

**IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL
CONSTITUTED IN ACCORDANCE WITH APPENDIX II OF THE 2017
ARBITRATION RULES OF THE ARBITRATION INSTITUTE OF THE
STOCKHOLM CHAMBER OF COMMERCE**

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AKTBIL: 2

**FESTORINO INVEST LIMITED,
FOSONTAL LIMITED,
PETRA SALESNY,
PETER DERENDINGER and
PETR ROJICEK
(Claimants)**

v.

**REPUBLIC OF POLAND
(Respondent)**

with the participation of

**THE EUROPEAN UNION
(Non-disputing treaty party)**

Award
Arbitration SCC V2018/098

30 June 2021

Arbitral Tribunal:
Mr. Bernardo M. Cremades (President)
Mr. Kaj Hobér
Mr. Zachary Douglas QC

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I. INTRODUCTION AND PROCEDURAL HISTORY

1. This arbitration was commenced by Claimants Festorino Invest Limited (“**Festorino**”), Fosontal Limited (“**Fosontal**”), Ms. Petra Salesny (“**Ms. Salesny**”), Mr. Peter Deredinger (“**Mr. Deredinger**”) and Mr. Petr Rojicek (“**Mr. Rojicek**”) (together the “**Claimants**”) against the Republic of Poland (“**Respondent**”) (together the “**Parties**”) by their Request for Arbitration dated 27 August 2018, submitted to the Arbitration Institute of the Stockholm Chamber of Commerce (“**SCC**”) pursuant to Article 26(2)(c) and 26(4)(c) of the Energy Charter Treaty (the “**Treaty**” or “**ECT**”).¹
2. In the Request for Arbitration, Claimants nominated Mr. Kaj Hobér as their party-appointed arbitrator.²
3. On 29 August 2018, the SCC wrote to Respondent notifying it of the commencement of this arbitration and requesting that it submit an answer to the SCC by 12 September 2018 pursuant to Article 9 of the 2017 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the “**SCC Rules**”).³
4. On 12 September 2018, Respondent filed a request for extending the time period to submit its answer to the Request for Arbitration.⁴
5. On 17 September 2018, Claimants submitted its response to Respondent’s request for an extension of time to file its answer to the Request for Arbitration.⁵
6. On 17 September 2018, the SCC granted Respondent an extension of time to submit the answer to the request for arbitration until 8 October 2018.⁶
7. On 8 October 2018, Respondent filed its Answer to the Request for Arbitration.⁷ In its Answer, Respondent nominated Professor Zachary Douglas QC as its party-appointed arbitrator.⁸ Further, in its Answer, Respondent requested the SCC Board to dismiss the case in its entirety pursuant to Article 12(i) due to the lack of SCC’s jurisdiction over the dispute.
8. On 17 October 2018, Claimants filed their Reply to Respondent’s Answer to the Request for Arbitration.⁹

¹ **Doc-1**, Request for Arbitration, 27 August 2018.

² *Id.*

³ **Doc-46**, 29 August 2018 letter from the SCC.

⁴ **Doc-62**, Respondent’s Request for Extending the Time Period to Submit the Answer to the Request for Arbitration, 12 September 2018.

⁵ **Doc-82**, Claimants Response to Respondent’s Request for Extension, 17 September 2018.

⁶ **Doc-9**, 17 September 2018 letter from SCC.

⁷ **Doc-10**, Answer to the Request for Arbitration, 8 October 2018.

⁸ *Id.*

⁹ **Doc-143**, Claimants’ Reply to Respondent’s Answer to the Request for Arbitration, 17 October 2018.

9. On 19 October, Mr. Douglas submitted his Confirmation of Acceptance, Availability and Independence.¹⁰
10. On 21 October, Mr. Hobér submitted his Confirmation of Acceptance, Availability and Independence.¹¹
11. On 26 October 2018, the SCC communicated its decision that it did not manifestly lack jurisdiction over the dispute.¹²
12. On 31 October 2018, the Parties submitted to the SCC their agreement for the process of choosing a President of the Tribunal.¹³
13. On 14 November 2018, Respondent filed its Submission on the Seat of Arbitration.¹⁴
14. On 15 November 2018, Claimants filed their Position on the Seat of Arbitration.¹⁵
15. On 4 December 2018, the co-arbitrators emailed the SCC and the Parties stating that pursuant to the agreed-upon process for choosing a President of a Tribunal, they nominated Bernardo M. Cremades as President of the Tribunal.¹⁶
16. On 5 December 2018, Mr. Cremades submitted his Confirmation of Acceptance, Availability and Independence.¹⁷
17. The contact details for the Arbitral Tribunal are as follows:

Mr. Bernardo M. Cremades
 Goya 18, 2º
 Madrid, 28001
 Spain
 Tel: +34 914 237 200
 Email: bcremades@bcremades.com

Mr. Kaj Hobér
 Säves väg 36
 SE 752 63 Uppsala
 Sweden
 Tel: (+46 72) 505 03 78
 Email: kaj.hober@outlook.com

¹⁰ **Doc-206**, Mr. Douglas's Confirmation of Acceptance, Availability and Independence, 19 October 2018.

¹¹ **Doc-199**, Mr. Hobér's Confirmation of Acceptance, Availability and Independence, 21 October 2018.

¹² **Doc-225**, 26 October 2018 Letter from the SCC.

¹³ **Doc-25**, 31 October 2018 email to the SCC.

¹⁴ **Doc-28**, Respondent's Submission on the Seat of Arbitration, 14 November 2018.

¹⁵ **Doc-306**, Claimants' Position on the Seat of Arbitration, 15 November 2018.

¹⁶ **Doc-34**, 4 December 2018 email from co-arbitrators.

¹⁷ **Doc-36**, Bernardo Cremades Confirmation of Acceptance, Availability and Independence, 5 December 2018.

Mr. Zachary Douglas QC
 Matrix Chambers
 Rue General Dufour 15
 Geneva 1204
 Switzerland
 Tel: +44 (0) 20 7404 3447
 Email: zacharydouglass@matrixlaw.co.uk

18. On 21 November 2018, the SCC communicated the SCC Board's decision that the Seat of Arbitration is Stockholm.¹⁸

19. The Claimants are represented in these emergency proceedings by:

Mr. Jaroslaw Kolkowski (kolkowski@dt.com.pl)
 Ms. Sabina Kubsik (kubsik@dt.com.pl)
 Drzewiecki, Tomaszek I Wspólnicy spółka komandytowa
 Belvedere Plaza
 ul. Belwederska 23
 00-761 Warsaw
 Poland
 T: +48 22 840 95 00
 F: +48 22 840 95 10

20. Respondent is represented in these emergency proceedings by:

General Counsel to the Republic of Poland

Mr. Rafal Bobkiewicz (rafal.bobkiewicz@prokuratoria.gov.pl)
 Ms. Klaudia Groszk (klaudia.groszyk@prokuratoria.gov.pl)
 Dr. Dominik Horodyski (dominik.horodyski@prokuratoria.gov.pl)
 Ms. Joanna Jackowska-Majeranowska (Joanna.jackowska-majeranowska@prokuratoria.gov.pl)
 Mr. Ludwik Jurek (ludwik.jurek@prokuratoria.gov.pl)
 Mr. Maciej Martynski (Maciej.martynski@prokuratoria.gov.pl)
 Prokuratoria Generalna Rzeczypospolitej Polskiej
 ul. Hoza 76/78
 00-682 Warsaw
 Tel: +48 22 392 32 27
 Fax: +48 22 392 31 20
 Email: DPME@prokuratoria.gov.pl

21. On 31 January 2019 the Tribunal convened a telephonic case management conference pursuant to Article 28 of SCC Rules to discuss the procedural timetable

¹⁸ **Doc-325**, 21 November 2018 SCC letter.

and other procedural aspects to be adopted in this arbitration. Counsel for Claimants and counsel for Respondent participated in the case management conference call.

22. On 1 February 2019 the Tribunal issued Procedural Order No. 1, which contained the procedural calendar as well as other procedural aspects for this arbitration. Among other issues, Procedural Order No. 1 noted that in accordance with Article 26 of the SCC Rules, the Parties had designated English as the language of the Arbitration.
23. On 6 March 2019, the Arbitral Tribunal received an Application for Leave to Intervene as Non-Disputing Party (the “**Application**”) from the European Commission (the “**Commission**”). In its Application, the Commission sought to intervene to argue that Article 26 of the ECT does not apply intra-EU, meaning that the Tribunal lacks jurisdiction.
24. On 7 March 2019, the Tribunal sent the Application to the Parties and requested that the Parties provide comments by 14 March 2019. On 14 March 2019, the Parties provided such comments.
25. On 18 March 2019, the Tribunal communicated to the Parties its decision, which was, pursuant to Article 4 of Appendix III of the SCC Rules, to permit the Commission to file a submission on the interpretation of Article 26 of the ECT on or before 1 April 2019. The Parties would then be permitted to provide observations on the Commission’s submission on or before 15 April 2019. The Commission was not to be granted any access to submissions and evidence filed in this arbitration and was not to be permitted to attend any hearings in this arbitration. Further, no alterations would be made to the procedural timetable as a result of the Commission’s intervention.
26. On 1 April 2019, the Commission filed its submission entitled “*Amicus Curiae Brief*.”
27. On 15 April 2019, the Parties filed their observations on the Commission’s submission.
28. On 30 April 2019, the Claimants filed their Statement of Claim.
29. On 7 October 2019, the Respondent filed its Statement of Defence.
30. On 2 December 2019, the Parties submitted their respective document production requests to the Tribunal.
31. On 16 December 2019, the Tribunal requested additional clarifications from the Parties concerning Claimants’ document production requests.
32. The Parties submitted their respected submissions on 20 December 2019.
33. On 24 December 2019, the Tribunal issued Procedural Order No. 2 concerning the Parties’ document requests.

34. On 20 March 2020, the Claimants filed their Reply.
35. On 18 April 2020, the Respondent requested an extension of the deadline for submitting its Rejoinder.
36. On 22 April 2020, the Claimant responded to Respondent's request for an extension of the deadline for submitting its Rejoinder.
37. On 23 April 2020, the Tribunal partially granted Respondent's request for an extension of the deadline for submitting its Rejoinder, the deadline of which was amended to 20 July 2020.
38. On 9 July 2020, the Respondent requested a one-week extension for filing its Rejoinder.
39. On 9 July 2020, the Claimants communicated that they did not object to Respondent's request.
40. On 9 July 2020, the Tribunal granted Respondent's request for a one-week extension for the filing of its Rejoinder.
41. On 27 July 2020, the Respondent filed its Rejoinder.
42. On 3 August 2020, the Tribunal conducted a pre-hearing conference call, in which counsel for Claimants and counsel for Respondents participated. During this call, the Parties and the Tribunal determined the organizational details for the hearing.
43. From 8-14 September 2020, a virtually hearing on jurisdiction and merits was held, using the Opus 2 platform.
44. On 14 October 2020, the Parties submitted their post-hearing briefs.
45. On 23 October 2020, the Parties submitted their Statements of Costs.

II. FACTUAL SUMMARY PROVIDED BY CLAIMANTS

46. The following summary does not intend to be an exhaustive summary of all of the factual allegations in dispute and the history of the dispute between the Parties to date. Instead, this summary intends to recount a brief summary of the main factual issues at hand as presented by the Claimants.

A. The Claimants

47. Claimant Festorino is a privately-owned limited liability company organized in accordance with the laws of the Republic of Cyprus. Festorino is registered under the number HE292682 and has its registered office in Nicosia, Cyprus, at:¹⁹

Promitheos 14

¹⁹ Request for Arbitration, ¶ 4.

Flat M002
 1065 Nicosia
 Cyprus
 Tel: +357 028 472
 Email: info@cpvcorp.com c/o Natalia Anastasiou

48. Claimant Fosontal is a privately-owned limited liability company organized in accordance with the laws of Cyprus. Fosontal is registered under the number HE 290578 and has its registered office in Nicosia, Cyprus, at:²⁰

Zinonos Sozou 11
 Flat 403
 2024 Nicosia
 Cyprus
 Tel: +357 22 361 600
 Email: achristodoulidou@citco.com

49. Claimant Ms. Salesny is a national of the Republic of Austria. At no time has Mr. Salesny ever been a national or citizen of Poland. Ms. Salesny is a permanent resident of the Swiss Federation. Her address is:²¹

Habuelstrasse 152
 CH-8704-Herrliberg
 Switzerland
 Tel: +41 43 244 31 00
 Email: petra.salesny@alpha-associates.ch

50. Claimant Mr. Derendinger is a national and permanent resident of Switzerland. At no time has Mr. Derendinger ever been a national or citizen of Poland. His address is:²²

Felsenrainstrasse 19
 CH-8832
 Switzerland
 Tel: +41 43 244 31 00
 Email: peter.derendinger@alpha-associates.ch

51. Claimant Mr. Rojicek is a national of the Czech Republic. At no time has Mr. Rojicek ever been a national or citizen of Poland. Mr. Rojicek is a permanent resident of Switzerland. His address is:²³

Habulstrasse 152
 CH-8704 Herrliberg

²⁰ *Id.*, ¶ 5.

²¹ *Id.*, ¶ 6.

²² *Id.*, ¶ 7.

²³ *Id.*, ¶ 8.

Switzerland
 Tel: +41 43 244 31 00
 Email: peter.rojcek@alpha-associates.ch

B. Introduction

52. The subject of this dispute is the Claimants' claim for compensation for damage they incurred as a result of actions and omissions of the Polish governmental authorities, namely the Minister of the Environment (the Department of Geology and Geological Concessions) (the "**Ministry**") and regional mining offices, which prevented the Claimants from carrying out a significant investment in the Polish energy sector (together the "**Authorities**").²⁴
53. The Claimants initiated a network of modern, high efficiency and low carbon mines combined heat and power plants ("**CHP**") to be developed and operated on the basis of recognized but untapped natural gas deposits in Poland (the "**Investment**").²⁵
54. The Investment was made through Blue Gas N'R'G Holding sp. z o.o. ("**Blue Gas Holding**"), a limited liability company organized and registered under the laws of Poland, in which the Claimants hold 100% of shares. Blue Gas Holding was the sole shareholder of four SPVs responsible for particular investment projects in different locations, namely:
- Blue Gas N'R'G sp. z o.o. ("**Blue Gas Uników**");
 - Blue Gas N'R'G' Stanowice sp. z o.o. ("**Blue Gas Stanowice**");
 - Blue Gas N'R'G Wrzosowo sp z o.o. ("**Blue Gas Wrzosowo**"); and
 - Blue Gas N'R'G' Zakrzewo sp z o.o. ("**Blue Gas Zakrzewo**");
- collectively referred to as the "**SPVs**" and, together with Blue Gas Holding, the "**Blue Gas Group**."²⁶
55. The Blue Gas Group started developing six investment projects (Uników, Wrzosowo, Stanowice, Międzyzdroje, Zakrzewo and Lelików) on as many as nine gas fields (reservoirs). The development of the Investment was halted due to the actions and omissions of the Authorities, which conducted relevant administrative proceedings in an arbitrary and discriminatory manner, resulting in an inability to continue with the planned projects. These proceedings consisted of granting, converting and modifying licenses for the recognition, exploration and mining of natural gas, approving planned geological works ("**PRG Documentation**") and investment and geological documentation ("**DGI Documentation**"). During the proceedings, the Authorities repeatedly exceeded statutory deadlines and imposed

²⁴ Statement of Claim ("**Soc**"), ¶ 4.

²⁵ *Id.*, ¶ 5.

²⁶ *Id.*, ¶ 6.

unjustified formal requirements which were used to conceal systematic delays within said proceedings, and to even extend such delays.²⁷

56. The Claimants assumed a certain, reasonably calculated budget for the Investment to become operational and self-financing. Protracted administrative proceedings, however, lasted for more than three years (2014-2017) and effectively prevented the completion of the Blue Gas Group's first six investment projects. As a result, the SPVs generated significant operational costs while failing to earn the expected sufficient capital gains which were then to be reinvested. Accordingly, Claimants eventually had to stop financing the Investment in order to minimize losses. Ultimately, Blue Gas Uników was forced to declare bankruptcy and the other SPV's had to be wound up.²⁸

C. The Investment

1. Business Concept

57. The Claimants wanted Blue Gas Group to fill a niche on the Polish energy market comprising unexplored but well-recognized deposits of nitrogen-rich natural gas. This would be done without interfering in the businesses of other entities already operating in the gas sector.²⁹
58. The deposits were discovered in various parts of Poland but were too small for large upstream companies to be interested in them. In addition, extracting the gas from these deposits would be too costly for gas trading as it would require the nitrogen to be removed first and then the "purified" gas to be transported over long distances via transmission pipelines. Therefore, for years the deposits remained untapped.³⁰
59. The Blue Gas Group planned on producing gas from existing wells (instead of drilling new ones) and burning it in CHP facilities located near the wells to produce heat and electricity in cogeneration. Such "products" would then be sold to local off-takers (e.g. industrial customers), technically and ecologically. In addition, SPVs – where applicable – were to sell condensate and other substances produced together with the gas ("accompanying minerals").³¹
60. Furthermore, the Investment was expected to benefit from the Act of 10 April 1997 – Energy Law (OJ 1997 No. 54 item 348 as amended) (the "**Energy Law**") in the form of "yellow certificates" (one certificate corresponded to 1 MWh of energy). Yellow certificates were to be able to be sold on the Polish Power Exchange ("**TGE**") or directly to other energy producers who were obliged to show a certain percentage of energy as being produced from environment friendly sources.³²

²⁷ *Id.*, ¶ 7.

²⁸ *Id.*, ¶ 8.

²⁹ *Id.*, ¶ 11.

³⁰ *Id.*, ¶ 12.

³¹ *Id.*, ¶ 13.

³² *Id.*, ¶ 14.

61. On 25 January 2019, the system of yellow certificates was replaced with a new support system introduced by the Act of 14 December 2018 on Promoting Electricity from High-Efficiency Cogeneration (OJ 2018, item 42) (the “**Cogeneration Act**”). In this new system, the CHP facilities operated by the SPVs would have been qualified as existing or modernized cogeneration units with an installed capacity of at least 1 MW and not more than 50 MW, which would have made the SPVs eligible for a “guaranteed premium” to be paid in cash regarding the produced, transmitted and sold energy. This guaranteed additional stable sources of proceeds that would have ensured the Investment’s profitability.³³
62. The Blue Gas Group identified approximately 40 gas fields on which the Investment was to be based. The idea was to construct a number of smaller CHP facilities which would not raise any CO₂-related obligations. Then, the Blue Gas Group would expand, using the proceeds from the first facilities, to finance projects with the total capacity of at least 100 MWe. At the same time, Blue Gas Holding held talks with various business partners to increasing the Investment’s potential and the number of projects that were taken into account.³⁴
63. The managers at Blue Gas Holding were aware that large upstream gas producers, including the largest state-controlled Polskie Górnictwo Naftowe i Gazownictwo S.A. (“**PGNiG**”), did not have any interest in the gas deposits which Blue Gas Group was considering. However, Claimants believed this might have changed once the Investment had a significant production capacity. Therefore, one of the key elements of the Blue Gas Group’s strategy was to acquire the most attractive deposits and to secure rights to mine gas, i.e., to obtain relevant licenses. This was done either by applying for a new license (wherever the gas field had not been subject to licensing before or when an existing license had expired) or through the acquisition of valid licenses held by third parties.³⁵
64. It was assumed that by 2021, the Blue Gas Group would have reached a capacity of around 100 MWe with 25 MWe coming from the CHP facilities fully developed in 2015–2017, and the remaining ca. 75 MWe from such facilities to be built successively in subsequent years.³⁶

2. The Location

65. The six investment projects were located in western and north-western Poland.³⁷
66. The locations are part of a large belt-like terrain going across the country from North-West to South-East that comprises the vast majority of oil and gas deposits in Poland.³⁸

³³ *Id.*, ¶ 15.

³⁴ *Id.*, ¶ 16.

³⁵ *Id.*, ¶ 17.

³⁶ *Id.*, ¶ 18.

³⁷ *Id.*, ¶ 19.

³⁸ *Id.*, ¶ 20.

3. Development Process

67. The development and implementation process was the same for each of the projects. It was divided into two phases:³⁹

Phase 1, estimated two years for completion:

- (i) Initial analysis of the deposits, including:
 - Identification of deposits;
 - Verification of the existing infrastructure and commercial potential (e.g., sales opportunities, cost effectiveness).
- (ii) Development of the wells and CHP facilities, including:
 - acquiring legal title to the land in question (e.g., entering into lease agreements containing purchase call options and subsequent acquisition of the plots);
 - obtaining a license for recognition and exploration of mineral deposits;
 - accessing the local grid (applying for connection terms and entering into a connection agreement);
 - obtaining environmental permits, when applicable;
 - obtaining a promise of a license for power generation to be issued by the President of the Energy Regulatory Office (URE);
 - obtaining building permits;
 - financing—in addition to the funds supplied by the Claimants, the SPVs entered into loan agreements with banks;
 - concluding long-term contracts with third-party off-takers:
 - power purchase agreements;
 - thermal energy supply agreements;
 - agreements on the delivery of condensate;
 - construction works:
 - reconstructing existing wells or drilling new wells;
 - installing pipelines and gas mining devices;
 - building CHP facilities;
 - staffing the mines and CHP facilities by entering into operation and maintenance agreements with external operators;
 - launching the CHP facilities.

Phase 2 – production, with an estimated span of 8 up to 30 years following the launch of a given CHP facility. The actual periods varied from one project to another and depended a great deal on the productivity of particular reservoirs. However, one of the characteristics of cogeneration is its flexibility. If necessary,

³⁹ *Id.*, ¶ 21.

operation periods could have been shortened or extended to adjust to the actual business circumstances. It is also not uncommon to construct or reconstruct additional boreholes nearby the existing CHP facility and thereby increasing its overall capacity.

68. The first project in the Investment was the Uników Project and was started by Blue Gas Uników in 2011. It was treated as a “prototype” and point of reference for other projects. The next was the Wrzosowo Project, which was initiated by Blue Gas Uników at the beginning of 2012 and transferred to Blue Gas Wrzosowo in 2014. The rest of the projects began in 2014. They consisted of the Lelikow Project and the Miedzyzdroje Project (Blue Gas Uników), the Zakrzewo Project (Blue Gas Zakrzewo) and the Stanowice Project (Blue Gas Stanowice).⁴⁰
69. Blue Gas Holding and the SPVs underwent a series of changes regarding their corporate structures and names. Such changes are reflected in the publicly-available registrar or entrepreneurs of the National Court Register.⁴¹ Until 2014, Blue Gas Holding was known as Zegar Enterprise sp. z o.o. Blue Gas Uników’s name was Blue Energy sp z o.o, also until 2014. In the same year, Degra Enterprise sp. z o.o. became Blue Gas Stanowice. Before 2015, Blue Gas Wrzosowo was known as Kalisja Enterprise sp. z o.o. (then briefly renamed Blue Gas N’R’G’ Silesia sp. z o.o.), and Blue Gas Zakrzewo was named Vesantia Enterprise sp. z o.o.⁴²
70. In its Statement of Claim, Claimants provide various figures displaying organizational structures of the Investment at certain stages of its development.⁴³ Ultimately, the Investment’s organization structure was shaped in the following manner:⁴⁴

⁴⁰ *Id.*, ¶ 22.

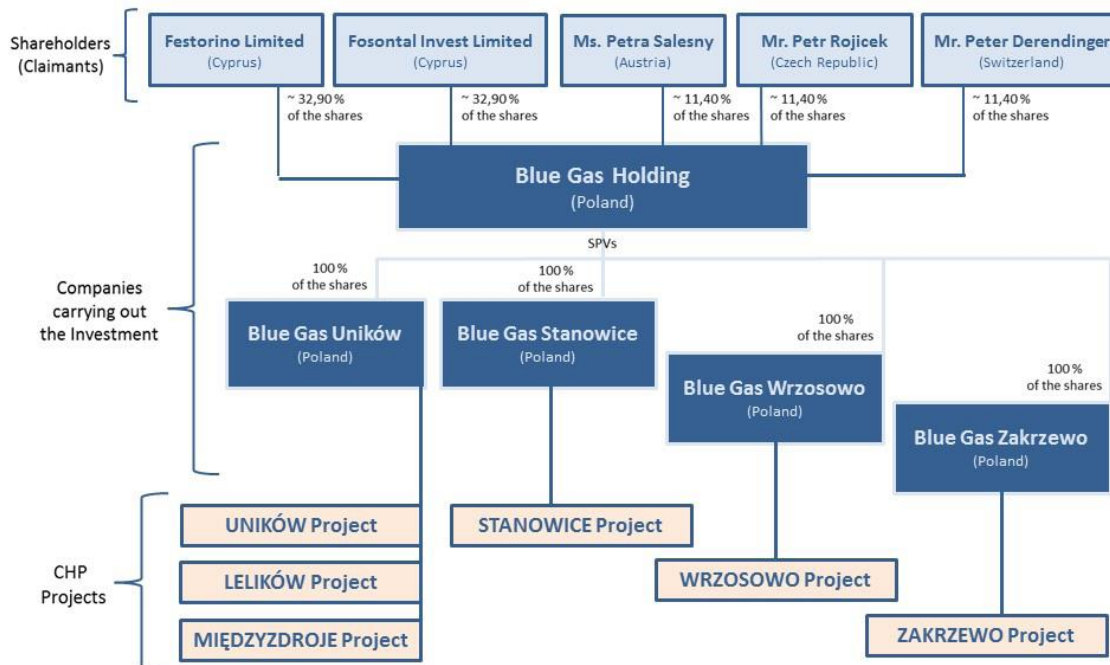
⁴¹ *Id.*, ¶ 23.

⁴² *Id.*, ¶ 24.

⁴³ *Id.*, ¶ 25.

⁴⁴ *Id.*, ¶ 26.

Organizational Structure of the Investment – 5th stage (V 2015 – I 2018)



71. In summary, regardless of the changes in the organizational structure of the Investment, the shares of the companies implementing it belonged directly or indirectly to the Claimants for the whole period of the Investment. In the initial years of its development, these were the following companies: Fosontal Ltd. and Festorino Invest Ltd. (Cyprus). In August 2013 the owners of these companies were joined by Petra Salesny (Austria), Petr Rojicek (Czech Republic) and Peter Derendinger (Switzerland).⁴⁵

4. Uników Project

72. Initially, the “Uników” deposits were covered by license No. 19/2009/p of 31 March 2009 granted to P.L. Energia S.A. with its registered seat in Krzywopłoty (“**PL Energia**”). On 31 March 2011, Blue Gas Uników and PL Energia jointly applied to the Ministry to transfer the license to Blue Gas Uników and to consent to have the right of mining usufruct assigned to Blue Gas Uników in order to recognize the deposits covered by the scope of that license.⁴⁶
73. Meanwhile, Blue Gas Uników concluded several agreements with third parties specializing in preparing management and design documentation for investments

⁴⁵ *Id.*, ¶ 27.

⁴⁶ *Id.*, ¶ 28 (citing **Exhibit C-19**).

related to the construction of natural gas mines. It also applied to the Mayor of Lututów for an environmental permit, which was issued on 20 April 2011.⁴⁷

74. On 16 June 2011, the Ministry issued a decision on transferring license No. 19/2009/p to Blue Gas Uników and approved the assignment of the right of mining usufruct.⁴⁸
75. In August and September 2011, Blue Gas Uników concluded further investment agreements related to the execution of the Uników Project and acquired ownership of the plot of land on which the project was located. On 6 September 2011, the Mayor of Lututów issued a location decision for the Uników mine and CHP facility, and on 14 November 2011 the Foreman of Wieruszów issued a building permit.⁴⁹
76. During 2012–2013 the following components of the CHP facility were installed: technological set-up, including borehole utilities, gas separators, formation water tank, condensate tanks, measuring systems, formation water and condensate tanking station, tubing and heat exchangers, pressure reduction and measurement station, gas output and power generators. Interconnection infrastructure was also built, linking the CHP facility with the local power and heat grids.⁵⁰
77. The management and operations of the CHP facility were entrusted to Trias sp. z o.o. The operator prepared the launch and testing of the CHP facility, which included initial gas mining. The operator's activities comprised:
 - preparing and applying to the Regional Mining Office in Kielce for approval of a mining plan for the reconstruction of the well (*plan ruchu zakładu górniczego*);
 - preparing a mining rescue plan and the initial gas mining;
 - testing the gas and condensate;
 - obtaining a permit for the CHP facility to be launched;
 - securing the agreement on the provision of mining rescue services.⁵¹
78. At the same time, Blue Gas Uników signed relevant connection and distribution agreements with PGE Dystrybucja S.A., the distribution power grid operator. It also concluded contracts on:
 - the delivery of condensate;

⁴⁷ *Id.*, ¶ 29 (citing **Exhibit C-20**).

⁴⁸ *Id.*, ¶ 30 (citing **Exhibits C-21-22**).

⁴⁹ *Id.*, ¶ 31 (citing **Exhibits C-23-25**).

⁵⁰ *Id.*, ¶ 32.

⁵¹ *Id.*, ¶ 33 (citing **Exhibit C-26**).

- the sale of heat;
 - the sale of electricity after the President of the URE granted Blue Gas Uników the license for the production of energy from the “Uników” cogeneration block.⁵²
79. The CHP facility started operating in December 2013. After 25.5 million m3 of gas had been extracted in 2016, the wellhead pressure dropped significantly as the well started producing brine. Eventually, a mixture of sediments from the reservoir, clots of crystalized salt and debris from reconstruction works blocked the well and extraction had to stop for servicing.⁵³
 80. As cleaning the borehole with pressurized hot water did not provide sufficient results, at the end of 2016 Blue Gas Uników and associates worked out a method of streamlining the borehole (slickline and coiled tubing). A new plan to extract gas was also developed.⁵⁴
 81. In the meantime, on 10 July 2015, Blue Gas Uników applied to the Ministry to convert license No. 19/2009/p into a unified license for exploration of the “Uników” natural gas deposit and mining the gas from the “Uników” natural gas deposit.⁵⁵ This was made possible by the Amendment to the Geological and Mining Law, which came into effect on 1 January 2015, according to which, within 2 years from the date of its entry into force, companies like Blue Gas Uników, which had been granted a concession for the prospection and exploration of hydrocarbon deposits, could convert the concession into one for the exploration, recognition and extraction of hydrocarbons from those deposits⁵⁶
 82. The Ministry claimed to examine the application for 13 months (including 8 months after informing Blue Gas Uników that the investigative phase of the proceedings had been finished). Finally, on 9 August 2016, the Ministry converted the license which received the new number 19/2009/Ł.⁵⁷
 83. Together with the application of 10 July 2015, Blue Gas Uników filed the PRG Documentation for the Uników deposit. The delay of the proceedings conducted by the Ministry made the PRG Documentation (or parts of it at least) obsolete.⁵⁸
 84. Initially, it was assumed that production tests on the Uników-2 borehole would have been finished by 31 December 2016. Immediately after this date, Blue Gas Uników was to proceed with regular operations. This required approval of the new DGI Documentation for the Uników deposit, which could not have been expected to

⁵² *Id.*, ¶ 34 (citing **Exhibit C-27**).

⁵³ *Id.*, ¶ 35.

⁵⁴ *Id.*, ¶ 36.

⁵⁵ Soc, ¶ 37; Reply, ¶ 98 (citing **Exhibit C-107**, Application by Blue Gas Uników for the conversion of the Uników Exploration License not a unified license, dated 10 July 2015).

⁵⁶ Claimants’ Reply (“**Reply**”), ¶ 98 (citing **Exhibits CL-52-CL-54**).

⁵⁷ Soc, ¶ 37 (citing **Exhibit C-29**).

⁵⁸ *Id.*, ¶ 38.

have taken 13 months. Therefore, to meet the deadline, Blue Gas Uników took the following actions:

- by letter of 24 August 2016, Blue Gas Uników submitted the additional PRG Documentation for the Ministry to approve (later it was supplemented to incorporate the slickline and coiled tubing method to streamline the borehole together with a subsequent production test as an alternative way to resume production);
- on 8 September 2016, it submitted the DGI Documentation for the Uników deposit for approval.⁵⁹

85. During the proceedings leading to the approval of the DGI Documentation, there were periods when the Ministry failed to make progress for periods lasting up to 5 months. The Ministry failed to ask Blue Gas Uników for any changes to the DGI Documentation even though on 15 December 2016 the SPV was informed that there were issues which needed clarification (e.g., a more precise description of the boundaries of the gas deposit). The Ministry failed to react to any of the requests to expedite the process that it received. Only in the letter of 23 January 2017 did the Ministry inform Blue Gas Uników that the date on which the proceedings were to be finalized had been pushed back until 31 March 2017.⁶⁰
86. In response to this letter, on 7 February 2017 Blue Gas Uników asked the Ministry for information regarding requirements to be met to resume operations at the Uników CHP facility which had been interrupted by the technical problems described above. Blue Gas Uników's request was additionally justified by the fact that according to license No. 19/2009/Ł, the borehole testing period expired on 31 December 2016. The Ministry again failed to respond. Therefore, on 23 February 2017 Blue Gas Uników sent another letter in which it requested urgent approval of the DGI Documentation for the Uników deposit, detailing the problems that such a delay was causing.⁶¹ Again, there was no response from the Ministry.⁶²
87. Eventually, Mr Jacek Strzelecki, the chairman of the management boards of Blue Gas Holding and the SPVs, called the relevant Ministry's official responsible for conducting the proceedings in question, Ms. Joanna Potęga. During that conversation, Ms Potęga proposed that Blue Gas Uników revise the DGI Documentation in accordance with the vague and informal suggestion of 15 December 2016. Blue Gas Uników complied with this proposition in the letter of 16 March 2017.⁶³
88. During the following months, the Ministry remained silent. Meanwhile, on 26–27 April 2017, the Regional Mining Office in Kielce carried out an inspection of the Uników mine. Even though the inspectors had not determined any shortcomings in

⁵⁹ *Id.*, ¶ 39 (citing **Exhibits C-31-32**).

⁶⁰ *Id.*, ¶ 40 (citing **Exhibit C-33**).

⁶¹ Reply, ¶ 86 (citing **Exhibit C-35**, pp. 3-4).

⁶² Soc, ¶ 41 (citing **Exhibit C-35**).; Reply, ¶ 87.

⁶³ Soc, ¶ 42 (citing **Exhibit C-36**).

Blue Gas Uników's activities, they stated: *"(in) the light of the requirements set forth in the license and mining plan for the borehole, the recognition of the Uników deposit through Uników-2 could have been carried out by 31 December 2016. Currently, there is no legal basis under the aforementioned documents to continue recognizing the Uników deposit through Uników-2."*⁶⁴

89. The reason for these observations was to delay the administrative proceedings during which time the Ministry was supposed to issue the following administrative decisions:
 - the decision on approval of the revised PRG Documentation submitted with the letter of 24 August 2016;
 - the decision on approval of the revised DGI Documentation submitted with the letter of 8 September 2016; and
 - the investment decision determining the requirements for extracting gas from the Uników deposit.⁶⁵
90. The Ministry extended the proceedings and communicated additional questionable formalities, i.e., it undertook a number of sham actions to justify the delay of the proceedings. As a result, no repairs or mining could be done on the Uników-2 borehole, which meant no CHP production and thus no gains.⁶⁶
91. While Respondent claims that ultimately Blue Gas Uników would not have been able to restore production of that well, it had done so before in October 2016 by removing salt deposits from the well with cold tubing, which was essentially what Blue Gas Uników was looking to repeat. This would have allowed the Uników-2 well to be cleaned out and would have prevented future blockage.⁶⁷
92. Importantly, if the Ministry had approved the DGI Documentation submitted in September 2016 within the 2 months required by statute, the company would have been able to apply this method for restoring production.⁶⁸
93. Even though Blue Gas Uników took all possible measures to save the Uników Project (it renegotiated a bank loan, obtained additional financing from the Claimants, and changed the borehole operator lowering the costs of drilling by as much as 60%), the Ministry's inaction stalled the Investment as a whole.⁶⁹ Not only did it make it impossible to resume the operations of the CHP facility within the timeframe prescribed by the license, but it prevented Blue Gas Uników from any reasonable planning. Claimants could not have assumed that the whole

⁶⁴ *Id.*, ¶ 43 (citing **Exhibit C-37**); Reply, ¶ 221.

⁶⁵ *Id.*, ¶ 44.

⁶⁶ *Id.*, ¶ 45 (citing **Exhibits C-38-44**).

⁶⁷ Reply, ¶ 82 (citing **Exhibit CER-2**, ¶¶ 120-121).

⁶⁸ *Id.*, ¶ 84.

⁶⁹ *Id.*, ¶ 87 (citing **Exhibits C-43-44, 125-126**).

administrative procedure would last more than two years without a prospect for an end date, i.e. at least 12 times longer than envisaged by law.⁷⁰

94. Depriving Blue Gas Uników of its revenues forced the Claimants to forego the Investment as a whole, even though they had invested approximately PLN 32,142 million in that SPV alone. As a result, on 31 October 2017 the management board of Blue Gas Uników had to file for bankruptcy, which was declared by the District Court for the capital city of Warsaw three months later.⁷¹

5. Wrzosowo Project

95. After analysing the Wrzosowo deposits, Blue Gas Holding identified two possibilities for commercializing the gas that it had planned to extract. The first of these was the sale of natural gas in the immediate vicinity of Wrzosowo, and the second—more economically attractive—was the use of gas for the production of electricity and heat in a CHP facility.⁷²
96. Blue Gas Uników was initially responsible for the implementation of the Wrzosowo Project. As with the Uników Project, the Wrzosowo deposit was covered by a license granted to PL Energia (license No. 16/2008/p dated 10 April 2008) concerning the area of Rybice. Therefore, on 28 October 2011, Blue Gas Uników and PL Energia jointly applied to the Ministry to transfer the license to Blue Gas Uników and to consent to the assignment of the right of mining usufruct.⁷³
97. On 30 January 2012, Blue Gas Uników concluded an agreement with Blue Line Engineering sp. z o.o. for the transfer of rights to the project concerning the exploration, recognition and mining of oil and gas deposits in the area of Rybice. Immediately afterwards, the Ministry issued a decision dated 23 February 2012, pursuant to which it decided to transfer license No. 16/2008/p to Blue Gas Uników, and at the same time agreeing to the assignment of the mining usufruct.⁷⁴
98. In May 2012, Blue Gas Uników acquired ownership of the property on which the Wrzosowo Project was to be implemented. It then commissioned the development of design and construction documentation, as well as the obtaining of relevant approvals related to its implementation. In the following months, Blue Gas Uników commissioned the reconstruction of the Wrzosowo-1 well. On 20 February 2013, the building permit regarding the Wrzosowo CHP facility was issued.⁷⁵
99. In December 2013, after license No. 16/2008/p had expired, Blue Gas Uników commissioned Trias sp. z o.o. to prepare an application to the Ministry for a license to recognise the Wrzosowo natural gas deposit. This application was submitted on 22 January 2014 and Blue Gas Uników obtained the requested license over a year

⁷⁰ Soc, ¶ 46.

⁷¹ *Id.*, ¶ 47 (citing **Exhibit C-45**).

⁷² *Id.*, ¶ 48.

⁷³ *Id.*, ¶ 49 (citing **Exhibits C-47-48**).

⁷⁴ *Id.*, ¶ 50 (citing **Exhibits C-49-50**).

⁷⁵ *Id.*, ¶ 51 (citing **Exhibit C-51**).

later, on 16 February 2015.⁷⁶ On the same day, Blue Gas Uników entered into an agreement for the establishment mining usufruct with the Ministry.⁷⁷

100. In the meantime, Blue Gas Wrzosowo was incorporated and, on 3 July 2015, Blue Gas Uników and Blue Gas Wrzosowo signed an assignment transferring the right of mining usufruct to Blue Gas Wrzosowo. Both SPVs then jointly applied to the Ministry for the transfer to Blue Gas Wrzosowo of license No. 1/2015/p.⁷⁸ On 22 June 2015, Blue Gas Uników submitted an application for the amendment of the Wrzosowo Exploration License regarding the territorial scope of the license and the geological works schedule indicated in it.⁷⁹ Blue Gas Uników provided a comprehensive explanation of the reasoning behind these changes.⁸⁰
101. Pending the decision of the Ministry regarding the transfer of the license, Blue Gas Uników and Blue Gas Wrzosowo took steps to prepare an investment process related to the reconstruction of wells and the CHP facility. For this purpose:
 - these SPVs commissioned the preparation of relevant project documentation, including applications for an environmental decision, location decision and building permit;
 - they also commissioned the preparation of mining plan for a reconstruction of the Wrzosowo-1 well; and
 - they acquired a heat discharge installation.⁸¹
102. On 9 November 2015, after approximately four months after submitting the application, the Ministry issued a decision, pursuant to which it transferred license No. 1/2015/p to Blue Gas Wrzosowo. On the same date, the Ministry, Blue Gas Uników and Blue Gas Wrzosowo concluded the assignment agreement regarding the mining usufruct rights. On 30 December 2015, Blue Gas Wrzosowo acquired from Blue Gas Uników the rights to expenditures incurred in the implementation of the Wrzosowo project.⁸²
103. In the first half of 2016, additional administrative decisions were obtained, including the location decision for the project involving the construction of a gas pipeline from the Wrzosowo CHP facility to Kamień Pomorski, together with the cogeneration power unit and technical infrastructure. In addition, the rights and obligations under the 20 February 2013 building permit dated were transferred to Blue Gas Wrzosowo.⁸³

⁷⁶ *Id.*, ¶ 52 (citing **Exhibits C-52-54**); Reply, ¶ 238.

⁷⁷ *Id.*, ¶ 52.

⁷⁸ *Id.*, ¶ 53 (citing **Exhibits C-55-56**).

⁷⁹ Reply, ¶ 238 (citing **Exhibits C-52-55, C-168, R-55**).

⁸⁰ *Id.*, ¶ 279 (citing **Exhibit R-55**).

⁸¹ Soc, ¶ 54.

⁸² *Id.*, ¶ 55 (citing **Exhibit C-57**).

⁸³ Soc, ¶ 56 (citing **Exhibits C-58-59**); Reply, ¶ 233 (citing **Exhibits C-51, 58**).

104. At the same time, Blue Gas Uników secured access by the planned CHP facility to the distribution network by signing the connection agreement and by planning to conclude an agreement with Enea Operator sp. z.o.o to provide electricity distribution services. Blue Gas Uników also secured heat collection by signing a letter of intent with a neighbouring health resort.⁸⁴
105. Additionally, analysis was carried out regarding the deposit geology, following which Blue Gas Wrzosowo prepared a concept for the development of the Wrzosowo gas deposit. On 15 September 2015, based on this concept, Blue Gas Wrzosowo applied for the amendment of its license to allow the execution of a 3D seismic survey which would replace physical drilling tests of the Wrzosowo wells. Eight months later, Blue Gas Wrzosowo learned that this concept had no chance of being approved by the Ministry. Because of the Ministry's late response there was a risk that the proceedings regarding the 3D testing would prolong beyond 31 December 2017, which was the deadline to file for conversion of the license, and thus Blue Gas Wrzosowo's plans had to be revised. Therefore, on 4 July 2016, Blue Gas Wrzosowo filed an application to convert license No. 1/2015/p into a unified license for the exploration and recognition of hydrocarbons and mining hydrocarbons from the "Wrzosowo" natural gas deposit.⁸⁵
106. As with the Uników Project, the Ministry extended the deadline for the conversion of the license several times, taking sham actions to justify the delay of the proceedings. This situation persisted for almost 18 months, which prevented Blue Gas Wrzosowo from continuing the Wrzosowo project. The management board of Blue Gas Holding was forced to stop financing the activities of Blue Gas Wrzosowo, as there was no realistic prospect of having the Wrzosowo project operating and generating proceeds. Hence, even though the Claimants invested approximately PLN 4 million in this project, Blue Gas Wrzosowo had to be wound up.⁸⁶

6. Stanowice Project

107. The plan for the Stanowice Project included three main steps: (1) the construction of a gas mine, and within its framework, the reconstruction of the existing boreholes; (2) the construction of a CHP facility; (3) the construction of new wells to increase the facility's production capacity.⁸⁷
108. Two options were considered. In the first, Blue Gas Group envisaged industrial dryers of timber, sewage sludge and segregated municipal waste in the area of the gas plant, which would produce alternative fuel and electricity in the organic Rankine cycle (ORC). In the other option, heat would be provided to customers in the nearby Kostrzyn-Stubice Special Economic Zone (SEZ).⁸⁸

⁸⁴ Soc, ¶ 57 (citing **Exhibits C-61-62**).

⁸⁵ *Id.*, ¶ 58 (citing **Exhibits C-63-64**).

⁸⁶ *Id.*, ¶ 59 (citing **Exhibits C-65-66**).

⁸⁷ *Id.*, ¶ 60.

⁸⁸ *Id.*, ¶ 61.

