210. First, the Respondent submits that the Apartment Buyer Protection Act was adopted by the Polish Parliament in a transparent and public legislative process,²⁸⁴ within the average time for legislative proposals submitted by MPs of the governing party.²⁸⁵

event of a Declaration of the Developer's Bankruptcy (Art. 38 of the Draft Act), *Sejm's Analyses Office*, 25 July 2011 (excerpts) (C-132), pp. 1 and 4; A. Machowska, "Provisions on Bankruptcy of a Property Developer in the Act on the Protection of Rights of Buyers of Apartments or Single-Family Houses," *Law Review* No. 24/2011 (excerpts) (C-127), pp. 1-2. *See also*, Reply, ¶263, referring to Opinion of the National Judicial Council on the Apartment Buyer Protection Act, 22 July 2011 (C-133); Opinion of the Polish Government on the Apartment Buyer Protection Act, 31 August 2011 (excerpts) (C-134); Opinion of the Polish Employers Association on the Apartment Buyer Protection Act, 22 July 2011 (excerpts) (C-135); R. Adamus, "Protection of Buyers of Apartments and Single-family Houses in Separate Bankruptcy Proceedings Against Developers," *Rejent*, year 23, No. 12 (272), December 2013 (excerpts) (C-140); R. Adamus, "Claims Secured with a Mortgage in Property Developer Bankruptcy," (excerpts) (C-141); M. Porzycki, "Developer Bankruptcy Regulations – Purported Improvement of the Situation of Residential Buyers," *Legal Gazette* 2012 No. 7 (excerpts) (C-142); R. Strzelczyk (ed.), *Protection of the rights of buyers of apartments and single-family houses (the property development act). Commentary*, C.H. Beck, 2013, commentary on Art. 36 (excerpts) (C-143); S. Moreu-Žak, Act on Property Development vs. new mortgages, 31 May 2012, Portal of Wardyński i Wspólnicy (C-144); A. Burzak, M. Okoń and P. Pałka, *Act on the Protection of Rights of Buyers of Apartments or Single-Family Houses*, Commentary, Lex 2012 (excerpts) (C-159); Transcript of the Parliamentary Committee Meetings concerning the Apartment Buyer Protection Act (C-212).

²⁸⁰ Statement of Claim, ¶¶209-210; Reply, ¶¶264-265 and 266-268; Claimant's Post-Hearing Brief, ¶267.

²⁸¹ Statement of Claim, ¶¶243-244; Reply, ¶265, referring to Act on the Protection of Rights of Buyers of Apartments or Single-Family Houses dated 16 September 2011 (C-137), Article 37; R. Strzelczyk (ed.), *Protection of the rights of buyers of apartments and single-family houses (the property development act). Commentary*, C.H. Beck, 2013, Commentary on Art. 36 (excerpts) (C-143), p. 2.

²⁸² Reply, ¶¶255 and 266-268; Claimant's Post-Hearing Brief, ¶¶268-269.

²⁸³ Statement of Defense, ¶170; Rejoinder, ¶311.

²⁸⁴ Statement of Defense, ¶171.

²⁸⁵ Statement of Defense, ¶¶53-54.

211. Second, the Respondent denies that the public authorities yielded to pressure exerted by the Prospective Buyers in adopting the Apartment Buyer Protection Act.²⁸⁶ In the Respondent's view, the purpose of the Act was to "address the general problem of the growing wave of insolvencies among Polish developers, which threatened to impact ... thousands of families ..."²⁸⁷ To the extent [REDACTED] case was specifically mentioned by MPs, the Respondent asserts that this was only because it was considered typical of many similar cases nationwide.²⁸⁸ Thus, in the Respondent's view, the Claimant has overstated the involvement and impact of the lobbying of the Prospective Buyers and the [REDACTED] Association.²⁸⁹
212. Third, the Respondent asserts that the Apartment Buyer Protection Act had no impact on the validity of the [REDACTED] Mortgage or any of the Claimant's rights, as the [REDACTED] Supreme Court Ruling explicitly noted that the Act had not yet come into force and that "it had based its judgment on laws which were in force on the date the judgment was passed."²⁹⁰
213. Fourth, and finally, the Respondent submits that there was no connection between the adoption of the Apartment Buyer Protection Act and the transfer of the Apartments to the Prospective Buyers, as the transfer was based entirely on the law applicable to the Bankruptcy Proceedings, and reflected the legal situation created by the decisions of the Polish courts regarding the [REDACTED] and [REDACTED] Mortgages.²⁹¹

(c) Legitimate expectations

The Claimant's Position

214. The Claimant submits that an investor's legitimate expectations are based on both "the host State's legal framework and any undertakings and representations made explicitly or implicitly by the host State at the time when the investment was made" (upon which the investor relied when deciding to pursue its investment).²⁹² The Claimant further submits that, "if the State assures an investor that the rights it has acquired under national law are valid and enforceable

²⁸⁶ Statement of Defense, ¶¶170-171; Rejoinder, ¶¶319 and 321.

²⁸⁷ Statement of Defense, ¶171; Rejoinder, ¶320.

²⁸⁸ Rejoinder, ¶322, referring to Zbigniew Wassermann Interpellation (C-103).

²⁸⁹ Rejoinder, ¶¶316-318, 323.

²⁹⁰ Statement of Defense, ¶172; Rejoinder, ¶325, referring to [REDACTED] Supreme Court Ruling (C-73), p. 14.

²⁹¹ Statement of Defense, ¶173; Rejoinder, ¶326, referring to Letter from Judge-Commissioner, 18 June 2014 (R-51); Hearing Transcript (25 September 2017), 124:24-25 and 125:1.

²⁹² Statement of Claim, ¶¶247-248, referring to R. Dolzer, C. Schreuer, *Principles of International Investment Law*, 2nd Edition (2012) (CA-52), p. 145; *Duke Energy v. Ecuador* (CA-9), ¶340; Claimant's Post-Hearing Brief, ¶247.

and it subsequently invalidates such rights, this frustrates the investor's legitimate expectations."²⁹³

215. Here, the Claimant contends that it entered into the Bond Purchase Agreement in November 2006 in the expectation that the receivables under that agreement would be secured by mortgages over [REDACTED] assets.²⁹⁴ This expectation was "wholly consistent with the then-existing Polish legal framework relating to mortgages."²⁹⁵ Further, the Registry Court's subsequent registration of the Mortgages constituted a representation that the Polish State recognized the validity of the Mortgages and considered them to be enforceable as a matter of law. It thus "gave rise to a legitimate expectation that should [REDACTED] fail to redeem the Bonds ... Manchester's claims could be satisfied from the proceeds of the sale of the [REDACTED] and [REDACTED] properties, with priority over [REDACTED] other existing, unsecured creditors ..."²⁹⁶
216. According to the Claimant, this legitimate expectation was frustrated when the Respondent took the following actions preventing enforcement of the [REDACTED] and [REDACTED] Mortgages: (i) the issuance of the First, Second and Third Injunctions prohibiting the enforcement of the [REDACTED] Mortgage; (ii) the issuance of the Prosecutor's Order prohibiting the sale of the [REDACTED] Property; (iii) the enactment of the Apartment Buyer Protection Act; (iv) the issuance of the [REDACTED] Supreme Court Ruling invalidating the [REDACTED] Mortgage; (v) the issuance of the Supreme Court ruling in the [REDACTED] case, which found that the [REDACTED] Mortgage was unenforceable; and (vi) the approval by the Bankruptcy Court of the Bankruptcy Trustee's request for the transfer of the Apartments to the Prospective Buyers.²⁹⁷
217. The Claimant explains that it does not contend that Polish courts are completely precluded from invalidating a mortgage registered in the LMR. Rather, the Claimant's position is that a registered mortgage can only be invalidated in exceptional circumstances and on the basis of information that was not known to the registry at the time of the registration.²⁹⁸ In this regard, the Claimant stresses that, at the time the [REDACTED] and [REDACTED] Mortgages were registered, the Registry Court was aware that the Prospective Buyers had unsecured claims towards [REDACTED]²⁹⁹

²⁹³ Statement of Claim, ¶248, referring to *Kardassopoulos v. Georgia* (CA-16), ¶192; *Arif v. Moldova* (CA-7), ¶547.

²⁹⁴ Statement of Claim, ¶249; Claimant's Post-Hearing Brief, ¶¶249-251.

²⁹⁵ Statement of Claim, ¶250.

²⁹⁶ Statement of Claim, ¶58. See also, J. Ignatowicz and K. Stefaniuk, "Property Law", *Lexis Nexis 2009* (C-149), Chapter XIV Mortgage (excerpts), pp. 7-8; Act on Land Register and Mortgages, 6 July 1982, consolidated text of 11 October 2012 (C-151), Article 65(1). See also, Claimant's Post-Hearing Brief, ¶¶252-255, 259.

²⁹⁷ Statement of Claim, ¶253; Reply, ¶¶272-273.

²⁹⁸ Reply, ¶231.

²⁹⁹ Reply, ¶232, referring to Expert Opinion of Professor Swaczyna, ¶42.

218. The Claimant further emphasizes that, although Article 58 of the Polish Civil Code, which provides for the invalidity of acts contrary to PSC, already existed at the time when its Mortgages were established, the Claimant could not have known that the [REDACTED] Supreme Court Ruling would rely on that provision to invalidate the [REDACTED] Mortgage. In this regard, the Claimant asserts that, since “the fall of the post war communist regime up until the decision of the Supreme Court in the [REDACTED] Case, the Supreme Court had never invalidated a mortgage on the basis of the [PSC].”³⁰⁰ The Claimant thus contends that “[e]ither the Supreme Court was wrong in referring to [PSC] when invalidating the [REDACTED] Mortgage, or the Registry Court should have refused to register the [REDACTED] Mortgage in the first place. In any event, Poland acted inconsistently with respect to the [REDACTED] Mortgage and frustrated Manchester’s expectations.”³⁰¹

The Respondent’s Position

219. The Respondent submits that the Claimant could not have had any legitimate expectations that the Mortgages would be enforceable.³⁰²
220. First, the Respondent submits that international tribunals have affirmed that investors’ expectations are protected only if they are reasonable and well-founded.³⁰³ The Respondent refers to *Duke Energy v. Ecuador* for the proposition that, when building up expectations, investors must look at the bigger picture and take into account the social and cultural conditions in the host State.³⁰⁴ In light of these requirements, the Respondent contends that the Claimant could not have had any legitimate expectations, because it “was aware that the establishment and enforcement of the [REDACTED] and [REDACTED] Mortgages, which would cause harm to several hundred families, were unethical and against the moral values which are embodied in the [PSC].”³⁰⁵
221. Second, the Respondent argues that the Claimant cannot ground its alleged expectations on the fact that the [REDACTED] and [REDACTED] Mortgages were registered in the LMR because, under Polish law, registration does not validate or legitimize a mortgage established contrary to the law. A right registered in the LMR is only “presumptively valid” and can be challenged by third

³⁰⁰ Hearing Transcript (25 September 2017), 30: 1-5 and 240:23-25; Statement of Claim, ¶277; Reply, ¶16 and ¶271.

³⁰¹ Claimant’s Post-Hearing Brief, ¶260.

³⁰² Statement of Defense, ¶¶174 and 176; Rejoinder, ¶¶328-329.

³⁰³ Statement of Defense, ¶¶175-176, referring to *International Thunderbird Gaming Corporation v. The United Mexican States* (“*International Thunderbird v. Mexico*”), UNCITRAL (NAFTA), Final Award, 26 January 2006 (RA-19), ¶147. See also, Rejoinder, ¶330; Hearing Transcript (25 September 2017), 97:8-10.

³⁰⁴ Statement of Defense, ¶177, referring to *Duke Energy v. Ecuador* (CA-9), ¶340.

³⁰⁵ Statement of Defense, ¶179; Rejoinder, ¶330.

parties.³⁰⁶ The Respondent contends that it is not “unusual” for the registration of mortgages or other property rights to be later overturned by the courts. Further, the Respondent asserts that the Claimant’s investment in [REDACTED] through the transfer of money under the Bond Purchase Agreement in November 2006, was made before the mortgage deed for the [REDACTED] property was signed in January 2007. Consequently, the Claimant could not have had any legitimate expectation that by transferring money to [REDACTED] it had made a secure investment.³⁰⁷

222. Third, the Respondent avers that the Registry Court had no power to conduct evidentiary proceedings to determine whether the Mortgages complied with PSC.³⁰⁸ The Respondent explains that when examining an entry, the Registry Court only reviews the application and supporting documents – if these do not give rise to doubt, the Court makes the entry as applied for. In contrast, in proceedings addressing the question of validity of an entry in a register, the court making the assessment is able to examine circumstances that go beyond those considered when the entry was made.³⁰⁹ Thus, in the [REDACTED] Supreme Court Ruling, the Supreme Court took into account various circumstances that had not been known to the Registry Court and which were irrelevant for the purpose of registration.³¹⁰ Accordingly, there is no inconsistency between the LMR registration and the [REDACTED] Supreme Court Ruling.³¹¹

(d) Arbitrary actions

223. The Claimant submits that the Respondent subjected its investment to arbitrary and unreasonable treatment through the following actions: (i) the establishment of and failure to annul the Compulsory Mortgages; (ii) the issuance of the Prosecutor’s Order; (iii) the issuance of the [REDACTED] Supreme Court Ruling; (iv) the issuance of inconsistent judicial decisions; and (v) the transfer of the Apartments to the Prospective Buyers. The Parties’ arguments regarding each of these actions are summarized in turn below.

³⁰⁶ Statement of Defense, ¶180; Rejoinder, ¶331; Respondent’s Post-Hearing Brief, ¶197, referring to Hearing Transcript (27 September 2017), 352:6-15.

³⁰⁷ Respondent’s Post-Hearing Brief, ¶¶200-202. *See also*, Statement of Defense, ¶¶228-229; Rejoinder, ¶279.

³⁰⁸ Rejoinder, ¶¶280-290.

³⁰⁹ Statement of Defense, ¶¶231-232.

³¹⁰ Rejoinder, ¶¶284-287. According to the Respondent, the application to the Registry Court would not have shown whether: (i) the Preliminary Agreements had been signed “by natural persons (consumers) or by entrepreneurs”; (ii) the Apartments were for residential or commercial purposes; (iii) the Prospective Buyers were “prohibited” by [REDACTED] from registering their rights in the LMR; and (iv) the Prospective Buyers had been informed that [REDACTED] was to burden the Apartments with mortgages.

³¹¹ Respondent’s Post-Hearing Brief, ¶¶203-207, referring to Hearing Transcript (27 September 2017), 352:16-25; 353:1-3.

(i) *The Compulsory Mortgages*

The Claimant's Position

224. The Claimant recalls that the Cracow Regional Court first established the Compulsory Mortgages in favour of some of the Prospective Buyers in the context of the Preliminary Agreement Enforcement Proceedings, before the beginning of the Bankruptcy Proceedings. After the Preliminary Agreement Enforcement Proceedings were discontinued, the Supreme Court issued a decision upholding the Compulsory Mortgages.
225. In this respect, the Claimant argues, first, that the decision of the [REDACTED] Regional Court was “highly unusual, as under Polish law, mortgages can secure only monetary claims,”³¹² whereas the Compulsory Mortgages were granted to secure the Prospective Buyers’ non-monetary claims in the Preliminary Agreement Enforcement Proceeding (i.e., claims for the transfer of the Apartments).³¹³ The Claimant relies in this respect on the opinion of its expert on Polish law, Professor Swaczyna.³¹⁴
226. Second, the Claimant argues that the Compulsory Mortgages were granted by way of interim relief and should therefore have been cancelled by operation of law upon the discontinuation of the proceedings in which they were granted.³¹⁵ Accordingly, in upholding the Compulsory Mortgages, the Supreme Court breached Polish law, “engaged in judicial activism” and acted arbitrarily.³¹⁶

The Respondent's Position

227. The Respondent replies, relying on its experts on Polish law, Professors [REDACTED] and [REDACTED]
[REDACTED]
[REDACTED]³¹⁷

³¹² Statement of Claim, ¶261; Reply, ¶178(a), referring to Expert Opinion of Professor Swaczyna, ¶¶50-52; Hearing Transcript (27 September 2017), 356:10-358:24.

³¹³ Statement of Claim, ¶261; Reply, ¶178(a), referring to Report of the Bankruptcy Trustee (C-46), pp. 1-2, which provides in relevant part: “[i]t is security for a claim against [REDACTED] the object of which was to be an obligation to make a declaration of will establishing separate ownership title to an apartment no. 82 in building A, located in [REDACTED] on [REDACTED]...”

³¹⁴ Claimant's Post-Hearing Brief, ¶241(a). See also, Hearing Transcript (27 September 2017), 358:13-24.

³¹⁵ Reply, ¶178(b), referring to Supreme Court of Poland, case file ref. III CZP 2/10, 28 April 2010 (C-44), p. 2; Polish Code of Civil Procedure (C-163), Article 744.

³¹⁶ Reply, ¶179; Claimant's Post-Hearing Brief, ¶241.

³¹⁷ Rejoinder, ¶220, referring to Expert Opinion of Professor [REDACTED] dated 13 October 2016 ([REDACTED] ¶¶115-118; Expert Opinion of Professor [REDACTED] dated 7 October 2016 ([REDACTED] ¶¶69 and 71.

228. In any event, the Respondent submits that the Prospective [REDACTED] Buyers pursued both monetary and non-monetary claims in the Preliminary Agreement Enforcement Proceedings: they requested the transfer of the Apartments, as well as compensation.³¹⁸ The Compulsory Mortgages were thus granted for these hybrid claims.³¹⁹ The Respondent submits that the Claimant's expert, Professor Swaczyna, confirmed at the hearing that 61.5% of the Compulsory Mortgages secured monetary claims.³²⁰
229. Further, the Respondent maintains that the Supreme Court decision regarding the Compulsory Mortgages was in accordance with Polish law and was not arbitrary. In the Respondent's view, the decision is "well-reasoned and rational," as "[t]he Court gave a detailed explanation of its reasons and concluded that, in accordance with the teleological interpretation of Article 774 of the [CCP] in connection with the provisions of the Bankruptcy Act, certain interim injunctions survive after the opening of bankruptcy proceedings."³²¹
230. Finally, the Respondent contends that the Claimant's characterization of the Supreme Court's decision as "uphold[ing] the Compulsory Mortgages" is misleading, given that the Supreme Court "was not asked to hear the case of the Prospective Buyers' Compulsory Mortgages, but to rule on an abstract legal issue submitted to it by the Court of Appeal in [REDACTED]." Accordingly, the Respondent contends that the Supreme Court decision "was issued without any regard to the Prospective Buyers' situation."³²²

(ii) *The Prosecutor's Order*

The Claimant's Position

231. Recalling that the Prosecutor's Order prohibited the sale of the [REDACTED] Property pending a criminal investigation of certain representatives of [REDACTED], the Claimant submits that it was "wholly unclear why it was necessary to maintain the legal status of the [REDACTED] Property in order to investigate alleged criminal liability."³²³ Accordingly, the Prosecutor's Order, "can ... only be characterised as arbitrary."³²⁴

³¹⁸ Hearing Transcript (27 September 2017), 361:9-23.

³¹⁹ Rejoinder, ¶¶217-219, referring to Decision for Granting a Guarantee before Initiating the Proceedings, case file ref. [REDACTED] 6 February 2009 (R-50); Report of the Bankruptcy Trustee dated 22 December 2010 (R-46), Point 19.

³²⁰ Respondent's Post-Hearing Brief, ¶214, referring to Hearing Transcript (27 December 2017), 363:3-15.

³²¹ Statement of Defense, ¶189. *See also*, Rejoinder, ¶¶223-225 and 245-254; Hearing Transcript (25 September 2017), 109:11-22.

³²² Rejoinder, ¶221.

³²³ Statement of Claim, ¶265.

³²⁴ Statement of Claim, ¶265.

232. The Claimant further submits that, although the Order was later quashed by the courts, “it remains arbitrary and can entail the State’s responsibility.”³²⁵

The Respondent's Position

233. The Respondent submits that it is well-settled and has been affirmed by investment tribunals and academic writings that a State can breach international law only by “a final and binding measure that is not or cannot be remedied upon appeal.”³²⁶
234. The Respondent also disagrees with the Claimant’s allegation that the Prosecutor’s Order was arbitrary.³²⁷

(iii) The [REDACTED] Supreme Court Ruling

The Claimant's Position

235. According to the Claimant, the [REDACTED] Supreme Court Ruling, which invalidated the [REDACTED] Mortgage as being contrary to PSC, was “based on discretion”, “arbitrary”, in violation of the “rule of law”, and sought to favour the Prospective Buyers.³²⁸ The Claimant argues that “amidst vocal support by influential MPs and the [REDACTED] Prosecutor,”³²⁹ the Supreme Court retroactively applied the underlying policies of the Apartment Buyer Protection Act by “resort[ing] to a new application of an archaic provision of Polish law” that “legal acts contrary to the [PSC] are invalid.”³³⁰ The Claimant contends that the [REDACTED] Supreme Court Ruling “shift[ed] the burden” of Poland’s failure to protect developers’ clients to the Claimant alone.³³¹
236. Relying on its second Polish law expert, Professor Sadurski, the Claimant states that the concept of PSC is “a remnant of the post-war Communist legal regime,”³³² but today should be understood as void of any ideological connotations. According to the Claimant, it does not license judges to apply their own moral preferences, but only values generally accepted in society, common to

³²⁵ Statement of Claim, ¶266; Reply, ¶182, referring to A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, Chapter 6, Kluwer Law International, 2009 (CA-51).

³²⁶ Statement of Defense, ¶192, referring to J. Paulsson, *Denial of Justice in International Law*, Cambridge 2005 (RA-13), p. 100; *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008 (RA-21), ¶76. See also, Rejoinder, ¶226.

³²⁷ Statement of Defense, ¶192; Rejoinder, ¶229.

³²⁸ Statement of Claim, ¶¶267, 270 and 295, referring to *ATA Construction v. Jordan* (CA-22), ¶¶62 and 128.

³²⁹ Statement of Claim, ¶270.

³³⁰ Statement of Claim, ¶¶268-269, 272 and 292-296, referring to [REDACTED] Supreme Court Ruling (C-73), p. 15.

³³¹ Hearing Transcript (25 December 2017), 54:14-55:8.

³³² Statement of Claim, ¶274; Reply, ¶189, referring to Expert Opinion of Professor Wojciech Sadurski dated 5 July 2016 (“Expert Opinion of Professor Sadurski”), ¶25.

European culture.³³³ To comply with the rule of law, PSC must be understood objectively, applied uniformly and strictly, and not in the exercise of law-making powers.³³⁴

237. Additionally, the Claimant submits that the Supreme Court has previously stated that PSC shall only be invoked as a basis to invalidate legal acts in “exceptional” circumstances and shall not be applied “arbitrarily or frivolously”.³³⁵ By invalidating the [REDACTED] Mortgage with reference to PSC, the Claimant argues, the Supreme Court ruled against its own legal precedent, as circumstances “were not exceptional”.³³⁶ The Claimant further argues that the [REDACTED] Supreme Court Ruling did not apply generally accepted values common to the European tradition, but “parochial, idiosyncratic and own preferences favoring local creditors and discriminating a foreign investor.”³³⁷ The ruling thus reflected “an evident bias”, creating a situation where the Prospective Buyers came to enjoy an even higher level of legal protection than was envisaged in the Apartment Buyer Protection Act.³³⁸ The Claimant further submits that the Respondent did not adhere to the conditions for invocation and application of PSC as determined by the Constitutional Tribunal in 2000.³³⁹
238. The Claimant observes that the decision of the Supreme Court characterized [REDACTED] conduct in entering into the Non-Registration Clauses with the Prospective Buyers as “dishonest” and concluded that the [REDACTED] Mortgage was “one of the planned results of the dishonest conduct of [REDACTED] with [Manchester] being aware of that dishonesty.”³⁴⁰ The Court implied that Manchester knowingly sought to take advantage of its position of priority over the Prospective [REDACTED] Buyers, and ruled that it would be “inappropriate to burden” those buyers with the

³³³ Reply, ¶¶187-191, referring to Expert Opinion of Professor Sadurski; Constitutional Tribunal of Poland, SK 5/99, 17 October 2000 (Attachment 5 of the Expert Opinion of Professor Sadurski). *See also*, Statement of Claim, ¶274, referring to M. Safjan, *Civil Law – General Part, Private Law System*, Vol. I, C.H. Beck 2007 (excerpts) (C-154), pp. 2-5.

³³⁴ Reply, ¶¶191(c) and 193, referring to Expert Opinion of Professor Sadurski, ¶¶31 and 38.

³³⁵ Statement of Claim, ¶275, referring to [REDACTED] Supreme Court Ruling (C-81), p. 5; Supreme Court of Poland, case file ref. I PKN 55/96, 7 January 1997 (C-155). *See also*, Reply, ¶¶197-199, referring to the Statistics of the Supreme Court Jurisprudence concerning “principles of social co-existence” (C-200); [REDACTED] Court of Appeal, case file ref. [REDACTED] 25 February 2004 (C-201); Supreme Court of Poland, case file ref. II CK 742/04, 23 June 2005 (C-202); Supreme Court of Poland, case file ref. IV CK 162/05, 13 October 2005 (C-203); Supreme Court of Poland, case file ref. II CK 297/05, 8 December 2005 (R-32); Supreme Court of Poland, case file ref. II CK 378/05, 26 January 2006 (R-33); Supreme Court of Poland, case file ref. IV CSK 478/07, 18 March 2008 (C-204); Supreme Court of Poland, case file ref. II CK 692/04, 14 June 2005 (C-205); Expert Opinion of Professor Sadurski, ¶31.

³³⁶ Statement of Claim, ¶278. *See also*, Hearing Transcript (26 September 2017), 297:9-18.

³³⁷ Reply, ¶194; *See also* Claimant’s Post-Hearing Brief, ¶¶224-236.

³³⁸ Statement of Claim, ¶278; Claimant’s Post-Hearing Brief, ¶¶218-223.

³³⁹ Reply, ¶191, referring to Expert Opinion of Professor Sadurski; Constitutional Tribunal of Poland, SK 5/99, 17 October 2000 (Attachment 5 of the Expert Opinion of Professor Sadurski).

³⁴⁰ Statement of Claim, ¶279(a).

full risk of failure of the [REDACTED] development.³⁴¹ This reasoning, the Claimant argues, was “economically absurd and irrational” for the reasons set forth below.³⁴²

239. First, the Claimant highlights that the economic purpose of a mortgage is to prioritize one creditor over another. The mere existence of a mortgage is not *a priori* evidence of bad faith. Similarly, the existence of unsecured creditors, “who willingly agreed to remain unsecured and thus exposed to the risk of subordination, does not make entering into a mortgage an act of bad faith.”³⁴³ The Claimant also underlines that the Non-Registration Clauses were a standard market practice at the time.³⁴⁴ In light of these factors, the Claimant asserts that it is “impossible” to understand why the Supreme Court concluded that [REDACTED] acted “dishonest[ly]” and how it could imply that the Claimant was wrong to secure its rights with the [REDACTED] Mortgage.³⁴⁵
240. Second, the Claimant submits that it is “wholly irrelevant” whether the Claimant was aware of the existence and content of the Preliminary Agreements, since these agreements did not create property rights to the [REDACTED] Apartments. The Claimant asserts that the Supreme Court expected the Claimant (a financier) to disregard its own legitimate interest in securing rights *via* mortgages (a permissible measure under Polish law and a common practice) in favour of the interests of the unsecured Prospective Buyers. Professor Sadurski confirms that such “moral heroism” (or “moral altruism”) is not an element of public morality in free societies, or of PSC.³⁴⁶
241. Third, the Claimant points out that, in invalidating the [REDACTED] Mortgage, the Supreme Court took into account events subsequent to the grant of the Mortgages (*i.e.*, [REDACTED] default as a result of an allegedly excessive and risky business). The Claimant maintains, however, that these subsequent events were unforeseeable at the time of the grant of the Mortgages and so should not have been considered.³⁴⁷ The Claimant denies the Respondent’s assertion that [REDACTED] was not in a strong financial position at the time (see paragraph 119 above).³⁴⁸ In any event, the Claimant submits that even risky or excessive business activities cannot in and of themselves be considered to be dishonest or contradictory to PSC.³⁴⁹

³⁴¹ Statement of Claim, ¶279, referring to [REDACTED] Supreme Court Ruling (C-73), pp. 14 and 16-17. *See also*, Reply, ¶¶200-202.

³⁴² Statement of Claim, ¶280.

³⁴³ Statement of Claim, ¶¶281-282, referring to J. Bardach, B. Leśnodorski and M. Pietrzak, *The History of Polish Governance and Law*, Lexis Nexis 2009 (excerpts) (C-161), p. 2. *See also*, Reply, ¶207.

³⁴⁴ Reply, ¶204; Hearing Transcript (25 September 2017), 31:17-18.

³⁴⁵ Statement of Claim, ¶283.

³⁴⁶ Reply, ¶¶205-207, referring to Expert Opinion of Professor Sadurski, ¶¶70-71, 110 and 117.

³⁴⁷ Statement of Claim, ¶288.

³⁴⁸ Reply, ¶208.

³⁴⁹ Reply, ¶209, referring to Expert Opinion of Professor Sadurski, ¶125.

242. Finally, the Claimant asserts that the Supreme Court made an “egregious procedural error” by departing from the Court of Appeal’s factual findings that: (i) “there was no evidence of an agreement between [REDACTED] and Manchester seeking to prevent the satisfaction of the Prospective Buyers’ claims”; and (ii) “there was no evidence of base behaviour or of a conspiracy by [REDACTED] and Manchester aimed at harming the Prospective Buyers.”³⁵⁰ The Claimant alleges that instead of accepting the factual findings of the Court of Appeal, the Supreme Court made new findings that: (i) [REDACTED] was “dishonest”, and Manchester was aware of this dishonesty; (ii) [REDACTED] business activity was “careless”, “irresponsible” and “ill-considered”; and (iii) [REDACTED] permitted Manchester “to take the initiative” by proposing to increase the price of flats for the Prospective Buyers.³⁵¹ According to the Claimant, the Supreme Court had no authority to make new factual findings and, by doing so, failed to accord Manchester’s investment due process.³⁵²

The Respondent’s Position

243. The Respondent maintains that the [REDACTED] Supreme Court Ruling was adopted in accordance with both due process and Polish law. The Respondent thus asserts that PSC are “an overriding principle in Polish contract law” embodied in the general duty of acting in good faith, which imposes a duty on contracting parties to deal with each other honestly and fairly, so as not to violate the rights of the other party or any third party.³⁵³ The Respondent opposes the Claimant’s allegation that PSC are “archaic”, observing that they have formed the basis of “several hundred judgments and decisions” of Polish courts and can even be found as part of the international legal order.³⁵⁴ The Respondent asserts that “one in every 20 awards rendered by Polish courts refers to [PSC].”³⁵⁵ It adds that PSC are an expression of the European heritage and culture and of generally accepted social values.³⁵⁶

³⁵⁰ Claimant’s Post-Hearing Brief, ¶131.

³⁵¹ Claimant’s Post-Hearing Brief, ¶¶136-145.