109. In any event, most of the electricity produced in the Stanowice Project was to be sold to external customers, in particular trading companies, hence the negotiations with Alpiq Energy SE and Axpo Polska sp. z o.o. In addition, direct sales to companies in the SEZ were also considered. The Blue Gas Group also considered the provision of system services by providing electricity at peak demand times to Polskie Sieci Elektroenergetyczne S.A. It could have been done by the Blue Gas Group alone or in cooperation with PGE Energia Odnawialna S.A.⁸⁹
110. The Stanowice natural gas deposit also contained condensate. So, in addition, Blue Gas Holding envisaged the possibility of selling it to three large recipients, including Grupa Lotos S.A., ZPRE “JEDLICZE” sp. z o.o. and Rafineria Trzebinia S.A., with which it negotiated in this matter.⁹⁰
111. Initially, Blue Gas Uników was responsible for the Stanowice Project. In this capacity, on 10 February 2014 it commissioned the development of the PRG Documentation for the Stanowice natural gas deposit, and in addition, on 24 April 2014 it concluded a lease agreement for the plot of land on which the Stanowice-2 borehole was located. Next, after Blue Gas Stanowice became responsible for the implementation of the Stanowice Project, on 10 September 2014 the rights and obligations under this agreement were transferred to Blue Gas Stanowice. On 15 September 2014, Blue Gas Stanowice submitted an application to the Ministry for a license for the recognition of the Stanowice natural gas deposit.⁹¹
112. On 22 October 2015, Blue Gas Stanowice applied to the Regional Director of Environmental Protection in Gorzów Wielkopolski for an environmental decision for this project. During the administrative proceedings, Blue Gas Stanowice had to carry out an environmental impact report. When the work on preparing the report was under way, Blue Gas Stanowice acquired the right from Blue Gas Holding to expenditures incurred in the implementation of the Stanowice Project.⁹²
113. In November 2017, the environmental decision was obtained, but the Ministry was in default in issuing the license in accordance with the applicable statutory deadlines. This persisted for almost three years, and this was experienced with respect to Uników and Wrzosowo as well. The management board of Blue Gas Holding had to stop financing the activities of Blue Gas Stanowice and wind up this SPV despite having invested around PLN 1.1 million in its activities.⁹³

7. Miedzyzdroje Project

114. The Miedzyzdroje Project concentrated primarily on the recognition and exploitation of the resources accumulated in the Rotliegend deposits located in the furthest part of north-western Poland. For this purpose, the plan was to first reinterpret the available seismic profiles. After the reinterpretation results, the plan

⁸⁹ *Id.*, ¶ 62.

⁹⁰ *Id.*, ¶ 63.

⁹¹ *Id.*, ¶ 64 (citing **Exhibit C-67**).

⁹² *Id.*, ¶ 65 (citing **Exhibit C-68**).

⁹³ *Id.*, ¶ 66 (citing **Exhibits C-69-71**).

was, optionally, to make additional seismic profiles and to reconstruct two or three wells (Miedzydroje-3, Miedzydroje-5 and Przetór-2) or, alternatively, drill new wells if need be. Commercial development would involve selling heat to local holiday resorts, residential estates and other recipients in Międzydroje.⁹⁴

115. Blue Gas Uników was responsible for the implementation of the Miedzydroje Project. On 10 February 2014, it commissioned the development of the PRG Documentation for the Miedzydroje deposit. On 5 September 2014, in order to secure the rights to the land where this project was to be implemented, Blue Gas Uników entered into a lease agreement for the relevant plot of land. Following the same business strategy, on 26 September 2014 Blue Gas Uników filed an application with the Ministry for a license for the recognition of the Miedzydroje natural gas deposit.⁹⁵
116. The Ministry extended the proceedings and articulated illegitimate formalities and obligations to justify delay. An example being an obligation to ask the Regional Director of Environmental Protection in Szczecin whether there was any need for an environmental impact report even though there was no legal basis for such a request.⁹⁶
117. This situation persisted for almost three years. The management board of Blue Gas Holding had to halt financing the project and Blue Gas Uników had to file for bankruptcy. All of the works regarding the Miedzydroje Project cost around PLN 270,000.⁹⁷

8. Zakrzewo Project

118. The plan for this project was the same as in the case of the Stanowice Project. It also included three main steps: (1) the construction of a gas mine, and within its framework, the reconstruction the existing Zakrzewo-1 or Zakrzewo-5 boreholes; (2) the construction of a CHP facility, (3) expansion of the CHP facility provided that there was enough gas available to supply additional CHP engines.⁹⁸
119. On 10 February 2014, Blue Gas Uników, which was responsible for the project at its origins, commissioned the preparation of the PRG Documentation. On 16 September 2014 it concluded a lease agreement with the Roman Catholic Parish of St. Klemens in Zakrzewo for the plot of land on which the project was to be implemented. Shortly afterwards, the rights and obligations under this agreement were transferred to Blue Gas Zakrzewo and on 29 September 2014, Blue Gas Zakrzewo submitted an application to the Ministry for a license for the recognition of the Zakrzewo natural gas deposit.⁹⁹

⁹⁴ *Id.*, ¶ 67.

⁹⁵ *Id.*, ¶ 68 (citing **Exhibit C-72**).

⁹⁶ *Id.*, ¶ 69.

⁹⁷ *Id.*, ¶ 70.

⁹⁸ *Id.*, ¶ 71.

⁹⁹ *Id.*, ¶ 72 (citing **Exhibit C-73**).

120. While awaiting the license, Blue Gas Zakrzewo took the following actions:

- on 11 February 2015, it applied to Enea Operator sp. z o.o. for a specification of the connection terms of the Zakrzewo CHP facility to the local distribution power grid;
- on 16 February 2015, it entered into a second lease agreement, this time for a plot of land on which the CHP facility was to be built;
- on 15 October 2015, it applied for an environmental decision, which resulted in the issuance of a ruling of 23 September 2016 obligating Blue Gas Zakrzewo to prepare an environmental impact report.¹⁰⁰

121. At the same time, Blue Gas Zakrzewo took steps to contract heat off-takers. Additionally, from 2015–2016, it engaged in negotiations with potential contractors that were to supply this SPV with the equipment for exploring, stimulating, servicing and mining the natural gas. Finally, as with all of the other SPVs, Blue Gas Zakrzewo acquired the right from Blue Gas Holding to expenditures incurred in the implementation of the Zakrzewo project.¹⁰¹

122. The administrative proceedings regarding the license did not go smoothly. Only on 24 June 2016, i.e., more than 21 months after submitting the license application, did the Ministry inform Blue Gas Zakrzewo that the proceedings had been initiated. The license itself was granted to this SPV on 12 May 2017, after another 11 months of inactivity. On the same day, an agreement for the establishment of a mining usufruct for the purpose of recognizing the Zakrzewo natural gas deposit was concluded.¹⁰²

123. The two-and-a-half-year timespan of the licensing procedure, combined with the other numerous problems regarding the SPVs, led Blue Gas Holding to stop financing the Investment. Despite having invested about PLN 845,000 in the Zakrzewo project, the Claimants had to withdraw from the project, Blue Gas Zakrzewo had to renounce license No. 3/2015/p, and the SPV itself needed to be wound up.¹⁰³

9. Lelikow Project

124. The concept of the Lelikow project was not unique. It was almost the same as the Stanowice and Zakrzewo Projects. And again, Blue Gas Uników was responsible for its implementation.¹⁰⁴

125. On 30 September 2014, Blue Gas Uników submitted an application to the Ministry for a license for the recognition of the Lelikow natural gas deposit. Unfortunately,

¹⁰⁰ *Id.*, ¶ 73 (citing **Exhibits C-74-76**).

¹⁰¹ *Id.*, ¶ 74.

¹⁰² *Id.*, ¶ 75 (citing **Exhibit C-77**).

¹⁰³ *Id.*, ¶ 76 (citing **Exhibits C-65, 78-79**).

¹⁰⁴ *Id.*, ¶ 77.

as in the other projects, this application remained unprocessed for almost one year. This time, however, on 30 December 2015 the Ministry refused to grant Blue Gas Uników the requested license. The Ministry justified its decision by the lack of submitting an environmental decision. As the Ministry had no grounds to dismiss Blue Gas Uników's motion, on 28 January 2016 the SPV challenged it by filing a request to have the case re-examined.¹⁰⁵

126. Blue Gas Uników waited for the Ministry's decision for almost two years and never received it. This stalled the Lelikow Project and, at the same time, contributed to the situation in which Blue Gas Holding's management decided to refuse further financing of the SPVs' activities. It was also yet another reason for Blue Gas Uników to file for bankruptcy. The aggregate cost of this project amounted to approximately PLN 184,000.¹⁰⁶

D. Irregularities in the Administrative Proceedings

127. The implementation and development of the entire Investment was prevented as a result of the acts and omissions of the Authorities that lasted for more than three years (2014–2017). These acts and omissions included illegal, discretionary, discriminatory, protracted and sluggish conducting of the licensing proceedings that effectively paralyzed the functioning of the SPVs.¹⁰⁷
128. One of the key elements of the Blue Gas Group's strategy and, at the same time, a necessary condition for the Investment, was obtaining licenses for the exploration and recognition of selected natural gas deposits and, subsequently, transforming them into licenses for the exploration and recognition of natural gas deposits and extracting gas from these deposits.¹⁰⁸
129. Under Polish law, hydrocarbon deposits, including natural gas, are subject to mining ownership, with the exclusive rights belonging to the State, i.e. the Respondent. In accordance with the Geological Law, conducting activities in the field of exploration, recognition and mining of hydrocarbons from deposits requires a license, which is granted by the Ministry.¹⁰⁹
130. Currently, the only way to obtain a gas license is through a public tender. However, before 1 January 2015, Art. 46 of the Geological Law provided an exception, according to which the Ministry was able to grant a license in the "application comparison" procedure if the applicant had filed its application on or before 30 September 2014. This procedure was also called the "open-door" method.¹¹⁰
131. Once an application is filed, the Ministry has to inform the public. The Ministry's announcement contains information on the submission of a license application and

¹⁰⁵ *Id.*, ¶ 78 (citing **Exhibits C-80-82**).

¹⁰⁶ *Id.*, ¶ 79 (citing **Exhibits C-65, 83**).

¹⁰⁷ *Id.*, ¶ 80.

¹⁰⁸ *Id.*, ¶ 81.

¹⁰⁹ *Id.*, ¶ 82.

¹¹⁰ *Id.*, ¶ 83.

the type of activity and area for which the license is to be granted. In addition, the Ministry also indicates a deadline for submitting competing applications by other entities interested in obtaining the license in question, with the term not lasting less than 90 days. After the necessary time elapses, the Ministry performs a comparison of all submitted applications. For the application which received the highest rating, the licensing proceedings are then initiated.¹¹¹

132. All but one license for which the SPVs applied were to be issued in open-door procedures. One license regarding the Uników gas deposit was acquired from a third party.¹¹²

1. Uników Proceedings

133. One year after license No. 19/2009/p was transferred to Blue Gas Uników, the SPV received the Ministry's decision of 12 July 2012 in which the Ministry requested that the SPV refrain from violating the terms of the license by submitting a report on the works carried out under the license in 2011.¹¹³
134. In response, on 24 July 2012 Blue Gas Uników sent a letter by which it submitted the report requested by the Ministry, as well as other relevant documents. In the same letter it explained the actions it had taken. Subsequently, in a letter dated 26 July 2012, Blue Gas Uników further explained the details of the reconstruction of the Uników-2 borehole, described the equipment already installed in the facility, and described the works that had already been scheduled between October 2012 and February 2013.¹¹⁴
135. Despite this, on 9 November 2012 the Ministry announced the initiation of proceedings on non-compliance with the terms specified in license No. 19/2009/p. Then, in a letter on 28 November 2012, the Ministry asked Blue Gas Uników to provide detailed information on the planned implementation of 3D seismic works and borehole drilling to a depth of 2,000m, and to provide clarifications regarding the compliance with the license obligations covering the total duration of the license.¹¹⁵
136. Once again, Blue Gas Uników complied with the Ministry's demands. In a letter on 10 December 2012, Blue Gas Uników indicated, among other things, that immediately after the transfer of the license, it had selected a contractor for the reconstruction works for the Uników-2 well, secured the right to the site, developed an operating plan for reconstruction and applied to the Regional Mining Office in Kielce for approval of a mining plan for the reconstruction of the well. At the same time, BGN indicated that the well had been reconstructed between 6 December

¹¹¹ *Id.*, ¶ 84.

¹¹² *Id.*, ¶ 85.

¹¹³ *Id.*, ¶ 86 (citing **Exhibit C-84**).

¹¹⁴ *Id.*, ¶ 87 (citing **Exhibits C-85-86**).

¹¹⁵ *Id.*, ¶ 88 (citing **Exhibits C-87-88**).

2011 and 19 February 2012, leading to the construction of a gas mine, the launch of which was scheduled for 21 December 2012.¹¹⁶

137. In that same letter, Blue Gas Uników confronted the Ministry's allegations. It pointed out that license 19/2009/p was granted for five years, and in section 4 only the ranges and stages of works were established, while section 9 contained the total duration of individual stages. The provisions of section 4 of the license did not give specific deadlines for the completion of particular stages of works, but only their duration. Such an approach, as emphasized by Blue Gas Uników, allows for the implementation of individual stages of works in periods not longer than specified in the license (five years), in periods not longer than specified for individual stages, and in the order described in the license, as the decision to start the next stage depends on the results obtained at an earlier stage. At the same time, BGN emphasized that the provisions of section 4 and section 9 of the licenses demonstrate that the total duration of stage I and stage II planned for the trial exploitation of the Uników-2 well was to be 36 months.¹¹⁷
138. Further, Blue Gas Uników explained that in the light of the provisions of section 10, the license holder should start the works specified in section 4 no later than one month from the date of the license being granted. The former license holder (PL Energia) did not commence the implementation of these works, which was the reason for the transfer of the license to Blue Gas Holding, which without undue delay complied with the license provisions. In addition, Blue Gas Uników noted that the Ministry did not respond to the implementation schedule of the various stages of the license activity when transferring the license.¹¹⁸
139. The Ministry did not accept Blue Gas Uników's explanations and issued a decision of 22 February 2013 calling on Blue Gas Uników to immediately stop the alleged violations.¹¹⁹
140. The Ministry stated that although the license did not specify the completion dates of individual stages of works, but rather only their duration, the exact schedule of implementing works was specified in the PRG Documentation. In the Ministry's opinion, the reconstruction of the Uników-2 well and the 3D seismic work were not carried out in line with the schedule. It estimated that all of the works referred to in section 4 of the license were obligatory, and Blue Gas Uników, after completing the previous stage, had the opportunity to decide on the next stage. In the event of unsatisfactory results in earlier stages, Blue Gas Uników could withdraw from the next stage and renounce the license. The Ministry threatened that if 3D seismic works did not commence by 30 April 2013, in accordance with Art. 37 (2) of the Geological Law, it might revoke the license without compensation.¹²⁰

¹¹⁶ *Id.*, ¶ 89 (citing **Exhibit C-89**).

¹¹⁷ *Id.*, ¶ 90.

¹¹⁸ *Id.*, ¶ 91.

¹¹⁹ *Id.*, ¶ 92 (citing **Exhibit C-90**).

¹²⁰ *Id.*, ¶ 93.

141. Therefore, in its letter of 12 March 2013, Blue Gas Uników asked Respondent's Chief Geologist for a meeting to discuss issues related to the license. In a letter of 12 March 2013, the Ministry indicated that organizing a meeting with the Chief Geologist would not be possible in the near future. Instead, the Ministry requested that all explanations related to the license be sent in writing.¹²¹
142. In the meantime, on 21 March 2013, Blue Gas Uników challenged the Ministry's decision of 22 February 2013. Blue Gas Uników repeated its argument that license 19/2009/p did not give specific deadlines for the completion of particular stages of works, but only their duration. Moreover, the SPV noted that the work schedule specified in the PRG Documentation was not an integral part of the license.¹²² These arguments were in line with Art. 43 sec. 2 of the Geological Law-,
143. If the Ministry had disagreed and dismissed Blue Gas Uników's appeal of 21 March 2013, this would have given Blue Gas Uników the right to appeal the dismissal in court. Instead, however, the Ministry delayed the proceedings and, on 14 August 2013, called on Blue Gas Uników to supplement and submit explanations to its 21 March 2013 challenging of the Ministry's initial decision.¹²³
144. On 29 October 2013, Blue Gas Uników sent a letter in which it provided the Ministry with the requested explanations. At the same time, Blue Gas Uników undertook to immediately submit to the Ministry the documentation and studies created in the process of designing 3D seismic works, which required the Ministry's approval or consent.¹²⁴
145. On 18 September 2013, Blue Gas Uników applied to the Ministry for an extension of the validity of license No. 19/2009/p until 30 September 2015. This application was subsequently supplemented with a letter dated 30 October 2013.¹²⁵
146. Afterwards, in a letter of 23 December 2013, supplemented with letters of 31 January and 11 February 2014, Blue Gas Uników applied for an amendment to the license for the recognition works it planned to carry out by 30 September 2015 by removing phase III from the license, including the construction of an additional borehole with a maximum depth of 2,100m, and limiting stage II to carrying out a trial operation of the Uników-2 borehole.¹²⁶
147. Blue Gas Uników argued that to have the Uników natural gas deposit properly documented, which was the purpose of license No. 19/2009/p, it was not necessary to drill an additional borehole or perform 3D seismic surveys, which due to the small area being investigated were unnecessary because they would not give

¹²¹ *Id.*, ¶ 94 (citing **Exhibits C-91-92**).

¹²² *Id.*, ¶ 95 (citing **Exhibit C-93**).

¹²³ *Id.*, ¶ 97 (citing **Exhibit C-94**).

¹²⁴ *Id.*, ¶ 98 (citing **Exhibit C-95**).

¹²⁵ Soc, ¶ 99 (citing **Exhibits C-96-97**); Reply, ¶ 92 (citing **Exhibit C-96**).

¹²⁶ Soc, ¶ 100 (citing **Exhibits C-98-100**); Reply, ¶ 92 (citing **Exhibit C-96**).

reliable results. At the same time, it argued that further utilization of the deposit would allow a detailed recognition of its capacity and structure.¹²⁷

148. As a result, on 23 January 2014 the Ministry notified Blue Gas Uników of the initiation of proceedings to amend license No. 19/2009/p. In addition, in another letter on the same date, the Ministry asked Blue Gas Uników for an urgent explanation of the doubts regarding the commencement date of the trial exploitation of the Uników-2 well.¹²⁸
149. On 28 January 2014, the Ministry informed Blue Gas Uników of the first extension of the proceedings to amend the license, this time until 10 March 2014. After two months of inactivity, in a letter on 7 March 2014, the Ministry extended the proceedings again, this time until 31 March 2014. On each occasion, the Ministry referred to an unspecified need to supplement the evidence, including obtaining further clarifications from Blue Gas Uników regarding the proposed amendment to the license.¹²⁹
150. On 13 March 2014, Blue Gas Uników informed the Ministry that according to a statement from the Regional Mining Office, the approval of the updated mining plan for the mine (*plan ruchu kopalni*), adjusted to the new license, would take approximately 14 days. However, the failure to obtain approval of this document by 31 March 2014 resulted in the mine being shut down, which exposed the company to financial losses. Therefore, Blue Gas Uników asked for an urgent decision regarding the amendment to the license.¹³⁰
151. On 26 March 2014, the Ministry issued a decision amending license No. 19/2009/p. In doing so, it agreed with Blue Gas Uników that performing works unnecessary for recognizing the deposit would in turn unnecessarily extend the time for having it documented, which would then delay the commencement of gas mining. As a result, the Ministry accepted the scope of the recognition of works proposed by Blue Gas Uników.¹³¹
152. On 10 July 2015, Blue Gas Uników applied to the Ministry to convert license No. 19/2009/p into a unified license to explore the Uników natural gas deposit and to mine the gas from it.¹³²
153. Four days later, the Ministry called on Blue Gas Uników to prove its experience in the exploration and recognition of hydrocarbon deposits, the exploitation of hydrocarbons from deposits, and to submit documents confirming the geological documentation of the hydrocarbons deposit, as well as other equivalent documentation confirming that the activity of mining hydrocarbons from deposits had been continued for at least three years. Blue Gas Uników responded in a letter

¹²⁷ Soc, ¶ 101.

¹²⁸ Soc, ¶ 102 (citing **Exhibits C-101-102**); Reply, ¶ 93 (citing **Exhibits C-101, 106**).

¹²⁹ Soc, ¶ 103 (citing **Exhibit C-104**); Reply, ¶ 97 (citing **Exhibits C-76, R-9**).

¹³⁰ Soc, ¶ 104 (citing **Exhibit C-105**).

¹³¹ *Id.*, ¶ 105 (citing **Exhibit C-106**).

¹³² *Id.*, ¶ 106 (citing **Exhibit C-107**).

of 27 July 2015, arguing that the obligation to prove experience in the field of exploration and recognition of deposits, as well as the inclusion of documents approving the geological documentation of hydrocarbons deposits only applied to entities applying for a license under the new provisions of the Geological Law, which did not apply to Blue Gas Uników's application.¹³³

154. In a letter of 20 August 2015, the Ministry called on Blue Gas Uników to submit additional documents concerning the motion of 10 July 2015, despite the fact that Blue Gas Uników had already submitted such documents, which the Ministry had admitted. However, the Ministry contended that in each administrative proceeding, the evidence was collected separately, meaning that Blue Gas Uników had to file the same documents again. This position of the Ministry conflicted with Art. 77, section 4 of the Code of Administrative Procedure, which states that "*universally accepted facts and facts known to the administrative body ex officio do not require proof. Parties to proceedings should be informed of facts that are known to the administrative body.*" This language means that once the Ministry obtained certain documents, it should have used them wherever and whenever they were needed.¹³⁴
155. Blue Gas Uników did not want to extend the proceedings further and therefore did not argue with the Ministry's demands, despite the fact it considered them to be unfounded. Instead, it submitted the following documents:
 - financial statement of Blue Gas Uników for 2014;
 - declaration by Blue Gas Holding on the readiness to finance the activity covered by Blue Gas Uników's application for the conversion of the license;
 - description of geological works, including geological works previously performed under license No. 19/2009/p with a description of their results;
 - a statement that all relevant documents submitted to the Ministry should be taken into account in the proceedings regarding the conversion of the license.¹³⁵
156. On 4 September 2015, Blue Gas Uników issued a letter by which it submitted a revised application for the conversion of the license and, in addition, applied for the conclusion of an annex extending the term of the agreement of 31 March 2009 for the establishment of a mining usufruct for the period until the new unified license was granted.¹³⁶
157. On 11 September 2015, i.e., more than 14 months after the application had been filed, the Ministry sent Blue Gas Uników a letter informing it of the commencement

¹³³ *Id.*, ¶ 107 (citing **Exhibits C-108-109**).

¹³⁴ Soc, ¶ 108 (citing **Exhibit C-110**); Reply, ¶ 106.

¹³⁵ Soc, ¶ 109; Reply ¶ 106 (citing **Exhibits C-110, 207, 208, 249, 250**).

¹³⁶ Soc, ¶ 110 (citing **Exhibit C-111**); Reply ¶ 107 (citing **Exhibits C-111, R-11**).

of the proceedings regarding the conversion of the license.¹³⁷ In a letter of 15 October 2015, it set the end date at 31 December 2015.¹³⁸

158. After two months of inactivity, the Ministry informed Blue Gas Uników that because other administrative authorities were also in delay with their respective decisions, the relevant proceedings could not complete before the deadline of the trial exploitation of the Uników-2 well. Therefore, Blue Gas Uników's application of 10 July 2015 became partially obsolete. The Ministry suggested modifications to the application and the accompanying PRG Documentation.¹³⁹
159. Blue Gas Uników had no other choice than to amend the application in accordance with the Ministry's suggestions, which it did on 22 December 2015.¹⁴⁰
160. In a letter of 5 January 2016, the Ministry notified Blue Gas Uników that the proceedings on the conversion of the license had been completed, but the Ministry withheld the issuance of the decision for 8 months.¹⁴¹ Respondent has provided reasons for this delay, such as the Claimants' alleged noncompliance with the terms of the Uników Exploration Licence as amended on 26 March 2014, and the lack of the Ministry's experience in handling proceedings for the conversion, but such allegations are factually inaccurate.¹⁴²
161. Being aware of the delay of administrative proceedings concerning all SPVs, on 15 April 2016 Blue Gas Holding sent a letter to the Ministry requesting the positive consideration of all applications as soon as possible. Blue Gas Holding emphasized that it found itself in an extremely difficult situation because of the duration of the proceedings that had triggered a risk of losing its bank. At the same time, Blue Gas Holding referred to one of the fundamental rights of a party to the proceedings: the right to examine the case without unreasonable delay.¹⁴³
162. Blue Gas Holding claimed that the excessive length of ongoing proceedings prevented the SPVs from taking full advantage of their rights destabilizing their business operations and generally manifesting uncertainty as to future actions. To exemplify this, Blue Gas Holding noted that the Ministry had still not issued the decision on the conversion of license No. 19/2009/p, despite Blue Gas Uników's compliance with every demand the Ministry had made.¹⁴⁴
163. The Ministry ignored the 15 April 2016 letter. Instead, after four months of silence, on 9 August 2016 the Ministry converted the license. On the same day, the Ministry

¹³⁷ Soc, ¶ 111 (citing **Exhibit C-112**).

¹³⁸ *Id.*, ¶ 112 (citing **Exhibit C-113**).

¹³⁹ Soc, ¶ 113 (citing **Exhibit C-114**).; Reply ¶ 112 (citing **Exhibits C-114-115, 311, R-19, CER-8, ¶ 62**).

¹⁴⁰ Soc, ¶ 114 (citing **Exhibits C-115**); Reply ¶ 112 (citing **Exhibits C-114-115, 311, R-19, CER-8, ¶ 62**).

¹⁴¹ Soc, ¶¶ 37, 115 (citing **Exhibits C-28-29, 116**).; Reply ¶ 116 (citing **Exhibits C-28, 116**).

¹⁴² Reply, ¶¶ 116-128 (citing **Exhibits C-28, C-106, R-22, R-23, C-313, C-312, R-22, R-23, R-24, C-326, C-107, R-24, C-28, C-314, R-21, C-28, C-29, C-117, C-115, C-28**).

¹⁴³ Soc, ¶ 116 (citing **Exhibits C-117**).

¹⁴⁴ *Id.*, ¶ 117.

entered into the previously mentioned agreement for the establishment of a mining usufruct.¹⁴⁵

164. On 24 August 2016, following the receipt of license No. 19/2009/Ł, Blue Gas Uników submitted the new PRG Documentation for the Ministry to approve.¹⁴⁶ In doing so, Claimants noted that that 3D seismic surveys would be optional, as explicitly started by the Ministry when it approved the Uników PRG Documentation within its decision on the conversion of the Uników exploration license.¹⁴⁷
165. Immediately afterwards, in a letter of 29 August 2016, Blue Gas Uników notified the Ministry of the commencement of works covered by the newly converted license.¹⁴⁸ A few days later, Blue Gas Uników applied for approval of the DGI Documentation for the Uników natural gas deposit.¹⁴⁹
166. However, on 22 September 2016 the Ministry objected to the PRG Documentation and four days later informed Blue Gas Uników of the extension until 30 November 2016 of the deadline for approval of the DGI Documentation. In its 26 September letter, the Ministry justified the extension by referring to “the necessity of gaining opinions of all of the cooperating authorities,” yet the applicable law indicated that the decision only required an opinion from one authority, the head of the Lututów commune, and the deadline for issuing such an opinion would have passed well before the new deadline.¹⁵⁰ This caused further delays and jeopardized the Investment.¹⁵¹
167. Blue Gas Uników appealed against the decision regarding the PRG Documentation on 10 October 2016, arguing that the PRG Documentation was created after an in-depth analysis taking into account the current situation in the area. It also argued that the decision conflicted with the practice which the Ministry had previously accepted.¹⁵² Further, it explained that the dates at the beginning and completion of the 3D seismic survey had been clearly specified in the PRG Documentation concerning the 3D seismic survey as dependent on the date at the beginning of the 3D seismic survey planned in Supplement No. 1 to the Uników PRG Documentation, which was unknown as it had yet to be approved.¹⁵³ It took another three months for the Ministry to issue a decision in which it upheld the appealed decision of 22 September 2016.¹⁵⁴
168. In the meantime, Blue Gas Uników received a letter of 4 November 2016 in which the Ministry informed Blue Gas Uników that the DGI Documentation had been

¹⁴⁵ *Id.*, ¶ 118 (citing **Exhibits C-28-29**).

¹⁴⁶ *Id.*, ¶ 119 (citing **Exhibit C-118**).

¹⁴⁷ Reply, ¶ 134 (citing **Exhibit C-311**).

¹⁴⁸ Soc, ¶ 120 (citing **Exhibit C-119**).; Reply, ¶ 130 (citing **Exhibit C-118**).

¹⁴⁹ Soc, ¶ 121 (citing **Exhibits C-120**).

¹⁵⁰ Reply, ¶¶ 141-143 (citing **Exhibit C-128, Exhibit R-25**).

¹⁵¹ Soc, ¶ 122 (citing **Exhibits C-121-122**); Reply, ¶ 135 (citing **Exhibit C-121**).

¹⁵² Soc, ¶ 123 (citing **Exhibit C-123**).; Reply, ¶ 136 (citing **Exhibit C-28**).

¹⁵³ Reply, ¶ 137 (citing **Exhibits C-173**).

¹⁵⁴ Soc, ¶ 124 (citing **Exhibits C-124**).; Reply ¶ 138 (citing **Exhibit C-124**).

handed over to the Mineral Resources Commission, a subsidiary body of the Minister of the Environment, in order to obtain opinions on its substantive and formal legal correctness.¹⁵⁵ The Uników DGI Documentation had also been sent to the Polish Geological Institute, although this had not been mentioned in the Ministry's letter.¹⁵⁶

169. The opinion of the Polish Geological Institute, which was asked to verify the coordinates of the territory in the Uników DGI Documentation was issued on 23 November 2017, although this opinion was never sent to Blue Gas Uników.¹⁵⁷ The Mineral Resources Commission shared the view that the Uników DGI Documentation had been prepared correctly but, to be approved, the title of the documentation would need to be changed and certain revisions would have to be made.¹⁵⁸ However, the Mineral Resources Commission reported in its letter to the Ministry of 20 December 2016 something quite different, but such letter was never communicated to Blue Gas Uników.¹⁵⁹
170. Instead, the Ministry was silent for 1 month after which it informed Blue Gas Uników that the deadline for the completion of the proceedings for the approval of the Uników DGI Documentation had been extended until 31 March 2017. This meant that the proceedings would at the earliest end seven months after their commencement.¹⁶⁰
171. In a letter of 7 February 2017, Blue Gas Uników requested guidance on how to resume business because according to the provisions of license No. 19/2009/Ł, the production test of the Uników-2 well should have been carried out by 31 December 2016. The SPV reminded the Ministry that in order to be able to continue mining it had applied to the Ministry for the approval of the DGI documentation on 8 September 2016. In turn, a verbal statement by the Chairman of the Commission on Mineral Resources, before which Blue Gas Uników's representatives appeared on 15 December 2016, indicated that the DGI Documentation should only specify the area of the deposit, and that after its urgent approval, Blue Gas Uników would obtain an investment decision and be able to continue mining.¹⁶¹
172. On 23 February 2017, Blue Gas Uników applied for the urgent approval of the DGI Documentation for the Uników natural gas deposit.¹⁶²
173. Blue Gas Uników argued that pursuant to Art. 35 of the Code of Administrative Procedure, administrative proceedings should be completed without undue delay and in any event no later than in one month from the date of their commencement.

¹⁵⁵ Soc, ¶ 125 (citing **Exhibits C-125, R-11**): Reply, ¶ 180 (citing **Exhibit R-34, Exhibit R-35**).

¹⁵⁶ Reply, ¶ 181(citing **Exhibit C-125**).

¹⁵⁷ *Id.*, ¶¶ 182-183 (citing **Exhibit R-37**).

¹⁵⁸ *Id.*, ¶ 187 (citing **Exhibit R-39**).

¹⁵⁹ *Id.*, ¶ 189 (citing **Exhibit R-38**).

¹⁶⁰ Soc, ¶ 125 (citing **Exhibits C-125-126**); Reply, ¶ 189 (citing **Exhibits C-126, R-38**).

¹⁶¹ Soc, ¶ 126 (citing **Exhibit C-127**); Reply, ¶¶ 180-181 (citing **Exhibits C-125, 240, R-34-35, RWS-2, ¶¶ 18, 24**).

¹⁶² Soc, ¶ 127.

In particularly complex cases, the maximum duration of the proceedings cannot exceed two months. Blue Gas Uników pointed out that while the Ministry could have considered the basis of the facts and evidence known to it *ex officio*, the applicable statutory deadlines had long since lapsed.¹⁶³

174. Blue Gas Uników accused the Licensing Authority of inactivity committed in flagrant breach of the law, arguing that the Ministry's failure to act in accordance with the law:
 - made it impossible to obtain an investment decision enabling further utilization and rational management of the Uników deposit;
 - led to a deterioration in the well and the operational equipment, including corrosion, and consequently to a reduction in the technical efficiency (Blue Gas Uników incurred significant expenditures to maintain unused engines in working order, and increased the risk of their malfunctioning due to being restarted after an extended period of disuse);
 - prevented Blue Gas Uników from carrying out condensate, heat and electricity sales activities that in turn jeopardized the SPV's financial standing.¹⁶⁴
175. On 2 March 2017, the Ministry reacted by issuing a letter in which it informed Blue Gas Uników of the extension of the proceedings until 30 April 2017.¹⁶⁵
176. On March 13, 2017, after a telephone conversation Mr. Jacek Strzelecki (Blue Gas Holding) and Ms. Joanna Potęga (the Ministry), in which Ms. Potęga suggested submitting a new, supplemented application, Blue Gas Uników once again asked the Ministry for urgent approval of the DGI Documentation, at the same time submitting the modified application.¹⁶⁶
177. The Ministry used the modification as a means to delay the proceedings further, on 12 May 2017 issuing another letter in which it informed Blue Gas Uników of the postponement of the deadline for the proceedings to be concluded until 30 June 2017.¹⁶⁷ In the meantime, on 26–27 April 2017, the Regional Mining Office in Kielce carried out the inspection of the Uników deposit.¹⁶⁸
178. On 4 May 2017, Blue Gas Uników filed reservations to the report issued in conclusion of the inspection. The SPV stated that in its opinion, the Director of the Regional Mining Office in Kielce sought to limit Blue Gas Uników's rights under the license and that he exceeded his authority by trying to interpret the scope of the license. In the letters of 22 May 2017 and 27 June 2017, the Director of the Regional Mining Office in Kielce did not specify any reservations, indicating that further

¹⁶³ *Id.*, ¶ 128.

¹⁶⁴ *Id.*, ¶ 129.

¹⁶⁵ *Id.*, ¶ 130 (citing **Exhibit C-128**).

¹⁶⁶ *Id.*, ¶ 131 (citing **Exhibit C-129**).

¹⁶⁷ *Id.*, ¶ 132 (citing **Exhibit C-130**).

¹⁶⁸ *Id.*, ¶ 133.

operations of the Uników-2 well were possible, provided that the Ministry approved the amended PRG Documentation.¹⁶⁹

179. Eventually, in a letter of 24 May 2017, the Ministry notified Blue Gas Uników that the application for the approval of the DGI Documentation had been dropped as unexamined, which effectively meant the discontinuation of the proceedings.¹⁷⁰ Blue Gas Uników had two options: i) either try to file a complaint with the Provincial Administrative Court in Warsaw and extend the proceedings even further; or ii) to withdraw its original application and file a new one as suggested by the Ministry's officials, hoping that this time it would be dealt with in a timely fashion. Blue Gas Uników chose to file a new application¹⁷¹
180. On 4 July 2017, Blue Gas Uników set a meeting with the Ministry during which the parties discussed the modification of Supplement No. 1 to the Uników PRG Documentation, as well as the status of the proceedings for the approval of the Uników DGI Documentation. Regarding the status of the proceedings, the Ministry's representatives informed the company that in order for the proceedings to be completed, (1) Blue Gas Uników needed to withdraw its application for restitution of the seven-day time limit for supplementing its application for the approval of the Uników DGI Documentation; (2) the Ministry needed to prepare a letter summarizing its position and, if needed, indicating everything that needed to be changed or supplemented; (3) Blue Gas Uników needed to revise the Uników DGI Documentation in accordance with the Ministry's comments and submit it to the Ministry; (4) Blue Gas Uników needed to prepare a letter explaining its position on the issue of holding a right to use the geological information; and (5) the Ministry needed to ask for the opinion of the Mineral Resources Commission so it could approve the revised Uników DGI Documentation.¹⁷²
181. On 17 July 2017, the Ministry informed Blue Gas Uników of a third extension to the deadline for settling the proceedings regarding the PRG Documentation, this time until 31 August 2017. Meanwhile, the Ministry demanded additional explanations.¹⁷³
182. On 4 September 2017, the company submitted the corrected, revised Supplement No. 1 to the Uników PRG Documentation as requested by the Ministry.¹⁷⁴
183. On 11 September 2017, the Ministry communicated a fourth extension, pushing the end of the proceedings to 31 October 2017. With this extension the Ministry again

¹⁶⁹ Soc, ¶ 134 (citing **Exhibits C-131-133**); Reply, ¶¶ 222-225 (citing **Exhibits C-131-132, 320, CER-8** ¶¶ 43-45, **R-38**).

¹⁷⁰ Soc, ¶ 135 (citing **Exhibits C-134-135**); Reply, ¶ 204 (citing **Exhibits C-307, R-42**).

¹⁷¹ Soc, ¶ 135 (citing **Exhibits C-134-135**).

¹⁷² Reply, ¶ 209 (citing **Exhibit C-315**).

¹⁷³ Soc, ¶ 137. (citing **Exhibit C-138**).

¹⁷⁴ Reply, ¶ 161 (citing **Exhibit R-28**).

submitted unfounded requests for explanations.¹⁷⁵ On 5 October 2017, Blue Gas Uników submitted the requested clarifications.¹⁷⁶

184. On 13 November 2017, the Ministry issued a letter to which the draft decision on the approval of the PRG Documentation was attached. The letter was addressed to the municipalities in the areas of which the Uników Project was located.¹⁷⁷
185. This was issued more than 14 months after the submission of the application regarding the approval of the PRG Documentation, and after Blue Gas Uników had filed for bankruptcy. The Ministry was well aware that Blue Gas Uników had filed for bankruptcy, as the management board of Blue Gas Uników informed the Ministry's subordinates immediately after submitting the bankruptcy motion. Almost instantly, it was confirmed in writing in Blue Gas Uników's letter of 13 November 2017.¹⁷⁸

2. Wrzosowo Proceedings

186. On 22 January 2014, Blue Gas Uników filed the application for a license for the recognition of the Wrzosowo natural gas deposit.¹⁷⁹
187. On 28 February 2014, the Ministry issued the first call to remove "formal defects" in the application. In addition, the Ministry requested Blue Gas Uników to modify the coordinates and redefine the area to be covered by the license. In response, Blue Gas Uników submitted a revised application and PRG Documentation.¹⁸⁰
188. The Ministry did not react to this submission. Blue Gas Uników thus sent a letter on 25 April 2014 asking the Authority for information on the status of the proceedings.¹⁸¹
189. Eventually, on 21 May 2014, the Ministry confirmed that it would promptly publish information in the EU Official Journal about Blue Gas Uników's application (the open-door procedure). The Ministry explained, however, that it had no influence on the timing of the publication, which could take up to two months, after which potential competing applicants would have at least 90 days to file for the license. The Ministry stated that naming the "winner" of the open-door procedure "should be completed within two months."¹⁸²

¹⁷⁵ Soc, ¶ 138 (citing **Exhibits C-139-141**).

¹⁷⁶ Reply, ¶ 163 (citing **Exhibit R-30**).

¹⁷⁷ Soc, ¶ 139 (citing **Exhibits C-142**); Reply, ¶ 162 (citing **Exhibits C-140, 325, R-27**).

¹⁷⁸ Soc, ¶ 140 (citing **Exhibits C-143**); Reply, ¶ 165 (citing **Exhibits C-316-318**).

¹⁷⁹ Soc, ¶ 142 (citing **Exhibits C-53**); Reply, ¶ 266 (citing **Exhibits C-53, 144-157, 335, R-51-54**).

¹⁸⁰ Soc, ¶ 143 (citing **Exhibits C-145-146**); Reply, ¶ 266.

¹⁸¹ Soc, ¶ 144 (citing **Exhibits C-146-147**); Reply, ¶ 266.

¹⁸² Soc, ¶ 145 (citing **Exhibits C-148**); Reply, ¶ 266.

190. On 4 June 2014, Blue Gas Uników provided its extensive explanations to all of the issues the Ministry had raised. The letter was accompanied mostly by financial documents the Ministry required.¹⁸³
191. Although the Ministry accepted these explanations, in a letter dated 3 July 2014 it requested Blue Gas Uników to submit statements by the Claimants regarding their financing. By letter of 11 July 2014, Blue Gas Uników submitted the documents the Ministry requested.¹⁸⁴
192. Shortly afterwards, on 15 July 2014, Blue Gas Uników sent a letter to the Ministry asking about the status of the proceedings and the date of their conclusion. The SPV also requested the Ministry to provide information regarding the “open-door” procedure and when it would start.¹⁸⁵
193. In response, the Ministry asked for an additional copy of the PRG Documentation, which led to a further unnecessary extension of the proceedings. Three weeks later, the Ministry informed Blue Gas Uników that it had initiated publication which commenced the “open-door” procedure.¹⁸⁶
194. On 10 December 2014 the Ministry finally notified Blue Gas Uników of the commencement of proceedings on the basis of the application filed almost 11 months earlier.¹⁸⁷
195. The proceedings were completed in January 2015. While this date indicated that the proceedings had not been unduly lengthy, the Ministry had only informed Blue Gas Uników of the commencement of the proceedings when it was ready to complete them. This was an improper manipulation of the commencement date in order for the Ministry to appear to meet the statutory deadlines.¹⁸⁸
196. Less than a month later, on 16 February 2015, the Ministry granted Blue Gas Uników license No. 1/2015/p. On the same day, Blue Gas Uników and the Ministry entered into an agreement for the establishment of a mining usufruct for the Wrzosowo natural gas deposit.¹⁸⁹
197. On 3 July 2015, Blue Gas Uników and Blue Gas Wrzosowo jointly applied to the Ministry for the transfer of license No. 1/2015/p. to Blue Gas Wrzosowo. In parallel, Blue Gas Uników and the Ministry conducted extensive correspondence regarding amending the license and the PRG Documentation for the Wrzosowo natural gas deposit. This, however, did not impact the transfer of the license to Blue Gas Wrzosowo.¹⁹⁰

¹⁸³ Soc, ¶ 146 (citing **Exhibit C-149**); Reply, ¶¶ 257, 266 (citing **Exhibits C-149, R-49**).

¹⁸⁴ Soc, ¶ 147 (citing **Exhibits C-150-151**); Reply, ¶ 266.

¹⁸⁵ Soc, ¶ 148 (citing **Exhibit C-152**); Reply, ¶ 266.

¹⁸⁶ Soc, ¶ 149 (citing **Exhibits C-153-154**); Reply, 266.

¹⁸⁷ Soc, ¶ 150 (citing **Exhibit C-155**); Reply, ¶ 266.

¹⁸⁸ Soc, ¶ 151 (citing **Exhibit C-156**); Reply ¶ 266.

¹⁸⁹ Soc, ¶ 152 (citing **Exhibits C-54, 157**); Reply, ¶ 266.

¹⁹⁰ Soc, ¶ 153 (citing **Exhibit C-56**).

198. In a letter on 4 September 2015, the Ministry called on Blue Gas Uników and Blue Gas Wrzosowo to submit:
- financial statements of both Blue Gas Uników and Blue Gas Wrzosowo for 2014 or other documents allowing the financial condition of these SPVs to be established; and
 - Blue Gas Holding's declaration on its readiness to finance the operations of Blue Gas Wrzosowo.¹⁹¹
199. Blue Gas Uników provided the requested documents on 14 September 2014.¹⁹²
200. Not until 26 October 2015 did the Ministry notify Blue Gas Uników and Blue Gas Wrzosowo of the commencement of the proceedings regarding the transfer of license No. 1/2015/p. to Blue Gas Wrzosowo. On the same day, the Ministry consented to the assignment of the right of a mining usufruct to Blue Gas Wrzosowo.¹⁹³
201. On 9 November 2015, the Minister transferred the license to Blue Gas Wrzosowo. On the same day, a tripartite assignment agreement regarding the mining usufruct rights was concluded.¹⁹⁴
202. For the next three months, the Ministry remained silent. On 29 January 2016, Blue Gas Wrzosowo got summoned to supplement the information required for the approval of the PRG Documentation.¹⁹⁵
203. In addition, in a letter of 5 February 2016, the Ministry called on Blue Gas Wrzosowo to eliminate alleged breaches of the terms of the license which had just been transferred. The Ministry claimed that:
- reports on the activities covered by the license for quarters II, III and IV of 2015, which had been submitted, did not meet the requirements of sec. 10 of the license:
 - presentation in the required tabular form, the template of which could be found on the Ministry's website;
 - (b) presentation of the progress of works indicated for implementation in sec. 4.1 and 4.2 of the license; and further

¹⁹¹ *Id.*, ¶ 154 (citing **Exhibit C-158**).

¹⁹² *Id.*, ¶ 155 (citing **Exhibit C-159**).

¹⁹³ Soc, ¶ 156 (citing **Exhibits C-160-161**); Reply, ¶ 274.

¹⁹⁴ Soc, ¶ 157 (citing **Exhibit C-57**).

¹⁹⁵ Soc, ¶ 158 (citing **Exhibits C-162**); Reply, ¶ 290 (citing **Exhibit C-162**).

- no copy of the proof of payment confirming the payment for the activity specified in the license had been provided.¹⁹⁶
204. Blue Gas Group sent an explanatory letter indicating, among other things, that the confirmation of payment had been sent to the Ministry on 4 March 2015.¹⁹⁷
205. On 16 February 2016, Blue Gas Wrzosowo provided the requested documents and information regarding the approval of the PRG Documentation.¹⁹⁸
206. The Ministry commenced the proceedings regarding the approval of the PRG Documentation on 9 May 2016, nearly eight months after Blue Gas Wrzosowo had applied for it. On the same day, the Ministry called on Blue Gas Wrzosowo to rectify the alleged deficiencies in the application. This occurred eight months after it had been filed.¹⁹⁹
207. Concurrently, Blue Gas Wrzosowo prepared a thorough plan for the development of the Wrzosowo deposit. As a result, on 4 July 2016 it filed the application (dated 30 June 2016) for the conversion of license No. 1/2015/p into a unified license. This led to the withdrawal of the motion to change the original license and the PRG Documentation.²⁰⁰
208. The Ministry subsequently extended the deadline for concluding the proceedings on the conversion of license No. 1/2015/p five times, which in total resulted in 15 months of delay: (i) in the letter of 31 August 2016, until 31 October 2016; (ii) in the letter of 14 November 2016, until 31 December 2016; (iii) in the letter of 3 March 2017, until 30 April 2017; (iv) in the letter of 17 July 2017, until 31 August 2017; and (v) in the letter of 11 September 2017, until 31 October 2017.²⁰¹
209. On 10 August 2017, Blue Gas Uników, Blue Gas Wrzosowo and Blue Gas Stanowice sent a letter to the Ministry demanding that it stopped breaching the law by extending the proceedings regarding:
- the conversion of license No. 1/2015/p regarding the Wrzosowo deposit;
 - granting a license for the recognition of the Stanowice deposit;
 - granting a license for the recognition of the Miedzyzdroje deposit; and
 - granting a license for the recognition of the Lelikow deposit.²⁰²

¹⁹⁶ Soc, ¶ 159 (citing **Exhibit C-163**).