³⁵² Claimant’s Post-Hearing Brief, ¶¶127, 147-148. *See also*, Hearing Transcript (26 September 2017), 306: 9-20; 314:8-16.

³⁵³ Statement of Defense, ¶¶199-200 and 204, referring to [REDACTED] Supreme Court Ruling (C-81), p. 6. *See also*, Rejoinder, ¶236, referring to Expert Opinion of Professor [REDACTED] ¶23.

³⁵⁴ Statement of Defense, ¶¶200, 203-205 and 213, referring to *Phoenix Action v. Czech Republic* (RA-3), ¶109; *World Duty Free v. Kenya* (RA-7), ¶¶161-179. As an example, the Respondent further refers to multiple Polish courts’ decisions issued between 24 February 2004 and 18 March 2008, in which PSC were discussed and applied, namely [REDACTED] Court of Appeal, case file ref. I ACa 1141/03, 25 February 2004 (R-28); Supreme Court of Poland, case file ref. II CK 692/04, 14 June 2005 (R-29); Supreme Court of Poland, case file ref. II CK 742/04, 23 June 2005 (R-30); Supreme Court of Poland, case file ref. IV CK 162/05, 13 October 2005 (R-31).

³⁵⁵ Hearing Transcript (25 September 2017), 107:1-8.

³⁵⁶ Statement of Defense, ¶¶200-201, referring to M. Saffjan, *Civil Law – General Part, Private Law System*, Vol. I, C.H. Beck 2007 (excerpts) (C-154), pp. 4-6; [REDACTED] Supreme Court Ruling (C-80). *See also*, Rejoinder, ¶236,

244. The Respondent contends that the Supreme Court's application of PSC to the [REDACTED] Mortgage was based on rational considerations. The Court carefully examined the facts of the case and found that the Claimant had acted dishonestly and unethically towards the Prospective Buyers. In particular, the Claimant knew that [REDACTED] did not allow the Prospective Buyers to register their rights under the Preliminary Agreements in the LMR.³⁵⁷ The Supreme Court accordingly found that the Claimant knowingly accepted that, in the event of default by [REDACTED] in purchasing back its bonds, the Prospective Buyers would be harmed.³⁵⁸ The Respondent then notes that Professor [REDACTED]

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245. The Respondent denies that the Supreme Court was politically influenced in making its ruling,³⁶¹ and further denies that the Supreme Court retroactively applied the underlying policies of the Apartment Buyer Protection Act.³⁶² The Respondent explains that there is a consistent practice of taking into account the fundamental purpose of new legislation when applying old legislation, that no provision of the Apartment Buyer Protection Act was cited, and that the only purpose of referring to it was to show that the moral norms underlying the Court's decision had also "won the legislator's approval."³⁶³ The Respondent describes the Supreme Court's reasoning as follows:

The Supreme Court concluded that if the circumstances of a case so require, particularly if a dishonest developer goes bankrupt and the buyers have already paid him a substantial amount of money, it is the duty of the courts to seek to ensure an appropriate level of legal protection for the buyers of apartments. The Supreme Court observed that "the need for such protection also arises from relevant constitutional norms (Art. 64 sec. 2 and Art. 76 of the Constitution)." The Court stressed, however, that protection should be sought "within the framework of existing system of laws which are in force at the time of passing the ruling (Art. 58 § 2, Art. 3531 of the Civil Code)."³⁶⁴

referring to Expert Opinion of Professor [REDACTED] ¶23. See also Respondent's Post-Hearing Brief, ¶¶87-101.

³⁵⁷ Statement of Defense, ¶¶208-209, referring to [REDACTED] Supreme Court Ruling (C-73), pp. 16-17.

³⁵⁸ Statement of Defense, ¶¶208-209, referring to [REDACTED] Supreme Court Ruling (C-73), pp. 16-17.

³⁵⁹ Rejoinder, ¶247, referring to Expert Opinion of Professor [REDACTED], ¶¶43-44; Respondent's Post-Hearing Brief, ¶¶80-86.

³⁶⁰ Respondent's Post-Hearing Brief, ¶¶114-115, referring to Expert Opinion of Professor [REDACTED], ¶¶43-44; Hearing Transcript (27 September 2017), 382:2-21.

³⁶¹ Statement of Defense, ¶196.

³⁶² Statement of Defense, ¶¶198-206; Rejoinder, ¶¶255-257, referring to Expert Opinion of Professor [REDACTED] ¶58.

³⁶³ Respondent's Post-Hearing Brief, ¶¶120-124.

³⁶⁴ Statement of Defense, ¶216; Respondent's Post-Hearing Brief, ¶¶102-105.

246. The Respondent further explains that the Constitution of Poland contains provisions to protect the housing needs of citizens.³⁶⁵ One of these provisions is Article 75(1), which states:

Public authorities shall pursue policies conducive to satisfying the housing needs of citizens, in particular combating homelessness, promoting the development of low-income housing and supporting activities aimed at acquisition of a home by each citizen.³⁶⁶

247. Professor [REDACTED]
[REDACTED]³⁶⁷

248. The Respondent submits that the Claimant's suggestion that the Supreme Court demanded that Manchester should have exhibited "moral altruism" toward the Prospective Buyers³⁶⁸ demonstrates a cynical and merciless approach to the interest and rights of other people. The Respondent notes that it is well-established that the law accords special protection to consumers as weaker parties.³⁶⁹

249. Further, the Respondent argues that the Supreme Court did not take any subsequent events (such as [REDACTED] bankruptcy) into account when assessing the Claimant's actions. According to the Respondent, [REDACTED] lack of strong financial standing was evident at the time the Mortgages were given by [REDACTED] to Manchester (see paragraph 121 above).³⁷⁰

250. Finally, with respect to the Claimant's argument that the Supreme Court departed from the Court of Appeal's factual findings and made new factual findings (resulting in "egregious procedural error"), the Respondent agrees that the findings of the Court of Appeal were binding on the Supreme Court pursuant to Article 398(2) of the Polish Civil Code.³⁷¹ However, its expert on Polish law, Mr. [REDACTED] explained at the hearing that [REDACTED]

[REDACTED]³⁷²

Mr. [REDACTED] indicated that [REDACTED]

[REDACTED]³⁷³ [REDACTED]

[REDACTED]

³⁶⁵ Rejoinder, ¶241, referring to Expert Opinion of Professor [REDACTED] ¶39.

³⁶⁶ Respondent's Post-Hearing Brief, ¶106, referring to Constitution of Poland, Article 75(1) (C-164).

³⁶⁷ Respondent's Post-Hearing Brief, ¶107, referring to Hearing Transcript (27 September 2017), 379:19-25; 380:1-6.

³⁶⁸ Hearing Transcript (25 September 2017), 108:23-25.

³⁶⁹ Rejoinder, ¶¶249-251, referring to Expert Opinion of Professor [REDACTED] ¶¶51 and 57.

³⁷⁰ Statement of Defense, ¶210.

³⁷¹ Statement of Defense, ¶68, referring to Polish Code of Civil Procedure (R-15), Article 398 §2; Hearing Transcript (27 September 2017), 418:23-25.

³⁷² Hearing Transcript (27 September 2017), 418:25; 419:1-4.

³⁷³ Hearing Transcript (27 September 2017), 419:5-8.

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(iv) *The allegedly inconsistent court rulings*

The Claimant's Position

251. The Claimant submits that lack of clarity and consistency in the legal system may result in arbitrariness, even unintentionally.³⁷⁵ In the present case, the Claimant asserts that the Polish courts rendered inconsistent rulings in respect of the [REDACTED] Mortgage on the one hand and the [REDACTED] and [REDACTED] Mortgages on the other.³⁷⁶
252. With respect to the [REDACTED] Mortgage, the Claimant thus asserts that, while the Supreme Court invalidated the [REDACTED] Mortgage, in the [REDACTED] and [REDACTED] cases it found that the [REDACTED] Mortgage was valid, “notwithstanding that both of these mortgages were established in the same circumstances,” under the same notarial deed.³⁷⁷ The Claimant emphasizes that the Court of Appeal made the same factual findings in respect of both Mortgages: (i) that Manchester did not aim to harm the Prospective Buyers; (ii) that Manchester provided financing to [REDACTED] or [REDACTED] further investments; and (iii) that [REDACTED]
[REDACTED]³⁷⁸
253. The Claimant further submits that it is not only the Supreme Court’s finding in respect of the validity of the Mortgages that was different, but also its approach to the factual findings of the Court of Appeal. While in the [REDACTED] and [REDACTED] cases the Supreme Court considered itself bound by the Court of Appeal’s factual findings, it disregarded them in its decision regarding the [REDACTED] Mortgage.³⁷⁹
254. The Claimants’ arguments concerning the inconsistency between the judicial treatment of the [REDACTED] and [REDACTED] Mortgages are summarized in the section on discrimination at paragraphs 265-271 below.

³⁷⁴ Hearing Transcript (27 September 2017), 422:22-25.

³⁷⁵ Statement of Claim, ¶298.

³⁷⁶ Statement of Claim, ¶299.

³⁷⁷ Reply, ¶234. *See also*, Statement of Claim, ¶¶300-302; Claimant’s Post-Hearing Brief, ¶¶202, 210.

³⁷⁸ Claimant’s Post-Hearing Brief, ¶¶203-207.

³⁷⁹ Claimant’s Post-Hearing Brief, ¶¶203-207.

The Respondent's Position

255. The Respondent submits that the [REDACTED] Supreme Court Ruling and the Supreme Court decisions in the [REDACTED] and [REDACTED] cases were consistent.³⁸⁰
256. Thus, in both the [REDACTED] Case and the [REDACTED] case, the Supreme Court arrived at the same conclusion: that the establishment or enforcement of the mortgages against the Prospective Buyers was unethical and contrary to the social norms embodied in PSC.³⁸¹ Specifically, the Supreme Court found the [REDACTED] Mortgage to be invalid because it contradicted PSC under Article 58(2) of the Civil Code, and similarly found that Manchester's request to enforce the [REDACTED] Mortgage was an "abuse of law under Article 5 of the Polish Civil Code as it violated the [PSC]."³⁸² While the Supreme Court abstained from passing judgment on the validity of the [REDACTED] Mortgage under Article 58(2) of the Civil Code, this was "only for procedural reasons," as the Court of Appeal had made factual findings by which the Supreme Court was bound.³⁸³ In the Respondent's view, the slightly different conclusions of the Supreme Court were justified by the fact that it was presented with different sets of facts in the two cases on which to give a legal opinion and accordingly took a "harsher" view of [REDACTED] activity in the ruling regarding the [REDACTED] Mortgage.³⁸⁴
257. The Respondent further submits that while in the [REDACTED] case, the Supreme Court declined to declare the [REDACTED] Mortgage over [REDACTED] apartment to be invalid, it did so because certain key facts established by the lower courts in the [REDACTED] case were different than in the [REDACTED] Case.³⁸⁵ In particular, [REDACTED] was not able to prove "the harmful purpose of the [REDACTED] Mortgage, the transfer of the investment risk or the privileging of the Claimant..."³⁸⁶ Additionally, [REDACTED] unlike the Prospective [REDACTED] Buyers, was not a consumer.³⁸⁷
258. The Respondent's arguments regarding the consistency of the judicial decisions regarding the [REDACTED] and [REDACTED] Mortgages are set out in the section on discrimination at paragraphs 273-276 below.

³⁸⁰ Respondent's Post-Hearing Brief, ¶¶152-153.

³⁸¹ Statement of Defense, ¶219.

³⁸² Respondent's Post-Hearing Brief, ¶154.

³⁸³ Rejoinder, ¶¶294-296; Statement of Defense, ¶220, referring to Polish Code of Civil Procedure (R-15), Article 398(2); Respondent's Post-Hearing Brief, ¶159.

³⁸⁴ Respondent's Post-Hearing Brief, ¶¶165-166.

³⁸⁵ Respondent's Post-Hearing Brief, ¶¶167-170.

³⁸⁶ Respondent's Post-Hearing Brief, ¶168(a).

³⁸⁷ Respondent's Post-Hearing Brief, ¶168(b).

(v) *The transfer of the Apartments to the Prospective Buyers*

The Claimant's Position

259. The Claimant contends that the Bankruptcy Court's approval of the transfer of the Apartments to the Prospective Buyers was "arbitrary" because it lacked "any rational economic considerations."³⁸⁸ The transfer reduced [REDACTED] bankruptcy estate. It therefore ran against the legal standards underlying bankruptcy proceedings, "which should be conducted in the interest of all creditors, not the few arbitrarily chosen by the Bankruptcy Court."³⁸⁹
260. The Claimant contests the Respondent's explanation that the Bankruptcy Trustee had to take into account the "human context" and the complexity that would have been involved in evicting the occupants of the Apartments.³⁹⁰ The Claimant argues that the building had not yet been "handed over for use" and so any occupation would have been illegal.³⁹¹ The Claimant also argues that even if illegal occupation had taken place, the eviction process could have been completed in time to sell the Apartments.³⁹² The Claimant adds that, "had Poland indeed acted with the intention of helping the Prospective Buyers meet their housing needs, it would not have approved the transfer of commercial premises to the Prospective Buyers or the transfer of units to commercial companies, at other creditors' costs."³⁹³

The Respondent's Position

261. The Respondent defends the rationality of transferring the Apartments to the Prospective Buyers. First, the Respondent asserts that multiple attempts to sell the [REDACTED] Property in the Bankruptcy Proceedings (at successively lower asking prices) had been unsuccessful. On this basis, the Respondent argues that it would have been "devoid of any sense" to continue to try and sell the [REDACTED] property.³⁹⁴ Moreover, even if the [REDACTED] property had eventually been

³⁸⁸ Statement of Claim, ¶306; Claimant's Post-Hearing Brief, ¶237.

³⁸⁹ Statement of Claim, ¶¶307-308.

³⁹⁰ Reply, ¶219. *See also*, Claimant's Post-Hearing Brief, ¶238.

³⁹¹ Reply, ¶220(b), referring to [REDACTED] Valuation (C-50), p. 4; Provisions of the Act of 7 July 1994 – Building Law (excerpts) (C-206), Article 55. *See also*, Claimant's Post-Hearing Brief, ¶¶238-239.

³⁹² Reply, ¶220(c), referring to Statement of Claim, ¶89.

³⁹³ Claimant's Post-Hearing Brief, ¶239.

³⁹⁴ Rejoinder, ¶¶261-264, referring to Letter from Judge-Commissioner, 18 June 2014 (R-51); Application of the Bankruptcy Trustee regarding Transfer of the Apartments, 22 April 2014 (R-52); Resolution of the Judge-Commissioner, 27 May 2013 (R-53); Resolution of the Judge-Commissioner, 30 July 2013 (R-54); Minutes from an Open Session concerning Decision on Tender, 21 March 2014 (R-55); Minutes from the Opening of Tenders, 27 March 2014 (R-56).

sold, the Respondent argues, “the likely purchase price would not have been sufficient to satisfy all the secured creditors, let alone unsecured creditors such as Manchester.”³⁹⁵

262. For this reason, the Respondent also submits that transferring ownership of the [REDACTED] Apartments would not have entailed a loss to the bankruptcy estate.³⁹⁶ In the Respondent’s view, the estate in fact benefitted from the transfer as it meant that “169 of the 172 secured creditors [the Prospective Buyers] had been satisfied,” bringing [REDACTED] total debt down by approximately PLN [REDACTED].³⁹⁷
263. As to the Claimant’s suggestion that the Prospective Buyers ought to have made additional payments to the bankruptcy estate in return for the transferred Apartments, the Respondent states that, considering that at the time of the transfer the [REDACTED] Apartments “were below the standard agreed in the Preliminary Agreement,” such argument is “ill-founded and ignores the circumstances of the case.”³⁹⁸ The Respondent notes that the Prospective Buyers who had not paid the full amount of the Purchase Price were obliged to pay the remaining price to the [REDACTED] Association, which in due course undertook to finish the construction of the [REDACTED] Property.³⁹⁹
264. Finally, the Respondent states that the Claimant is wrong to imply that the Bankruptcy Trustee should have evicted the Prospective Buyers. The Respondent asserts that “eviction was not an option” because it had not been finally decided whether the [REDACTED] Property would be liquidated through sale or by performance of the Preliminary Agreements.⁴⁰⁰ In addition, the Bankruptcy Trustee was not under any obligation to evict the Prospective Buyers from the [REDACTED] Property. The Respondent notes that it is common in bankruptcy proceedings for evictions to be left for the purchaser to conduct as it: (i) enables the bankruptcy estate to avoid the costs of eviction and enforcement; (ii) decreases the time in which liquidation can take place; and (iii) allows an amicable solution to be found between the purchaser and the residents.⁴⁰¹ Moreover, the Respondent posits that evicting the Prospective Buyers would have caused “bad press” and would have buried any chance of selling the property.⁴⁰²

³⁹⁵ Rejoinder, ¶264, referring to Minutes from an Open Session concerning Decision on Tender, 21 March 2014 (R-55).

³⁹⁶ Rejoinder, ¶¶265-266.

³⁹⁷ Rejoinder, ¶¶266-267; Hearing Transcript (25 September 2017), 113:8-17.

³⁹⁸ Rejoinder, ¶¶269-270; Respondent’s Post-Hearing Brief, ¶¶186-189.

³⁹⁹ Rejoinder, ¶271, referring to Letter from the Residents’ Association of the [REDACTED] Property regarding the Value of Construction Work, 4 October 2016 (R-57).

⁴⁰⁰ Rejoinder, ¶275.

⁴⁰¹ Rejoinder, ¶275.

⁴⁰² Rejoinder, ¶276; Respondent’s Post-Hearing Brief, ¶¶190-191.

(e) Discrimination

The Claimant's Position

265. The Claimant submits that “it was subjected to discriminatory treatment by the Respondent, given the treatment accorded to [REDACTED] a financial institution controlled by the Polish State.”⁴⁰³ Relying on the definition contained in *Saluka v. Czech Republic*, the Claimant submits that a State’s conduct is considered discriminatory “if (i) similar cases are (ii) treated differently (iii) and without reasonable justification.”⁴⁰⁴
266. The Claimant asserts that Manchester and [REDACTED] are comparable entities that were objectively in similar situations, as they were both lenders that provided financing to [REDACTED] to enable it to pursue its development activities. Both secured their loans through mortgages over the [REDACTED] Property, which were registered in the LMR by the Registry Court.⁴⁰⁵
267. Notwithstanding their “like situations”, the Claimant contends that Manchester and [REDACTED] were treated differently by the Polish courts. The circumstances invoked in the [REDACTED] Supreme Court Ruling for invalidating the [REDACTED] Mortgage were equally present in the case of the [REDACTED] Mortgage, yet that mortgage was not found to be in breach of PSC and was not invalidated.⁴⁰⁶ In particular, both Manchester and [REDACTED] were aware that [REDACTED] had unsecured creditors, both were aware of the Non-Registration Clauses, and in both cases the risk of [REDACTED] activity fell more strongly on the Prospective Buyers than on the secured lenders.⁴⁰⁷ The Claimant thus contends that although courts may “change their minds” and reverse themselves in a later decision, the reasoning in the two Supreme Court decisions regarding the [REDACTED] and [REDACTED] Mortgages “does not reveal a change of view following further reflection or more informative advocacy but simply a contrived difference in result ... explained by a willingness to disadvantage the foreign investor, Manchester, but not the Polish State-controlled bank.”⁴⁰⁸
268. The Claimant dismisses the Respondent’s argument that the [REDACTED] Mortgage was different in that it was established in connection with a credit facility extended for the purposes of purchasing the

⁴⁰³ Statement of Claim, ¶309; Hearing Transcript (25 September 2017), 21:7-9.

⁴⁰⁴ Statement of Claim, ¶311, referring to *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 (“*Saluka v. Czech Republic*”) (CA-23), ¶313; *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award, 16 May 2012 (CA-24), ¶262.

⁴⁰⁵ Statement of Claim, ¶¶314-316; Reply, ¶¶244-245 and 247.

⁴⁰⁶ Statement of Claim, ¶¶317-318. *See also*, Statement of Claim, ¶¶303-304.

⁴⁰⁷ Statement of Claim, ¶¶317 and 319-320.

⁴⁰⁸ Hearing Transcript (25 September 2017), 68:16-25 and 69:1-3; Statement of Claim, ¶319. The Claimant notes that, on several occasions, the [REDACTED] Supreme Court Ruling refers to Manchester as a “US entity” [REDACTED] Supreme Court Ruling (C-73), p. 16. *See also*, Reply, ¶¶251-252.

Property, whereas the proceeds from Manchester's Bonds were to be used to finance expansion activities. The Claimant argues that the "validity of a mortgage is wholly unrelated to the question about what the monies raised by a mortgage were spent on."⁴⁰⁹ The Claimant adds that, in any event, it is untrue that Manchester's funds were used for purposes unrelated to the

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269. The Claimant also disagrees with Respondent's assertion that the Prospective Buyers had "different awareness" concerning the and Mortgages, asserting that they were made aware of both mortgages.⁴¹¹ In any event, the Claimant submits that whether the Prospective Buyers were informed of plan to establish the Mortgage is "not a relevant differentiating factor."⁴¹² Under Polish law, the validity of a mortgage does not depend on whether a debtor's creditors know in advance of the debtor's intention to establish a mortgage for the benefit of a new creditor.⁴¹³
270. Further asserting the likeness of the and Mortgages, the Claimant states that they had the same terms of contractual release,⁴¹⁴ and that both Manchester and sought to ensure that their mortgages would have priority.⁴¹⁵
271. The Claimant adds that it is irrelevant that it was Manchester, rather than the Prospective Buyers, who sought the invalidation of the Mortgage, and that the Mortgage was already in place when Manchester invested in . The Claimant asserts that Manchester filed its claim against to test whether the Mortgage would be treated in a similar manner to the Mortgage, using the same arguments as those of the Prospective Buyers in the Case.⁴¹⁶ The Claimant finally asserts that the Supreme Court did not provide any reasonable justification for its "less favourable" treatment of the Mortgage as

⁴⁰⁹ Reply, ¶246.

⁴¹⁰ Claimant's Post-Hearing Brief, ¶¶164-165, 174.

⁴¹¹ Claimant's Post-Hearing Brief, ¶¶166-172, referring to testimony of Mr. at Hearing Transcript (26 September 2017), 208:1-16.

⁴¹² Reply, ¶248.

⁴¹³ Reply, ¶¶66 and 246-249, referring to Expert Opinion of Professor Swaczyna, ¶¶28-31 and 33; Hearing Transcript (27 September 2017), 338:18 to 343:13; Claimant's Post-Hearing Brief, ¶¶159-163.

⁴¹⁴ Claimant's Post-Hearing Brief, ¶¶175-176, referring to Bond Purchase Agreement (C-2), Article 10.5; Witness Statement, p. 8; Agreement (C-95), ¶14.6.

⁴¹⁵ Claimant's Post-Hearing Brief, ¶¶178-180.

⁴¹⁶ Claimant's Post-Hearing Brief, ¶¶181-184.

compared to the [REDACTED] Mortgage, taking the position that the Supreme Court's decision was politically motivated.⁴¹⁷

272. Finally, the Claimant points to the bankruptcy proceedings of five other developers: [REDACTED]

[REDACTED]⁴¹⁸ The Claimant argues that the Respondent did not treat their creditors "in the same manner as it did Manchester," a foreign investor.⁴¹⁹ According to the Claimant, while these developers faced financial challenges or bankruptcy proceedings similar to [REDACTED] the Respondent did not invalidate the mortgages of their secured creditors or transfer the mortgaged property into the ownership of prospective buyers as it did in [REDACTED] case.⁴²⁰

The Respondent's Position

273. The Respondent submits that it did not discriminate against the Claimant, as there can be no discrimination if different treatment is accorded to entities that are not in like situations, which was the case of [REDACTED] and Manchester.⁴²¹

274. The Respondent describes the lower courts' differing assessments of the [REDACTED] and [REDACTED] Mortgages as follows:

Both the [REDACTED] Regional Court and the [REDACTED] Court of Appeal decided that the circumstances in which the [REDACTED] Mortgage and the [REDACTED] Mortgage had been established were not alike. The [REDACTED] Mortgage was established in connection with a credit facility that [REDACTED]. The first instance court also found that [REDACTED] had informed the Prospective Buyers that it intended to take out a commercial credit to purchase the [REDACTED] Property. The courts concluded that the taking out of the [REDACTED] credit was in the interests of the Prospective Buyers. The courts observed that the situation in which the [REDACTED] Mortgage had been established was different. [REDACTED] intended to use the proceeds from the sale of the commercial bonds to finance the expansion of its activities, including an IPO, and the purchase of new real property. None of these new plans were related to the [REDACTED] Property so they were not in the interests of the Prospective Buyers. Likewise, the Prospective Buyers were not informed by [REDACTED] that it intended to establish on the [REDACTED] Property the [REDACTED] Mortgage in favour of Claimant as collateral in connection with [REDACTED] commercial bonds. Therefore both the [REDACTED] Regional Court and the [REDACTED] Court of Appeal decided that unlike the [REDACTED] Mortgage, the [REDACTED] Mortgage had been established in accordance with the principles of social coexistence.⁴²²

⁴¹⁷ Claimant's Post-Hearing Brief, ¶¶185-193.

⁴¹⁸ Claimant's Submission Concerning the Bankruptcy Proceedings of other Developers dated 13 January 2012, ¶3.

⁴¹⁹ Claimant's Submission Concerning the Bankruptcy Proceedings of other Developers dated 13 January 2012, ¶¶5-6.

⁴²⁰ Claimant's Submission Concerning the Bankruptcy Proceedings of other Developers dated 13 January 2012, ¶¶4-6.

⁴²¹ Respondent's Post-Hearing Brief, ¶¶125-129.

⁴²² Statement of Defense, ¶78.

275. The Respondent asserts that the Supreme Court agreed with the lower courts and pointed out that: (i) the two mortgages secured different types of claims; (ii) different sequences of events led to the establishment of the two mortgages; and (iii) there was no reason to afford special protection to Manchester as a professional entity.⁴²³ Additionally, in the Respondent's view, the factors differentiating the mortgages include: (i) the different purposes of the two mortgages; (ii) the Prospective Buyers' awareness of the [REDACTED] Mortgage, but not the [REDACTED] Mortgage; (iii) the fact that the [REDACTED] Mortgage, unlike the [REDACTED] Mortgage, was in the interest of the Prospective Buyers, as it was established to purchase the [REDACTED] Property; (iv) the terms of release, which for the [REDACTED] Mortgage only required that a Prospective Buyer pay 100% of the purchase price, but for the [REDACTED] Mortgage required that [REDACTED] not breach the Bond Purchase Agreement, which was beyond the Prospective Buyers' control; and (v) the fact that [REDACTED] unlike Manchester, did not make its mortgage contingent upon the Non-Registration Clauses.⁴²⁴ The Respondent emphasizes that "the purpose of the claim secured by the mortgage and the creditors' awareness of the mortgage, may be considered in assessing whether the [PSC] were violated."⁴²⁵
276. The Respondent also argues that the Claimant's claim of discrimination must fail because it is conditional upon the Tribunal finding that the [REDACTED] Supreme Court Ruling did not breach the BIT. Should the Tribunal make this finding, it then needs to analyze whether the ruling upholding the [REDACTED] Mortgage is in line with Polish and international law. The Respondent proffers that the Tribunal should rely on the guidelines offered by Professor Sadurski in his expert opinion, based on which it will find that the Supreme Court correctly upheld the [REDACTED] Mortgage. With this finding, coupled with the earlier finding that the Supreme Court correctly invalidated the [REDACTED] Mortgage, the grounds for discrimination "simply disappear".⁴²⁶
277. Finally, the Respondent contends that the Claimant's argument that it was discriminated because it was a foreign investor cannot be supported by a comparison to [REDACTED] bankruptcy proceedings, as that developer's mortgages were established in favour of [REDACTED] ("[REDACTED] Bank") and [REDACTED] ("[REDACTED] Bank"), which were both, at the time, also owned by foreign investors.⁴²⁷

⁴²³ Rejoinder, ¶300.

⁴²⁴ Respondent's Post-Hearing Brief, ¶¶125-150; Hearing Transcript (25 September 2017), 118:23-25, 119:1-3 and 120:2-12.

⁴²⁵ Rejoinder, ¶303.

⁴²⁶ Hearing Transcript (25 September 2017), 121:7 to 122:1.

⁴²⁷ Respondent's Submission Concerning the Bankruptcy Proceedings of other Developers dated 19 April 2017, ¶¶10-12.

(f) Inconsistent actions

The Claimant's Position

The Claimant submits that the “inconsistent and self-contradictory treatment of Manchester’s investment by two Polish organs in itself is a breach of the FET, which encompasses the prohibition of inconsistent treatment.”⁴²⁸

Specifically, the Claimant submits that the Respondent acted inconsistently when its Supreme Court invalidated the [REDACTED] Mortgage after that Mortgage was duly registered in the LMR by the [REDACTED] Registry Court.⁴²⁹ This argument is summarized in the section on legitimate expectations at paragraphs 214-218 above.

280. In addition, the Claimant submits that the Supreme Court rendered inconsistent decisions in respect of the [REDACTED] and [REDACTED] Mortgages, as described in the section on arbitrary actions at paragraphs 251-253 above.⁴³⁰

The Respondent's Position

281. The Respondent submits that it acted consistently,⁴³¹ as described in the sections on legitimate expectations and arbitrary actions at paragraphs 219-222 and 255-257 above, respectively.

(g) Denial of justice and external interference in the judicial proceedings

The Claimant's Position

282. The Claimant submits that, when assessing denial of justice claims, investment tribunals have analyzed whether: (i) a court’s decision is arbitrary, unjust or idiosyncratic; (ii) a court’s decision lacks legal logic or is based on “manifestly insufficient grounds and irrelevant arguments”; (iii) a court’s decision is based on “insubstantial evidence or is bereft of a basis in law”; (iv) justice is administered in a “seriously inadequate way”; (v) the judiciary “used its powers for improper purposes”; and (vi) the judiciary acted intentionally against the investor to harm its investments or exercised unreasonable pressure on an investor to reach certain goals.⁴³²

⁴²⁸ Statement of Claim, ¶323.

⁴²⁹ Statement of Claim, ¶¶326-330, referring to *Arif v. Moldova* (CA-7), ¶547(b). See also, Reply, ¶226.

⁴³⁰ Reply, ¶¶234-236, referring to [REDACTED] Supreme Court Ruling (C-80); [REDACTED] Supreme Court Ruling (C-81), p. 6; Second Instance [REDACTED] Ruling (C-65); Claimant’s Post-Hearing Brief, ¶¶203-210.

⁴³¹ Statement of Defense, ¶227; Rejoinder, ¶¶279 and 291.