¹⁹⁷ *Id.*, ¶ 160 (citing **Exhibit C-164**).

¹⁹⁸ Soc, ¶ 161 (citing **Exhibit C-165**); Reply, ¶ 291 (citing **Exhibits C-165, 369**).

¹⁹⁹ Soc, ¶ 162 (citing **Exhibits C-166-167**); Reply, ¶ 292 (citing **Exhibit C-333**).

²⁰⁰ Soc, ¶ 163 (citing **Exhibit C-168**); Reply, ¶ 238 (citing **Exhibits C-54, 168, R-55**).

²⁰¹ Soc, ¶ 164 (citing **Exhibits C-169-173**).

²⁰² Soc, ¶ 165 (citing **Exhibit C-174**); Reply, ¶ 250 (citing **Exhibit C-174**).

210. The SPVs indicated in the letter that the Ministry's unlawful behavior jeopardized the operations of the entire Blue Gas Group. The SPVs reminded the Ministry that under the provisions applicable in the pending proceedings, those SPVs which already had recognition licenses had the right to convert them into unified licenses only until 1 January 2015. The chronicity of the administrative proceedings conducted by the Ministry deprived them of this opportunity.²⁰³
211. The SPVs pointed out that because of the Ministry's inaction for almost two years, they could not conduct the economic activities covered by the scope of the licenses for which they had applied.²⁰⁴
212. In a letter of 18 September 2017, the Ministry called on Blue Gas Wrzosowo to remove non-existent formal deficiencies in the application for the conversion of the license. Blue Gas Wrzosowo responded with a letter of 2 October 2017, explaining that, contrary to the Ministry's allegations, two copies of the application had been submitted correctly together with a description of the geological works, including geological works previously performed under license No. 1/2015. Blue Gas Wrzosowo also submitted a supplement to the previously submitted description of geological works.²⁰⁵
213. Only on 16 November 2017 did the Ministry inform Blue Gas Wrzosowo that the proceedings regarding the conversion of the license had been commenced (16 months from the date of the application). This commencement of the proceedings took place after Blue Gas Uników had filed for bankruptcy and after the other SPVs had to initiate winding up procedures.²⁰⁶
214. For this reason, on 28 December 2017 Blue Gas Wrzosowo issued a letter in which it waived license No. 1/2015/p. The SPV explained that the excessive length of administrative proceedings conducted by the Ministry made it impossible to reach the economic goal for which Blue Gas Wrzosowo had been established. Since the SPV was not able to continue the activities covered by the license, all of the prerequisites for the expiration of the license referred to in Art. 38 § 2 of the Geological Law had been met.²⁰⁷
215. On 1 April 2019, Blue Gas Wrzosowo received a letter from the Ministry informing it that the proceedings regarding the expiration of license No. 1/2015/p were about to end. This was 14 months after the relevant waiver.²⁰⁸

²⁰³ Soc, ¶ 166.

²⁰⁴ *Id.*, ¶ 167.

²⁰⁵ *Id.*, ¶ 168 (citing **Exhibits C-175-176**).

²⁰⁶ *Id.*, ¶ 169 (citing **Exhibit C-177**).

²⁰⁷ *Id.*, ¶ 170 (citing **Exhibit C-178**).

²⁰⁸ *Id.*, ¶ 171 (citing **Exhibits C-67, 179**).

3. Stanowice Proceedings

216. On 15 September 2014, Blue Gas Stanowice submitted an application to the Ministry for a license for the recognition of the Stanowice natural gas deposit.²⁰⁹
217. Despite consistent requests for status updates concerning the proceedings, the Ministry did not act for almost ten months. On 8 July 2015, Blue Gas Stanowice demanded that the Ministry stop breaching the law by extending the proceedings.²¹⁰
218. Specifically, Blue Gas Wrzosowo demanded that the Ministry:
 - specify the final deadline to conclude the proceedings;
 - explain the reasons for not settling the matter on time; and
 - take measures to prevent a future breach of the statutory provisions providing time limits in administrative proceedings.²¹¹
219. The Ministry responded by calling on Blue Gas Stanowice to eliminate the alleged deficiencies in the 15 September 2014 application. To save time, Blue Gas Stanowice complied with the Ministry's demands. Despite this, in a letter on 7 August 2015, the Ministry requested further explanations.²¹²
220. In response to this letter, on 28 August 2015, Blue Gas Stanowice provided the Ministry with a uniform version of the 15 September 2014 license application, with attachments, and then submitted that letter, in which it provided detailed explanations of the application for the second time.²¹³
221. On 14 July 2015, the Ministry sent a letter requesting the company to modify its application and to provide additional explanations regarding some of the substantive issues.²¹⁴
222. On 23 July 2015, Blue Gas Stanowice submitted a letter asking for a seven-day extension to the deadline to submit the requested documents and explanations.²¹⁵
223. On 29 July 2015, Blue Gas Stanowice sent the corrected application, providing all of the requested information.²¹⁶
224. On 31 August 2015, the Ministry issued a ruling in which it admitted that the proceedings in question had been excessively lengthy. However, the Ministry

²⁰⁹ *Id.*, ¶ 173 (citing **Exhibit C-67**).

²¹⁰ *Id.*, ¶ 174 (citing **Exhibits C-180-183**).

²¹¹ *Id.*, ¶ 175.

²¹² Soc, ¶ 176 (citing **Exhibits C-184-186**); Reply, ¶ 359 (citing **Exhibits C-184, 186, 189, R-110-111, 113-115**).

²¹³ Soc, ¶ 177 (citing **Exhibit C-187**).

²¹⁴ Reply, ¶ 361 (citing **Exhibit C-184**).

²¹⁵ *Id.*, ¶ 362 (citing **Exhibit R-78**).

²¹⁶ *Id.* (citing **Exhibit C-187**).

conclude that the delays did not constitute a material breach of the law and therefore the deadline for the conclusion of the proceedings could be extended until 31 May 2016.²¹⁷

225. On 26 October 2015, the Ministry again called on Blue Gas Stanowice to provide explanations to the license application.²¹⁸ The Ministry discussed the rationality of Blue Gas Stanowice's plans and suggested dividing the term of the license into two stages:
 - stage I, including mandatory reconstruction of the Stanowice-2 borehole, mandatory trial exploitation of the deposit, and optional reconstruction of the Stanowice-3 borehole, which should not take longer than four and a half years; and
 - stage II, covering the remaining optional works, taking no longer than eighteen months.²¹⁹
226. Blue Gas Stanowice responded in a letter of 10 November 2015 in which it followed the Ministry's suggestions.²²⁰
227. On 11 April 2016, the Ministry issued a fourth letter asking for further explanations and changes to the work schedule.²²¹
228. On 27 April 2016, Blue Gas Stanowice issued a letter in which it provided yet another package of documents required by the Ministry. Blue Gas Stanowice firmly stated that there were no grounds for introducing changes to the license application and the PRG Documentation in accordance with the Ministry's arbitrary suggestions.²²²
229. The Ministry again went silent, this time almost ten months until on 12 January 2017, when the Ministry informed Blue Gas Stanowice of the absence of any competing applications filed during the "open-door" procedure. On the same day, the Ministry issued another notification on the commencement of proceedings on granting the license (two and a half years from the date of Blue Gas Stanowice's application).²²³
230. The Ministry again subsequently announced three further delays to the proceedings, amounting to an additional nine months of delay: (i) in the letter of 2 March 2017,

²¹⁷ Soc, ¶ 178 (citing **Exhibit C-188**).

²¹⁸ Soc, ¶ 179 (citing **Exhibit C-189**); Reply, ¶ 359 (citing **Exhibits C-184, 186, 189, R-110-111, 113-115**).

²¹⁹ Soc, ¶ 179 (citing **Exhibit C-189**).

²²⁰ Soc, ¶ 180 (citing **Exhibit C-190**); Reply, ¶ 371 (citing **Exhibit C-190**).

²²¹ Soc, ¶ 181 (citing **Exhibit C-191**).

²²² *Id.*, ¶ 182 (citing **Exhibit C-192**).

²²³ *Id.*, ¶ 183 (citing **Exhibits C-193-194**).

until 30 April 2017; (iii) in the letter of 12 May 2017, until 30 June 2017; and (iii) in the letter of 17 July 2017, until 30 August 2017.²²⁴

231. On 10 August 2017, together with Blue Gas Uników and Blue Gas Wrzosowo, Blue Gas Stanowice sent a letter in which it demanded that the Ministry stopped breaching the law by extending the proceedings.²²⁵
232. The Ministry's first reaction was to extend the proceedings yet again, this time until 31 October 2017. The Ministry then issued a ruling admitting that the proceedings were excessively lengthy. The Ministry again claimed, however, that the delays did not constitute a material breach of the law, and extended the proceedings a fifth time, until 31 December 2017.²²⁶
233. Less than a month after receiving this ruling, Blue Gas Stanowice received the Ministry's letter of 12 October 2017 in which it requested, for the fifth time, further explanations. The Ministry's inquiry concerned the maximum depth of the Stanowice-1, Stanowice-2 and Stanowice-3 boreholes. Blue Gas Stanowice complied with the Ministry's demands.²²⁷
234. On 16 November 2017, Ms. Joanna Potega accidentally encountered Mr. Jacek Strzelecki, CEO of Blue Gas Stanowice, and had indicated that the license would be found to still contain deficiencies.²²⁸
235. Finally, in a letter of 21 November 2017, the Ministry notified Blue Gas Stanowice that the proceedings regarding the license for the recognition of the Stanowice natural gas deposit had been completed. This letter came in more than 38 months after the date of Blue Gas Stanowice's license application, which included 10 months of having the license application unexamined followed by 26 months of analysis which included intermittent months of silence.²²⁹ Blue Gas Uników had already filed for bankruptcy and Blue Gas Holding had to begin winding up the other SPVs.²³⁰

4. Międzyzdroje Proceedings

236. Blue Gas Uników filed the application for a license for the recognition of the Międzyzdroje natural gas deposit on 26 September 2014. Despite repeat requests for information on the progress on the application, the Ministry failed to act for ten months.²³¹

²²⁴ *Id.*, ¶ 184 (citing **Exhibits C-195-197**).

²²⁵ *Id.*, ¶ 185.

²²⁶ *Id.*, ¶ 186 (citing **Exhibits C-198-199**).

²²⁷ *Id.*, ¶ 187 (citing **Exhibits C-200-201**).

²²⁸ Reply, ¶ 335 (citing **Exhibit CWS-1**, ¶¶ 62-63).

²²⁹ Soc, ¶ 188 (citing **Exhibit C-202**); Reply ¶ 335 (citing **Exhibit CWS-1**, ¶¶ 62-63).

²³⁰ *Id.*

²³¹ Soc, ¶ 190 (citing **Exhibits C-72, 203-205**).

237. As with the Stanowice project, this resulted in a letter of 8 July 2015 in which Blue Gas Uników demanded that the Ministry stopped breaching the law by extending the proceedings regarding:
- the application of 26 September 2014 concerning the Miedzyzdroje project; and
 - the application of 30 September 2014 concerning the Lelikow project.²³²
238. Because this letter was sent almost nine months after the dates of the applications, Blue Gas Uników demanded that the Ministry:
- specify a final deadline to conclude the proceedings;
 - explain the reasons for not settling the matter on time; and
 - take measures to prevent future breaches of the statutory provisions by providing time limits in administrative proceedings.²³³
239. On 14 July 2015, the Ministry notified Blue Gas Uników of alleged deficiencies in the license application that needed to be remedied and asked for explanatory information. Blue Gas Uników responded with a letter on 23 July 2015.²³⁴
240. On 9 September 2015, Blue Gas Uników decided to amend the license application by deleting from the scope of optional works the additional drilling of one to two new boreholes.²³⁵
241. On 18 August 2016, the Ministry notified Blue Gas Uników of the commencement of administrative proceedings regarding the license, almost a year after the application.²³⁶
242. Two weeks later, the Ministry issued a ruling admitting that these proceedings were also excessively lengthy but again declared they did not constitute a “material breach” of the law. The Ministry also added an extension to the duration of the proceedings, setting the end date at 31 May 2016.²³⁷
243. Expecting delays in the proceedings, Blue Gas Uników amended the license application by deleting from the scope of optional works the additional drilling of one to two new boreholes.²³⁸

²³² Soc, ¶ 191 (citing **Exhibit C-206**); Reply, ¶ 403 (citing **Exhibits C-180-182, 206-207**).

²³³ Soc, ¶ 192.

²³⁴ Soc, ¶ 193 (citing **Exhibits C-207-208**); Reply, ¶ 403 (citing **Exhibits C-180-182, 206-207**).

²³⁵ Soc, ¶ 196 (citing **Exhibit C-211**); Reply, ¶ 439.

²³⁶ Soc, ¶ 194 (citing **Exhibit C-209**).

²³⁷ *Id.*, ¶ 195 (citing **Exhibit C-210**).

²³⁸ *Id.*, ¶ 196 (citing **Exhibit C-211**).

244. The Ministry continued with additional demands for alleged deficiencies, and additional information was provided.²³⁹
245. In light of the issues with the administrative proceedings, on 15 April 2016 Blue Gas Holding sent the previously-mentioned letter to the Ministry in which it requested the positive consideration of all of the applications filed by the SPVs as soon as possible.²⁴⁰
246. The Ministry failed to act for almost seven months after receiving the letter. On 12 January 2017, the Ministry informed Blue Gas Stanowice of the absence of any competing applications filed during the “open-door” procedure. On the same day, Blue Gas Uników was informed of the commencement of the administrative proceedings which under law should have been initiated with the license application of 26 September 2014.²⁴¹
247. In a letter of 2 March 2017, the Ministry pushed back the deadline for concluding the proceedings to 30 April 2017.²⁴²
248. On 27 April 2017, four months from the commencement of the proceedings, the Ministry issued a ruling in which it obliged Blue Gas Uników to request the Regional Director of Environmental Protection in Szczecin to obtain “a decision on the confirmation of a possible obligation to carry out an environmental impact report for the project.” This occurred 18 months after the first notification in which the Ministry mentioned environmental issues.²⁴³
249. In the ruling, the Ministry agreed that Blue Gas Uników did not have any obligation to obtain an environmental decision for the Miedzyzdroje Project but at the same time that it potentially might have. Despite no legal grounds for the allegations, this was used to delay the proceedings further.²⁴⁴ On 10 May 2017, the Ministry suspended the administrative proceedings
250. On 23 May 2017, Blue Gas Uników challenged the rulings by filing a request to have the case re-examined.²⁴⁵
251. On 10 August 2017, together with Blue Gas Stanowice and Blue Gas Wrzosowo, Blue Gas Uników sent the letter in which it demanded that the Ministry stopped breaching the law by extending the proceedings.²⁴⁶
252. As before, on 14 September 2017, the Ministry issued a ruling admitting that the proceedings were excessively lengthy. And as before, the Ministry claimed that Blue Gas Uników’s complaints were, nonetheless, unjustified. The Ministry

²³⁹ *Id.*, ¶ 197 (citing **Exhibits C-215-217**).

²⁴⁰ *Id.*, ¶ 198 (citing **Exhibit C-117**).

²⁴¹ *Id.*, ¶ 199 (citing **Exhibits C-218-219**).

²⁴² *Id.*, ¶ 200 (citing **Exhibit C-220**).

²⁴³ *Id.*, ¶ 201 (citing **Exhibit C-221**).

²⁴⁴ *Id.*, ¶ 202.

²⁴⁵ *Id.*, ¶ 204 (citing **Exhibit C-223**).

²⁴⁶ *Id.*, ¶ 205.

claimed that while the proceedings were lengthy, their duration did not result from the Ministry's misconduct, but from their specificity.²⁴⁷

5. Zakrzewo Proceedings

253. On 28 March 2014, Blue Gas Uników sent a letter to the Ministry stating that it was interested in developing the Zakrzewo. It also asked about the legal status of the deposit and whether the deposit was covered by a license. The Ministry did not respond, and Blue Gas Uników reiterated its request on 25 April 2014.²⁴⁸
254. The Ministry replied in a letter of 21 May 2014, confirming that the deposit in question was not covered by a license. As a result, on 29 September 2014, Blue Gas Zakrzewo applied for a license to recognize the Zakrzewo natural gas deposit.²⁴⁹
255. As with the Stanowice and Miedzyzdroje projects, this license application was also put aside for almost ten months, even though Blue Gas Zakrzewo repeatedly requested information on the subject.²⁵⁰ Such requests took place on 12 November 2014, 4 February 2015 and 29 May 2015, all of which received no response.²⁵¹
256. Eventually, on 8 July 2015, Blue Gas Zakrzewo sent a letter in which it demanded that the Ministry stopped breaching the law by extending the proceedings beyond statutory deadlines.²⁵²
257. Therefore, exactly as with the Stanowice and Miedzyzdroje projects, Blue Gas Zakrzewo demanded that the Ministry:
 - specify a final deadline to conclude the proceedings;
 - explain the reasons for not settling the matter on time; and
 - take measures to prevent future breaches of statutory provisions by providing time limits in administrative proceedings.²⁵³
258. On 16 July 2015 the Minister issued a ruling, refusing to commence administrative proceedings on the basis of Blue Gas Zakrzewo's license application because such proceedings had already been initiated on an application by another entity (Green Gas Polska sp. z o.o.).²⁵⁴
259. On 5 August 2015, Blue Gas Zakrzewo expressed its surprise, indicating it had learned of the third-party application almost ten months after it had been filed, despite the fact that in accordance with Art. 46 of the Geological Law, the Ministry

²⁴⁷ *Id.*, ¶ 206.

²⁴⁸ Soc, ¶ 208 (citing **Exhibits C-225-226**); Reply, ¶ 496 (citing **Exhibits C-148, 225-226**).

²⁴⁹ Soc, ¶ 209 (citing **Exhibits C-73, 148**).

²⁵⁰ *Id.*, ¶ 210 (citing **Exhibits C-227-229**).

²⁵¹ Reply, ¶ 513 (citing **Exhibits C-203-205, 230**).

²⁵² Soc, ¶ 211 (citing **Exhibit C-230**).

²⁵³ *Id.*, ¶ 212.

²⁵⁴ Soc, ¶ 214 (citing **Exhibit C-232**); Reply, ¶ 512 (citing **Exhibits C-73, 232, 234, R-109**).

should have announced this application publicly without undue delay. The Ministry's failure to perform its duties on time caused Blue Gas Zakrzewo to incur significant costs without taking into account the third-party application, the knowledge of which would have assuredly affected the SPV's business strategy.²⁵⁵

260. On 31 August 2015 the Ministry issued a ruling admitting that these proceedings were also excessively lengthy. And again, in the Ministry's opinion this situation did not constitute a material breach of the law.²⁵⁶
261. Nevertheless, as the license was to be granted during the "open-door" procedure, Blue Gas Zakrzewo awaited the mandatory publication of information regarding the third-party application. This was released on 15 September 2017.²⁵⁷ On 7 December 2015, Blue Gas Zakrzewo submitted an appropriate competitive license application.²⁵⁸
262. On 5 April 2016, the Ministry issued a letter asking for additional documents and information.²⁴⁷ Blue Gas Zakrzewo complied with the Ministry's demands in a letter of 20 April 2016.²⁵⁹
263. Green Gas Polska sp. z o.o. ultimately withdrew its license application on 18 May 2016.²⁶⁰ Therefore, on 23 June 2016, the Ministry discontinued the proceedings regarding that application. The application of Blue Gas Zakrzewo was now the only one for the Ministry to rule on, but it still took significant time.²⁶¹
264. Eventually, on 24 June 2016, the Ministry notified Blue Gas Zakrzewo of the commencement of proceedings regarding granting the license.²⁶² On 31 August 2016, the Ministry informed Blue Gas Zakrzewo that the proceedings would be concluded by 31 October 2016.²⁶³
265. After being asked about the status of the proceedings again on 2 November 2016, the Ministry once again pushed back the end date of the proceedings, this time until 30 June 2017.²⁶⁴
266. Finally, on 11 January 2017, (27 months from the submission of the initial license application and 13 months after the submission of the second license application), the Ministry notified Blue Gas Zakrzewo of the completion of the proceedings.²⁶⁵ However, Blue Gas Zakrzewo had to wait an additional four months until the Ministry granted the SPV license No. 3/2017/p. on 12 May 2017. On the same day,

²⁵⁵ Soc, ¶ 215 (citing **Exhibit C-232**).

²⁵⁶ *Id.*, ¶ 213 (citing **Exhibit C-231**).

²⁵⁷ *Id.*, ¶ 216.

²⁵⁸ *Id.*, ¶ 217 (citing **Exhibit C-234**).

²⁵⁹ Soc, ¶ 218 (citing **Exhibits C-235-236**); Reply, ¶ 517 (citing **Exhibits C-236-237, R-119**).

²⁶⁰ Reply, ¶ 517 (citing **Exhibit R-119**).

²⁶¹ Soc, ¶ 219 (citing **Exhibit C-237**).

²⁶² Soc, ¶ 221 (citing **Exhibit C-238**); Reply, ¶ 518 (citing **Exhibit C-238**).

²⁶³ Soc, ¶ 222 (citing **Exhibit C-239**); Reply, ¶ 519 (citing **Exhibits C-239-241**).

²⁶⁴ Soc, ¶ 223 (citing **Exhibits C-240-241**).

²⁶⁵ Soc, ¶ 224 (citing **Exhibits C-242-244**); Reply, ¶ 522 (citing **Exhibit C-242**).

Blue Gas entered into an agreement with the Ministry for the establishment of a mining usufruct.²⁶⁶

267. Notwithstanding this, Blue Gas Zakrzewo did not operate in a vacuum. It was a part of the Blue Gas Group which, in turn, was a vehicle for the Investment. Hence, once the other components of the vehicle broke down, Blue Gas Zakrzewo had to be scrapped along with them. Therefore, on 28 December 2017, it waived license No. 3/2017/p. Blue Gas Zakrzewo explained that as the licensee it was not able to continue the activities covered by the license (due to the lack of financing from Blue Gas Holding), and therefore all of the prerequisites for the expiration of the license referred to in Art. 38 § 2 of the Geological Law had been met.²⁶⁷
268. On 8 April 2018, more than a year from the date of the waiver, the Ministry officials sent a letter to the Roman Catholic Parish of St. Klemens in Zakrzewo stating that the Ministry had just learned that Blue Gas Zakrzewo had not commenced any geological works on the “Zakrzewo” gas deposit.²⁶⁸
269. On the same day, the Ministry issued a letter addressed to Blue Gas Zakrzewo in which it informed the company of the completion of the proceedings regarding the expiration of license No. 3/2017/p.²⁶⁹

6. Lelikow Proceedings

270. On 30 September 2014, Blue Gas Uników submitted an application to the Ministry for a license for the recognition of the Lelikow natural gas deposit.²⁷⁰
271. As with the Stanowice, Miedzyzdroje and Zakrzewo projects, this license application was also put aside for almost ten months even though Blue Gas Uników repeatedly requested information on the subject.²⁷¹
272. Consequently, on 8 July 2015 Blue Gas Uników sent a letter in which it demanded that the Ministry stopped breaching the law by extending the proceedings beyond statutory deadlines. As with the other projects, on 31 August 2015 the Ministry issued a ruling admitting that the proceedings regarding the Lelikow project were also excessively lengthy. The Ministry stated that even though it breached the applicable law governing the timeframe, it was not a material breach.²⁷²
273. As with the Miedzyzdroje Project, on 14 July 2015 the Ministry notified Blue Gas Uników of alleged deficiencies in the license application that needed to be remedied, and it requested explanatory information. Blue Gas Uników responded

²⁶⁶ Soc., ¶ 224 (citing **Exhibits C-242-244**); Reply, ¶ 498 (citing **Exhibits C-73, 77, 360-361**).

²⁶⁷ Soc., ¶ 225 (citing **Exhibit C-245**).

²⁶⁸ *Id.*, ¶ 226 (citing **Exhibit C-246**).

²⁶⁹ *Id.*, ¶ 227.

²⁷⁰ *Id.*, ¶ 229 (citing **Exhibit C-247**).

²⁷¹ *Id.*, ¶ 230 (citing **Exhibits C-227-229**).

²⁷² *Id.*, ¶ 231 (citing **Exhibits C-183, 248**).

in a letter of 23 July 2015, in which it complied with almost all of the Ministry's requests.²⁷³

274. On 18 August 2015, a little less than a year after the date of the license application, the Ministry notified Blue Gas Uników of the commencement of the administrative proceedings regarding granting the license. On 7 September 2015, the Ministry informed Blue Gas Uników of the completion of the administrative proceedings.²⁷⁴
275. On 11 November 2015, two months after it had communicated the completion of the administrative proceedings, the Ministry oddly again informed Blue Gas Uników of the completion of the same proceedings. Although the Ministry did not provide any new information, it did gain additional weeks.²⁷⁵
276. On 30 December 2015, the Ministry issued a decision refusing to grant the license that Blue Gas Uników had applied for within the framework of the Lelików Project. In its reasoning, the Ministry stated that Blue Gas Uników had not submitted an environmental decision.²⁷⁶
277. In response, on 28 January 2016 Blue Gas Uników sent a letter in which it demanded that the Ministry overturn its decision entirely and issue a decision on granting the license for the recognition of the Lelików natural gas deposit. In support of this motion, Blue Gas Uników amended the license application so there would be no doubt that applying for the environmental decision, as described in the Ministry's decision of 30 December 2015, would be redundant.²⁷⁷
278. Despite no legal basis for doing so, on 23 February 2016, the Ministry informed Blue Gas Uników of the commencement of new proceedings regarding the license application, as amended by the 28 January 2016 letter.²⁷⁸
279. A new application meant new deadlines, which would be extended even further: first, until 30 May 2016 and then until 31 July 2016. This was one of the reasons for Blue Gas Holding's letter of 15 April 2016.²⁷⁹
280. On 30 June 2016, the Ministry asked Blue Gas Uników for additional documents and explanations. Blue Gas Uników responded with a letter of 3 August 2016.²⁸⁰ The Ministry did not respond to the supplementation and explanations for more than ten months. Instead, it extended the deadline for the proceedings to be completed until 31 May 2017.²⁸¹

²⁷³ Soc, ¶ 232 (citing **Exhibits C-249-250**); Reply, ¶ 588.

²⁷⁴ Soc, ¶ 233 (citing **Exhibits C-251-252**).

²⁷⁵ *Id.*, ¶ 234 (citing **Exhibit C-253**).

²⁷⁶ *Id.*, ¶ 235 (citing **Exhibit C-254**).

²⁷⁷ *Id.*, ¶ 236 (citing **Exhibit C-255**).

²⁷⁸ *Id.*, ¶ 237 (citing **Exhibit C-256**).

²⁷⁹ *Id.*, ¶ 238 (citing **Exhibits C-257-258**).

²⁸⁰ *Id.*, ¶ 239 (citing **Exhibits C-259-260**).

²⁸¹ Soc, ¶ 240 (citing **Exhibit C-261**); Reply, ¶ 615 (citing **Exhibits C-136, 261, 368, R-135, 137**).

281. After this new deadline lapsed, the Ministry called on Blue Gas Uników to provide more explanations. Blue Gas Uników responded to the Ministry's demands on 27 June 2017, limiting its comments to the minimum necessary as, considering past experiences, Blue Gas Uników assumed more elaborate responses would not accomplish anything and could give the Ministry a reason for extending the proceedings further.²⁸² In this letter, the company attached a license application with a revised title indicating a "prospection and exploration (exploration and recognition) license" as the type of license being applied for with respect to the Lelikow deposit.²⁸³
282. On 10 August 2017, together with Blue Gas Stanowice and Blue Gas Wrzosowo, Blue Gas Uników sent the letter in which it demanded that the Ministry stop breaching the law by extending the proceedings. This time, however, the Ministry did not issue a ruling regarding the Lelikow Project, but instead ignored the demand.²⁸⁴

7. Reports by the Supreme Audit Office

283. The Supreme Audit Office (the "**NIK**") is the top independent state audit authority whose mission is to safeguard public spending. For over 90 years, NIK has looked into the way the Polish state operates and how it spends public funds. NIK investigates all areas of state activity where public money or state assets are involved. NIK also checks whether public institutions meet their objectives effectively, efficiently and economically. Every year, NIK audits several thousand entities, and on this basis, it develops a report that describes the overall picture of how well the Polish state is functioning. Pronouncements on audit results are submitted to the Sejm (the lower chamber of the Polish Parliament) and to the institutions responsible for the proper functioning of the audited entities.²⁸⁵
284. One of the institutions NIK audits is the Ministry. One of the areas of the Ministry's activities which NIK audited is licensing proceedings.²⁸⁶ The NIK's findings in this respect can be found in NIK's report of August 2017, entitled "Granting a license for the exploration and recognition of copper and hydrocarbon deposits, including shale gas" (the "**NIK Report**"). It covered the years 2008–2016 for licenses regarding copper and hydrocarbons from conventional deposits including natural gas, and the years 2013–2016 regarding licenses for the exploration and recognition of shale gas deposits.²⁸⁷
285. One of the fundamental weaknesses NIK identified with the Ministry was the lack of an appropriate licensing policy. NIK suggested that a long-term strategy of the

²⁸² Soc, ¶ 241 (citing **Exhibits C-262-263**); Reply, ¶ 569 (citing **Exhibit C-263**).

²⁸³ Reply, ¶ 569 (citing **Exhibit C-263**).

²⁸⁴ Soc, ¶ 242 (citing **Exhibit C-174**).

²⁸⁵ *Id.*, ¶ 244.

²⁸⁶ *Id.*, ¶ 245.

²⁸⁷ *Id.*, ¶ 246.

State's activities in the exploration and mining sector would increase the operational confidence of business entities.²⁸⁸

286. The NIK Report also drew attention to the fact that the criteria for assessing applications for licenses was unclear and ambiguous. It indicated that the Ministry should have developed uniform, objective and non-discriminatory criteria. Meanwhile, it characterized the Ministry's decisions as arbitrary.²⁸⁹
287. In addition, NIK considered the Ministry's internal procedures to be inadequate, unreliable and to carry a significant risk of irregularities which led to a lack of transparency in administrative proceedings. It stated that such procedures should serve to develop a uniform and transparent methodology for processing applications and indicate the order in which they are to be processed. They should also help the Ministry establish appropriate and effective controlling mechanisms. NIK firmly stated that such internal rules are an important element of implementing the principles of the proper and efficient conducting of administrative proceedings, included in the Administrative Procedure Code.²⁹⁰
288. Another problem NIK observed was the faulty organization of work at the Ministry which prevented the timely and reliable meeting of its objectives. Primarily, this issue manifested itself in insufficient staffing. As NIK noted, the Ministry did not carry out an analysis of the optimal level of employment, nor the potential effects of staff shortages, and as a consequence it was not prepared for a sudden increase in applications. Thus, as NIK emphasized, "the ill-fitting organization of work and staff shortages" "in the period when entrepreneurs expressed increased interest in obtaining licenses" led to an accumulation of "cases pending settlement and, in result, the deadlines imposed by the principles of administrative procedure not being observed."²⁹¹
289. As a consequence, the process of examining license applications was lengthy and inconsistent. In matters related to applications for granting or amending a license for the exploration and recognition of hydrocarbon deposits, including natural gas, the processing time ranged from 17 up to as many as 719 days, and thus the difference exceeded two years.²⁹²
290. NIK's observations also included breaches of law, including the provisions of the Administrative Procedure Code and the Geological Law. Breaches were found in 47 out of 57 administrative proceedings, a ratio of 82%, regarding granting and changing licenses for the exploration and recognition of copper and hydrocarbon deposits. The violations concerned regulations on: (i) settling administrative matters without delay; (ii) informing the parties of the commencement of proceedings; (iii) statutory deadlines; (iv) informing the parties of a matter not

²⁸⁸ *Id.*, ¶ 247 (citing **Exhibit C-264**).

²⁸⁹ *Id.*, ¶ 248 (citing **Exhibit C-265**).

²⁹⁰ *Id.*, ¶ 249 (citing **Exhibit C-266**).

²⁹¹ *Id.*, ¶ 250 (citing **Exhibit C-267**).

²⁹² *Id.*, ¶ 251 (citing **Exhibit C-268**).

being settled on time, reasons for delays and setting new deadlines for a case to be settled; and (v) summoning the parties to supplement their applications.²⁹³

291. NIK is an independent state institution. Its reports are one of the most reliable sources of information about the activities of administrative authorities, both governmental and municipal, organizations utilizing public funds as well as commercial entities owned or controlled by those authorities. At the same time, it is a *statio fisci*. It has no legal personality separate from the Respondent. It represents the Respondent.²⁹⁴
292. Accordingly, it must be acknowledged that for the purposes of this arbitration the NIK Report serves as both “an indictment and confession.” One representative of the Respondent (NIK) accused the other (the Ministry) of systematically breaching its legal obligations towards entrepreneurs who applied for licenses for the exploration and recognition of copper and hydrocarbon deposits. At the same time, by determining these facts, NIK confirmed that the Respondent is liable for the breaches of law described in the NIK Report.²⁹⁵

III. FACTUAL SUMMARY PROVIDED BY THE RESPONDENT

A. Uników Project

1. Proceedings for non-compliance by Blue Gas Uników exploration license

293. By letter of 9 November 2012, the Ministry notified Blue Gas Uników of its decision to initiate proceedings for non-compliance with the Uników exploration licence of 31 March 2009. The Ministry took the decision after having reviewed the explanatory reports submitted by Blue Gas Uników, which brought about doubts as to whether Blue Gas Uników had complied with the terms and conditions of the license. The Ministry explained that under the licence, Blue Gas Uników was to (i) reconstruct the Uników-2 well (between March 2009 and March 2010); (ii) perform 10 km² of 3D seismic works (between March 2010 and March 2012); and (iii) drill a well to the depth of 2,000 m (between March 2012 and March 2014). The Ministry pointed out in letters of 24 July 2012 and 26 July 2012 that Blue Gas Uników had only confirmed to have completed the first requirement.²⁹⁶
294. Blue Gas Uników provided additional explanations, but the Ministry remained concerned and on 22 February 2013 instructed Blue Gas Uników to immediately stop its infringement of the 31 March 2009 license by commencing the 3D seismic works by 30 April 2013. The Ministry’s decision indicated that 3D seismic works at the Uników location had not been commenced, and had not been finished by 31

²⁹³ *Id.*, ¶ 252 (citing **Exhibits C-269**).

²⁹⁴ *Id.*, ¶ 253.

²⁹⁵ *Id.*, ¶ 254.

²⁹⁶ Statement of Defense (“**Sod**”), ¶ 54 (citing **Exhibits C-87-88**).

March 2012, meaning that Blue Gas Uników had failed to comply with the license.²⁹⁷

295. On 12 March 2013, Blue Gas Uników asked the Chief National Geologist for a meeting to discuss the issues related to the performance of the licence by Blue Gas Uników in connection with the Ministry's 22 February 2013 decision. The Ministry requested Blue Gas Uników to provide all communications be submitted in writing.²⁹⁸
296. On 21 March 2013, Blue Gas Uników challenged the Ministry's 22 February 2013 decision by filing for the reconsideration of the case. After Blue Gas Uników provided the Ministry with additional explanation, the Ministry issued its decision on 14 August 2013.²⁹⁹
297. In its decision, the Ministry upheld its 22 February 2013 and provided a new deadline 30 October 2015 by which Blue Gas Uników was to commence 3D seismic works. The change of the deadline was of purely formal character, as the previous deadline had already expired by the time the Ministry had issued its decision on reconsideration.³⁰⁰ The Ministry explained to Blue Gas Uników that it did not comply with the licence by failing to commence 3D seismic works by 31 March 2012.³⁰¹ This decision could have been challenged by Blue Gas Uników before the Polish Administrative Court, but Blue Gas Uników chose not to.³⁰²

2. Proceedings for modification of the Uników exploration license of 31 March 2009

298. On 19 September 2013, Blue Gas Uników filed an application for modification of the Uników exploration licence of 31 March 2009 by (i) extending the validity of the licence to 30 September 2015 and (ii) changing the scope of the works in stage III, increasing the drilling depth to approx. 2,100 m.³⁰³
299. As the proceedings for the modification were instigated, Blue Gas Uników submitted several related applications, including (i) the application of 18 September 2013 for modification of the licence; (ii) letter of 30 October 2013 supplementing the modification application; (iii) letter of 7 November 2013 supplementing the modification application; (iv) letter of 9 December 2013 amending the original licence modification application; and (v) letter of 23 December 2013 modifying/supplementing the application for modification.³⁰⁴ Only after such

²⁹⁷ *Id.*, ¶ 55 (citing **Exhibits C-90, R-3**).

²⁹⁸ *Id.*, ¶ 57.

²⁹⁹ *Id.*, ¶ 58 (citing **Exhibit C-94**).

³⁰⁰ *Id.*, ¶ 59 (citing **Exhibit C-94**).

³⁰¹ *Id.*, ¶ 61.

³⁰² Statement of Rejoinder ("Rejoinder"), ¶ 61.

³⁰³ *Sod*, ¶ 63 (citing **Exhibit C-96**).

³⁰⁴ *Id.*, ¶ 64 (citing **Exhibits C-96-98, R-4**).

letters were submitted and analyzed could the Ministry have formally commence the proceedings.³⁰⁵

300. Consequently, on 23 January 2014 the Ministry notified Blue Gas Uników that the proceedings for the modification of the Uników exploration licence of 31 March 2009 had been instigated. On that same day, the Ministry requested explanations to resolve confusion that had been created by Blue Gas Uników's numerous letters supplementing or modifying the original 18 September 2013 application. The Ministry requested Blue Gas Uników (i) to explain when the trial exploitation of the Uników-2 well was commenced and (ii) to modify Blue Gas Uników's licence modification application appropriately, taking into account that "[...] *the works planned by you [Blue Gas Uników] in between May and September 2015, consisting in the preparation and submission of an application for a concession for the extraction of natural gas from a deposit in the area of "Uników" are not included in the scope of exploratory works covered by the concession No. 19/2009/p and therefore cannot be entered as one of the conditions of this concession.*"³⁰⁶
301. In its letter of 28 January 2014, the Ministry explained that: "[...] *the extension of the deadline for settling this matter [i.e. modifying the licence] is caused by the necessity to supplement the evidence, including obtaining further explanations from the Applicant concerning the application submitted to the concession authority.*"³⁰⁷
302. It was after this 28 January 2014 letter that Blue Gas Uników submitted additional explanations in letters of 31 January 2014 and 11 February 2014. In doing so, Blue Gas Uników submitted a series of explanations, which caused additional confusion and disrupted the progress of the proceedings.³⁰⁸
303. The Ministry processed Blue Gas Uników's explanations and changes to the application for amendment of the 31 March 2009 Uników exploration license.³⁰⁹ Pursuant to the applicable law, the Ministry prepared a draft decision on this amendment application and on 13 February transmitted it to the relevant authorities for consultation. Those authorities then issued the decisions and delivered them to the Ministry.³¹⁰
304. On 6 March 2014, the Ministry requested Blue Gas Uników to provide explanations concerning the financing of the activity to be performed in accordance with Blue Gas Uników's application for amendment of the 31 March 2009 Uników exploration licence. These explanations were necessary as the same loans were planned for Blue Gas Uników to finance the activities under the Wrzosowo exploration licence for which Blue Gas Uników had applied.³¹¹

³⁰⁵ Rejoinder, ¶ 65.

³⁰⁶ Sod, ¶ 65 (citing **Exhibits C-101-102**).

³⁰⁷ *Id.*, ¶ 67 (citing **Exhibit C-103**).

³⁰⁸ *Id.*, ¶ 68 (citing **Exhibits C-99-100**).

³⁰⁹ *Id.*, ¶ 69.

³¹⁰ *Id.*, ¶ 70 (citing **Exhibits R-5-6**).

³¹¹ *Id.*, ¶ 71 (citing **Exhibit R-7**).

305. Blue Gas Uników provided its explanations on 14 March 2014. After obtaining Blue Gas Uników's statement of 19 March 2014 that it would not submit any additional comments or pleadings related to the proceedings, on 26 March 2014 the Ministry issued its decision on amendment of the 31 March 2009 licence.³¹² The decision reflected the fact that Blue Gas Uników's application had been modified in a series of pleadings throughout the proceedings.³¹³
306. The main amendments to the 31 March 2009 included: (i) removing the requirement of performing the 3D seismic works in accordance with Blue Gas Uników's request; (ii) extending the second phase of the exploration works, i.e., the trial exploitation of the Uników-2 well until 30 September 2015; and (iii) removing the third phase of the exploration works, i.e. Blue Gas Uników was no longer required or allowed to drill additional wells. This meant that Blue Gas Uników was only allowed to exploit the reconstructed Uników-2 well.³¹⁴

3. Proceedings for conversion of the Uników exploration license of 31 March 2009 into a unified license for prospection, exploration and mining of the Uników deposit, i.e. the Uników unified license

307. On 10 July 2015, Blue Gas Uników applied to the Ministry for conversion of the 31 March 2009 Uników exploration licence into a Uników unified licence.³¹⁵
308. In this application, Blue Gas Uników generally sought to reintroduce into the unified licence the works that earlier had been removed from the 31 March 2009 Uników exploration licence pursuant to Blue Gas Uników's application for amendment of that licence.³¹⁶ Blue Gas Uników requested that the unified licence include two phases: (i) the prospection and exploration phase of 5 years and (ii) the mining phase of 30 years.³¹⁷
309. On 14 July 2015, the Ministry called on Blue Gas Uników to (i) submit information on Blue Gas Uników's "experience in performing activities related to prospecting and exploration of hydrocarbon deposits or extraction of hydrocarbons from deposits (item 6 of the application), or providing information that the Applicant does not intend to apply for a concession independently or as an operator jointly with other entities," and (ii) submit "a document or documents approving geological documentation of a hydrocarbon deposit or any other equivalent document or document confirming that for a period of at least 3 years the activity consisting in the extraction of hydrocarbons from a deposit has been continuously conducted, unless the Applicant does not intend to apply for a concession independently or as an operator jointly with other entities." The Ministry explained that the request for information was a response "to the submission by Blue Gas N'R'G Sp. z o.o. of the application for the qualification procedure, prepared on the

³¹² *Id.*, ¶ 72 (citing **Exhibits R-8-9, C-106**).

³¹³ *Sod*, ¶ 73; Rejoinder, ¶ 72.

³¹⁴ *Sod*, ¶ 74 (citing **Exhibit C-106**).

³¹⁵ *Id.*, ¶ 76 (citing **Exhibit C-106**).

³¹⁶ *Id.*, ¶ 77.

³¹⁷ *Id.*, ¶ 78 (citing **Exhibit C-107**).

basis of the annex to the Decree of the Council of Ministers of 20 April 2015 on the application for the qualification procedure (O. J. of 22 May 2015, item 708) [...]” which was filed by Blue Gas Uników on 3 July 2015, and not as a response to Blue Gas Uników’s application of 10 July 2015 for conversion of the 31 March 2009 Uników exploration licence into a unified licence.³¹⁸

310. On 27 July 2015, Blue Gas Uników explained to the Ministry that a separate comprehensive procedure, which required fulfilment of the restrictive conditions as listed in the Ministry’s letter of 14 July 2015, should not be applied to the 10 July 2015 application for conversion of the 31 March 2009 licence into a unified licence. Blue Gas Uników explained that the precondition of the procedure for conversion of the 31 March 2009 licence into the unified licence was the qualification procedure. These communications complicated the matter and required clarification attempts on the part of the Ministry.³¹⁹
311. Having reviewed Blue Gas Uników’s (i) 10 July 2015 application for conversion of the 31 March 2009 licence into a unified licence and (ii) explanations of 27 July 2015, the Ministry, by the letter of 20 August 2015, requested Blue Gas Uników to remedy the formal defects of the application for the conversion by providing: *“(1) the financial statements of the Company for 2014 and the statement of Blue Gas N'R'G Holding Sp. z o.o. on its readiness to finance the activities covered by your application [...]; (2) information on the technologies of the work to be carried out in order to achieve the planned objective; (3) two copies of the geological works design prepared in accordance with the requirements specified in the Regulation of the Minister of Environment of 20 December 2011 on detailed requirements concerning geological works designs, including works the performance of which requires obtaining a concession (O.J. of 2011, No. 288, item 1696), as amended by the Regulation of the Minister for the Environment of 1 July 2015 amending the Regulation on detailed requirements concerning geological works designs, including works the performance of which requires obtaining a concession (O. J. of 2015, item 964); (4) description of geological surveys, including geological works, performed so far under concession No. 19/2009/p for the exploration of the Uników natural gas deposits with the presentation of their results; (5) application to carry out an investigation into the assessment of whether the company is under the corporate control of a third country, entity or a national of a third country, and in the case of such control, whether this control may threaten the security of the state [the qualification procedure].”*³²⁰
312. With respect to the qualification procedure as a precondition to the procedure for conversion of the licence, the Ministry, in its letter of 20 August 2015, explained that: *“It should be noted that the application for the qualification procedure dated 3 July 2015 [...] was received by the Minister of the Environment on 6 July 2015, i.e. a few days before the application for the transformation [conversion of the licence] was submitted to the Ministry of the Environment and even before the*

³¹⁸ *Id.*, ¶ 80 (citing Exhibits C-107-108, R-10).

³¹⁹ *Id.*, ¶ 82 (citing Exhibit RWS-1, ¶¶ 60-65, Exhibit C-109).

³²⁰ *Id.*, ¶ 83 (citing Exhibit C-110).

application for the transformation was drawn up. Due to purely chronological reasons, it was therefore impossible to consider the application of 3 July 2015 as submitted pursuant to Article 9, sec. 4 of the Act of 11 July 2014 on amending the Act - Geological and Mining Law and certain other acts as Annex to the application of 10 July 2015 [application for conversion of the licence]. As a result, your request for the qualification procedure is currently being processed on its own, without any connection with the subsequent proposal for the transformation of concession No 19/2009/p. If it is your intention that the application for conducting the qualification procedure of 3 July 2015 should be treated by the concession authority as an application submitted pursuant to Article 9(4)(1) of the Act of 11 July 2014 amending the Act - Geological and Mining Law and certain other acts under the procedure for the change of concession No. 19/2009/p, please submit the relevant statement in this matter.”³²¹

313. Additionally, in its letter of 20 August 2015, the Ministry asked Blue Gas Uników for further explanation regarding the following issues:

- Blue Gas Uników attached to its 10 July 2015 application of for conversion of the licence Addendum No. 1 to the PRG Documentation of the Uników deposit – the Ministry indicated that the relevant law did not require that an application for conversion of a licence be accompanied by such documentation. The Ministry also indicated that “*simultaneous submission by the company [Blue Gas Uników] of an application for the change of concession No. 19/2009/p pursuant to the procedure provided for in Article 9 of the Act amending the Act - Geological and Mining Law and certain other acts, as well as the geological documentation of the deposit is a contradictory action. If the company has documented the Uników cold gas deposit in a sufficient manner to prepare its geological and investment project documentation, it is not justified to submit an application for the change of concession No. 19/2009/p, providing for a five-year prospecting and exploration stage. However, if Blue Gas N'R'G Sp. z o.o. is of the opinion that it is necessary and justified to continue exploration of the Uników natural gas deposit, then it is unreasonable and premature to submit an annex to the geological documentation for approval by the authority, summarizing the work performed under concession No. 19/2009/p and documenting the Uników deposit.*”
- The documentation submitted by Blue Gas Uników was inconsistent as to the date on which the trial extraction of the Uników natural gas deposit by the reconstructed Uników-2 well started, which required Blue Gas Uników’s explanations.

³²¹ *Id.*, ¶ 84 (citing **Exhibit C-110**).

- Joint duration of (i) the prospection and exploration phase as well as (ii) the exploration phase, could not exceed 30 years. The relevant adjustment of Blue Gas Uników's 10 July 2015 application of for conversion of the licence was therefore required.³²²
314. Blue Gas Uników indicated to the Ministry that some of the information and documentation the Ministry requested could not have been produced because geologist engaged by Blue Gas Uników was not available at that time.³²³ Consequently, on 4 September 2015 Blue Gas Uników submitted its modified application for conversion of the 31 March 2009 licence. At the same, Blue Gas Uników requested that the unified licence include two phases: (i) the prospection and exploration phase of 5 years, consisting of the compulsory subphase and the optional phase; and (ii) the mining phase of 30 years.
315. On 11 September 2015, the Ministry notified Blue Gas Uników that the proceedings for conversion of the licence had commenced.³²⁴ Such letter only confirmed that the proceedings had commenced, meaning that the formal deficiencies had been remedied. The gathering of evidence to evaluate the application and delivering an opinion were separate stages.³²⁵
316. The qualification procedure related to Blue Gas Uników's modified application for conversion of the licence was conducted as follows: 1) On 17 September 2015 the Ministry requested the relevant authorities (i.e. the Head of the National Intelligence, the General Inspector of Financial Information, the Head of the National Security Agency and the Financial Supervision Agency) to conduct the qualification procedure; (2) on 16 October 2015, the relevant decision was issued by the Head of the National Intelligence; (3) on 22 October 2015, the relevant decision was issued by the General Inspector of Financial Information; (4) on 27 October 2015, the relevant decision was issued by the Head of the National Security Agency; and (5) on 27 November 2015, the relevant decision was issued by the Financial Supervision Agency.³²⁶
317. On 15 December 2015, the Ministry notified Blue Gas Uników that its modified application of 4 September 2015 positively passed the qualification procedure and moved on to the next stage of the proceedings.³²⁷
318. By the same letter of 15 December 2015, the Ministry indicated that, as the qualification procedure had been concluded only recently, it was impossible to conclude the proceedings for conversion of the licence before 13 December 2015, i.e. before the end of the trial exploitation of the Uników deposit via the reconstructed Uników-2 well. The Ministry suggested that Blue Gas Uników amend its 4 September 2009 modified application by removing the trial exploitation. This

³²² *Id.*, ¶ 85.

³²³ *Id.*, ¶ 87 (citing **Exhibit R-11**).

³²⁴ *Id.*, ¶ 90.

³²⁵ Rejoinder, ¶ 75 (citing **Exhibit CER-8**, ¶ 37).

³²⁶ *Sod*, ¶ 95 (citing **Exhibits R-15-18**).

³²⁷ *Id.*, ¶ 96 (citing **Exhibit R-19**).

would require amendments to (i) Blue Gas Uników's 4 September 2015 modified application for conversion and (ii) the PRG Documentation attached to the same application.³²⁸

319. In the same 15 December 2015 letter, the Ministry also requested Blue Gas Uników to supplement its 3 September 2015 modified application for conversion of the 31 March 2009 licence by: (1) providing information on the technologies planned to be applied by Blue Gas Uników in order to achieve the relevant aims under the unified licence; (2) amending the description of the geological works performed under the 31 March 2009 Uników exploration licence; and (3) paying the outstanding stamp duty for considering Blue Gas Uników's 4 September 2015 modified application for conversion.³²⁹
320. In a letter of 18 December 2015, Blue Gas Uników did not question the reasonableness or lawfulness of the Ministry's requests. Blue Gas Uników simply made the relevant amendments/completions to its 4 September 2015 modified application for conversion, as requested by the Ministry.³³⁰
321. On 5 January 2016, the Ministry notified Blue Gas Uników that the proceedings for conversion of the licence had been completed and that Blue Gas Uników could access the files of the proceedings and present its statements on the collected evidence and materials.³³¹
322. On 19 January 2016, the Ministry received from Blue Gas Uników a letter in which the Blue Gas Uników stated that it did not intend to make use of its right to access the files of the proceedings and present its statements on the collected evidence and materials.³³²
323. On 11 February 2016, Blue Gas Uników provided the Ministry with a signed agreement on the establishment of a mining usufruct of the Uników natural gas deposit and extraction of the Uników natural gas deposit, which was necessary for Blue Gas Uników to perform its activities under the unified licence requested by Blue Gas Uników in its 4 September 2015 modified application.³³³
324. The Ministry's Department of Geology and Geological Licences, responsible for managing the proceedings for conversion of the 31 March 2009 licence into a unified licence, was notified by the Ministry's Department of Geological Supervision of the lack of compliance by Blue Gas Uników with respect to the terms of the 31 March 2009 Uników exploration licence.³³⁴

³²⁸ *Id.*, ¶ 97 (citing **Exhibit R-19**).

³²⁹ *Id.*, ¶ 98 (citing **Exhibit R-19**).

³³⁰ *Id.*, ¶ 99 (citing **Exhibit C-115**).

³³¹ Sod, ¶ 100 (citing **Exhibit C-116**); Rejoinder, ¶ 81.

³³² Sod, ¶ 102 (citing **Exhibit R-20**); Rejoinder, ¶ 81.

³³³ Sod, ¶ 103 (citing **Exhibit R-21**); Rejoinder, ¶ 81.

³³⁴ Sod, ¶ 104 (citing **Exhibits RWS-1**, ¶ 95, **C-106**); Rejoinder, ¶ 81 (citing **Exhibit RWS-1**, ¶¶ 95-96).

325. On 9 August 2016, after engaging in works that went beyond standard Ministry activities, thus necessitating additional time, the Ministry issued its decision converting the 31 March 2009 Uników exploration licence into a unified Uników licence.³³⁵ The 9 August 2016 unified Uników licence was granted for 30 years (5 years for the prospection and exploration phases and 25 years for the mining phase, which started to run from the date on which the investment decision was issued). The prospection and exploration phases included: (i) obligatory performance of the Uników deposit production test using the reconstructed Uników-2 well performed until 31 December 2016; (ii) optional performance, from 1 January 2017 to 9 August 2021, of the 3D seismic analysis, 2D seismic analysis, reconstruction of the Uników-1, 4, 8, 9 wells, performance of a well up to a maximum depth of 2,300 m and trial exploitation of the Uników deposit using a reconstructed or newly created well.³³⁶
326. The 9 August 2016 unified licence set forth that: (i) the scope of geological works was determined in the PRG Documentation attached to Blue Gas Uników's application for conversion of the 31 March 2009 licence into a unified licence and that (ii) information on the detailed location of geological sites, including geological works, would be presented to the Ministry before the commencement of on-site works in Addendums to the PRG Documentation, in accordance with Article 80a of the Geological and Mining Law.³³⁷
327. On the same date, the agreement on the establishment of a mining usufruct was entered into by the Ministry.³³⁸

4. Two proceedings for approval of the PRG Documentation in the territorial area of Uników as well as outside

328. On 24 August 2016, Blue Gas Uników submitted two groups of documentation for the Ministry's approval: (1) PRG Documentation - 3D seismic analyses: (i) only outside of the area of Uników unified license, *i.e.*, the area covered by licence no. 31/2011/p granted to ORLEN Upstream Sp. z o.o.; and (ii) some additional area not covered by licences; and (2) Addendum No. 1 to the PRG Documentation for for the 3D seismic investigations within the area covered by the Uników licence.³³⁹
329. Concerning the first group of documentation, on 22 September 2016 the Ministry issued a decision, raising an objection under Article 85a of the Geological and Mining Law by indicating that the PRG Documentation failed to comply with the requirements set forth under the Regulation on specific requirements for projects of geological works, including works which may be performed without a licence.³⁴⁰

³³⁵ Rejoinder, ¶ 82.

³³⁶ Sod, ¶ 108 (citing **Exhibit C-28**).

³³⁷ *Id.*, ¶ 109 (citing **Exhibit C-28**).

³³⁸ *Id.*, ¶ 110 (citing **Exhibit C-29**).

³³⁹ Sod, ¶ 112 (citing **Exhibit C-118**); Rejoinder, ¶ 94 (citing **Exhibit C-118**).

³⁴⁰ Sod, ¶ 116 (citing **Exhibit C-21**).

330. By letter on 10 October 2016, Blue Gas Uników filed with the Ministry its motion for reconsideration of the case. The Ministry's respective decision with a detailed reasoning was issued on 18 January 2017, upholding its decision of 22 September 2016.³⁴¹
331. Concerning the second group of documentation, the Ministry considered certain factors when deciding on how to proceed: (1) the significant workload of the Ministry's staff who supervised and/or conducted the administrative proceedings concerning natural gas and oil, and the grade of urgency of the remaining administrative proceedings which required setting priorities; (2) the low urgency of Blue Gas Uników's 24 August 2016 application, with Blue Gas Uników reserving the right to decide whether to perform the geological works in proposed Addendum No. 1 to the PRG Documentation and failing to indicate it would perform such works; (3) After the 24 August 2016 application was submitted by Blue Gas Uników, subsequent acts seemed to confirm the lack of certainty regarding whether Blue Gas Uników would perform the optional geological works; and (4) similar, obligatory geological works had already been removed from the scope of the Uników 31 March 2009 exploration licence, upon Blue Gas Uników's own application.³⁴²
332. On 10 August 2017, after having reviewed the 18 July 2017 modified application for approval of Addendum No. 1 to the PRG Documentation, the Ministry called on Blue Gas Uników to remedy several formal deficiencies. Namely, the Ministry relied on the relevant provisions of Polish law and requested Blue Gas Uników to comply with several standard legal requirements which should have been known to a professional entity acting in the area of prospection, exploration and mining of natural gas deposits, i.e.: (1) to submit information on Blue Gas Uników's rights to the real estate on which it intended to perform geological works; (2) to submit a schedule of the intended geological works, including deadlines for commencement of the particular geological works and for completing them; (3) to submit graphic attachments prepared in accordance with § 1(3) and (4) as well as § 2 of the Regulation on specific requirements for projects of geological works, including works which may be performed without licence; and (4) to have Addendum No. 1 signed by a person legally authorized to perform, supervise and direct geological works, including prospection and exploration of hydrocarbons.³⁴³
333. In addition, the Ministry drew Blue Gas Uników's attention to some obvious errors in the coordinates determining the territory on which the 3D investigations were to be performed according to Addendum No. 1 to the PRG Documentation. The territory determined according to those coordinates was situated outside the Uników territory under the 9 August 2016 unified Uników licence.³⁴⁴

³⁴¹ *Id.*, ¶ 117 (citing **Exhibit C-123**).

³⁴² *Id.*, ¶ 118 (citing **Exhibit RWS-1**, ¶¶ 106-108, **RWS-3**, ¶¶ 20-21).

³⁴³ *Id.*, ¶ 121 (citing **Exhibit R-27**).

³⁴⁴ *Id.*, ¶ 122 (citing **Exhibit R-27**).

334. A chain of events ultimately led to the Ministry's 21 December 2017 decision on approval of Addendum No. 1 to the PRG Documentation. These events were as follows: (1) by a letter of 15 September 2017, the Ministry informed Blue Gas Uników that, after the formal deficiencies of the application for approval of Addendum No. 1 to the PRG Documentation had been remedied, the administrative proceedings for the approval were instigated; (2) by another letter of 15 September 2017, after having reviewed the corrected Addendum No. 1 to the PRG Documentation submitted by Blue Gas Uników with its 4 September 2017 letter, the Ministry called on Blue Gas Uników to provide explanations in relation to the corrected Addendum No. 1 submitted by Blue Gas Uników; (3) on 5 October 2017, Blue Gas Uników submitted its explanations in response to the Ministry's letter of 15 September 2017; (4) on 13 November 2017, the Ministry forwarded a draft of the decision on approval of Addendum No. 1 to the PRG Documentation to the relevant authorities and requested those authorities for their opinion on the draft; and (5) on 21 December 2017, the Ministry issued a decision on approval of Addendum No. 1 to the PRG Documentation.³⁴⁵

5. Proceedings for approval of the DGI documentation

335. On 8 September 2016, Blue Gas Uników submitted to the Ministry its application for approval of the DGI Documentation.
336. By three letters of 4 November 2016, the Ministry: (1) transmitted the DGI Documentation to the Mineral Resources Commission for it to verify the substantive and legal correctness; (2) transmitted the DGI Documentation to the Polish Geological Institute for it to verify whether the corners' coordinates of the territory, which the DGI Documentation related to, were correctly established; (3) informed Blue Gas Uników that the DGI Documentation was transmitted to (i) the Mineral Resources Commission for consultation and (ii) the Ministry, which was reviewing and verifying the correctness of the DGI Documentation as well as the corners' coordinates of the territory.³⁴⁶
337. On 23 November 2016, the Polish Geological Institute submitted its opinion, as requested by the Ministry, in which some deficiencies of the DGI Documentation were identified.
338. On 5 December 2016, the Ministry notified Blue Gas Uników of the Mineral Resources Commission's session concerning the DGI Documentation that was to be held on 15 December 2016. The following day, Blue Gas Uników was provided with the 5 December 2016 opinion prepared by Mr Artur Marcinkowski. The opinion identified several deficiencies in the DGI Documentation submitted by Blue Gas Uników.³⁴⁷

³⁴⁵ *Id.*, ¶ 124 (citing **Exhibits R-29-32, C-140**).

³⁴⁶ *Id.*, ¶ 129 (citing **Exhibits R-34-35, C-125**).

³⁴⁷ *Id.*, ¶ 131 (citing **Exhibits C-305-306**).

339. On 15 December 2016, the session of the Mineral Resources Commission was held. In addition to the Members of the Mineral Resources Commission, both Blue Gas Uników's as well as the Ministry's representatives participated in the session and the deficiencies identified by the Commission were subject to the discussion. According to the Minutes prepared by the Mineral Resources Commission on 15 December 2016, the Commission held that Mr. Artur Marcinkowski's opinion on the DGI Documentation, submitted by Blue Gas Uników, was correct and that it shared Mr. Marcinkowski's position as expressed in his 5 December 2016 opinion.³⁴⁸
340. On 20 December 2016, the Mineral Resources Commission transmitted its opinion on the DGI Documentation. The Commission expressed its opinion that the Documentation could not be approved due to the identified errors. The Commission stated that Blue Gas Uników should attach to the DGI Documentation a proof of holding a right to using the geological information on the basis of which the Documentation had been prepared.³⁴⁹
341. On 23 January 2017, the Ministry notified Blue Gas Uników that the proceedings concerning approval of the DGI Documentation were extended until 31 March 2017. The complicated nature of the proceedings for approval of the DGI Documentation is also reflected in the Ministry's statistics, which show that the average duration of such proceedings was 245.11 days (for the proceedings which ended in 2016 with a decision on approval of the DGI Documentation), and 220.67 days (for the proceedings which ended in 2017 with a decision on approval of the DGI Documentation).³⁵⁰
342. The Ministry performed its own analysis of the DGI Documentation, including the opinion delivered by the Mineral Resources Commission. By a letter of 16 March 2017, Blue Gas Uników submitted the modified DGI Documentation and requested the Ministry to approve it. As a result of these additional submissions, the Ministry required extra time reviewing and analyzing the relevant documents.³⁵¹
343. On 15 May 2017, the Ministry, after having duly reviewed the modified DGI Documentation, called on Blue Gas Uników to remedy the deficiencies of the Documentation. The deficiencies included: (i) lack of a document proving that Blue Gas Uników paid the stamp duty for the issuance of a decision on approval of the DGI Documentation by the Ministry; and (ii) lack of a proof that Blue Gas Uników held a right to use the geological information on the basis of which the Documentation had been prepared.³⁵²
344. In that same letter, the Ministry indicated that Blue Gas Uników was required to remedy formal deficiencies in the DGI Documentation within 7 days following the receipt of the letter. The Ministry also indicated if Blue Gas Uników failed to

³⁴⁸ *Id.*, ¶ 132 (citing **Exhibits RWS-2**, ¶ 21, **R-38-39**).

³⁴⁹ *Id.*, ¶ 133 (citing **Exhibit R-38**).

³⁵⁰ *Id.*, ¶ 135 (citing **Exhibits C-126**, **RWS-3**, ¶ 18, **RWS-2**, ¶ 24).

³⁵¹ *Id.*, ¶ 136 (citing **Exhibit R-40**, **RWS-2**, ¶¶ 25-26).

³⁵² *Id.*, ¶ 137 (citing **Exhibit R-40**).

remedy the deficiencies, the application for approval of the DGI Documentation would be left unprocessed.³⁵³

345. On 18 May 2017, Blue Gas Uników (i) submitted a proof that the stamp duty for issuing a decision on approval of the DGI Documentation was paid; and (ii) requested that the proceedings for approval of the DGI documentation to be suspended. Blue Gas Uników claimed that it required about 2 weeks to adjust the DGI Documentation in accordance with the Ministry's 15 May 2017 letter.³⁵⁴
346. On 24 May 2017, the Ministry dismissed Blue Gas Uników's motion for suspension of the proceedings. The Ministry indicated that the proceedings for approval of the DGI Documentation had not been validly instigated, as Blue Gas Uników was called on to remedy the formal deficiencies in the DGI Documentation and failed to remedy those deficiencies within the statutory time limit of 7 days.³⁵⁵
347. As Blue Gas Uników did not remedy the deficiencies in the DGI Documentation within the statutory time limit, the Ministry notified Blue Gas Uników that it left its application for approval of the DGI Documentation unprocessed.³⁵⁶
348. On 26 May 2017, Blue Gas Uników submitted (i) its motion to reinstate the time limit to remedy the deficiencies in the DGI Documentation; and (ii) withdrew its motion for the proceedings for approval of the DGI Documentation to be suspended, and if the Ministry had already decided to suspend the proceedings, Blue Gas Uników applied for the proceedings to be resumed. In addition, Blue Gas Uników submitted a new version of the DGI Documentation. Blue Gas Uników admitted that the old geological documentation of 1973, containing an estimation of gas volumes in the Uników deposit, was unreliable and that the much more reliable investigation, performed by Blue Gas Uników during the trial exploitation of the Uników deposit, showed that the same was over 4 times overestimated.³⁵⁷
349. On 4 July 2017 Blue Gas Uników withdrew its motion to reinstate the time limit to remedy the deficiencies in the DGI Documentation.³⁵⁸
350. On 7 July 2017 Blue Gas Uników presented its explanation concerning Blue Gas Uników's alleged right to use the geological information on the basis of which the DGI Documentation had been prepared. In that letter, Blue Gas Uników indicated that the gas volumes in the Uników deposit were over 4 times overestimated due the unreliable estimation methodology applied by authors of the original geological documentation of 1973. In addition, Blue Gas Uników admitted that, *"[i]rrespective of the unreliability of the estimated gas deposits shown in the documentation of 1973, the geological information also contained false information*

³⁵³ Sod, ¶ 138 (citing **Exhibit R-40**); Rejoinder, ¶ 143 (citing **Exhibit R-40**).

³⁵⁴ Sod, ¶ 139 (citing **Exhibit R-41**).

³⁵⁵ Sod, ¶ 140 (citing **Exhibit R-42**); Rejoinder, ¶ 150.

³⁵⁶ Sod, ¶ 141 (citing **Exhibit C-307**); Rejoinder, ¶ 150.

³⁵⁷ Sod, ¶ 142 (citing **Exhibit R-43**).

³⁵⁸ *Id.*, ¶ 143 (citing **Exhibit R-44**).

*on how the Uników-2 borehole was sealed which led to major complications and extension of reconstruction works at the Uników-2 borehole.”*³⁵⁹

351. On 27 July 2017, the Ministry again explained to Blue Gas Uników that the proceedings for approval of the DGI Documentation were left unprocessed due to Blue Gas Uników’s failure to remedy the formal deficiencies of the DGI Documentation within the statutory time limit. The Ministry stated that the new proceedings for approval of the DGI Documentation could be instigated based on a new and complete application. The Ministry noted that the new DGI Documentation, submitted with Blue Gas Uników’s letter of 26 May 2017, could be included in the files of the new administrative proceedings.³⁶⁰
352. On 4 August 2017, Blue Gas Uników submitted a new application for approval of the DGI Documentation. Blue Gas Uników indicated that the new DGI Documentation, attached to Blue Gas Uników’s 26 May 2017 letter, should be subject to the Ministry’s approval.³⁶¹
353. After several procedural steps, the Commission presented its position on the DGI Documentation. It stated that the DGI Documentation was generally adjusted in accordance with the observations made by the Commission in its opinion of 5 December 2017.³⁶²
354. Due to the instigation of bankruptcy proceedings against Blue Gas Uników, the new proceedings for approval of the DGI Documentation were not further continued.³⁶³

B. Wrzosowo Proceedings

1. Proceedings for granting the Wrzosowo exploration license and transferring the license from Blue Gas Uników to Blue Gas Wrzosowo

355. On 22 January 2014, Blue Energy Uników submitted its application for granting the licence for exploration of the Wrzosowo deposit.³⁶⁴ The requested licence was later issued by the Ministry of Environment in form of the 16 February 2015 Wrzosowo Exploration Licence.³⁶⁵
356. On 28 February 2014, the Ministry called on Blue Gas Uników to remedy formal deficiencies in its application for the licence. In response, Blue Gas Uników, by a letter on 11 March 2014, submitted its revised application, including the revised PRG Documentation.³⁶⁶

³⁵⁹ *Id.*, ¶ 144 (citing **Exhibit R-45**).

³⁶⁰ *Id.*, ¶ 145 (citing **Exhibit C-135**).

³⁶¹ *Id.*, ¶ 146 (citing **Exhibit R-46**).

³⁶² *Id.*, ¶ 147 (citing **Exhibit R-47**).

³⁶³ *Id.*, ¶ 148 (citing **Exhibit RWS-2**, ¶ 34).

³⁶⁴ *Id.*, ¶ 181 (citing **Exhibit C-53**).

³⁶⁵ *Id.*, ¶ 181 (citing **Exhibit C-53**).

³⁶⁶ *Id.*, ¶ 182 (citing **Exhibits C-144-145**).

357. By letters of 11 March 2014 and 5 May 2014, Blue Gas Uników supplemented its revised application for a licence by submitting its financial statement, as requested by the Ministry in its letter of 28 February 2014 and notified the Ministry of the change to Blue Gas Uników's business name.³⁶⁷
358. On 25 April 2014, Blue Gas Uników requested the Ministry to provide information on the status of the proceedings.³⁶⁸
359. On 20 May 2014, the Ministry called on Blue Gas Uników to remedy the formal deficiencies of its 11 March 2014 revised application and requested some explanations related to the same application.³⁶⁹
360. On 21 May 2014, in response to Blue Gas Uników's letter of 25 April 2014, the Ministry informed Blue Gas Uników of the specifics of the procedure, *i.e.*, "[...] once Blue Gas N'R'G Sp. z o.o. [Blue Gas Uników] has supplemented the deficiencies identified in the summons of 20 May 2014, ref. No. DGK-IV-4770-104/20469/14/JP, the Ministry of the Environment will immediately forward a notice on the application lodged for publication in Official Journal of the European Union. The waiting time for the publication of the notice is independent of the Ministry of the Environment and is approximately 2 months. Upon publication of the notice, other operators will have at least 90 days to submit competing applications (see: Article 46 section 1 point 4 of the Act of 9 June 2011 Geological and Mining Law). The winner of the comparison procedure will then be subject to a standard concession award procedure in accordance with the requirements of the Code of Administrative Procedure, which should be completed within two months."³⁷⁰
361. On 4 June 2014, Blue Gas Uników provided explanations in response to the Ministry's 20 May 2014 letter. Blue Gas Uników assured the Ministry that it had the necessary financing for performing the obligatory part of the works under the Wrzosowo exploration licence and that those works would start within 6 months from the date of the Ministry's decision on granting the licence.³⁷¹
362. On 3 July 2014, the Ministry called on Blue Gas Uników to submit additional explanations/supplements to Blue Gas Uników' licence application. Once again, the nature of the requested explanations/supplements showed that Blue Gas Uników had failed to perform the necessary due diligence of Respondent's legal environment and had failed to comply with the Ministry's 20 May 2014 request to provide the relevant explanations/supplements to Blue Gas Uników's 11 March 2014 revised licence application.³⁷²

³⁶⁷ *Id.*, ¶ 183 (citing **Exhibits R-50-51**).

³⁶⁸ *Id.*, ¶ 184 (citing **Exhibit C-146**).

³⁶⁹ *Id.*, ¶ 185 (citing **Exhibit C-147**).

³⁷⁰ *Id.*, ¶ 186 (citing **Exhibits C-148, RWS-1, ¶¶ 50-55**).

³⁷¹ *Id.*, ¶ 188 (citing **Exhibit C-149**).

³⁷² *Id.*, ¶ 189.

363. As a result, the Ministry highlighted the following issues concerning the revised licence application: (1) the relevant statement regarding securing financing of the activities under the licence had not been submitted by Blue Gas Uników in its original or in a properly certified copy; (2) The relevant law, as expressly indicated by the Ministry, required that“ [...] *the PRG Documentation attached to the application for the licence should be signed by a person who holds confirmed, relevant qualifications to perform, supervise and direct geological works, together with a number of a certificate confirming qualifications, or a person who holds recognised appropriate qualifications to perform regulated professions in the field of geology, together with a number of a decision on recognition of qualifications. This requirement also includes changes to the PRG Documentation. Therefore, kindly sign the most recent changes introduced in the PRG Documentation by the author of the project, provided together with your application for granting the concession. For the sake of readability of the document, it would be advisable to submit to the concession authority a consolidated text of the PRG Documentation, taking into consideration any changes that were necessary during the present procedure.*”; (3) “*With regard to the modification of the concession application in terms of the duration of the concession (page 3 of your letter of 4.06.2014), let me point out that the requested duration of the concession (5 years) is shorter than the total duration of both planned stages (5 years, 5 months). This issue needs to be clarified, as it is not possible to introduce a provision in the text of the concession in the version suggested by you.*”; 4) the Ministry repeated its request concerning the schedule of the plan of geological works and indicated that: “*[a]ccording to your application [application for the licence], the first stage of the concession, covering the mandatory scope of works, is to last three years, followed by launch of stage II, covering the optional scope of works. Meanwhile, in the geological works schedule, you forecast the launch of optional 3D seismic survey in the 31st month from the date of granting the concession, that is in the three-year period for mandatory scope of works. Therefore, kindly modify this provision in a manner which makes it compatible with your application.*”³⁷³
364. On letter of 11 July 2014, Blue Gas Uników complied with the Ministry’s requests from the 3 July 2014 letter.³⁷⁴
365. On 15 July 2014, Blue Gas Uników asked the Ministry whether the application for the licence submitted by Blue Gas Uników was completed and when the “open door” procedure would start.³⁷⁵
366. On 15 July 2014, the Ministry requested Blue Gas Uników to submit an additional copy of the PRG Documentation.³⁷⁶ On 18 July 2014, Blue Gas Uników complied with the request.³⁷⁷

³⁷³ *Id.*, ¶ 190 (citing **Exhibit C-150**).

³⁷⁴ *Id.*, ¶ 191 (citing **Exhibit C-151**).

³⁷⁵ *Id.*, ¶ 192 (citing **Exhibits C-152, RWS-1**, ¶¶ 50-55).

³⁷⁶ *Id.*, ¶ 193 (citing **Exhibit C-153**).

³⁷⁷ *Id.*, ¶ 195 (citing **Exhibit R-52**).

367. On 8 August 2014, the Ministry informed Blue Gas Uników that: “. . . on 7 August 2014, the Department of Geology and Geological Concessions of the Ministry of the Environment submitted for publication in Official Journal of the European Union the Announcement of the Government of the Republic of Poland on granting a concession for prospecting or exploration the “Wrzosowo” natural gas deposit located in Strzeżewo area. The waiting time for the publication of the notice is independent of the Ministry of the Environment and is approximately 2 months.”³⁷⁸
368. On 5 September 2014, the announcement regarding the Wrzosowo deposit was placed in the Official Journal of the European Union.³⁷⁹
369. On 10 December 2014, the Ministry informed Blue Gas Uników that proceedings for granting the Wrzosowo exploration licence had been commenced. Potential competitive applications for the Wrzosowo exploration licence could have been submitted within 90 days from the announcement in the Official Journal of the European Union, so almost immediately after the lapse of a 90-day time limit, the Ministry commenced the proceedings in relation to Blue Gas Uników’s licence application.³⁸⁰
370. On 17 December 2014, the Ministry submitted a draft decision regarding the Wrzosowo gas deposit exploration licence to the relevant authority, asking for its opinion.³⁸¹
371. On 19 January 2015, the Ministry informed Blue Gas Uników that the proceedings were closed and that Blue Gas Uników was entitled to review the files of the proceedings and express its opinion on the collected evidence and materials.³⁸²
372. On 16 February 2015, the Ministry issued the Wrzosowo Exploration Licence. On the same day, the agreement on establishment of the mining usufruct related to the Wrzosowo Exploration Licence was entered into by and between the Ministry and Blue Gas Uników.³⁸³
373. The 16 February 2015 Wrzosowo Exploration Licence was transferred to Blue Gas Wrzosowo on 9 November 2015, and the respective assignment agreement regarding the mining usufruct related to the Wrzosowo Exploration Licence was entered into by and between the Ministry, Blue Gas Uników and Blue Gas Wrzosowo on the same date.³⁸⁴
374. The Ministry’s decision was preceded by (i) the respective application of 3 July 2015 for the transfer of the licence filed with the Ministry by Blue Gas Uników and Blue Gas Wrzosowo; (ii) the Ministry’s letter of 4 September 2015 calling on Blue

³⁷⁸ *Id.*, ¶ 196 (citing **Exhibit R-154**).

³⁷⁹ *Id.*, ¶ 198 (citing **Exhibit R-53**).

³⁸⁰ *Id.*, ¶ 199 (citing **Exhibit C-155**).

³⁸¹ *Id.*, ¶ 201 (citing **Exhibit R-54**).

³⁸² *Id.*, ¶ 202 (citing **Exhibit C-156**).

³⁸³ *Id.*, ¶ 204 (citing **Exhibits C-54, 157**).

³⁸⁴ *Id.*, ¶ 205 (citing **Exhibit C-57**).

Gas Uników to remedy formal deficiencies in its application; (iii) Blue Gas Uników's letter of 14 September 2015 by which the formal deficiencies were remedied; and (iv) the Ministry's notification of 26 October 2015 that the proceedings for the transfer of the 16 February 2014 Wrzosowo Exploration Licence were commenced after the formal deficiencies of the application for the transfer had been remedied.³⁸⁵

2. Proceedings (i) for amendment of the Wrzosowo Exploration Licence of 16 February 2015 and (ii) for approval of the modified Addendum No. 1 to the PRG Documentation

375. On 22 June 2015, Blue Gas Uników applied for the Wrzosowo 16 February 2015 Exploration Licence to be substantially amended.³⁸⁶
376. The requested changes would completely change both (i) the territorial scope of the Wrzosowo Exploration Licence and (ii) the scope and nature of the geological works as foreseen under the licence.³⁸⁷
377. The scope and nature of the changes caused concern at the Ministry. Due to the specific wording of Blue Gas Uników's 22 June 2015 application for amendment of the licence, almost all the geological works would become optional. Additionally, the deadlines for commencing the works would be significantly extended. Blue Gas Uników also sought to increase twice the territorial scope of the Wrzosowo Exploration Licence, which was not allowed under the Polish legal framework.³⁸⁸
378. On 21 August 2015, the Ministry called on Blue Gas Uników to remedy the formal deficiencies in Blue Gas Uników's application for amendment of the licence.³⁸⁹
379. On 31 August 2015, Blue Gas Uników withdrew its application of 22 June 2015 relating to the increase in the territorial scope of the 16 February 2015 Wrzosowo Exploration Licence. In addition, Blue Gas Uników also explained that it would prepare and provide the Ministry with the Addendum to the PRG Documentation at a later date.³⁹⁰
380. On 15 September 2015, Blue Gas Uników submitted its corrected application for amendment of the Wrzosowo Exploration Licence and two copies of the Addendum to the PRG Documentation.³⁹¹
381. After having reviewed the corrected application for amendment of the Wrzosowo Exploration Licence on 29 January 2016 the Ministry summoned Blue Gas

³⁸⁵ *Id.*, ¶ 206.

³⁸⁶ *Id.*, ¶ 209 (citing **Exhibit R-55**).

³⁸⁷ *Id.*, ¶ 210 (citing **Exhibit R-55**).

³⁸⁸ Sod, ¶ 211 (citing **Exhibit RWS-1**, ¶ 144); Rejoinder, ¶ 217.

³⁸⁹ Sod, ¶ 213 (citing **Exhibit R-56**); Rejoinder, ¶ 227.

³⁹⁰ Sod, ¶ 214 (citing **Exhibit R-57**).

³⁹¹ Sod, ¶ 215 (citing **Exhibit R-58**); Rejoinder, ¶ 227.

Wrzosowo to remedy the formal deficiencies of the application and to remove an error identified by the Ministry in the Addendum to the PRG Documentation.³⁹²

382. On 15 February 2016, Blue Gas Wrzosowo provided the Ministry with the corrected application for amendment of the Wrzosowo Exploration Licence, two copies of the corrected Addendum to the PRG Documentation and a proof of payment for the stamp duty. Nowhere in the letter did Blue Gas Wrzosowo question the lawfulness of the Ministry's requests.³⁹³

3. Proceedings for conversion of the Wrzosowo Exploration Licence into a unified licence

383. After the discontinuation of the proceedings for amendment of the Wrzosowo Exploration Licence and the approval of the Addendum to the PRG Documentation, Blue Gas Wrzosowo filed for conversion of the Wrzosowo Exploration Licence. The respective application was submitted in Blue Gas Wrzosowo's letter of 30 June 2016.³⁹⁴
384. The long period of processing Blue Gas Wrzosowo's application for conversion of the Wrzosowo Exploration Licence into a unified licence resulted from objective obstacles and, at the same time, the Ministry, faced with many pending administrative proceedings and other matters requiring engagement of its officials, decided to set priorities in a reasonable and objective manner.³⁹⁵

C. Stanowice Project and Proceedings

385. The application for the Stanowice prospection and exploration licence was submitted on 15 September 2014.³⁹⁶ The Ministry responded to the licence application on 14 July 2015. The delay resulted from the unusual workload at the Ministry at that time, which required it to establish priorities on the basis of objective and non-discriminatory criteria.³⁹⁷
386. On 14 July 2015, the Ministry called on Blue Gas Stanowice to remedy a number of deficiencies of the licence application. The Ministry found that the application was incomplete, and in some instances important and obligatory documents were missing.³⁹⁸
387. On 23 July 2015, Blue Gas Stanowice requested an extension of the deadline to submit additional documents and clarifications. Blue Gas Stanowice responded to the Ministry's 14 July 2015 letter on 29 July 2015.³⁹⁹

³⁹² Sod, ¶ 216 (citing **Exhibit C-162**).

³⁹³ Sod, ¶ 219 (citing **Exhibit C-165**); Rejoinder, ¶ 227.

³⁹⁴ Sod, ¶ 224 (citing **Exhibit C-168**).

³⁹⁵ *Id.*, ¶ 229.

³⁹⁶ Rejoinder, ¶ 285 (citing **Exhibit C-67**).

³⁹⁷ Sod, ¶ 262 (citing **Exhibits C-184, RWS-1, ¶¶ 22-23, 119, 184**).

³⁹⁸ *Id.*, ¶ 263 (citing **Exhibit C-184**).

³⁹⁹ *Id.*, ¶ 264 (citing **Exhibits R-78, C-185**).

388. The Ministry's review of Blue Gas Stanowice's 29 July 2015 letter of 29 July 2015 showed that it had not entirely complied with the Ministry's requests. In its letter of 7 August 2015, the Ministry observed that Blue Gas Stanowice failed to remove the discrepancies between the licence area presented in the application and the licence area presented in the graphical annexes to it. Moreover, one of the planned boreholes - Stanowice-3 - was still outside the licence boundaries specified in the licence application. In addition, the licence area still did not cover the entire Stanowice deposit, and Blue Gas Stanowice still did not provide geological justification for such a design of the licence area.⁴⁰⁰
389. In the meantime, on 14 July 2015, Blue Gas Stanowice sent to the Ministry a letter of 8 July 2015 in which it called on the Ministry to stop breaching the applicable deadlines.⁴⁰¹
390. The Ministry addressed Blue Gas Stanowice's letter by issuing a decision on 31 August 2015 in which it clarified that on 1 January 2015, a material amendment to the Geological and Mining Law entered into force. This amendment introduced a new obligatory tender procedure for granting licences for hydrocarbon deposits. Subsequently, 30 September 2014 was the final date by which a hydrocarbon deposit exploration licence application could have been effectively submitted on the existing terms and conditions. As a result of this exceptional situation, the Ministry experienced a great number of applications for prospection and exploration licences by the end of September 2014. These applications were consequently reviewed in the order of their submission.⁴⁰²
391. After additional correspondence, the Ministry informed Blue Gas Stanowice on 21 November 2017 that the proceedings regarding the Stanowice prospection and exploration licence had been completed. This notification was issued after ten months of administrative proceedings (formally commenced on 12 January 2017). The proceedings were completed within the time limit set up by the Ministry itself in its decision of 14 September 2017.⁴⁰³
392. In November 2017, the licence was ready to be issued to Blue Gas Stanowice. On 22 November 2017, the Ministry sent to Blue Gas Stanowice an agreement on the establishment of a mining usufruct to sign and return to the Ministry.³⁷¹ If the agreement on the establishment of a mining usufruct had been signed, the licence would have been issued to Blue Gas Stanowice. It was Blue Gas Stanowice's decision to withdraw from the licence proceedings.⁴⁰⁴

D. Miedzydroje Project and Proceedings

393. Blue Gas Uników committed a number of serious mistakes which contributed to the protraction of the Międzydroje proceedings. As with the Stanowice Project,

⁴⁰⁰ *Id.*, ¶ 265 (citing **Exhibit C-168**).

⁴⁰¹ *Id.*, ¶ 266 (citing **Exhibit C-183**).

⁴⁰² Sod, ¶ 267 (citing **Exhibits C-88, RWS-1**, ¶¶ 14-23); Rejoinder, ¶ 308.

⁴⁰³ Sod, ¶¶ 268-293 (and accompanying footnotes).

⁴⁰⁴ *Id.*, ¶ 294 (citing **Exhibits R-74, 90**).

the delays resulted from: (i) Blue Gas Uników's lack of familiarity with Polish law; (ii) submitting an incorrect and incomplete licence application; (iii) resistance to rectifying the licence application despite the Ministry's remarks, phone calls and in-person meetings; and (iv) an increased number of licence applications due to the deadline of 30 September 2014 for submitting applications for hydrocarbon licences pursuant to the old and more beneficial legal provisions of the Geological and Mining Law.⁴⁰⁵

394. The Międzyzdroje exploration licence application was submitted on 26 September 2014 and was subsequently amended on 14 December 2015 and 10 May 2016.⁴⁰⁶ The application contained numerous errors, forcing the Ministry to verify the submitted application and to notify Blue Gas Uników of the identified irregularities and deficiencies in order to make the licence application ready for proceedings.⁴⁰⁷
395. Blue Gas Uników sent three letters to the Ministry on 12 November 2014, 4 February 2015 and 29 May 2015, requesting the Ministry to provide Blue Gas Uników with the progress of the proceedings. The delay in the Międzyzdroje proceedings did not result from the unusual workload at the Ministry at that time, which required it to establish priorities on the basis of objective and non-discriminatory criteria.⁴⁰⁸
396. On 8 July 2015, Blue Gas Uników submitted a letter in which it demanded that the Ministry stop breaching the law by extending the proceedings. By its letter of 14 July 2015, the Ministry requested Blue Gas Uników to remedy a number of deficiencies of the licence application.⁴⁰⁹
397. In a decision of 31 August 2015, the Ministry provided Blue Gas Uników with a calendar of the proceedings, setting a new deadline to complete the proceedings by 31 May 2016.⁴¹⁰
398. After continued correspondence concerning various deficiencies, on 7 April 2016 the Chief National Geologist issued a joint decision for the Stanowice and Międzyzdroje Projects, according to which scheduling only optional works was associated with a risk of non-performing any geological works at all through the whole licence period.⁴¹¹
399. Over the next several months, the Parties continued to exchange correspondence concerning various issues, with the Ministry indicating that: "*its duration [of the proceedings] has not resulted from overly long conducting of the matter by the authority, but from the specific features of the open-door procedure, complexity of*

⁴⁰⁵ *Id.*, ¶ 300.

⁴⁰⁶ Sod, ¶ 301 (citing **Exhibit C-72**); Rejoinder, ¶ 348 (citing **Exhibits C-72, C-215, C-217, R-187, R-168**).

⁴⁰⁷ Sod, ¶ 301 (citing **Exhibit C-72**).

⁴⁰⁸ *Id.*, ¶ 302 (citing **Exhibits C-203-205**).

⁴⁰⁹ *Id.*, ¶ 304 (citing **Exhibit C-207**).

⁴¹⁰ *Id.*, ¶ 321 (citing **Exhibit C-210**).

⁴¹¹ *Id.*, ¶¶ 322-333 (citing **Exhibits C-211, RWS-1**, ¶ 219).

*the matter, causing the attorney for the Company himself twice requesting extending of the deadlines for supplementing the application.”*⁴¹²

400. After delivering a decision on 14 September 2017 to Blue Gas Uników mandating that Blue Gas Uników produce a decision of the Regional Director for Environmental Protection, the Ministry expected that Blue Gas Uników would be persuaded and would produce it. In this 14 September 2017 decision, the Ministry expressly pointed out that that: “*presently this deadline [for the proceedings to be completed] is dependent primarily on the Company. It is up to the Company to adhere to the last procedural decision of the concession authority dated 27 April 2017 and to apply to RDOŚ Szczecin to obtain a decision as to stating the possible duty to assess the influence of the venture provided for in the Company’s application upon the Nature 2000 areas; what will reopen the suspended procedure*” and that “*the Ministry would take all efforts and activities to complete the proceedings for granting the license for exploration of the Międzyzdroje natural gas deposit within 2 months of the date when the reasons for suspending the proceedings cease to exist.*”⁴¹³
401. Blue Gas Uników, however, failed to request the relevant decision from the Regional Director for Environmental Protection in Szczecin. On 30 January 2018, the Ministry received Blue Gas Holding’s letter, informing it about the liquidation proceedings concerning Blue Gas Wrzosowo, Blue Gas Stanowice and Blue Gas Zakrzewo. This letter, however, did not mention Blue Gas Uników. A month later, Blue Gas Uników’s bankruptcy trustee served the Ministry with a letter stating that on 1 February 2018, bankruptcy proceedings regarding Blue Gas Uników had been instigated.⁴¹⁴

E. Zakrzewo Project and Proceedings

402. Even though Blue Gas Zakrzewo obtained the 12 May 2017 Zakrzewo Exploration Licence, no geological works aimed at proper exploration of the Zakrzewo deposit had ever been performed.⁴¹⁵ The primary reason for any administrative delays were primarily due to Blue Gas Zakrzewo’s poor conduct during the license proceedings and failure to properly navigate the applicable law.⁴¹⁶
403. On 29 September 2014, Blue Gas Zakrzewo applied for the Zakrzewo exploration licence.⁴¹⁷
404. By letters of 12 November 2014, 4 February 2015 and 29 May 2015, Blue Gas Zakrzewo requested the Ministry for information about the progress of the

⁴¹² *Id.*, ¶¶ 334-368 (and accompanying footnotes).

⁴¹³ Sod, ¶ 369 (citing **Exhibit C-224**); Rejoinder, ¶ 382.

⁴¹⁴ Sod, ¶ 370 (citing **Exhibits R-105-106**).

⁴¹⁵ *Id.*, ¶ 376 (citing **Exhibit RWS-1**, ¶ 270).