⁴³² Statement of Claim, ¶334, referring to *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (“*Waste Management v. Mexico*”) (CA-31), ¶130; *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, 18 November 2014 (“*Flughafen Zürich v. Venezuela*”) (CA-30), ¶¶639 and 698; *Robert Azinian v. United Mexican States* (CA-32), ¶¶102, 105 and 120; *Mohammad Anmar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability, 2 September 2009 (“*Mohammad Al-Bahloul v.*

283. The Claimant also submits that a denial of justice may occur, not only through procedural shortcomings, but also as a result of the substance of a court decision. In its view, this is established as a matter of customary international law⁴³³ and by investment treaty case law.⁴³⁴ While the Claimant agrees that an international tribunal considering denial of justice claims may not act as an appellate court, it also submits that "it is appropriate for them to analyse the reasoning of the decisions of a host State's courts in order to determine whether there has been a breach of the host State's obligation under public international law."⁴³⁵ The Claimant adds that denial of justice constitutes a breach of the FET standard, and can also amount to an independent breach of customary international law.⁴³⁶
284. In the present case, the Claimant submits that the inconsistency, arbitrariness and unfairness of the Polish court judgments concerning the [REDACTED] and [REDACTED] Mortgages (as described above) constitute a denial of justice.⁴³⁷
285. Additionally, the Claimant contends that the outcome of the various judicial proceedings and the interventions by the Public Prosecutor and MPs gave the impression that the judiciary "acted intentionally against Manchester, in favour of the [REDACTED] Claimants and also [REDACTED]"⁴³⁸
286. In particular, the Claimant refers to the following acts of external interference in the judicial proceedings:
- a) On 25 June 2009, a group of MPs filed a written appeal with the Bankruptcy Court in [REDACTED] and called upon the Bankruptcy Court to protect the Prospective Buyers;
 - b) On 17 July 2009, the Public Prosecutor joined the [REDACTED] Case and called for the invalidation of the [REDACTED] Mortgage.
 - c) On 26 October 2009, the Public Prosecutor issued the Prosecutor's Order to prevent the sale of the [REDACTED] Property in the course of the Bankruptcy Proceedings.
 - d) Various MPs appealed to the Polish judiciary to invalidate the [REDACTED] Mortgage. [...]
 - e) On 20 February 2012, the Public Prosecutor General called for the invalidation of the [REDACTED] Mortgage.

Tajikistan") (CA-33), ¶¶218-221. See also, Reply, ¶274.

⁴³³ Statement of Claim, ¶333, referring to "The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners," (1929) 23 American Journal of International Law, Special Supplement 133, 1929 (CA-29), Article 9.

⁴³⁴ Statement of Claim, ¶333, referring to *Flughafen Zürich v. Venezuela* (CA-30), ¶¶636 and 721; *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, 24 August 2015 ("*Dan Cake v. Hungary*") (CA-53), ¶146; Claimant's Post-Hearing Brief, ¶¶42-54, 276-280.

⁴³⁵ Statement of Claim, ¶335, referring to *Dan Cake v. Hungary* (CA-53), ¶¶111, 119, 132 and 142.

⁴³⁶ Statement of Claim, ¶337, referring to *Arif v. Moldova* (CA-7), ¶433.

⁴³⁷ Statement of Claim, ¶¶338-340.

⁴³⁸ Statement of Claim, ¶340.

- f) Finally, the Polish Parliament enacted the Apartment Buyer Protection Act which encouraged the Supreme Court to invalidate the [REDACTED] Mortgage.⁴³⁹

287. The Claimant rejects the Respondent's argument that the Public Prosecutor was "legally obliged" to join the proceedings in the [REDACTED] Case.⁴⁴⁰ In the Claimant's view, a legal duty to join civil proceedings only exists in respect of certain categories of cases (e.g. family law cases). Public prosecutors have a discretion whether to join a case for the invalidation of a mortgage, but it is unusual for them to exercise that discretion. The Claimant rejects the Respondent's statistics on prosecutor interventions, arguing that they are misleading because they include cases in which the participation of a public prosecutor is mandatory. The Claimant asserts that, in this case, the Public Prosecutor was "inspired" by MP Jaroslaw Gowin to join the [REDACTED] Case to increase pressure on the courts to invalidate the [REDACTED] Mortgage.⁴⁴¹ The Claimant also points out that certain documents reveal the involvement of the Human Rights Ombudsman.⁴⁴²

The Respondent's Position

288. As described above, the Respondent argues that the decisions of the Polish courts were not arbitrary, inconsistent or unfair, and accordingly submits that it has not denied justice to the Claimant.
289. The Respondent also objects to the Claimant's allegation that there was "external interference" in the judicial proceedings, arguing that the Claimant has failed to identify irregularity in the actions of the Polish authorities and has failed to prove that they had any influence over the proceedings.⁴⁴³
290. In particular, the Respondent argues that it was the Prosecutor's statutory duty to participate in the [REDACTED] Case.⁴⁴⁴ It adds that it is not unusual for the Prosecutor to be involved in Polish civil proceedings.⁴⁴⁵ A public prosecutor will join civil proceedings if required in order to protect the public interest or citizens' rights and property. The [REDACTED] Case, the Respondent states,

⁴³⁹ Reply, ¶276, referring to Statement of Claim, ¶¶93, 96, 100 and 130-131; Appeal of the Polish Members of Parliament to the Bankruptcy Court dated 25 June 2009 (C-37); *Radio Kraków*, "That's the Talk" broadcast dated 21 July 2011, downloaded on 15 October 2015 from nuta24.pl/mp3/elgkfh/program-o-tvm-sie-mowi-21-lipca-2011.html (C-128), p. 7; Opinion of the Public Prosecutor General submitted in the [REDACTED] case, case file ref. [REDACTED] 20 February 2012 (C-79).

⁴⁴⁰ Reply, ¶277.

⁴⁴¹ Reply, ¶280, referring to Letter from [REDACTED] to the [REDACTED] Association, 19 July 2011 (C-127).

⁴⁴² Reply, ¶281, referring to Letter from the Polish Ombudsman to [REDACTED] 10 March 2014 (C-218); Letter from the Ministry of Finance to the Polish Ombudsman, 25 October 2013 (C-219).

⁴⁴³ Rejoinder, ¶334.

⁴⁴⁴ Statement of Defense, ¶236.

⁴⁴⁵ Statement of Defense, ¶81, referring to Appendices to the Prosecutor General's Report on the Activities of the Public Prosecutor's Office in the years 2010, 2011 and 2012 (R-16).

“involved more than 200 families facing the threat of losing their apartments due to a mortgage having been established by a creditor on their apartments,” and so the participation of the Prosecutor was consistent with her statutory duty.⁴⁴⁶ In response to the Claimant’s comment that the Prosecutor’s participation may have been “inspired by an MP”, the Respondent submits that there is no evidence on record to even imply that the Public Prosecutor joined the [REDACTED] Case for reasons other than to carry out her statutory duty and that, in any event, “it is highly unlikely that the prosecutor would act upon a letter from a single MP.”⁴⁴⁷

291. The Respondent also denies the Claimant’s claim that the Public Prosecutor General “call[ed] for the invalidation of the [REDACTED] Mortgage.” The Respondent explains that the Supreme Court (in the [REDACTED] case) had requested the Public Prosecutor General to express his opinion as to the grounds for the cassation filed by Mr. [REDACTED] successors. The Public Prosecutor General was obliged to respond to this request and accordingly provided an opinion in which she concluded only that “the cassation appeal should be allowed by the Supreme Court, given the infringements of substantive law that exist in this case.”⁴⁴⁸
292. Regarding the involvement of MPs, the Respondent submits that they are obliged to address problems notified to them by citizens, and that their actions in response to the [REDACTED] Association’s letters were not unusual.⁴⁴⁹ The Respondent denies that the MPs called upon the Bankruptcy Court to “protect the Prospective Buyers” as the Claimant alleges.⁴⁵⁰ Rather, the MPs expressed only their general hope that the social aspect of the case would be considered and that “it will be possible to work out a solution satisfactory to all parties.”⁴⁵¹
293. Finally, the Respondent asserts that the Human Rights Ombudsman “did not participate at any stage of the proceedings, either in the [REDACTED] Case or the [REDACTED] Case.”⁴⁵² The Ombudsman only learnt of the cases in 2013, by which stage the proceedings were concluded.⁴⁵³

⁴⁴⁶ Statement of Defense, ¶¶81-83; Rejoinder, ¶340.

⁴⁴⁷ Rejoinder, ¶342.

⁴⁴⁸ Rejoinder, ¶338, referring to Opinion of the Public Prosecutor General submitted in the [REDACTED] Case, case file ref. [REDACTED] 20 February 2012 (C-79), p. 15.

⁴⁴⁹ Rejoinder, ¶¶335(a) and 343, referring to Appeal of the Polish Members of Parliament to the Bankruptcy Court, 25 June 2009 (C-37); Letter from [REDACTED] to the [REDACTED] Association, 19 July 2011 (C-217), p. 1.

⁴⁵⁰ Rejoinder, ¶335(b).

⁴⁵¹ Rejoinder, ¶335(b)-(c), referring to Appeal of the Polish Members of Parliament to the Bankruptcy Court, 25 June 2009 (C-37); Radio Interview Transcript, 21 July 2011 (C-128), pp. 6 and 8.

⁴⁵² Rejoinder, ¶344, referring to Letter from the Polish Ombudsman to [REDACTED] 10 March 2014 (C-218).

⁴⁵³ Rejoinder, ¶344.

2. Other alleged breaches of the BIT

294. In addition to its argument that the Respondent breached the FET standard under Article II(6) of the BIT, including through a denial of justice, the Claimant submits that the Respondent breached its obligations under the BIT to: (i) treat investment and associated activities on a nondiscriminatory basis (Article II(1)); (ii) not impair by arbitrary or discriminatory (or unreasonable)⁴⁵⁴ treatment the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investments (Article II(6)); (iii) provide investments with full protection and security (Article II(6)); (iv) provide effective means of asserting claims and enforcing rights with respect to investments (Article II(7)); and (v) not expropriate except for a public purpose, in a nondiscriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with due process of law and the general principles of treatment provided for in Article II(6) of the BIT (Article VII).
295. In making these claims, the Claimant takes issue with the same actions of the Respondent as those which it submits breached the Respondent's FET obligations (including the prohibition on denial of justice). The Respondent denies any breach of the BIT. In light of the Tribunal's findings in respect of FET and denial of justice, set out in Section VI.B below, the Tribunal considers it unnecessary to set out the Parties' arguments on these other alleged breaches in any greater detail.

D. DAMAGES

1. Legal Standard

The Claimant's Position

296. Relying on the *Chorzów* decision of the Permanent Court of International Justice, the Claimant asserts that it is entitled to full reparation such that it is restored to "the position it would have occupied in the absence of Poland's breaches of the BIT."⁴⁵⁵

⁴⁵⁴ Although Article II(6) of the BIT does not refer to unreasonable measures, the Claimant invokes the most-favored nation clause in Article II(1) of the BIT to import the non-impairment standard contained in Article 3(1) of the *Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investments*, which states that a Contracting Party "shall not impair by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal of the investments of investors of the other contracting party." Statement of Claim, ¶350; Reply, ¶285.

⁴⁵⁵ Statement of Claim, ¶384, referring to *Case Concerning the Factory at Chorzów (Germany v. Poland)*, (Claimant for Indemnity) (Merits) P.C.I.J. (ser. A) No. 17, 13 September 1928 ("*Chorzów*") (CA-47), p. 47. See also, Reply, ¶297, referring to International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (CA-3), Article 36(2).

297. This standard, the Claimant submits, is confirmed by Article 36 of the ILC Articles, which states:

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

298. The Claimant submits that it cannot be compensated by way of restitution (*i.e.*, through a reinstatement of the [REDACTED] Mortgage) because the [REDACTED] Apartments have already been transferred to the Prospective [REDACTED] Buyers. Accordingly, the Claimant seeks monetary compensation.⁴⁵⁶

The Respondent's Position

299. The Respondent submits that the *Chorzów* full reparation standard is "not universally accepted for assessing damages for a breach of the BIT."⁴⁵⁷ In the present case, the Respondent argues, the standard for calculating compensation in the event of expropriation is set out in Article VII of the BIT, which provides that compensation shall be equivalent to the fair market value of the investment. The Respondent argues that since the BIT does not provide for a different standard for breaches of other provisions of the BIT, the standard in Article VII should be applied to calculate compensation for such other breaches.⁴⁵⁸

2. Causation

The Claimant's Position

300. With respect to causation, the Claimant first states that, but for the illegal actions of the Respondent that prevented the enforcement of the [REDACTED] Mortgage (the First, Second and Third Injunctions, the Prosecutor's Order and the Supreme Court [REDACTED] Ruling), Manchester would have been able to enforce its [REDACTED] Mortgage in 2012 and could have re-invested the funds received. Instead, the Claimant was preoccupied with legal battles in the Polish courts and was eventually relegated to the status of an unsecured creditor with respect to the [REDACTED] property in [REDACTED] Bankruptcy Proceedings.⁴⁵⁹

301. Second, the Claimant states that, but for the Supreme Court ruling in the [REDACTED] case, it could have enforced a portion of its claims under the [REDACTED] Mortgage and re-invested the funds

⁴⁵⁶ Reply, ¶299.

⁴⁵⁷ Rejoinder, ¶357.

⁴⁵⁸ Rejoinder, ¶358.

⁴⁵⁹ Statement of Claim, ¶¶389-391. *See also*, Reply, ¶¶306-308.

received. The Claimant adds that it incurred significant legal costs in the proceedings concerning the [REDACTED] Mortgage.⁴⁶⁰

302. Third, the Claimant recalls that the Respondent granted Compulsory Mortgages to the Prospective Buyers and later upheld them, declined to invalidate the [REDACTED] Mortgage, and transferred the [REDACTED] and [REDACTED] Apartments to the Prospective Buyers. But for these actions, the Claimant submits, “the size of [REDACTED] general bankruptcy estate would have been larger and accordingly, Manchester could have satisfied a larger portion of its claims on a *pro rata* basis (even despite the invalidation of the [REDACTED] Mortgage and prevention of enforcement of the [REDACTED] Mortgages).”⁴⁶¹

The Respondent's Position

303. The Respondent submits that it is well-established in international law that a proximate cause has to be shown between the act complained of and the alleged damage. The Respondent adds that the burden of proof lies with the claiming party.⁴⁶²
304. In the present case, the Respondent submits that the cause of any damage connected to the [REDACTED] Property and Mortgage was the Bankruptcy Trustee's failure to sell the [REDACTED] Property, not any action of the Respondent. Thus, to succeed, the Claimant must show that in the absence of the events constituting the Respondent's alleged BIT breaches, the sale would have been made.⁴⁶³ In the Respondent's view, however, the Claimant has failed to demonstrate this.⁴⁶⁴
305. Specifically, the Respondent contends that if there was any possibility of selling the [REDACTED] Property through Manchester's enforcement proceedings against [REDACTED] initiated on 24 November 2008, this possibility was not hindered by the First, Second and Third Injunction for the following reasons: (i) the First Injunction did not prohibit Manchester from enforcing its mortgage because it was issued against [REDACTED] (ii) the Second Injunction against Manchester did not, in its effect, stop the enforcement proceedings; and (iii) the Third Injunction against Manchester, which did stop the enforcement proceedings, was issued only a month and a few days before [REDACTED] declared bankruptcy, while the enforcement proceedings were not sufficiently advanced to have allowed a sale of the [REDACTED] Property within that month.⁴⁶⁵

⁴⁶⁰ Statement of Claim, ¶¶392-393. *See also*, Reply, ¶¶314-316.

⁴⁶¹ Statement of Claim, ¶¶394-395. *See also*, Reply, ¶¶320-322 and 326-327.

⁴⁶² Statement of Defense, ¶251.

⁴⁶³ Respondent's Post-Hearing Brief, ¶¶230-232.

⁴⁶⁴ Respondent's Post-Hearing Brief, ¶232.

⁴⁶⁵ Hearing Transcript (25 September 2017), 132:22-134:117; Respondent's Post-Hearing Brief, ¶¶244-257.

306. The Respondent also contends that if there was any possibility of selling the [REDACTED] Property in [REDACTED] Bankruptcy Proceedings, this possibility was not halted by the Second or Third Injunctions because these decisions did not have an effect on the Bankruptcy Proceedings.⁴⁶⁶
307. With regard to the alleged breaches of the BIT at the Bankruptcy Proceedings stage (the Prosecutor's Order, the granting of and failure to annul the Compulsory Mortgages, the [REDACTED] Supreme Court Ruling and the confirmation of the [REDACTED] Mortgage), the Respondent contends that they did not prevent the Bankruptcy Trustee from selling the [REDACTED] Property.⁴⁶⁷ Of these, the only act that suspended the sale was the Prosecutor's Order, but this was only for seven months at an early stage of the Bankruptcy Proceedings. The remaining three events did not "in any way result in prohibition on selling or suspension of sale of the [REDACTED] Property," as the Trustee could sell or transfer the property at any time.⁴⁶⁸
308. In respect of the Supreme Court's invalidation of the [REDACTED] Mortgage, the Respondent argues that it did not prevent the Bankruptcy Trustee from trying to sell the [REDACTED] Property.⁴⁶⁹ However, as a matter of fact, the Bankruptcy Trustee was unable to sell the [REDACTED] Property. He attempted to do so four times from April 2013 to March 2014, but received no offers.⁴⁷⁰

3. Quantification of damages

309. The Claimant seeks compensation for the invalidation of the [REDACTED] Mortgage, which entailed "the loss of Manchester's status as a secured creditor with respect to the [REDACTED] Property" (the "[REDACTED] Harm").⁴⁷¹ Should the Tribunal consider that the invalidation of the [REDACTED] Mortgage did not constitute a breach of the BIT, the Claimant seeks compensation for: (i) the loss suffered by the Claimant as result of the Supreme Court judgment in the [REDACTED] case (the "[REDACTED] Harm");⁴⁷² (ii) the decrease in the value of [REDACTED] general bankruptcy estate and the Claimant's inability to satisfy its claims as a result of the Respondent's transfer of the ownership of the [REDACTED] Apartments to the Prospective Buyers (the "Transfer Harm");⁴⁷³ and (iii) the further decrease in the value of [REDACTED] general bankruptcy estate and

⁴⁶⁶ Hearing Transcript (25 September 2017), 134:18-25.

⁴⁶⁷ Hearing Transcript (25 September 2017), 136:6-21.

⁴⁶⁸ Hearing Transcript (25 September 2017), 136:21-137:11; Respondent's Post-Hearing Brief, ¶¶259-263.

⁴⁶⁹ Respondent's Post-Hearing Brief, ¶272.

⁴⁷⁰ Hearing Transcript (25 September 2017), 139:12-15.

⁴⁷¹ Reply, ¶¶300, 305 and 307.

⁴⁷² Reply, ¶301(a).

⁴⁷³ Reply, ¶301(b).

Manchester's inability to satisfy its claims as a result of the Respondent's refusal to invalidate the [REDACTED] Mortgage (the "[REDACTED] Harm").⁴⁷⁴ The Claimant further seeks compensation for the legal costs associated with each of the aforementioned harms.⁴⁷⁵ Finally, the Claimant seeks pre and post-award interest.

310. In support of its claims, the Claimant submits three expert reports on damages by Mr. Brian O'Brien⁴⁷⁶ and six expert reports by Mr. Krzysztof Grzesik, in which Mr. Grzesik values the [REDACTED] and [REDACTED] Properties.⁴⁷⁷

311. The Respondent denies any liability concerning the [REDACTED] [REDACTED] Transfer and [REDACTED] Harms and any legal costs associated with these Harms. The Respondent relies on three expert reports on damages by Mr. [REDACTED] and Ms. [REDACTED] of [REDACTED].⁴⁷⁸

(a) The [REDACTED] Harm

The Claimant's Position

312. According to the Claimant, the [REDACTED] Harm is the damage resulting from the Supreme Court's invalidation of the [REDACTED] Mortgage, which weakened the Claimant's ability to satisfy its claim under the Bond Purchase Agreement against the [REDACTED] Property.⁴⁷⁹ It corresponds to the "amount Manchester would have recovered under the [REDACTED] Mortgage[], had the [REDACTED] Mortgage[] not been invalidated."⁴⁸⁰

313. Excluding legal costs and pre-award interest, the Claimant's damages expert, Mr. O'Brien (who in turn refers to the Claimant's valuation expert, Mr. Grzesik) calculates this amount to be

[REDACTED]
[REDACTED]

⁴⁷⁴ Reply, ¶301(c).

⁴⁷⁵ Reply, ¶302.

⁴⁷⁶ Expert Report of Brian O'Brien; Rebuttal Report of Mr. Brian O'Brien dated 13 January 2017 ("Rebuttal Report of Brian O'Brien"); Supplementary Report of Mr. Brian O'Brien dated 28 November 2017 ("Supplemental Report of Brian O'Brien").

⁴⁷⁷ Expert Reports of Mr. Krzysztof Grzesik, FRICS REV dated May 2016 ("Expert Reports of Krzysztof Grzesik"), together with the Valuation Report [REDACTED] and the Valuation Report [REDACTED]; Rebuttal Report of Mr. Krzysztof Grzesik, FRICS REV dated 12 January 2017 ("Rebuttal Expert Report of Krzysztof Grzesik"); Supplementary Report of Mr. Krzysztof Grzesik, FRICS REV dated 28 November 2017.

⁴⁷⁸ Expert Report of Mr. [REDACTED] and Ms. [REDACTED] dated 13 October 2016 ("[REDACTED] Report"); Supplementary Expert Report of Mr. [REDACTED] and Ms. [REDACTED] dated 13 April 2017 ("Rebuttal [REDACTED] Report"); Second Supplementary Expert Report of Mr. [REDACTED] and Ms. [REDACTED] dated 6 February 2018.

⁴⁷⁹ Reply, ¶306.

⁴⁸⁰ Reply, ¶310. See also, Rebuttal Report of Brian O'Brien, ¶2.3(i).

314. The Claimant explains that Mr. O'Brien assumed that: (i) if the Bankruptcy Proceedings had taken a normal course, the [REDACTED] Property would have been sold by 31 December 2012; and (ii) the proceeds from the sale of the [REDACTED] Property would have been distributed to the secured creditors, such as the Claimant, by 31 March 2013.⁴⁸² These assumptions are based on the Bankruptcy Trustee's initial plans and the average length of bankruptcy proceedings of real estate developers in Poland.⁴⁸³
315. Mr. O'Brien rejects the Respondent's experts' contention that the [REDACTED] Property would have been sold no earlier than on 27 June 2014. He considers, first, that the sale process as it actually occurred was affected by numerous actions taken by the Respondent, including the Prosecutor's Order, the First Instance [REDACTED] Ruling, the Second Instance [REDACTED] Ruling, the [REDACTED] Supreme Court Ruling, and the decision to transfer ownership to the Prospective [REDACTED] Buyers. Second, Mr. O'Brien argues that the Respondent's experts did not consider the documentation relating to, and the events surrounding, the Bankruptcy Trustee's tenders to sell the Property, and thus did not take into account the fact that the failure to sell was due to "the events which were the aftermath and direct consequence of the invalidation of Manchester's Mortgages, i.e. the option to transfer the apartments to the [REDACTED] Buyers."⁴⁸⁴ Mr. O'Brien also suggests that several actions taken by the Bankruptcy Trustee appear "not to be genuine actions aimed at selling the [REDACTED] Property but rather [to be] designed to limit the potential interest in the [REDACTED] Property" and to decrease the offer price to "a level comparable with the claims by the [REDACTED] Buyers against the bankrupt estate."⁴⁸⁵
316. Accordingly, the Claimant's valuation expert, Mr. Grzesik, calculates the value of the [REDACTED] Property as at 31 December 2012 and concludes that on that date it could have been sold for PLN [REDACTED]⁴⁸⁶ on the assumption that the [REDACTED] Property was unoccupied. The Claimant justifies this "non-occupation" assumption by pointing out that: (i) the Bankruptcy Trustee was under the obligation to ensure that the [REDACTED] Property was free of occupants; and that (ii) at the time of valuation, the [REDACTED] Apartments had not received an occupancy

⁴⁸¹ Claimant's Post-Hearing Brief, ¶¶318-319, referring to Supplemental Report of Brian O'Brien, ¶¶2.8-2.9, 42.

⁴⁸² Reply, ¶311(a).

⁴⁸³ Reply, ¶311(a), referring to Bankruptcy Trustee's Report, 27 July 2009 (C-40), pp. 3-4; Expert Report of Brian O'Brien, ¶¶5.21-5.23. *See also*, Rebuttal Report of Brian O'Brien, ¶¶4.21-4.22.

⁴⁸⁴ Rebuttal Report of Brian O'Brien, ¶4.29.

⁴⁸⁵ Rebuttal Report of Brian O'Brien, ¶¶4.30 and 4.32-4.34.

⁴⁸⁶ Reply, ¶311(b), referring to Expert Reports of Krzysztof Grzesik; Expert Report of Brian O'Brien, ¶¶5.54-5.67. *See also*, Rebuttal Report of Brian O'Brien, ¶4.36.

permit.⁴⁸⁷ In the alternative, Mr. Grzesik submits that, assuming that the Apartments were occupied and given the absence of occupancy permits, the market value of the [REDACTED] Property on 31 December 2012 was PLN [REDACTED].⁴⁸⁸

317. Mr. Grzesik does not believe that the [REDACTED] Property was a distressed asset and rejects the Respondent's experts' resulting discount of [REDACTED] on the property value.⁴⁸⁹ Mr. Grzesik also maintains that the construction costs for the completion of the [REDACTED] Property that he incorporated into his valuation are accurate,⁴⁹⁰ noting that "[f]or the purposes of a construction cost estimate as at the date of valuation (31-12-2012) only known facts and or information available at or before the date of valuation should be taken into account."⁴⁹¹
318. Considering the Claimant's market value for the [REDACTED] Property as at 31 December 2012 (PLN [REDACTED]), as well as the value of [REDACTED] claims secured by the [REDACTED] Mortgage (PLN [REDACTED]) and enforcement costs of [REDACTED] both of which had priority over the Claimant's claim, Mr. O'Brien calculates that the sale of the [REDACTED] Property would have raised enough proceeds to cover Manchester's claim of PLN [REDACTED].⁴⁹² He also opines that, even if the Tribunal were to accept the amount of PLN [REDACTED] as the market value of the [REDACTED] Property (as proposed by the Respondent's experts), that amount would still "have been sufficient to cover Manchester's claims recoverable under the [REDACTED] Mortgage."⁴⁹³
319. With respect to the rate at which the two-year interest should be calculated on the amounts due under the Bonds, the Claimant submits that, under Polish law, a mortgage secures interest on the main claim at the rate provided in the mortgage deed, which in this case is [REDACTED].⁴⁹⁴

⁴⁸⁷ Reply, ¶311(b).

⁴⁸⁸ Rebuttal Report of Krzysztof Grzesik, ¶3(2).

⁴⁸⁹ Rebuttal Report of Krzysztof Grzesik, ¶6(2). *See also*, Rebuttal Report of Brian O'Brien, ¶¶4.41(ii)-(iii), 4.42.

⁴⁹⁰ Rebuttal Report of Krzysztof Grzesik, ¶¶5(3) and 6(5).

⁴⁹¹ Rebuttal Report of Krzysztof Grzesik, ¶5(2).

⁴⁹² Reply, ¶311(d)-(e), referring to Expert Report of Brian O'Brien, ¶¶5.54-5.67. *See also*, Supplemental Report of Brian O'Brien, ¶¶2.7-2.10.

⁴⁹³ Rebuttal Report of Brian O'Brien, ¶4.38. *See also*, Claimant's Post-Hearing Brief, ¶317.

⁴⁹⁴ Reply, ¶311(c)-(d), referring to Expert Report of Brian O'Brien, ¶¶5.51-5.53; Expert Opinion of Professor Swaczyna, ¶59; Claimant's Post-Hearing Brief, ¶322(a).

The Respondent's Position

320. Should the Tribunal consider that the Respondent is liable for the [REDACTED] Harm and that, as a result, the Claimant should be awarded damages, the Respondent's experts submit that the appropriate valuation of this Harm is no more than PLN [REDACTED].⁴⁹⁵
321. The Respondent's experts agree with Mr. O'Brien that the nominal amount outstanding under the Bond Purchase Agreement that could be claimed from the proceeds of the sale of the [REDACTED] Property was PLN [REDACTED].⁴⁹⁶ They also concur that a two-year interest should be calculated on this sum,⁴⁹⁷ but apply an interest rate of [REDACTED] which "reflects the statutory interest in the period from December 2008 to December 2014 that covers 2-year[s] prior to the sale of the property."⁴⁹⁸ The Respondent's experts accordingly calculate that the interest due was PLN [REDACTED]⁴⁹⁹ and conclude that the total value of Manchester's claims secured by the [REDACTED] Mortgage was PLN [REDACTED].⁵⁰⁰
322. As to the value for which the [REDACTED] Property could have been sold, the Respondent's experts submit that Mr. Grzesik's valuation should be adjusted downward by 33 % to reflect: (i) the distress of selling a property in the course of bankruptcy proceedings; (ii) the fact that the apartments were occupied by the Prospective [REDACTED] Buyers;⁵⁰¹ (iii) the fact that the actual construction costs to complete the [REDACTED] Property were higher than the amounts estimated by Mr. Grzesik;⁵⁰² and (iv) the "media attention and negative press" surrounding the [REDACTED] Property.⁵⁰³ On this basis, the Respondent contends that the proceeds of the sale of the [REDACTED] Property would have amounted to PLN [REDACTED].⁵⁰⁴ Considering this value of the [REDACTED] Property, as well as the [REDACTED] secured claim of PLN [REDACTED] and enforcement costs, both of which were ranked above Manchester's claim, the amount of PLN [REDACTED] could have been recovered under the Wierzbowa Mortgage.⁵⁰⁵

⁴⁹⁵ Rebuttal [REDACTED] Report, ¶¶125, 127. See also Respondent's Post-Hearing Brief, ¶356(a).

⁴⁹⁶ Rebuttal [REDACTED] Report, ¶113.

⁴⁹⁷ Rebuttal [REDACTED] Report, ¶119(c).

⁴⁹⁸ Rebuttal [REDACTED] Report, ¶120; Hearing Transcript (25 September 2017), 140:14-20.

⁴⁹⁹ Rebuttal [REDACTED] Report, ¶¶121-122.

⁵⁰⁰ Rebuttal [REDACTED] Report, ¶125.

⁵⁰¹ [REDACTED] Report, ¶¶35-36, referring to Valuation Report [REDACTED] ¶¶3.4, 8.3.2 and 10.2; [REDACTED] Valuation (C-50), p. 69; Letter from the Residents' Association of the [REDACTED] Property regarding the Value of Construction Work, 4 October 2016 (R-57).

⁵⁰² Rebuttal [REDACTED] Report, ¶¶15(b)-(c), 17-18, 88 and 93.

⁵⁰³ Rebuttal [REDACTED] Report, ¶70(b).

⁵⁰⁴ Rebuttal [REDACTED] Report, ¶¶19, 36 and 98; Hearing Transcript (28 September 2017), 646:6 to 674:13.

⁵⁰⁵ Rebuttal [REDACTED] Report, ¶36.