⁴¹⁶ *Id.*, ¶ 380.

⁴¹⁷ *Id.*, ¶ 387 (citing **Exhibit C-73**).

Zakrzewo proceedings. The Ministry replied on 16 July 2015, the earliest such day it could have replied.⁴¹⁸

405. On 26 September 2014, Green Gas Polska sp. z o. o. (“**Green Gas**”) submitted a Zakrzewo exploration licence application. As Blue Gas Zakrzewo’s licence application was submitted on 29 September 2014, Green Gas’s application was considered and proceeded first.⁴¹⁹ The Ministry was obliged to instigate the proceedings following Green Gas’s licence application, provided that it was complete and complied with the relevant legal requirements. The Ministry analysed Green Gas’s application and summoned Green Gas to correct it in its letters of 10 March 2015, 25 May 2015, and 16 June 2015. In response, Green Gas complied with the Ministry’s requests and delivered to the Ministry its letters of 20 March 2015, 10 June 2015 and 2 July 2015. Only after having assured that Green Gas’s corrected licence application met the legal requirements and could be further proceeded could the Ministry inform Blue Gas Zakrzewo about its refusal to commence the proceedings following Blue Gas Zakrzewo’s licence application. Consequently, in its decision of 16 July 2015, the Ministry informed Blue Gas Zakrzewo that it was refusing to commence the proceedings for granting Blue Gas Zakrzewo’s application for the Zakrzewo exploration licence because the proceedings had already been commenced following Green Gas’s licence application, which was submitted first.⁴²⁰
406. The Ministry’s decision of 16 July 2015 did not close the door for Blue Gas Zakrzewo to obtain the Zakrzewo exploration licence. In its decision of 16 July 2015, the Ministry explained that: *“At the same time, considering the wording of Art. 9 APC, the party has to be informed that once a communication of the Government of the Republic of Poland of an application being submitted for granting a concession for exploration of the Zakrzewo natural gas deposit in Official Journal of the European Union and on the Public Information Page of the concession authority (www.mos.gov.pl), other interested entities, including also Blue Gas N’R’G Zakrzewo Sp. z o.o., will be able to submitted competitive application within the deadline set forth in the referred to announcement. Once this deadline lapses, the concession authority will compare the applications submitted according to this procedure and will select the entity to which a concession would be granted after conducting the administration procedure based on criteria set forth in Art. 44.1 of the Geological and Mining Law before amendment in the wording applicable on 31 December 2014.”*⁴²¹
407. There were no delays in the Zakrzewo proceedings between September 2014 and July 2015. The nature of the “open door” procedure, as well as Green Gas’s Zakrzewo licence application, made it necessary for the Ministry to undertake a

⁴¹⁸ Sod, ¶ 388 (citing **Exhibit C-213**); Rejoinder, ¶ 455.

⁴¹⁹ Sod, ¶ 389 (citing **Exhibit RWS-1**, ¶ 250).

⁴²⁰ Sod, ¶ 390 (citing **Exhibits R-110-115, C-232, RWS-1**, ¶ 253); Rejoinder, ¶ 456.

⁴²¹ Sod, ¶ 391 (citing **Exhibit C-232**).

number of procedural steps before it could review and evaluate Blue Gas Zakrzewo's licence application.⁴²²

408. At the beginning of July 2015, Blue Gas Zakrzewo's representative was informed about the progress of the proceedings by the Ministry's official, Ms. Potęga. By a letter of 8 July 2015, Blue Gas Zakrzewo: *"demanded that the Ministry stopped breaching the law by extending the proceedings beyond statutory deadlines."*⁴²³
409. Blue Gas Zakrzewo sent another letter to the Ministry on 5 August 2015. According to Claimants, Blue Gas Zakrzewo *"had learned of the third-party application almost ten months after it had been filed, despite the fact that in accordance with Art. 46 of the Geological Law, the Ministry should have announced this application publicly without undue delay. The Ministry's failure to perform its duties on time made Blue Gas Zakrzewo incur significant costs without taking into account the third-party application the knowledge of which would have assuredly affected the SPV's business strategy."*⁴²⁴
410. This demonstrates that Blue Gas Zakrzewo was unfamiliar with the legal environment applicable to the licence proceedings and lacked experience in such cases. The Ministry could not inform Blue Gas Zakrzewo about Green Gas's competitive licence application earlier than it ultimately did so. The Ministry had to wait until Green Gas's licence application would be completed and prepared for the "open door" procedure to be started. Blue Gas Zakrzewo failed to notice that Article 46 of the Geological and Mining Law, providing that the Ministry should announce the licence application publicly without undue delay, referred to a situation in which the relevant licence application was complete and could therefore initiate the "open door" procedure. Once Green Gas's application was completed, the Ministry notified Blue Gas Zakrzewo, in a decision of 16 July 2015, of its refusal to commence the administrative proceedings for granting the Blue Gas Zakrzewo's application for the Zakrzewo exploration licence due to the fact that Green Gas's licence application was submitted first.⁴²⁵
411. On 1 January 2015, the Ministry noted that a material amendment to the Geological and Mining Law entered into force. This amendment introduced a new obligatory tender procedure for granting licences for hydrocarbon deposits. According to this amendment, 30 September 2014 was the final date by which a hydrocarbon deposit exploration licence application could have been submitted in accordance with the old legal framework, which was far more beneficial for applicants than the new tender proceedings. As a result of this exceptional situation, by the end of September 2014, the Ministry was flooded with exploration licence applications. Those applications were reviewed by the Ministry in the order of date of their submission.⁴²⁶

⁴²² *Id.*, ¶ 392.

⁴²³ *Id.*, ¶ 393 (citing **Exhibit C-230**).

⁴²⁴ *Id.*, ¶ 394 (citing **Exhibit C-233**).

⁴²⁵ *Id.*, ¶ 395 (citing **Exhibits R-115, RWS-1**, ¶ 253).

⁴²⁶ *Id.*, ¶ 398 (citing **Exhibits C-231, RWS-1**, ¶¶ 14-23).

412. The Ministry began to prepare for the “open door” procedure initiated by Green Gas’s complete licence application. On 11 August 2015, the Ministry prepared a draft communication from the Government of the Republic of Poland concerning Directive 94/22/EC of the European Parliament and of the Council on the conditions for granting and using authorizations for the prospection, exploration and mining of hydrocarbons in the ‘Zakrzewo’ area. On 12 August 2015, this draft communication was internally transferred to the Department of Sustainable Development, Section of European Affairs of the Ministry with a request to publish it in the Official Journal of the European Union. A month later, on 15 September 2015, the communication was published in the Official Journal of the European Union. In that notice, the Ministry indicated a statutory deadline of 90 days to submit competitive Zakrzewo exploration licence applications, which expired on 15 December 2015. The Ministry also indicated the criteria for application evaluation as well as informed potential applicants that: *“The application evaluation procedure will be completed within a period of six months after the deadline for submitting [competitive] applications expires.”* Any investor must have been thus aware that the best application would be selected by 15 June 2016. It was the deadline for selecting the winner of the “open door” procedure with whom the Ministry would formally continue the proceedings for granting the Zakrzewo exploration licence.⁴²⁷
413. Blue Gas Zakrzewo submitted its competitive licence application on 7 December 2015, a few days before the expiry of the deadline for submitting competitive applications.⁴²⁸
414. On 5 April 2016, the Ministry requested Blue Gas Zakrzewo to correct the identified irregularities and deficiencies of its 7 December 2015 licence application.⁴²⁹
415. On 18 May 2016, Green Gas unexpectedly withdrew its Zakrzewo licence application. As a consequence, the Ministry was obliged to issue a decision of 23 June 2016 in which it discontinued the proceedings regarding Green Gas’s licence application. As a result, Blue Gas Zakrzewo’s licence application was the only one left for the Ministry’s consideration. As with the other potential deposits targeted by the Blue Gas Group, no entity other than a Blue Gas Group’s company expressed interest in the Zakrzewo area.⁴³⁰
416. Due to the changed situation, on 24 June 2016 the Ministry informed Blue Gas Zakrzewo that its licence application had been selected and that the administrative proceedings for the granting of the licence were to be commenced on the basis of Blue Gas Zakrzewo’s 7 December 2015.⁴³¹
417. On 31 August 2016, the Ministry extended the proceedings until 31 October 2016 and, in a letter of 14 November 2016, until extended them until 31 December 2016.

⁴²⁷ Sod, ¶ 400 (citing **Exhibit C-231**); Rejoinder, ¶ 817.

⁴²⁸ Sod, ¶ 402 (citing **Exhibit C-234**); Rejoinder, ¶ 817.

⁴²⁹ Sod, ¶ 404 (citing **Exhibit C-235**).

⁴³⁰ *Id.*, ¶ 408 (citing **Exhibits R-119. C-237**).

⁴³¹ *Id.*, ¶ 409 (citing **Exhibit C-238**).

The extension of the proceedings was necessary, and during this period the Ministry was working on Blue Gas Zakrzewo's application and preparing a draft decision on granting the Zakrzewo exploration licence. At that time, the Ministry's officials responsible for the hydrocarbon licensing were overloaded with legislative work and the audit performed by the Supreme Audit Office.⁴³²

418. On 11 January 2017, the Ministry informed Blue Gas Zakrzewo that the licence proceedings had been completed.⁴³³
419. In a letter of 11 April 2017, the Ministry sent the mining usufruct agreement to Blue Gas Zakrzewo.⁴³⁴
420. On 24 April 2017, the Ministry received Blue Gas Zakrzewo's letter with the signed mining usufruct agreement. This agreement was then transmitted to the Chief National Geologist, who on 12 May 2017 signed it on behalf of the Minister of Environment. That same day, the Ministry issued the Zakrzewo exploration licence for Blue Gas Zakrzewo.⁴³⁵
421. Blue Gas Zakrzewo never commenced any geological works as foreseen under the 12 May 2017 Zakrzewo exploration licence, and waived the licence on 28 December 2017, 7 months after it had been awarded.⁴³⁶

F. Lelików Project and Proceedings

422. Like in the case of the Stanowice and Zakrzewo Projects, the Lelików Project was nothing more but an initial step aimed at prospection and/or exploration of the only potential and unproven deposit. In its Lelików licence application of 30 September 2014, Blue Gas Uników stated: *"The purpose of applicant's activities is to recognize the natural gas resources accumulated in basic limestone deposits within the concession block Lelików as provided for in the Graphic Enclosure No. 1. . . . Result of these works and interpretation of new seismic results will enable the entrepreneur o p t i o n a l design and perform drilling works in a new location at the Lelików site . . . The next stage of works will be to perform two-year long trial exploitation of the drill which would define the prospective volume parameters for the future deposit. Results obtained combined with analysis of geophysical measurements will contribute to recognition of physical parameters of the basic limestone deposit, and will also provide an answer as to whether presence of gas in the sandstone deposit within the concession area is probable."*⁴³⁷
423. The delays in the relevant proceedings resulted from: (i) Blue Gas Uników's lack of understanding of Polish law during the proceedings; (ii) Blue Gas Uników's submission of an incorrect and incomplete licence application, which at the outset

⁴³² Sod, ¶ 410 (citing **Exhibits C-239, 241, RWS-1**, ¶¶ 157-158).

⁴³³ Rejoinder, ¶ 417 (citing **Exhibit C-242**).

⁴³⁴ Sod, ¶ 416 (citing **Exhibit R-125**).

⁴³⁵ *Id.*, ¶ 417 (citing **Exhibits C-77, 244**).

⁴³⁶ *Id.*, ¶ 418 (citing **Exhibits C-245-246**).

⁴³⁷ *Id.*, ¶ 421 (citing **Exhibit C-80**).

lacked the necessary environmental decision; (iii) the fact that the territorial licence area proposed by Blue Gas Uników overlapped with the area of the licence held by PGNiG; (iv) the intended Lelików licence area overlapped with the licence area of another company – Ostrzeszow Copper sp. z o. o.; (v) Blue Gas Uników's conduct, including failing to respond to the the Ministry's requests for many months; and (vi) a great number of similar licence applications due to the deadline of 30 September 2014 for submitting licence applications under the previous, more beneficial legal provisions.⁴³⁸

424. Blue Gas Uników submitted a Lelików licence application by its letter of 30 September 2014.⁴³⁹ The Lelików application, like the Stanowice, Międzyzdroje and Zakrzewo applications, was filed on the deadline date for applying for a hydrocarbon licence under the old beneficial legal provisions.⁴⁴⁰
425. On 2 July 2015, the representatives of Blue Gas Uników had a phone call with the Ministry's official, Ms. Potęga, who explained why the Ministry could not answer Blue Gas Uników's licence application earlier and assured them that the Ministry would notify Blue Gas Uników about the progress of the Lelików proceedings by the end of July 2015.⁴⁴¹
426. On 14 July 2015, the Ministry sent to Blue Gas Uników a letter in which it requested Blue Gas Uników to remedy a number of deficiencies of the licence application.⁴⁴² In addition, the Ministry communicated its justification as to why an environmental decision was necessary, with the reference made to the relevant legal provisions.⁴⁴³
427. The Ministry addressed Blue Gas Uników's letter by issuing a decision on 31 August 2015 in which it explained why the procedure had lasted so long, that is, the effect of the material amendment to the Geological and Mining Law entering into force and the increased number of number of applications filed by 30 September 2014 seen as a result. Those applications were reviewed by the Ministry on a first-come, first-served basis.⁴⁴⁴
428. Before issuing the 31 August 2015, the Ministry received Blue Gas Uników's letter of 23 July 2015 (in response to the Ministry's letter of 14 July 2015). In that letter, Blue Gas Uników admitted that the majority of the Ministry's comments were correct.⁴⁴⁵
429. Blue Gas Uników ultimately refused to provide the necessary environmental decision, even though an environmental decision was required and that without it the Ministry was obliged to refuse to grant the licence. Consequently, by a letter of

⁴³⁸ *Id.*, ¶ 434.

⁴³⁹ *Id.*, ¶ 435.

⁴⁴⁰ *Id.*, ¶ 436 (citing **Exhibit RWS-1**, ¶¶ 14-23, 273).

⁴⁴¹ *Id.*, ¶ 437.

⁴⁴² *Id.*, ¶ 438 (citing **Exhibit C-249**).

⁴⁴³ *Id.*, ¶ 439 (citing **Exhibit C-249**).

⁴⁴⁴ *Id.*, ¶ 442 (citing **Exhibits C-118, 210, 231, 248, RWS-1**, ¶ 273).

⁴⁴⁵ *Id.*, ¶ 444 (citing **Exhibits C-248, 250**).

18 August 2015, the Ministry informed Blue Gas Uników of the commencement of the Lelików proceedings and planned to complete the proceedings and issue a decision on refusal to grant the Lelików licence.⁴⁴⁶

430. In the meantime, on 28 August 2015, the Ministry received a letter from PGNiG, in which PGNiG explained that its “Pakosław-Krotoszyn” licence area overlapped with the area covered by the Lelików licence requested by Blue Gas Uników. As a consequence, PGNiG stated that there was an obstacle to granting Blue Gas Uników the Lelików exploration licence. On 9 September 2015, PGNiG informed the Ministry that it waived its “Pakosław-Krotoszyn” licence. Even though this eliminated one formal obstacle to granting the licence, the missing environmental decision was still an issue.⁴⁴⁷
431. On 7 September 2015, the Ministry completed the proceedings. The Ministry noticed, however, that another company should have been consulted as a participant to those proceedings, i.e., Ostrzeszów Copper sp. z o. o. (Ostrzeszów Copper), as Ostrzeszów Copper had two licences (“Janowo” and “Sulmierzyce”), whose areas overlapped with the Lelików deposit area. Ostrzeszów Copper’s licences covered the prospection and exploration of copper. Therefore, the Ministry was obliged to inform Ostrzeszów Copper about the Lelików proceedings. The Ministry did so in a letter of 10 November 2015.⁴⁴⁸
432. In response, Ostrzeszów Copper, in a letter of 20 November 2015, informed the Ministry that it opined positively on granting the Lelików licence to Blue Gas Uników, but requested the Ministry to impose on Blue Gas Uników an obligation to inform Ostrzeszów Copper on any geological works that Blue Gas Uników planned to perform on the area covered by the Lelików licence which overlapped with the “Janowo” and “Sulmierzyce” licence areas.⁴⁴⁹
433. After informing all participants about the Lelików proceedings, the Ministry could formally conclude the proceedings with its notification of 19 November 2015.⁴⁵⁰
434. In its letter of 28 January 2016, Blue Gas Uników did not challenge the correctness of the Ministry’s 30 December 2015 decision, but instead Blue Gas Uników *“exercise[d] its right to modify the application for issuing the administrative decision up until the case has not ended with a final decision and hereby amend[ed] its application for issue of the Concession in the manner specified in wording of the application appended to this letter and of the enclosed appendices in particular by waiving in the original application its intention to optionally perform the drilling operation with a hole having depth of 1870 m.”* To conclude, Blue Gas Uników submitted a modified licence application in order to eliminate the obligation to obtain an environmental decision. Such a modified licence application was

⁴⁴⁶ *Id.*, ¶ 455 (citing **Exhibit C-251**).

⁴⁴⁷ *Id.*, ¶ 446 (citing **Exhibit R-128**).

⁴⁴⁸ *Id.*, ¶ 447 (citing **Exhibits C-252, R-130**).

⁴⁴⁹ *Id.*, ¶ 448 (citing **Exhibit R-131**).

⁴⁵⁰ *Id.*, ¶ 449 (citing **Exhibit C-253**).

submitted in the form of Blue Gas Uników's request for reconsideration of the case.⁴⁵¹

435. On 23 February 2016, the Ministry informed Blue Gas Uników of commencement of the proceedings regarding the modified application of 28 January 2016. This meant that the Ministry complied with Blue Gas Uników's request and decided that it was admissible to modify the licence application at that stage.⁴⁵²
436. Because those proceedings were instigated by an appeal (containing Blue Gas Uników's modified licence application), the case files were transferred to a different Ministry's official who needed time to become acquainted with the case. The former case administrator, Ms. Potęga, was excluded from the appeal proceedings by operation of the relevant procedural rules. At the same time, the modification of the licence application meant that the application had to be fully reviewed anew.⁴⁵³
437. After issuing a decision on commencement of the proceedings, the Ministry started to review Blue Gas Uników's modified application of 28 January 2016 for the Lelików licence.⁴⁵⁴
438. On 30 June 2016, the Ministry summoned Blue Gas Uników to remedy the deficiencies in the 28 January 2016 modified licence application.⁴⁵⁵ The Ministry advised Blue Gas Uników on how to improve the licence application to remove Ministry's potential doubts and fasten the proceedings.⁴⁵⁶
439. On 30 June 2016, the Ministry set up a deadline of 30 day for Blue Gas Uników to respond. Blue Gas Uników did not comply with this deadline. On 27 July 2016, Blue Gas Uników requested extension of this deadline until 31 August 2016.⁴⁵⁷
440. Blue Gas Uników's inactivity lasted for additional months in 2017, where no financial statements were provided. On 30 March 2017, the Ministry once again reminded Blue Gas Uników about the missing financial statements of Blue Gas Holding that had been due since 31 August 2016.⁴⁵⁸ Due to Blue Gas Uników's inactivity, the Ministry had to extend the proceedings until 31 May 2017. The new deadline could have been met if Blue Gas Uników had complied with the Ministry's instructions and presented the requested financial statements⁴⁵⁹
441. After additional correspondence concerning the requested financial statements, as well as other deficiencies, the licence application was eventually complete, and the Ministry could process it under the "open door" procedure. On 30 August 2017, the

⁴⁵¹ *Id.*, ¶ 453 (citing **Exhibit C-255**).

⁴⁵² *Id.*, ¶ 454 (citing **Exhibit C-256**).

⁴⁵³ *Id.*, ¶ 455 (citing **Exhibit RWS-1**, ¶ 294).

⁴⁵⁴ *Id.*, ¶ 457.

⁴⁵⁵ *Id.*, ¶ 459 (citing **Exhibit C-259**).

⁴⁵⁶ Sod, ¶ 460 (citing **Exhibit C-259**); Rejoinder, ¶ 569,

⁴⁵⁷ Sod, ¶ 461 (citing **Exhibit R-134**).

⁴⁵⁸ *Id.*, ¶ 464 (citing **Exhibit C-261**).

⁴⁵⁹ *Id.*, ¶ 465 (citing **Exhibit C-261**).

Ministry's official responsible for the Lelików proceedings prepared a draft of the Communication from the Government of the Republic of Poland concerning Directive 94/22/EC of the European Parliament and of the Council on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons in the 'Lelików' area, and transmitted it to the Department of Sustainable Development, Section of European Affairs of the Ministry for publication.⁴⁶⁰

442. The Communication from the Government of the Republic of Poland concerning Directive 94/22/EC of the European Parliament and of the Council on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons in the 'Lelików' was published in the Official Journal of the European Union on 10 October 2017. The deadline of 91 days was set forth for submitting competing licence applications and the Ministry indicated that the procedure of competing applications' evaluation would last an additional 6 months from the deadline to submit them.⁴⁶¹
443. On 14 September 2017, in response to Blue Gas Uników's demand that the Ministry stop extending the proceedings, the Ministry explained that the proceedings were conducted as a result of Blue Gas Uników's 28 January 2016 application for reconsideration of the case, which contained the modified licence application. Therefore, proceedings concerned only the period between 28 January 2016 and 11 August 2017. During that period, Blue Gas Uników repeatedly exercised its right to modify and supplement the licence application, which triggered the Ministry's verification process. The Ministry observed that it informed Blue Gas Uników a number of times of necessary corrections to the Lelików application and in September 2017 that the "open door" procedure had been instigated. Accordingly, the Ministry had not remained inactive between 28 January 2016 and 11 August 2017.⁴⁶²
444. This decision was not challenged by Blue Gas Uników. On 9 February 2018, in part as a result of the Ministry learning of Blue Gas Uników's bankruptcy proceedings, the Ministry informed Blue Gas Uników that no competitive application during the "open door" procedure was submitted and requested information concerning whether Blue Gas Uników upheld its licence application.⁴⁶³
445. The Ministry never obtained Blue Gas Uników's response. The Ministry was formally notified of Blue Gas Uników's bankruptcy by a bankruptcy trustee's letters of 15 February 2018 and 21 February 2018.⁴⁶⁴

⁴⁶⁰ *Id.*, ¶¶ 466-473 (citing **Exhibits R-135-142, C-174, 262-263, RWS-1**, ¶ 306).

⁴⁶¹ *Id.*, ¶ 474 (citing **Exhibit R-143**).

⁴⁶² *Sod*, ¶¶ 475-476 (citing **Exhibit R-126**); Rejoinder, ¶ 536.

⁴⁶³ *Id.*, ¶ 477 (citing **Exhibit R-144**).

⁴⁶⁴ *Id.*, ¶ 478 (citing **Exhibit R-146**).

IV. JURISDICTION AND ADMISSIBILITY

A. *EU Law Objection*

1. European Commission's Position

446. The Commission has a central role, as guardian of the European Union, in ensuring the uniform interpretation and proper application of the rules relating to investment protection within the Union and therefore has a particular interest in avoiding any conflict between arbitration awards and EU law.⁴⁶⁵
447. Two elements of Union law are of crucial significance for the proceedings before you:
- Articles 267 and 344 Treaty on Functioning of European Union (“TFEU”): On 6 March 2018, the Court of Justice of the European Union (“CJEU”) held that those provisions “must be interpreted as precluding a provision in an international agreement concluded between Member States [...] under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.
 - Commission Communication of 19 July 2018 on the Protection of intra-EU investment: in that document, the Commission stated that Article 26 of the Energy Charter Treaty “if interpreted correctly, does not provide for an investor-State arbitration clause applicable between investors from a Member State of the EU and another Member State of the EU.”⁴⁶⁶
448. In addition, an important element of context is now provided by the Declarations of all 28 Member States of 15 and 16 January 2019 on the legal consequences of the judgment of the CJEU in *Achmea* and on investment protection in the European Union.⁴⁶⁷
449. In a statement accompanying the recent signing of the International Energy Charter, and therefore in the context of the Energy Charter Treaty, the Union has affirmed its position that intra-EU investor-State dispute resolution is contrary to Union law. The Union has also unanimously authorised the tiling of submissions specifically putting forward that view in the context of a number of actions for enforcement of arbitration awards pending before US courts.⁴⁶⁸

⁴⁶⁵ EU Amicus Curiae Brief, ¶ 1.

⁴⁶⁶ *Id.*, ¶ 2.

⁴⁶⁷ *Id.*, ¶ 3.

⁴⁶⁸ *Id.*

450. Article 26 ECT does not apply in intra-EU relations; the case law of the CJEU according to which Union law precludes any investor-State arbitration concerning intra-EU disputes as contrary to Articles 267 and 344 TFEU and the fundamental principles of autonomy, effectiveness and mutual trust; and Article 26 ECT should - even if it were held to apply to intra-EU disputes - be set aside as infringing a higher-ranking norm of Union law (i.e. the treaty provisions and fundamental principles mentioned a moment ago).⁴⁶⁹
451. The Arbitral Tribunal should decline jurisdiction in the proceedings pending before it.⁴⁷⁰

2. Respondent's Position

452. Respondent contends that the *Achmea* Judgment is of decisive importance for deciding the issue of jurisdiction in the present case. The incompatibility between the EU law and ISDS clauses that the CJEU found in the *Achmea* case is easily transferable to all intra-EU investment disputes, including ECT arbitration.⁴⁷¹
453. In the *Achmea* decision, the CJEU held that:

*“Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.”*⁴⁷²

454. In its reasoning, the CJEU recalled the fundamental pillars of the EU legal system, in particular its primacy over the laws of the Member States, direct effect and autonomy of EU law with respect both to the law of the Member States and to international law combined with the principle of mutual trust. The CJEU further noted that, in order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the EU Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law. In accordance with Article 19 TEU and Article 267 TFEU, it is for the national courts and tribunals, as well as the CJEU, to ensure the full application of EU law.⁴⁷³
455. The CJEU indicated that EU law must be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between the Member States. On that basis, the CJEU concluded that an arbitral

⁴⁶⁹ *Id.*, ¶ 5.

⁴⁷⁰ *Id.*, ¶ 6.

⁴⁷¹ *Sod*, ¶ 493.

⁴⁷² *Id.*, ¶ 494.

⁴⁷³ *Id.*, ¶ 495 (citing **Exhibit RL-1**, ¶¶ 35-37).

tribunal constituted under an intra-EU BIT “*may be called on to interpret or indeed to apply EU law, particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital.*”⁴⁷⁴

456. At the same time, the CJEU found that an arbitral tribunal cannot be classified as “*a court or tribunal of a Member State*” within the meaning of Article 267 TFEU and, therefore, is not entitled to make a reference to the CJEU for a preliminary ruling.⁴⁷⁵
457. The CJEU held that, by concluding an intra-EU BIT, the Member States established a mechanism for settling disputes between an investor and a Member State “*which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law.*”⁴⁷⁶
458. According to the CJEU, the mere hypothetical possibility of submitting investment disputes to a body which is not part of the judicial system of the EU calls into question “*not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties . . . and is not therefore compatible with the principle of sincere cooperation.*”⁴⁷⁷
459. In the light of the above arguments, the CJEU categorically held that ISDS provisions “*have an adverse effect on the autonomy of EU law.*”⁴⁷⁸

3. Claimants’ Position

460. Comparing the relation between EU law and the national laws of the EU Member States to the relation between EU law and international treaties is groundless when considering treaties to which the EU is a party, and which are not limited to the EU Member States and/or accession countries. This has been confirmed on numerous occasions by arbitral tribunals both before and after the *Achmea* judgment.⁴⁷⁹ Concerning the reach of the *Achmea* judgment, the scope of the

⁴⁷⁴ *Id.*, ¶ 496 (citing **Exhibit RL-1**, ¶¶ 41-42).

⁴⁷⁵ *Id.*, ¶ 497 (citing **Exhibit RL-1**, ¶¶ 46, 49).

⁴⁷⁶ *Id.*, ¶ 498 (citing **Exhibit RL-1**, ¶ 56).

⁴⁷⁷ *Id.*, ¶ 499 (citing **Exhibit RL-1**, ¶ 58).

⁴⁷⁸ *Id.*, ¶ 500 (citing **Exhibit RL-1**, ¶ 59).

⁴⁷⁹ Claimant’s Observations on Commission’s Amicus Curiae, ¶¶ 25-30; *Charanne B.V. and Construction Investments S.A.R.L. v. Spain*, SCC Arb No. 062/2012 (rejecting argument that dispute settlement under the ECT was incompatible with EU law; Judgment of the CJEU of 1 June 1999 in Case C-126/97 (*Eco Swiss China Time Ltd. v. Benetton International NV*) CLI:EU:C:1999:269 (rejecting claim that Article 344 TFEU prohibits Member States from submitting disputes that could involve an application and interpretation of EU law to dispute settlement proceedings other than those provided by the EU framework); *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012 (concluding that Article 344 TFEU is intended not to exclude intra-EU disputes from the jurisdiction of arbitration tribunals, but to provide the CJEU with the final Word on how EU law is to be interpreted to ensure its uniform interpretation); *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.a.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30 (noting that given the parties to the ECT are not only the EU and its Member States, but also other non-EU

preliminary questions submitted by the German Federal Court of Justice in that case was limited strictly to intra-EU BITs, and not to BITs or to investment treaties generally. Extending its impact would be unacceptable over-interpretation.⁴⁸⁰ This has been explicitly confirmed by arbitral tribunals.⁴⁸¹

461. Article 26 of the ECT applies in this arbitration. The *Achmea* judgment does not constitute grounds for denying jurisdiction.⁴⁸²

4. Tribunal's Decision

462. Article 26 of the ECT sets out the dispute settlement provisions pursuant to which the Claimants' application in this case has been filed:

Article 26

Settlement of Disputes between an Investor and a Contracting Party

(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

(2) If such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:

(a) to the courts or administrative tribunals of the Contracting Party party to the dispute;

(b) in accordance with any applicable, previously agreed dispute settlement procedure; or

(c) in accordance with the following paragraphs of this Article.

(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.

....

States, and thus the ECT binds all of them, "it cannot be upheld that, by ratifying the ECT, those non-EU States have accepted EU law as prevailing over the ECT.")

⁴⁸⁰ *Id.*, ¶ 38

⁴⁸¹ *Id.*, ¶¶ 46, 47; *Vattenfall AB, Vattenfall GmbH, Vattenfall Europe Nuclear Energy GmbH, Kernkraftwerk Krümmel GmbH & Co. oHG, Kernkraftwerk Brunsbüttel GmbH & Co. oHG v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, award of 31 August 2018; *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, award of 16 May 2018.

⁴⁸² *Id.*, ¶ 54.

(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:

(a)(i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the "ICSID Convention"), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention;

463. The first question is whether the dispute is, in the words of Article 26(1) of the ECT, a dispute *"between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III [of the ECT]."* The only question here is whether the Claimants are "Investors" of "another Contracting Party." If they are, the remaining requirements in Article 26(1) are plainly met.
464. It is argued that the Claimants are all "Investors" of the EU, of which Poland is a Member State, and are therefore not "Investors" of 'another Contracting Party' to the ECT. This is the "intra-EU" argument, according to which the ECT does not operate in the context of intra-EU States but only in the context of a dispute involving an EU State and a non-EU State.
465. The Tribunal is bound to interpret and apply the instruments to which it owes its existence and its powers and, in the words of ECT Article, to do so *"in accordance with [the ECT] and applicable rules and principles of international law."*
466. The starting point is the rule of interpretation set out in VCLT Article 31(1): *"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."*
467. Austria, Czech Republic, Cyprus and Poland are ECT Contracting Parties. On the face of it, and giving the terms of Article 26(1) their ordinary meaning, this is plainly a dispute *"between a Contracting Party and an Investor of another Contracting Party"*. The question is whether this conclusion is vitiated by the fact that the EU is also a Contracting Party to the ECT.
468. There is nothing in the wording of Article 26, or any other provision of the ECT, that suggests that because the EU is itself a Contracting Party, Austria, Czech Republic, Cyprus and Poland cease to be distinct Contracting Parties vis-à-vis one another under the ECT. It would not have been difficult to make provision for that eventuality in Article 26 or in another part of the ECT or by an additional "Understanding" of the kind attached to many ECT Articles (including Article 26 itself). But no such step was taken.

469. The argument that the ECT cannot apply rests on the interpretation of general provisions of EU Law, notably Article 3(2) of the Treaty on the Functioning of the European Union (“TFEU”), which stipulates that the Union has “*exclusive competence for the conclusion of an international agreement when its conclusion ... may affect common rules or alter their scope*”. Nothing in the TFEU, however, addresses the question of the continuing validity of the ECT when it brought investment under Union competence in 2007, after the ECT had been ratified and entered into force for the EU, Austria, Czech Republic, Cyprus and Poland.
470. Whilst the ECT does not contain any provision concerning the relationship between the ECT and the TFEU or EU more generally, the ECT does make provision for circumstances where two treaties appear to be in conflict. ECT Article 16, together with the Decision relating to its application, reads as follows:

Article 16

Relation to Other Agreements

[DECISION] With respect to the Treaty as a whole

*In the event of a conflict between the treaty concerning Spitsbergen of 9 February 1920 (the Svalbard Treaty) and the Energy Charter Treaty, the treaty concerning Spitsbergen shall prevail to the extent of the conflict, without prejudice to the positions of the Contracting Parties in respect of the Svalbard Treaty. In the event of such conflict or a dispute as to whether there is such conflict or as to its extent, Article 16 and Part V of the Energy Charter Treaty shall not apply.**

Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty,

(1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and

(2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty,

where any such provision is more favourable to the Investor or Investment.

**Decision n. 1 with respect to the Energy Charter Treaty (Annex 2 to the Final Act of the European Energy Charter Conference).*

471. The ordinary meaning of these provisions applied in this context mean that nothing in the ECT derogates from any provision of any of the EU treaties in relation to investment promotion and protection (ECT Part III) or from any right to dispute resolution; and nothing in the EU treaties derogates from any provision of any of

the ECT in relation to investment promotion and protection (ECT Part III) or from any right to dispute resolution. The explicit reference to the Svalbard Treaty highlights the silence of Article 16 in relation to the EU treaties. Article 16 clearly rests on the understanding that the ECT and the EU treaties were intended by ECT Contracting Parties (including the EU) to co-exist, with investors entitled to take the benefit of the more favourable treaty provision in any particular case.

472. The foregoing analysis is confirmed by decisions of other tribunals. In *Vattenfall v. Germany*, it was stated:

*“...Article 26 ECT and the above-cited provisions must be read in the context of Article 16 ECT, which specifically and explicitly addresses this situation. The plain language of Article 16 speaks against Respondent’s and the EC’s proposed interpretation of the ECT. Article 16 provides as follows (...) [Therefore], [w]hile the ordinary meaning of Article 26 was already clear, Article 16 confirms beyond doubt that Respondent’s proposed reading of the provisions of the ECT is untenable. In light of this provision it is not possible to “read into” Article 26 an interpretation whereby certain investors would be deprived of their right to dispute resolution, whether against an EU Member State of otherwise.”*⁴⁸³

473. The Tribunal dismisses the inter-EU objection to its jurisdiction.

B. Claimants’ Investor Status

1. Whether Festorino and Fosontal were incorporated in accordance with the law of Cyprus

(a) Respondent’s Position

474. It is well-established in investment case-law that the burden of proof with regard to the nationality falls on Claimants.⁴⁸⁴
475. Claimants failed to prove that Festorino Invest Ltd and Fosontal Ltd are companies organized in accordance with the law of the Republic of Cyprus.⁴⁸⁵
476. The only evidence submitted in this respect by Claimants are two partially-illegible printouts from an unspecified website. There is no indication of the entity which certified the content of the website. There is also no indication (at least in English) that the companies were registered in Cyprus. Accordingly, the printouts are not sufficient proof of the jurisdiction *ratione personae* of the Tribunal and jurisdiction should be denied as to Festorino and Fosontal.⁴⁸⁶

⁴⁸³ *Id.*, ¶ 46

⁴⁸⁴ *Sod*, ¶ 563.

⁴⁸⁵ *Id.*, ¶ 564.

⁴⁸⁶ *Id.*, ¶ 565 (citing **Exhibits C-1-2**).

(b) *Claimants' Position*

477. The Claimants are in possession of and have provided:

- for Fosontal: i) certificate of incorporation dated 7 September 2015; ii) certificate of address dated 4 November 2016; iii) certificate of shareholders dated 9 December 2016; iv) certificate of directors dated 17 January 2018; and iv) certificate of incorporation dated 28 February 2020;
- for Festicorino: i) certificate of incorporation dated 17 November 2017; ii) certificate of address dated 17 November 2017; iii) certificate of shareholders dated 17 November 2017; iv) certificate of directors dated 17 November 2017; iv) certificate of registration dated 17 November 2017; and iv) certificate of incorporation dated 4 March 2020.⁴⁸⁷

(c) *Tribunal's Decision*

478. While maintaining that the documents previously provided were sufficient, Claimants in their Reply provided the additional documents referenced above. The Tribunal is satisfied with these additional exhibits provided by Claimants to support their position that Festicorino Invest Ltd and Fosontal Ltd were incorporated in accordance with the laws of Cyprus. The Tribunal notes that in its Rejoinder, Respondents do not advance their contention as it related to Festicorino Invest Ltd and Fosontal Ltd.⁴⁸⁸

2. Whether Ms. Salesny and Mr. Rojicek qualify as Swiss investors

(a) *Respondent's Position*

479. In the Statement of Claim, Claimants assert for the first time that Ms. Salesny and Mr. Rojicek enjoy the protection of ECT as Swiss residents. This allegation apparently is aimed at bypassing the EU law objection raised by Respondent.⁴⁸⁹

480. This allegation is to no avail for the following reasons.

481. First, Claimants are not entitled to change the factual and legal basis of the jurisdiction *ratione personae* in the course of the arbitration proceedings. Article 1(7)(a)(i) of the ECT envisages three alternative criteria for establishing a natural person's status as an investor of the Contracting Party: (i) citizenship, (ii) nationality, and (iii) permanent residence in accordance with the law of the Contracting Party.⁴⁹⁰

⁴⁸⁷ Reply, ¶ 34 (citing Exhibits C-398.1, 398.2).

⁴⁸⁸ Rejoinder, ¶ 626.

⁴⁸⁹ Sod, ¶ 566.

⁴⁹⁰ *Id.*, ¶ 568.

482. The tribunal in *Uzan v. Turkey* stated that “[o]nce an Investor asserts jurisdiction based on either one of these three possible characteristics, the Investor may not then rely on another.”⁴⁹¹
483. The present proceedings were instituted when Claimants filed their request for arbitration. By the same document Claimants allegedly accepted Poland’s offer of arbitration contained in the ECT. Ms. Salesny and Mr. Rojicek launched the proceedings unequivocally invoking the fact that they are Austrian and Czech nationals. Consequently, they lost the right to derive the tribunal’s jurisdiction *ratione personae* from their alleged place of permanent residence.⁴⁹²
484. In the Request for Arbitration, Claimants expressly indicated that “*the dispute is between Poland and investors from Austria, Cyprus, the Czech Republic, and Switzerland.*” They also stated that Ms. Salesny and Mr. Rojicek “*qualify as investors in the meaning of Article 1(7)(a)(ii) ECT*” as nationals of Austria and the Czech Republic, respectively. Similarly, in the trigger letter of 29 March 2018, Claimants characterised Ms. Salesny simply as “*the citizen of Austria*” and Mr. Rojicek as “*citizen of Czechia.*”⁴⁹³
485. Second, the ECT does not entitle Claimants to invoke in the same proceedings two different characteristics (nationality and permanent residence) as a basis of the jurisdiction *ratione personae*. As is apparent from the wording of Article 1(7)(a)(i) of the ECT, there are three equally important, but alternative, criteria for establishing the home state of the investor. The criterion of “permanent residence” is aimed at granting the protection to those investors who are not nationals of any Contracting State but nevertheless retain sufficiently close links with a Contracting State as recognized by domestic legal order. Therefore, an investor who already indicated that he/she is a national of the Contracting Party is not entitled to claim to be an investor from another Contracting Party.⁴⁹⁴
486. The above reasoning was confirmed in the *Stati v. Kazakhstan* award, where the arbitral tribunal held that “*residence would only matter, as is clear from the wording of the definition in Art. 1(7) ECT by the second alternative after the word “or”, if they [the investors] would not have the nationality of a Contracting State.*”⁴⁹⁵
487. Third, Claimants have not proven that Ms. Salesny and Mr. Rojicek were at any time permanent residents of Switzerland, i.e., that they possessed the status of permanent residents acknowledged by the relevant laws of Switzerland and that they actually lived in Switzerland. Claimants have also failed to prove that Ms. Salesny and Mr. Rojicek were permanent residents of Switzerland on all the dates relevant to establishing the jurisdiction *ratione personae*.⁴⁹⁶

⁴⁹¹ *Id.*, ¶ 569 (citing **Exhibit CL-3**, ¶ 145).

⁴⁹² *Id.*, ¶ 570.

⁴⁹³ *Id.*, ¶ 571 (citing **Exhibit C-11**).

⁴⁹⁴ *Id.*, ¶ 572 (citing **Exhibits CL-3, RL-36**).

⁴⁹⁵ *Id.*, ¶ 573 (citing **Exhibit RL-37**, ¶ 743).

⁴⁹⁶ *Id.*, ¶ 574.

488. Article 1(7) ECT defines an investor as a person who is permanently residing in a Contracting Party “*in accordance with its applicable law.*” Therefore, in order to establish whether a natural person meets the above characteristics it is necessary to verify: 1) whether that person actually permanently lives in one of the Contracting Parties and 2) whether the Contracting Party grants this person, on the basis of its internal law, the status of a permanent resident. In the words of the *Uzan* tribunal: “*The use of “permanently residing” appears to require that a natural person should be both permanently residing in the Contracting Party (a factual requirement), and for such status to be recognised by local domestic law (a legal requirement).*”⁴⁹⁷
489. It should be uncontested that both the above-mentioned requirements of permanent residence (legal and factual) must be met continuously from the date of the alleged breach until the time the arbitral proceedings are commenced. In Respondent’s view, the “permanent residence” criterion must also be satisfied on the date of the making of investment and of the resolution of the claim.⁴⁹⁸
490. The only evidence submitted by Claimants with regard to the permanent residence of Ms. Salesny and Mr. Rojicek in Switzerland are two tax certificates issued on 14 April 2015. The certificates are not sufficient proof of the Tribunal’s jurisdiction *ratione personae* under Article 1(7)(a)(1) for the following reasons.
491. First, the certificates do not confirm that Mr. Rojicek and Ms. Salesny were considered by Switzerland as permanent residents and that they actually permanently lived in Switzerland. Tax residence is not tantamount to permanent residence. Moreover, under Swiss law, a relatively short stay in Switzerland is sufficient to acquire a tax resident status. Pursuant to Article 3(3) of the Law on Federal Direct Taxation, a person is deemed a tax resident if a stay of a minimum of 30 days is combined with a gainful activity, or without such activity if the stay lasts a minimum of 90 days. In other words, the only thing attested by the certificate is that Mr. Rojicek and Ms. Salesny stayed and gained profit for at least a month in Switzerland prior to its issuance.
492. Second, the certificate only establishes that Mr. Rojicek and Ms. Salesny were deemed tax residents of Switzerland on 14 April 2015. Therefore, it was not confirmed that they were residents of Switzerland (even within a narrow tax law meaning) at the time when they allegedly invested in Poland (2013), when the alleged ECT breach occurred (2014-2017) and when the dispute was submitted to arbitration (2018).
493. Third, Claimants provided no evidence with regard to the prerequisites of obtaining the permanent resident status under Swiss law. They also failed to prove that Mr. Rojicek and Ms. Salesny, were not only entitled to live, but actually lived, in Switzerland on the dates relevant to establishing jurisdiction *ratione personae*.

⁴⁹⁷ *Id.*, ¶ 575 (citing **Exhibit CL-3**, ¶ 156).

⁴⁹⁸ *Id.*, ¶ 576 (citing **Exhibits RL-38-41**).

(b) *Claimants' Position*

494. As the Respondent does not question that Austria and the Czech Republic are parties to the ECT or that Ms. Salesny and Mr. Rojicek are nationals of Austria and the Czech Republic, Claimants need not establish that they were permanent residents of Switzerland.⁴⁹⁹

(c) *Tribunal's Decision*

495. In its Rejoinder, Respondent reiterates that its objections as they pertain to Ms. Salesny and Mr. Rojicek are based on Respondent's EU law objection (as Ms. Salesny and Mr. Rojicek are citizens of Austria and the Czech Republic).⁵⁰⁰ As the Tribunal rejects Respondent's EU Law objection, it sees no need to address the Swiss residency issue as Respondent's objection is dependent upon the success of its EU law objection.

3. Whether Claimants made their investments in accordance with the ECT

(a) *Respondent's Position*

496. Claimants' legal argumentation that their alleged investment fulfils the criteria of "the investment" under the ECT generally boils down to statements that: (i) Claimants directly hold interest in Blue Gas Holding, and indirectly through this company they hold interest in Blue Gas Uników, Blue Gas Wrzosowo, Blue Gas Stanowice and Blue Gas Zakrzewo, and (ii) Claimants allegedly appointed the board members of Blue Gas Holding which, in turn, appointed the board members of the special purpose vehicles mentioned above.⁵⁰¹
497. The term "investment," as it is used in Article 1(6) of the ECT, has an inherent meaning that requires that the assets must be the result of an act of actual investing. They presuppose an investment in the sense of a commitment of resources. Without such a commitment of resources, the interests held by Claimants in the Blue Gas Group in Poland do not constitute investments under the ECT.⁵⁰²
498. This is not only confirmed by the ordinary meaning of the term "investment" but, *inter alia*, by the dispute resolution clause of Article 26(1) of the ECT, which provides for resolution of disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former. Pursuant to the interpretative principles of the VCLT, which instruct that treaty terms are to be read in their ordinary meaning in context, reference to the investment "of" an investor must connote active contribution.⁵⁰³

⁴⁹⁹ Reply, ¶ 35.

⁵⁰⁰ Rejoinder, ¶ 626.

⁵⁰¹ Sod, ¶ 578.

⁵⁰² *Id.*, ¶ 580.

⁵⁰³ *Id.*, ¶ 581.

499. The above approach taken by Respondent is supported by Article 31 (1) of VLCT according to which: “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁵⁰⁴
500. It is widely recognized by investment arbitration tribunals that the word “investment”, in its ordinary meaning, entails: (i) contribution of resources (ii) duration and (iii) assumption of risk.⁵⁰⁵
501. Against this backdrop, Respondent submits that each Claimant has to prove that it made its own investment in terms of the ECT by (i) committing its resources (ii) for a longer period of time and (iii) under assumption of risk. Consequently, each Claimant has to prove to have made its own contribution to establish its own investment under the ECT.⁵⁰⁶
502. Contrary to the above, Claimants only claim to have made together some contribution, without explaining which part of the alleged contribution was made by each individual Claimant). In doing so, Claimants fail to provide sufficient evidence to prove their contentions.⁵⁰⁷
503. Respondent notes Exhibit C-65, i.e., Resolution No. 1/10/17 of the Management Board of Blue Gas Holding of 30 October 2017, in which an allegation is made that Blue Gas Uników allegedly invested over 30 million in the Uników Project. However, this Claimants’ allegation that Blue Gas Uników invested over 30 million in the Uników Project is unsupported by any source documents. Even assuming, *arguendo*, that such expenditures were in fact made by Blue Gas Uników for the purposes of the Uników Project, Claimants fail to explain why those alleged expenditures should be treated as Claimants’ contributions. Claimants also fail to establish which parts of the alleged contributions should be attributed to each individual Claimant.⁵⁰⁸
504. In its Reply, Respondent further stresses that Claimants cannot simply allege that all Claimants together made an investment for the purpose of the ECT, but rather that each individual Claimant must establish that it made a sufficient contribution to be covered under the treaty.⁵⁰⁹
505. Respondent does not contend that each individual Claimant must prove that it spent its “own” money in order to acquire shares in a Polish Company, but it maintains that simply inheriting or being given shares in Blue Gas Holding is insufficient.⁵¹⁰ In other words, Claimants cannot exclusively rely on a third party’s contribution and the resulting benefits to establish the making of an investment under the

⁵⁰⁴ *Id.*, ¶ 582 (citing **Exhibit RL-42**).

⁵⁰⁵ *Id.*, ¶ 583.

⁵⁰⁶ *Id.*, ¶ 586.

⁵⁰⁷ *Id.*, ¶ 587 (citing **Exhibits C-66, 71, 78-79**).

⁵⁰⁸ *Id.*, ¶ 588.

⁵⁰⁹ Rejoinder, ¶ 634.

⁵¹⁰ *Id.*, ¶ 636.

Treaty.⁵¹¹ Specifically, there must be an economic link between the capital used to make an investment and the purported investor that enables the Tribunal to find that an investment is actually an investment of a particular investor.⁵¹² Here, Claimants failed to establish that they made any substantial contributions, either using their own funds or using other types of contributions in acquiring the shares in Blue Gas Holding.

506. The fact that ultimately some funds were spent on developing the Uników Project or preparing applications in various license proceedings before the Ministry does not sufficiently establish that each Claimant made a qualifying contribution.⁵¹³
507. Claimants failed to prove that each individual Claimant made its required contribution, necessary to establish the investment under the ECT. Accordingly, the Tribunal should deny its jurisdictions over all Claimants' claims.⁵¹⁴

(b) Claimants' Position

508. Pursuant to Article 1(6) of the ECT, an "Investment" means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:
- tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
 - a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;
 - claims to money and claims to performance pursuant to a contract having an economic value and associated with an Investment;
 - Intellectual Property;
 - Returns;
 - any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.⁵¹⁵
509. Fosontal, Festorino, Ms. Salesny, Mr. Derendinger and Mr. Rojicek directly own and control 100% (32.93% + 32.93% + 11.38% + 11.38% + 11.38% respectively) of the shares in Blue Gas Holding. Blue Gas Holding is the parent company and the

⁵¹¹ *Id.*, ¶¶ 637, 639.

⁵¹² *Id.*, ¶ 638 (citing **Exhibit RL-83**, ¶ 355).

⁵¹³ *Id.*, ¶ 640.

⁵¹⁴ *Sod.*, ¶ 589.

⁵¹⁵ *Reply*, ¶ 37.

sole owner of the SPVs. Accordingly, the Claimants' indirect ownership of the SPVs constitutes an Investment in Poland pursuant to Article 1(6)(b) of the ECT.⁵¹⁶

510. Respondent cites *Romak v. Uzbekistan* in support of its argument that Claimants have failed to make an investment under the ECT, but in paragraph 185 of that award, the arbitral tribunal clearly stated that the meaning of the term "investment" should be limited to preserve "the distinction between investments, on the one hand, and purely commercial transactions, on the other." That is why the tribunal stated, "*that the term »investments« under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk.*"⁵¹⁷
511. The investment the Claimants made fulfils these requirements as it was not a commercial transaction, it was not trade or rendering services, but it was a real contribution of assets in Poland which extended over a long time and involved risk.⁵¹⁸
512. Claimants disagree that each of the individual Claimants must prove that she/he/it made her/his/its own investment. There are three reasons for this.⁵¹⁹
513. Firstly, the Claimants made a joint investment. They had different economic interests in the Investment but this does not mean that each of them made a "separate" investment which should be subject to separate examination by the Tribunal. There is an important difference in holding a share in an investment and the investment itself.⁵²⁰
514. Secondly, if what the Respondent has in mind refers specifically to Article 1(6)(b) of the ECT, then the Claimants did specify their respective shareholdings in Blue Gas Holding and, therefore, their interests in the SPVs, i.e., the Investment. The Claimants provided evidence that Fosontal and Festorino each held 69,144 shares in Blue Gas Holding (2 x 32.93%) whereas Ms. Salesny, Mr. Derendinger and Mr. Rojicek each held 23,904 shares in Blue Gas Holding (3 x 11.38%). Holding shares in a company incorporated, registered and operating in Poland is considered an investment in the Area of this Contracting Party in the meaning of Article 1(10)(a) of the ECT.⁵²¹
515. Thirdly, if the Respondent means that each of the Claimants should prove that she/he/it spent a specific amount of money to acquire the shares, then such requirement has no basis in the ECT. On the contrary, Article 1(8) of the ECT states that to "Make Investments" or "Making of Investments" means establishing new Investments, acquiring all or part of existing Investments or moving into different

⁵¹⁶ *Id.*, ¶ 38.

⁵¹⁷ *Id.*, ¶¶ 39-40 (citing **Exhibit CL-41**).

⁵¹⁸ *Id.*, ¶ 41.

⁵¹⁹ *Id.*, ¶ 42.

⁵²⁰ *Id.*, ¶ 43.

⁵²¹ *Id.*, ¶ 44.

fields of Investment activity. In other words, it is enough for the Claimants to prove that they acquired (bought, inherited, contributed for or were given) the shares in Blue Gas Holding and, thus, they made the Investment.⁵²²

516. The very essence of the dispute is the value of the Investment, which corresponds to the damage the Claimants suffered because of the Respondent's breach of the ECT, which Claimants have established. The actual capital expenditures (CAPEX) and operative expenditures (OPEX) have been described and analysed in CER-7. These reports were based on evidence presented to the Tribunal. Moreover, the evidence itself was verified by independent experts (see Xodus).⁵²³
517. The Respondent seems to suggest that the expenditures made in the Investment should be accounted for in the calculations of the damages sought, unless each of the Claimants proves that the monies were paid "out of their pockets." This position has no merit from a business perspective and would require Claimants to prove the unprovable.⁵²⁴
518. Any business may be funded both by its owners, out of their savings or estate, or by external sources (banks, venture capitalists, trade credit, etc.). It does not matter at all where the money comes from as it is never free: all debts must be paid and all profits shared with partners. Respondent's contention ignores basic business principles.⁵²⁵
519. Another issue the Respondent indicates with the Investment is its structure comprising of several different projects. In this context, the Respondent cites *Nordzucker v. Poland* to suggest that Claimants' projects do not constitute a single investment.⁵²⁶
520. At the outset, it needs to be emphasised that there is a significant difference in the structures of the Investment made by the Claimants and the "investment" described in the *Nordzucker* arbitration. Nordzucker AG had no legal title to the sugar mills it intended to acquire. Moreover, the process of privatisation very much depended on the State (the Respondent) as the seller. The State decided which sugar mills and under what conditions they would be privatised. Therefore, Nordzucker AG could not have structured its "investment" on its own and could not have claimed that the mills it did not acquire were part of the "investment."⁵²⁷
521. This is not the case here. The Claimants identified approximately 40 natural gas fields to look into to pursue the Investment. Eventually, Blue Gas Group chose to continue with the Uników Project and the Wrzosowo Project.⁵²⁸

⁵²² *Id.*, ¶ 45.

⁵²³ *Id.*, ¶ 46.

⁵²⁴ *Id.*, ¶ 47.

⁵²⁵ *Id.*, ¶ 48.

⁵²⁶ *Id.*, ¶ 50 (citing **Exhibit RL-50**).

⁵²⁷ *Id.*, ¶ 51.

⁵²⁸ *Id.*, ¶ 52.

522. In addition, Blue Gas Group decided to develop the Stanowice Project, the Miedzyzdroje Project, the Zakrzewo Project and the Lelikow Project. And, contrary to what the Respondent has suggested, these projects were material. The Claimants contributed material resources to develop these projects and the fact that they did not obtain licences for them does not change anything.⁵²⁹
523. For the Stanowice Project, Blue Gas Group acquired legal title to a plot of land, it commissioned the development of the PRG Documentation, applied to the Ministry for a licence for the recognition of the “Stanowice” natural gas deposit, and obtained an environmental decision for this project.
524. Similar actions were taken regarding the Miedzyzdroje Project, the Zakrzewo Project and the Lelikow Project. Such material contributions and actions are easily distinguishable from the investment plans Nordzucker AG had regarding certain sugar mills it never acquired.⁵³⁰
525. One has to differentiate plans to invest (as in *Nordzucker v. Poland*) and real contributions which should be qualified as investments in the meaning of Article 1(6) of the ECT (as in the case at hand). The stage of a real investment is another issue which should not be dealt with in the jurisdictional phase of the arbitration. In other words, the fact that the Uników and Wrzosowo Projects were far more advanced than the Miedzyzdroje, Zakrzewo and Lelikow Projects does not mean the latter cannot be qualified as part of the Investment as a whole.⁵³¹

(c) *Tribunal’s Decision*

526. As Claimants note, “*Fosontal, Festorino, Ms. Salesny, Mr. Derendinger and Mr. Rojicek directly own and control 100% (32.93% + 32.93% + 11.38% + 11.38% + 11.38% respectively) of the shares in Blue Gas Holding. Blue Gas Holding is the parent company and the sole owner of the SPVs. In consequence, the Claimants’ indirect ownership of the SPVs constitutes an Investment in Poland pursuant to Article 1(6)(b) of the ECT.*”
527. The essence of this particular objection stems from the necessary contribution in acquiring shares in order to qualify as an investment. Respondent contends that Claimants cannot rely on third party contributions in acquiring the shares that makeup the Investment, while Claimants argue that it is enough for the Claimants to prove that they acquired (bought, inherited, contributed for or were given) the shares in Blue Gas Holding. Claimants primarily rely on the plain language of Art. 1(6) of the ECT, which defines an investment as, *inter alia*, an asset controlled directly or indirectly by an Investor, which can include shares, stock or other forms of equity participation.
528. The Tribunal agrees with Respondent that there must be an economic link between relevant capital and an investor for the purpose of characterizing such capital as an

⁵²⁹ *Id.*, ¶ 53.

⁵³⁰ *Id.*, ¶¶ 54, 55 (citing **Exhibit RL-50**, ¶ 150).

⁵³¹ *Id.*, ¶ 56.

investment of that particular investor. However, the scenario described by Respondent, in which alleged investors have no connection to alleged investment, is not the case in this dispute.

529. It is accepted that Claimants here directly own and control 100% of the shares in Blue Gas Holding, which was the parent company and sole owner of the SPVs responsible for the subsequent monetary investments in the projects at issue in this case. Consequently, the relevant connection stressed by Respondent is present even if Claimants have not established that the relevant shares were acquired with personal funds of each Claimant, as here we have indirect ownership of SPVs responsible for spending on the project at the heart of this dispute.
530. The Tribunal does not agree with Respondent that the spending of funds on aspects of the project, including license proceedings, fails to establish that each specific Claimant made its contribution (i.e., that some economic link between the capital and the purported investor can enable the Tribunal to find that a given investment is an investment of that particular investor). Through Claimants' indirect ownership of the SPVs, the subsequent spending of the SPVs, acknowledged by the Respondent to have taken place, creates a direct economic link through that ownership structure to each of the Claimants as indirect owners. Such a direct link is sufficient to satisfy the burden articulated by the Respondent.

4. Whether Claimants continuously held an interest in the Polish Blue Gas Group's Companies from the moment they had their alleged investments throughout the entire period of the alleged breaches of the ECT

(a) Respondent's Position

531. In order for each Claimant to establish Tribunal's jurisdiction in this arbitration, each of them, separately, must prove that it held interest (and, if so, which interest) in their alleged investments starting from the date on which their alleged investments were established and throughout the entire period of the alleged breaches of the ECT.⁵³² Such approach is consistent with investment case law.⁵³³
532. Claimants' story on the changes to the corporate structure of their alleged investments is unsupported by evidence.⁵³⁴
533. Claimants' failure to prove the necessary interests in the investment as well as qualifying dates of such interests should lead to dismissal of Claimants' entire case at the jurisdictional stage.⁵³⁵

⁵³² Sod, ¶ 590.

⁵³³ *Id.*, ¶ 591 (citing **Exhibits RL-48-49**).

⁵³⁴ *Id.*, ¶ 592.

⁵³⁵ *Id.*, ¶ 593.

(b) Claimants' Position

534. By referring to this Tribunal's jurisdiction *ratione temporis*, the Respondent suggests that the Claimants have not proved that they had held an interest in the Investment when the Respondent breached the ECT. Again, the Claimants do not wish to pursue unnecessary discussions, thus they simply refer to official documents produced by the State (i.e., the Respondent), even though the whole corporate history of the Investment was presented in the Statement of Claim.⁵³⁶
535. The timeline of the Respondent's breach of the ECT should be dated September 2015 onwards. Although there were serious delays in the administrative proceedings before, those that affected the Investment the most began in September 2015.⁵³⁷
536. All Claimants acquired interests in the Investment long before July 2015. However, given the changes in the Investment's corporate structure and to simplify the issue, it is enough to refer to the ultimate outline of the said structure.⁵³⁸
537. The ultimate structure of Blue Gas Holding with all the Claimants as shareholders was registered in the National Court Register on 2 February 2015.⁵³⁹
538. Blue Gas Holding was registered as the sole shareholder of Blue Gas Uników on 24 June 2015.⁵⁴⁰
539. Blue Gas Holding was registered as the sole shareholder of Blue Gas Stanowice on 22 September 2014 (as Zeger Enterprise sp. z o.o.) and, on 28 July 2015, the entry was changed to update the name of the shareholder.⁵⁴¹
540. Blue Gas Holding was registered as the sole shareholder of Blue Gas Zakrzewo on 16 February 2015.⁵⁴²
541. Blue Gas Holding was registered as the sole shareholder of Blue Gas Wrzosowo on 4 February 2015.⁵⁴³
542. The corporate structure of Blue Gas Holding and the SPVs has not changed since.⁵⁴⁴
543. In consequence, there can be no doubt that the Claimants had "made the investment" (see Article 1(8) of the ECT) before the breach began and they could not have taken into account any risk of the irregularities in the administrative

⁵³⁶ Reply, ¶ 58.

⁵³⁷ *Id.*, ¶ 59.

⁵³⁸ *Id.*, ¶ 60.

⁵³⁹ *Id.*, ¶ 61 (citing **Exhibit C-390**).

⁵⁴⁰ *Id.*, ¶ 62 (citing **Exhibit C-391**).

⁵⁴¹ *Id.*, ¶ 63 (citing **Exhibit C-392**).

⁵⁴² *Id.*, ¶ 64 (citing **Exhibit C-393**).

⁵⁴³ *Id.*, ¶ 65 (citing **Exhibit C-394**).

⁵⁴⁴ *Id.*, ¶ 66.

proceedings as described in Section III of the Statement of Claim and Section III hereof.⁵⁴⁵

(c) *Tribunal's Decision*

544. In its Reply, Claimants accept that for the purpose of establishing the alleged breaches, the timeline should run from September 2015 onwards. In its Rejoinder, Respondent accepts this position and merely confirms that acts prior to that date should not be considered when analyzing the presence of a potential breach, but that such acts may be considered to the extent they are relevant to understanding the context behind the impugned conduct after September 2015.⁵⁴⁶
545. As both Parties are in agreement as to the extent of the Tribunal's jurisdiction *ratione temporis*, there is no objection for the Tribunal to decide.

5. Whether the Uników Project, Wrzosowo Project, Stanowice Project, Miedzyzdroje Project, Zakrzewo Project and Lelików Project should be viewed as separate economic ventures

(a) *Respondent's Position*

546. Respondent submits that each of the Blue Gas Group's Projects in Poland, i.e. the Uników Project, the Wrzosowo Project, the Stanowice Project, the Miedzyzdroje Project, the Zakrzewo Project and the Lelików Project should be viewed as separate economic ventures, which are independent of one another in economic terms. It is thus Respondent's submission that each Project separately has to qualify as "the Investment" of each Claimant under the ECT in order for Tribunal's jurisdiction to be established in the present case.⁵⁴⁷
547. First, during the licence proceedings, Claimants and the Blue Gas Group issued specific assurances to Respondent that they secured financing unconditionally for the development of all the Projects. Such guarantee was a condition necessary for Respondent to issue relevant licences, without which the Blue Gas Group could not start to develop any CHP projects.⁵⁴⁸
548. Secondly, each Project concerned the development of other potential gas deposits. Those potential deposits were geographically scattered all around Poland. The characteristics of each deposit were crucial for the development of the respective Project.⁵⁴⁹
549. Thirdly, each Project was to be developed as a self-contained venture with its own planning, licences to be obtained from the Ministry, other decisions/approvals to be sought (such as approval of the Mining Plans by competent Regional Mining

⁵⁴⁵ *Id.*, ¶ 67.

⁵⁴⁶ Rejoinder, ¶¶ 659-660.

⁵⁴⁷ *Sod*, ¶ 595.

⁵⁴⁸ *Id.*, ¶ 597.

⁵⁴⁹ *Id.*, ¶ 598.

Offices), infrastructure to be established, including, but not limited to, mine and CHP facilities.⁵⁵⁰

550. In addition, for each Project, Blue Gas Group had to establish its own network of clients, in particular off-takers of electricity and heat. In conclusion, a hypothetical economic failure or success of one of the Projects did not translate into failure/success of any other Project.
551. Respondent submits that the above circumstances are strikingly similar to those considered by the tribunal in *Nordzucker vs. Poland*. In that case, the tribunal found that Nordzucker's attempts to acquire (during several and separate privatization proceedings) different sugar groups in Poland should not be viewed as a single overall investment. The tribunal noted that some of Nordzucker's acquisition attempts failed with the consequence that some sugar groups targeted by Nordzucker were acquired and some not. Then, the tribunal went on to consider whether the particular failed acquisitions could be qualified as investments and it concluded that they could not.⁵⁵¹
552. Respondent submits that, save for the Uników and Wrzosowo Projects, no other Project could fulfil the criteria of the investment under the ECT. Accordingly, Claimants' alleged claims related to Projects other than the Uników and Wrzosowo Projects are beyond this Tribunal's jurisdiction, irrespective of any other jurisdictional objections raised by Respondent.⁵⁵²
553. The major difference between the Uników and Wrzosowo Projects on the one hand and other Projects on the other are the licences granted by the Ministry. Without the respective licences from the Ministry allowing exploration of the relevant deposit, the Blue Gas Group's projects are comparable to the acquisitions in *Nordzucker vs. Poland*, which do not fulfil the criteria of the term "investment."⁵⁵³
554. Without the necessary licences, the Stanowice, Zakrzewo, Międzyzdroje and Lelików Projects were just business concepts on paper. Without such licences from the Ministry, the Blue Gas Group had no right to explore the relevant deposit, which was a necessary condition for considering the development of any of the Blue Gas Group's CHP Projects, irrespective of whether they would prove viable or not.⁵⁵⁴
555. Respondent acknowledges that the Blue Gas Group obtained the Zakrzewo exploration licence of 12 May 2017, but it is also clear that Claimants' ECT allegations concern events that preceded the granting of this 12 May 2017 licence, therefore excluding the claims related to the Zakrzewo Project from the Tribunal's jurisdiction.⁵⁵⁵

⁵⁵⁰ *Id.*, ¶ 599.

⁵⁵¹ *Id.*, ¶ 600 (citing **Exhibit RL-50**, ¶¶ 143-159, 160-162, 201).

⁵⁵² *Id.*, ¶ 602.

⁵⁵³ *Id.*, ¶ 603.

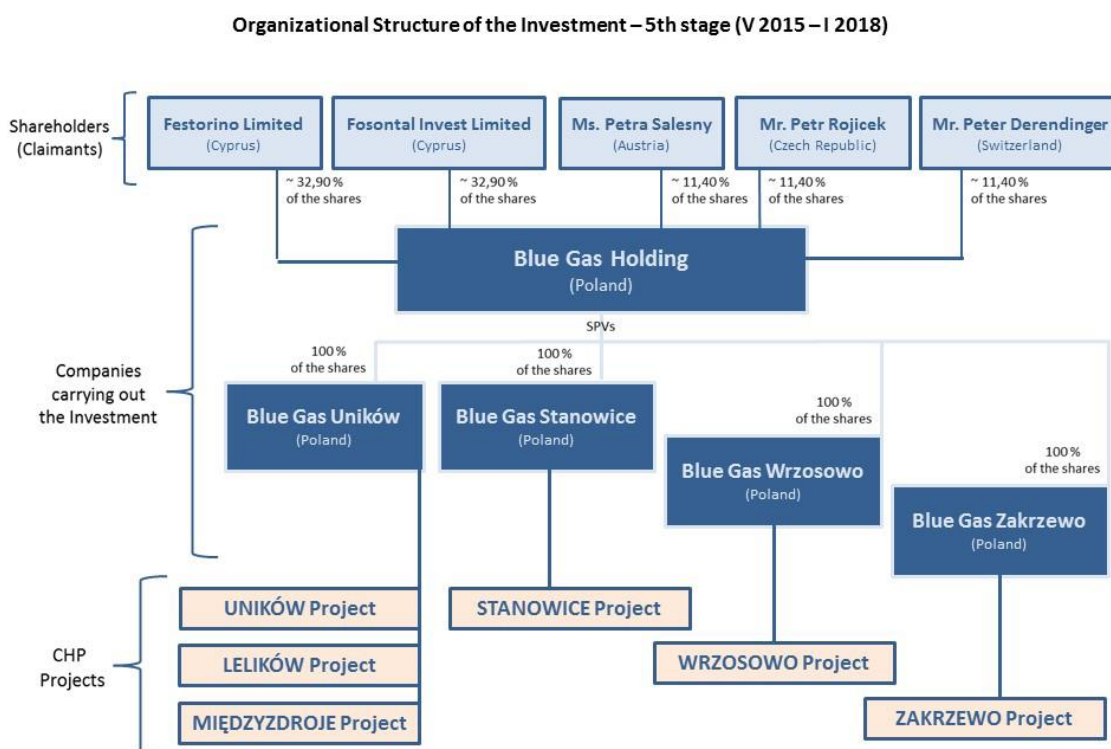
⁵⁵⁴ *Id.*, ¶ 604.

⁵⁵⁵ *Id.*, ¶ 605.

556. With respect to the Wrzosowo exploration licence of 16 February 2015, Respondent, in accordance with the above reasoning, submits that Respondent's all measures, which took place prior to the granting of that Licence, are also outside this Tribunal's jurisdiction.⁵⁵⁶

(b) *Claimants' Position*

557. All of these projects should be treated as one investment. *Nordzucker v. Poland* could only be referred to in this arbitration if the Claimants sought compensation for the five real projects and the remaining 35-or-so they considered developing in the future. The Claimants made one Investment consisting of five projects. If they had ever invested in more projects, it would have had to be treated as a simple expansion of the Investment. It did not happen, and, unlike Nordzucker AG, the Claimants never treated their investment plans as part of the Investment itself.⁵⁵⁷
558. The organizational structure of the Investment displays the general concept of a single investment in Blue Gas Holding, with the business plan being that Blue Gas Group would then control SPVs to carry out the various prongs of the overarching investment. This structure was again displayed in Claimants' Opening Statement and is copied below:



⁵⁵⁶ *Id.*, ¶ 606.

⁵⁵⁷ Reply, ¶ 57.

559. In essence, the shares in Blue Gas Group constituted a single investment with one business concept, the structure of which was designed to grow into a heightened final energy capacity.⁵⁵⁸

(c) *Tribunal's Decision*

560. It is not uncommon in largescale energy projects that there exist different stages, sub-projects, preliminary projects, etc., in a general sense. It is true that for some projects it may be easy to articulate what appears to be a single, truly individual, overarching plan, such as the construction of a particular nuclear power plant. In such a case, it would be difficult to argue that the construction of certain parts of the given plant should be considered different investments as opposed to characterizing it all as a single investment in the construction of the plant.
561. The Tribunal notes that there is more difficulty in the case at hand, where the investors are characterizing as a single investment the development, or attempted development, of distinct, arguably independent projects located in different locations of a given state. The projects admittedly involved independent license procedures, which themselves entailed different analysis as the projects were not identical in nature, and of course the lack of a single unifying task was displayed by the mere fact that in this case there are several projects that have different names because they were in fact different endeavours.
562. The Tribunal does not consider that these differences between the projects should be translated into the legal atomisation of what in an economic sense is clearly a single investment. It would be equally artificial, for example, to postulate that a golf course and a spa are separate investments as opposed to recognizing that the overarching singular plan was the development of a resort.
563. Here, Respondent does not rely on an argument that Claimants lacked a singular business plan which consisted of the development of the projects at issue through the Blue Gas Group. Rather, Respondent relies more on the independent nature of each project in arguing that they are fundamentally different investments.
564. However, the Tribunal is not convinced by the position that the investment here can be severed merely because the various projects involved different licensing procedures, infrastructure requirements and the like. To require such characteristics to be identical would unreasonably constrain the ability to characterize any largescale project as a single investment.
565. In the *Nordzucker* decision relied heavily upon by Respondent, the Claimant argued that the acquisition of four Sugar Groups constituted a single investment, relying on its strategic goal of acquiring 20% of the Polish market.⁵⁵⁹ The tribunal in that case noted that the link between the various public sales procedures for the different sugar groups which had been launched by Poland was the fact that they were

⁵⁵⁸ Claimants' Opening Statement, p. 10.

⁵⁵⁹ *Nordzucker AG v. Poland*, Partial Award, 10 December 2008, ¶¶ 143-144 (**Exhibit RL-50**).

governed by the same Privitization Act and that it was the same Ministry of State Treasury which was involved in the supervision of the sales process.⁵⁶⁰ The tribunal determined that such limited common aspects of the sales procedures for sugar groups did not support the conclusion that the acquisition of more than one group constituted a single investment.⁵⁶¹

566. The scenario here is not equivalent. Claimants have not premised their concept of an investment on aspirational ideas as to how a state would choose to privatize a given industry, with an arbitrary percentage of control articulated as the magic number dictating which actions would be considered as falling under the given investment, as was the case in *Nordzucker*.
567. Here, the business concept was to construct a number of smaller CHP facilities, then using the proceeds from the first facilities to finance projects with a higher capacity. Claimants entered the investment with this plan because it was this complete, interrelated series of steps that was necessary to realize the business opportunity that they had identified.
568. Further, Respondent implicitly acknowledged it was aware of the totality of the Claimants' plans (not plans merely contemplated but affirmatively attempted in the relevant license proceedings). While Respondent does so in arguing that Claimants either misled the State with respect to the dependence on certain projects for financing or did not mislead the State and thus there was no economic connection among any of the projects, this adds credibility to Claimants' position that from the outset these given projects constituted a single investment under a single business plan. While it is true that in *Nordzucker* the State was also aware of the general goal of the investors to acquire 20% of the sugar market, this can be distinguished from the case at hand where Claimants had not merely communicated a general goal of of X% of the market or X amount of power output, but instead a relatively unified plan to ultimately tap into, in a profitable manner, the niche market of unexplored but recognized deposits of nitrogen-rich natural gas.
569. The Tribunal recognizes that there lacks a clear test applicable in cases such as this to determine whether arguably independent projects can be considered a unified venture to the extent of qualifying as a single investment. In this case, the Tribunal is satisfied that the interrelation of the SPV activities under the overarching Blue Gas Group business concept is sufficient to constitute a single investment.

6. Clean Hands

(a) Respondent's Position

570. In their Statement of Claim, Claimants made the following admissions:

⁵⁶⁰ *Id.*, ¶ 146.

⁵⁶¹ *Id.*, ¶ 147.

“Depriving Blue Gas Uników of its revenues forced the Claimants to forego the Investment as a whole, even though they had invested approximately PLN 32.1 million in the said SPV alone. In consequence, on 31 October 2017 the management board of Blue Gas Uników had to file for bankruptcy, which was declared by the District Court for the capital city of Warsaw three months later.”

“Given the importance of the Uników project to the entire Investment (see paragraphs 8, 16, 22 and 47 above), it is fair to say that the impairment of this project resulted in the eradication of the Investment. As already indicated, the proceeds gained from the Uników license were to be reinvested in the other projects so that the entire network could operate as one business entity. Destroying the Uników project caused a chain reaction which could not be stopped or remedied with the development of any other project.”⁵⁶²

571. By making the above admissions, Claimants revealed that the financing of the projects other than the Uników Project, i.e. (i) the Wrzosowo Project, (ii) the Stanowice Project, (iii) the Międzyzdroje Project, (iv) Zakrzewo Project as well as (v) the Lelików Project, was dependent upon the Uników Project’s success and the other projects were to be financed from the proceeds gained from the Uników Project.⁵⁶³
572. These admissions contradict the assurances made by the Blue Gas Group’s companies during the administrative proceedings before the Ministry.⁵⁶⁴
573. Namely, in relation to all the projects other than the Uników Project, the Blue Gas Group’s companies assured the Ministry that the financing for performing the works to be scheduled under the relevant licences was guaranteed and not conditional upon the proceeds from the Uników Project.⁵⁶⁵
574. The fact that Claimants made such assurances has been confirmed by Ms. Potęga, the Ministry’s official responsible for conducting the majority of the licence proceedings related to the Blue Gas Group’s projects.⁵⁶⁶
575. The Witness Statement of Ms. Potęga makes clear that the Ministry would not have granted any licences had the Blue Gas Group’s companies revealed at the stage of the licence proceedings their true intention to conditionally finance the works under the relevant licences.⁵⁶⁷ Ms. Potęga demonstrated that the operation of the relevant provisions of law, applicable to the administrative proceedings for granting licences and licence conversion, would have resulted in the Ministry refusing to grant the

⁵⁶² Sod, ¶ 607.

⁵⁶³ *Id.*, ¶ 608.

⁵⁶⁴ *Id.*, ¶ 609.

⁵⁶⁵ *Id.*, ¶ 610.

⁵⁶⁶ *Id.*, ¶ 611 (citing **Exhibit RWS-1**, ¶¶ 42-48).

⁵⁶⁷ *Id.*, ¶ 612 (citing **Exhibit RWS-1**, ¶¶ 39-41).

relevant licenses and such conversions. Moreover, Ms. Potęga also shows that such application of law was expressly acknowledged by the Polish administrative courts as lawful.⁵⁶⁸

576. Had the Blue Gas Group or Claimants not assured the Ministry during the licence proceedings that the financing of Projects was to be unconditional, the Ministry would have refused to grant licences or licence conversions.⁵⁶⁹
577. Jurisprudence of investment tribunals, including that under the ECT, widely recognizes that an investment which was made in breach of the host state's laws either (i) sets the relevant claims outside the scope of arbitral tribunal's jurisdiction or (ii) renders them inadmissible.⁵⁷⁰
578. Respondent relies on *Plama vs. Bulgaria* case based on the ECT. In that case, the tribunal clearly stated that:

Unlike a number of Bilateral Investment Treaties,³ the ECT does not contain a provision requiring the conformity of the Investment with a particular law.

This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law. As noted by the Chairman's statement at the adoption session of the ECT on 17 December 1994:

. . . the Treaty shall be applied and interpreted in accordance with generally recognized rules and principles of observance, application and interpretation of treaties as reflected in Part III

of the Vienna Convention on the Law of Treaties of 25 May 1969. . . . The Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of treaty in their context and in the light of its object and purpose.¹⁴

139. In accordance with the introductory note to the ECT "[t]he fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues

. . ." Consequently, the ECT should be interpreted in a manner consistent with the aim of encouraging respect for the rule of law. The Arbitral Tribunal concludes that the substantive protections of the ECT cannot apply to investments that are made contrary to law."⁵⁷¹

⁵⁶⁸ *Id.*, ¶ 613 (citing **Exhibit RWS-1**, ¶ 41).

⁵⁶⁹ *Id.*, ¶ 614.

⁵⁷⁰ *Id.*, ¶ 617.

⁵⁷¹ *Id.*, ¶ 618 (citing **Exhibits RL-42, 51**).

579. Further, Respondent relies on *Hamester vs. Ghana* which confirmed as follows:

“123. The Tribunal considers, as was stated for example in Phoenix v. Czech Republic, that: “States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments not made in good faith.”

An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State’s law (as elaborated, e.g., by the tribunal in Phoenix).

*124. These are general principles that exist independently of specific language to this effect in the Treaty.*⁵⁷²

580. In *Phoenix vs. Czechia* the tribunal stated that:

“In the Tribunal’s view, States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws. If a State, for example, restricts foreign investment in a sector of its economy and a foreign investor disregards such restriction, the investment concerned cannot be protected under the ICSID/BIT system. These are illegal investments according to the national law of the host State and cannot be protected through an ICSID arbitral process. And it is the Tribunal’s view that this condition – the conformity of the establishment of the investment with the national laws –

*is implicit even when not expressly stated in the relevant BIT. This position of the Tribunal has also been adopted in the case of Plama, where the Tribunal was faced with the silence of the relevant treaty on the necessary conformity of a protected investment with the laws of the host country.”*⁵⁷³

581. During the licence proceedings, Claimants made assurances to the Ministry concerning the unconditional nature of the financing of the Projects other than the Uników Project. Such assurances resulted in the Ministry issuing positive decisions with respect to those licenses. In particular, the Ministry issued the Wrzosowo exploration licence on 16 February 2015 and the Zakrzewo exploration licence on 12 May 2017. In yet other cases, the Blue Gas Group, at the stage of the licence proceedings, assured the Ministry that the financing for the works intended under the requested licences was unconditionally secured.⁵⁷⁴

⁵⁷² *Id.*, ¶ 619 (citing **Exhibit RL-52**).

⁵⁷³ *Id.*, ¶ 620 (citing **Exhibit RL-53**).

⁵⁷⁴ *Id.*, ¶ 621.

582. It is apparent that a significant part of Claimants' alleged investment was made due to the Blue Gas Group's or Claimants' false statements submitted to the Ministry.⁵⁷⁵
583. Had the Blue Gas Group informed the Ministry of its true intentions, the consequence, under the applicable Polish law, would be that no licences for projects other than the Uników Project would have been granted.⁵⁷⁶
584. By providing the Ministry with their misrepresentations as to the nature of the financing, the Blue Gas Group and/or Claimants breached international law, including the applicable principle of good faith. As recognized by the *Plama vs. Bulgaria* tribunal: "[t]he principle of good faith encompasses, inter alia, the obligation for the investor to provide the host State with relevant and material information concerning the investor and the investment."⁵⁷⁷
585. A range of the international law principles have a role in the present case: (i) the principle of good faith defined as the "*absence of deceit and artifice during the negotiation and execution of instruments that gave rise to the investment*"; (ii) the principle of *nemo auditur propriam turpitudinem allegans* – which means that no party can benefit from its own wrong – understood as the prohibition for an investor to "*benefit from an investment effectuated by means of one or several illegal acts*"; (iii) the principle of international public policy, according to which recognizing the existence of rights arising from illegal acts would violate the "respect for the law"; and (iv) the principle on the prohibition on unlawful enrichment, according to which "*when the cause of the increase in the assets of a certain person is illegal, such enrichment must be sanctioned by preventing its consummation.*"⁵⁷⁸
586. The circumstances of this case confirm that Claimants made their investment in a deceitful and fraudulent manner by providing the Ministry with false information on the financing for the relevant projects. The Ministry relied on those misrepresentations during the licence proceedings. Had it not been for such misrepresentations, the Ministry, acting in accordance with relevant law, would have refused to grant any licences or licence conversions save for the Uników Project.⁵⁷⁹
587. The documents on the record in this case show that the Ministry expressly advised the Blue Gas Group as early as 20 May 2014 (during the licence proceedings concerning other Projects than Uników Project), concerning the financing required for securing performance of works under the licences the Blue Gas Group requested, in particular:

"The revenues from the "Uników" investment project, which you intend to use to finance the "Wrzosowo" project, are distant in future and uncertain, it is not possible to estimate their amount at the moment and therefore

⁵⁷⁵ *Id.*, ¶ 622.

⁵⁷⁶ *Id.*, ¶ 623 (citing **Exhibit RWS-1**, ¶¶ 39-41, 48).

⁵⁷⁷ *Id.*, ¶ 624 (citing **Exhibit RL-51**, ¶ 144).

⁵⁷⁸ *Id.*, ¶ 625 (citing **Exhibit RL-54**, ¶¶ 231, 240-242, 245-252, 254).

⁵⁷⁹ *Id.*, ¶ 626.

*cannot be treated by the concession authority as a security for the financing of the proposed activity.*⁵⁸⁰

588. In response, Blue Gas Uników, in its letter of 4 June 2014, assured the Ministry that the necessary financing, was secured:

*“We continue to uphold the commitment made by our shareholders to provide financing for the investment projects carried out by the company, in particular company’s concession commitments. At the same time, please be advised that the additional funds declared by the shareholders have not yet been made available due to the fact that this financing first required optimum structuring. The work on structuring this financing is nearing completion and the whole operation will be completed within one month. To confirm these declarations, we submit a statement by our shareholders as to the availability of funds to finance the company’s operations under the Wrzosowo concession, in particular by making available financing in the amount of USD 3 million.”*⁵⁸¹

589. The above excerpts from the correspondence between the Blue Gas Group and the Ministry, juxtaposed with the admissions made by Claimants in their Statement of Claim clearly show the Blue Gas Group’s bad faith when providing the Ministry with its false statements on the financing. It was in May 2014, at the latest, that the Blue Gas Group and their shareholders became acquainted with the Ministry’s position on the financing required for obtaining licences. From that point forward, the Blue Gas Group continuously assured the Ministry in all licence proceedings that the financing was guaranteed and unconditional.⁵⁸²
590. The Tribunal should deny its jurisdiction in the present case in relation to any and all claims advanced by Claimants in this arbitration. In case the Tribunal is of the opinion that the issues discussed in this objection should be considered in terms of admissibility or otherwise on the merits of the case, Respondent respectfully requests that Tribunal dismiss Claimants’ all claims as inadmissible or otherwise on the merits as Tribunal deems appropriate.⁵⁸³
591. This request is justified because Claimants’ alleged investment was based on the assumption that the Uników Project was an indispensable element of the entire scheme under which the Uników Project’s aim was to finance the performance of the other projects. Should, however, the Tribunal be of the opinion that the Uników Project should be treated as a separate investment which is not tainted with Claimants’ bad-faith misrepresentations as described above, Respondent hereby respectfully requests that all Claimants’ claims, save for those resulting from the

⁵⁸⁰ *Id.*, ¶ 627 (citing **Exhibit C-147**).

⁵⁸¹ *Id.*, ¶ 628 (citing **Exhibit C-149**).

⁵⁸² *Id.*, ¶ 629.

⁵⁸³ *Id.*, ¶ 630.

Uników Project, be found to be (i) beyond the jurisdiction of this Tribunal or (ii) inadmissible or otherwise be dismissed on the merits.⁵⁸⁴

592. Had the Ministry been properly informed that Claimants had intended for the works under the relevant licences were conditional upon financing from the expected proceeds of the Uników Project, the Ministry, pursuant to Polish law, would not have granted any license to the Blue Gas Group Concerning the Wrzosowo, Stanowice, Miedzyzdroje, Zakrzewo and Lelików Projects.⁵⁸⁵
593. In essence, Claimants' case requires one of two interpretations: (1) the works under various licenses were conditional upon financing from the expected proceeds of the Uników Project, in which case Claimants acted in bad faith in misleading the Ministry and violated the clean hands doctrine as applied to all projects; or (2) the Uników Project can be treated as a separate investment untainted by the bad faith misrepresentations (as they applied to the license procedures for the other projects), in which case jurisdiction should be denied as to all projects aside from the Uników Project.⁵⁸⁶

(b) Claimants' Position

594. Not only is the applicability of the clean hands doctrine debatable in the sphere of investment arbitration, but crucially the Respondent bears the burden of proof here. In other words, even if the doctrine were to be applied in this arbitration, the Respondent would have to prove that the Claimants acted in bad faith or illegally when making the Investment. The Respondent failed to do so.⁵⁸⁷
595. The Respondent claims that the SPVs "assured the Ministry that the financing for performing the works to be scheduled under the relevant licenses was guaranteed" but this declaration, and thus the Investment, "was made in a deceitful and fraudulent manner." If this had been the case, however, the Ministry would have refused to grant any of the SPVs relevant licences or their conversion. Except for the Lelikow Project, the Ministry never refused Blue Gas Group a licence. (And in the case of Lelikow, the reasoning of the Ministry's decision did not mention financing.)⁵⁸⁸
596. The Ministry's decisions to grant such licenses and conversions were made despite the fact that the Blue Gas Group and the Claimants were subject to scrutiny which covered their financials. Importantly, the Ministry was in possession of the evidence provided by the Blue Gas Group during the administrative proceedings and decided not to question that evidence, confirming that the Claimants had, and demonstrated, sufficient resources.⁵⁸⁹

⁵⁸⁴ *Id.*, ¶ 631.

⁵⁸⁵ Rejoinder, ¶ 664 (citing **Exhibit RER-5**, ¶¶ 5.1-5.6).

⁵⁸⁶ *Id.*, ¶ 669.

⁵⁸⁷ Reply, ¶ 68 (citing **Exhibit CL-42**).

⁵⁸⁸ *Id.*, ¶ 69.

⁵⁸⁹ *Id.*, ¶ 70.

597. During this arbitration, the Respondent did not provide any evidence to the contrary despite the rule of *onus probandi*. The only basis for the Respondent's unfounded allegations is its interpretation of the Investment and the fact that the Claimants did not want to "burn money" without real prospects of profit due to the Respondent's misconduct.⁵⁹⁰
598. The Respondent tries to find a link between the Claimants' business decision to wind up the Blue Gas Group and the alleged lack of financing for the Investment. In other words, the Respondent wants this Tribunal to conclude that since the Claimants refused to keep on financing the Investment regardless of the obstacles the Ministry put in their way, they admitted that they did not have sufficient financing to begin with. This contention is false.⁵⁹¹
599. The "clean hands" doctrine can only be applied in situations where investors launder money, commit fraud or breach strict laws regarding human rights or investments in particular industries or areas. The investors' actions must be regarded as unethical, manifestly wrongful or undertaken in bad faith. Claimants did not even approach such conduct.⁵⁹²
600. Blue Gas Group did not breach the law, neither did they misrepresent their financial situation. The Respondent deliberately mistakes declarations and evidence proving that Blue Gas Holding and the SPVs had sufficient resources to run their businesses with a promise never to go bankrupt even if the Ministry/the Respondent made these activities non-operational and, therefore, unprofitable.⁵⁹³
601. Not only do the Claimants not deny that the activities and financials of the SPVs were intertwined, they reaffirm it. That is what made them part of one business concept: the Investment. However, providing sufficient resources to make a business operational, and keeping it alive for an unspecified period in the face of illegal obstacles are different concepts.⁵⁹⁴
602. The Claimants provided financing for all SPVs to start their operations. They did not provide and they did not promise to provide revenue for the SPVs. The SPVs were supposed to earn revenue on their own and the Respondent prevented them from doing so. When it became obvious that Blue Gas Wrzosowo, Blue Gas Stanowice and Blue Gas Zakrzewo would not start their operations as planned because of the administrative hindrances, the Claimants decided that Blue Gas Uników should help finance the other SPVs. This, in turn, depended on the recommencement of Blue Gas Uników's operations but, unfortunately, this was also blocked by the Respondent.⁵⁹⁵

⁵⁹⁰ *Id.*, ¶ 71.

⁵⁹¹ *Id.*, ¶ 72.

⁵⁹² *Id.*, ¶ 73.

⁵⁹³ *Id.*, ¶ 74.

⁵⁹⁴ *Id.*, ¶ 75.

⁵⁹⁵ *Id.*, ¶ 76.