323. Finally, the Respondent's experts assume that the [REDACTED] Property would have been sold no earlier than on 27 June 2014⁵⁰⁶ and that the proceeds would have been distributed to the Claimant on 31 December 2014.⁵⁰⁷ They justify using 27 June 2014 as the valuation date by noting that it is the Respondent's position that the sales process for the [REDACTED] property was not affected by any actions taken by the Respondent. Since the Bankruptcy Trustee unsuccessfully tried to sell the [REDACTED] property on four occasions (that is, on 16 April 2013, 27 May 2013, 30 July 2013 and 21 March 2014),⁵⁰⁸ the Respondent's experts consider it reasonable to assume that the next tender would have been arranged no earlier than three months after the last tender date.⁵⁰⁹

(b) The [REDACTED] Transfer and [REDACTED] Harm

The Claimant's Position

324. According to the Claimant, the [REDACTED] harm consists of damage arising from the Supreme Court decision in the [REDACTED] case that the [REDACTED] Mortgage was unenforceable, which weakened the Claimant's ability to satisfy its claim under the Bond Purchase Agreement against the [REDACTED] apartment.⁵¹⁰ To value the [REDACTED] Harm, Mr. O'Brien calculates "what amount Manchester would have recovered under the [REDACTED] Mortgage, had the [REDACTED] Mortgage not been held to be unenforceable."⁵¹¹ Although the [REDACTED] Mortgage secured a nominal amount of PLN [REDACTED] the Claimant could have recovered no more than the value of the [REDACTED] apartment from enforcement of the [REDACTED] Mortgage against Mr. [REDACTED] estate.⁵¹² The Claimant's valuation expert, Mr. Grzesik, values the [REDACTED] apartment as at 31 December 2012 at PLN [REDACTED]⁵¹³ Accordingly, after discounting 10% enforcement costs (and accounting for payments received by Manchester since April 2013), Mr. O'Brien submits that Manchester would have received PLN [REDACTED] from the enforcement of the [REDACTED] Mortgage against the [REDACTED] apartment.⁵¹⁴

⁵⁰⁶ [REDACTED] Report, ¶¶33-34. See also, Rebuttal [REDACTED] Report, ¶13.

⁵⁰⁷ [REDACTED] Report, ¶¶71, 122.

⁵⁰⁸ [REDACTED] Report, ¶70(a). See also, Rebuttal [REDACTED] Report, ¶¶48-64.

⁵⁰⁹ [REDACTED] Report, p. 18, n.139.

⁵¹⁰ Reply, ¶¶313(a) and 314.

⁵¹¹ Reply, ¶317. See also, Rebuttal Report of Brian O'Brien, ¶2.3(iv).

⁵¹² Reply, ¶317(c), referring to J. Ignatowicz and K. Stefaniuk, "Property Law", *Lexis Nexis 2009*, Chapter XIV (excerpts) (C-149), ¶426.

⁵¹³ Reply, ¶317(b), referring to Expert Reports of Krzysztof Grzesik – Assessment of the Market Value of Apartment [REDACTED] p. 9, together with the [REDACTED] Valuation Report. See also, Rebuttal Expert Report of Brian O'Brien, ¶8.6.

⁵¹⁴ Claimant's Post-Hearing Brief, ¶¶376-386, referring to Supplemental Report of Brian O'Brien, ¶2.10 and p. 11.

325. The Claimant further submits that the Transfer Harm consists of damage resulting from the Respondent's failure to liquidate the [REDACTED] Property and its decision to transfer ownership of the [REDACTED] Property to the Prospective Buyers without any payment being made into the general bankruptcy estate.⁵¹⁵ To value the Transfer Harm, Mr. O'Brien calculates "what amount Manchester would have received from the sale of the [REDACTED] Property as an unsecured creditor."⁵¹⁶ Using a value for the [REDACTED] Property of PLN [REDACTED] at 31 December 2012 (see paragraph 316 above), Mr. O'Brien concludes that, as an unsecured creditor, the Claimant would have been entitled to receive an amount of PLN [REDACTED].⁵¹⁷
326. Finally, according to the Claimant, the [REDACTED] Harm consists of damage caused by the Supreme Court's failure to invalidate the [REDACTED] Mortgage, which entitled [REDACTED] to satisfy its claims from the proceeds of the sale of the [REDACTED] Property with priority over unsecured creditors, including the Claimant.⁵¹⁸ To value the [REDACTED] Harm, Mr. O'Brien calculated "the amount Manchester would have received from the sale of the [REDACTED] Property as an unsecured creditor, had the [REDACTED] Property been sold, rather than being transferred to the Prospective Buyers, and had the [REDACTED] Mortgage been invalidated."⁵¹⁹ In this hypothetical, he indicates that Manchester would have received PLN [REDACTED].⁵²⁰

The Respondent's Position

327. The Respondent submits that the value of the [REDACTED] Harm is zero, because the [REDACTED] Apartment was encumbered by a lifetime right in favour of one [REDACTED] in 2009.⁵²¹ This lifetime right would have made the sale of the Apartment "practically impossible",⁵²² as any potential buyer would have faced the risk that the lifetime right would be binding on him.⁵²³
328. The Respondent further submits that the value of the Transfer Harm and the [REDACTED] Harm is also zero. The Respondent begins from the premise that the proceeds of the sale of the [REDACTED] Property would have amounted to PLN [REDACTED] (see paragraph 322 above).⁵²⁴ Taking into

⁵¹⁵ Reply, ¶¶313(a), 318-320.

⁵¹⁶ Reply, ¶323. *See also*, Rebuttal Report of Brian O'Brien, ¶2.3(ii).

⁵¹⁷ Supplemental Report of Brian O'Brien, ¶2.10 and p. 11.

⁵¹⁸ Reply, ¶324.

⁵¹⁹ Reply, ¶328. *See also*, Rebuttal Report of Brian O'Brien, ¶2.3(ii)-(iii).

⁵²⁰ Claimant's Post-Hearing Brief, ¶¶371 and 374; Supplementary Report of Brian O'Brien, ¶2.10 & p. 11.

⁵²¹ Respondent's Post-Hearing Brief, ¶¶366-367.

⁵²² Rebuttal [REDACTED] Report, ¶¶21, 102-103 and 105, referring to Rebuttal Expert Opinion of Professor [REDACTED] dated 31 March 2017; Hearing Transcript (25 September 2017), 141:1-10.

⁵²³ Respondent's Post-Hearing Brief, ¶367.

⁵²⁴ Rebuttal [REDACTED] Report, ¶¶19, 36 and 98.

account secured claims and liquidation costs, which would have been satisfied first, such sale proceeds would not have been sufficient to pay the claims of unsecured creditors, such as Manchester, whether or not [REDACTED] secured claim had been excluded.⁵²⁵

(c) Legal costs

The Claimant's Position

329. The Claimant seeks compensation for the costs of the legal proceedings associated with each of the aforementioned Harms,⁵²⁶ in the amount of [REDACTED].⁵²⁷

330. The Claimant submits that investment treaty case law confirms that the costs of local proceedings resulting from breaches of the BIT are claimable in BIT proceedings.⁵²⁸ [REDACTED]

[REDACTED]
[REDACTED]⁵²⁹

The Respondent's Position

331. The Respondent submits that, under the BIT, the costs of domestic proceedings are not claimable.⁵³⁰ Alternatively, the Respondent argues that no costs should be awarded to the Claimant, as the claimed amounts were incurred by [REDACTED] rather than Manchester.⁵³¹

332. The Respondent adds that the Claimant has not proven that the costs were incurred as a result of the alleged breaches of the BIT. It alleges that the work specifications provided by the Claimant only generally show that they cover the costs of other court proceedings involving the Claimant, but not that they are the court proceedings within which the BIT was breached. The Respondent also questions the Claimant's need to incur certain legal costs (even if they were linked with the alleged breaches), such as the costs of the proceedings to remove the [REDACTED] Mortgage from the LMR and the "test" case for the [REDACTED] Mortgage to be declared invalid.⁵³² Moreover, the Respondent's experts state that there are discrepancies between the invoice amounts and the

⁵²⁵ Respondent's Post-Hearing Brief, ¶356; [REDACTED] Report, ¶¶42-43, 94 and 96, referring to ¶¶95, 109 and 126; Rebuttal [REDACTED] Report, ¶¶19, 36 and 98.

⁵²⁶ Reply, ¶302.

⁵²⁷ Supplemental Report of Brian O'Brien, p. 11.

⁵²⁸ Claimant's Post-Hearing Brief, ¶327, referring to *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine* (ICSID Case No. ARB/08/8), (CA-85), ¶392.

⁵²⁹ Claimant's Post-Hearing Brief, ¶¶328-329, referring to Second [REDACTED] Witness Statement, ¶30.

⁵³⁰ [REDACTED] Report, ¶¶99-100. See also, Rebuttal [REDACTED] Report, ¶27.

⁵³¹ Rebuttal [REDACTED] Report, ¶31; Hearing Transcript (25 September 2017), 141:24-142:2.

⁵³² Respondent's Post-Hearing Brief, ¶¶393-403.

payment confirmations,⁵³³ and that it was only possible “to match four out of 45 confirmations of payments to the invoices presented by the Claimant.”⁵³⁴

333. On this basis, the Respondent takes the position that the claim for legal costs is unproven and should be dismissed in full,⁵³⁵ but that, should the Tribunal decide to award such costs, compensation should not exceed [REDACTED]

(d) Interest

The Claimant's Position

334. The Claimant claims compound pre-award interest on all amounts awarded by the Tribunal at a rate equivalent to the cumulative internal rate of return for [REDACTED].⁵³⁶ Alternatively, the Claimant claims pre-award compound interest at a commercial rate.⁵³⁸

335. The Claimant's damages expert, Mr. O'Brien, opines that applying a risk-free rate, as suggested by the Respondent, would not be appropriate, as pre-award interest should compensate the Claimant for the return that it would have earned had it been compensated at the time of the alleged breaches.⁵³⁹ [REDACTED]

[REDACTED].⁵⁴⁰ Therefore, Mr. O'Brien concludes, applying [REDACTED] actual internal rate of return is the only methodology that re-establishes the situation which would have existed “but for” the Respondent's alleged breaches.⁵⁴¹

336. In the alternative, Mr. O'Brien suggests the statutory rate of interest under Polish law (between 5 and 13%) or the borrowing rate from banks in Poland (the three-month WIBOR rate plus 4%).⁵⁴²

337. Additionally, the Claimant claims post-award interest “on any monetary award up to the date of payment, being compounded or alternatively simple interest, at a commercial rate.”⁵⁴³

⁵³³ Rebuttal [REDACTED] Report, ¶29(a).

⁵³⁴ Rebuttal [REDACTED] Report, ¶29(b).

⁵³⁵ Respondent's Post-Hearing Brief, ¶405.

⁵³⁶ Rebuttal [REDACTED] Report, ¶¶32 and 156.

⁵³⁷ Claimant's Post-Hearing Brief, ¶334. *See also*, Statement of Claim, ¶398.

⁵³⁸ Statement of Claim, ¶398.

⁵³⁹ Rebuttal Report of Brian O'Brien, ¶¶7.8, 7.11-7.12 and 7.25.

⁵⁴⁰ Expert Report of Brian O'Brien, Appendix F; Supplemental Report of Brian O'Brien, ¶3.4.

⁵⁴¹ Rebuttal Report of Brian O'Brien, ¶¶7.13 and 7.17.

⁵⁴² Reply, ¶333, referring to Expert Report of Brian O'Brien, ¶5.76. *See also*, Rebuttal Report of Brian O'Brien, ¶7.26.

⁵⁴³ Statement of Claim, ¶399.

The Respondent's Position

338. The Respondent argues that the Tribunal should apply a risk-free rate. Yield rates of Government bonds are a "widely accepted approximation of the risk free rate."⁵⁴⁴ In the case of PLN, this is the rate on Polish Government bonds, currently at 1.78%.⁵⁴⁵
339. In the Respondent's view, there are no grounds for interest decisions being based on the rates of return of a specific entity, especially the rate of return of an entity other than the Claimant.⁵⁴⁶

4. The issue of double recovery

The Respondent's Position

340. The Respondent asserts that there is a risk of double recovery because "in parallel to these proceedings Claimant has been enforcing [REDACTED] debt in the bankruptcy proceedings and from third parties" and there is a "high probability, the Claimant will recover in the bankruptcy proceedings at least [REDACTED] PLN as a secured creditor, and further amounts as an unsecured creditor."⁵⁴⁷ The Claimant is further enforcing its claim against a property at Twardowskiego Street, which was valued at over PLN [REDACTED].⁵⁴⁸
341. The Respondent asserts that it is uncontested that there was a debt secured by the [REDACTED] and [REDACTED] mortgages, since the Polish courts upheld in full the Claimant's claim against [REDACTED] for payment of PLN [REDACTED].⁵⁴⁹ The same claim was acknowledged for the benefit of Manchester in the Bankruptcy Proceedings.⁵⁵⁰ The Respondent therefore argues that the Claimant did not lose its debt and still has a chance of being partially paid.⁵⁵¹
342. The Respondent disagrees with the Claimant's suggestion that, should the Tribunal award damages, "the Claimant would reimburse Poland any amounts received as a result of enforcing its receivables in Poland, less any payments Manchester may be required to pay to [REDACTED]"

⁵⁴⁴ Rejoinder, ¶364.

⁵⁴⁵ Rejoinder, ¶364; [REDACTED] Report, ¶¶123-124.

⁵⁴⁶ Respondent's Post-Hearing Brief, ¶413.

⁵⁴⁷ Hearing Transcript (28 September 2017), 676:8-21; Respondent's Post-Hearing Brief, ¶359.

⁵⁴⁸ Hearing Transcript (28 September 2017), 676:22 to 677:2; Letter from the Bankruptcy Trustee to the General Counsel to the Republic of Poland, 6 September 2017 (R-63); Letter from Court Bailiff [REDACTED] to the General Counsel to the Republic of Poland, 14 September 2017 (R-64); Letter from the Bankruptcy Trustee to the General Counsel of the Republic of Poland, 22 January 2018 (R-68).

⁵⁴⁹ Respondent's Post-Hearing Brief, ¶361, referring to [REDACTED] Regional Court, case file ref. [REDACTED] 3 October 2008 (C-6).

⁵⁵⁰ Respondent's Post-Hearing Brief, ¶361, referring to Extract from the List of Claims, Case file ref. [REDACTED] Zw 417, 8 August 2011 (C-7).

⁵⁵¹ Respondent's Post-Hearing Brief, ¶362, referring to Letter from the Bankruptcy Trustee to the General Counsel to the Republic of Poland, 6 September 2017 (R-63).

clients in respect of the pending Polish court proceedings.”⁵⁵² According to the Respondent, this proposal cannot be implemented in a way that would properly secure the interests of the Respondent without a settlement. Further, any such settlement would have to provide the Respondent with appropriate tools to monitor the performance of the obligations assumed by the Claimant. It would require a complex document, as the Claimant would need to be well-motivated to continue the enforcement of its claims in an efficient manner. It would also “require that the Respondent sets a team responsible for monitoring of the Claimant’s actions, which would cause an unreasonable burden for the Respondent.”⁵⁵³

343. The Claimant’s further proposal that “the Tribunal award the full amount of damages on condition that the Claimant undertakes to withdraw the claims pending in Poland against [REDACTED] bankruptcy estate and other debtors in relation to the Bond Purchase Agreement, save for pre- and post-award interest and costs” is equally unacceptable to the Respondent.⁵⁵⁴ The Respondent submits that this proposal would amount to the “Respondent paying the Claimant all the amounts it had not recovered up until present date, and indirectly making a de facto donation to an unknown group of [REDACTED] creditors.”⁵⁵⁵

344. Instead, the Respondent proposes that the Tribunal address the risk of double recovery by issuing an award on liability and, if it finds Poland liable for breach of the BIT, deferring its award on quantum until all enforcement and bankruptcy proceedings have come to an end. In the alternative, it proposes that the Tribunal issue a final award but deduct any amounts that Manchester can still potentially recover in the bankruptcy and enforcement proceedings from the amount of awarded damages, if any.⁵⁵⁶

The Claimant’s Position

345. The Claimant recalls that the [REDACTED] Mortgage was invalidated in 2012 and asserts that, since then, Manchester has been unable to recover its claim in full. Accordingly, in its view, the prospect of recovery of the outstanding amount from the current bankruptcy or enforcement proceedings is remote.⁵⁵⁷

⁵⁵² Hearing Transcript (28 September 2017), 677:3-13; Claimant’s Letter dated 22 September 2017.

⁵⁵³ Hearing Transcript (28 September 2017), 678:10 to 679:5.

⁵⁵⁴ Hearing Transcript (28 September 2017), 677:20 to 678:2; Claimant’s Letter dated 22 September 2017.

⁵⁵⁵ Hearing Transcript (28 September 2017), 679:6-13.

⁵⁵⁶ Hearing Transcript (28 September 2017), 680:13-22.

⁵⁵⁷ Hearing Transcript (28 September 2017), 682:14-22. *See also*, Claimant’s Post-Hearing Brief, ¶393; Claimant’s Letter dated 19 February 2018, ¶4.

346. The Claimant further argues that “Manchester may incur further losses” as a result of the [REDACTED] Supreme Court Ruling.⁵⁵⁸ Since the ruling, Manchester has been implicated in multiple proceedings by various entities seeking invalidation of further securities of Manchester, including the mortgage over the [REDACTED] property. There are also two pending class actions against Manchester by Prospective Buyers who claim damages of PLN [REDACTED] on the grounds that the Supreme Court held that Manchester’s mortgages were contrary to PSC.⁵⁵⁹
347. To address any risk of double recovery with respect to payments that may be received before the Tribunal issues a final award in these proceedings, Manchester offers to “update its damage calculations with reference to any payments that Manchester may receive before the award is issued.”⁵⁶⁰
348. With respect to payments that Manchester may receive after the Award is rendered, the Claimant submits that it would be up to the Polish courts to address any issues of double recovery, as the Polish authorities will take into account the Tribunal’s Award “before ordering any subsequent payments to Manchester in the course of pending enforcement or bankruptcy proceedings.”⁵⁶¹ The Claimant refers to *Chevron v. Ecuador*, where the tribunal held that “Claimant’s recovery in the arbitration should not be reduced based on the uncertain possibility of a favourable outcome in the national proceedings.”⁵⁶² The Claimant avers that this internationally recognized position is also recognized by Polish law.⁵⁶³
349. The Claimant further contends that, should the Tribunal wish to address the issue of double recovery in its Award, this is possible, and that the Claimant’s “undertaking to withdraw its claims pending in Poland, upon receipt of payment from Poland, or its undertaking to reimburse Poland in the amount of the proceeds that Manchester may subsequently receive ... can be easily accommodated in the arbitral award, and this would eliminate any risk, however remote, of double recovery.”⁵⁶⁴ The Claimant objects to the Respondent’s proposal that the Tribunal defer its Award on damages or reduce the Claimant’s damages by the amount that can potentially be recovered in the proceedings in Poland, as it would mean that the Claimant would be further

⁵⁵⁸ Hearing Transcript (28 September 2017), 682:12-13.

⁵⁵⁹ Hearing Transcript (28 September 2017), 683:10 to 684:9.

⁵⁶⁰ Hearing Transcript (28 September 2017), 684:17 to 685:5. *See also*, Claimant’s Post-Hearing Brief, ¶397.

⁵⁶¹ Hearing Transcript (28 September 2017), 685:6-17, *See also*, Claimant’s Post-Hearing Brief, ¶394.

⁵⁶² *Chevron v. Ecuador* (CA-41), ¶557.

⁵⁶³ Hearing Transcript (28 September 2017), 685:10-25. *See also*, Claimant’s Post-Hearing Brief, ¶395.

⁵⁶⁴ Hearing Transcript (28 September 2017), 686:5-17. *See also*, Claimant’s Post-Hearing Brief, ¶397.

penalized for the invalidation of its security, for as long as the assets in ██████████ bankruptcy estate remain unsold.⁵⁶⁵

E. COSTS

The Claimant's Position

350. The Claimant submits that the Respondent should bear the entire costs of arbitration, including legal and other costs.⁵⁶⁶

351. In respect of the costs of its legal representation, the Claimant seeks an award of the costs of Clifford Chance LLP and Clifford Chance Janicka, Krużewski, Namiotkiewicz i Wspólnicy sp. k. (together, Clifford Chance) incurred both in this arbitration and in the court proceedings in Poland, as well as the costs of DeBenedetti Majewski Szczesniak Kancelaria Prawnicza sp. k. (DMS), the Claimant's local counsel in the court proceedings in Poland.⁵⁶⁷ In the Claimant's view, the costs incurred in the Polish court proceedings were "ancillary to this arbitration" as they include, for example, the claim for invalidation of the ██████████ Mortgage, which is the subject matter of this arbitration.⁵⁶⁸

352. The Claimant also explains that the fees and expenses of Clifford Chance, as well as the fees and expenses of expert witnesses, have been invoiced to the Claimant, while the legal fees and expenses of DMS have been invoiced to ██████████ Advisors, ██████████.⁵⁶⁹

353. In sum, the Claimant seeks an award of the following amounts:⁵⁷⁰

Cost	Amount (EUR)	Amount (USD)	Amount (GBP)
Tribunal fees (deposits)		325,000	
Fees and expenses of Clifford Chance	██████████		
Fees and expenses of DMS	██████████		
Fees and expenses of expert witnesses:	██████████		
- Mr. Brian O'Brien	██████████		
- Mr. Krzysztof Grzesik	██████████		

⁵⁶⁵ Hearing Transcript (28 September 2017), 686:18 to 687:3. *See also*, Claimant's Post-Hearing Brief, ¶396.

⁵⁶⁶ Claimant's Costs Submissions dated 19 February 2018 ("Claimant's Cost Submissions"), ¶3.

⁵⁶⁷ Claimant's Costs Submissions, ¶5.

⁵⁶⁸ Claimant's Letter dated 23 March 2018, ¶¶5-6.

⁵⁶⁹ Claimant's Costs Submissions, ¶11; Claimant's Letter dated 26 March 2018, ¶¶7-8, referring to Claimant's Post Hearing Brief, ¶328.

⁵⁷⁰ Claimant's Costs Submissions, ¶¶6-8.

- Professor Bartłomiej Swaczyna			
- Professor Wojciech Sadurski			
Additional expenses incurred by the Claimant (travel costs)			
TOTAL		325,000	

The Respondent's Position

354. The Respondent requests that the Tribunal order the Claimant to pay all costs, disbursements and expenses incurred by the Respondent in its defense against the Claimant's claims in this arbitration "including, but not limited to, legal, consulting and witness fees and expenses, travel and administrative expenses, and the arbitration costs."⁵⁷¹

355. The Respondent avers that it has incurred the following costs:⁵⁷²

Cost	Amount (EUR)	Amount (USD)	Amount (PLN)
Advances on fees and costs of arbitrators		325,000.00	
Counsel fees and expenses			
Expert opinions			
Other costs (translations, travel and accommodation costs)			
TOTAL		325,000.00	

356. The Respondent opposes the Claimant's request for reimbursement of the costs incurred in the Polish court proceedings, stating that these costs should not be considered part of the "costs of the arbitration." It asserts that a party may only seek reimbursement of its legal and other costs if they were "incurred in connection with the arbitration proceedings."⁵⁷³

357. In this regard, it argues that: (i) the Polish court proceedings were not ancillary to the arbitration or procedurally connected with it; (ii) the Respondent was not party to any of the court proceedings referred to by the Claimant; and (iii) the costs of the associated legal advice should have been claimed and awarded in the relevant proceedings.⁵⁷⁴

⁵⁷¹ Respondent's Costs Submissions dated 19 February 2018 ("Respondent's Cost Submissions"), ¶1.

⁵⁷² Respondent's Costs Submissions, ¶2; Respondent's Letter dated 16 March 2018, ¶1.

⁵⁷³ Respondent's Letter dated 16 March 2018, ¶2(a).

⁵⁷⁴ Respondent's Letter dated 16 March 2018, ¶2(a).

358. Finally, the Respondent submits that any costs invoiced to and paid by [REDACTED] Advisors, and not the Claimant, should not be awarded. [REDACTED]

[REDACTED] 575

VI. THE TRIBUNAL'S ANALYSIS

A. JURISDICTION

359. The Respondent has raised three objections to the jurisdiction of the Tribunal, namely that there was no protected investment under the BIT, that the Claimant acted in bad faith, and that the Tribunal is not competent to review the substance of the Polish courts' judgments unless there is denial of justice.

1. Was there an investment?

360. The Respondent argues that: (i) the purchase of the Bonds is a commercial activity and does not fall within the ordinary meaning of investment; (ii) the BIT does not contain a precise definition of investment and it is necessary to take into account the meaning of investment in international law; and (iii) the so-called *Salini* test is applicable and not met by the purchase of the Bonds by the Claimant.⁵⁷⁶

361. According to Article I(1)(b) of the BIT, the term "investment" includes:

- (i) tangible and intangible property, including rights such as mortgages, liens and pledges;
- (ii) a company or shares of stock, or other interests in a company or interests in the assets thereof;
- (iii) a claim to money or a claim to performance having economic value, and associated with an investment;
- (iv) intellectual property which includes, rights relating to: literary and artistic works, including sound recordings, patent rights, industrial designs, semiconductor mask works, trade secrets and trademarks, service marks, and trade names; and
- (v) any right conferred by law or contract, and any licenses and permits pursuant to law.

362. The BIT defines "commercial activity" as "activities carried on by nationals or companies of a Party related to the sale or purchase of goods and services and the granting of franchises or rights under license, which are not investments or related activities" (Article I(1)(i)).

⁵⁷⁵ Respondent's Letter dated 16 March 2018, ¶2(b).

⁵⁷⁶ Statement of Defense, ¶¶100-106, referring to *Salini v. Morocco* (RA-2), ¶52. See also, Rejoinder, ¶¶95-99.

363. The Tribunal will interpret the terms of the BIT “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,” as provided in Article 31 of the VCLT.⁵⁷⁷
364. The Tribunal notes that commercial activity is defined in the negative, as an activity that is not an investment or related to it. Hence, to interpret the definition, the Tribunal needs first to determine what is an investment under the BIT. Furthermore, the last phrase of the definition, “which are not investments or related activities,” is ambiguous; it may be read to mean that some of these activities may be investments or related to investments. The inclusion of the same term – “licenses” – under “investment” and “commercial activity” adds to the ambiguity.
365. The initial definition of “investment” in Article I(1)(b) is somewhat circular in that “investment” is defined “as every kind of investment.” The specific list of “included” categories that follows illustrates what the parties to the BIT intended to include under the general term of investment. They left the definition open to include other possible ways to invest, but ensured that the investments listed would be included. This list provides guidance to the Tribunal on the BIT parties’ understanding of what is an investment.
366. According to the Claimant, its investment consists of:
- a) In relation to the Bond Purchase Agreement concluded with [REDACTED]
 - (i) The payment of PLN [REDACTED] to [REDACTED] in exchange for the Bonds issued at such face value, as financing for [REDACTED] real estate projects in Poland; and
 - (ii) Claims, arising under the terms of the Bond Purchase Agreement, for the payment of money on presentation of coupons and at maturity of the Bonds, which were crystallised in the Payment Order and acknowledged in the Bankruptcy Proceedings; and
 - b) Manchester’s rights arising out of the [REDACTED] and [REDACTED] Mortgages, which were acquired to secure the receivables under the Bond Purchase Agreement.⁵⁷⁸
367. As described, the investment of the Claimant in the form of Bonds secured by mortgages would fall within the categories specifically included in Article I(1)(b): (i) the Bonds represent a claim to money lent to [REDACTED] by the Claimant for real estate development, an economic activity; and (ii) the secured Bonds also fit under the category of interests in the assets of [REDACTED]. Given the definition of “commercial activity” in the BIT, if an activity fits under one of the listed categories of investment, then, *prima facie*, the activity concerned will qualify as an investment and not as an excluded “commercial activity”.
368. The Respondent has argued that, because of the lack of precision in the definition of investment in the BIT, the Tribunal needs to take into account the meaning of investment in international

⁵⁷⁷ VCLT (CA-58), Article 31.

⁵⁷⁸ Reply, ¶¶83 and 95; Statement of Claim, ¶216.

law.⁵⁷⁹ On the other hand, the Claimant contends that, if an investment qualifies as such “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose,” it would be contrary to the VCLT to have recourse to other means of interpretation, including jurisprudence from other arbitral tribunals under other treaties such as the ICSID Convention.⁵⁸⁰

369. The Tribunal agrees that *prima facie* the Claimant did make and maintain an investment in the Respondent State within the definition of Article I(1)(b) of the BIT. In order nonetheless to dispose of the Respondent’s contention, however, that the Tribunal should “take into account the meaning of investment in international law” and, in particular, apply the so-called *Salini* test, the Tribunal will proceed to address it.
370. The Tribunal is mindful that there is no agreed definition of investment in international law. The definitions, if any, vary in the treaties and the jurisprudence. The characteristics of an investment, as argued by the Respondent, have more commonly been developed and analyzed by tribunals in ICSID cases because of the complete lack of definition of investment in the ICSID Convention. In summing up investment cases jurisprudence, the Respondent states that, in order to qualify as an investment, an asset must at least fulfil three criteria: contribution, duration and risk. While the Tribunal does not endorse the Respondent’s view that these criteria reflect customary international law,⁵⁸¹ the Tribunal now proceeds to consider those three criteria, frequently referred to, in relation to this arbitration.
371. The Respondent has noted that some tribunals have added to the three above-mentioned criteria the requirements that the investment be made in good faith and contribute to the economic development of the host State. The Tribunal considers that to determine whether an investment at the time it is made will contribute to economic development is rather speculative and, at most, would be an estimated expectation. Whether such an expectation actually is realized may eventually become known in the future and then it may be problematic to evaluate it. As regards the criterion of good faith, in the view of the Tribunal, given in any event the requirement of Article II(1) of the BIT that an investment be made “in accordance with [the host State’s] laws and regulations,” an investment may qualify as such, but, if made in bad faith, may not be worthy of protection under the BIT. The Respondent has argued that Manchester acted in bad faith as an objection to the jurisdiction of the Tribunal and the Tribunal will examine this matter separately below (see paragraphs 379-382 and 392-402).

⁵⁷⁹ Statement of Defense, ¶100; Rejoinder ¶95.

⁵⁸⁰ Reply, ¶89; Claimant’s Post Hearing Brief, ¶¶81-93.

⁵⁸¹ See, Rejoinder, ¶99, relying on *Alps Finance v. Slovakia* (CA-50), ¶240.