603. In summary, it was not the Claimants' choice to make the entire Investment dependent on Blue Gas Uników. It was a necessity, which actually supports Claimants' contention that the SPVs were part of one investment and that they cannot be treated separately. Describing the Claimants' attempts to uphold the Investment as "fraudulent and deceitful" is inaccurate.⁵⁹⁶

(c) *Tribunal's Decision*

604. There is no doubting the importance of the Uników Project in the grand scheme of the Investment and the ultimate collapse that led to this arbitration. Claimants have not avoided such a characterization and have extensively relied on the Uników Project's importance in describing what they allege was an illegal frustration of the Investment as a whole, with the Uników Project's ultimate inability to provide financing that they argued was necessary for the continuation of the business plan.
605. Respondent's clean hands argument relies heavily on the extent to which Claimants had always planned on the centrality of the Uników Project to its financing structure as compared to representations made to Respondent regarding the same.
606. In its Rejoinder, Respondent highlights language that Claimants used in their Statement of Claim versus their Reply to argue that Claimants ultimately realized their mistake in portraying the Uników Project's significant position in the financial plans, and thus unconvincingly tried to walk back from their characterization of the subsequent projects as conditional upon revenue expected from the Uników Project.⁵⁹⁷ Respondent argues that this attempted twist of the narrative highlights that Claimants are aware that they misled the Ministry with respect to this issue and are now trying to change their story to avoid any issue under the cleans hands doctrine.
607. The Tribunal acknowledges that the precise characterization of the Uników Project's expected role as a financier of sorts for the subsequent projects has been less than perfectly consistent. However, the Tribunal is not convinced that Claimants violated the cleans hands doctrine on that basis.
608. The crucial paragraph that Respondent points to as proof that Claimants had relied on the Uników Project more than had represented to the Ministry reads as follows:

Given the importance of the Uników Project to the entire Investment (see paragraphs 8, 16, 22 and 47 above) it is fair to say that the impairment of this project resulted in the eradication of the Investment. As already indicated, the proceeds gained from the Uników license were to be reinvested in the other projects so that the entire network could operate as one business entity. Destroying the Uników Project caused a chain

⁵⁹⁶ *Id.*, ¶ 77.

⁵⁹⁷ Rejoinder, ¶¶ 665-666.

*reaction which could not be stopped or remedied with the development of any other project.*⁵⁹⁸

609. This quote, however, does not demonstrate that Claimants had planned to necessarily rely on the Uników Project's projected revenue for financing of subsequent projects. In fact, it arguably does the opposite. In Respondent's Rejoinder, it specifically emphasizes the "or remedied with the development of any other project" language as establishing its point.⁵⁹⁹ However, this language suggests that whilst other projects could have theoretically been developed after the "destruction" of the Uników Project, the chain reaction that followed from the failure of the Uników Project nonetheless undermined any real prospect of success for the other projects and thus the overall Investment.
610. Accordingly, the Tribunal finds that Claimant did not engage in fraudulent or deceitful acts or acts in bad faith when portraying the financial plan for the Investment. The Tribunal considers it likely that the success of the Uników Project was always considered of crucial importance, and that its failure did indeed, on its own, lead to the downfall of the Investment. However, the Tribunal does not find that Claimants' planned use of Uników Project revenue was in direct conflict with representations made to Respondent. The clean hands doctrine simply does not apply.
611. The Tribunal also finds that Respondent has failed to establish a viable objection to admissibility. Respondent had, in passing, indicated that its jurisdictional argument could also be considered an admissibility argument. To the extent Respondent has presented an admissibility objection based on the clean hands doctrine, it is also rejected.

V. THE MERITS OF THE CLAIMS

612. As was the case with the factual summary, the following summaries of the Parties' positions on the merits do not intend to be exhaustive summaries of each claim that has been made.

A. Claimants' Position

1. General

613. Art. 10(1) of ECT states the following:

"Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments by Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most

⁵⁹⁸ Rejoinder, ¶ 666.

⁵⁹⁹ *Id.*

*constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with with an Investor or an Investment by an Investor of any other Contracting Party.*⁶⁰⁰

614. It sets out the fundamental principles on which the ECT rests. All of the other subsections of Art. 10 of the ECT are rooted in the above cited general norm. The principles can be grouped under the following categories:

- the obligation to accord to investors fair and equitable treatment (**FET**);
- the obligation to protect investments against unreasonable or discriminatory measures, including the guarantee of the national treatment and most favoured nation treatment (**MFN**);
- the duty to observe obligations entered into with the investors or investments (the **Umbrella Clause**).⁶⁰¹

615. The Respondent infringed all of these principles. Each of them affected the Investment. In fact, each infringement caused disruption for the Investment concerned and caused the Claimants to suffer damage.⁶⁰²

2. Fair and Equitable Treatment

616. The right to fair and equitable treatment is perceived by arbitral tribunals as an overriding principle that includes all other guarantees that arise from it. This view was expressed in *Petrobart vs. Kyrgyzstan*. The arbitral tribunal stated that Art. 10(1) of the ECT “*in its entirety is intended to ensure a fair and equitable treatment of investments*” and, therefore, “*it is sufficient to conclude that the measures for which the [the State] is responsible failed to accord [the investor] a fair and equitable treatment of its investment to which it was entitled under Article 10(1).*”⁶⁰³

617. It is commonly accepted that the protection of the legitimate expectations of investors is the dominant element of fair and just treatment. In this context, determining a breach of treaty protection first requires examining the impact of the applied measure (undertaking or discontinuing a given measure) on the investor’s legitimate expectations, and whether the state failed in this way to meet the investor’s expectations that the state created or reinforced through its own acts. In *Tecmed vs. Mexico*, the arbitral tribunal concluded that it is the State’s obligation, “*to provide to international investment treatment that does not affect the basic*

⁶⁰⁰ Soc, ¶ 271.

⁶⁰¹ *Id.*, ¶ 272.

⁶⁰² *Id.*, ¶ 273.

⁶⁰³ *Id.*, ¶ 274 (citing **Exhibit CL-8**, p. 76).

*expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.”*⁶⁰⁴

618. The FET standard has not been precisely defined in the ECT or any other international treaty. A breach of the FET standard must be determined on a case-by-case basis. Nevertheless, some tribunals have attempted to define some basic factors which constitute the FET standard, such as the tribunal in *Lemire vs. Ukraine (II)*. The tribunal concluded that: “[i]t requires an action or omission by the State which breaches a certain threshold of propriety, causing harm to the investor, and with a causal link between action or omission and harm. The threshold must be defined by the Tribunal, on the basis of the wording of Article II.3 of the BIT, and bearing in mind a number of factors, including the following:

- *whether the State has failed to offer a stable and predictable legal framework;*
- *whether the State made specific representations to the investor;*
- *whether due process has been denied to the investor;*
- *whether there is an absence of transparency in the legal procedure or in the actions of the State;*
- *whether there has been harassment, coercion, abuse of power or other bad faith conduct by the host State;*
- *whether any of the actions of the State can be labelled as arbitrary, discriminatory or inconsistent.*

The evaluation of the State’s action cannot be performed in the abstract and only with a view of protecting the investor’s rights. The Tribunal must also balance other legally relevant interests, and take into consideration a number of countervailing factors, before it can establish that a violation of the FET standard, which merits compensation, has actually occurred:

- *the State’s sovereign right to pass legislation and to adopt decisions for the protection of its public interests, especially if they do not provoke a disproportionate impact on foreign investors;*
- *the legitimate expectations of the investor, at the time he made his investment;*

⁶⁰⁴ *Id.*, ¶ 275 (citing **Exhibits CL-9; CL-10**, ¶ 154).

- *the investor's duty to perform an investigation before effecting the investment;*
- *the investor's conduct in the host country.*⁶⁰⁵

619. Not all of the above criteria may be applied in this arbitration or necessarily fit Article 10(1) of the ECT, but they provide non-binding guidelines for the Tribunal in this case.⁶⁰⁶
620. The Respondent unequivocally failed to ensure transparency in the administrative proceedings regarding licenses for the exploration, recognition and mining of hydrocarbon deposits. The absence of such transparency was not caused by the law. It was caused by the Ministry's actions. As confirmed by the NIK Report, entrepreneurs who applied for such licenses never knew: (i) how long the procedure would take; (ii) how many times and to what end would the Ministry would demand additional documents and explanations; (iii) what criteria would be applied in one case versus another; (iv) whether or when the Ministry would inform them of any relevant issues, even if such information was mandatory; and (v) whether the Ministry would respond to their submissions or inquiries at all.⁶⁰⁷
621. Respondent contends that the administrative proceedings initiated by the SPVs were fair and transparent and points to the NIK Report of August 2017 to support this contention.⁶⁰⁸ However, the NIK Report clearly indicates the faulty organization of work and violations of law by the Ministry, which was apparent from the documents produced in this arbitration.⁶⁰⁹
622. Importantly, Respondent did not contest the NIK Report's findings that the relevant statutory deadlines were strict and that they were not adhered to, meaning that Respondent admitted to violating the applicable laws during these proceedings. This amounts to a violation of the FET standard.⁶¹⁰
623. Mr. Jacek Strzelecki confirmed in his witness statement that before pursuing the Investment, the Claimants analysed the Polish upstream gas market. The analysis showed that there were approximately nine thousand boreholes (the largest number in Europe) and a great deal of geological documentation covering the entire country which could serve as a perfect basis to assess the potential of any given project.⁶¹¹
624. Respondent argues that Claimants could not have relied on their analysis of the upstream gas market in Poland because they failed to perform any due diligence, but the market analysis is based on publicly-available data and thus the conclusions

⁶⁰⁵ *Id.*, ¶ 276 (citing **Exhibit CL-11**, ¶¶ 284-285).

⁶⁰⁶ *Id.*, ¶ 277.

⁶⁰⁷ *Id.*, ¶ 278.

⁶⁰⁸ Reply, ¶ 627.

⁶⁰⁹ *Id.*, ¶¶ 629-630 (citing **Exhibit C-395**).

⁶¹⁰ *Id.*, ¶ 632 (citing **Exhibit C-396**).

⁶¹¹ Soc, ¶ 279.

do not result from due diligence. Importantly, Respondent does not question the actual results of the market analysis completed by Claimants.⁶¹²

625. Polish law provides certain privileges for small to medium gas producers using environment friendly technology. The “yellow certificates” system (then replaced by the “guaranteed premium” under the Cogeneration Act) ensured additional stable sources of proceeds. In addition, most of the natural gas deposits that were discovered in various parts of Poland were too small for large upstream companies to be interested in them.⁶¹³
626. Furthermore, the Administrative Procedure Code and the Geological Law set strict deadlines for the Authorities to observe. Because of this, even knowing that there would inevitably be some delays caused by unforeseen circumstances, the expected timeframe of the license proceedings seemed acceptable from the Claimants’ business perspective.⁶¹⁴
627. In summary, the Claimants had legitimate expectations towards the Respondent and its administrative bodies which justified the business concept of the Investment. The above-described acts and omissions do not meet the standards of good-government conduct, thus, they constitute a perfect textbook case of a breach of the FET.⁶¹⁵
628. In the end, Claimants summarize the conduct alleged to have violated the applicable FET standard:
- the Ministry did not observe the statutory deadlines for the completion of administrative proceedings, thus, complete undermining the Claimants’ reasonable expectations as to when the licenses and other necessary approvals would be issued which, in turn, affected the Claimants’ economic projections;
 - the Ministry assured Blue Gas Uników that the Uników Unified License would allow it to undertake the works on the Unikow-2 well designed to clean up the borehole and secure the gas flows but refused to confirm this assurance in writing for the Regional Mining Office in Kielce;
 - the Ministry’s unpredictable and unreasonable behavior in the Uników Project made it impossible to assume that similar problems would not occur in Stanowice, Wrzosowo, Zakrzewo, Miedzyzdroje or Lelikow. The situation in Uników made the whole investment unpredictable which, from a financial standpoint, had to be regarded as a serious risk factor financial institutions;

⁶¹² Reply, ¶ 625.

⁶¹³ Soc, ¶ 280.

⁶¹⁴ *Id.*, ¶ 281.

⁶¹⁵ *Id.*, ¶ 282 (citing **Exhibit CL-12**, pp- 157-158).

- even though the Ministry prioritized the examination of the applications allowing the investors to continue their operations, none of the Blue Gas Group's applications was considered as deserving of prioritization; on the contrary, they were all considered as having "low urgency," including Blue Gas Uników's applications for the approval of the documentation allowing this Company to continue works on the Uników-2 well and to move on to the gas production phase as well as the application by Blue Gas Wrzosowo to first amend its exploration license and subsequently to convert the Wrzosowo Exploration License into a unified license;
- . . . the Ministry refused to [] provide guidance for the Blue Gas Group's representatives so they could accelerate the various proceedings conducted by the Ministry;
- on numerous occasions, the Ministry went silent for up to ten months at a time with no information about the status of the proceedings;
- the Ministry did not respond to the letters in which the SPVs asked about the status of the proceedings and reasons for them being delayed;
- the SPVs could never tell when the proceedings would end or when the requested decision would be issued because some of the Ministry's employees thought statutory deadlines were not binding;
- whenever the Ministry informed the SPVs that the deadline for the completion of given proceedings would be extended, the justification [] the Ministry provided was neither reasonable nor truthful;
- the Ministry provided either vague or no explanations at all as to why it did not meet the deadlines for completing the proceedings and issuing the requested decisions while setting new deadline[s] which it also failed to observe due to its own misconduct; [and]
- the Ministry kept summoning the SPVs to provide additional documentation and explanations almost endlessly, sometimes up to 36 months after the relevant proceedings had been initiated.⁶¹⁶

3. Unreasonable and discriminatory measures

629. Given the general observation of the arbitral tribunal in *Petrobart vs. Kyrgyzstan* it might be said that the obligation to protect investments against unreasonable or discriminatory measures, including the guarantee of the national treatment and the MFN and the FET standards, overlap. And it would be difficult to argue that the Respondent's actions, which could be perceived as discriminatory, should not be classified as unfair and unequitable. That said, the Claimants decided to discuss this

⁶¹⁶ Claimants' Post Hearing Brief ("Claimants' PHB"), ¶¶ 87-89.

subject separately in order to emphasize certain infringements attributable to the Respondent.⁶¹⁷

630. As stated in *LG&E vs. Argentina* “[i]n the context of investment treaties, and the obligation thereunder not to discriminate against foreign investors, a measure is considered discriminatory if the intent of the measure is to discriminate or if the measure has a discriminatory effect. (...) in order to establish when a measure is discriminatory, there must be (i) an intentional treatment (ii) in favour of a national (iii) against a foreign investor, and (iv) that is not taken under similar circumstances against another national.” The tribunal concluded that the aforementioned prerequisites of declaring the host-State’s actions discriminatory would have been met if the State had treated the gas-distribution companies (the investors) in a discriminatory manner, imposing stricter measures on the gas-distribution companies than other public-utility sectors.⁶¹⁸
631. When deciding on the Investment, the Claimants were well aware that the Polish gas market was dominated by PGNiG. However, PGNiG was too large to enter the niche market in which the Claimants were interested. In addition, it was fair to assume that this state of affairs would soon change as a result of the introduction of the “exchange obligation” (the need to sell gas on the TGE) and the abolition of the tariff regime for gas supplies. However, it transpired completely differently. The Respondent’s primary policy became state control (and nationalization) over certain industries, in particular the energy sector.⁶¹⁹
632. The most evident examples of this policy are as follows:
- in November 2014, the Ministry revoked two licenses granted to a subsidiary of Lumina Copper Corp. and allocated them to KGHM Polska Miedź S.A. (a state-controlled company) which resulted in an investment arbitration being instigated under the Polish-Canadian BIT;
 - in May 2016, the Polish Parliament adopted a statute which effectively suppressed the wind farm sector in Poland, and which resulted in multiple disputes between the Respondent or state-owned companies and wind farm owners, including the investment arbitration instigated by Invenergy LLC under the Polish-USA BIT;
 - in July 2017, the Polish Parliament adopted new legislation on gas storages which resulted in PGNiG becoming an effective monopolist on this market (effectively preventing gas trading by foreign investors) and the EU Commission commencing an investigation;

⁶¹⁷ Soc, ¶ 283.

⁶¹⁸ *Id.*, ¶ 284 (citing **Exhibit CL-13**, ¶¶ 146-147).

⁶¹⁹ *Id.*, ¶ 286 (citing **Exhibit C-272**).

- in November 2017, Électricité de France S.A. (EDF) sold its Polish assets to PGE Polska Grupa Energetyczna S.A., another state-controlled company;

in May 2018, the same PGE Polska Grupa Energetyczna S.A. tried to take over Polenergia S.A., one of the largest private electricity producers in Poland;

- in February 2019, another foreign investor, Prairie Mining Ltd., instigated investment arbitration against Poland because of the Ministry's (!) misconduct regarding licenses for mining coal.⁶²⁰

633. Admittedly, the Respondent's policy does not amount to discrimination *per se*. But when juxtaposed with publicly-available numbers regarding licenses for the exploration, recognition and mining of hydrocarbon deposits it reveals a pattern. It proves that the Ministry's unlawful actions and omissions regarding the Blue Gas Group were in fact intentional.⁶²¹

634. The Ministry's "disabilities" as described in the NIK Report did not seem to affect PGNiG. On page 86 of its financial statement for 2017, PGNiG stated the following:

*"As of 1 January 2017, the PGNiG Group held 53 licenses for the recognition and exploration of crude oil and natural gas deposits. As of 31 December 2017, PGNiG held 48 licenses. In 2017, 33 administrative proceedings regarding the prolongation, amendment or conversion of licenses were concluded (a total of 21 licenses were converted). Forty proceedings regarding the approval of appendices to PRG documentation were also concluded."*⁶²²

635. On page 96 of the same financial statement, PGNiG observed the following:

*"Both domestically and abroad there is a risk of competition from other firms in terms of acquiring licenses for the recognition and exploration of hydrocarbon deposits. However, it must be stated that this risk significantly diminished over the past year on the domestic market."*⁶²³

636. PGNiG's applications appear to have enjoyed maximum priority. If they had been treated in the same way as the applications filed by the SPVs, the Ministry could not have finished a total of 73 proceedings regarding licenses and PRG Documentation. During this same time period, the Ministry settled fewer than ten cases initiated by the SPVs.⁶²⁴

⁶²⁰ *Id.*, ¶ 287.

⁶²¹ *Id.*, ¶ 288.

⁶²² *Id.*, ¶ 289 (citing **Exhibit C-273**, p. 86).

⁶²³ *Id.*, ¶ 290 (citing **Exhibit C-274**, p. 96).

⁶²⁴ *Id.*, ¶ 291.

637. It is no coincidence that, as PGNiG observed, the risk of competition on the Polish market diminished. This is because the Ministry eliminated PGNiG's competitors.⁶²⁵
638. Such prioritization was even confirmed by Mr. Piotr Nowak in his witness statement, in which he admitted that the SPVs were treated in a less favorable manner than other applicants.⁶²⁶ This admission fits the statistics with respect to those applications submitted by PGNiG as compared to the SPVs.⁶²⁷ Importantly, there was no legal justification for this prioritization.⁶²⁸ Issues such as staff shortages are not an excuse for discrimination of foreign investors.⁶²⁹
639. In summary, the Ministry's actions and omissions, for which the Respondent is liable, had discriminatory effects. They were intentional as they were part of the Respondent's policy in the energy sector. They favoured the national, state-controlled PGNiG over foreign investors (the Claimants acting through the SPVs). And no such measures were taken in similar circumstances against other national operators. As of the end of 2017, the overwhelming majority of licenses were held by either PGNiG or other state-controlled companies (e.g., Lotos Petrobaltic S.A., and Orlen Upstream sp. z o.o.). The few remaining ones were either held by foreign investors or were utterly insignificant.⁶³⁰
640. The above remarks prove that the Respondent also failed to accord national treatment to the Claimants. The Ministry failed to act in accordance with Art. 10(1) of the ECT because the applications of the state-controlled "nationals" were prioritized.⁶³¹

4. Umbrella Clause

641. The last sentence of Art. 10(1) of the ECT contains an "umbrella clause" obligating the Respondent to observe any obligations it has entered into with the Claimants or the Investment. The traditional debate regarding similar clauses concentrates on the type of obligations the relevant clause covers. Here, it is clear that the umbrella clause applies.⁶³²
642. In *SGS vs. Pakistan* the arbitral tribunal concluded that "umbrella clauses" "*are not limited to contractual commitments. The commitments referred to may be embedded in, e.g., the municipal legislative or administrative or other unilateral measures of a Contracting Party.*" In this context, the Respondent breached the obligations it

⁶²⁵ *Id.*, ¶ 292.

⁶²⁶ Reply, ¶ 635.

⁶²⁷ *Id.*, ¶ 636.

⁶²⁸ *Id.*, ¶ 637.

⁶²⁹ *Id.*, ¶ 638.

⁶³⁰ Soc, ¶ 293.

⁶³¹ *Id.*, ¶ 294.

⁶³² *Id.*, ¶ 295.

entered into by means of signing the agreements for the establishment of a mining usufruct as well as issuing license No. 19/2009/Ł for the Uników project.⁶³³

643. As shown, when granting a license, the Respondent, represented by the Minister of the Environment, entered into the following agreements with the SPVs:

- concerning license No. 1/2015/p, on 16 February 2015 the Respondent and Blue Gas Uników entered into the agreement for the establishment of a mining usufruct regarding the Wrzosowo natural gas deposit, which was assigned to Blue Gas Wrzosowo on 9 November 2015;
- concerning unified license No. 19/2009/Ł, on 9 August 2016 the Respondent and Blue Gas Uników entered into the agreement for the establishment of a mining usufruct regarding the Uników natural gas deposit; and
- concerning license No. 3/2017/p, on 12 May 2017 the Respondent and Blue Gas Zakrzewo entered into the agreement for the establishment of a mining usufruct regarding the Zakrzewo natural gas deposit.⁶³⁴

644. Pursuant to Art. 354 of the Civil Code, the Respondent was obliged to act in good faith, in particular to cooperate with the SPVs in the performance of their obligations. The provision states:

“§ 1. A debtor should perform its obligation in accordance with its substance and in a manner complying with its social and economic purpose and the principles of community life, and if there is an established custom in this respect, also in a manner complying with this custom.

*§ 2. The creditor should cooperate in the same manner in the performance of an obligation.”*⁶³⁵

645. This means, as emphasized by the Supreme Court in its judgment of 25 February 2015, that both the debtor and the creditor are obliged to “*look at the legitimate interest of the contractor and not do anything that would complicate, hinder or impede the performance of the obligation.*” They should cooperate in order to achieve the economic goal of the agreement.⁶³⁶

646. Considering the facts of this case, it is apparent that the Respondent (the creditor) not only did not cooperate with the SPVs in the performance of their contractual obligations, but actually hampered them, and in some cases even blocked them, negating the purpose for which the agreements were concluded. The Ministry's (i.e., the Respondent's) behaviour was more inappropriate considering that it was just a

⁶³³ *Id.*, ¶ 296 (citing **Exhibit CL-14**, ¶ 166).

⁶³⁴ *Id.*, ¶ 297.

⁶³⁵ *Id.*, ¶ 298.

⁶³⁶ *Id.*, ¶ 299 (citing **Exhibit CL-15**).

matter of whether the Ministry was willing to act in good faith, and not a matter of actual ability to perform the agreements.⁶³⁷

647. The clearest example of a breach of the obligation to cooperate was the deferment regarding the approval of the PRG Documentation and DGI Documentation for the Uników Project. This completely blocked the possibility of obtaining an investment decision specifying the conditions for extracting natural gas from the “Uników” deposit and, as a result, Blue Gas Uników’s ability to meet its obligations under the agreement.⁶³⁸
648. The same facts amount to a breach of the Respondent’s obligations under unified license No. 19/2009/Ł. Undoubtedly, a license is an administrative decision granting the licensee certain rights the acquisition of which is limited by law. However, once such rights are granted, they must be mirrored by the obligations of the licencing authority to facilitate the use of these rights.⁶³⁹
649. The Ministry did exactly the opposite. Its inaction resulted in the observation made by the Regional Mining Office in Kielce regarding the expiration of the deadline for the recognition of the Uników deposit through Uników-2. The Ministry’s failure to meet statutory deadlines for the conclusion of proceedings caused a situation in which there was no legal requirement to continue recognizing the Uników’s deposit through Uników-2.⁶⁴⁰
650. The Respondent contends that Claimants can not have umbrella clause claims arising from the relevant agreements because the parties to the agreements were Blue Gas Wrzosowo, Blue Gas Uników and Blue Gas Zakrzewo. However, the authorities cited by Respondent do not refer to the ECT, Article 10(1) of which explicitly reads that “*Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.*” Accordingly, the ECT umbrella clause covers agreements concluded with both the investors and their subsidiaries which are covered by the definition of “investment.” Here, the SPVs fall within that definition.⁶⁴¹
651. Claimants do not pursue any claims under the agreements which could otherwise be adjudicated by Polish courts, contrary to Respondent’s contention.⁶⁴²
652. Given the importance of the Uników project to the entire Investment, it is fair to say that the impairment of this project resulted in the eradication of the Investment. The proceeds gained from the Uników license were to be reinvested in the other projects so that the entire network could operate as one business entity. Destroying

⁶³⁷ *Id.*, ¶ 300.

⁶³⁸ *Id.*, ¶ 301.

⁶³⁹ *Id.*, ¶ 302.

⁶⁴⁰ *Id.*, ¶ 303.

⁶⁴¹ Reply, ¶¶ 643-645.

⁶⁴² *Id.*, ¶ 646.

the Uników project caused a chain reaction which could not be stopped or remedied with the development of any other project.⁶⁴³

B. Respondent's Position

1. Fair and Equitable Treatment

653. Within their FET arguments, Claimants (i) advance the legitimate expectations claim; (ii) generally claim that some of Respondent's measures allegedly did not meet some standards of good-government; and (iii) contend Respondent allegedly failed to ensure transparency in the licence proceedings.⁶⁴⁴
654. The international responsibility of a host state for a breach of the fair and equitable treatment standard under the ECT is not triggered by any failure of host states, but rather only when such failures are qualified as "gross" and "manifest." It is well established in the jurisprudence of the international investment tribunals that: ". . . the issue of a high threshold of liability [with respect to the fair and equitable treatment standard] provides assurance to host States that they will not be exposed to international responsibility for minor malfunctioning of their agencies and that only manifest and flagrant acts of maladministration will be punished."⁶⁴⁵
655. In the above context, Respondent submits that it is also well established in investment case law that not every breach of domestic law amounts to a violation of investment treaties. This was confirmed by the tribunal in *Loewen vs United States*: "whether the conduct [of the host State] amounted to a breach of municipal law as well as international law is not for us to determine. A NAFTA claim cannot be converted into an appeal against decisions of [the host State]." Such approach should be followed under the ECT.⁶⁴⁶
656. The scope of the standard presented in the Statement of Claim does not address the issues relevant to this arbitration, i.e. (i) when legitimate expectations can actually arise or (ii) which moment in time is relevant to establishing investor's legitimate expectations.⁶⁴⁷
657. In the above context, Respondent takes issue with the description of the legitimate expectations standard in the *Tecmed vs. Mexico* case relied on by Claimants. As opposed to *Tecmed vs. Mexico*, Respondent submits that the expectations must meet certain clear criteria in order to be legitimate and thus protected under the ECT.⁶⁴⁸
658. First, it is widely established in investment case law that the legitimate expectations have to be assessed at the time when the investment was made. The host state must make a specific promise or assurance to a foreign investor and a foreign investor

⁶⁴³ Soc, ¶ 304.

⁶⁴⁴ Sod, ¶ 633.

⁶⁴⁵ *Id.*, ¶ 634 (citing **Exhibit RL-55**, p. 88).

⁶⁴⁶ *Id.*, ¶ 635 (citing **Exhibits RL-41**, ¶ 134; **RL-56**, ¶ 315; **RL-57**, ¶ 325).

⁶⁴⁷ *Id.*, ¶ 636.

⁶⁴⁸ *Id.*, ¶ 637.

must rely on such a promise or assurance. Finally, such reliance must be reasonable.⁶⁴⁹

659. Second, the promise or assurance must be made by a competent authority or representative of the respondent state. It may be explicit as well as implicit, as long as the respondent state contributed to the creation of the legitimate expectations. A foreign investor must have relied on such a promise or assurance when it made its investment. The expectations of a foreign investor must be a determining factor for a decision to make an investment. The reasonableness of the expectations depends on the surrounding circumstances and factual background. What is more, the reasonableness must be objective.⁶⁵⁰
660. Against this background, Respondent asserts that Claimants' claim concerning legitimate expectations fails on at least multiple counts.⁶⁵¹
661. Firstly, and most importantly, Respondent made no specific promise or representation to Claimants. In particular, Claimants could not have built their legitimate expectations upon the law of general application. Such law did not imply any specific representation of Respondent to Claimants.⁶⁵²
662. Secondly, none of the Claimants established that they relied on any such promise or representation of Respondent when deciding whether to make their alleged investments. This alone is enough to defeat Claimants' case.⁶⁵³
663. Claimants rely on a statement of their witness, Jacek Strzelecki, who asserts that "*before pursuing the Investment, the Claimants analysed the Polish upstream gas market.*" In response, Respondent submits that no due diligence/feasibility reports were included in the record of the case. The only "due diligence report" that Claimants' experts rely on is Exhibit CEG-1, i.e., a memorandum dated August 2015, entitled "Blue Gas N'R'G up to 100 MWe Gas Fired CHPs in Poland" directed to the Blue Gas Group's potential investors, which was not aimed to replace such potential investors' own due diligence. Irrespective of the content of this "report," none of Claimants could have reasonably relied on it when making their decision to invest, at least due to the date of this "report."⁶⁵⁴
664. Claimants' allegation about the allegedly non-transparent character of the proceedings before the Ministry, allegedly confirmed by the Supreme Audit Office, manifestly lacks relevance in the present case. Only the specific proceedings before the Ministry concerning the Blue Gas Group's Projects are relevant in this case, and during such proceedings, the Blue Gas Group's representatives manifestly ignored applicable legal rules. In addition, (i) the Blue Gas Group had access to the files of

⁶⁴⁹ *Id.*, ¶ 638 (citing Exhibits RL-58, ¶¶ 302, 304, 305; RL-56, ¶¶ 330, 333; RL-60, ¶¶ 118-121; RL-61, ¶ 668).

⁶⁵⁰ *Id.*, ¶ 639 (citing Exhibits RL-49, ¶ 331; RL-52, ¶¶ 117-118; RL-53, ¶¶ 669, 672; RL-61, ¶ 670).

⁶⁵¹ *Id.*, ¶ 640.

⁶⁵² *Id.*, ¶ 641.

⁶⁵³ *Id.*, ¶ 642.

⁶⁵⁴ *Id.*, ¶ 644.

those proceedings; (ii) the Ministry's officials were available for the Blue Gas Group's representatives by phone; (iii) meetings were held at the Ministry's premises to discuss the Blue Gas Group's inquiries; and (iv) during the proceedings, the Ministry responded to the Blue Gas Group's written inquiries and/or letters during concerning the Projects. Furthermore, the Supreme Audit Office's Report does not support Claimant's allegations that the proceedings related to the Blue Gas Group's Projects, let alone all the proceedings before the Ministry related to hydrocarbons, lacked transparency. Importantly, the scope of control performed by the Supreme Audit Office was very limited and it did not include several types of the relevant proceedings, such as (i) approvals of the DGI Documentation and (ii) approvals of addendums to the PRG Documentation. In addition, Claimants fail to demonstrate how the allegedly non-transparent nature of the relevant proceedings translated into the corresponding decisions/rulings issued by the Ministry. Claimants do not complain about the Ministry's decisions granting the Blue Gas Group, in particular: (i) the Uników exploration licence of 31 March 2009; (ii) the unified Uników licence of 9 August 2016; (iii) the approval dated 21 December 2017 of Addendum No. 1 to the PRG Documentation related to the unified Uników licence of 9 August 2016; and (iv) the Wrzosowo exploration licence of 16 February 2015. In any case, Claimants do not explain whether they challenged the particular decisions/rulings of the Ministry, *inter alia*, before the competent Polish administrative courts and why the relevant awards/rulings of those courts, if any, should be regarded as non-transparent.⁶⁵⁵

665. It is incorrect for Claimants to contend that their alleged investments would have enjoyed the support of Respondent in economic terms. Claimants' claims do not concern any changes to Respondent's support system for the CHP projects, which allegedly changed, contrary to some Claimants' alleged legitimate expectations. The matter of the applicability of Respondent's support to Claimants' potential CHP projects is only relevant for the purposes of Claimants' causation/damages theory, which is itself flawed.⁶⁵⁶
666. Claimants' reliance on (i) the Polish Administrative Procedure Code and (ii) the Geological and Mining Law remains undeveloped. Claimants' legitimate expectations again could not have been established on the basis of the law of general application. Such law did not imply any specific representation of Respondent to Claimants. Moreover, none of the Claimants established that they relied on the respective provisions of the Polish Administrative Code or the Geological and Mining Law the moment they made their decision to invest.⁶⁵⁷
667. Claimants fail to support their contention that they relied on some "strict deadlines for the Authorities to observe" as established by the Administrative Procedure Code and the Geological and Mining Law. The relevant deadlines are in reality not strict and they are not applicable in several situations, including, but not limited to, the circumstances in which the delays are (i) due to fault/negligence of a party to the

⁶⁵⁵ *Id.*, ¶ 645 (citing **Exhibit CWS-1**, ¶ 41).

⁶⁵⁶ *Id.*, ¶ 646.

⁶⁵⁷ *Id.*, ¶ 647.

administrative proceedings; (ii) due to participation in the administrative proceedings of some consulting authorities, which is required under law; or (iii) due to other reasons which are beyond control of an authority in charge of the administrative proceedings. In addition, the deadlines provided for under the Polish Administrative Procedure Code were inapplicable to the licence proceedings related to the Blue Gas Group's Projects due to the nature of those proceedings, which was acknowledged by the Blue Gas Group in its correspondence to the Ministry.⁶⁵⁸

668. In all, Claimants' FET claim manifestly lacks merit. Even if the Ministry in some cases did not comply with the relevant Polish law, it does not automatically translate into a breach of the ECT. Only manifest and flagrant acts of maladministration are relevant for the purposes of this international responsibility, which were not remedied by exhaustion of available options, such as appeals to the Polish courts. At the same time, Respondent notes that it also should not escape Tribunal's attention that the acquired rights obtained by the relevant companies of the Blue Gas Group in the form of the licences concerning the relevant deposits were not affected by the course of the proceedings before the Ministry. In this context, Respondent also submits that the Blue Gas Group was, at all the relevant times, free to perform the geological works foreseen under any and all the licences issued by the Ministry, i.e., under (i) the Uników exploration licence of 31 March 2009; (ii) the unified Uników licence of 9 August 2016; (iii) the Wrzosowo exploration licence of 16 February 2015; and (iv) the Zakrzewo exploration licence of 12 May 2017.⁶⁵⁹

2. Discrimination

669. It first must be noted that within the context of discrimination, Claimants discuss other standards of protection, whose scopes do not overlap, i.e., National Treatment (NT) and Most Favoured Nation Treatment (MFN). The conflating of these concepts seems to imply that Claimants' grievances relate only to alleged discrimination of Claimants' subsidiaries vis-à-vis Polish nationals, and not investors from other countries. For this reason, the Respondents address solely the claim resulting from the alleged breach of the NT standard.⁶⁶⁰
670. Claimants' contention here concerns primarily various unrelated acts, of various branches of the Polish government, targeted at foreign investors. None of the facts discussed relate to Claimants, Blue Gas Group companies or even gas extraction industry. Among the alleged wrongdoings of Polish State, Claimants list the following issues:
- Ordinary business transactions of Polish companies (such as the acquisition of certain assets by a Polish company from a French state enterprise, EDF),

⁶⁵⁸ *Id.*, ¶ 648 (citing **Exhibit RWS-1**, ¶¶ 7-13).

⁶⁵⁹ *Id.*, ¶ 649.

⁶⁶⁰ *Id.*, ¶ 650.

even when they were only planned and did not actually occur (the attempted acquisition of Polenergia by PGE);

- Two disputes between Poland and foreign investors (concerning respectively the investments in copper mining and wind farms), which are still pending and in which no award establishing the violation of investment treaties was issued;
- Misleading information about the alleged investment arbitration dispute between Prairie Mining Ltd and Poland concerning the coal mining (in fact no arbitration proceedings were instigated by the said company).⁶⁶¹

671. Claimants admit that the above actions, “[do] *not amount to the discrimination per se.*” Despite that admission, they contend that the actions “*reveal the pattern*” and prove that Respondent’s actions regarding Blue Gas Group companies “*were in fact intentional.*” Claimants lack any evidence suggesting that the length of administrative proceedings instigated by the Blue Gas Group was the result of a hidden discriminatory agenda targeted at foreign investors.⁶⁶²
672. It is well established in the investment case-law that an analysis to determine whether discrimination occurred is based on three basic factors: (i) identification of the relevant subjects for comparison; (ii) consideration of the relative treatment each comparator receives; and (iii) consideration of whether any factors exist that justify any deviation in the treatment.⁶⁶³
673. It should be also uncontested that the burden of proof with regard to the above prerequisites of responsibility lies with Claimants.⁶⁶⁴
674. With regard to the first factor (a relevant subject for comparison), it is widely held that the subjects of comparison (“the comparators”) must be found to be “in like circumstances” before considering any unfavourable treatment. The comparison should be made between Claimants and their commercial competitors (domestic investors or investments operating in the same sector). As noted by the *Total* tribunal:

*“In order to determine whether the treatment is discriminatory, it is necessary to compare the treatment challenged with the treatment of persons or things in a comparable situation. In economic matters the criterion of “like situation” or “similarly-situated” is widely followed because it requires the existence of some competitive relation between those situations compared that should not be distorted by the State’s intervention against the protected foreigner.”*⁶⁶⁵

⁶⁶¹ *Id.*, ¶ 652.

⁶⁶² *Id.*, ¶ 653.

⁶⁶³ *Id.*, ¶ 654 (citing **Exhibits RL-62**, p. 291; **RL-63**, ¶ 711).

⁶⁶⁴ *Id.*, ¶ 655 (citing **Exhibit RL-64**, ¶ 457).

⁶⁶⁵ *Id.*, ¶ 656 (citing **Exhibits RL-60**, ¶¶ 210, 212-213; **RL-62**, p. 291-292; **RL-66**, ¶ 78).

675. The only company mentioned by Claimants which possibly could be treated as a comparator to Blue Gas Group Companies is PGNiG. While PGNiG is an entrepreneur operating, among others, on the market of gas extraction, it can hardly be treated as Blue Gas Group's competitor *sensu stricto*. Even Claimants admit that they intended to operate on the niche market, and that PGNiG, being too large to enter, was not interested in that niche.⁶⁶⁶
676. Concerning the second factor (relative treatment each comparator receives), Claimants contend that PGNiG's applications were given maximum priority by the Ministry, while the proceedings instigated by Blue Gas Group were seriously protracted.⁶⁶⁷
677. It transpires that the entire discrimination claim relies on two short passages taken from PGNiG's financial statement for 2017. As indicated in that document, on 1 January 2017, PGNiG Group held 53 licences for the recognition and exploration of crude oil and natural gas deposits. As of 31 December 2017, the number of licences declined to 48. In 2017, 33 administrative proceedings regarding the prolongation, amendment or conversion of licences, as well as 40 proceedings regarding the approval of Addendums to PRG documentation, were concluded. The document does not state how long the proceedings lasted, *i.e.* it does not specify if they were instigated in 2017 or earlier. For this reason, Claimants' allegation that PGNiG's proceedings were conducted more smoothly by the Ministry than the similar proceedings instigated by the Blue Gas Group companies lacks any evidentiary basis.⁶⁶⁸
678. It is also illegitimate to compare the number of licences held by PGNiG and the Blue Gas Group in support of the contention that Poland systematically discriminates against foreign investors. PGNiG has existed for nearly 40 years and was ranked 5th among the biggest companies in 2017 in the whole CEE region. PGNiG's position on the market is therefore a result of several decades of development and not recent actions of Polish authorities. Moreover, as transpires from PGNiG's financial statement, in 2017, the number of licences held by the PGNiG Group actually declined by nearly 10%.⁶⁶⁹
679. *Ex abundante cautela*, it should also be observed that, even if the average time of the proceedings instigated by PGNiG was shorter than in the case of the Blue Gas Group, this alone is insufficient to prove the preferential treatment of this company. It would be necessary to analyse the record of each case in order to establish whether the proceedings were similar enough to be compared.⁶⁷⁰
680. The length of the administrative proceedings is determined by a number of factors, such as the type and scope of the application, the complexity of the factual and legal

⁶⁶⁶ *Id.*, ¶ 657.

⁶⁶⁷ *Id.*, ¶ 658.

⁶⁶⁸ *Id.*, ¶ 659.

⁶⁶⁹ *Id.*, ¶ 660 (citing **Exhibit R-148**).

⁶⁷⁰ *Id.*, ¶ 661.

background, the quality of the applications and of the accompanying documentation, etc.⁶⁷¹

681. Moreover, as pointed out by the *Total* tribunal, in order to succeed with a discrimination claim, an investor has to prove that different treatment between foreign and national investors, who are similarly situated or in like circumstances, must be nationality-driven. Claimants do not provide evidence in this respect.⁶⁷² Claimants contend that the witness statement of Mr. Piotr Nowak is such evidence, as he explained that during the heavy workload in 2016, the Department of Geology and Geological Licences was forced to prioritize certain applications. However, the decision on how to prioritize was based on objective, non-discriminatory criteria, *i.e.*, priority was given to the extension of licences that were about to expire.⁶⁷³
682. Mr. Nowak did not state that the applications of the Blue Gas Group Companies were generally deemed less urgent. Rather, he highlighted one example, Blue Gas Uników's application for approval of Addendum No. 1 to the PRG Documentation, which was deemed less urgent for the justified reason that the applicant informed the Ministry that the relevant works were optional and that it had yet to make a decision whether to undertake them.⁶⁷⁴

3. Umbrella Clause

683. Claimants invoke the alleged breach of three agreements for the establishment of a mining usufruct ("Agreements") as the basis for their umbrella clause claim, namely (1) the agreement of 9 August 2016 regarding the Uników gas deposit (the "Uników Agreement"); (2) the agreement of 12 May 2017 regarding the Wrzosowo gas deposit (the "Wrzosowo Agreement"); and (3) the agreement of 16 February 2015 (the "Zakrzewo Agreement").⁶⁷⁵
684. At the outset, it should be noted that all the Agreements contain a forum selection clause, granting exclusive jurisdiction for the resolution of the disputes resulting therefrom to the Polish common court competent for the seat of the Ministry. Accordingly, the claims related to the alleged breach of the Agreements, absent the judgement of a Polish court declaring that such breach occurred, cannot be successfully pursued in investment arbitration on the basis of an umbrella clause.⁶⁷⁶
685. Claimants contend that they are not pursuing any claims under the relevant agreements which could otherwise be adjudicated by Polish courts, but this claim is logically flawed as the umbrella clause concerns an alleged breach of contract (ruled by domestic law), which is then elevated to international law. If there is no

⁶⁷¹ *Id.*, ¶ 662.

⁶⁷² *Id.*, ¶ 663 (citing **Exhibit RL-60**, ¶ 213).

⁶⁷³ Rejoinder, ¶ 690 (citing **Exhibit RWS-1**, ¶ 23).

⁶⁷⁴ *Id.*, ¶ 691 (citing **Exhibit RWS-3**, ¶ 21).

⁶⁷⁵ Sod, ¶ 664 (citing **Exhibits C-29, 157, 244**).

⁶⁷⁶ *Id.*, ¶ 665; Rejoinder, ¶ 695 (citing **Exhibit RL-85**, ¶¶ 372-275).

contractual claim based on Polish law, possible to be pursued before Polish courts, there is nothing to elevate to a treaty breach by means of an umbrella clause.⁶⁷⁷

686. In the case *Toto Costruzioni Generali v. Lebanon*, the arbitral tribunal observed:

*“Although Article 9.2 of the Treaty may be used as a mechanism for the enforcement of claims, it does not elevate pure contractual claims into treaty claims. The contractual claims remain based upon the contract; they are governed by the law of the contract and may be affected by the other provisions of the contract. In the case at hand that implies that they remain subject to the contractual jurisdiction clause and have to be submitted exclusively to the Lebanese courts for settlement. Because of this jurisdiction clause in favour of Lebanese courts, the Tribunal has no jurisdiction over the contractual claims arising from the contract referring disputes to Lebanese courts.”*⁶⁷⁸

687. Similar conclusions were reached by the arbitral tribunal in *SGS v. Philippines*:

*“[T]he Tribunal should not exercise its jurisdiction over a contractual claim when the parties have already agreed on how such a claim is to be resolved, and have done so exclusively. SGS should not be able to approbate and reprobate in respect of the same contract: if it claims under the contract, it should comply with the contract in respect of the very matter which is the foundation of the claim. The Philippine courts are available to hear SGS’s contract claim.”*⁶⁷⁹

688. Also, the tribunal in *Bosh v. Ukraine* stated that, in the presence of a valid forum selection clause in the contract, the tribunal was not competent to establish whether there was a breach of the umbrella clause:

*“The Tribunal takes the position that in order to present a contractual claim under the umbrella clause in the BIT, the Claimants (here B&P) are required to have their rights and obligations under the 2003 contract determined by the applicable dispute settlement forum, i.e., in accordance with Article 13(1) of the 2003 Contract, which refers the parties to dispute settlement ‘in accordance with Ukrainian legislation’. In other words, B&P is obliged to follow the dispute settlement provision included in the 2003 Contract.”*⁶⁸⁰

⁶⁷⁷ Rejoinder, ¶ 696.

⁶⁷⁸ Sod, ¶ 666 (citing **Exhibit RL-67**, ¶ 202).

⁶⁷⁹ *Id.*, ¶ 667 (citing **Exhibit RL-68**, ¶ 155).

⁶⁸⁰ *Id.*, ¶ 668 (citing **Exhibit RL-69**, ¶ 251).