372. In denying that the alleged investment of the Claimant qualified as a contribution, the Respondent relies on *Romak v. Uzbekistan* and *Poštová banka v. Greece*.⁵⁸² Neither case is apposite. In *Poštová banka*, the dispute concerned sovereign debt. The term “bonds” in the relevant bilateral investment treaty was only mentioned in the context of debt instruments issued by commercial companies and not by States. A key element in the reasoning of the *Poštová banka* tribunal was that the claim to money in the case of sovereign debt bought in the secondary market did not arise under a direct contractual relationship with the issuer of the bonds.⁵⁸³ *Romak* concerned a straight sale contract for milling wheat. That tribunal stated that it interpreted the term “contribution” in broad terms as “[a]ny dedication of resources that has economic value ...”.⁵⁸⁴ The tribunal found that “*Romak*’s delivery of wheat was a transfer of title in performance of a sale of goods contract. *Romak* did not deliver the wheat as a contribution in kind in furtherance of a venture. Accordingly, the Arbitral Tribunal does not consider that *Romak* made a contribution in relation to the transaction in question.”⁵⁸⁵
373. In the instant case, the Claimant and [REDACTED] had a direct contractual relationship in the form of the Bond Purchase Agreement, and the Bonds secured by the Mortgages were held by the Claimant. The purchase of the Bonds was not an isolated transaction; it created a relationship with the seller which established mortgages to secure the loan made by the Claimant and evidenced by the Bonds. Furthermore, Manchester had the right to appoint two members to [REDACTED] supervisory board.⁵⁸⁶ There is no doubt that a bond is a claim to money, which in this case was associated with the real estate development activities of the seller. An investment may be financed by debt or equity, and either way, the investor, in the words of *Romak*, makes a contribution in “furtherance of a venture.”⁵⁸⁷ In view of these considerations, the Tribunal finds that the Claimant’s investment meets the contribution criterion.
374. The Respondent has also argued that the Claimant did not incur an operational risk as distinct from sovereign or commercial risk.⁵⁸⁸ The *Romak* and *Poštová banka* awards relied on by the Respondent define risk in the context of the factual situation in their respective cases. The Respondent recalls that the *Poštová banka* tribunal pointed out that commercial risk is distinct from investment risk and that the distinction “would be between a risk inherent in the investment

⁵⁸² Statement of Defense, ¶¶108-109, referring to *Romak v. Uzbekistan* (RA-1) and *Poštová banka v. Greece* (RA-4).

⁵⁸³ *Poštová banka v. Greece* (RA-4), ¶¶317-349.

⁵⁸⁴ *Romak v. Uzbekistan* (RA-1), ¶214.

⁵⁸⁵ *Romak v. Uzbekistan* (RA-1), ¶222.

⁵⁸⁶ Bond Purchase Agreement (C-2), Art. 6.2.2.

⁵⁸⁷ *Romak v. Uzbekistan* (RA-1), ¶222.

⁵⁸⁸ Statement of Defense, ¶¶116-117.

operation in its surrounding – meaning that the profits are not ascertained but depend on the success or failure of the economic venture concerned – and all the other commercial and sovereign risks.”⁵⁸⁹ The view of the Respondent on the nature of the risk is colored by its concept of investment, which seems to be restricted to investments in equity and dismisses the Claimant’s investment as a “financial transaction.” The *Romak* award considers risk in “a situation in which the investor cannot be sure of a return on his investment.”⁵⁹⁰

375. The nature of the risk will depend on the type of investment. Tribunals have considered a variety of risks, from the existence of the dispute itself to risks inherent in long-term contracts or in the economic or political situation in the host State. In the instant case, the return to the Claimant was dependent on the success or failure of the economic venture. While the amount of a loan and the interest rate may be known from the start, there is no certainty of the success of the investment to which the financial operation has contributed and on which payment of the interest and the amortization of the loan depend. The dispute before the Tribunal attests to the risks of Manchester’s investment.
376. The Respondent also contends that the Mortgages do not qualify as an investment. According to the Respondent, not all mortgages would qualify as investments and, in the instant case, the Mortgages were established as part of the commercial activity of the Claimant.⁵⁹¹ The Tribunal has determined that the activity of the Claimant qualified as an investment and, therefore, the Mortgages, to the extent that they made possible the Bonds’ purchase, should be considered to be part of the investment. They carry risks regarding their enforcement as shown by the dispute before this Tribunal. The investment has to be considered in its totality.⁵⁹²
377. As regards the criterion of duration, there is no set number of years below which an investment would not qualify as such.⁵⁹³ Whether the duration criterion is satisfied will depend on the nature and surrounding circumstances of the operation concerned. Tribunals have interpreted this characteristic flexibly and regarded a period of two to five years as sufficient.⁵⁹⁴ In the case of

⁵⁸⁹ Statement of Defense, ¶116, referring to *Poštová banka v. Greece* (RA-4), ¶370.

⁵⁹⁰ *Romak v. Uzbekistan* (RA-1), ¶230.

⁵⁹¹ Rejoinder, ¶87.

⁵⁹² See, Pierre Lalive, “The First ‘World Bank’ Arbitration (Holiday Inns v. Morocco)—Some Legal Problems” (1981), 51 BYIL 123, p. 159; *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, ¶72; *Romak v. Uzbekistan* (RA-1), ¶211.

⁵⁹³ *Romak v. Uzbekistan*, Award (RA-1), ¶225: “The Arbitral Tribunal does not consider that, as a matter of principle, there is some fixed minimum duration that determines whether assets qualify as investments. Short-term projects are not deprived of “investment” status solely by virtue of their limited duration. Duration is to be analyzed in light of all of the circumstances, and of the investor’s overall commitment.”

⁵⁹⁴ C.H. Schreuer, *The ICSID Convention- A Commentary* (2nd edition, Cambridge University Press 2009) (CA-68), p. 130.

Manchester, the Bonds had a duration of two years. The Tribunal does not consider the effect that a default may have on the duration of an investment to be relevant for purposes of determining whether a transaction is an investment. In the circumstances of this case, the Tribunal considers that the duration criterion is satisfied.

378. The Tribunal concludes that the claim to money represented by the Bonds and the associated Mortgages constitute an investment even if judged under the *Salini* criteria.

2. Was the investment made in bad faith?

379. The Respondent has argued as a jurisdictional matter that the Claimant cannot rely on the BIT's protection because the Mortgages were established or enforced in bad faith. The Claimant contends that the Respondent cannot rely on bad faith as a jurisdictional defense and denies that it acted in bad faith when establishing or enforcing the Mortgages. The Claimant has pointed out that the objection of bad faith has been raised only in respect of the establishment and enforcement of the Mortgages and not in respect of the Bond Purchase Agreement.
380. Tribunals are divided on whether bad faith should be considered as part of the jurisdiction or the merits. The tribunal in *Abaclat v. Argentina* summarized this divergence:

With regard to breaches of material good faith, different tribunals have followed two different approaches. Either they have dealt with the question of material good faith within the context of the examination of the Tribunal's jurisdiction or within the context of the examination of the legality of the investment: (i) It can be seen as an issue of consent and thus of jurisdiction, where the consent of the Host State cannot be considered to extend to investments done under circumstances breaching the principle of good faith; (ii) It can be seen as an issue relating to the merits, where the key question is whether the circumstances in which the relevant investment was made are meant to be protected by the relevant BIT.⁵⁹⁵

381. The *Abaclat* tribunal concluded:

There are certainly good reasons in support for each of these approaches, and the choice of the appropriate approach will eventually depend on the circumstances of the case at stake.⁵⁹⁶

382. In Procedural Order No. 2, the Tribunal joined to the merits the objections to its jurisdiction. Hence, it has the benefit of the full factual record and, on this basis, it will decide the Respondent's objection as part of its consideration of the merits (see paragraphs 392-402 below).

3. To what extent can the Tribunal review decisions of domestic courts?

383. The Respondent has argued that the claim of the Claimant is "outside the jurisdiction of this Tribunal because the Claimant is requesting a substantial review of the Polish court decisions and

⁵⁹⁵ *Abaclat v. Argentina*, Award (CA-61), ¶648.

⁵⁹⁶ *Abaclat v. Argentina*, Award (CA-61), ¶650.

a determination of whether these decisions were issued in accordance with Polish law.”⁵⁹⁷ The Respondent argues that this request would place the Tribunal in the role of an appellate tribunal, which is contrary to international law and not covered by the consent of the Respondent under Article IX of the BIT.⁵⁹⁸ The Respondent has further argued that, if the Tribunal decides that it may review the decisions of the local courts, “this review is not encompassed by any BIT standard, particularly the fair and equitable treatment standard.”⁵⁹⁹ On the other hand, the Claimant replied that its claim does not call into question the Tribunal’s jurisdiction because it requests the Tribunal to assess the decisions of the Polish courts in light of international law.⁶⁰⁰

384. The parties to the BIT did not exclude any organ of the State from the obligations undertaken under the BIT. The courts may breach the parties’ obligations, as may any other organ of the State, although the content of the standard when applied to the judicial system has to be clearly ascertained. In the Tribunal’s view, this is not a matter of jurisdiction but of the standard of review under international law of the decisions of domestic courts and other organs of the administration of justice. It will be best addressed as part of the Tribunal’s consideration of the merits (see paragraphs 404-424 below).

B. LIABILITY

1. What acts can be attributed to a State?

385. The Parties differ on whether the acts of the Bankruptcy Trustee or the Bankruptcy Court may be attributed to the Respondent. The Claimant has based its arguments on Article 4⁶⁰¹ and Article 8⁶⁰² of the ILC Articles and on Article 115⁶⁰³ of the Polish Criminal Code, which specifically lists a bankruptcy trustee as a State official.

⁵⁹⁷ Rejoinder, ¶161.

⁵⁹⁸ Rejoinder, ¶161.

⁵⁹⁹ Rejoinder, ¶162.

⁶⁰⁰ Reply, ¶155.

⁶⁰¹ “Article 4. Conduct of organs of a State: 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.”

⁶⁰² “Article 8. Conduct directed or controlled by a State. The conduct of a person shall be considered an act of State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct.”

⁶⁰³ Article 115 lists as public officials “a judge, a lay judge, a public prosecutor, an official of a financial authority conducting preparatory proceedings or of an authority superior to the financial authority conducting preparatory proceedings, a notary public, a bailiff, a court-appointed probation officer and curator, a bankruptcy trustee, a court-appointed supervisor and administrator, a person passing rulings as a member of a disciplinary authority operating under a statute...” Polish Criminal Code (C-197).

386. The Respondent disputes the relevance of Article 115 because

[the] Criminal Code establishes a very specific legal regime aimed at combating criminal activity and for this reason uses its own definitions tailor-written to serve its purposes. For example, under the Criminal Code a teacher or a doctor are considered public officials. This demonstrates that definitions contained in the Criminal Code depart from the general understanding of terms and are usually much wider.⁶⁰⁴

387. In further support, the Respondent refers to a judgment of the [REDACTED] Court of Appeal that decided:

A bankruptcy trustee is not a state body, for whose actions or inactions the State Treasury would be liable. The bankruptcy trustee performs actions on their own [on the bankruptcy trustee's own] name, but on the account of the insolvent party, and it is the bankruptcy trustee who is liable for a loss incurred through their own fault (Article 415 of the Polish Civil Code) as a consequence of improper performance of their obligations.⁶⁰⁵

388. The Respondent has also contested the attribution of the acts of the Bankruptcy Trustee to the Respondent under Article 8 of the ILC Articles. The Respondent contends that the Claimant had not proven that the Bankruptcy Trustee was acting under the direction, instruction or control of the Respondent.⁶⁰⁶

389. According to the Bankruptcy and Recovery Law, the Judge-Commissioner manages the bankruptcy proceedings and monitors the actions of the Bankruptcy Trustee. The Judge-Commissioner specifies what action the Bankruptcy Trustee may not take without the Judge-Commissioner's approval.⁶⁰⁷ The Bankruptcy Trustee submits reports to the Judge-Commissioner on the actions taken with a statement of reasons⁶⁰⁸ and the Judge-Commissioner admonishes the Bankruptcy Trustee if the Trustee neglects her duties.⁶⁰⁹ The Judge-Commissioner may fine the Bankruptcy Trustee if she does not correct the negligence.⁶¹⁰ While there may be some doubt as to whether under Polish law a Bankruptcy Trustee is a public official whose actions are attributable to the State, it is clear that the Bankruptcy Trustee acted under the general supervision and control of the Judge-Commissioner. Therefore, the next question for the Tribunal is whether the actions of the Judge-Commissioner may be attributed to the Respondent.

390. The Respondent has argued that the acts of the Judge-Commissioner in the instant case were not judicial acts because the judge acted in lieu of the creditors' committee, which had not been

⁶⁰⁴ Rejoinder, ¶201.

⁶⁰⁵ Court of Appeal in [REDACTED] I Civil Department, case file no [REDACTED] 3 March 2011 (R-49).

⁶⁰⁶ Rejoinder, ¶207.

⁶⁰⁷ Bankruptcy and Recovery Proceedings Law, 23 February 2003 (C-198), Article 152.1.

⁶⁰⁸ Bankruptcy and Recovery Proceedings Law, 23 February 2003 (C-198), Article 168.1.

⁶⁰⁹ Bankruptcy and Recovery Proceedings Law, 23 February 2003 (C-198), Article 169 a.

⁶¹⁰ Bankruptcy and Recovery Proceedings Law, 23 February 2003 (C-198), Article 169 a.

established.⁶¹¹ However, the excerpts of the Bankruptcy and Recovery Law in the record of this proceeding do not show that the monitoring and supervision function is limited to cases in which a committee of creditors has not been established. These excerpts also show that the Judge-Commissioner determines which acts of the Bankruptcy Trustee require her approval or the consent of the council of creditors. Even if a creditors' committee had been established in the instant case, the Judge-Commissioner would have been required to approve the transfer of the apartments. In its Post-Hearing Brief, the Respondent explains that

when referring to the "*bankruptcy court*", the Parties in fact meant two bodies involved in conducting bankruptcy proceedings: the bankruptcy court and the judge-commissioner. Therefore, it should be clarified that – based on the facts presented in this arbitration –

- (a) the bankruptcy court declared [REDACTED] bankrupt, while
- (b) the judge-commissioner approved the transfer of the Apartments to the Prospective Buyers by the bankruptcy trustee.⁶¹²

Whether or not the acts of the Bankruptcy Trustee can be attributed to the Respondent depends on the question whether the specific acts complained of were performed under the direction of the Judge-Commissioner, which inquiry is not necessary here.

391. It is indeed not disputed that acts of the courts may be attributed to the Respondent. In view of the findings by the Tribunal later in this Award, the differences between the Parties on attribution to the Respondent of acts of the Bankruptcy Trustee or the Judge-Commissioner are not material to the Tribunal's conclusions (see, in particular, paragraph 500 below).

2. Was the investment made in bad faith?

392. The Respondent bases its objection on the following facts:

(i) the Prospective Buyers had paid the full or a substantial portion of the purchase price for the [REDACTED] and [REDACTED] Apartments, (ii) [REDACTED] had agreed to transfer to the Prospective Buyers the ownership rights to these Apartments without any encumbrances, and (iii) enforcement of the Mortgages would deprive the Prospective Buyers of any rights to the [REDACTED] and [REDACTED] Apartments.⁶¹³

393. According to the Respondent, the Claimant knowingly accepted that the Mortgages would harm the Prospective Buyers and intentionally breached the principle of good faith, which is part of PSC under Polish law.⁶¹⁴ The Respondent explains that the Polish courts decided that the

⁶¹¹ Statement of Defense, ¶89; Rejoinder, ¶¶190 and 208-209; Respondent's Post-Hearing Brief, ¶¶18-22.

⁶¹² Respondent's Post-Hearing Brief, ¶18.

⁶¹³ Statement of Defense, ¶125.

⁶¹⁴ Statement of Defense, ¶125.

- ██████████ Mortgage was contrary to these principles and applied these principles to prevent the Claimant from profiting from its own wrongdoing.⁶¹⁵
394. The jurisprudence adduced by the Respondent shows that bad faith requires “abuse of the system of international investment protection,”⁶¹⁶ “a contract obtained by wrongful means,”⁶¹⁷ a “deliberate concealment amounting to fraud”⁶¹⁸ or “corruption, fraud or deceitful conduct.”⁶¹⁹ According to the Respondent, by establishing the Mortgages as collateral for the Bonds, the Claimant “knowingly accepted that this would harm the Prospective Buyers.”⁶²⁰ Thus, the “Claimant in order to secure itself a nice return on ██████████ bonds breached intentionally the good faith principle.”⁶²¹
395. The ██████████ Court of Appeal has explained PSC “by reference to the comprehensible semantic content of such concepts as ‘principles of equity’, ‘principles of fair trade’, ‘principles of honesty’, ‘loyalty’, or simply put – ‘Christian values’ – which are shared by the decisive majority of society as the dictates of behavior towards other members of society.”⁶²² These principles are more far reaching in scope than the principle of good faith and some affirmations of the Respondent based on these principles belong to the realm of ethics. The Tribunal is not an ethics tribunal and will limit itself to adjudicate on the basis of international law. While the Parties may disagree on the content of the PSC and their applicability, they do not contest the content of the principle of good faith as expressed by arbitral tribunals and relied on by the Respondent. The Tribunal will be guided by how the principle of good faith has been understood and applied under international law.
396. Before proceeding further, the Tribunal refers to the Respondent’s preliminary remarks about ██████████ strategy.⁶²³ ██████████ is not a party to these proceedings and the cases referred to by the Respondent are not before this Tribunal or related to it. Hence, the Tribunal considers the Respondent’s comments in this regard to be irrelevant to the solution of the dispute.

⁶¹⁵ Statement of Defense, ¶152, referring to First Instance ██████████ Ruling (C-63).

⁶¹⁶ Statement of Defense, ¶145, referring to *Phoenix Action v. Czech Republic* (RA-3), ¶113.

⁶¹⁷ Statement of Defense, ¶148, referring to *Plama v. Bulgaria* (RA-11), ¶143.

⁶¹⁸ Statement of Defense, ¶147, referring to *Plama v. Bulgaria* (RA-11), ¶135.

⁶¹⁹ Statement of Defense, ¶150, referring to *Hamester v. Ghana* (RA-12), ¶123.

⁶²⁰ Statement of Defense, ¶151.

⁶²¹ Statement of Defense, ¶151.

⁶²² Second Instance ██████████ Ruling (C-65), p. 37.

⁶²³ Statement of Defense, ¶¶127-136 and 151; Rejoinder, ¶¶156-157. See also, paragraph 161 above.

397. It is also useful to refer to the context in which the Claimant made the investment. The Respondent has described the situation in its Statement of Defense as follows:

In order to buy before house prices rose and to meet their own housing needs, clients of development companies frequently decided to buy apartments even before construction started.



The Respondent has also described as a common practice for developers to prohibit their clients from registering in the LMR their right for ownership of the apartments to be transferred because they wanted to keep the real estate free of any encumbrances.⁶²⁵

398. As noted earlier in this Award, the Preliminary Agreements concluded by [REDACTED] with the Prospective Buyers and the [REDACTED] Mortgage, which pre-date the investment of the Claimant, have the features described by the Respondent in this arbitration. It is not disputed that the Claimant did not create the system or tailor the Prospective Buyers' Preliminary Agreements to its investment. The Tribunal understands the risk that Prospective Buyers incurred, but it is clear from the record that this was standard practice, which raises the question of what is different in the Claimant's relationship with [REDACTED] that made its Mortgages reprehensible and contrary to PSC.

399. The conduct of the Claimant was found by the Regional Court to be reprehensible and contrary to PSC because of the Claimant's awareness of the existence of third-party claims.⁶²⁶ However, the Court of Appeal disagreed:

[T]he claimants are not questioning the existence of the claims of the defendant, Manchester Securities Corporation, against [REDACTED] and now the bankruptcy estate of [REDACTED] in liquidation bankruptcy; in these proceedings, they

⁶²⁴ Statement of Defense, ¶35.

⁶²⁵ Statement of Defense, ¶35.

⁶²⁶ First Instance [REDACTED] Ruling (C-63), pp. 40-42.

have not challenged the agreements and arrangements concluded by the claimants which constituted the source of the mortgages in question, nor did they point to any circumstances that could have constituted evidence of collusion between the defendants aimed at harming the claimants as creditors by the intentional establishment of security interests in favour of Manchester Securities Corporation in the described form. On the contrary, the Regional Court found that the transaction between [REDACTED] and Manchester Securities Corporation was a typical business transaction initiated by [REDACTED]⁶²⁷

400. The Court of Appeal emphasized that the claimants – the Prospective Buyers – had no direct relationship with Manchester, and that the existence of Manchester's claims was not challenged by the claimants. The Court further reasoned that, if security established as a result of procurement of funds for real estate activity were contrary to PSC, this

would have to lead to the conclusion that an entity conducting real estate development activity would not be able to secure the credit facilities taken out by establishing mortgages on its properties, as the conduct of such business activity entails continuous investment and construction on those properties, which leads to an increase in their value in the period from the taking out of the credit facility to its repayment. In the current regulatory environment, there are no grounds for treating entities conducting real estate development activities differently, so the use of this kind of security was and is common.⁶²⁸

401. Furthermore, it was standard practice for developers to include Non-Registration Clauses in preliminary agreements with buyers because, as noted in the First Instance [REDACTED] Ruling, banks required such clauses to grant loans.⁶²⁹ That it was common practice is also proven by the need to pass legislation such as the Apartment Buyer Protection Act in order to protect prospective apartment buyers. In defense of the Claimant's claim of discrimination, the Respondent itself has argued that the new legislation was meant to address a generic situation and that it did not target the Claimant.⁶³⁰

402. The Tribunal is mindful that the Supreme Court disagreed with the Court of Appeal in the case of the [REDACTED] Mortgage and the Tribunal will return to this matter when considering the claim of breach of FET. For purposes of determining whether the Claimant acted in bad faith under international law, the Tribunal observes that the Claimant had no part in devising the Preliminary Agreements, that the Respondent confirmed in the Statement of Defense that the practices followed by the Claimant were standard practices in the Polish real estate market, and that no misrepresentation, bribery, fraud or abuse of process has been alleged against the Claimant. These considerations lead the Tribunal to conclude that in making the investment, in securing it and in seeking to enforce the Mortgages, the Claimant did not act in bad faith.

⁶²⁷ Second Instance [REDACTED] Ruling (C-65), p. 38 (emphasis added).

⁶²⁸ Second Instance [REDACTED] Ruling (C-65), p. 39 (emphasis added).

⁶²⁹ First Instance [REDACTED] Ruling (C-63), p. 41.

⁶³⁰ Respondent's Post-Hearing Brief, ¶¶120-124.

403. The Tribunal will now consider first the relationship of denial of justice to the BIT standards and then proceed to examine the claims for breach of the BIT.

3. What is the relationship of denial of justice to the BIT standards?

404. Under the FET standard in the BIT, Manchester has claimed, *inter alia*, denial of justice, and, alternatively, it has claimed the same under customary international law.⁶³¹ The Respondent has argued that this claim is “outside the jurisdiction of this Tribunal because the Claimant is requesting a substantial review of the Polish court decisions and a determination of whether these decisions were issued in accordance with Polish law.”⁶³² The Respondent considers that this request is contrary to international law and that it is not covered by the consent of the Respondent under Article IX of the BIT.⁶³³ The Respondent has further argued that, if the Tribunal decides that it may review the decisions of the local courts, “absent a denial of justice, this review is not encompassed by any BIT standard, particularly the fair and equitable treatment standard.”⁶³⁴
405. The Tribunal observes that “denial of justice” is not included *expressis verbis* in any provision of the BIT and that none of the provisions in Article II of the BIT on “Treatment of Investment” exclude courts from their application. Article II(6) requires that “[i]nvestment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.” This text does not exclude any branch of the Government and establishes the gauge against which to measure the treatment to be accorded.
406. The Tribunal disagrees with the Respondent’s affirmation that the review of domestic courts’ decisions is not encompassed by any BIT standards. The Tribunal observes that other obligations respecting the treatment of investments under Article II of the BIT, such as protection of investments against discrimination or arbitrary measures, are part of FET and may rise to a denial of justice. Moreover, by including the phrase “shall in no case be accorded treatment less than that required by international law” in Article II(6), the BIT incorporates customary international law, necessarily including “denial of justice.”
407. In any event, arbitral tribunals consistently have found that FET encompasses denial of justice. For those tribunals, denial of justice is a part of the FET applicable to a State’s courts, based on

⁶³¹ Statement of Claim, ¶337.

⁶³² Rejoinder, ¶161.

⁶³³ Rejoinder, ¶161.

⁶³⁴ Rejoinder, ¶162.

different specific criteria, when applied to courts. This has been clearly articulated in many investment awards, for example in *Swisslion v. Macedonia*:

Bilateral investment treaties often contain the obligation to provide fair and equitable treatment. Some treaties are more specific and include within that standard the obligation not to deny justice and to respect the principle of due process. But even in cases in which there is no clause of that type, ICSID tribunals have considered that fair and equitable treatment includes the prohibition against denial of justice.⁶³⁵

408. Similarly, the tribunal in *Jan de Nul v. Egypt* stated:

The Tribunal recognizes that the 2002 and 1977 BITs do not comprise a specific provision regarding the miscarriage or denial of justice. It considers, however, that the fair and equitable treatment standard encompasses the notion of denial of justice.⁶³⁶

409. The same approach was adopted in *Oostergetel v. The Slovak Republic*:

Although the BIT does not specifically refer to the concept of denial of justice, the Tribunal, in line with other tribunals and established doctrine, considers it to be comprised in the FET standard.⁶³⁷

410. The question for the Tribunal is whether it may find a breach of FET by the courts short of a finding of denial of justice. Expressed differently, is the threshold for finding a breach of FET by the courts different from the threshold applicable in the case of denial of justice?

411. At the request of the Tribunal, the Parties discussed in their Post-Hearing Briefs the question of whether, absent denial of justice, the Tribunal may review decisions of Polish courts for breach of international law on grounds of discrimination, unfair and inequitable treatment, national treatment or judicial expropriation. The Parties further developed their arguments on this issue and the Tribunal finds their discussion of the practice of arbitral tribunals instructive.

412. Both Parties refer to the *Arif v. Moldova* case. The Claimant draws the attention of the Tribunal to the distinction drawn by the *Arif* tribunal between denial of justice and FET.⁶³⁸ That tribunal stated that, notwithstanding the overlap between the two,

the terms to describe one or the other sphere of international rights and obligations (denial of justice or fair and equitable treatment) – such as “arbitrariness”, “discrimination” “unfairness” or “bias” – are used interchangeably. This semantic overlap might contribute to certain confusion. It does not imply, however, that both standards and principles have merged into one and that the prerequisites as well as the consequences of a claim for denial of justice and for the violation of a treaty standard of fair and equitable treatment have become identical.⁶³⁹

⁶³⁵ *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012, ¶262 (emphasis added).

⁶³⁶ *Jan de Nul v. Egypt* (RA-34), ¶188 (emphasis added).

⁶³⁷ *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Award, 23 April 2012, ¶272.

⁶³⁸ Claimant's Post-Hearing Brief, ¶24(a).

⁶³⁹ *Arif v. Moldova* (CA-7), ¶433.

413. The Respondent has emphasized that, when assessing whether the investor was accorded fair and equitable treatment, the *Arif* tribunal applied the test as if it were assessing the facts for a claim of denial of justice. Thus, the tribunal held that “the State can be held responsible for an unfair and inequitable treatment of a foreign indirect investor if and when the judiciary breached the standard by fundamentally unfair proceedings and outrageously wrong, final and binding decisions.”⁶⁴⁰

414. To fully understand the holding of the *Arif* tribunal, it is useful to consider its factual context. The *Arif* tribunal dismissed Mr. Arif’s claim of denial of justice because the claimant was an indirect investor through ownership of shares in a local company. The tribunal reasoned:

Conversely to a free-standing claim for denial of justice which can only be brought by a person that has participated in the national court proceedings, the standard of fair and equitable treatment also protects the foreign shareholder in a local company. If the standard is breached by a denial of justice, the State will be held responsible towards the indirect investor for a breach of fair and equitable treatment.⁶⁴¹

415. The *Arif* tribunal considered two sets of court actions under the heading of “Denial of Justice under the Fair and Equitable Treatment Standard.” After reviewing the first set of court decisions, the tribunal concluded: “[These arguments] do not disqualify, however, the national courts’ application to such a degree to be so egregiously wrong that no competent and honest court would use them.”⁶⁴² In reviewing the second set, it recalled that its “role is limited to determine whether the judiciary has denied justice by applying procedures that are so void of reason that they breathe bad faith.”⁶⁴³ Expressions such as “egregiously wrong” or “devoid of reason” used by the *Arif* tribunal indicate a threshold reminiscent of denial of justice as understood under customary international law.⁶⁴⁴ The tribunal dismissed the claim of denial of justice and upheld the claim of breach of FET for reasons unrelated to the courts’ actions.

416. Both Parties have also discussed the *Tatneft v. Ukraine* award. According to the Claimant, that tribunal accorded more limited deference to domestic courts and upheld the claim of FET even if it did not amount to denial of justice.⁶⁴⁵ On the other hand, the Respondent argues that this case supports its argument that misapplication of the domestic law does not constitute a breach of the

⁶⁴⁰ Respondent’s Post-Hearing Brief, ¶14, referring to *Arif v. Moldova* (CA-7), ¶445.

⁶⁴¹ *Arif v. Moldova* (CA-7), ¶438 (emphasis added).

⁶⁴² *Arif v. Moldova* (CA-7), ¶453 (emphasis added).

⁶⁴³ *Arif v. Moldova* (CA-7), ¶482 (emphasis added).

⁶⁴⁴ See, *B.E. Chattin (United States) v. United Mexican States*, 4 RIAA 282 (1927), ¶11, stating that “state responsibility is limited to judicial acts showing outrage, bad faith, willful neglect of duty, or manifestly insufficient governmental action.”

⁶⁴⁵ Claimant’s Post-Hearing Brief, ¶30, referring to *Tatneft v. Ukraine* (CA-84), ¶¶474-475.

BIT.⁶⁴⁶ As regards deference to the domestic courts in the context of FET, the *Tatneft* tribunal held that:

Deference is further limited by a variety of considerations arising from equitableness and reasonableness. In this sense a decision can be inequitable and unreasonable without rising to levels as dramatically wrong as those just mentioned [high standards of egregiousness, manifest injustice, lack of due process, offending judicial propriety, arbitrariness, bad faith and clear and malicious application of the law] and still eventually engage liability for the breach of the FET standard.⁶⁴⁷

417. The *Tatneft* tribunal concluded that:

[T]here are no sufficient reasons to justify a finding of denial of justice. However, it is quite evident that the fair and equitable treatment standard has been compromised by a number of court actions. In this respect such standard has a broader meaning than the strict denial of justice as understood under traditional customary international law.⁶⁴⁸

418. On the other hand, the Respondent notes that while “the [*Tatneft*] tribunal held that judicial conduct which is arbitrary and unreasonable can breach the FET standard even if it does not amount to a denial of justice,” in the next sentence the tribunal concluded that “the mere misapplication of domestic law is not enough to give rise to liability absent some kind of adverse intention.”⁶⁴⁹

419. The Parties have also discussed other cases that illustrate the various approaches taken by arbitral tribunals in respect of FET and other commitments of States under the BIT and their relationship to denial of justice. The Respondent has referred to *Saipem v. Bangladesh* and *Liman Caspian Oil v. Kazakhstan* in support of the argument that the test of denial of justice is also applied in assessing whether decisions of the courts are expropriatory.⁶⁵⁰ Thus, in the case of *Liman Caspian Oil*, the tribunal found that “the Kazakh court decisions were not arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory or lacking due process, even if they might have been incorrect as a matter of Kazakh law, and that correspondingly they have to be accepted from the perspective of international law and particularly that of the ECT.”⁶⁵¹ Similarly, the decision that the Bangladeshi courts expropriated Saipem was based on a finding by the tribunal that those courts abused their supervisory jurisdiction over the arbitration process.⁶⁵² However, the Tribunal observes that it is relevant to the present discussion that the *Saipem* tribunal’s jurisdiction was limited to

⁶⁴⁶ Respondent’s Post-Hearing Brief, ¶16, referring to *Tatneft v. Ukraine* (CA-84), ¶¶474 and 411.