689. The *SGS v. Pakistan* and *BIVAC v. Paraguay* tribunals also endorsed the idea that a tribunal should honor a forum selection clause, and that a tribunal cannot resolve an alleged breach of the relevant contract that contains such a clause.⁶⁸¹
690. Respondent therefore respectfully requests that the Arbitral Tribunal declare Claimants' umbrella clause claims inadmissible, or, alternatively, to declare that the Tribunal is devoid of jurisdiction with respect to these claims.⁶⁸²
691. Even assuming, *arguendo*, that the claims based on an umbrella clause are within the ambit of the jurisdiction of Tribunal and admissible, Claimants cannot invoke the Agreements as a legal basis for their claims. The reason for this is simple: Claimants were not the parties to the Agreements and therefore acquired no rights stemming therefrom. The only entities which could possibly raise the claims related to the alleged breach of the Agreements are the relevant Blue Gas Group's companies.⁶⁸³
692. Claimants contend that they can indeed pursue these claims under the wording of the ECT, but the jurisprudence on this issue indicates otherwise. Such cases demonstrate that national law determines the obligor and obligee in a contractual relationship, and an umbrella clause does not alter this, allowing an investor to pursue claims which are not its own.⁶⁸⁴
693. In order to establish whether the host state breached its "obligation" within the meaning of the umbrella clause, it is necessary to resort to the law governing that obligation, *i.e.* municipal law. In the case at hand, the agreements allegedly breached by Respondent were of course governed by Polish law. It is also clear that, both under general provisions of Polish law and the plain meaning of the Agreements, the Agreements conferred no rights on third parties, including the shareholders of the parties thereto.⁶⁸⁵
694. On numerous occasions, investment arbitral tribunals have confirmed that an umbrella clause does not allow a shareholder to pursue contractual claims of its subsidiary. For example, the *Burlington v. Ecuador* tribunal observed:

"In this case, the PSCs are governed by Ecuadorian law. It is that law that defines the content of the obligation including the scope of and the parties to the undertaking, i.e., the obligor and the obligee. Applying these two elements to this case, one cannot but conclude that the umbrella clause does not protect obligations arising from the PSCs. Whose right is correlated to the obligation? The answer is found in the law governing the obligation, here Ecuadorian law. Burlington has not alleged, not to speak

⁶⁸¹ *Id.*, ¶ 669 (citing **Exhibits RL-70**, ¶¶ 156-173; **RL-71**, ¶¶ 148-159).

⁶⁸² *Id.*, ¶ 670.

⁶⁸³ *Id.*, ¶ 671.

⁶⁸⁴ Rejoinder, ¶¶ 699-704 (citing **Exhibits RL-86-88**).

⁶⁸⁵ *Sod*, ¶ 672.

of established, that under Ecuadorian law the non-signatory parent of a contract party may directly enforce its subsidiary's rights."⁶⁸⁶

695. In the same vein, the Annulment Committee in *CMS v. Argentina* explained:

*"The effect of the umbrella clause is not to transform the obligation which is relied on into something else; the content of the obligation is unaffected, as is its proper law. If this is so, it would appear that the parties to the obligation (i.e., the persons bound by it and entitled to rely on it) are likewise not changed by reason of the umbrella clause."*⁶⁸⁷

696. The reasoning of the *Burlington* decision was endorsed by the arbitral tribunal in *WNC Factoring v. Czech Republic*, while the *WNC Factoring* tribunal further stated:

*"To summarise, the Claimant's contention that there is no requirement of privity in relation to umbrella clauses finds no authoritative support in the case law of international investment tribunals. To the contrary, tribunals have rather consistently resolved that they have no jurisdiction under umbrella clauses to consider contractual obligations between host states and investors' locally incorporated subsidiaries."*⁶⁸⁸

697. Even if these umbrella claims do not fail for reasons of jurisdiction or admissibility, the claims belong solely to the respective Blue Gas Group companies and not Claimants themselves.⁶⁸⁹

698. With respect to the merits, it must first be noted that Claimants failed to identify the precise contractual provisions allegedly breached by Respondent. They invoke only the provisions of Polish Civil Code regarding the performance of the obligations in good faith.⁶⁹⁰

699. The alleged breach was also indicated only vaguely. Claimants state that *"the clearest, though not the only, example of a breach of the obligation to cooperate was the deferment regarding the approval of the PRG Documentation and DGI Documentation for the Uników Project."*⁶⁹¹

700. Claimants fail to point out that the Uników Agreement does not mention any obligations on the part of the State Treasury regarding the approval of the PRG and DGI Documentation. It is also not an implied obligation of the State Treasury. The issuance of the licence (and consequently also the execution of the agreement on the mining usufruct), does not guarantee that the PRG or DGI Documentation will be accepted. Moreover, the agreement, being a private law instrument, could not

⁶⁸⁶ *Id.*, ¶ 673 (citing **Exhibit RL-72**, ¶¶ 214-215).

⁶⁸⁷ *Id.*, ¶ 674 (citing **Exhibit RL-73**, ¶ 95).

⁶⁸⁸ *Id.*, ¶ 675 (citing **Exhibits RL-74**, ¶¶ 334; **RL-75**, ¶ 384; **RL-76**, ¶ 205; **RL-77**, ¶ 377).

⁶⁸⁹ *Id.*, ¶ 676.

⁶⁹⁰ *Id.*, ¶ 677; Rejoinder, ¶ 695.

⁶⁹¹ *Sod*, ¶ 678.

create obligations with regard to *acta iure imperii*, i.e., a guarantee that the Ministry will issue an administrative decision approving the PRG and DGI documentation.⁶⁹²

701. In the absence of a clear contractual provision imposing on Respondent an obligation to approve the PRG and DGI Documentation, Claimants rely solely on the Polish statutory provision regarding the performance of obligations in good faith. Under Polish civil law, a requirement to perform an obligation (and to cooperate in its performance) in good faith plays only a subordinate role in respect of the performance in line with the “substance” of the obligation. In other words, good faith does not override clear meaning of the agreement and cannot create new obligations in contravention to this meaning. Good faith is not, as Claimants seem to suggest, a sufficient ground for introducing into the agreement brand new obligations which were not contemplated by the parties thereto.⁶⁹³
702. An analysis conducted from the perspective of public international law leads to similar conclusions. While it is generally accepted that good faith is one of the fundamental principles of international law, it is also recognised that good faith is not a freestanding source of any obligations which may give rise to claims for its violation. In *Vigotop v. Hungary*, the tribunal found that:

*“ . . . the principle of good faith, whether under Hungarian law or under international law, informs the manner in which an international or, in the case of Hungarian law a contractual, obligation is to be performed, but it is not in itself an independent source of obligations. ”*⁶⁹⁴
703. Claimants’ contentions regarding the alleged “deferment” of the approval of the PRG and DGI documentation for the Uników Project are unsubstantiated.⁶⁹⁵
704. Claimants indicate no breaches of the Wrzosowo Agreement and Zakrzewo Agreement, despite identifying these agreements as legal basis of their claim.⁶⁹⁶
705. Concerning Claimants’ contention regarding the alleged violation of licence No. 19/2009/Ł [Respondents understands that Claimants refer to the Uników exploration licence of 31 March 2009 and unified Uników licence of 9 August 2016] due to the protraction of the administrative proceedings, the deadline for the recognition of the Uników deposit through the Uników-2 well expired. Claimants’ contentions do not constitute the violation of any of the conditions set out in the licence (which unequivocally stated the short time limit for using the Uników-2 well), but rather the failure to amend it.⁶⁹⁷

⁶⁹² *Id.*, ¶ 679.

⁶⁹³ *Id.*, ¶ 680 (citing **Exhibits R-149-151**).

⁶⁹⁴ *Id.*, ¶ 681 (citing **Exhibit RL-78**, ¶ 585).

⁶⁹⁵ *Id.*, ¶ 682.

⁶⁹⁶ *Id.*, ¶ 683.

⁶⁹⁷ *Id.*, ¶ 684.

706. Moreover, Claimants fail to mention two facts crucial to understanding the reasons of this situation:

- The date of 31 December 2016 as the deadline for the test production was chosen by Claimants and not Respondent;
- It was only on 18 July 2017 (*i.e.* more than half a year after the lapse of the said time limit) that Blue Gas Uników decided to apply for approval of Addendum No.1 to the PRG documentation concerning reconstruction and test production via the Uników-2 well;
- The PRG documentation was accepted by the Ministry without undue delay (after receiving necessary explanations from the applicant and conducting the consultations with local authorities prescribed by applicable law) in the decision of 21 December 2017.⁶⁹⁸

C. Tribunal's Decisions

1. Fair and Equitable Treatment

707. In their Post-Hearing Brief, Claimants particularised their case on the breach of Art. 10(1) ECT around three concepts set out in the first sentence of that provision: the encouragement and creation of (i) stable, (ii) favourable and (iii) transparent conditions for Investors to make Investments in Poland. The Respondent has contested whether the first sentence of Art. 10(1) ECT imposes any freestanding obligations upon a host State and cites *Isolux v Spain* and *Novenergia v Spain* in this context.⁶⁹⁹ The Tribunal will return to that issue if necessary in its assessment of Claimants' claim.

708. In relation to "stable conditions", Claimants summarised their case as follows:

- *the Ministry did not observe the statutory deadlines for the completion of administrative proceedings, thus, completely undermining the Claimants' reasonable expectations as to when the licences and other necessary approvals would be issued which, in turn, affected the Claimants' economic projections....*
- *the Ministry assured Blue Gas Unikow that the Unikow Unified Licence would allow it to undertake the works on the Unikow-2 well designed to clean up the borehole and secure the gas flows (as these works were in a scope of the Licence) but refused to confirm this assurance in writing for the Regional Mining Office in Kielce...*
- *the Ministry's unpredictable and unreasonable behaviour in the Unikow Project made it impossible to assume that similar problems*

⁶⁹⁸ *Id.*, ¶ 685.

⁶⁹⁹ Respondent's Post Hearing Brief ("Respondent's PHB"), ¶ 30-31.

*would not occur in Stanowice, Wrzosowo, Zakrzewo, Miedzyzdroje or Lelikow. The situation in Unikow made the whole Investment unpredictable which, from a financial standpoint, had to be regarded as a serious risk factor for financial institutions (e.g. mBank S.A.); it meant an exponential increase in regulatory risk.*⁷⁰⁰

709. The Tribunal observes that the first paragraph of this submission relates to delay. The second relates to a particular incident in respect of Blue Gas Unikow, which will be considered below. The third paragraph is an inference that Claimants draw from their allegations in respect of the Blue Gas Unikow project, which is contingent upon making good those allegations (and thus succeeds or fails depending on that).

710. In relation to “favourable conditions”, Claimants said the following in the Post-Hearing Brief:

– even though the Ministry prioritised the examination of the applications allowing the investors to continue their operations ... none of the Blue Gas Group’s applications was considered as deserving of prioritisation; on the contrary, they were all considered as having “low urgency”, including Blue Gas Unikow’s applications for the approval of the documentation allowing this company to continue works on the Unikow-2 well and to move on to the gas production phase as well as the application by Blue Gas Wrzosowo first amend its exploration licence and subsequently to convert the Wrzosowo Exploration Licence into a unified (exploration and production) licence;

*– as evidenced by Mr Piotr Nowak’s testimonies, the Ministry refused even to provide guidance for the Blue Gas Group’s representatives so they could accelerate the various proceedings conducted by the Ministry.*⁷⁰¹

711. These allegations all relate to delay in the administrative proceedings.

712. Finally, under the heading of “transparent conditions”, Claimants state as follows in their Post-Hearing Brief:

– on numerous occasions, the Ministry went silent for up to ten months at a time with no information about the status of the proceedings...;

– the Ministry did not respond to the letters in which the SPVs asked about the status of the proceedings and reasons for them being delayed;

– the SPVs could never tell when the proceedings would end or when the requested decision would be issued because some of the Ministry’s employees thought statutory deadlines were not binding...;

⁷⁰⁰ Claimants’ PHB, ¶ 87.

⁷⁰¹ *Id.*, ¶ 88.

- whenever the Ministry informed the SPVs that the deadline for the completion of given proceedings would be extended, the justification (rationale) the Ministry provided was neither reasonable nor truthful;
- the Ministry provided either vague or no explanations at all as to why it did not meet the deadlines for completing the proceedings and issuing the requested decisions while setting new deadline which it also failed to observe due to its own misconduct;
- the Ministry kept summoning the SPVs to provide additional documentation and explanations almost endlessly, sometimes up to 36 months after the relevant proceedings had been initiated.

713. Once again, these allegations all relate to delay in the administrative proceedings.

714. The fact that this case in essence boils down to delays in administrative proceedings is also apparent from Claimants' summary of their position in the introduction to their Post-Hearing Brief. Specifically, Claimants provide the following brief summary of how Respondent's actions caused the loss of the Investment:

- *The administrative proceedings conducted by the Authorities lagged beyond any measure of reasonableness, let alone statutory deadlines, which should be determined from the perspective of international public law;*
- *The delays were unjustified insofar as [] they resulted from various circumstances created or under the control of the Respondent and they could not have been induced by the Claimants;*
- *In consequence, the entire enterprise lost its economic purpose and had to be shut down to minimize the Claimants' losses.*⁷⁰²

715. Within its overall claim of delay, Claimants contend that a breach of the ECT occurs if a license such as those in question in this arbitration is not granted after one year.⁷⁰³

716. Before continuing, it is important to understand why Claimants are in a sense forced into this contention in this particular case.

717. On 31 October 2017, Claimants filed for the bankruptcy of Blue Gas Uników, which they have consistently contended was the end of the Investment. Obviously, therefore, the relevant breach(es) must have occurred before that event in order for there to be a causal link between the alleged breach and damage to the Investment. On the other hand, Claimants agreed that only events beginning September 2015 could be considered as elements pertaining to a breach of the ECT.⁷⁰⁴ On Claimants' case there is, therefore, a window of approximately 25 months for the numerous

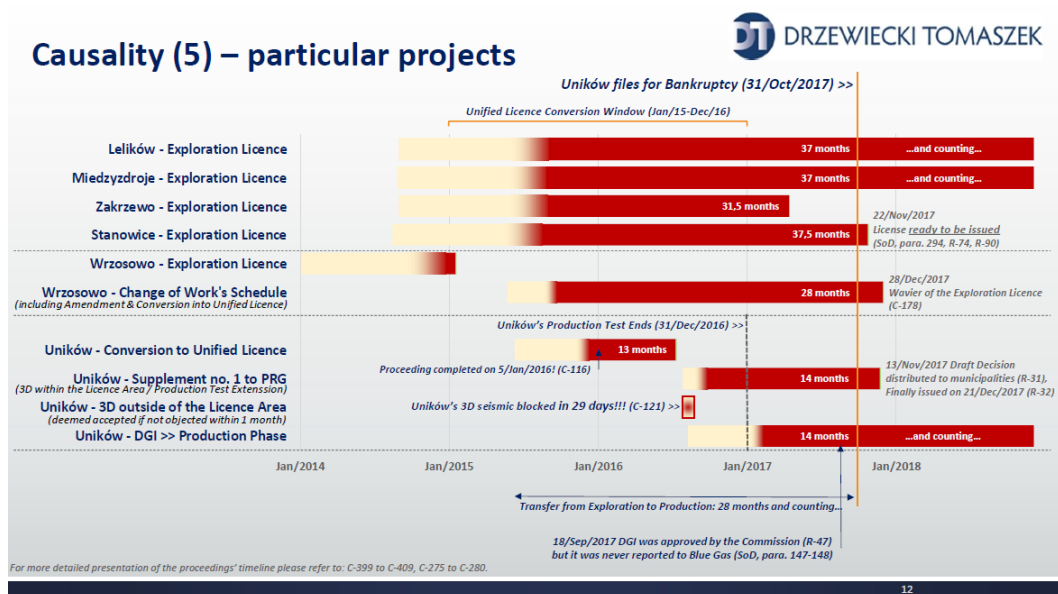
⁷⁰² *Id.*, ¶ 5(e-g).

⁷⁰³ Hearing Transcript, Day 5, 142:15-21.

⁷⁰⁴ Reply, ¶ 59.

events pleaded in respect of each project to have risen to the level of a breach of the ECT and caused loss to the Investment.

718. In their closing statement, Claimants provided a helpful graph indicating the relevant timelines of the proceedings in question. This graph is provided below.⁷⁰⁵



719. In interpreting this graph, it is important to note what the indicated timeframes mean (e.g., 13 months for “Uników – Conversion to the Unified License”). While answering questions during closing statements, Claimants clarified that the yellow segments correspond to the one-year period from the initiation of each relevant application.⁷⁰⁶ Importantly, the timeframes indicated refer to the total time of the initial one-year yellow segment plus the additional red time that elapsed.⁷⁰⁷ Therefore, for example, the 13 months for “Uników Conversion to the Unified License” is 13 months from the application.
720. It is clear from this graph why Claimants ultimately adopted the “one year plus one day” theory for the breach of the ECT by delay. In the critical Uników applications, the applicable timeframes were 14 months or less, with some of those timeframes falling on the wrong side of the 31 October 2017 bankruptcy for Claimants to establish causation.
721. As a result, during the hearing, Claimants’ explicitly put forth a theory of breach, according to which a breach of the ECT occurs after one year has elapsed from a relevant application.⁷⁰⁸

⁷⁰⁵ Claimants’ Closing Statement, p. 32.

⁷⁰⁶ Hearing Transcript Day 5, 141:4-9.

⁷⁰⁷ Hearing Transcript Day 5, 141:4-17.

⁷⁰⁸ Hearing Transcript, Day 5, 142:15-21.

722. In communicating this theory, Claimants acknowledge that this one-year timeframe is unrelated to Polish statutory deadlines, as such deadlines actually require periods much shorter than one year. Instead, by selecting one year as the relevant time period, Claimants contend they are trying to be reasonable and account for flexibility.⁷⁰⁹
723. Claimants have also taken the position that their own conduct cannot be considered in evaluating the delay as represented above, as Claimants necessarily must work within the Polish system, meeting applicable statutory deadlines, or otherwise face rejection as opposed to unjustified delay.⁷¹⁰ Accordingly, they contend that the continuation of any such proceedings demonstrates they were working properly within the Polish system.⁷¹¹
724. A threshold legal question thus arises. Assuming Claimants' own conduct is irrelevant to the assessment of the delay in issuing licenses, is the proposition that a breach of fair and equitable treatment under Art. 10(1) of the ECT occurs if a license is not granted after one year correct as a matter of international law?
725. It is true, as the Claimants maintain, that the ECT itself and previous arbitration awards under the ECT do not provide concrete guidance as to when excessive delays in processing administrative applications by state authorities meet the threshold of unfair and inequitable treatment under Art. 10(1).
726. There is no doubt that extreme delay in processing applications for administrative permits may very well amount to a breach of FET in the ECT context. But it is not possible to settle upon a particular length of time, in the abstract, that will trigger international responsibility. Context is everything. A delay of one-year to approve the release of urgent medical supplies might amount to a violation of human rights, whereas the same delay in processing a complex application to undertake a sensitive mining project is unlikely to be a breach of international investment law unless there are particular aggravating circumstances.
727. And it is precisely because context is everything that it is also impermissible to disregard Claimants' own conduct in an examination of the administrative proceedings in question.
728. The Tribunal cannot, therefore, accept the two fundamental premises of Claimants' case on breach of Art. 10(1) of the ECT. First, it cannot endorse an abstract rule that when an application for a licence remains pending for more than a year then the State is internationally responsible. There is no reason in principle and certainly no authority in support of such a rule. To the contrary, the fault-based standards of liability under the ECT require an assessment of the Respondent's actions in their proper context to determine whether delays in the administrative process may or may not be justified on the basis of the objective circumstances. Second, the

⁷⁰⁹ Hearing Transcript, Day 5, 141:22-142:14.

⁷¹⁰ Hearing Transcript, Day 5, 144:22-145:19.

⁷¹¹ *Id.*

conduct of Claimants is an essential factor in this analysis and the Tribunal cannot simply disregard this conduct on the hypothesis that the Polish authorities would have discontinued the licence-application procedures if Claimants had not complied with the statutory requirements. Just as the statutory deadlines are not dispositive in respect of a claim for actionable delay under the ECT, the conduct of Claimants cannot be made irrelevant in applying the international standard simply because it was not sanctioned by the Polish authorities.

729. The Tribunal now turns to the administrative proceedings relating to Blue Gas Unikow. It will be recalled that Claimants filed for the bankruptcy of Blue Gas Unikow on 31 October 2017.⁷¹² It will further be recalled that the success of Blue Gas Unikow was essential to the financial feasibility of the other projects: Claimants intended to finance those other projects from the revenues generated by Blue Gas Unikow.
730. Blue Gas Unikow applied for the conversion of its Exploration Licence into a Unified Licence on 10 July 2015.⁷¹³ The Ministry notified Blue Gas Unikow that the conversion proceedings had commenced on 11 September 2015 after the formal deficiencies in the application had been rectified⁷¹⁴ (a modified application had been sent by Blue Gas Unikow on 4 September 2015).⁷¹⁵ The decision granting the conversion was rendered on 9 August 2016.⁷¹⁶ In the process of rendering this decision, the Ministry had completed the investigation phase by January 2016 and had requested that Blue Gas sign and resend the mining usufruct agreement to the Ministry, which it did on 11 February 2016.⁷¹⁷ According to Claimants, “[t]his means that after February 2016 the Ministry had no reason whatsoever to abstain from issuing a decision”.⁷¹⁸ But taking Claimants’ case at its highest on this point, that only amounts to inaction on the part of the Ministry of some six months. The Respondent, moreover, contests Claimants’ inference that there was such inaction. It refers to the issues raised by the Ministry’s Department of Geological Supervision in respect of points 8 and 12a of the Unikow exploration licence, which required action on Claimants’ part, which is evidenced by a series of letters in March 2016.⁷¹⁹ Furthermore, a legal issue relating to the financial security that needed to be provided in respect of obligations to be performed under unified licences arose and the Ministry sought a legal opinion to ensure that all applicants would be treated in the same way. That legal opinion was issued on 18 April 2016.⁷²⁰ Thus, on the Respondent’s submission, the period of inactivity was only three months (from May 2016 to August 2016) and that was caused by the Ministry’s employees being occupied with the audit performed by the Supreme Audit Office and the

⁷¹² **Exhibit C-83.**

⁷¹³ **Exhibits C-107; R-168.**

⁷¹⁴ **Exhibit C-112.**

⁷¹⁵ **Exhibit C-111.**

⁷¹⁶ **Exhibit C-28.**

⁷¹⁷ **Exhibit R-21.**

⁷¹⁸ Claimants’ PHB, ¶ 32.

⁷¹⁹ Rejoinder, ¶ 81, (citing **Exhibits R-166, R-23**).

⁷²⁰ **Exhibit R-24.**

implementation of an EU Directive.⁷²¹ But regardless of whether there was 3 months or 6 months of inactivity, the Tribunal cannot possibly conclude that the Respondent violated Art. 10(1) on that basis.

731. Blue Gas Unikow then filed an application for approval of a newly designed 3D seismic survey for areas within and outside the area covered by the Unikow Unified Licence on 24 August 2016.⁷²² This application related to seismic works that Blue Gas Unikow intended to perform (but had not yet committed to performing). The pendency of this application did not have any impact on Blue Gas Unikow's ability to unblock the Unikow-2 well, the problems with which started in May 2016.⁷²³ It is thus difficult to fathom how any delays relating to this application could have caused Claimants to abandon Blue Gas Unikow. In any event, the Ministry sent a letter on 22 September 2016 by which it raised several issues in respect of the applicable regulations.⁷²⁴ Blue Gas Unikow then responded on 10 October 2016.⁷²⁵ The Ministry then affirmed its original objection to Blue Gas Unikow's plans for 3D seismic surveys on 18 January 2017.⁷²⁶
732. Blue Gas Unikow then submitted a modified application on 18 July 2017, which was directed to the reconstruction and rehabilitation of the Unikow-2 well in order to resume gas production.⁷²⁷ This application was in the form of Addendum No. 1 to the PRG Documentation. Claimants could have submitted this application immediately after Blue Gas Unikow had received the Unified Licence on 9 August 2016 and yet they waited until July 2017. According to the Respondent, it would have been impossible for Blue Gas Unikow to receive the four regulatory approvals to start the works on Unikow-2 well before Claimants put Blue Gas Unikow into bankruptcy on 31 October 2017.
733. Following requests for further information and rectifications sent by the Ministry on 10 August 2017⁷²⁸ and 15 September 2017,⁷²⁹ to which Blue Gas Unikow responded on 5 October 2017,⁷³⁰ the Ministry then forwarded a draft decision on the approval of Addendum No. 1 to the Unikow PRG Documentation to the relevant authorities for their opinion on 13 November 2017.⁷³¹ The decision granting approval was given on 21 December 2017.⁷³²
734. Blue Gas Unikow further filed an application for the approval of the Unikow DGI Documentation on 8 September 2016,⁷³³ which was necessary to move to the

⁷²¹ Rejoinder, ¶ 82

⁷²² **Exhibit C-118.**

⁷²³ Rejoinder, ¶ 86.

⁷²⁴ **Exhibit C-121.**

⁷²⁵ **Exhibit C-123.**

⁷²⁶ **Exhibit C-124.**

⁷²⁷ **Exhibit C-31.**

⁷²⁸ **Exhibit R-27.**

⁷²⁹ **Exhibit C-140.**

⁷³⁰ **Exhibit R-30.**

⁷³¹ **Exhibit C-142.**

⁷³² **Exhibit R-32.**

⁷³³ **Exhibit C-120.**

production phase and to be able to extract gas from the Unikow deposit using the Unikow-2 well after 31 December 2016 following the completion of the production test. According to the Respondent, four regulatory decisions were also required from different competent authorities (including the Mineral Resources Commission and the Polish Geological Institute) and Claimants had only applied to the Ministry for the first decision.⁷³⁴ Claimants say that they had anticipated that the production test of the Unikow-2 well would be completed by 31 December 2016,⁷³⁵ but this was clearly unrealistic in light of the regulatory requirements for approval of the DGI Documentation.

735. The Ministry sent a letter to Blue Gas Unikow concerning its application on 4 November 2017⁷³⁶ and 2 December 2017.⁷³⁷ A hearing to discuss the DGI Unikow Documentation was scheduled on 15 December 2016 with the Mineral Resources Commission.⁷³⁸ This was followed up with a letter from the Commission to the Ministry on 20 December 2016, which contained a series of recommendations.⁷³⁹ Blue Gas Unikow submitted revised DGI Documentation on 16 March 2017. The Ministry then pointed out deficiencies with the revised documentation (most notably in relation to the absence of proof concerning its right to the geological information underlying the documentation) on 15 May 2017.⁷⁴⁰ Claimants did not seek to rectify those deficiencies and the application remained unprocessed as a result. Blue Gas Unikow was notified of this on 24 May 2017.⁷⁴¹ This was further confirmed in the Ministry's letter to Blue Gas Unikow of 27 July 2017.⁷⁴²
736. Meanwhile a meeting between Blue Gas Unikow and the Ministry took place on 4 July 2017 at which the deficiencies in the DGI Documentation were again discussed (principally the absence of proof concerning Blue Gas Unikow's right to the geological information underlying the documentation).⁷⁴³ Following further correspondence between the parties, the Ministry then received an opinion from one of the members of the Mineral Resource Commission on this issue on 8 September 2017.⁷⁴⁴ This was later confirmed to be the opinion shared by the Commission as a whole on 18 September 2017.
737. The Tribunal cannot conclude from this brief survey of the administrative proceedings relating to Blue Gas Unikow that the Respondent's conduct reached the threshold of inordinate delay that would justify a finding of international responsibility under Art. 10(1) ECT. Furthermore, the Tribunal cannot draw a causal connection between any delay in these administrative proceedings and the

⁷³⁴ Rejoinder, ¶¶ 119(6), 121, 163(4), 111; Reply, ¶ 188.

⁷³⁵ Claimants' PHB, ¶ 33.

⁷³⁶ **Exhibit C-125.**

⁷³⁷ **Exhibit R-37.**

⁷³⁸ **Exhibit R-39.**

⁷³⁹ **Exhibit R-38.**

⁷⁴⁰ **Exhibit R-40.**

⁷⁴¹ **Exhibit C-307.**

⁷⁴² **Exhibit C-135.**

⁷⁴³ **Exhibits C-315; R-174.**

⁷⁴⁴ **Exhibit R-47.**

failure to unblock the Unikow-2 well so that production could be restarted and revenues be generated. Blue Gas Unikow did not apply for the approval of modified Addendum No. 1 to the Unikow PRG Documentation until 18 July 2017. This was one regulatory route to performing the necessary works to the Unikow-2 well albeit it was by no means a straightforward one and the Tribunal is satisfied that it would not have been possible to obtain the relevant approvals before Blue Gas Unikow was put into liquidation in October 2017. Another more promising regulatory route would have been for Blue Gas Unikow to request that the deadline for completion of the test production at the Unikow-2 well be set for after 31 December 2016 in its original application for conversion of the exploration licence into a unified licence. This it could have done before the Ministry approved the conversion on 9 August 2016. For this reason, Claimants' reliance on the report of the Regional Mining Office in Kielce to the effect that the production test of the Unikow-2 well could only be performed until 31 December 2016⁷⁴⁵ is a red herring because it was Claimants' regulatory strategy that resulted in that impasse. It is also not the Respondent's fault that Claimants apparently discovered only on 26-28 April 2017 during the inspection performed by the Regional Mining Office that the works on the Unikow-2 well could only be performed if the Ministry approved the DGI Documentation⁷⁴⁶ as this was a clear requirement under Polish law. In any case, it appears from Blue Gas Unikow's own correspondence that it was well aware of that requirement much earlier.⁷⁴⁷

738. Claimants placed particular significance⁷⁴⁸ on the fact that the Regional Mining Office in Kielce stated in its letter of 27 June 2017⁷⁴⁹ that the works designed to clean out the Unikow-2 well could be possible if the Ministry confirmed in writing that this was permissible in circumstances where neither the DGI Unikow Documentation nor Addendum No. 1 to the Unikow PRG Documentation had been approved. But it was not incumbent upon the Ministry to give an approval outside the standard administrative procedures; indeed, it may well have been a violation of the applicable regulations to do so.
739. As a matter of causation, it seems more likely than not that the real reason that the Claimants abandoned Blue Gas Unikow in October 2017 by placing it into bankruptcy was the fact that the Unikow-2 well could not be exploited in a manner that was financially feasible.
740. The problems at the Unikow-2 well started in May 2016 and production ceased altogether in October 2016. There were several attempts to unblock the well in 2016 and 2017.⁷⁵⁰ The Claimants' expert, Dr Moy, describes the situation as follows:

⁷⁴⁵ Claimants' PHB, ¶ 35.

⁷⁴⁶ Reply, ¶¶ 83-4, 219.

⁷⁴⁷ **Exhibit C-34.**

⁷⁴⁸ Claimants' PHB, ¶ 37.

⁷⁴⁹ **Exhibit C-133.**

⁷⁵⁰ **Exhibits RER-1**, ¶¶ 199, 210-212; **RER-3**, ¶¶ 86-90, 95.

*[The well] was cleaned and rinsed with fresh water and production resumed on 31st May; however, salt continued to be an issue and the well was shut-in again on 24th June; both the facilities and the Unikow-2 production tubing had to be cleaned and rinsed with fresh water. Production resumed on 28th June, but the well had to be shut-in for a third time on 16th July for further cleaning. Production re-started on 25th August [over a month later] and continued until 30th August. A service company was employed to use coiled tubing (CT) to clear out the production tubing within the well using a 15% solution of HCL. The well was placed back into production but was finally shut-in on 29th October 2016.*⁷⁵¹

741. It is critical that just two weeks before Blue Gas Unikow was put into liquidation by Claimants, they received a report on 14 October 2017 that it had commissioned from a mining expert, Mr Mularczyk. He concluded that the planned works at the Uników-2 well were “burdened with a high technical risk, and the result of salt swilling out as well as the final effect in the form of liquids inflow, their type and volume, remain a great unknown. This has to be weighed against the possible costs and benefits to be gained, if any.” He further concluded that “[i]t is highly probable that the most productive part of the zone of Uników-2 well influence has been largely exploited”.⁷⁵²
742. In preparing this report, Mr Mularczyk relied upon the documentation that Blue Gas Unikow’s services company, Naftech, had prepared earlier that year on 15 March 2017.⁷⁵³ But in this respect it is also important to note that Blue Gas Unikow’s contractor, Exalo Drilling, had not been able to submit a final proposal to Blue Gas Unikow to carry out the works. The evidence shows that they were in communication in July and August 2017.⁷⁵⁴ Indeed, on 30 October 2017, the day before the Claimants put Blue Gas Unikow into liquidation, Exalo Drilling send the following message to Blue Gas Unikow:

*First of all, I'm sorry that we didn't write a specific proposal for the borehole. I make no secret of the fact that we have a lot of current projects. Practically, we are carrying out the project after the project on an ongoing basis. Due to the fact that the borehole is very difficult to come up with an unambiguous proposal, bearing in mind, on the one hand, the costs, on the other hand, the maximum possibility of exploiting the deposit, we made a meeting where we considered several ideas. Taking all pros and cons into account the most optimal proposition for the borehole would be to reconstruct it.*⁷⁵⁵

743. The Tribunal finds that the likely reason that the Claimants put Blue Gas Unikow into bankruptcy on 31 October 2017 was their receipt of information during the

⁷⁵¹ Exhibit CER-2, ¶ 117.

⁷⁵² Exhibit GC-03.

⁷⁵³ Exhibit GC-08.

⁷⁵⁴ Exhibits CER-2, ¶ 117; Exhibits R-153, R-154.

⁷⁵⁵ Exhibit R-154.

same month to the effect that: (i) the planned works to unblock the Unikow-2 well were fraught with technical risk; (ii) the most productive part of the well was likely to have already been exploited; and (iii) the most optimal approach to exploiting the well would be to reconstruct it, with all the costs that would entail.⁷⁵⁶

744. For all the foregoing reasons, the Tribunal dismisses Claimants' claim based upon the FET standard under Art. 10(1) ECT. There was no inordinate delay on the part of the Respondent's organs during the administrative procedures involving Blue Gas Unikow and therefore no breach of the ECT. The reason that Blue Gas Unikow could not generate revenue and the reason for which it was ultimately put into bankruptcy by Claimants are likely to have been unrelated to the administrative procedures in so far as the Unikow-2 well was blocked and it was unlikely to be profitable given the probable costs involved in dealing with the technical problems. As the success of the Blue Gas Unikow was critical to the development of the other projects, as it was to be the source of finance, it follows that Claimants' decision to put Blue Gas Unikow into bankruptcy effectively ended those other projects as well.

2. Discrimination

745. Respondent is correct that Claimants primarily base their discrimination allegation on limited information concerning licenses held by PGNiG. Specifically, Claimant primarily relies on the following:

- On page 86 of its financial statement for 2017, PGNiG stated the following: *"As of 1 January 2017, the PGNiG Group held 53 licenses for the recognition and exploration of crude oil and natural gas deposits. As of 31 December 2017, PGNiG held 48 licenses. In 2017, 33 administrative proceedings regarding the prolongation, amendment or conversion of licenses were concluded (a total of 21 licenses were converted). Forty proceedings regarding the approval of appendices to PRG documentation were also concluded."*⁷⁵⁷
- And, in a similar vein, Claimants demonstrate that on page 24 of PGNiG's Directors' Report for 2017 stated: *"As at December 31st 2017, PGNiG held 48 licences for exploration and appraisal of crude oil and natural gas deposits, vs 53 licences as at January 1st 2017. In 2017, 33 proceedings to extend, change or convert licences were closed (with a total of 21 concessions converted). 40 proceedings to approve additional works in geological projects were also completed. As at December 31st 2017, proceedings to convert 4 licences and extend 2 licences were still pending at the Ministry of the Environment. 17 additions to geological projects also*

⁷⁵⁶ Although there was some dispute about what "reconstruction" meant in this context, one of Claimants' experts conceded that it would mean "redrilling" the well: Transcript, Day 3, p. 67. The Respondent's expert, Mr. Goedhals, agreed: Transcript, Day 4, pp. 100-101. Only Dr. Moy expressed a different opinion: Transcript, Day 3, pp. 115-6.

⁷⁵⁷ *Id.*, ¶ 289.

await final approval. As at December 31st 2017, PGNiG held a total of 213 production licences in Poland. In 2017, no new licences were granted to PGNiG, 26 licences were changed and 12 licences expired.”⁷⁵⁸

746. Respondent is correct that the Tribunal cannot simply view the number of licenses held, converted, extended, etc. for a single entity and, without more, determine that it demonstrates discrimination to an extent sufficient to find a violation of the ECT.
747. To find that these facts demonstrate actionable discrimination, the Tribunal would have to be in possession of significantly more evidence proving (i) that the Claimants and PGNiG were afforded noticeably different treatment in proceedings similar enough to be compared; and (ii) that such a discrepancy was nationality-based and not the result of some other confounding variable unrelated to nationality.
748. Here, the Tribunal lacks evidence on either point. First, it is not possible to view these limited passages concerning PGNiG’s licenses and determine, without more than Claimants’ account of the factual background, that PGNiG was treated in a considerably different manner that could amount to a potential treaty breach.
749. As Respondent correctly points out, “the length of the administrative proceedings is determined by a number of factors, such as the type and scope of the application, the complexity of the factual and legal background, the quality of the applications and of the accompanying documentation, etc.”⁷⁵⁹ Claimants would have needed to provide additional evidence regarding the facts present in the PGNiG reports to establish that these factors were comparable enough to warrant its theory of discrimination.
750. Further, even if the Tribunal was convinced that Claimants and PGNiG were treated differently in comparable proceedings, the Tribunal lacks any evidence suggesting that such differences were not the result of other variables. The Tribunal is not willing to determine, absent any evidence suggesting this is the case, that potential differences in license proceedings between Claimants and a single other entity were the result of discrimination as a matter of international law.
751. If discrimination could be found merely based on limited summaries of oil and gas licenses held, sought, etc. by certain entities, States would be put in a virtually impossible situation to maintain levels of potentially-superficial equality to avoid treaty claims. Considering the complexity in this sector and the numerous variables that go into such license proceedings, such a result would surely have obstructive implications and, more importantly, would impose such requirements absent support in international law.

3. Umbrella Clause

752. Before discussing the role of the umbrella clause under the ECT, the Tribunal notes that the factual issues at hand in Claimants’ view on this point overlap with the

⁷⁵⁸ Claimants’ PHB, ¶ 103.

⁷⁵⁹ Sod, ¶ 662.

general discussion of FET in that they concern various back-and-forth moments between the Parties as they navigated proper filings, addressed deficiencies, deadlines for responses, etc.

753. As was the case with FET, the Tribunal can acknowledge that Respondent failed to act as efficient as possible without finding conduct actionable under an umbrella clause.
754. Both Parties focus on the fact that Claimants' umbrella clause position primarily rests of Art. 354 of the Civil Code, which mandates that Respondent act in good faith, which Claimants quote the Supreme Court as requiring Respondent to "*look at the legitimate interest of the contractor and not do anything that would complicate, hinder or impede the performance of the obligation.*"⁷⁶⁰
755. Claimants do not provide any evidence demonstrating that good faith under the Polish system is stricter than the principle as found in civil law systems more generally. In other words, the phrase "not do anything" cannot be taken to the extreme to imply that any such acts on the part of Respondent that could possibly have even a minimal negative impact on Claimants' investment are necessarily a violation of good faith.
756. The Tribunal does not wish to engage in a lengthy discussion of the requirements of good faith, but it can be safely said that something more than administrative inefficiencies is required to find such a violation. Here, like with FET, Claimants point to administrative proceedings that they argue were delayed, with Respondent failing to act timely both on its own and when requested to expedite certain processes.⁷⁶¹
757. Without going into detail about possible acts taken by Claimants that could be blamed for aspects of the relevant delays, the Tribunal can acknowledge a level of failure on the part of Respondent to act in an efficient manner without finding a violation of good faith, which it does here.
758. The Tribunal lacks evidence demonstrating any ill-intent on the part of Respondent in the relevant administrative proceedings. The Tribunal is not satisfied that Respondent acted in a manner to complicate, hinder or impede the Investment. With the evidence in front of it, the Tribunal instead finds various administrative proceedings that, due in part to factors such as staff shortages and an arguable failure to act in the most effective manner (as well as possible deficiencies in various filings made by Claimants), were not completed in the most ideal timeframe. While this is regrettable and the Tribunal agrees that Claimants reasonably expected a smoother process, the facts of this case, as presented, fail to establish a violation of good faith.

⁷⁶⁰ Claimants' PHB, ¶ 299.

⁷⁶¹ See, e.g., Soc, ¶¶ 38-46.

759. Even if, *arguendo*, there were a breach of the duty of good faith as understood under Polish law, this does not mean that this duty itself is somehow actionable under Article 10(1) of the ECT. The Claimants have not explained how a general duty of good faith under Polish law can be equated with an obligation that Poland has “entered into” with the Claimants’ Investment as required under Article 10(1). Such an approach would have far-reaching consequences: all general legal obligations in domestic law would be elevated to the level of international obligations. The Claimants have failed to make out its case on this point as well and for this additional reason the Tribunal dismisses this claim.

VI. CAUSATION AND DAMAGES

760. Because the Tribunal finds that the Respondent did not breach the ECT, there are no issues of causation or damages.

VII. COSTS

761. Claimants’ Statement of Costs indicate a total amount of EUR 2,237,526.50. Out of this total, EUR 406,201.75 have been spent on costs of the arbitration.

762. Respondent’s Statement of Costs indicates that, when combining the costs of the General Counsel to the Republic of Poland and the Ministry of Climate and Environment, the total costs amount to PLN 6,611,245.73. None of these costs were allocated to the costs of the arbitration.

763. Pursuant to Article 49(6) of the SCC Rules:

Unless otherwise agreed by the parties, the Arbitral Tribunal shall, at the request of a party, apportion the Costs of the Arbitration between the parties, having regard to the outcome of the case, each party’s contribution to the efficiency and expeditiousness of the arbitration and any relevant circumstances.

764. Pursuant to Article 50 of the SCC Rules:

Unless otherwise agreed by the parties, the Arbitral Tribunal may in the final award, at the request of a party, order one party to pay any reasonable costs incurred by another party, including costs for legal representation, having regard to the outcome of the case, each party’s contribution to the efficiency and expeditiousness of the arbitration and any other relevant circumstances.

765. In this case, both Parties have requested that the Tribunal order the other Party to pay for all costs and expenses included in this arbitration, including arbitration fees

and expenses, fees and expenses of experts and fees and expenses spent on legal representation.⁷⁶²

766. It is fairly common practice to allocate costs and fees based on the costs follow the event principle, In these proceedings, however, neither party was fully successful in its claims. That is, the Claimants prevailed on numerous jurisdictional objections while the Respondent prevailed on the merits.
767. As a result of these mixed outcomes, the Tribunal feels a justified outcome involves a more balanced approach.
768. While the Respondent presented numerous unsuccessful jurisdictional challenges, it did not seek bifurcation of this arbitration and thus the Tribunal was able to address these issues without suffering significant delays or increases in costs. While Claimants and ultimately the Tribunal were indeed forced to confront all such unsuccessful challenges in written pleadings, hearing time and this award, they were not so significant as to outweigh the ultimate outcome of the merits of this dispute.
769. Concerning the merits, the Claimants' case ultimately failed in its entirety, as the Tribunal has dismissed all the claims for violations of the ECT. This is the fundamental result of this arbitration, and thus while the Tribunal acknowledges that Respondent also failed in many aspects of its case, its success on the merits renders it the more prevailing party of the two opposing sides.
770. As a result, the Tribunal concludes that the Claimants should bear a more significant share of the costs and fees associated with this arbitration than the Respondent.
771. Accordingly, the Tribunal first determines that the Claimants should bear all of the costs of the arbitration. The Claimants are jointly and severally liable to pay such costs, which were set by the SCC on 17 June 2021 as follows:
772. The Fee of Chairperson Bernardo M. Cremades amounts to EUR 255,170 and compensation for expenses EUR 735, in total EUR 255,905, plus VAT of EUR 63,976.25.
773. The Fee of Co-Arbitrator Kaj Hobér amounts to EUR 127,585, plus VAT of EUR 31,896.25.
774. The Fee of Co-Arbitrator Zachary Douglas QC amounts to EUR 127,585.
775. The Administrative Fee of the SCC amounts to EUR 60,000, plus VAT of EUR 15,000.
776. With respect to fees, the Tribunal notes that Respondent's Statement of Costs includes a breakdown of fees incurred by separate branches of the Polish government, namely the Ministry of Climate and Environment and the General

⁷⁶² Soc, ¶ 318(c); Sod, ¶ 727.

Counsel to the Republic of Poland.⁷⁶³ Due to Respondent's failed jurisdictional challenges, the Tribunal determines that Claimants should not bear all of the legal fees incurred by Respondent. After analyzing the amounts incurred by each branch, the Tribunal determines a fair allocation is for Claimants to bear the costs incurred by the General Counsel to the Republic of Poland, but not the Ministry of Climate and Environment. This total amounts to PLN 1,296,584.50.

777. Within their submissions, the Parties both requested that any amount awarded in this arbitration be subject to interest. While Respondent failed to specify any particular percentage, Claimants requested that a standard rate of 5% per annum be applied.⁷⁶⁴ The Tribunal finds this percentage to be reasonable and it shall be applied to the order for Claimants to partially reimburse Respondent for their legal fees.

VIII. TRIBUNAL'S AWARD

778. For the reasons stated above, the Arbitral Tribunal:

- 778.1. DENIES Respondent's jurisdictional objections and upholds the jurisdiction of the Tribunal;
- 778.2. DENIES all of Claimants' claims;
- 778.3. DENIES all other claims;
- 778.4. ORDERS Claimants to bear all costs of the arbitration as noted in paragraphs 771 through 775 of this Award; and
- 778.5. ORDERS Claimants to pay Respondent the amount of PLN 1,296,584.50 to reimburse Respondent for the legal fees incurred by the General Counsel to the Republic of Poland, with 5% interest per annum accruing from the date of this award.

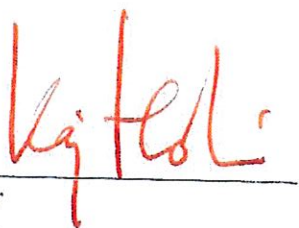
⁷⁶³ Respondent's Statement of Costs, ¶¶ 5, 7.

⁷⁶⁴ Soc, ¶ 318.

Place of arbitration: Stockholm, Sweden

Date: 30 June 2021

Signatures:



Kaj Hobér
Arbitrator



Zachary Douglas QC
Arbitrator



Bernardo M. Cremades
President