⁶⁴⁷ *Tatneft v. Ukraine* (CA-84), ¶475.

⁶⁴⁸ *Tatneft v. Ukraine* (CA-84), ¶481.

⁶⁴⁹ Respondent’s Post-Hearing Brief, ¶16, referring to *Tatneft v. Ukraine* (CA-84), ¶411.

⁶⁵⁰ Respondent’s Post-Hearing Brief, ¶¶13-16.

⁶⁵¹ *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, 22 June 2010 (RA-39), ¶431.

⁶⁵² *Saipem v. Bangladesh* (CA-40), ¶¶159 and 161.

expropriation claims and that the tribunal differentiated a claim of expropriation by the courts from a claim of denial of justice: “While the Tribunal concurs with the parties that expropriation by the courts presupposes that the courts’ intervention was illegal, this does not mean that expropriation by a court necessarily presupposes a denial of justice.”⁶⁵³

420. The Claimant has also discussed the cases of *Deutsche Bank v. Sri Lanka*, *ATA v. Jordan*, *Saipem, Chevron v. Ecuador*, *Sistem Mühendislik v. The Kyrgyz Republic* and *White Industries v. India* in support of its argument that breach of the BIT by actions of the courts may occur short of denial of justice.⁶⁵⁴ The Claimant relies on the *Deutsche Bank* case to show that the tribunal found an order of the Supreme Court of Sri Lanka lacking in due process and in breach of FET despite the fact that denial of justice had not been pleaded.⁶⁵⁵ The Tribunal observes that the interim order of the Supreme Court of Sri Lanka was granted based on “extremely limited evidence and without a hearing from the various banks whose contractual rights were directly affected ...”⁶⁵⁶ The *Deutsche Bank* tribunal also relied on public statements of the Sri Lankan Chief Justice, who confirmed that the order was issued for political reasons.⁶⁵⁷ While the tribunal found a breach of the respondent’s fair and equitable treatment obligation in the form of a due process violation without qualifying it as egregious, the facts relied on by the tribunal speak for themselves: “extremely limited evidence”, no hearing for those affected and political motivation.

421. In the *ATA* case, the tribunal rejected the claim of denial of justice for lack of jurisdiction *ratione temporis*.⁶⁵⁸ Notwithstanding the lack of jurisdiction, the tribunal observed:

From the outset, the parties focussed on the conduct of the Jordanian courts in adjudicating the grounds for annulment of the Final Award. Their actions could hardly be said to have constituted abusive misconduct, bad faith or a denial of justice. Notwithstanding its finding of a lack of jurisdiction, the Tribunal would note that it was unconvinced that, even if there had been jurisdiction, a claim of denial of justice, whether substantive or procedural, could have been sustained.⁶⁵⁹

Although the claim of denial of justice could not be sustained, the *ATA* tribunal found the court of cassation’s retroactive application of a new arbitration law to be contrary to the obligations of the respondent under the relevant bilateral investment treaty. The tribunal did not specify which

⁶⁵³ *Saipem v. Bangladesh* (CA-40), ¶181.

⁶⁵⁴ Claimant’s Post-Hearing Brief, ¶¶26-38.

⁶⁵⁵ Claimant’s Post-Hearing Brief, ¶28, referring to *Deutsche Bank v. Sri Lanka* (CA-63).

⁶⁵⁶ *Deutsche Bank v. Sri Lanka* (CA-63), ¶476.

⁶⁵⁷ *Deutsche Bank v. Sri Lanka* (CA-63), ¶479.

⁶⁵⁸ *ATA Construction v. Jordan* (CA-22), ¶95.

⁶⁵⁹ *ATA Construction v. Jordan* (CA-22), ¶123.

of those obligations had been breached, but it found it necessary to clarify that the action by the court of cassation was in breach of the treaty even if a denial of justice could not be sustained.⁶⁶⁰

422. As we have already noted above, the *Saipem* tribunal had no jurisdiction other than for expropriation claims and clarified that denial of justice is not a pre-condition for a finding of expropriation by decisions of courts. The *Sistem Mühendislik* tribunal found expropriation of the claimant's interest in a hotel by the courts without any discussion of denial of justice.⁶⁶¹ Similarly, the tribunals in *Chevron* and *White Industries* found that the effective means obligation under a BIT may be breached by failures of domestic courts even if such failures may not be sufficient to find a denial of justice.⁶⁶²
423. The practice of the tribunals having made a reference to FET is varied. It shows that tribunals have been open to find a breach of obligations under bilateral investment treaties by domestic courts without a finding of denial of justice, but, at the same time, that they have recognized that a high threshold should be applied to the FET standard. The variations in the practice of tribunals merit the following observations: first, irrespective of the position taken by a tribunal on this question, a high threshold is applied to determine a breach of FET by domestic courts. Second, the evaluation of the threshold is factually driven and the egregiousness of the facts may be more indicative of the threshold applied than the adjectives used by a tribunal to describe the threshold, if described at all. As stated by the *Saluka v. Czech Republic* tribunal, "[t]o the extent that the case law reveals different formulations of the relevant thresholds, an in-depth analysis may well demonstrate that they could be explained by the contextual and factual differences of the cases to which the standards have been applied."⁶⁶³ Third, what was not egregious in the context of criminal proceedings in Mexico in the early decades of the twentieth century⁶⁶⁴ may qualify as egregious by today's standards.
424. The Claimant has pleaded breach of the FET standard on the basis of arbitrary and discriminatory treatment, inconsistent conduct, failure to maintain a stable legal framework, frustration of the Claimant's legitimate expectations and denial of justice. As grounds for denial of justice, the Claimant has adduced the arbitrary nature of the Supreme Court rulings, discriminatory treatment, including the discriminatory application of PSC, and interference by the Respondent in the judicial proceedings. The Tribunal will consider each of these grounds in order to verify whether a denial of justice has occurred. Arbitrary and discriminatory treatment by courts, and

⁶⁶⁰ *ATA Construction v. Jordan* (CA-22), ¶128.

⁶⁶¹ *Sistem Mühendislik v. Kyrgyz Republic* (CA-39).

⁶⁶² *Chevron v. Ecuador* (CA-41), ¶¶242 and 244; *White Industries v. India* (CA-49), ¶11.4.19.

⁶⁶³ *Saluka v. Czech Republic* (CA-23), ¶291.

⁶⁶⁴ *B.E. Chatrin (United States) v. United Mexican States*, 4 RIAA 282 (1927).

interference by the Respondent in judicial proceedings, are directly related to the claim of denial of justice. The claim of inconsistent conduct bears a relationship with the claim of discriminatory treatment of the investment by the Polish courts. Had the claim of denial of justice been found to be baseless by applying the threshold of egregiousness inherent to such claim, the Tribunal would have had to address the issue of whether a lesser threshold may be applied in considering conduct of domestic courts under the FET standard. However, considering the conclusion reached by the Tribunal on the existence of a denial of justice (see paragraphs 497-499 below), there is no need for it to take a position on this issue.

4. The FET standard

(a) What is the scope of the FET standard?

425. In order to assess the different elements of FET under the prism of denial of justice, the scope of the standard needs to be ascertained. The Tribunal first notes that, in its Statement of Claim, the Claimant alleged that the Respondent breached a number of obligations encompassed by the FET standard. In its Statement of Defense, the Respondent did not contest that these obligations were part of the FET standard; it only disputed the allegation that it had breached them. In the Reply, the Claimant recalled the elements of the FET standard encompassed by Article II(6) of the BIT and noted that they had not been disputed by the Respondent in the Statement of Defense. However, in the Rejoinder, the Respondent disagreed on certain elements of the FET standard alleged by the Claimant, in particular, inconsistent State conduct, the obligation to maintain a stable legal and business framework and the protection of investors' legitimate expectations. The Respondent contends that the Claimant has failed to produce evidence of State practice or *opinio juris* to confirm that international law recognizes all of the components of the FET standard argued by the Claimant.⁶⁶⁵ The next opportunity for the Claimant to address this issue was in its opening argument at the hearing. The Claimant stated:

As you know very well [the FET standard] is not defined in the Treaty ... it has been the subject of many awards and commentaries. With respect, we find the list in Professor Dolzer and Schreuer's book to be a helpful starting point, and I'm sure you know from other cases and submissions that those commentators refer to the principles that are encompassed in the FET, stability and protection of the investor's legitimate expectations, transparency, compliance with contractual obligations, procedural propriety, good faith as included in this concept. Also, awards – some of your own – refer to the prohibition of discrimination or arbitrary treatment, inconsistent State conduct, and the obligation to maintain a stable legal and business framework and denial of justice, also encompassing the FET standard.⁶⁶⁶

The Respondent did not address this matter further at the hearing.

⁶⁶⁵ Rejoinder, ¶211.

⁶⁶⁶ Hearing Transcript (25 September 2017), 69:6-23.

426. The Claimant has argued as part of the alleged breach of the FET standard that the Respondent failed to maintain a stable legal and business framework for the Claimant's investment, frustrated the Claimant's legitimate expectations, acted arbitrarily, discriminated against the Claimant and acted inconsistently, and that the Respondent's acts amount to denial of justice. The Claimant has also argued that the composite effect of the Respondent's measures breached the FET standard.⁶⁶⁷
427. Fair and equitable treatment may be applicable to a wide variety of situations, which may explain the lack of a uniform and comprehensive definition under international law to which the Tribunal could turn. The Tribunal will interpret FET in accordance with its ordinary meaning, context and purpose as required by Article 31 of the VCLT.
428. The term "fair" means "treating people equally without favoritism or discrimination", and "just or appropriate in the circumstances."⁶⁶⁸ "Equitable" means "fair" and "impartial."⁶⁶⁹ "Just, equitable, fair-minded, open-minded, honest, upright, honorable, trustworthy" are synonyms of "fair", and "fair and just" are synonyms of equitable.⁶⁷⁰ The context of the undertaking of FET is an article that details the treatment to be accorded to foreign "investment", starting with a general commitment to treat foreign investment on a non-discriminatory basis. The wider context is the entire BIT, a treaty on "business and economic relations" of the two State parties. As set forth in its Preamble, the parties agree that fair and equitable treatment of investment is desirable in order "to maintain a stable framework for investment and maximum effective utilization of resources."⁶⁷¹ The twin purposes of fair and equitable treatment set the bar against which a State party's performance must be measured. As pointed out by other tribunals, FET needs to be interpreted in a balanced manner, as has been stated forcefully, for example, by the *El Paso* tribunal:

This Tribunal considers that a balanced interpretation is needed, taking into account both State sovereignty and the State's responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow.⁶⁷²

⁶⁶⁷ Claimant's Post-Hearing Brief, ¶¶297-299.

⁶⁶⁸ English Oxford Living Dictionaries, 'fair', available at en.oxforddictionaries.com/definition/fair, last visited on 5 December 2018.

⁶⁶⁹ English Oxford Living Dictionaries, 'equitable', available at en.oxforddictionaries.com/definition/equitable, last visited on 5 December 2018.

⁶⁷⁰ English Oxford Living Dictionaries, 'equitable', available at en.oxforddictionaries.com/thesaurus/equitable, last visited on 5 December 2018 (emphasis in the original).

⁶⁷¹ See, BIT Preamble: "Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources."

⁶⁷² *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, ¶70.

The FET standard should not be understood to be for the exclusive benefit of the investor, but it should be recognized that it serves a wider purpose underlying the willingness of the State to enter into the BIT. To sum up, the Tribunal understands fair and equitable treatment to mean treatment that objectively will be considered just by an impartial observer bearing in mind the circumstances. The standard is “a flexible one which must be adapted to the circumstances of each case.”⁶⁷³

(b) Has the Respondent breached the FET standard by committing a denial of justice?

(i) *Was the investment subject to arbitrary treatment?*

429. In its ordinary meaning, arbitrary means “based on random choice or personal whim, rather than any reason or system.”⁶⁷⁴ The International Court of Justice in the *ELSI* case defined “arbitrariness” as “not so much something opposed to a rule of law, as something opposed to the rule of law... It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.”⁶⁷⁵ The Claimant has argued that the Respondent took a series of arbitrary actions against its investment not based on reason or fact. The Tribunal will now consider each one of the actions in question.

The Compulsory Mortgages

430. In support of its claim of arbitrary treatment, the Claimant relies on the fact that Compulsory Mortgages were granted as injunctive relief for the Prospective [REDACTED] Buyers before [REDACTED] bankruptcy and that the Supreme Court upheld the injunctive relief after [REDACTED] bankruptcy.
431. The first part of the Claimant’s argument concerns whether the claims secured by the Compulsory Mortgages are monetary claims. The Claimant relies on the Report of the Bankruptcy Trustee, which describes the object of the security “to be an obligation to make a declaration of will establishing separate ownership title to an apartment [REDACTED] located in [REDACTED] on [REDACTED]”⁶⁷⁶ The Respondent argues that the Prospective [REDACTED] Buyers had monetary claims against [REDACTED] or the payments that they had made.⁶⁷⁷

⁶⁷³ *Waste Management v. Mexico* (CA-31), ¶99.

⁶⁷⁴ English Oxford Living Dictionaries, ‘arbitrary’, available at en.oxforddictionaries.com/definition/arbitrary, last visited on 5 December 2018.

⁶⁷⁵ *Case Concerning Elettronica Sicula S.p.A (ELSI) (United States of America v. Italy)*, ICJ Reports 1989, p. 76, ¶128.

⁶⁷⁶ Statement of Claim, ¶261; Reply, ¶178(a), referring to Report of the Bankruptcy Trustee (C-46), p. 1.

⁶⁷⁷ Rejoinder, ¶217.

432. It is not disputed that the Prospective Buyers made payments to [REDACTED]. The issue is, what obligation did the Compulsory Mortgages secure? The Respondent has pointed out that the Prospective Buyers sought not only a declaration of will but also compensation, and that the Compulsory Mortgages were granted as security for these hybrid claims.⁶⁷⁸ The Respondent has further pointed out that the security sought in the Preliminary Agreement Enforcement Proceedings was governed by the CCP.⁶⁷⁹ Article 755 of the CCP provides that “if the object of security is not a monetary claim, the court will award such security as it deems fit in the circumstances, not excluding methods provided to secure monetary claims.”⁶⁸⁰ Thus, it is not excluded by the applicable provisions of Polish law that a court grants mortgages as security beyond monetary claims.
433. The second leg of the Claimant’s argument concerns the alleged judicial activism of the Supreme Court when it interpreted Articles 744 and 182 of the CCP. The Supreme Court decision was prompted by the following question from the [REDACTED] Court of Appeal: “Does the discontinuation of proceedings pursuant to Article 182 par. 1 of the Code of Civil Procedure result in the cancellation of injunctive relief pursuant to Art. 744 of the Code of Civil Procedure?”⁶⁸¹ The Supreme Court decided that:

The discontinuation of the proceedings pursuant to Art. 182 par. 1 of the Code of Civil Procedure does not result in the cancellation of the injunctive relief provided for in Art. 744 of the Code of Civil Procedure, consisting in the encumbrance of a real property with a compulsory mortgage entered into the land and mortgage register before the declaration of bankruptcy.⁶⁸²

The Supreme Court noted: “When introducing the new basis for the discontinuation of the proceedings, set out in Art. 182 par. 1 of the Code of Civil Procedure, the legislators did not synchronize that provision with Art. 744, par. 1 of the Code of Civil Procedure, in force (in its basic form) since 1965 ...”⁶⁸³ After referring to the reasoning behind the solution adopted in Article 744, paragraph 1 and Article 182 of the CCP, the Court concluded:

[T]he discontinuation of proceedings as a result of the declaration of liquidation bankruptcy of the defendant is aimed at enabling the claimant to use another (appropriate in such case) method of satisfying its claim, rather than ending the proceedings due to the inability to enforce the claim at all.⁶⁸⁴

⁶⁷⁸ Rejoinder, ¶¶217-219, referring to Decision for Granting a Guarantee before Initiating the Proceedings, case file ref. I Co 79/09, 6 February 2009 (R-50); Report of the Bankruptcy Trustee dated 22 December 2010 (R-46), Point 19.

⁶⁷⁹ Rejoinder, ¶220.

⁶⁸⁰ Rejoinder, ¶220; Respondent’s Post-Hearing Brief, ¶210.

⁶⁸¹ Resolution of the Supreme Court, case file ref. III CZP 2/10, 28 April 2010 (C-44), p. 1.

⁶⁸² Resolution of the Supreme Court, case file ref. III CZP 2/10, 28 April 2010 (C-44), p. 1.

⁶⁸³ Resolution of the Supreme Court, case file ref. III CZP 2/10, 28 April 2010 (C-44), p. 4.

⁶⁸⁴ Resolution of the Supreme Court, case file ref. III CZP 2/10, 28 April 2010 (C-44), p. 3.

434. According to the Supreme Court, the different nature of the need to discontinue the proceedings under Article 182, paragraph 1 of the CCP does not arise from the inadmissibility of pursuing the relevant claim, but rather from the need to introduce the appropriate method of satisfying it. Thus, Article 182(2) of the CCP enables the claimant to pursue the claim again by way of proceedings discontinued earlier.⁶⁸⁵ According to the Supreme Court, it would be incompatible with this provision that the discontinuation of proceedings result in the cancellation of the relief granted. The Supreme Court also considered its interpretation of the CCP in the context of the legislation relevant to mortgage registration and bankruptcy.⁶⁸⁶ The Tribunal concludes that the Supreme Court discussed the rationale for the different provisions of the CCP and endeavored to give a cohesive interpretation of the law. The Tribunal finds without merit the argument advanced by the Claimant that the decision of the Supreme Court on the Compulsory Mortgages was arbitrary.

The Prosecutor's Order

435. On 26 October 2009, the [REDACTED] Prosecutor issued an order seizing the [REDACTED] Property as evidence in the criminal proceedings against [REDACTED].⁶⁸⁷ The order was appealed to the [REDACTED] Regional Court by the Bankruptcy Trustee and the Claimant. The [REDACTED] Regional Court quashed the order.⁶⁸⁸ The Parties disagree on whether the order was a Government measure or a decision of the judiciary and on whether such an order meets the test of finality under international law. The Tribunal is of the view that whether or not the order of the prosecutor was a Government measure is irrelevant. The order of the Prosecutor was subject to court review and the [REDACTED] Regional Court found that it had no basis in law. The Claimant and the Bankruptcy Trustee availed themselves successfully of the remedy provided by Polish law. The Tribunal does not consider that international responsibility may arise from conduct of an officer of the State which has been remedied by that State's judiciary.

The [REDACTED] Supreme Court Ruling

436. The Supreme Court invalidated the [REDACTED] Mortgage on the basis of PSC. The Court found determinative the so-called negative clauses of the Preliminary Agreements (the Non-Registration Clauses) and the awareness of such clauses by Manchester. This led the Court to conclude:

⁶⁸⁵ Resolution of the Supreme Court, case file ref. III CZP 2/10, 28 April 2010 (C-44), pp. 3-4.

⁶⁸⁶ Resolution of the Supreme Court, case file ref. III CZP 2/10, 28 April 2010 (C-44), p. 3.

⁶⁸⁷ Decision of the [REDACTED] Public Prosecutor, 26 October 2009 (C-43).

⁶⁸⁸ [REDACTED] District Court, case file ref. [REDACTED] 31 May 2010 (C-45), pp. 12-13.

Therefore, it should be noted that the action taken by defendant [Manchester] to secure its interests as a new creditor of the developer was one of the planned results of the dishonest conduct of the developer, with that defendant [Manchester] being aware of that dishonesty.⁶⁸⁹

437. In the context of the exceptional nature of the application of PSC, it is disputed between the Parties whether the principles were appropriately applied, whether the Supreme Court took into account events subsequent to the grant of the [REDACTED] Mortgage, and whether it failed to explain how the taking of security by a financing party when the developer's clients had made their payments without any security violates PSC. As briefly expressed by the Claimant:

[T]he crux of this dispute is that although the Supreme Court invoked "principles of social co-existence", in its judgment concerning the [REDACTED] Mortgage, it did not apply generally accepted values common to the European tradition, but parochial, idiosyncratic and own preferences favoring local creditors and discriminating against a foreign investor.⁶⁹⁰

438. The Supreme Court based its decision on four grounds:

(i) The Court considered that the clearly dishonest and risky conduct of the developer made it necessary to carry out an appropriately thorough examination of the circumstances in which the developer established the mortgages "from the point of view of the principles of social co-existence, while also taking into consideration the rules of professional ethics of property developers."⁶⁹¹

(ii) The Court objected to the Court of Appeal's qualification as "neutral" in respect of PSC the fact that the "US entity" would protect its claims diligently. The opinion of the Court of Appeal ignored "the circumstances leading to precisely such special protection that clearly worsens the situation of the developer's original creditors ..."⁶⁹² The Supreme Court then referred to the negative clauses designed to ensure that the developer maintained an appropriate level of creditworthiness in legal transactions. The Court concluded its reasoning on this point by stating that:

It is clear that defendant [Manchester] was aware of those clauses during the contractual cooperation between the two defendants that was aimed at creating a basic form of financing for the developer. Therefore, it should be noted that the action taken by defendant [Manchester] to secure its interests as a new creditor of the developer was one of the planned results of the dishonest conduct of the developer, with that defendant being aware of that dishonesty.⁶⁹³

(iii) The Court insisted on the Claimant's awareness of the situation and had "no doubt that creating a mortgage over the real property to which the investment related, with priority before

⁶⁸⁹ [REDACTED] Supreme Court Ruling (C-73), p. 17.

⁶⁹⁰ Reply, ¶194.

⁶⁹¹ [REDACTED] Supreme Court Ruling (C-73), p. 16.

⁶⁹² [REDACTED] Supreme Court Ruling (C-73), p. 16.

⁶⁹³ [REDACTED] Supreme Court Ruling (C-73), p. 17.

the initial creditors (claimants) was an element of an appropriate legal and economic calculation by defendant [Manchester].”⁶⁹⁴

(iv) The Court noted that:

The claimants had already borne the risk of the failure of the investment (currently they are trying only to protect their pecuniary claims, Art. 91 sec. 2 of the Bankruptcy Law). The developer’s irresponsible and irrational economic activity that led to the creation of mortgages for the benefit of a single, major creditor contrary to the terms of the preliminary agreements and as a consequence permission for defendant [Manchester] to “take the initiative” with regard to finalizing the investment project (in the form of a proposal to increase the price of flats for the claimants) may therefore be seen as dishonest conduct that is inconsistent with the principles of social co-existence and professional ethics of property developers (Art. 58 § 2 of the Civil Code).⁶⁹⁵

439. The Tribunal is not an appellate tribunal. PSC are clearly part of Polish law and it is not the role of this Tribunal to question the understanding of PSC by the Supreme Court. It is immaterial whether Article 58(2) of the Civil Code was transplanted from communist law in 1964. The Constitutional Court determined the conditions for its invocation and application in 2000.⁶⁹⁶ The Claimant has relied on the Constitutional Court judgment to argue that the Supreme Court departed from those conditions in applying PSC in the case of the [REDACTED] Mortgage.⁶⁹⁷ The Tribunal will not second-guess the Supreme Court’s application of Polish law.

440. A different matter is whether the Supreme Court inconsistently engaged in a determination of facts at variance with the factual findings of the Court of Appeal notwithstanding its limited role as a cassation court, thus committing a denial of justice. The Claimant has argued that the Supreme Court made factual findings that were not in the ruling of the Court of Appeal without an evidentiary hearing, which raises an issue of due process. Specifically, the Supreme Court found that: [REDACTED] acted dishonestly, Manchester was aware of it, [REDACTED] business activity was risky, careless and irrational, and Manchester took the initiative in proposing an increase in the price of the [REDACTED] Apartments. According to the Claimant, these findings of fact were reached by the Supreme Court in disregard of Article 398(13) of the CCP. This article provides: “New facts and evidence cannot be admitted in cassation proceedings, and the Supreme Court is bound by the findings constituting the basis of the challenged judgment.”⁶⁹⁸ On the other hand,

⁶⁹⁴ [REDACTED] Supreme Court Ruling (C-73), p. 17.

⁶⁹⁵ [REDACTED] Supreme Court Ruling (C-73), p. 18.

⁶⁹⁶ Constitutional Tribunal of Poland, SK 5/99, 17 October 2000 (Attachment 5 of the Expert Opinion of Professor Sadurski).

⁶⁹⁷ Reply, ¶210.

⁶⁹⁸ Claimant’s Post-Hearing Brief, ¶¶127, 147-148. *See also*. Hearing Transcript (27 September 2017), 306: 9-20; 314:8-16.

the Respondent contends that the statements of the Supreme Court are legal assessments of facts different from the assessment by the Court of Appeal and not actual determinations of facts.⁶⁹⁹

441. For the Tribunal, the question is whether the Supreme Court in each of the instances in which it considered the [REDACTED] Mortgage, the [REDACTED] Mortgage [REDACTED] and [REDACTED] cases) and the [REDACTED] Mortgage applied the same distinction in the exercise of its function as a court of cassation and, if it did not, whether this amounts to a denial of justice, and thus to a breach of FET. The Tribunal observes that the Court of Appeal in its decision on the [REDACTED] Mortgage held that, to invalidate a contractual mortgage on the basis of Article 58(2) of the Civil Code, "it would be necessary to demonstrate the factual circumstances attesting to the base behavior of or even a conspiracy between the defendants aimed at harming the claimants. The Regional Court did not find such conspiracy, and what is more the claimants did not point to one..."⁷⁰⁰ In the [REDACTED] case, the Supreme Court dismissed the claim of invalidation of the [REDACTED] Mortgage.⁷⁰¹ The Court explained that the appellant ignored the fact that she was departing from the findings by which the Supreme Court is bound in accordance with Art. 398(2) of the Code of Civil Procedure. This applies first and foremost to the findings as to the lack on the part of [REDACTED] of the intention to cause harm to the appellant's legal predecessor, the reasons for the company's bankruptcy, its lack of regular business relations with the claimant before the conclusion of the cooperation agreement, as well as the lack of enrichment on the claimant's part.⁷⁰²
442. Nonetheless, the Supreme Court found that the [REDACTED] Mortgage was unenforceable under Article 5 of the Civil Code.⁷⁰³ As a practical matter, for the Claimant the distinction between invalidity and enforceability is not significant. But for the Tribunal it is relevant that the Supreme Court held that it could not depart from the factual findings of the lower courts. It is also particularly relevant what the Supreme Court considered factual findings – *inter alia*, the lack of intention of [REDACTED] to cause harm and the reasons for the company's bankruptcy.
443. In the [REDACTED] case, the Supreme Court decided that the [REDACTED] Mortgage complied with PSC and found this mortgage valid and enforceable.⁷⁰⁴ The Supreme Court based its decision on the factual findings of the Court of Appeal.
444. There has been no explanation in the [REDACTED] Case as to why the Supreme Court disregarded the facts established by the Court of Appeal. The Supreme Court found the [REDACTED] Mortgage

⁶⁹⁹ Hearing Transcript (27 September 2017), 419:5-8.

⁷⁰⁰ Second Instance [REDACTED] Ruling (C-65), p. 42.

⁷⁰¹ [REDACTED] Supreme Court Ruling (C-80), p. 25.

⁷⁰² [REDACTED] Supreme Court Ruling (C-80), p. 22.

⁷⁰³ [REDACTED] Supreme Court Ruling (C-80), p. 24.

⁷⁰⁴ [REDACTED] Supreme Court Ruling (C-81).

to be contrary to the Preliminary Agreements notwithstanding that these agreements did not restrict [REDACTED] ability to borrow funds in the future or mortgage its assets. The Supreme Court did not rely on any clause in the Preliminary Agreements in support of this determination. The Preliminary Agreements have equally no provision that would permit Manchester to take the initiative and complete the project. The Supreme Court analyzed the situation after the bankruptcy proceedings started as if Manchester had known that [REDACTED] would eventually be bankrupt.

445. It is not so much a question of whether the action taken by the Supreme Court was a legal assessment of facts or a fact-finding exercise, or of whether in either case its decision should be accordingly considered arbitrary. What remains wholly unexplained is why such an exercise would be necessary in the case of the [REDACTED] Mortgage, but not in the case of the [REDACTED] Mortgage [REDACTED] and [REDACTED] cases) or the [REDACTED] Mortgage. Such a different approach concerning Polish nationals or foreign entities is arbitrary, as it has no rational justification. The Tribunal will return to this question in considering the claim of discrimination (see paragraphs 448-468 below).

The Ownership Transfer

446. On 29 April 2014, the Judge-Commissioner, in a two-paragraph decision without any reasoning, allowed the Bankruptcy Trustee “to perform the mutual agreements concluded by the bankrupt with individual or organizational units ... and commercial premises situated in buildings [REDACTED] [REDACTED] Street as well as in the building at [REDACTED] Street in [REDACTED] (preliminary agreements).”⁷⁰⁵ A month earlier, the [REDACTED] Regional Court had dismissed a lawsuit of the Prospective Buyers against the Bankruptcy Trustee. The Prospective Buyers had requested that the apartments be transferred to them. According to the [REDACTED] Regional Court, only pecuniary claims could be satisfied in bankruptcy, but the Court, in an *obiter dictum*, seemed to have favored the decision approving the transfer.⁷⁰⁶ By then, the Supreme Court had invalidated the [REDACTED] Mortgage.
447. Of the various grounds argued by the Claimant in support of its claim of arbitrary treatment of its investment, the Tribunal finds surprising that the title transfer, without a modicum of reasoning by the Bankruptcy Trustee, would be approved by the Judge-Commissioner. More significantly, the Tribunal finds it difficult to understand the fact-finding in which the Supreme Court engaged, which apparently depended on the nature of the creditor or who was the holder of a mortgage. The Tribunal will return to this question in considering the next item.

⁷⁰⁵ Decision of the Judge-Commissioner, case file ref. [REDACTED] 29 April 2014 (C-53).

⁷⁰⁶ [REDACTED] Regional Court, case file ref. [REDACTED] 27 March 2014 (C-52).

(ii) *Was the investment subject to discrimination?*

448. Manchester's claim of discrimination is based on the different treatment of the [REDACTED] and [REDACTED] Mortgages by the Supreme Court and the different treatment of unsecured creditors in the case of bankruptcy proceedings of other real estate developers.
449. The Parties agree on the test to determine whether Poland discriminated against the Claimant: different treatment of entities in like situations without reasonable justification.⁷⁰⁷
450. The Claimant has argued that the Respondent discriminated against Manchester's investment because Manchester was a foreign investor. The Respondent contends that the difference of treatment can be explained by the fact that the Claimant acted in bad faith in the case of the [REDACTED] Mortgage and that only the Prospective [REDACTED] Buyers sought invalidation of their mortgages, while the clients of other real estate developers did not. The Respondent points out that other lenders to real estate developers such as [REDACTED] and [REDACTED] were also foreign owned at the time of the bankruptcy of their borrowers and, therefore, their case does not support the Claimant's discrimination claim.⁷⁰⁸
451. The Tribunal has already determined that the Claimant did not act in bad faith. Even the Supreme Court was not consistent in finding that the Claimant acted in bad faith. Bad faith is not determinative for the Tribunal to distinguish the treatment of Manchester's investment from treatment of other lenders to other real estate developers. On the other hand, the Tribunal finds it to be a determinative distinguishing factor that the clients of other real estate developers in financial difficulty did not seek in the courts the invalidation of the mortgages held by lenders.
452. After these observations, the Tribunal's analysis of the claim of discrimination will be mainly concerned with the treatment of the [REDACTED] Mortgage as compared with the treatment accorded to the [REDACTED] Mortgage. The analysis will be complemented by that of the [REDACTED] and [REDACTED] cases under the Claimant's allegation of inconsistent conduct.
453. There is no dispute between the Parties that the [REDACTED] Mortgage and the [REDACTED] Mortgage were treated differently. The issue is whether the Claimant and [REDACTED] were in like situations. The Claimant asserts that Manchester and [REDACTED] were in like circumstances because both lent funds to [REDACTED] the loans were secured by mortgages registered in the LMR, and Manchester's and [REDACTED] claims had priority over the claims of the Prospective Buyers. Both entities were aware

⁷⁰⁷ Claimant's Post-Hearing Brief, ¶154; Respondent's Post-Hearing Brief, ¶126.

⁷⁰⁸ Respondent's Submission Concerning the Bankruptcy Proceedings of other Developers dated 19 April 2017, ¶¶10-12.

of the unsecured claims of the Prospective Buyers and of the contents of the Preliminary Agreements, particularly the Non-Registration Clauses.⁷⁰⁹

454. On the other hand, the Respondent contests that Manchester and [REDACTED] were in like circumstances because: (i) the financing they provided served different purposes; (ii) the Prospective Buyers were aware of the [REDACTED] Mortgage, but not of [REDACTED] intention to enter into the secured transaction with Manchester; (iii) the financing of [REDACTED] was in the interest of the Prospective Buyers, while Manchester's financing was contrary to their interest; (iv) the terms of release were different; (v) the approaches of the two lenders to the Non-Registration Clauses were different; and (vi) the parties seeking invalidation of the mortgages were different.⁷¹⁰
455. The Court of Appeal in the [REDACTED] case found that there were distinguishing factors between the [REDACTED] Mortgage and the [REDACTED] Mortgage, and the Supreme Court decided on the basis of those findings.⁷¹¹
456. The argument of the different purpose of the mortgages is based on the premise that the funds lent by [REDACTED] were for the purchase of the [REDACTED] Property, while the funds lent by the Claimant were used for purposes broader than the [REDACTED] Property. In the case of the Bond Purchase Agreement, the funds of each Bond issue were earmarked for a specific purpose and an issue of up to PLN [REDACTED] was for the current business activity of [REDACTED]. It is correct that none of the funds were destined specifically to the financing of the [REDACTED] Property. However, the Tribunal questions whether this is a distinguishing factor between the two mortgages because the [REDACTED] Mortgage was itself secured by other properties unrelated to the purchase of the [REDACTED] Property and not all the funds borrowed from [REDACTED] were intended for the purchase of the [REDACTED] Property.⁷¹² Moreover, the monies paid by the Prospective [REDACTED] Buyers were not necessarily used for construction of the [REDACTED] Property and

⁷⁰⁹ Statement of Claim, ¶¶314-316; Reply, ¶¶244-245 and 247.

⁷¹⁰ Respondent's Post-Hearing Brief, ¶¶125-129.

⁷¹¹ [REDACTED] Court of Appeal, case file ref. [REDACTED] 23 April 2015 (C-102), pp. 10-11; Supreme Court, case file ref. III CSK 339/15, 14 September 2016 (Attachment 41 to Rebuttal Expert Opinion of Professor Wojciech Sadurski dated 12 January 2017), p. 8.

⁷¹² [REDACTED] Agreement (C-95), Part V: Security for the credit facility. As described by the [REDACTED] Court of Appeal, the [REDACTED] Facility was secured as follows: "The credit agreement provided for security interests for the facility along with interest and banking costs: a ceiling mortgage of up to PLN [REDACTED] as a first-ranking mortgage on that property; a joint ceiling mortgage of up to PLN [REDACTED] as a first-ranking mortgage on other properties (land and premises) of the developer; a bill given by [REDACTED] and [REDACTED] a blank promissory note drawn by the developer along with a promissory note declaration; and an assignment of rights under the investment insurance agreement. The credit facility was also secured by a security assignment of receivables for the benefit of the Bank under the agreement already concluded and under those to be concluded in the future by the developer as borrower with the buyers of the premises to be built based on the facility granted for the investment. Additional security interests over other properties were necessary, because as at the date of the valuation report, it was established that the market value of the properties for the purchase of which the facility was granted was PLN [REDACTED] Court of Appeal, case file ref. [REDACTED] 23 April 2015 (C-102), p. 4.

the Prospective Buyers were granted Compulsory Mortgages irrespective of whether their payments had been dedicated to financing the construction of the apartments or shops in the [REDACTED] Property. As the [REDACTED] Court of Appeal observed:

As established by the Regional Court, the investment on [REDACTED] Street was not the only investment implemented by [REDACTED] at the time. It must be added, however, that it was not being implemented by a separate special purpose vehicle, and the monies paid in by the claimants on the dates arising from the preliminary agreements were not being credited to a separate account for the implementation of that specific project.⁷¹³

457. On the timing of payments by the Prospective Buyers and their use, the [REDACTED] Court of Appeal stated:

It also follows from the preliminary agreements that the buyers of the premises were paying in [REDACTED]

⁷¹⁴

458. More generally, the [REDACTED] Court of Appeal determined that:

⁷¹⁵

459. The Tribunal is not persuaded that the purposes of the [REDACTED] and [REDACTED] Mortgages were different. Both mortgages secured the financing of real estate purchases or construction for a borrower who proved to be financially insolvent when the financial crisis struck. Whether the plans of [REDACTED] were hazardous is based on hindsight and is not a factor to distinguish the two mortgages. The Tribunal does not question whether under Polish law the purpose of a mortgage may be taken into account under PSC but, in this case, purpose is not a significant differentiating factor.

460. The second distinguishing factor is related to the degree of awareness of Manchester and [REDACTED] lending by the Prospective Buyers. The issue is the extent to which the Prospective Buyers were informed of the existence of the mortgages or of the intention to grant them. The Respondent asserts that the [REDACTED] Mortgage. It is significant, from the outset, to recall that it is not contrary to law in Poland to establish a mortgage irrespective of whether other creditors are aware of it,⁷¹⁶

⁷¹³ Second Instance [REDACTED] Ruling (C-65), pp. 28-29.

⁷¹⁴ Second Instance [REDACTED] Ruling (C-65), p. 29.

⁷¹⁵ Second Instance [REDACTED] Ruling (C-65), pp. 38-39.

⁷¹⁶ See, Expert Opinion of Professor Swaczyna, ¶¶6 and 31.

and that neither lender had a direct relationship with the Prospective Buyers. It is also of significance that the content of the Preliminary Agreements was not devised by Manchester. It is equally relevant that the Preliminary Agreements did not limit the ability of [REDACTED] to borrow and secure the borrowing. It is not documented, except for the testimony of Mr. [REDACTED] one of the Prospective [REDACTED] Buyers, that the Prospective Buyers were [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Mortgage, the Tribunal concludes that awareness of the Mortgages is not a justification for different treatment.

461. Third, the Respondent contends that the [REDACTED] Mortgage was in the interests of the Prospective Buyers while the [REDACTED] Mortgage was to their prejudice. The Respondent presumes that, "[i]f the [REDACTED] credit facility had not been granted, [REDACTED] would probably not have purchased the land and so would not have been able to carry out the [REDACTED] construction or perform the Preliminary Agreements ..."⁷¹⁷ Furthermore, the Respondent contends that it cannot be said that [REDACTED] and [REDACTED] passed the commercial risk on to the Prospective Buyers because [REDACTED]
[REDACTED] The first point is speculative: [REDACTED] may have found another lender. The Tribunal already has determined that establishing a mortgage on a property to finance another is not a significant factor in this case. Whether Manchester and [REDACTED] passed on the credit risk to the Prospective Buyers is the subject of the next items.

462. The terms of relief are the fourth distinguishing factor argued by the Respondent. The key evidence is that, in the case of the [REDACTED] Mortgage, in October 2006, after the signing of the [REDACTED] facility, [REDACTED] wrote to [REDACTED] promising to release its mortgage over apartments for which the Prospective Buyers had paid the full price.⁷¹⁸ However, [REDACTED] did not honor the promise and refused to release the Mortgage when [REDACTED] defaulted and was declared bankrupt.⁷¹⁹ The Tribunal is unconvinced that the unfulfilled promise of [REDACTED] is a differentiating factor.

463. In fifth place, the Respondent contends that the two lenders had a different approach to Non-Registration Clauses. [REDACTED]
[REDACTED]
[REDACTED]

⁷¹⁷ Respondent's Post-Hearing Brief, ¶143.

⁷¹⁸ Statement of [REDACTED] on releasing the [REDACTED] Mortgage, 10 October 2006 (C-97).

⁷¹⁹ Letter from [REDACTED] to Bankruptcy Trustee, dated 3 June 2014 (C-98).

Mr. [REDACTED] testified that he was informed by staff of [REDACTED]

⁷²¹ There is no evidence before the Tribunal to show that the two lenders had a different approach in respect of these clauses. If they had, it would have been incorporated in their lending instruments with [REDACTED] and it was not.

464. The Claimant has argued that the Respondent has implied a sixth ground for distinguishing between the [REDACTED] and [REDACTED] Mortgages, namely, that the Prospective Buyers' claim was grounded in the constitutional protection of the housing needs of Polish citizens. In contrast, Manchester's claim to invalidate the [REDACTED] Mortgage lacked such basis for two reasons: the identity of the claimant – the Prospective Buyers or Manchester – seeking invalidation, and the timing of the Preliminary Agreements and of the investment of Manchester in relation to when the mortgages were established.⁷²²
465. The Tribunal has difficulty understanding how the housing needs protected by the Polish Constitution can be a differentiating factor since, just as in the case of the invalidation of the [REDACTED] Mortgage, the invalidation of the [REDACTED] Mortgage would have been in the interest of the Prospective Buyers.
466. In sum, the Tribunal remains unconvinced by the reasons advanced by the Respondent to differentiate between the [REDACTED] and [REDACTED] Mortgages and thereby justify the different treatment of [REDACTED] and Manchester. By the same token, the Tribunal is unconvinced by the judgment of the Supreme Court in the [REDACTED] case, endorsing the analysis of the Court of Appeal, to the effect that there were differentiating factors explaining why the W [REDACTED] Mortgage was considered by the Supreme Court in the light of PSC, while the [REDACTED] Mortgage was not so considered.⁷²³
467. The lack of justification becomes more evident when the reasons argued by the Respondent in these proceedings are compared with the reasoning of the Supreme Court in the [REDACTED] case, where it accepted the facts established by the Court of Appeal:

The aim of the said acts [the establishment of the mortgage] in law was not to cause harm to her legal predecessor; that [REDACTED] used the funds obtained from the issue of the bonds for further investments; that it was not declared bankrupt until two and a half years after the cooperation agreement was concluded with the claimant; and that the reason for the bankruptcy was a whole series of business move[s] that were not fully thought out and reasonable, especially

⁷²⁰ See, Statement of Defense, ¶34.

⁷²¹ Mr. [REDACTED] Witness Statement, ¶8.

⁷²² Claimant's Post-Hearing Brief, ¶181.

⁷²³ Supreme Court, case file III CSK 339/15, 14 September 2016 (Attachment 41 to Rebuttal Expert Opinion of Professor Wojciech Sadurski dated 12 January 2017), p. 8.

errors in the assessment of market mechanisms and its own production capabilities and resources.⁷²⁴

468. The Tribunal concludes that the Respondent failed to accord the Claimant the treatment that [REDACTED] was accorded. The Tribunal will continue to address the differences in treatment under the allegation of inconsistent conduct before reaching an overall conclusion.

(iii) Did the Respondent adopt inconsistent conduct?

469. The claim of inconsistency is based on the invalidation of the [REDACTED] Mortgage after it had been confirmed by the Registry Court and the different treatment of Manchester's [REDACTED] and [REDACTED] Mortgages.
470. On the first point, the Claimant has argued that registration of a mortgage in the LMR is constitutive and that the registration of the mortgages gave rise to a reasonable expectation that they were valid and enforceable.⁷²⁵ The Claimant does not contest that registered mortgages may be invalidated, but contends that the courts may invalidate registered mortgages only on the basis of information not known to the Registry Court at the time of registration.⁷²⁶
471. The Respondent explains that the Registry Court does not have the power to conduct evidentiary proceedings to determine whether mortgages comply with PSC.⁷²⁷ According to the Respondent, the Registry Court registers a mortgage based only on a review of the application for registration, the documents attached to the application and the content of the LMR. The Respondent further explains that the general information on the Preliminary Agreements did not show whether the Preliminary Agreements were entered into by natural persons or entrepreneurs, whether the Prospective Buyers could or could not register their rights under the Preliminary Agreements, or whether the Prospective Buyers had been informed that [REDACTED] intended to establish mortgages on the property.⁷²⁸
472. The Tribunal is not convinced by the argument that the Respondent acted incoherently by first registering and then annulling the mortgages. The jurisdiction of the Registry Court and the information at its disposal were limited. A different matter is the expectation to which registration may have given rise as regards the validity of the Mortgages, particularly where, as here, no mortgage had previously been invalidated on the basis of PSC. The legitimate expectations of the

⁷²⁴ [REDACTED] Supreme Court Ruling (C-80), p. 21.

⁷²⁵ Statement of Claim, ¶58.

⁷²⁶ Reply, ¶231.

⁷²⁷ Rejoinder, ¶¶280-290.

⁷²⁸ Rejoinder, ¶¶284-287.

Claimant are dealt with separately within the overall claim of breach of FET (see paragraphs 492-496 below).

473. As regards the different treatment of Manchester's [REDACTED] and [REDACTED] Mortgages, in the different cases, it might be relevant to restate here that different protagonists were involved in the two cases. Before the Supreme Court, Manchester was the defendant one time and the claimant three times. In the [REDACTED] Case, a group of Prospective Buyers acted against [REDACTED] and Manchester, which was therefore a defendant in the case, and the Supreme Court decided that the [REDACTED] Mortgage was against PSC.⁷²⁹ In the [REDACTED] Mortgage case, Manchester was the claimant and asked the Supreme Court to invalidate the [REDACTED] Mortgage. The Supreme Court rejected the request, stating that the [REDACTED] Mortgage was not against PSC, as mentioned in the preceding section.⁷³⁰
474. Manchester's [REDACTED] Mortgage was also examined by the Supreme Court in the [REDACTED] and [REDACTED] cases. In the [REDACTED] case, Manchester was the claimant and acted against the estate of Mr. [REDACTED] in order to have its mortgage enforced, but the Supreme Court decided that the [REDACTED] Mortgage was against PSC.⁷³¹ In the [REDACTED] case, Manchester was again the claimant and acted against a commercial entity, [REDACTED] in order to have its mortgage enforced, and in this case, the Supreme Court found for Manchester, deciding that the [REDACTED] Mortgage was not against PSC.⁷³²
475. The Tribunal at the outset wishes to make clear that, in its consideration of these cases, it will not enter into the question of whether the decisions of the Supreme Court on the applicability of PSC under the Polish Civil Code are consistent. The Tribunal will limit its analysis to the alleged inconsistency of the Supreme Court in considering itself bound or not by the facts found by the lower courts; a matter that, as noted earlier, raises issues of due process.
476. In the [REDACTED] case, the Court of Appeal found that the defendant had not proven collusion between the Claimant and [REDACTED]. Similarly, the Court of Appeal in the [REDACTED] Case found that the Prospective Buyers did not "point to any circumstance that could have constituted evidence of collusion between the defendants [Manchester and [REDACTED] aimed at harming the claimants [the Prospective Buyers]".⁷³³ The Supreme Court in the [REDACTED] case held that it was bound by the facts in the Court of Appeal ruling:

⁷²⁹ [REDACTED] Supreme Court Ruling (C-73).

⁷³⁰ Supreme Court, case file III CSK 339/15, 14 September 2016 (Attachment 41 to Rebuttal Expert Opinion of Professor Wojciech Sadurski dated 12 January 2017).

⁷³¹ [REDACTED] Supreme Court Ruling (C-80).

⁷³² [REDACTED] Supreme Court Ruling (C-81).

⁷³³ Second Instance [REDACTED] Ruling (C-65), p. 38.

The allegation of a violation of Art. 58 §2 of the Civil Code in conjunction with Art. 76 sec. 4 of the LMRM Act by failing to take into account that an act in law consisting in the establishment of the mortgage in dispute was contrary to the principles of social co-existence and for this reason invalid, cannot have the desired effect... The appellant totally disregards the binding findings of the Court of Appeal, from which it follows that the aim of the said acts in law was not to cause harm to her legal predecessor; that [REDACTED] used the funds obtained from the issue of the bonds for further investments; that it was not declared bankrupt until two and a half years after the cooperation agreement was concluded with the claimant; and that the reason for the bankruptcy was a whole series of business move[s] that were not fully thought out and reasonable, especially errors in the assessment of market mechanisms and its own production capabilities and resources.⁷³⁴

477. The Supreme Court in the [REDACTED] Case ignored the findings of fact of the Court of Appeal and concluded “that the action taken by defendant [Manchester] to secure its interests as a new creditor of the developer was one of the planned results of the dishonest conduct of the developer, with that defendant being aware of that dishonesty.”⁷³⁵

478. The Supreme Court considered again Manchester’s [REDACTED] Mortgage in the [REDACTED] case. The Court viewed as ineffective the allegation of breach of Article 58(2) of the Civil Code. According to the Court, for an act to qualify as contrary to PSC, the content, intended purpose and expected consequences are of decisive importance. The Court stated that by introducing “unclear criteria”, PSC “may pose a threat to the security of commercial transactions” and indicated that they should be applied cautiously and to flagrant cases.⁷³⁶ The Court found that:

Just entering into a transaction simply being aware of the existence of third party rights established earlier cannot really be treated as one of such cases. In order to have the effect provided under Art. 58 § 2 of the Civil Code, the conduct of the parties to a transaction must also impair other values accepted in society.⁷³⁷

479. The Supreme Court emphasized that compliance of an act with PSC is an issue of factual context. The Supreme Court recalled that it takes the stance that “the states of human awareness such as the will, the purpose of the action, the intention of the parties to the agreement, are an element of factual findings excluded from review by way of a cassation appeal.”⁷³⁸ The Supreme Court held:

[T]he view presented in the appeal disregards the findings as to the facts binding on the Supreme Court, adopted as the basis for the judgment under appeal. It does not follow from those findings that the subsequent acts in law of [REDACTED] and the claimant were aimed at causing detriment to the defendant. The purpose of cooperation with regard to the bond issue was to obtain funds to facilitate the continuation of the developer’s investment activities, including the purchase of real property for a multifamily housing scheme and for the financing of current activities. [REDACTED] had been carrying out those activities and was only declared bankrupt more than two years after the conclusion of the cooperation agreement with the claimant. The analysis of the provisions of that agreement did not provide the court with any grounds to

⁷³⁴ [REDACTED] Supreme Court Ruling (C-80), p. 21 (emphasis added).

⁷³⁵ [REDACTED] Supreme Court Ruling (C-73), p. 17.

⁷³⁶ [REDACTED] Supreme Court Ruling (C-81), p. 5.

⁷³⁷ [REDACTED] Supreme Court Ruling (C-81), p. 5.

⁷³⁸ [REDACTED] Supreme Court Ruling (C-81), p. 5 (emphasis added).

conclude that it was structured in a manner actually preventing the developer from fulfilling its obligations towards the purchasers of the premises.⁷³⁹

480. It is noteworthy that the factual findings of the Court of Appeal were the same in all three cases. It is equally notable that the Supreme Court did not consider itself bound by the factual findings of the Court of Appeal in the [REDACTED] Case, but did so in the [REDACTED] and [REDACTED] cases. For the Tribunal, it is not a question of whether the Supreme Court committed a procedural error, but whether the error was committed selectively to justify a finding against Manchester, the defendant in the case of the [REDACTED] Mortgage and the claimant in the [REDACTED] case. The finding in favor of Manchester in the [REDACTED] case was to no avail, as explained below.

481. In the [REDACTED] and [REDACTED] cases, the Supreme Court found the [REDACTED] Mortgage to be against PSC in the [REDACTED] case⁷⁴⁰ and not against PSC in the [REDACTED] case.⁷⁴¹ The distinction between these two cases is that [REDACTED] was a business entity as opposed to the heirs of Mr. [REDACTED].⁷⁴² This differentiation between consumers and business entities for purposes of finding whether PSC have been violated was not taken into account by the Supreme Court in the [REDACTED] Case. The Supreme Court assumed that all the Prospective Buyers were consumers and ignored the fact that part of the [REDACTED] Property consisted of commercial units as some Prospective [REDACTED] Buyers were business entities.⁷⁴³ Furthermore, the protection of consumers as a reason to invalidate a mortgage for being contrary to PSC would have applied equally to the [REDACTED] Mortgage.

482. Notwithstanding the decision of the Supreme Court on the validity and enforceability of the [REDACTED] Mortgage in the [REDACTED] case, [REDACTED] started new proceedings before the District Court in [REDACTED]. Surprisingly, this Court did not find itself bound by the Supreme Court's decision and held that the [REDACTED] Mortgage over [REDACTED] apartment was against PSC and that it was irrelevant that [REDACTED] was not a consumer.⁷⁴⁴

483. There is no evidence before the Tribunal that the Claimant appealed the decision of the [REDACTED] District Court. A pre-condition for a claim of denial of justice, which would be a breach of FET under the BIT, is the exhaustion of local remedies.⁷⁴⁵ But the local remedies rule requires that

⁷³⁹ [REDACTED] Supreme Court Ruling (C-81), p. 5 (emphasis added).

⁷⁴⁰ Conclusion of the Judgment, C-80: "... the claimant demand should be deemed contrary to the principles of community life."

⁷⁴¹ [REDACTED] Supreme Court Ruling (C-80), p. 24.

⁷⁴² [REDACTED] Supreme Court Ruling (C-81), p. 7.

⁷⁴³ See, Claimant's Post-Hearing Brief, ¶¶63-65.

⁷⁴⁴ Decision of the District Court for [REDACTED] in [REDACTED] Civil Division I, 7 April 2017 (E4/157a), pp. 15-16.

⁷⁴⁵ Judge Brower notes that it presently is unclear in the jurisprudence whether a finding of denial of justice within the principle of fair and equitable treatment requires that local remedies be exhausted as they are required to be in

remedies be exhausted only once; it does not require appealing twice or more to the Supreme Court on the same matter. The District Court decision shows that, even when the Supreme Court upheld the validity and enforceability of the [REDACTED] Mortgage in the [REDACTED] case, a lower level court disregarded the Supreme Court's ruling with the sole purpose of invalidating the [REDACTED] Mortgage.

484. To conclude, the Tribunal finds that the Supreme Court rulings discriminated against the Claimant's investment and that, when they did not in the sole instance of the [REDACTED] case, a lower court disregarded the Supreme Court ruling to the detriment of the Claimant with the result that, among the lenders to real estate developers, only the Claimant carried the burden of Poland's failure to protect real estate developers' clients. The Tribunal concludes that there has been discrimination towards the Claimant in respect to the [REDACTED] Mortgage. The Tribunal will continue to address the difference of treatment under the allegation of interference in the judicial proceedings.

(iv) Did the Respondent interfere in the judicial proceedings?

485. As proof of interference, the Claimant lists the following circumstances: (i) on 25 June 2009, MPs filed a written appeal with the Bankruptcy Court in [REDACTED] calling upon the Court to protect the Prospective Buyers; (ii) on 17 July 2009, the Public Prosecutor joined the [REDACTED] Case and called for the invalidation of the [REDACTED] Mortgage; (iii) on 26 October 2009, the Public Prosecutor issued the Prosecutor's Order to prevent the sale of the [REDACTED] property in the course of the Bankruptcy Proceedings; (iv) on 20 February 2012, the Public Prosecutor General called for the invalidation of the [REDACTED] Mortgage; and (v) the Polish Parliament enacted the Apartment Buyer Protection Act, which encouraged the Supreme Court to invalidate the [REDACTED] Mortgage.⁷⁴⁶ The Tribunal will examine each of these circumstances in turn.
486. MPs appealed to the Bankruptcy Court in the context of [REDACTED] bankruptcy after customers of [REDACTED] had come to the members' offices for several months asking for help. In their appeal, the MPs stated: "We feel obliged towards our voters to take action that could help them in the dramatic situation in which they have found themselves. We are impressed by the resolve, consistency and coherence of the actions of the people united under the common heading of [REDACTED]."⁷⁴⁷ The appeal concluded in the following terms:

In view of the declaration of bankruptcy of [REDACTED] we are putting forward a wholehearted appeal for any decisions that are to be made to take into account the particularly

the case of a denial of justice under customary international law. He notes that it is not necessary to decide that issue here, however, inasmuch as in fact local remedies have been exhausted.

⁷⁴⁶ Reply, ¶276.

⁷⁴⁷ Appeal of the Polish MPs to the Bankruptcy Court, 25 June 2009 (C-37).

socially significant and human aspect of the problem, and not contribute to the further worsening of the situation of [REDACTED] customers. We trust that, given the willingness to cooperate declared by the customers of the [REDACTED] developer, it will be possible to work out a solution satisfactory to all parties.⁷⁴⁸

The Tribunal observes that the appeal refers generally to the bankruptcy of [REDACTED]. It mentions specifically the customers of [REDACTED] grouped under the [REDACTED] banner but there is no reference to any particular mortgage. The appeal makes reference to several dozen cases in the courts of [REDACTED] against the developer and Manchester, but the conclusion is couched in terms of reaching a solution satisfactory to all parties concerned.

487. The interventions of the Public Prosecutor on 17 July and 26 October 2009 can hardly be qualified as external interference. Public prosecutors are an integral part of a justice system. Even if, as argued by the Claimant, the Public Prosecutor was not obliged to intervene in a case such as that of the [REDACTED] Mortgage, the Claimant itself recognized that the Public Prosecutor's intervention may have been unusual but remained within the ambit of its discretion.⁷⁴⁹ The order seizing the [REDACTED] Property as evidence and prohibiting the Bankruptcy Trustee from selling it in the course of the Bankruptcy Proceedings was appealed by the Bankruptcy Trustee on 4 November 2009 and the Claimant on 24 November 2009.⁷⁵⁰ The order was quashed by the [REDACTED] Regional Court.⁷⁵¹ The Court found that the Prosecutor's Order lacked legal basis. Thus, the Bankruptcy Trustee and the Claimant availed themselves of the available remedies and succeeded.
488. The Public Prosecutor General intervened at the request of the Supreme Court in the appeal of the Claimant against the decision of the [REDACTED] Court of Appeal in the [REDACTED] case. The Supreme Court requested that the Public Prosecutor General state in writing her opinion on the cassation appeal filed by the defendant against the judgment of the Court of Appeal of 22 June 2010.⁷⁵² The Tribunal fails to see how, by expressing her opinion at the request of the Supreme Court, the Public Prosecutor General could have been guilty of an "external interference" with the Polish judiciary.
489. The Claimant has described the negative public reaction to the [REDACTED] Court of Appeal's ruling, and the pressure applied in particular by the Prospective [REDACTED] Buyers on MPs to take action

⁷⁴⁸ Appeal of the Polish MPs to the Bankruptcy Court, 25 June 2009 (C-37).

⁷⁴⁹ Reply, ¶279.

⁷⁵⁰ Statement of Claim, ¶¶101-102.

⁷⁵¹ Notice of Arbitration, ¶38; [REDACTED] District Court, case file ref. [REDACTED] 31 May 2010 (C-45), pp. 12-13.

⁷⁵² Opinion of the Public Prosecutor General submitted in the [REDACTED] Case, case file ref. [REDACTED] 20 February 2012 (C-79).

to protect real estate developers' customers.⁷⁵³ In turn, according to the Claimant, MPs applied pressure on the Minister of Justice, who declared in August 2011 that "the Polish Parliament was working on a new law which would protect the real estate developers' clients."⁷⁵⁴ The Respondent has described a broader situation of bankruptcies of real estate developers nationwide that prompted the Government to take remedial action. It has denied that the [REDACTED] Association played any key role in the legislative process.⁷⁵⁵

490. The record shows that the Prospective [REDACTED] Buyers mobilized to seek a change in the law to remedy their predicament. From the record, they seem to have been effective in catalyzing support for legislative change. The fact that they reached out to Parliament to pass a new law of general application to protect unsecured customers of real estate developers and the expediency with which Parliament processed the new law do not substantiate the claim of external interference in the judiciary. The Apartment Buyer Protection Act's relevance is limited to the allegation that the Supreme Court applied it before it became effective. The Act provided specifically for its future application. Whether or not the Supreme Court applied it before it entered into force, it cannot be said that the Parliament "encouraged the Supreme Court to invalidate the [REDACTED] Mortgage."

491. To conclude, the Tribunal finds that the Respondent did not interfere in the judicial proceedings.

(v) *Was there a frustration of the Claimant's legitimate expectations?*

492. Legitimate and reasonable expectations are "the dominant element" of the FET standard⁷⁵⁶ and "central" in its definition.⁷⁵⁷ However, both Parties' expectations need to be taken into account and, in order for them to be protected, "[they] must rise to the level of legitimacy and reasonableness in light of the circumstances."⁷⁵⁸

493. The Claimant has argued that it could not have expected that the establishment of mortgages, which of itself was lawful, not restricted by the Preliminary Agreements and consistent with market practice, would be contrary to PSC when no mortgage ever had previously been

⁷⁵³ Statement of Claim, ¶¶127-132.

⁷⁵⁴ Statement of Claim, ¶133.

⁷⁵⁵ Statement of Defense, ¶¶36-37.

⁷⁵⁶ *Saluka v. Czech Republic* (CA-23), ¶302.

⁷⁵⁷ *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. Arb/03/15, Award, 31 October 2011 ("*El Paso Merits Award*") (CA-36), ¶348: "[T]he legitimate expectations of the investors have generally been considered central in the definition of FET, whatever its scope. There is an overwhelming trend to consider the touchstone of fair and equitable treatment to be found in the legitimate and reasonable expectations of the Parties, which derive from the obligation of good faith."

⁷⁵⁸ *Saluka v. Czech Republic* (CA-23), ¶304 (emphasis removed).

invalidated on the basis of those principles. The Claimant also has pointed out that the Respondent took other actions that prevented Manchester from enforcing its claims, namely, the Second and Third Injunctions, the Prosecutor's Order, the Supreme Court ruling in the [REDACTED] case and, ultimately, the transfer of apartments to the Prospective Buyers.⁷⁵⁹

494. The Respondent has contested the claim of legitimate expectations by arguing that the Claimant's expectations could not be legitimate because they were contrary to PSC as provided by Polish law. Furthermore, the Claimant could not have legitimate expectations because registration of the mortgages was presumptive.⁷⁶⁰

495. The Tribunal has already determined that the Claimant did not act in bad faith (see paragraphs 392-402 above). In the view of the Tribunal, it would have been reasonable for the Claimant to expect that mortgages registered after the vetting of the Registry Court would be *prima facie* valid under Polish law, as a business expectation. But for an investor's expectation to be considered as a legitimate expectation protected by international law, something more than the existence of a general legal framework is needed. As observed by the *El Paso* tribunal:

A reasonable general regulation can be considered a violation of the FET standard if it violates a specific commitment towards the investor. The Tribunal considers that a special commitment by the State towards an investor provides the latter with a certain protection against changes in the legislation, but it needs to discuss more thoroughly the concept of "specific commitments." In the Tribunal's view, no general definition of what constitutes a specific commitment can be given, as all depends on the circumstances. However, it seems that two types of commitments might be considered "specific": those specific as to their addressee and those specific regarding their object and purpose.⁷⁶¹

496. The Tribunal understands that registration is only presumptive, and considers that it cannot be considered as a specific commitment giving rise to an internationally protected legitimate expectation.

(vi) *Overall conclusion on the claim of denial of justice as a breach of FET*

497. The Tribunal has concluded that the investment of the Claimant was subject to arbitrary and discriminatory treatment. Did this treatment rise to the level of a denial of justice? The Supreme Court held that "the states of human awareness such as the will, the purpose of the action, the intention of the parties to the agreement, are an element of factual findings excluded from review by way of a cassation appeal."⁷⁶² This holding notwithstanding, the Supreme Court in the [REDACTED] Case engaged in a review of factual findings of the Court of Appeal. At variance with

⁷⁵⁹ Statement of Claim, ¶253; Reply, ¶¶272-273.

⁷⁶⁰ Statement of Defense, ¶180; Rejoinder, ¶331; Respondent's Post-Hearing Brief, ¶197.

⁷⁶¹ *El Paso Merits Award* (CA-36), ¶375.

⁷⁶² [REDACTED] Supreme Court Ruling (C-81), p. 5 (emphasis added).

the Court of Appeal, the Supreme Court found that [REDACTED] acted dishonestly, and that the Claimant conspired with [REDACTED] dishonest behavior against the Prospective Buyers. This was a key finding on the basis of which the Supreme Court invalidated the [REDACTED] Mortgage.

498. Furthermore, the reliance by the Supreme Court on new findings of fact different from those of the Court of Appeal resulted in a violation of the Claimant's due process against which it had no opportunity to present evidence or legal argument. In these circumstances and in the view of the Tribunal, the finding that the Claimant conspired dishonestly with [REDACTED] against the Prospective Buyers is particularly egregious. For these reasons, the Tribunal finds that the Respondent breached the FET standard by committing a denial of justice⁷⁶³ in relation to the Claimant's investment.⁷⁶⁴
499. In view of this conclusion and for reasons of procedural economy, the Tribunal will omit consideration of the other claims of breach of the BIT since irrespective of whether the Tribunal upholds them or dismisses them, the amount of damages will be unaffected.

C. DAMAGES

500. The Claimant has pleaded two alternative damage scenarios: first, if the Tribunal finds that the invalidation of the [REDACTED] Mortgage constituted a breach of the BIT, then the Claimant seeks compensation in the amount of the [REDACTED] Harm. Alternatively, if the Tribunal does not make this finding, the Claimant seeks compensation for the Transfer, [REDACTED] and [REDACTED] Harms.⁷⁶⁵ Since the Tribunal has found that the invalidation of the [REDACTED] Mortgage breached the BIT, the Tribunal will only consider the claim for the [REDACTED] Harm. The Claimant has also pleaded for the legal costs related to all heads of damage if the Tribunal would find that the Claimant is entitled to compensation for them. For the reasons set forth below, the Tribunal does not need to consider the legal costs claimed by the Claimant for the damages alternative to the [REDACTED] Harm.

1. Preliminary matters

501. The Tribunal will first consider two preliminary matters raised by the Parties' arguments: the applicable legal standard and causation.

⁷⁶³ Arbitrator Stern considers that denial of justice is the only standard under which an international arbitral tribunal can review the judgments of the national courts, as it is not a court of appeal.

⁷⁶⁴ Judge Brower is of the view that the Tribunal could have found that the Respondent breached its FET obligation on a basis other than denial of justice.

⁷⁶⁵ Claimant's Post-Hearing Brief, ¶¶307-312.

(a) Legal standard

502. The Tribunal has found that the Respondent breached the BIT when its Supreme Court committed a denial of justice because it acted arbitrarily and discriminated against the Claimant in cancelling the [REDACTED] Mortgage. The Claimant has argued that it is entitled to "full reparation".⁷⁶⁶ The Respondent contends that the standard to be applied is the standard of reparation for expropriation found in Article VII of the BIT.⁷⁶⁷
503. The BIT standard is applicable only in the case of expropriation that meets the conditions set forth in that article, but it is not applicable in cases where the BIT has been breached. The applicable standard is that provided by customary international law for wrongful acts of the State as set forth in the *Case Concerning the Factory at Chorzów*⁷⁶⁸ and reflected in Article 36 of the ILC Articles.

(b) Causation

504. The Parties hold different views on the link between the cancellation of the [REDACTED] Mortgage and the claim for damages. The Claimant contends that the Respondent prevented the enforcement of the [REDACTED] Mortgage through injunctions, the Prosecutor's Order, and then its invalidation. According to the Claimant, were it not for these actions, [REDACTED] bankruptcy estate would have been larger and the Claimant could have satisfied a larger portion of its claims despite the invalidation of the [REDACTED] Mortgage.⁷⁶⁹ The Respondent argues that the Claimant failed to prove the linkage of the acts referred to by the Claimant and the alleged damages.
505. The Tribunal has found that denial of justice against the Claimant was limited to the decision of the Supreme Court and its aftermath. For this reason, the Tribunal will limit its consideration of causation to the decision of the Supreme Court. The Tribunal should distinguish between the effect of the actual discrimination against the Claimant by the different treatment of the [REDACTED] Mortgage and the valuation of the damage that this effect had. It is to state the obvious that a creditor in a bankruptcy proceeding who has a credit secured by a mortgage is in a better position to obtain satisfaction of its claim than a creditor who does not. The question is, what is the value of this effect? In the case of the Claimant, its claim was displaced from being ranked second after the [REDACTED] Mortgage,⁷⁷⁰ to being one of the unsecured creditors. It should be noted

⁷⁶⁶ Statement of Claim, ¶384.

⁷⁶⁷ Rejoinder, ¶358.

⁷⁶⁸ *Chorzów* (CA-47).

⁷⁶⁹ Statement of Claim, ¶¶389-395. *See also*, Reply, ¶¶306-308 and 314-316.

⁷⁷⁰ Expert Report of Brian O'Brien, ¶¶5.58, 5.63; [REDACTED] Report, ¶40; Bankruptcy Trustee's list of all claims against the [REDACTED] Property, 12 November 2012 (C-49).

that the ranking for the Claimant was not changed when the owners of the apartments or shops in the [REDACTED] Property were awarded Compulsory Mortgages since its claim was senior to theirs. The Claimant's ranking only changed when the Supreme Court invalidated the [REDACTED] Mortgage and, therefore, the Supreme Court's ruling is the relevant factor for valuing the displacement of the Claimant as a secured creditor.

2. Calculation of the [REDACTED] Harm

506. The experts of both Parties adopt the same methodology and approach to the calculation of damages. They diverge on the assumptions: the assumed date of sale of the [REDACTED] Property, the justification to adjust the sale price to the nature of the sale – whether or not it was a distressed sale – and the cost to complete construction of the property. The Parties also differ on whether legal costs may be included as part of the claim and on whether the applicable pre-award rate of interest should be the rate of return of Manchester's parent company or a risk-free interest rate.

(a) The value of the claim

507. The Tribunal observes that multiple mortgages secured the Bonds. [REDACTED]
[REDACTED] represented the outstanding claim under the Bond Purchase Agreement that could be settled from the sale of the [REDACTED] Property.⁷⁷¹ Additionally, the Claimant concedes that a deduction should be made for a payment received by Manchester in 2013, in the amount of PLN [REDACTED].⁷⁷² For this reason, and for purposes of calculating the [REDACTED] Harm, the Parties' disagreement on the value of the [REDACTED] Property calculated by the Claimant's expert, Mr. Grzesik, and relied on by their expert Mr. O'Brien, is irrelevant. As explained by the Claimant, "[e]ven under the valuation presented by the Respondent's Expert (i.e. PLN [REDACTED]), the value of the [REDACTED] Property was high enough to cover Manchester's claims secured under the [REDACTED] Mortgage, as calculated by the Claimant's Expert (PLN [REDACTED])."⁷⁷³
508. The disagreement between the Parties concerns the rate of interest applicable during the two years preceding the date of the bankruptcy. The Claimant contends that the applicable rate is the rate provided in the Bond Purchase Agreement, while the Respondent claims that the statutory rate

⁷⁷¹ Claimant's Post-Hearing Brief, ¶¶318-319, referring to Supplemental Report of Brian O'Brien, ¶¶2.8-2.9; Rebuttal [REDACTED] Report, ¶113.

⁷⁷² Claimant's Post-Hearing Brief, ¶¶318-319.

⁷⁷³ Claimant's Post-Hearing Brief, ¶317. Note that the Claimant's expert's calculation also included interest over the two years preceding bankruptcy, discussed in the next paragraph.

of 13% for late payments is applicable.⁷⁷⁴ The Tribunal recalls that Prof. Swaczyna, the Claimant's expert in Polish law, testified that, under Polish law, a mortgage secures interest on the main claim at the rate provided for in the mortgage deed.⁷⁷⁵ The Tribunal also notes that the Bankruptcy Trustee calculated the interest on Manchester's claim at the rate of [REDACTED] agreed in the Bond Purchase Agreement.⁷⁷⁶ The Tribunal finds that this is the applicable rate in calculating the value of Manchester's claim. Accordingly, the two-year interest shall be calculated as a simple interest, at a rate of [REDACTED] per annum on the nominal value of PLN [REDACTED]. It amounts to PLN [REDACTED].

509. Accordingly, the total amount of the [REDACTED] claim is PLN [REDACTED] (that is, [REDACTED]).

(b) Estimated date of sale (start date for the accrual of pre-award interest)

510. The date of sale is the date on which it is estimated that the Claimant would have received the proceeds of the sale of the [REDACTED] Property. It is therefore the date from which pre-award interest shall accrue. The Claimant advocates for 31 March 2013, while the Respondent advocates for 31 December 2014. The date chosen by the Claimant is based on the Bankruptcy Trustee's Report of 27 July 2009, in which the Trustee established the order for the planned sale of [REDACTED] assets. The [REDACTED] Property was to be sold last by the end of 2011. Thus, after allowing for some delay, the Claimant has argued that the property would have been sold by the end of December 2012 and that it would have received proceeds from the sale by 31 March 2013.⁷⁷⁷ On the other hand, according to the Respondent, 27 June 2014 would have been a more likely date for the sale; it is the earliest date on which the next tender for the [REDACTED] Property could have been arranged – three months after the last announcement on 25 March 2014.⁷⁷⁸ The Respondent's damages experts add that Manchester would have received the proceeds six months after the sale, by 31 December 2014.⁷⁷⁹

511. The Claimant has further argued that the alleged breaches of the BIT starting in 2009 affected the sale process and that "at no point between 2009 and the end of 2012 was there a period of time whereby the Trustee could have realistically offered the [REDACTED] property to the

⁷⁷⁴ Claimant's Post-Hearing Brief, ¶¶319-323; Rebuttal [REDACTED] Report, ¶120.

⁷⁷⁵ Expert Opinion of Professor Swaczyna, ¶¶58-60.

⁷⁷⁶ Bankruptcy Trustee's list of all claims against the [REDACTED] Property, 12 November 2012 (C-49).

⁷⁷⁷ Reply, ¶311(a).

⁷⁷⁸ Respondent's Post-Hearing Brief, ¶331; [REDACTED] Report, ¶¶33-34. *See also*, Rebuttal [REDACTED] Report, ¶13.

⁷⁷⁹ [REDACTED] Report, ¶122.

market.”⁷⁸⁰ The Respondent contends that the alleged breaches did not affect the timing of the offer of the [REDACTED] Property for sale.⁷⁸¹

512. The Tribunal recalls that the sale of the [REDACTED] Property had been planned by the Bankruptcy Trustee to take place by the end of the Bankruptcy Proceedings. As explained in the Trustee’s Report:

It will be known by then to what extent the bondholder’s claims will be satisfied from the sale of other assets and whether it will be possible to agree the cancellation of the mortgage by way of negotiations with the customers at ul. [REDACTED] and ul. [REDACTED]. This could potentially make it possible to perform the preliminary agreement to deliver the premises or – as a last resort to re-sell the property. The bondholder’s claim would be satisfied in full, and the other funds would be designated for distribution between the remaining creditors as part of the general bankruptcy estate.⁷⁸²

It is also noted that the Bankruptcy Trustee’s plan was illustrative and suffered delays. The Respondent provides examples:

According to the liquidation plan in the Trustee’s Report, the real property at ul. [REDACTED] was to be sold in the autumn of 2009. It was actually sold two years later. The real property in [REDACTED] was to have been sold in 2010. It has still not been sold (seven-year delay from the date on the calendar).⁷⁸³

513. The Tribunal is not persuaded that the delay in offering the [REDACTED] Property for sale can be attributed to the alleged breaches of the BIT or that the breaches have a bearing on the dates chosen by the Bankruptcy Trustee to advertise it.
514. The Parties further disagree on whether the Bankruptcy Trustee made a sufficient effort to sell the [REDACTED] Property. For background, it will be useful to review the chain of events that followed the invalidation of the [REDACTED] Mortgage by the Supreme Court on 9 February 2012.⁷⁸⁴ The Bankruptcy Trustee attempted to sell the [REDACTED] Property on four occasions: on 16 April 2013, 27 June 2013, 23 September 2013 and 24 March 2014.⁷⁸⁵ On 19 February 2014, the [REDACTED] Mortgage was removed from the LMR by the Registry Court on application of the Bankruptcy Trustee just before the last attempt by the Bankruptcy Trustee to sell the [REDACTED] Mortgage. The Bankruptcy Court transferred ownership of the [REDACTED] Property to the Prospective [REDACTED] Buyers on 29 April 2014.⁷⁸⁶

⁷⁸⁰ Rebuttal Report of Brian O’Brien, ¶4.26.

⁷⁸¹ Respondent’s Post-Hearing Brief, ¶331.

⁷⁸² Trustee Report, 27 July 2009 (C-40), p. 4.

⁷⁸³ Respondent’s Post-Hearing Brief, ¶322.

⁷⁸⁴ [REDACTED] Supreme Court Ruling (C-73)

⁷⁸⁵ [REDACTED] Report, ¶70(a). *See also*, Rebuttal [REDACTED] Report, ¶¶48-64.

⁷⁸⁶ Decision of the Judge-Commissioner, case file ref. [REDACTED] 29 April 2014 (C-53).

515. According to the Respondent, the Bankruptcy Trustee fulfilled her advertising obligations:

(a) [she] was obliged to publish the announcements: (i) two weeks before the tender; and (ii) in at least one local daily; whereas (b) [she] actually published the announcements: (i) 3 weeks before the tender; and (ii) in two local dailies and additionally in national dailies, internet portals and [the] official gazette.⁷⁸⁷

516. The Claimant finds fault in that the Bankruptcy Trustee limited her efforts to sell the property to her statutory minimum obligations. Furthermore, the Claimant attributes this conduct to the fact that, even before any tender for the [REDACTED] property was advertised, the Bankruptcy Trustee had contemplated, as an alternative to the sale, the transfer of title to the Prospective [REDACTED] Buyers.⁷⁸⁸ But this was not possible pending the proceedings of the Registry Court. Ownership of the [REDACTED] Property was transferred to the Prospective W [REDACTED] Buyers shortly after the Registry Court removed the [REDACTED] Mortgage from the LMR. As reported by the Bankruptcy Trustee to the Bankruptcy Court, there had been some interest in purchasing the [REDACTED] Property for PLN [REDACTED] but no formal bid.⁷⁸⁹ At the hearing, Poland admitted that the Bankruptcy Trustee might have been waiting for the outcome of the mortgage case.⁷⁹⁰

517. The Tribunal observes that the Bankruptcy Trustee had no obligation to go beyond the statutory requirements. It is also a fact that no bids were received at any price, even in the fourth round, which had no minimum bid requirement and that, by then, the [REDACTED] Mortgage had been removed from the LMR. The potential new owners would have had to deal with a difficult situation of occupied premises, a fact that by itself would likely have had an impact on the sale irrespective of the Bankruptcy Trustee's efforts.

518. The Tribunal is therefore unpersuaded that, as contended by the Claimant, the [REDACTED] Property could have been sold in 2013. In the view of the Tribunal, the Claimant could have obtained the payment of the claims due to it under the Bond Purchase Agreement either following the sale of the [REDACTED] property in a further, fifth tender in the bankruptcy proceedings (assuming the [REDACTED] Property would not have been transferred to the Prospective Buyers in April 2014) or in enforcement proceedings against the Prospective Buyers (assuming that the transfer did take place). In either case, the Tribunal estimates that, but for the invalidation of the [REDACTED] Mortgage, the Claimant would have received the proceeds of the sale of the

⁷⁸⁷ Rebuttal [REDACTED] Report, ¶56.

⁷⁸⁸ Claimant's Post-Hearing Brief, ¶237.

⁷⁸⁹ Record of the hearing in the Bankruptcy Proceedings, case file ref. [REDACTED] 21 March 2014 (Exhibit 38 to the Rebuttal Report of Brian O'Brien).

⁷⁹⁰ Claimant's Post-Hearing Brief, ¶342; Hearing Transcript (25 September 2017), 137:12-14.

Property around 27 June 2014, which is therefore the date from which pre-award interest will accrue.

(c) Pre-award interest

519. As stated in the Respondent's Post-Hearing Brief: "The Parties are not in dispute over whether, if the Arbitral Tribunal finds that the BIT was breached, it is possible for the injured party to be awarded pre-award interest."⁷⁹¹ However, they disagree on the applicable rate of interest. The Claimant has argued for a rate equivalent to the average rate of return of investments of [REDACTED] given the nature of its business.⁷⁹² The Respondent, based on the report of its damages experts, stated that "only a risk-free interest rate which only reflects the time value of money should be applied and yield rates of government bonds are a widely accepted approximation of the risk-free rate. In the case of PLN, this is the rate on Polish government bonds."⁷⁹³
520. Article VII of the BIT provides for "interest at a commercially reasonable rate, such as LIBOR plus an appropriate margin, from the date of expropriation; be fully realizable; be freely transferable; and calculated on the basis of the prevailing market rate of exchange for commercial transactions on the date of expropriation." While the standard established in Article VII applies, *stricto sensu*, only in the case of expropriations that meet the conditions set forth in that article, the Tribunal considers that it nevertheless provides a reasonable guide to interest in the present case. The Tribunal further considers that to apply the average rate of return of the parent company of the Claimant would be unusual and highly speculative. First, the rate of return is not "a commercially reasonable rate." Second, it would be the rate of return of investments of the Claimant's parent company, which is not a party to these proceedings. Third, the average rate of return of [REDACTED] obscures the actual rate of return of specific investments, in the instant case, the return on Manchester's [REDACTED] investment; such rate would turn this Award into an insurance policy against the risks inherent in the investment.
521. The risk-free rate of 1.78% advanced by the Respondent is the rate on its own bonds and not necessarily a reasonable commercial rate. The BIT does not require that the rate be risk-free. It only requires that the interest rate be reasonable and the added margin be appropriate. The Respondent has also referred to the international practice of using LIBOR or LIBOR plus a low margin and stated that the LIBOR plus a margin rate follows also from Article VII of the BIT.⁷⁹⁴ The Claimant, in the alternative, has referred to the statutory rate applicable to late payments in

⁷⁹¹ Respondent's Post-Hearing Brief, ¶406.

⁷⁹² Reply, ¶40.

⁷⁹³ Rejoinder, ¶364.

⁷⁹⁴ See, Respondent's Post-Hearing Brief, ¶412.

Poland ranging from 5 to 13% per annum, to the WIBOR three-month rate plus four percentage points or to “such commercial rate the Tribunal may deem appropriate.”⁷⁹⁵

522. The Tribunal notes that the claim is in PLN and hence the applicable rate should be a reasonable commercial rate for borrowing in PLN. The Tribunal considers that the average WIBOR annual rate of interest for PLN between 27 June 2014 and the date of the Award plus two percentage points, which amounts to 3.88%, would be a reasonable commercial rate. As stated at paragraph 518 above, interest shall accrue from 27 June 2014.

(d) Legal costs

523. The Parties disagree on whether the claim for legal costs incurred by the Claimant in previous domestic proceedings may be claimed as part of the compensation for breach of the BIT in the form of a denial of justice. The Claimant has referred in support to the award in the case of *Inmaris et al. v. Ukraine*.⁷⁹⁶ In that case, the tribunal “concluded that Respondent’s act caused Claimants’ insolvency, and, therefore, Respondent is responsible for compensating Claimants for the resulting harm, including with respect to the payment of insolvency costs.”⁷⁹⁷ In opposing the claim for legal costs for proceedings before domestic courts, the Respondent found support in the case of *Petrobart v. Kyrgyzstan*. The tribunal in that case held that “[t]he costs relating to these previous proceedings were – or should have been – finally settled in connection with those proceedings, and the Arbitral Tribunal finds no basis for granting compensation for them in the present arbitration proceedings.”⁷⁹⁸
524. The Tribunal has considered these opposing arguments. The Tribunal has found that the cancellation of the [REDACTED] Mortgage by the Supreme Court was a discriminatory and arbitrary act that amounted to a denial of justice. The Claimant availed itself of access to the Respondent’s courts to defend its rights in a series of lawsuits brought by private parties. The Tribunal does not consider that the legal costs of the Claimant incurred in defense of its rights in these circumstances should be compensated by the Respondent.⁷⁹⁹ As the *Petrobart* tribunal found, these costs were or should have been settled in the proceedings preceding this arbitration. These considerations against compensation for the legal costs related to the [REDACTED] Harm

⁷⁹⁵ Reply, ¶333, referring to Expert Report of Brian O’Brien, ¶5.76. See also, Rebuttal Report of Brian O’Brien, ¶7.26.

⁷⁹⁶ Claimant’s Post-Hearing Brief, ¶327.

⁷⁹⁷ *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Award, 1 March 2012 (CA-85), ¶392.

⁷⁹⁸ *Petrobart v. Kyrgyzstan* (CA-34), p. 87.

⁷⁹⁹ Judge Brower believes that in accordance with *Chorzów* (CA-47, p. 47) the Claimant should be awarded such costs in order to “wipe out all the consequences” of the Respondent’s unlawful act.

apply to all legal costs incurred by the Claimant in relation to the other heads of damage pleaded in this proceeding.

3. The issue of double recovery

525. The Respondent alerted the Tribunal to the risk of double recovery.⁸⁰⁰ As pointed out by the Respondent, [REDACTED] debt to the Claimant has been recognized in the Bankruptcy Proceedings. If the claim for redress of the [REDACTED] Harm is upheld in full by the Tribunal, it might lead to the Claimant being compensated in excess of the damage. At the hearing, the Respondent proposed that the Tribunal defer its award on quantum until the end of the Bankruptcy Proceedings or that the Tribunal deduct the amounts that the Claimant could potentially recover in those proceedings from the amounts granted in this Award.⁸⁰¹
526. The Claimant has opposed the Respondent's solutions to avoid double recovery. The Claimant has argued that the possibility of recovery in the domestic proceedings is remote and has expressed its willingness to undertake to notify the Tribunal of any new payments received in the enforcement and bankruptcy proceedings prior to the issuance of the Award and, if the Tribunal awards the Claimant's claim in full and the Respondent pays it in full, to reimburse the Respondent in the amount of any recovery received from the enforcement and bankruptcy proceedings to the extent they overlap with payments made by the Respondent pursuant to the award. The Claimant has also offered to
- withdraw its claims in the bankruptcy or enforcement proceedings in Poland against [REDACTED] bankruptcy estate and other debtors in relation to the Bond [Purchase] Agreement, up to the amount awarded by the Arbitral Tribunal and paid by Poland (save for any pre- and post-award interest and costs awarded by the Arbitral Tribunal).⁸⁰²
527. As observed in *Nykomb v. Latvia*, "the Treaty based right to arbitration is not excluded or limited in cases where there is a possible risk of double payment."⁸⁰³ Nevertheless, the Tribunal has considered the Parties' proposals to alleviate this risk. The Tribunal considers that the mechanisms proposed by the Respondent and the first alternative proposed by the Claimant are too uncertain. They would leave these proceedings open for an undetermined period of time, the amount to be deducted might be estimated too high or too low, or settlement of accounts between the Parties may last for years beyond the closure of these proceedings. On the other hand, the Tribunal finds merit in the Claimant's proposal to withdraw its claims in the bankruptcy and

⁸⁰⁰ Hearing Transcript (28 September 2017), 676:8-21; Respondent's Post-Hearing Brief, ¶359.

⁸⁰¹ Hearing Transcript (28 September 2017), 680:13-22.

⁸⁰² Claimant's Post-Hearing Brief, ¶397 (b) and (c).

⁸⁰³ *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC, Arbitral Award, 16 December 2003, p. 9.

enforcement proceedings up to the amount awarded by this Tribunal save for pre- and post-award interest. This proposal has the advantage that it does not leave these proceedings or settlement of accounts between the Parties open for an indefinite period.

4. Post-award interest

528. The Claimant has requested that the Tribunal “order the Respondent to pay the Claimant post-award interest at such commercial rate the Tribunal may deem appropriate.”⁸⁰⁴ The Respondent has not argued for a different rate should the Tribunal find in favor of the Claimant. The Tribunal has already decided in the case of pre-award interest what it considers an appropriate commercial interest rate (see paragraph 522 above). The same annual rate of interest shall apply to the amount awarded and it shall accrue as from 60 days of the date of this Award.

D. COSTS

1. Allocation of costs

529. Each Party has pleaded that the Tribunal order the other to pay all the costs of this arbitration and its costs of legal representation and assistance.⁸⁰⁵ Under Article 40(1) of the UNCITRAL Rules, the costs of arbitration shall in principle be borne by the unsuccessful party, but “the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.” As regards the costs of legal representation and assistance, “the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.”⁸⁰⁶
530. The Tribunal observes that the costs of the arbitration have been financed in equal parts by the Parties and that neither Party has fully prevailed in its arguments. For these reasons, the Tribunal considers it reasonable that each Party pay 50% of the arbitration costs and its own costs of legal representation and assistance.⁸⁰⁷

⁸⁰⁴ Claimant’s Post-Hearing Brief, ¶398(d).

⁸⁰⁵ Claimant’s Costs Submissions, ¶3; Respondent’s Costs Submissions, ¶1.

⁸⁰⁶ UNCITRAL Rules, Article 40(2).

⁸⁰⁷ Judge Brower believes, given that the Tribunal has found (i) that it has jurisdiction, (ii) that the Respondent has committed a denial of justice, a heinous international delict, and (iii) hence has awarded the Claimant full damages, that it would have been more appropriate to award the Claimant all of its legal costs and all of the costs of the arbitration.

2. Fixing of the costs of the Tribunal and the PCA

531. Article 38 of the UNCITRAL Rules provides that the Tribunal “shall fix the costs of arbitration in its award” and that such costs include only:
- (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
 - (b) The travel and other expenses incurred by the arbitrators;
 - (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
 - (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
 - (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
 - (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.
532. In light of the Tribunal’s decision that each Party shall bear its own costs of legal assistance and representation (see paragraph 530 above), there is no need to fix the costs under Article 38(d) and (e). No costs under Article 38(f) have been incurred in these proceedings. The costs of arbitration under Article 38(a), (b) and (c) are fixed in the following paragraphs.
533. The fees and expenses in these proceedings of Judge Charles N. Brower, the arbitrator appointed on behalf of the Claimant, amount respectively to USD 227,300.00 and USD 5,534.50.
534. The fees and expenses in these proceedings of Professor Brigitte Stern, the arbitrator appointed on behalf of the Respondent, amount respectively to USD 130,250.00 and USD 10,455.44.
535. The fees and expenses in these proceedings of Dr. Andrés Rigo Sureda, the Presiding Arbitrator, amount respectively to USD 189,750.00 and USD 9,143.63.
536. Pursuant to the Tribunal’s Procedural Order No. 1, the PCA was designated to serve as registry in these proceedings. The PCA’s fees and expenses amount respectively to USD 109,637.54 and USD 2,572.09.
537. Other arbitration costs, including the costs of hearing facilities, court reporters, interpretation, IT equipment, bank transactions, and all other expenses relating to the proceedings, amount to USD 66,331.88.
538. Based on the above figures, the costs of the Tribunal and the PCA, comprising the items covered in Article 38(a) to (c) of the UNCITRAL Rules, total USD 750,975.08.
539. The Parties made deposits for the costs of arbitration in these proceedings in equal shares, in a total amount of USD 800,000.00. In accordance with Article 41(5) of the UNCITRAL Rules, the PCA will return the unused balance, in an amount of 49,024.92, to the Parties in equal shares.

VII. DECISION

540. For the foregoing reasons, the Tribunal has decided:

- (a) That the Respondent is liable for breach of the obligation of fair and equitable treatment under the BIT because of egregious arbitrary and discriminatory treatment of the Claimant's investment amounting to a denial of justice.
- (b) Not to consider the other claims of the Claimant for reasons of procedural economy, which hereby are dismissed.
- (c) To award the Claimant PLN 37,603,654.12.
- (d) To order the Claimant to withdraw its claims in the bankruptcy or enforcement proceedings in Poland against ██████████ bankruptcy estate and other debtors in relation to the Bond Purchase Agreement, up to the amount awarded by the Tribunal (PLN 37,603,654.12) and paid by Poland.
- (e) To award the Claimant pre-award simple interest on PLN 37,603,654.12 at 3.88% per annum as from 27 June 2014 to the date of this Award.
- (f) To dismiss in its entirety the claim for costs on account of litigation before the domestic courts.
- (g) That the amount in PLN awarded in subparagraph (c) above shall carry simple interest at 3.88% per annum as from 60 days after the date of this Award and until the date of payment by Poland.
- (h) That each Party shall be responsible for 50% of the costs of the arbitration, namely, the fees and expenses of the arbitrators and of the PCA.
- (i) That each Party shall be responsible for its own costs of legal representation and assistance.

* * *

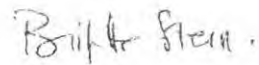
Place of arbitration: Brussels, Belgium

Date: 7 December 2018

The Arbitral Tribunal:



Judge Charles N. Brower



Professor Brigitte Stern



Dr. Andrés Rigo Sureda
Presiding Arbitrator